THE BAR ASSOCIATION FOR COMMERCE, FINANCE AND INDUSTRY

THE DENNING LECTURE 2024

THE RIGHT HON LADY JUSTICE ANDREWS DBE

AFFORDING JUSTICE

Financing dispute resolution in the 21st century

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1. It is a great privilege to have been asked to deliver a lecture which bears the name of one of my judicial heroes, the great Lord Denning. As a student at King's College London, whenever I had the opportunity to do so, I would creep in to the back of Court 3 (then the Master of the Rolls' court) to watch him in action, regardless of the subject matter of the appeal. In those days there were no skeleton arguments, so cases in the Court of Appeal took much longer, and when one came in partway through it could be a challenge for an observer to understand what the issues were. However, to me that was of secondary importance. I was not only able to observe firsthand the workings of his incisive legal brain, and the deployment (to counsel's discomfort) of his near-photographic memory, but also the way in which he was able to communicate clearly, succinctly and in everyday language with everyone in the court, especially litigants in person, whom he took great care to put at their ease. In that regard he served as a role model to all of us who follow in his judicial footsteps.

2. Although he was imbued with the social and moral attitudes of his generation, a fact for which he has subsequently received what I regard as unfair criticism, Lord Denning was well ahead of his time in many respects. There are not many judges then or since who have demonstrated so clearly a willingness to develop existing principles of law, or even to create new ones, in order to achieve a just outcome to a dispute. It is perhaps unsurprising, therefore, that when around ten years ago I first sat in Court 3 it took me a moment or two to compose myself, finding it difficult to

digest that I was sitting in the great man's chair. I think that was when I first truly understood the meaning of the expression "imposter syndrome". So I am deeply honoured to have been invited to follow in the footsteps of so many illustrious speakers who have delivered these annual lectures in his name.

3. "Afford" of course is a word with two meanings; to provide or to supply something, and to have sufficient money to pay for it. Affording justice, in the sense of providing justice, was at the heart of everything that Lord Denning stood for. This talk, however, is concerned with affording justice in the financial sense, although naturally the one has an effect on the other. Bearing in mind my audience, I also intend to focus on general civil litigation, excluding certain types of dispute (such as employment cases) which have their own special rules.

4. Self-evidently if a person, whether claimant or defendant, does not have the financial resources to get a case to trial, a meritorious argument may not be heard and determined. Although those who speak or write about this subject tend, for obvious reasons, to focus on individual claimants, that problem impinges just as much on corporations as it does on individuals and on defendants as much as claimants.

5. Take for example a company which has expended a lot of money on research and development, acquisition of intellectual property rights, marketing and publicity for a new product. It may even have taken on new staff, or expanded its premises or entered into new contracts with manufacturers or suppliers of components. Then, quite unexpectedly, a business competitor claims that the product infringes its intellectual property rights. Internal counsel gives robust advice that there is nothing in the claim, and that if there had been, the objection would have emerged at the time when the company obtained its own trademarks or patents. However, they advise the Board of Directors that in order to see off the claim the company will need advice from external lawyers and probably an expert opinion.

6. This is a company with little spare cash in its reserves; its competitor has deep pockets, access to Magic Circle law firms, and it is tenacious. The cost of litigating out of its own limited resources (whilst trying to keep the business afloat) may well

be far more than paying damages, but a commercial settlement along those lines is hard to achieve because the rival is threatening to seek injunctive relief to stop the launch of the new product. The company does not wish to submit to an injunction and throw away all of the money it spent on developing the product – particularly as it believes there is no merit in the claim. How can it therefore protect its interests and defend this claim? That company may have as much need of recourse to litigation funding as any individual whose resources would not stretch to covering the cost of taking a case all the way to trial (and having to pay the other side's costs if unsuccessful). The need for litigation funding is therefore not confined to individuals with small or medium-sized claims.

7. Even if a party with limited resources is able to find the means to litigate, and succeed, will justice necessarily be achieved if part of any monetary award must be used to pay funders and lawyers? Awards of damages are designed to compensate for loss, and will be calculated with that aim in mind. If they are swallowed up in payments to the claimant's legal representatives they will not be achieving their purpose. But realistically that may be the only source from which to reimburse them; and unless the lawyers are prepared to act for nothing, the client has no other means of getting any form of redress. This problem is a long-standing one, to which there is no easy solution.

