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Hybrid DBAs: In the spotlight of *Lexlaw v Zuberi* should you be thinking of hybrid DBAs for your clients?

White Paper Costs Conference 2021

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DBAs

- Introduced from April 2013 by Section 58AA Courts and Legal Services Act 1990 as amended
- And the Damages-Based Agreement Regulations 2013 (2013/609), all following the Jackson report.

- They have been a "***spectacular failure***", those being the words of Sir Rupert himself in 2019.

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Section 58AA

- Courts and Legal Services Act 1990 (as amended by LASPO 2012) as from 1.4.13:

- *"(1) A damages-based agreement which satisfies the conditions in subsection (4) is not unenforceable by reason only of its being a damages-based agreement.*

- *(2) But… a damages-based agreement which does not satisfy those conditions is unenforceable.*

Compare Section 58 re CFAs – a gateway to argument.

Section 58AA

- *(3) For the purposes of this section—*
- *(a) a damages-based agreement is an agreement between a person providing advocacy services, litigation services or claims management services and the recipient of those services which provides that—*
- *(i) the recipient is to make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided, and*
- *(ii) the amount of that payment is to be determined by reference to the amount of the financial benefit obtained.*

Section 58AA

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- (4)(a) The agreement must be in writing;

- (b) if regulations so provide, must not provide for a payment above a prescribed amount or for a payment above an amount calculated in a prescribed manner;

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The DBA Regulations 2013

- Regulation 1 contains definitions, including:
- "costs" means the total of the representative's time reasonably spent, in respect of the claim or proceedings, multiplied by the reasonable hourly rate of remuneration of the representative
- "expenses" means disbursements incurred by the representative, including the expense of obtaining an expert's report and, in an employment matter only, counsel's fees;**[counsel's fees therefore included in the "payment"]**
- "payment" means that part of the sum recovered in respect of the claim or damages awarded that the client agrees to pay the representative, and excludes expenses but includes, in respect of any claim or proceedings to which these regulations apply other than an employment matter, any disbursements incurred by the representative in respect of counsel's fees…"

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The DBA Regulations 2013

- Regulation 3 provides:
- [The DBA] “must specify—
- (a) the claim or proceedings or parts of them to which the agreement relates;
- (b) the circumstances in which the representative's payment, expenses and costs, or part of them, are payable; and
- (c) the reason for setting the amount of the payment at the level agreed, which, in an employment matter, shall include having regard to, where appropriate, whether the claim or proceedings is one of several similar claims or proceedings.”

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DBA Regulations

- Regulation 4 provides, inter alia:
- "(1) In respect of any claim or proceedings, other than an employment matter, to which these Regulations apply, **a damages-based agreement must not require an amount to be paid by the client other than—**
- **(a) the payment**, net of—
- (i) any costs … and
- (ii) where relevant, any sum in respect of disbursements incurred by the representative in respect of counsel's fees,
- that have been paid or are payable by another party to the proceedings by agreement or order; and

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DBA Regulation 4

- (1) (b) any expenses incurred by the representative, net of any amount which has been paid or is payable by another party to the proceedings by agreement or order."

- (2) provides that in a claim for personal injuries, a DBA cannot provide for a payment of 25% of damages including VAT ultimately recovered by the client but excluding damages for future pecuniary loss.

- (3) provides in a non-personal injury claim for that figure 50% including VAT.

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DBA Regulation 8

- This **only** applies to employment matters and states, inter alia, at (2):
- "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"
- (4) The representative may not terminate the agreement and charge costs unless the client has behaved or is behaving unreasonably.
- (5) Paragraphs (3) and (4) are without prejudice to any right of either party under general law of contract to terminate the agreement."

The Problem

- S58AA(2): a DBA which does not satisfy the statutory conditions is unenforceable.

- Reg 4 DBA Regs provides that the DBA shall not require an amount to be paid by the client other than the Payment [the percentage contingency fee, net of costs recovered and expenses] and expenses.

