Just costs SOLICITORS
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newsletter

Berezovsky v Abramovich

Mrs Justice Gloster has thrown out claims totalling $5bn brought by Russian oligarch Boris Berezovsky against Chelsea FC owner Roman Abramovich.

Berezovsky was represented by Addleshaw Goddard under a conditional-fee agreement described as 'no win, smaller fee' (rather than 'no win, no fee').

The case is thought to have generated total legal fees in excess of £100m, with Addleshaws reported to have ATE insurance in place to cover the risk of losing. If this is true then Gloster J's comments may give cause for concern:

"I found Mr Berezovsky an unimpressive, and inherently unreliable, witness, who regarded truth as a transitory, flexible concept, which could be moulded to suit his current purposes. At times the evidence which he gave was deliberately dishonest; sometimes he was clearly making his evidence up as he went along in response to the perceived difficulty in answering the questions in a manner consistent with his case"

Perhaps the insurer will be pointing to certain paragraphs of their policy terms before signing any cheques…

The other interesting thing to note about this case is that one of the largest law firms in the country has taken on a case that it must have realised was pretty risky, and done it on a conditional fee agreement.

Some have questioned the thinking behind this, but such 'Discounted CFA' agreements allow for the lawyers to charge their client on an hourly-rate basis for the duration of the case, but seek a higher rate (and a success fee) should the case win.

We are seeing more and more clients looking for value from their lawyers, and this is a great way of sharing risk, without damaging cash-flow.

Whilst Addleshaws would undoubtedly have preferred to win, by offering such a deal to their client in 2010, they secured a major piece of litigation and I'm sure they've done well from the deal.

Just Costs are happy to advise on the full range of funding options available to you, to ensure you meet your statutory obligations to your clients, and also maximise your opportunities.

Inside this issue

The anticipated DBA (contingency fee) regime

Whilst we wait on the precise terms of the Statutory Instrument and of any CPR rule changes that will define the new DBA regime, let's look at some of the key issues…

One of the main considerations is how the DBA regime will inter-relate with costs-shifting and recoverable costs. The 'Ontario' model is the preferred basis for the new regime, so it's worth looking at what this actually means in practice.

The best way I've seen of explaining how this will work involved a comparison between the Ontario model and a Success Fee model, using a hypothetical case that settled for £100,000 in damages, with inter partes recoverable costs assessed at £20,000.

If the contingency fee in this case was set at 25% of the damages recovered, then the Claimant's solicitor will be entitled to a fee of £25,000. With the Ontario model, that £25,000 is made up of the £20,000 recovered costs and £5,000 from the Client's damages. The Claimant themselves keeps £95,000 of the damages awarded.

Compare this with the Success Fee model. In the same example the solicitor keeps the £20,000 recovered costs, and then takes 25% of the damages as a success fee. The lawyer receives £45,000 in total, with the client retaining £75,000 of the damages awarded.
It is certainly good news for clients that the favoured approach is the Ontario model.

Another major consideration is what fees fall within the cap?

These may include counsel's fees, VAT, and the cost of the ATE premium. But there could be other fees that fall outside the cap, such as the share that a third party funder may be entitled to, upon the success of the claim.

Adverse Costs

It is likely that Hodgson immunity for solicitors (as currently exists when acting under a CFA) will remain. Of course, in some circumstance a solicitor might choose to be liable, or partly liable, for adverse costs in return for a higher contingency fee.

I think it is also likely that the Arkin principle will apply to Third Party Funders should a claimant lose. In other words, the third party funder's liability to pay adverse costs should be limited to the amount of funding which it provided in the case.

LASPO Act – Commercial litigators act now!

Th e LASPO Act has now been passed and is intended to be put into effect in April 2013. The precise date in April has not yet been announced, although it looks, without any sense of irony, as though April Fools day is the favourite date. Neither the premiums for policies or success fees for CFAs entered into after April 2013, will be recoverable from the paying party in litigation. The only exception in commercial litigation will be for insolvency claims. In personal injury claims, the exceptions are claims for mesothelioma sufferers and ATE premiums for disbursements in clinical negligence cases.

There is no apparent logic to any of these exceptions that the writer can discern.

However this leaves the practitioner with two issues. Are there any steps that commercial litigators should take before April 2013? Secondly, what is likely to happen after that date to litigation funding/ate insurance?

The answer to the first question is fairly obvious. There is now a disappearing opportunity to litigate on the most favourable terms for your client and your firm and therefore it is incumbent upon you to maximise these opportunities.

Astute litigators should be out and about explaining to their clients and potential clients the implications of the end of recoverability. If clients are sitting on potential claims they should be encouraged to sign up to CFAs or discounted CFAs and getting their cases insured on the current basis while they still can. It does not mean, of course, that cases have to be litigated instantly, as long as the CFA and ATE policy have been entered into or issued before the deadline for the end of recoverability.

If you, as a commercial litigator, still do not understand how a discounted CFA works then you have a limited time to use this most valuable tactical and profitable weapon for the benefit of your firm and its clients. Speak to your friendly costs consultant about it!

The principle of charging clients for premiums after April 2013 is alien to all we have stood for at Temple Legal Protection. Nevertheless the change of model has been forced upon us and we will continue to provide ATE insurance. Therefore before April 2013, the message must be to insure all cases on the current basis while you still can.