8. In his novel Bleak House, which was first published as a serial between 1852 and 1853, the great social commentator Charles Dickens provided a coruscating indictment of the justice system in Victorian England, and in particular of the endless delays and concomitant expense involved in litigation before the Court of Chancery. Those of you who are familiar with the novel will remember that when the seemingly endless case of *Jarndyce v Jarndyce*, a dispute about who was to inherit a family fortune, eventually reached a conclusion, there was no money left from the estate to pay to the successful beneficiaries because it had all been consumed in legal fees. That was a case in which nobody had to pay for the litigation out of their own pocket, and no doubt it would be said that the correct legal result was reached, but justice was plainly not served.

9. Some 20 years after that novel was published, Parliament enacted the first of the Judicature Acts which completely reorganised the higher court system, part of which had been the target of Dickens' criticism, and created a new Supreme Court of Judicature comprising the High Court of Justice and the Court of Appeal, which were directed to administer both law and equity. That improved the excessive delay and duplication of process which the old structure had engendered. But access to justice remained, like the Ritz hotel, open to all in theory, but only to those who could afford it in practice. Further reforms have streamlined civil procedure still further, but the overall cost of litigation remains prohibitive for all but a few. That is not the fault of the lawyers, who deserve to be paid fairly for doing a difficult and demanding job.

10. It was not until 1949 that legal aid was introduced to assist those of "small or moderate means" to pay the fees of lawyers who appeared for private clients in all courts and tribunals. Although the system is looked at by many through rose-tinted spectacles, the truth is that it was never a panacea for all ills. For example it did not avail companies with limited resources, like the one in the example given above, or individuals whose main asset, their home, soared in value through the rise in property prices, but provided them with no ready means of obtaining cash. The cost/benefit ratio applied in civil legal aid meant that even those with meritorious claims were excluded if the sum likely to be recovered was less than the cost of going to court to get the judgment. As the monetary thresholds became eroded by inflation, and the criteria became harder to satisfy, the number of individuals who were eligible gradually dwindled.

11. Then on 1 April 2013, with the coming into effect of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) large areas of litigation were removed from the scope of legal aid altogether. It is no part of this talk to comment on the wisdom or otherwise of that decision. Realistically we must accept that there is no prospect, at least in the foreseeable future, that civil legal aid will be reintroduced in those areas. Even for those areas which remained in scope, many law firms have concluded that they could not afford to continue with publicly funded work, and there are areas of this country which are recognised to be legal aid "deserts". That

problem may well have come about irrespective of the changes brought about by LASPO, though they were probably hastened by it.

12. The fact is that litigation in this jurisdiction is expensive, and most ordinary people, even those who are reasonably well off, cannot afford it. The same is true of many businesses, whether or not they are incorporated.

13. Time does not permit me to address online courts, cost-capping, qualified one way cost shifting, costs budgeting, remote hearings and other means by which justice can be made more affordable for litigants, such as the rules in certain courts and tribunals precluding awards of costs to a successful litigant save in exceptional circumstances, or capping the recoverable costs. I propose to concentrate on the different forms of litigation funding that have evolved to try and fill a gap which existed prior to the truncation of civil legal aid but grew wider on account of it, and the impact that they have on the types of case which come before the courts and tribunals for determination.

14. I begin by posing this question: what types of case are being funded? The public get to hear about a few big cases which get funding and make the headlines. The Post Office group litigation claim is a recent well-known example of a case which, thanks to litigation funding, got off the ground and eventually triumphed. But what of the perhaps equally meritorious cases that fell by the wayside, of which no-one has ever heard? What criteria govern the selection of cases to fund, who makes the decisions, and is the bar being set too high?

15. I intend to cover three broad topics, though they do interlink. These are: third party litigation funding; litigation insurance; and new and emerging ways of funding litigation. I shall also be addressing the role that AI has to play.

THIRD PARTY LITIGATION FUNDING: CFAS, DBAS and LFAs

16. For many years, strangers to litigation were not allowed to fund the costs of the litigation, particularly if they agreed to do so in exchange for a share of the proceeds. When the Criminal Law Act 1967 came into force, maintenance and champerty ceased to be criminal offences, and actionable torts, but section 14(2) provided that

the abolition of criminal and civil liability for maintenance and champerty did not affect any rule of law as to the cases in which a contract was to be treated as "contrary to public policy or otherwise illegal."