- Reg 8 – solicitor can charge on hourly rate if client terminates DBA – but only in employment cases

The Problem

- So if a DBA in a non-employment case provides for the solicitor to charge hours spent x hourly rate if the client terminates (or the solicitor does so for good reason),

- Is that a breach of Reg 4 which says that a DBA "*must not require an amount to be paid by the client other than [the percentage of damages]*" and is the **entire DBA therefore unenforceable**?

Harlequin

- This point arose in *Glasgow/Harlequin* (July 2017) relating to the costs of a firm of solicitors and 2 QCs, both on a DBA with a termination provision who stood to lose millions if the DBA was held unenforceable.

- But then it was settled after argument and awaiting judgment. So no-one knew the answer and few failed to include a termination provision in their DBA. Until…

Lexlaw Ltd v Zuberi

- [2021] EWCA Civ 16
- (15.1.21)
- C had DBA where clause 6.2 provided that if the client terminated the DBA at any time, she was liable to pay the solicitors' time costs up to the date of termination.

- C accepted a settlement and sought her costs.

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Lexlaw v Zuberi

- D contended clause 6.2 obliged her to pay an amount other than the %age payment, so breached Reg 4(1) DBA Regs

- DBAs are "*islands of legality in a sea of illegality*"

- So a DBA which did not comply with the Regs had not reached "*the safety of the island*": so it was **unenforceable** under s.58AA(2).

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Lewison LJ

- **What is a DBA?**
- Is the whole retainer agreement a DBA? Or is only the contingency fee element of the retainer a DBA and everything else not a DBA?

- Lewison LJ held the latter:
- (a) Good policy reasons that the only change in the law was to allow contingency fees, and
- (b) that view is reflected in the Regulations.

Lewison LJ

- But how does he explain Reg 4 which prevents a DBA providing for **any** payment other than the contingency fee?
- Can't then have termination payments?

- **Wrong** – This interpretation is contrary to Reg 8 (termination) – although ltd to employment, shows that Reg 4 did not ban termination payments

Lewison LJ

- All that is covered in a DBA is the contingency fee itself, everything else outside is not a DBA and not governed by the DBA Regs
- Therefore, the termination clause was lawful
- (and even if it had not been, he would have severed it anyway so the contract would have survived)

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Coulson LJ

- Coulson LJ agreed with Lewison LJ on the narrow interpretation of what a DBA is –
- D's interpretation could not be right as it would be "*commercial suicide*" for DBA lawyers…
- (just why almost no-one used DBAs since 2013…)

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Implications

- (1) **Termination** –
- Lawyers can provide for payment if client terminates.
- But beyond this, the logic is:
- (2) **Hybrid DBAs** (i.e. we get paid our percentage if we win but discounted hourly rates if we lose) are therefore **lawful** (contrary to what the government has said is its policy).

= Brave New World for DBAs now

Newey LJ

- He agreed with the outcome of the appeal but disagreed with the majority's reasoning.
- He adopted a wide definition of a DBA, i.e. any retainer which included within it a percentage contingency fee (and normally such agreements are headed DBAs)
- Intention was if client didn't win, lawyer would not get paid
- Further, if Lewison and Coulson LJ were right, you could get both %age and hourly rate

Newey LJ

- So Newey LJ held that **hybrid DBAs are not permitted**
- BUT the fact that Reg 8 exists referring termination payments for employment lawyers means that Reg 4 did not ban it.
- Therefore, while no hybrid DBAs should be permitted, termination provisions are not prevented by Reg 4

Effects of the Judgment

- But of course, although it is a powerful dissenting judgment, Newey LJ was in a minority.

- Since then (21.1.21) instructions to draft hybrid DBAs have become much more common

Effects of the Judgment

- No-one has tried the percentage PLUS the hourly rate on top arrangement referred to by Newey LJ…

- But DBAs have undoubtedly become far more user-friendly as a result of this judgment both adding in termination provisions and making them hybrid so that the lawyers can get paid something if the case is lost.

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Is a DBA a viable funding option now?

- **Appeal?** Seems unlikely but not impossible.
- The previous uncertainty re termination made DBAs untenable for most. That has now been resolved (subject to an appeal).
- The calls to allow **hybrid DBAs** (no win low fee DBAs) have been loud and consistent since April 2013. The government set itself against. But the Court of Appeal has now decided otherwise.
- That all helps.