There will be the inevitable and unenviable group of solicitors after April 2013 who will have to explain to their clients that they could have insured their case at effectively no cost but that opportunity has now been lost.

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LASPO Act – Commercial litigators act now! (continued)

The client will now have to pay for the ATE insurance themselves, in all probability, as a deduction from the damages recovered along with the success fee. This could result in professional negligence claims or complaints to the SRA.

What of the new world? There is confidence that there will be ATE insurance for commercial litigation. However precise details of new models are not likely to be available until the new rules are published this autumn. On any basis they will not be as favourable to clients as the situation that currently exists. The big difference is that the client will have to pay the premium and therefore it will effectively be a deduction from their damages. Given that any success fee for a CFA or contingency agreement will also fall to be a deduction from the Claimant's damages, as a result, from a practical viewpoint there will be fewer claims where cover will be taken up and/or cases not pursued.

There will also be certain classes of litigation that will simply be uninsurable; one of the most obvious of those is defamation and privacy claims.

The writer is confident, having recently participated in an address to Tory MPs, that the members of this Government have no understanding of what they have done. Indeed the Prime Minister at the Leveson enquiry remarked that ordinary people like the Dowlers, should not be left without redress and at the mercy of the media. However by removing recoverability of success fees and ATE premiums, that is precisely what this Government has achieved.

Given the evidence from the Leveson enquiry, it does seem extraordinary that the media should be granted all that they have lobbied for by the removal of recoverability. Heaven forbid that there should be any chilling effect on such responsible and morally driven organisations.

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Managed Legal Solutions (MLS) are a specialist provider of litigation funding

They provide unique solutions on claims of £50,000 to £1m. They also invest in multi-million pound claims. Their CEO, Ken Arnold, talks to Just Costs Solicitors.

Just Costs: Litigation Funding has been around a long time, yet still seems to fund very few cases. What is holding it back?

Ken Arnold: I think there are a number of reasons for the slow development of the market. My top three might be:
1. I think that the funding market has focused on a small band of cases where damages exceed £3m, and it's been a pretty expensive solution.

2. The solutions provided have been too time-consuming for Solicitors.

3. The benefits of funding have not been properly communicated to either solicitors or their clients.

JC: What do you think will happen over the next year within this sector?

Ken: Litigation and litigation funding are arguably at the brink of a revolution. We have implementation of the Jackson report in April, and the adverse financial market conditions appear set to continue. There is a clear need for law firms to react and take advantage of these changes, or potentially find themselves victims. I think the potential exists for funding to have a strong 12 months.

JC: I guess that positive outlook will depend on how Funders deal with your three earlier points…

Ken: True. I do think there is definite movement in all those areas though. Certainly, MLS is funding cases where damages might be £50,000 or £100,000. Whilst other Funders might try to cherry pick high-value cases and look for massive returns, we take a different approach: By looking at a wider range of cases, and building relationships with law firms, we think we can charge much lower fees and grow are more viable business for the long term.

JC: You still may have a job on your hands getting solicitors to look at these kinds of options.

Ken: In some instances, yes. But there are lots of solicitors that want to find the best solution for their client, including the best funding solution.

JC: It does force lots of fee earners onto ground where they are just not comfortable though, doesn't it?

Ken: Absolutely. I think there are more fee earners that would rather not think about funding and ATE than there are that enjoy it… However, the market is changing quickly, and most people in the legal field now realize that they need to move with the times. The alternative is not very attractive.

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Managed Legal Solutions (MLS) (continued)

JC: You recently worked with Just Costs on a project for a mutual client. What can you tell us about that?

Ken: It was very interesting. The client wanted a simple, repeatable model for ATE and funding that their fee earners could use on a wide range of cases. We worked with an insurer, an insurance broker and Just Costs to deliver a complete funding and insurance solution for a client. Their Dispute Resolution team now has an elegant solution that allows them to exceed their clients' needs, meet the regulatory obligations, and minimize non fee earning time in the process. They're very pleased.

JC: The team here found it very useful to get everyone together to look at the clients' needs and then how we could simplify the process for them. It has definitely made us think about other ways we help clients.

Ken: Definitely. We are already talking to a number of other firms that are keen to get their processes in place between now and April. I'm sure there'll be others.

JC: Thanks for speaking with us Ken. Can you tell us a little about MLS before you go?

Ken: It's been a pleasure. I would just add that one of our main advantages is that MLS has a genuinely fast acceptance process. Typically, funders in this market have a lengthy due diligence process coupled with multiple 'funding committees' that can severely delay decisions. They even reject cases at the very final hurdle, months after the initial application.

MLS aims to give a decision within 5 to 10 days including a conditional deed. We recognize that 'one size fits all' is not appropriate for this market, and by collaborating with interested parties we are able to provide a more reliable, responsive service, and develop solutions where all parties interests are aligned. Most importantly, we are looking to build lasting relationships with law firms.

JC: Thanks Ken.

If you are interested in third party funding, speak with your contact at **Just Costs Solicitors, or contact Ken Arnold at Managed legal Solutions Ltd:**
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