17. Despite the sea change in attitudes to litigation funding which has gradually come about over the past 30 years or so, it remains the case that, a matter of public policy, champertous arrangements will still not be enforced unless they meet certain strict criteria laid down by Parliament. This is because of the recognised potential for conflicts of interest that will arise upon giving a lawyer a stake in the outcome of litigation. That rationale does not necessarily apply, or at least not with as much force, where the source of the funds is a professional third party funder, but there will still be a danger of a conflict of interest between the funder and the litigant incentivising inappropriate settlements (or, conversely, refusals to settle).

18. The two categories of litigation funding agreement entered into with lawyers are conditional fee agreements (CFAs) and damages based agreements (DBAs). An important thing to note about both species is that they are a carve-out from the general prohibition on maintenance and champerty and therefore must be taken to be acceptable as a matter of public policy, provided they comply with the requirements laid down from time to time by Parliament.

19. CFAs were the first inroad into the rules on maintenance and champerty. They were introduced by Section 58 of the Courts and Legal Services Act 1990, which came into effect in 1995 in consequence of the Conditional Fee Agreements Order of that year. This was supplemented for a time by the Conditional Fee Agreements Regulations 2000 (revoked in 2005) leading to a so-called "costs war" which it is beyond the scope of this talk to discuss. Section 58 defines conditional fee agreements as agreements with a person providing advocacy or litigation services which provide for that person's fees and expenses (or any part of them) to be payable only in certain circumstances. The CFA may also (and usually will) provide for a success fee, that is, for the fees to which it applies to be increased in certain specified circumstances. The typical structure of a CFA is "no win, no fee" plus a percentage uplift on base costs if the litigation is successful. Certain types of

proceedings cannot be lawfully made the subject of a CFA – currently these are criminal and family proceedings (Section 58A).

20. CFAs can only be entered into with lawyers or others authorised to conduct litigation or with rights of audience. Section 58 precludes such agreements from being unenforceable provided that (i) the agreement is in writing; (ii) it states the percentage amount of the success fee uplift; and (iii) that percentage does not exceed a percentage specified in relation to the description of proceedings to which the agreement relates by order made by the Lord Chancellor. In commercial cases that can be up to a maximum of 100% of normal fees.(The rules for personal injury claims changed with the coming into force of LASPO.)

21. Further mandatory requirements, imposed by regulations, include a requirement to explain the percentage of any uplift chosen and the reasoning behind it. The reasons for setting that particular percentage must be spelled out in the CFA from the onset. A failure to do so, or failure to abide by any other requirement of the statute or the regulations, will result in the agreement being unenforceable.

22. When it comes to the assessment by a costs judge of the reasonableness of a success fee the relevant practice direction refers to a number of factors which include the risk that the circumstances in which the costs fees or expenses would be payable might or might not occur, the liability for disbursements and what other methods of financing the costs were available to the recovering party.

23. A success fee reflects the risk of no payment – in broad terms, the greater the risk the higher the fee. One problem, in terms of promoting access to justice, is that the highest capped success fee of 100% is measured by reference to a 50% chance of winning or losing – which means that there is little or no incentive for a solicitor to fund cases with prospects of success which fall below that bright line. Which side of the line a case may fall is a matter of subjective judgment, depending on a host of factors.

24. CFAs rapidly became a commonplace means of funding claims for personal injuries and clinical negligence (though they are used across the entire spectrum of

litigation). They served a useful purpose of getting smaller claims off the ground which would otherwise never have seen the light of day – for example, a modest claim for personal injuries brought by an elderly person with pre-existing ailments and no claim for loss of earnings. However a problem which soon emerged was dissatisfaction with the exposure of the losing party (and their insurers) to elevated costs, which could be up to double the normal fees. Defence insurers lobbied successfully for change. In the light of recommendations in the Jackson Report into the costs of civil litigation in 2009, LASPO changed the climate by capping success fees in personal injury claims at 25%, and precluding the solicitors from recovering them from the unsuccessful party. These changes came into effect for all personal injury CFAs entered into on and after 1 April 2013. It was thought that a more generous approach to the assessment of recoverable (standard) costs might provide sufficient to make up for the impact of these changes, but there is no real correlation between the two.

25. The key question for the claimant's solicitor became whether it was really worth their while to lay out all the disbursements from their own pocket, and take no payment for doing the work, on the basis that if the claim was successful they would get only their standard costs (and reimbursement of the disbursements). Understandably this was not viewed as an attractive proposition. It led to the situation in which solicitors doing that kind of work will generally require the client to agree that their (more limited) success fee will come out of the damages. The reduction in the success fee also had a knock-on effect on the types of case which the solicitors are prepared to fund; the chances of success would need to be much higher than 50/50 to justify a return of only 25%, and only those cases leading to much larger awards would appear to justify funding a case to trial.

