Breaking down barriers

Kevin Latham explains a welcome new ruling that will boost the use of DBAs

Rarely is a judgment quite so critical of the legislature, but Coulson J was undoubtedly right to note in his judgment last month in *Zuberi v Lexlaw Limited* [2021] EWCA Civ 16 that 'nobody can pretend that these regulations represent the draftsman's finest hour…'

The regulations in question are the Damages-Based Agreements Regulations 2013.

Regulation 1 contains various definitions, including:
(i) 'costs' as 'time reasonably spent… multiplied by the reasonable hourly rate'; and
(ii) 'payment' as 'that part of the sum recovered in respect of the claim or damages awarded that the client agrees to pay the representative…'.

Regulation 4 – which relates to civil claims only and not employment claims – provides that 'a damages-based agreement must not require an amount to be paid by the client other than… the payment…'

Regulation 8 – which relates to employment claims only – provides that: 'If the agreement is terminated, the representatives may not charge the client more than the representative's costs and expenses for the work undertaken in respect of the client's claim or proceedings'. No similar provision is made in the regulations for civil claims.

Those regulations gave rise to considerable concern within the profession, as to what could and could not be written into the terms of a damages based agreement (DBA) in a civil claim. In particular, many were concerned that regulation 4 prevented a solicitor from including a provision entitling the solicitor to payment in the event that the client terminated the retainer before a successful outcome was achieved, as to do so would be to 'require an amount to be paid… other than the payment'. However, the absence of a payment on termination clause would prevent the solicitor from recovering any fees in the event that a client terminated the retainer, even if that occurred after considerable work had been undertaken – or very shortly before settlement was achieved.

In 2015, the Damages Based Agreements Reform Project (an independent review arranged by the Ministry of Justice and led by Professor Rachael Mulheron and Nicholas Bacon QC) reviewed the regulations. In a comprehensive and – in the author's humble opinion – very useful paper, a number of problems with the regulations were identified, and a number of amendments designed to remedy those problems were recommended. Unfortunately, whether through a lack of parliamentary time or impetus (perhaps in light of the distraction of Brexit) the regulations have remained unamended.

The uncertainties resulted largely in solicitors shunning DBAs as a legitimate funding option. Both the Law Society and the Bar Council chose not to prepare a model form of DBA for use by their members. In large part, it is this collective reluctance to enter into DBAs that has likely contributed to the fact that after being in force for nearly eight years, it is only now that the Court of Appeal has been required to examine this issue, and provide much needed and – as will become clear from the below – welcome guidance for the professions.

THE FACTS

The appellant had obtained a bank loan and later alleged that she had been missold certain financial products. She engaged the respondent firm to bring a claim on her behalf against the bank. She retained the respondent under the terms of a written retainer which provided (i) for calculation of the solicitors' fee at 12% of any damages recovered (plus expenses); (ii) in the event of a loss, for payment of expenses only; and (iii) for calculation of the solicitors' fee on a time basis (that is to say, a conventional time spent multiplied by hourly rate basis) in the event that the client terminated the retainer before damages were recovered. Ultimately the claim settled, and the solicitor delivered a bill of just less than £130,000.

The appellant contested her liability to pay the respondent. While the termination clause had not been triggered, she contended that its mere existence rendered the retainer non-compliant with regulation

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4, and that accordingly the retainer was unenforceable. At first instance, HHJ Parfitt rejected that submission and found the retainer enforceable ([2020] EWHC 1855 (Ch)), and the appellant appealed to the Court of Appeal.

While all three members of the constituted Court of Appeal arrived at the conclusion that the appeal should be dismissed, they agreed and dissented from each other to varying degrees.

WHAT IS A DBA?

On this first question, both Lewison LJ and Coulson LJ agreed that a narrow definition of what amounts to a DBA was required by the regulations, concluding that if a contract of retainer contains both (i) a provision entitling a lawyer to a share of damages; and (ii) a provision for payment on a different basis, only those provisions dealing with payment out of damages amount to the DBA (per Lewison LJ at [33] and Coulson LJ at [77]).

