

Clean House or Bleak Future

Forecasting more storms then spring

The opportunistic abuse of the legal aid system has led to the killing of what was seen by some short-sighted lawyers as a golden goose. On the other hand the many ethical lawyers must feel aggrieved by the changes brought about by the withdrawal of most publicly funded civil legal aid, in addition to the many honest litigants, now without access to justice, whose over-crowded life raft is now without tiller or paddle. There are genuine personal injury and clinical negligence litigants who do not have the resources to contest an undervalued offer or who need immediate funds for exceptional issues facing them in their daily lives.

The introduction of alternative business structures (ABS) will undoubtedly help to correct some of this inequity by driving down legal costs through the introduction of both professional management and more keenly priced competition, theoretically providing relief for some impecunious litigants. Some legal firms are being forced to come to the realisation that they need to develop stricter management controls in order to survive, while others are taking a pro-active approach because they are progressive in their corporate attitude. Some newly created legal firms, as well as established partnerships have become incorporated suggesting that they are considering the portability of their equity in the future; through an ABS route or a related alternative; such as amalgamation or sale. Incorporation creates a clearer and more acceptable mechanism for valuation and accounting, in addition to tax structures that are more transparent and understandable for possible investors. These firms are being structured with a view to their future as a business.

Professional legal standards are likely to improve in the near to medium term as competitive pressure is felt by those lawyers whose main eye was focused on their own fees. Few in the legal establishment would have predicted that the ABS model would have even been considered not to mention introduced not so very long ago. To many lawyers the very idea of an ABS is abhorrent, but as cited in my previous articles in the Clerksroom Newsletter there are currently an enormous number of legal firms that are running into cash-flow problems or are at risk of insolvency. Those who do not favour the ABS system could argue that there can be ambiguity of fiduciary responsibility, especially where lawyers are involved in joint venture arrangements with accountants or investment managers, but if one accepts that systems of protocols can be installed to counter any such ethical worries, the development of alternative business structures can be beneficial. The number of ABS firms at just over two hundred fifty may appear insignificant amidst the circa 11,000 conventional law firms, but it should be borne in mind that this is from a standing start in 2012. This number will grow.

The other external source of work-in-progress finance originates from third party litigation funding, the alternative for those firms determined to remain independent. This effectively transfers the responsibility for funding a case back to the litigants. This provides the law firm with the opportunity to do what it does best, while ensuring that the meritorious cases are adequately funded. The litigant, the client of the legal firm, also becomes a client of the third party litigation fund (TPLF) under the terms of a litigation funding agreement. This outlines the responsibilities of the parties involved, including budgeting, funding and reporting. It has the advantage that both lawyer and client not only have the security of funding, but also a considerable degree of psychological assurance, as a case that has been funded is seen to have adequate merit to warrant investment by the TPLF. Furthermore the involvement of a TPLF may provide, of itself, a counter intuitive effect on a well-resourced defendant, who may have otherwise contested the action more aggressively than might be reasonable given the evidence.

Clients are attracted by the prospect of risk-free and cost-free litigation, and are satisfied to have 60% of their award, rather than a larger percentage with the inherent risk, but according to Lord Justice Jackson, it "is a better position to be in than to recover no winnings at all". TPLFs such as Trusted Litigation Capital in turn manage the risk and associated cost by spreading it over many cases so that the winners effectively share the burden of the losers.

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