26. DBAs were introduced by amendment to section 58 (Section 58 AA) by section 154 of the Coroners and Justice Act 2009; shortly after that provision came into effect the Damages Based Regulations 2013 came into force which set out certain additional conditions which must be satisfied if a DBA is to be enforceable. The regulations are best described as somewhat opaque, and in 2019 Professor Rachel Mulheron and Nicholas Bacon KC proposed a number of refinements which were generally well received, but have yet to be adopted. The definition of a DBA

adopted in s. 58AA was taken directly from the Compensation Act 2006 and it was this which led to the problems in the recent case of *PACCAR*, which I will discuss in the context of litigation funding arrangements.

27. DBAs are risk sharing agreements whereby payment of the costs and a success fee is dependent on achieving defined success criteria agreed at the outset. The legislation makes it clear that only DBAs that fall within the statutory definition and comply with the regulations are enforceable. As the name suggests, payments are based on a percentage of the sums *recovered* from the losing party or under a settlement agreement. It can be up to 25% of general damages and pecuniary loss (other than future pecuniary loss) for a personal injury claim and up to 50% in other cases. However there is no limit on the uplift for an appeal.

28. A DBA must be measured by reference to a benefit which is recovered from the opposing party; it cannot be based upon an amount which the client has not had to pay: see *Candey Ltd v Tonstate Group Ltd* [2022] EWCA Civ 936. Therefore, unless there is a monetary counterclaim, as a general rule DBAs will not be available to defendants.

29. The Courts and Legal Services Act says nothing that expressly or by necessary implication affects or alters the common law as it applies to non-compliant CFAs and DBAs. Solicitors whose arrangements fell by the wayside and who would therefore find their agreements unenforceable often resorted to special pleading which have generally got short shrift from the courts. See for example the remarks of Dyson LJ giving the judgment of the Court in *Garrett v Halton BC* [2006] EWCA Civ 1017, [2007] 1 WLR 554 at [27]-[30]:

> "27. … The starting point must be the language of section 58(1) and (3) of the 1990 Act. It is clear and uncompromising: if one or more of the applicable conditions is not satisfied, then the CFA is unenforceable. Parliament could have adopted a different model. It could, for example, have provided that where an applicable condition is not satisfied, the CFA will only be enforceable with the permission

of the court or upon such terms as the court thinks fit. There is nothing inherently improbable in a statutory scheme which provides that, if the applicable conditions are not satisfied, the CFA shall be unenforceable with the consequence that the solicitor will not be entitled to payment for his services. Such a scheme can yield harsh results in certain circumstances, especially if the client has not suffered any actual loss as a result of the breach. It can also produce results which, at first sight, may seem odd: … . But the scheme is designed to protect clients and to encourage solicitors to comply with detailed statutory requirements which are clearly intended to achieve that purpose. The fact that it may produce harsh or surprising results in individual cases is not necessarily a good reason for construing the statutory provisions in such a way as will avoid such results.

30… To use the words of Lord Nicholls, Parliament was painting with a broad brush. It must be taken to have deliberately decided not to distinguish between cases of non-compliance which are innocent and those which are negligent or committed in bad faith, nor between those which cause prejudice (in the sense of actual loss) and those which do not. It would have been open to Parliament to distinguish between such cases, but it chose not to do so. The conditions stated in section 58(3)(c) and in particular the requirements prescribed in the 2000 Regulations are for the protection of solicitors' clients. Parliament considered that the need to safeguard the interests of clients was so important that it should be secured by providing that, if any of the conditions were not satisfied, the CFA would not be enforceable and the solicitor would not be paid. To use the words of Lord Nicholls again, this is an approach of punishing solicitors pour encourager les autres. Such a policy is tough, but it is not irrational. The public interest in protecting solicitors' clients required that the satisfaction of the statutory conditions was an essential prerequisite to the enforcement of CFAs."

