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The lament of the DBA

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What does the future hold for damages-based agreements, asks Francis Kendall

A damages-based agreement (DBA) is an agreement between a lawyer and his client under which the client agrees to pay the lawyer a percentage of any sums recovered in a claim. The lawyer is not paid if the case is lost. Previously unlawful for contentious work (ignoring employment and other tribunal claims), s 45 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, supported by the Damages-Based Agreements Regulations 2013 (SI 2013/609), allowed DBAs from 1 April 2013—a direct result of the Jackson report.

The maximum payment that the lawyer can recover from the client's damages is capped at 25% of damages (excluding damages for future care and loss) in personal injury cases; 35% of damages on employment tribunal cases (as has existed since 2010); and 50% of damages in all other cases.

Costs recovery from the losing party will proceed as usual based on the costs actually incurred with the client liable to pay any shortfall from their damages. The indemnity principle remains in that the lawyer's fee is restricted to what is due under the DBA. If the actual costs incurred are greater, the client, and the losing party, would only be liable to pay the DBA fee (limited within the terms of the DBA or as above).

As recently as October 2014 Lord Justice Jackson himself recognised DBAs as one of two headline areas "where things have gone wrong" from the recommendations he made.

Hybrid debate

From the outset debate centred on partial or hybrid DBAs that would allow the lawyer to limit exposure from all or nothing to "no win, low fee". The various mutterings thereon appear to have resulted in finality with the Civil Justice Council recently unveiling a 10-strong working party to conduct a review of DBA regulations at the request of the government.

Its task is to consider technical revisions and specifically does not extend to hybrids. Lord Justice Jackson has gone so far as to openly state that it is illogical to ban hybrid DBAs, while allowing "no win, low fee" conditional fee agreements. Further he found it "worse than illogical" to permit third-party funding to operate on a hybrid basis when DBAs are more efficient (involving two parties with a stake in the litigation as opposed to three).

However, the reasoning behind the decision to limit the ambit of the review is government concerns that allowing hybrids will lead to "low risk, high return" strategies being adopted.

It has been widely recognised that, as a result of this issue as much as the technical problems that need to be resolved with the regulations, DBAs have simply not been adopted or have been utilised at an extremely low level.

LSLA rumblings

So still nothing to report as yet, a constant message on DBAs, or is it? There seem to be rumblings from the London Solicitors Litigation Association (LSLA) of mystery members using or intending to use them.

Back in October 2014 Francesca Kaye, immediate past president of the LSLA, said: "The LSLA agrees with Jackson LJ that hybrid agreements form an essential part of the Jackson reform package and preserve access to justice for businesses whatever their size." This comment was made while "strongly" urging the Ministry of Justice to reconsider their now closed stance on hybrids.

Notwithstanding the uncertainty, even a brief trawl of the net with appropriate key words will result in a significantly long list of DBA offerings from a multitude of law firms. The highlighted benefits to clients of entering into a DBA include the obvious cash flow advantages and the certainty on legal spend for financial reporting purposes.

Dead on arrival?

While DBAs have been described as being "dead on arrival", this has mainly been illustrated by reference to personal injury cases. In commercial litigation, some major City firms are gearing up for the use of DBAs. A good example is Lewis Silkin announcing the launch of a new DBA product combined with after-the event-insurance through litigation funding broker The Judge.

There are significant returns to be made on DBA-funded commercial litigation cases that settle at an early stage. Although there will be tension on one side of any DBA-funded case in extreme circumstances, this can surely only be validated by the application of hindsight.

Examples of extreme circumstances would be a case with early settlement and high damages that will favour the lawyer, or a case requiring significant levels of resourcing that only achieves low damages which will favour the client (and, arguably, any paying party).

Both parties were content at the stage the DBA was set, there have been continuing calls for a requirement for clients to obtain independent legal advice prior to entering into a DBA (a Jackson recommendation the government rejected), and hindsight has long been a principle not to be applied on detailed assessment. It remains to be seen if lawyers or clients can exercise the restraint and composure shown by costs judges when the terms of a DBA are enforced in extreme cases.

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