It follows that regulation 4 is only concerned with a solicitor's fees in circumstances whereby a recovery has been made. Beyond that, regulation 4 was not concerned with fees calculated on any other basis (i.e. time costs) in circumstances whereby no recovery is made (Lewison LJ at [43]).

While that majority view will bind vertically and horizontally, Newey LJ gave a dissenting judgment on the point, preferring a much wider definition of a DBA. Having set out a substantial history to the regulations, he relied upon the apparent intention underlying the regulations that DBAs should be a form of 'no win, no fee' agreement which prevented payment of solicitors' fees in the event of a loss. Accordingly, he preferred the view that if an agreement provides for both a share of the damages as well as other mechanisms for payment, the whole agreement is to be considered a DBA (at [66-67]).

TERMINATION CLAUSE

Nevertheless, Newey LJ took the view that regulation 4 did not bite at all in respect of the termination clause. He compared regulations 4(3) and 7 (which both provide for percentage caps on the 'payment' in respect of civil claims and employment claims respectively) and concluded that just as regulation 7 was not intended to extend to early termination, nether should regulation 4 apply to early termination clauses (at [71]).

Addressing the absence of a corresponding regulation 8 applicable to civil claims, Newey LJ placed reliance upon the fact that debate ahead of the regulations being approved indicated that regulation 8 was included to address the fact that unregulated 'non-lawyers' can pursue employment matters, whereas civil matters can only be pursued by qualified lawyers who are regulated by their professional bodies (at [72]).

Coulson LJ agreed, holding that the inclusion of regulation 8 demonstrates that termination provisions are, in themselves, entirely lawful. He added that nothing in regulation 4 affects the operation of a termination clause, as it does not address early termination at all. For the reasons given by Newey LJ, the fact that the regulations do not prohibit or limit termination provisions for general civil litigation was not – found Coulson LJ – an inadvertent omission (at [78-79]).

Instead, on this issue, it was Lewison LJ who disagreed, noting that Newey LJ's approach required that payment of 'an amount' other than expenses is prohibited if the claim is lost; but permitted if the retainer is terminated early. He concluded that he could not find that reflected in the text of regulation 4 (at [50]).

IS THE FUTURE CERTAIN?

The Court of Appeal's judgment undoubtedly provides welcome clarity. Subject to any second appeal to the Supreme Court, those considering use of a DBA can take some comfort in the fact that they can enter into a retainer which provides for payment of time costs in the event that the client terminates the retainer before recovery of damages is achieved.

However, the judgment gives rise to an interesting and potentially significant opportunity for litigators.

The majority view of Lewison LJ and Coulson LJ as to the definition of a DBA means that the regulations do not deal with a lawyer's remuneration in the event that the client pursues a case to trial and loses (per Lewison LJ at [43]). Newey LJ fairly set out the consequences of that conclusion at [64]; there would be '…nothing to prevent a solicitor agreeing with his client that he will receive up to 50% of the sums ultimately recovered if the claim succeeds and be paid his full-time costs if the claim fails. In fact, it would seem to be the case that a retainer could provide for a solicitor to become entitled to both half of recoveries and full time costs in the event of the claim succeeding'.

> In light of this judgment, DBAs might appear a significantly more attractive funding agreement

One wonders whether in light of this judgment, DBAs might appear not just a viable alternative funding agreement to solicitors pursuing civil claims, but a significantly more attractive one.

However, a word of caution. CPR r.44.18(2)(b) provides that a 'party may not recover by way of costs more than the total amount payable by that *party under the damages-based agreement* for legal services provided *under that agreement*' (emphasis added).

If the narrow definition of a DBA is applied similarly to the CPR, the total amount payable under the DBA is presumably the 'payment', and not any further agreement which may be contained within the same retainer. Thus, while the solicitor may be entitled to charge their client both the 'payment' and time costs, the likelihood is that the 'payment' will act as a cap on what might be recovered from the opponent. Solicitors may have to be careful not to fall foul of the provisions of CPR r.46.9 and perhaps section 74(3) of the Solicitors Act 1974 when advising their client at the outset. The effect of CPR r.44.18 is not considered in the judgment.

Thus, while some clarity has been achieved, it seems that litigators would still be well advised to take specialist advice before entering into a DBA.

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