30. I made a similar point more recently in the case of *Diag Human v Volterra Fietta* [2023] EWCA Civ 1107. That was a case in which the arrangement with the solicitors involved their discounting their normal hourly rate, and getting a success fee in return. The discounted rate was payable win or lose, as the agreement made clear. The percentage uplift transgressed the rules for a CFA because it was capable of being calculated as more than 100%. The solicitors sought to sever the offending parts of the agreement. The Court of Appeal said no, for detailed reasons set out in the leading judgment given by Lord Justice Stuart-Smith. In my concurring judgment, I said this:

> "There would be little incentive to solicitors to adhere to the straightforward requirements of the regulations laid down for the protection of their clients, if the worst that could happen if they failed to do so would be that they would be paid the amount that the client had agreed to pay for their services win or lose. It makes no difference to the principle if that amount is based on a discount from the solicitors' usual hourly rate, or subject to a financial cap. If Parliament had wished to provide for the consequences of entry into a non-compliant CFA to be limited to loss of the success fee or other form of contingent remuneration, it would have done so. There has been no indication that Parliament considers a discounted fee arrangement to be any different in character from a "no win, no fee" arrangement or intends that a distinction be drawn between them."

31. In 1999, Parliament introduced section 58B into the Courts and Legal Services Act, which was designed to make provision for the regulation of litigation funding agreements as therein defined. However, that section has never been brought into force. It was left to the courts to develop the common law in order to accommodate new forms of litigation funding by persons other than the lawyers instructed in the case. The breakthrough came with the seminal judgment of the Court of Appeal in *R(Factortame Ltd) v Secretary of State for Transport (No 8)* [2002] EWCA Civ 932, [2003] QB 381. That was a case in which the funding arrangements under scrutiny were entered into with accountants who had provided services as experts. In line with a growing tolerance of third party funding arrangements, the Court explained

that only funding arrangements that tended to "undermine the ends of justice" should fall foul of the prohibition on maintenance and champerty. Thus reasonable Litigation Funding Agreements (LFAs) entered into with reputable professional third party funders who respect the integrity of the judicial process are lawful. This opened the door for the many and varied forms of funding arrangements which grew up over the next 20 years or so.

32. Litigation funding is a non-recourse investment. If the case is lost the funder loses its money and the client does not have to repay it. The funder will also be subject to exposure to paying the other side's costs (generally subject to the principle laid down in *Arkin v Borchard Lines and others* [2005] EWCA Civ 655 that this should be capped at the funder's financial contribution to the unsuccessful party's costs). It is possible to obtain after the event (ATE) insurance to cover such exposure (a topic I address in the second section of this talk). There have been a number of recent inroads into the practice of applying the "Arkin cap", but they have turned on somewhat unusual facts, see for example *Chapelgate Credit Opportunity Master Fund Ltd v Money and Others* [2020] EWCA Civ 246. Realistically, of course the money to repay the funders can only come from any settlement monies or damages or other financial compensation received by the client at the end of the day.

33. The advantage of such third party funding arrangements over CFAs and DBAs made with lawyers, is that the funders take the litigation risk. The lawyers get paid their normal fees as they go along and the lawyers are not expected to front up the expense of the litigation, including disbursements for experts, from their own resources. However, as I have already indicated, there are associated dangers with litigation funding including the prospect of interference by the funder (intermeddling) in the process of the litigation – lawyers cannot be servants of two masters.

34. In England and Wales that concern has been addressed by self-regulation via the Association of Litigation Funders which adheres to a published Code of Conduct. There are three main facets of the Code; the funder must have enough capital to cover all their funding agreements and liabilities for at least 36 months; they must only withdraw their support from a claim or settle in certain circumstances (so that

the funded party cannot be unfairly left in the lurch); and, perhaps most importantly in this context, they cannot control the litigation or do anything which requires a lawyer to act in breach of their professional duties. That may well be spelled out expressly in the contract between the funder and the lawyer. The major disadvantage is that the bigger the outlay and the bigger the funder's fee, the greater will be the erosion of the damages if the litigation succeeds. Funders who are prepared to take a risk on very speculative litigation would want to take a very big cut of the winnings as a quid pro quo, and unlike DBAs and CFAs, there is currently no regulatory cap.

35. Although litigation funding is commercially motivated, it is now widely acknowledged to play a valuable role in furthering access to justice, particularly where group litigation is involved. Large numbers of claimants with individually small losses arising from a common source would not otherwise get claims before the courts, and the third party funding helps to redress the balance in cases where there is a total inequality of arms (the David v Goliath scenario). Group litigation arising from environmental disasters or from product liability are good examples of the types of case that have been funded in this way. A more recent example is the group litigation action being brought by students against various Universities as a result of the impact of the response to the Covid-19 pandemic on the services that they have received in return for their tuition and other fees.

