JACKSON: FROM CFA'S TO DBA'S –

ANY CHANGE FOR MEDIATORS?

Now that the Jackson reforms are in force since the 1 April 2013, will mediators find any change in the way the parties conduct mediation? Will mediators be faced with new challenges or will life be made easier?

Damages Based Agreements (DBA's)

After the 1 April 2013 the "success fee" will no longer be payable by the losing side. If there is a DBA in place, it will be paid by the winning party, typically out of the damages recovered.

Under a DBA, the lawyer may take a percentage of the damages recovered for their client as their fee if the case is successful. The maximum payment that the lawyer can recover from the claimant's damages is capped at 25% of damages (excluding damages for future care and loss in personal injury cases); at 35% of damages on employment tribunal cases (which has existed since 2010); and at 50% of damages in all other cases.

Conflicts of Interest between the parties and their lawyers

Mediators have long been aware of the challenges that are thrown up in mediation if a party is operating under a CFA. More often than not the issue arises at the end of the mediation when an acceptable offer is being considered.

If that offer includes a figure in respect of a costs contribution, by its very nature it is a figure which is less than the parties would expect to receive in an assessment. The issue then arises as to whether the lawyer is prepared to reduce their entitlement under the CFA, often requiring the lawyer to waive their entitlement to an uplift altogether. The mediator is then faced with the challenge of having to mediate between the party and their lawyer to see whether an acceptable solution can be reached. An added pressure on mediators is that, whilst this debate is going on, the offering party are sitting in their room awaiting a response.

In their fourth mediation audit of May 2010 CEDR noted the impact of CFA's on mediation:-

> "For the first time, however, the role of conditional fee agreement emerged as a factor, with a number of respondents citing instances in

> which, due to high uplifts, claimant's solicitors costs had become out of all proportion to the other issues in dispute, resulting in conflicts of interest between solicitor and client and, as a result, an additional barrier to settlement. One respondent went so far as to predict that the role of CFA's could have a significant effect on the level of future mediation settlements."

Whilst some mediators flag up the potential difficulties that could be posed by a CFA at the beginning of the mediation, some prefer to wait and see and cross that particular bridge when they come to it. All the old CFA challenges for the mediator will still remain.

It is anticipated that a debate will still have to take place between the lawyer and their party if a DBA is in place.

As Bill Wood QC, the Vice Chairman of CMC (and also a PIM Senior Mediator) says in his note of the 27 March 2013:-

> "The defendant will no longer need to be concerned with any additional element of liability for costs – but the claimant and his lawyer may need to discuss whether they might agree to shave the lawyer's proportion of the damages in order to get a deal."

This view is reflected in the Law Society's Gazette of the 25 March 2013 where Michael Frisby, a partner at Stevens & Bolton, is quoted as saying:-

> "Of most serious concern is the impact on the relationship between clients and solicitors: costs battles are now more likely to be waged by clients on their solicitors than (between) parties."

The mediator's job will be made no easier if the paying party chooses to offer a lump sum, leaving the receiving party and their lawyer to argue about the split.

Costs

Often a mediator will ask the parties either to exchange details of costs up to the date of the mediation and for going through to trial. If these figures are not exchanged prior to mediation, almost always they are discussed during it.

The introduction of costs budgeting and costs capping should at least make the debate on costs easier for the mediator. Hopefully, there will not be so much scope for arguing about either the amount of costs or the costs risk when the parties have exchanged costs budgets and there is a cost cap in place. Interestingly, the need to agree costs budgets may lead to the lawyers working in a more collaborative way. If a precedent can be set to that particular aspect of the litigation, it may lead to further collaboration with regard to agreeing the best way to resolve the dispute including the possibility of mediation.

However, the new cost management rules do not yet apply to the Admiralty or Commercial Courts.

