

# CEDR FORUM 12<sup>th</sup> JUNE 2013

POST JACKSON  
AND  
CFAs – v – DBAs

IMPLICATIONS FOR MEDIATIONS AND  
MEDIATORS

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# THE IMPACT OF JACKSON ON ADR/ MEDIATIONS/MEDIATORS

- More or less mediations? More!
- Why?
  - Change to CPR 1.1 *'just and at a proportionate cost.'*
  - New 'Disclosure Report' prior to first CMC.
  - Fixed costs in some cases.
  - Costs budgeting and capping.
  - Judges and litigants alike: greater and earlier focus on costs proportionality.

# FUNDING LITIGATION – BEST ADVICE FUNDING LITIGATION- BEST ADVICE TO BE GIVEN BY LEGAL REPRESENTATIVES

- SRA Code of Conduct 2011.
- Outcome 1.6.
- Indicative Behaviours.

# CFA<sub>s</sub> POST 31/3/2013

- Permissible in all civil litigation.
- Success Fee and ATE premium now irrecoverable from opponent (exceptions temporarily: Publication/privacy/defamation claims: also PI Mesothelioma and insolvency claims).
- Statutory maximum Success Fee is 100% of base costs (both PI and non-PI cases).
- No Statutory Cap on amount of Success Fee calculated by reference to damages for non-PI cases.
- Conversely in PI cases – Cap is 25% of General and Past Loss Damages [(see CFA Order 2013 and LAPSO section 58(4B)(d)].

# DAMAGES BASED AGREEMENTS (DBAS) – PI AND NON-PI CASES

- On winning the case and recovering damages the solicitor for the winning claimant becomes entitled to a share of them as part and parcel of his overall costs claim.
- Non PI cases – DBAs must not provide for a payment above an amount which, including VAT, is equal to 50% of the damages ultimately recovered by the client.
- PI cases – As with CFAs ‘Success Fee’, capped at 25% of General and Past Loss Damages.
- Much satellite cost litigation anticipated.
- Hence early amending legislation likely.

# DBAs

## NOT QUITE A “US-STYLE” CONTINGENCY FEE ARRANGEMENT!

PI – 25% Cap	Base Cost	Damages	Fee	Client retains
HENCE	£ 10,000	£ 50,000	£ 12,500 (£10,000 + 25%)	£ 47,500
<u>NOT</u>	£ 10,000	£ 50,000	£ 22500 (£10,000 + 25% of £50,000)	£ 37,500

Non PI – 50% Cap	Base Cost	Damages	Fee	Client retains
HENCE	£ 10,000	£ 50,000	£ 15,000 (£10,000 + 50%)	£ 45,000
<u>NOT</u>	£ 10,000	£ 50,000	£ 35,000 (£10,000 + 50% of £50000)	£ 25,000

# DBAs

## THE INDEMNITY PRINCIPLE APPLIES!

PI – 25% Cap	Base Cost	Damages	Fee	Client retains
HENCE	£ 10,000	£ 20,000	£ 5,000 (25% of £20,000)	£ 20,000
<u>NOT</u>	£ 10,000	£ 20,000	£ 12,500 (£10,000 + £2,500)	£ 17,500

# CFAs - v – DBAs IN PI CASES

(NOTE: In non PI apply 50% Statutory Cap instead)

## EXAMPLE 1

### *'A big but costly win'*

	CFA 100% Success Fee (subject to 25% cap)	DBA 25%
Damages	£ 6,000,000	£ 6,000,000
Generals and Past Loss	£ 1,000,000	£ 1,000,000
Time Value	£ 250,000	£ 250,000
Base Costs	£ 250,000	£ 250,000
Success Fee (SF)/ Share of damages (SD)	SF £ 250,000	SD nil (because Statutory Cap (SC) applies: base costs already equate to 25% of the 1m G & PS damages)
Total Costs	£ 500,000	£ 250,000
Retained Damages	£ 5,750,000 (£6,000,000 less Success Fee of £ 250,000)	£ 6,000,000



# CFAs - v - DBAs

## EXAMPLE 2

### *'A big but cheap win'*

	CFA 100% Success Fee (subject to 25% cap)	DBA 25%
Damages	£ 6,000,000	£ 6,000,000
Generals and Past Loss	£ 1,000,000	£ 1,000,000
Time Value	£ 75,000	£ 75,000
Base Costs	£ 75,000	£ 75,000
SF/SD	SF £ 75,000	SD £ 175,000 (£250,000 less £75,000)
Total Costs	£ 150,000	£ 250,000
Retained Damages	£ 5,925,000 (£6,000,000 less Success Fee of £ 75,000)	£ 5,825,000 (£6,000,000 less £175,000)

# CFAs - v - DBAs

## EXAMPLE 3

### *'A small and costly win'*

	CFA 100% Success Fee (subject to 25% cap)	DBA 25%
Damages	£ 20,000	£ 20,000
Generals and Past Loss	£ 10,000	£ 10,000
Time Value	£ 9,000	£ 9,000
Base Costs	£ 9,000	£ 2,500 (Indemnity Principle applies: hence balance of £6,500 cannot be recovered from Defendant)
SF/SD	SF £ 2,500 (not £9,000 as 25% cap applies)	SD Nil
Total Costs	£ 11,500	£ 2,500
Retained Damages	£ 17,500 (£ 20,000 less Success Fee of £ 2,500)	£ 20,000

# CFAs - v - DBAs

## EXAMPLE 4

### *'A small but cheap win'*

	CFA 100% Success Fee (subject to 25% cap)	DBA 25%
Damages	£ 20,000	£ 20,000
Generals and Past Loss	£ 10,000	£ 10,000
Time Value	£ 1,300	£ 1,300
Base Costs	£ 1,300	£ 1,300
SF/SD	SF £ 1,300	SD £1,200 (£1,300 plus £1,200 = 25% of £10,000)
Total Costs	£ 2,600	£ 2,500
Retained Damages	£ 18,700	£ 18,800

# IMPLICATIONS FOR MEDIATORS

- You will need to know how the claim/litigation is being funded: preferably in advance of mediation day.
- Invite legal representatives to come to it armed! e.g. get necessary cost limit authorities from BTE or ATE funders, suggest to representatives that they consider their own and their client's bottom line costs positions re. different outcomes/scenarios should the case settle at mediation.
- Also ask them to estimate costs (**including CFA or DBA Success Fee**) to the conclusion of a trial were there to be one.
- In theory less likelihood of Success Fees scuppering deals brokered by the parties.....but we shall see!
- But for some while yet though there will be many cases funded by pre-1.4.13 CFAs: hence probability that at the concluding stages of mediations defendants will be called upon by claimants to pay or significantly contribute towards the cost of pre-Jackson Success Fees and ATE premiums.