36. There were further endorsements of third party litigation funding in the years running up to the Jackson report and Sir Rupert Jackson himself strongly supported the concept. He pointed out that funders are highly experienced litigators who exercise effective control over costs, often insisting on having court approved budgets. In consequence of this change in attitude, third party funding became a well established and commonly used part of the English litigation landscape and the number of market participants, the capital available to them, the types of disputes funded and the size of investments grew incrementally.

37. However, cold water was poured on the litigation funding industry last July when judgment was handed down in *R(on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] UKSC 28. That case concerned an

application to the CAT to bring collective proceedings for breaches of competition law. The CAT first needed to be satisfied that the proposed claimants had adequate funding arrangements in place to meet their own costs and any adverse costs orders made against it. The prospective claimants sought to rely on LFAs under which the funder's maximum remuneration was calculated by reference to a percentage of the damages ultimately recovered in the litigation. It was thought that because the funders had a passive role in the conduct of the litigation that these agreements would not fall within section 58AA.

38. The Supreme Court decided, by a majority, (with a powerful dissenting judgment by Lady Rose) that LFAs which entitle funders to payment based on the amount of damages awarded are DBAs, however passive a role the funder may play. Consequently such LFAs are unenforceable unless they comply with the 2013 regulations governing DBAs. The decision turned on whether litigation funding fell within the express definition of "claims management services" which includes "the provision of financial services or assistance". It was held that it did. The immediate effect was that the model for litigation funding adopted in the vast majority of LFAs used in this jurisdiciton was ineffective and those LFAs were unenforceable because they did not comply with the regulations governing DBAs.

39. Responses to the decision in *PACCAR* were many and various. The previous Government hastened to produce a Bill to cure the problem by amending section 58AA, but it stalled in consequence of the General Election. It is not known whether it will be revived or amended or whether the current regime wishes to introduce its own Bill. In the meantime, there is more litigation en route to the Court of Appeal about whether all non-recourse funding is unenforceable, or whether *PACCAR* only bites where the model is based on payment of a percentage of the damages. Funders have also attempted to produce DBA compliant agreements. It appears from reading some of the on-line commentaries that some of these have been drafted to include supposedly severable provisions designed to restore the old model if an Act is passed which cures the problem. In the light of *Diag Human v Volterra Fietta*, to which I have already referred, and the "all or nothing" approach of the courts to

compliance with the strict legal requirements for enforceability, I am not entirely confident that this would work.

INSURANCE

40. Before the Event (BTE) insurance is cover for the cost of legal representation for claims or defending claims. It may also enable the assured to recover otherwise uninsured losses (e.g. after a no fault road traffic accident causing injuries). It covers a wide range of circumstances. The insurance may cover homeowners and businesses in relation to occupier's liability, damages for personal injury, or road traffic accidents, employee disputes, breaches of commercial contracts and tax investigations. Self-evidently such insurance is an exercise in the unknown – the basic premise for it is that it must be more likely than not that the claim will succeed. It is common for the policy to require ongoing consideration to be given to the prospects of success as the case progresses, so that if it dips below 50% the assured loses the insurance cover. A bigger problem, perhaps, is that generally the financial cap on provision for unknown future litigation will be so low that it will mean that the litigant cannot use the insurance to cover more than early stage expenditure.

41. After the Event (ATE) insurance is different – it deals with the fall out of exposure to the other party's costs if the insured loses a claim, the nature and details of which are known at least in general terms at the time when cover incepts (likewise, the approximate quantum of exposure). Although available to defendants, ATE insurance is in practice more often used by claimants in conjunction with a CFA or DBA, and will be bought by the solicitor on the client's behalf. It will cover a wide range of disputes. A litigation funder might also wish to take out ATE insurance to protect its own exposure to adverse costs orders.

42. ATE insurance affords good protection for a claimant or funder for adverse costs orders and disbursements incurred by solicitors which cannot be recovered from the other side. However for policies taken out since 1 April 2013 when LASPO came into force, with certain limited exceptions (broadly, for privacy and defamation cases) ATE premiums are not recoverable as a disbursement by a successful litigant, and they are a front-end expense. The higher the exposure to costs, the higher the premium – and this once again steers funding towards cases which are perceived to

have the highest prospects of success. Indeed the costs of taking out ATE insurance could be a deterrent to the pursuit of an otherwise arguable claim if the insurer takes a different view of the risks to that of the lawyers (or even the funder). Whilst the litigant does not need to take out an ATE policy early on, one major disadvantage of taking out the insurance later is that it is likely to become more expensive as the case progresses, whereas at the outset the ATE may be subject to a fixed standard premium. A further difficulty with waiting until later in the case to take out ATE insurance is convincing the insurer at that later stage that the claim is likely to succeed.