Further, they only apply in the Chancery Division, Technology and Construction Court and Mercantile Courts, to cases where at the date of the first case management conference the sums in dispute in the proceedings do not exceed £2,000,000 (excluding interest and costs), except where the court so orders. Mediators will need to be aware of these different approaches to cost management in the various courts and the implications they have for mediations. It remains to be seen whether judges will order costs management in cases where the sum in dispute is greater than £2 million.

The proportionality of claimed costs under the new rules is likely to feature more strongly in settlement discussions in mediation than was the case in the past. That is because the overriding objective has been specifically amended to a requirement to deal with cases at a proportionate cost. No doubt what that means will become clearer as the courts make decisions on the point. In the meantime, court rules say that to be proportionate, costs should bear a reasonable relationship to the sums in issue, the value of non-monetary relief (if any), complexity, additional work generated by the paying party, reputation and public importance.

The requirement for a party to produce an estimate of costs in respect of expert evidence will also be of assistance to mediators. The new part 35 requiring the clarification of the issues which any expert will address and allowing the court to specify issues that the expert evidence should address will assist in concentrating the parties in the mediation on those particular issues rather than resulting in a wide ranging discussion amongst experts.

Insurance

There are a number of issues that might be of relevance to those cases (of which there are many) where insurers have an involvement. The position might differ depending upon whether the insurers' involvement is as claimant (usually by way of subrogation) or relates to the defendant (that is, covering the liability (and costs) of the actual defendant to the action rather than where the insurers, themselves, are defendants in a coverage dispute).

So far as the pursuit of subrogated actions is concerned risk sharing by lawyers is usually viewed positively by insurers. The degree of comfort derived from the lawyers' willingness to support their own view in this manner is obvious. Whilst a CFA or DBA is unlikely universally to be a pre requisite to receipt of instructions, insurers are likely to increasingly look to solicitors to align interests.

Currently the authors of this article are uncertain as to the extent to which law firms have fully embraced the concept of DBAs; a brief check of the media and internet indicates something less than total enthusiasm.[1] That being so, it may be some time before we see their widespread use. Further, those advisers who are on DBAs may not necessarily be happy to be so. Those who compare DBAs unfavourably to CFAs appear to focus on the risks

[1] See for example, The Law Society Gazette, 26th March 2013: "*Firms are getting cold feet over DBAs*"

associated with lower value, high maintenance claims unless the merits are very strong. There is also a worry that, once committed to the DBA, the lawyers must see the case through. If these concerns persist, mediators who encounter claims pursued by insurers on DBAs may find legal representatives increasingly enthusiastic about early mediated settlements. It is currently unclear whether their insurer clients will feel likewise.

For those insurers defending a case pursued by a claimant whose representatives are on a DBA the balance may have changed significantly since CFA agreements were replaced; obtaining an early settlement while there remain sufficient funds to satisfy both the claimant and his lawyer may become a priority. Mediators involved in such claims might hope to see fewer cases where the solicitors' fees, with uplift, are so great as to dominate the discussion in mediation in both rooms. Perhaps there will be a return to consideration of the true merits of the underlying claim.

It will be interesting to see whether the change in funding to DBA cases and the requirement for ATE premiums to be paid out of damages will result in more incentives to settle earlier. If the lawyers can recover as much under a DBA regardless of when the case is settled, this could operate as an encouragement for early settlement.

There will be more incentive for claimants to reduce costs and settle early to preserve their damages. However there will be less incentive for defendants to settle claims. The changes may see the return of more widespread use of part 36 offers as they will allow the recovery of a greater proportion of the lawyer's costs from the opposing party.

Conclusion

Jackson will not make a mediator's task significantly easier. The costs capping will assist. However, the lawyer/client debate over their respective share in DBA's is likely to be as difficult, as if not more difficult, than in CFA's.

This article was written by Jane Andrewartha, David Cornes, David Miles and David Richbell who are all members of PIM Senior Mediators.

The views expressed in the article are not necessarily the views of all PIM Senior Mediators (http://www.pimseniormediators.co.uk)