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The future for DBAs

- *Lexlaw* is not alone in its "purposive" interpretation of legislation in this area to overcome apparent poor drafting:

- *Paccar Inc v Road Haulage Association and UK Trucks* [2021] EWCA Civ 299 (5.3.21) - is a commercial third party funding agreement a DBA, and subject to the same DBA regime?

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UK Trucks

- Surprisingly, on the face of it, third party funders appear to fit the definition of providing "*claims management services*" within s58AA.

- Defn "claims management services" in Competition Act 2006 incl "*advice or other services in relation to the making of a claim*", including "*the provision of financial services or assistance*"

UK Trucks

- But Court of Appeal applied purposive statutory construction – what is the purpose of the legislation as a whole and this provision as part of that overall purpose?

- Held: in the context of the purpose of the Act as a whole, not intended that Third Party Funding should have to comply with DBA rules.

So have the courts solved the problems with DBAs?

- Well, not all of them…
- They cannot be used for Defendants – % has to be out of sums "*ultimately recovered*" (i.e. received):
- see *Tonstate Group v Wojakovski* [2021] EWCA Civ 1122 (Ch) per Zacaroli J (30.4.21)

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Problems with DBAs

- Current conflict between the Act which refers to "*financial benefit*" and the Regs which refer to sum recovered in respect of the claim or damages awarded.

- If the claim is for a Renoir, or an equitable interest in a trust fund etc, that is not "*a sum recovered or damages awarded*".
- So what is your percentage based on?

Problems with DBAs

- Expenses (disbursements) are outside the DBA % payment: have to be paid for by the client on top on terms to be agreed with their solicitors

- BUT Counsel's fees are (except in employment cases) NOT an expense for this purpose – i.e. they are included in the %age

Remaining issues with DBAs

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- Or can counsel enter into their own separate DBA with the client? Nothing on the face of the provisions to stop this, but in theory both solicitors and counsel could enter into CFAs for 50% of the damages...

- And is the DBA between counsel and the client or counsel and the solicitor? Section 58AA (3) DBA between a person providing advocacy/litigation services and "*the recipient of those services*" where "*the recipient obtains a specified financial benefit*", i.e. it appears to be the client

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Remaining issues with DBAs

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- % is of sum “ultimately recovered” so if enforcement problems, lawyers take the risk

- Watch out also for set-offs

Revised DBA Regulations?

- CJC review of LASPO in 2015 – recommendations died a death…

- Report commissioned by MoJ from Professor Rachel Mulheron and Nick Bacon QC launched on 17.10.19.
- Included termination payments and hybrid DBAs so reform now less urgent post-*Lexlaw*
- But would address some of the above problems

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DBAs v CFAs

- End in Solicitor/counsel vs own client disputes?

- Case selection – will solicitors choose CFAs or DBAs?

- If likely to settle early, DBA for lawyer
- If likely to go to trial, CFA for lawyer
- But the precise opposite interest for the client – inherent conflict
- **Make good attendances notes of advice on funding!**

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Can a DBA be “unfair”?

- *Bolt Burdon Solicitors v Tariq and others* [2016] EWHC 811 (QB) Spencer J
- DBA between solicitors and experienced businessman so solicitors get 50% of compensation + disbursements under the Financial Conduct Redress Scheme vs a bank

- Client obtains compensation of £820,000 quickly – solicitors have done less than £50,000 worth of work on a traditional hourly rate basis

- Held: solicitors were entitled to £410,000 under the DBA

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“Unfair” DBA

- That is simply in the nature of a DBA, win some, lose some
- Client’s eyes were open
- No undue influence
- Not “unfair and unreasonable” under Section 57 of the Solicitors Act 1974 and so would not be struck down by the courts
- Vital judgment for DBAs to be viable for solicitors.

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Model Agreements

- Law Society and Bar Council refused to publish one, only the Chancery Bar Association has (with caveats)

- That might change now…

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The Future of DBAs

- They are not without problems.
- The Regs could still do with a major redraft.

- BUT *Lexlaw* brings them into the realms of a viable funding option for solicitor and client.

- The future for them is undoubtedly brighter.

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