43. The ATE insurer and the solicitor acting on a CFA or the litigation funder will want to back a winning case, the insurer because then it will not have to pay, and the solicitor because they will then get paid and earn their uplift, or the funder will get back their outlay and a return on their investment. Each of them will want to carry out a risk assessment to evaluate the chances of success; they may seek an opinion from counsel or apply their own methodology (or sometimes, both).

44. How are the risks assessed? It is a multi-factorial exercise involving an evaluation of factual uncertainties, legal uncertainties, client risk, opponent risk, procedural risk and cost risk. There are different methods of evaluation, and each can be applied to liability and to quantum. Ultimately the assessment is a matter of evaluative judgement, and different people will place different weight on relevant factors when making it.

45. Lawyers are obliged to advise clients as the case progresses about the risks as well as exposure to costs. It is conventional to use percentage terms. Using a mathematical basis for risk assessment is popular, but it risks creating an appearance of precision or objectivity when what is carried out is quintessentially a subjective exercise. Each lawyer will look at different facets of a dispute and weigh them up slightly differently. If a case turns on a point of construction of a contract or a statute which is capable of being interpreted in more than one way, one may more easily find a consensus that the prospects are around 50/50 or that, because one interpretation makes more commercial sense, they are higher than that. Cases which are more nuanced, particularly if there are tricky issues of causation or a novel point

of law, are much harder to evaluate. Human beings are fallible, and there will often be a spectrum of views. Is it fair that the ability to get a case off the ground depends on whereabouts in that spectrum the individual tasked with the evaluation happens to end up? On the other hand, would the use of an algorithm produce any more reliable an assessment?

46. One way of seeking to predict the uncertain is by the use of mathematical probability – often with the assistance of a computer – though this has inherent difficulties. It can also be highly misleading. Bayes' Theorem involves multiplying together the probabilities of each event occurring (e.g. the probability of a coin landing heads first, in successive throws). However, that theorem assumes that the first event must be combined with the second and successive events, whereas in litigation they tend to be independent of each other – proof of damage will normally depend on entirely different factors from proof of negligence, for example. If the probability of proving negligence is 65%, causation 75%, and damage 60 %, the multiplication rule would produce a probability of proving all three (and therefore winning) of only 29%. However, were one to take the probability of proving the least likely issue (i.e. the probability of establishing the weakest aspect of the case) as the appropriate yardstick, in the above example, damage, that would be 60%. Instinctively that approach appears to be a fairer reflection of the chances of success than the multiplication approach. A lawyer who assessed the overall prospects of success in the above example would be likely to say they were more than 50% but a purist mathematical approach would almost certainly lead to it being rejected for funding.

47. Insurers (especially the larger ones) do tend to use algorithms and AI to help with the assessment of risk nowadays. We are all used to filling in standard proposal forms for insurance which, instead of being weighed up by an underwriter, will now be fed into a computer. Whilst it may safeguard against the emotive response which might subconsciously prompt a human to boost the assessment of the prospects of a cause with which they have empathy, the use of computers may impact upon the decision making process in a manner which is adverse as well as beneficial. AI is only as good as the information fed into it and as we know, it is not always possible to provide unqualified answers to questions in a proposal form. Moreover, forms

are not always designed in such a way as to enable crucial information to be provided.

48. It is possible to make adjustments to an algorithm which is used for purely statistical prediction, so as to cure any bias or correct any inaccurate information which is fed in to such models. However, when AI is used to process information and make a decision about what risks to accept or reject, the process is not transparent and it may not even be clear what criteria have been used in the evaluation. This is quite deliberate, because the designers are seeking to replicate as closely as possible the highly complex process of human decision-making. The reasons for the acceptance or rejection of the risk will not be immediately apparent either. Leaving the decision about which cases to fund to a computer could be extremely unfair. But even if the decision-maker simply uses the AI as a means of weeding out hopeless causes, the process could be flawed. The use of computers, even as an aid to human decision making, can exacerbate any underlying bias in assessment of what cases are or are not worthy of support. There is the further concern of placing too much trust in the machine as well, and that if its product looks convincing the human decision-maker will not challenge it, or at least will afford too much weight to it.

49. What might this do for our sense of justice? For example if AI flags a low prospect of success will it lead to the prospective funder not looking at the case further and never really considering it? There is an obvious danger that if this happens, meritorious claims will slip through the net. There is also a risk of bias built in to any such evaluation exercise - including too great a reliance on the information produced by the computer, even if it is reasonably accurate. For example, if the data fed into the computer includes information about the nature of previous successful cases, this could potentially skew the results in favour of cases of a similar type to the exclusion of those which do not have similar characteristics.

50. Irrespective of whether the decision taker is a human being, a computer or a combination of the two, the general problem for all litigants is the reluctance of anyone to take a risk which is less than even chance. It was ever thus, even before legal aid was truncated.

NEW FORMS OF FUNDING

51. Time only permits me to mention two new forms of funding, one of which is becoming prevalent here, the other which is gaining traction in the USA and may also be adopted in this jurisdiction once the problem caused by *PACCAR* has been addressed.

52. Crowdfunding is a popular way of raising money through social media or online to support all kinds of causes – including litigation on matters of local or national importance. It tends to appeal to causes which strike a chord with the public at large, or with certain sectors of the public. It can be useful as a means of raising finance for cases with a local impact (often in the planning sphere) or climate change/environmental claims, particularly when used in conjunction with cost capping under the Aarhus convention. Downsides include the lack of regulation, the absence of any security for the funders, and the fact that funders have no real control over the litigation but may be exposing themselves to third party costs orders if it does not succeed.

53. A portfolio litigation funding arrangement enables multiple cases to be funded by one or many funders under a single facility through a streamlined process and on agreed terms. It is essentially a form of investment treating the "asset" as the litigation. Portfolio finance gathers multiple litigation or arbitration matters into a single funding vehicle. This is still non-recourse lending but the model is more sophisticated than a straightforward LFA and enables the funder to spread the risk and keep down the costs.

54. There are typically three main frameworks to these arrangements– (1) prior submit, which allows each participating funder to assess each case prior to offering terms, much as they would under an ordinary LFA; (2) delegated authority where the law firm holding the funds has the authority to draw down funding on a case by case basis under agreed terms provided it meets fixed criteria, which can work well for specialist areas, and (3) the most sophisticated cross-collateralised arrangement which provides a single pool of funding for use across all cases in the portfolio. This requires significant due diligence to be carried out because the lawyers are entrusted

with the investment – but it will ensure that the law firm gets an agreed amount of fees across all the batch of cases in the portfolio, and the success fee is only payable once the firm recovers an agreed amount across the batch.

55. Just as with other mixed portfolio investments, in theory the portfolio approach could lead to riskier claims with lower prospects of success than 50% being funded if the lawyer (and the funder) were willing to include them in the portfolio. However, since it would not generally be in their economic interests to do so, it remains to be seen whether that will make any impact in practice on the types of cases which fall by the wayside.

56. One downside of portfolio arrangements is the inevitable closeness of the relationship between the lawyer and the funder, and economic dependency on the facility, with potential knock-on effects on advice to the client.

CONCLUSION

57. The sources of litigation funding are many and varied, and the categories are not yet closed. Concern remains about how cases are selected for support and whether the funding models which are being adopted do afford justice (in the first sense) for the successful litigants. Although it may be argued that without the funding they would get nothing at all because they cannot afford to bring a claim, is it truly justice that much of the money which was designed to compensate them for their losses will be swallowed up in payment of costs and disbursements? Concerns of that nature appear to be driving current considerations by Minsters of putting a cap on the amounts that funders under an LFA can recover from damages. But this has led to pleas by the likes of Mr Bates of Post Office fame that this will deter litigation funders from supporting causes like his.

58. On a separate note, is there a danger of populism or mechanical selection leading to meritorious but unfashionable causes going unsupported, or to causes being supported regardless of their merits merely because they happen to capture the public imagination? And is there a real danger that making selections of which cases

to support financially, either with the assistance of AI or fully delegating the selection to a computer, allied with the lack of transparency about that process, will lead to unjust results or at least a perception of unfairness?

59. There are no easy answers to the problem of how to afford justice in the modern era. It seems to me that it would require the creativity of another Lord Denning to come up with a solution.