THE DBA REFORM PROJECT

EXTRACTS

Post-Implementation Review of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)

Civil Litigation Funding and Costs

Paragraph 19, page 6:

19. Two main areas of concern have been identified in the feedback from stakeholders. The first is that the DBA regulations would benefit from additional clarity and certainty. The Government accepts this argument. It will give careful consideration to the way forward in the light of the outcome of the independent review of the drafting of the regulations, which is being undertaken by Professor Rachael Mulheron and Nicholas Bacon QC. Their report is expected later in 2019.

Section 5, paragraphs 114–122, pp 27–29:

5: The introduction of Damages Based Agreements (DBAs) for funding civil cases

Damages-based agreements (DBA): under a DBA lawyers are not paid if they lose a case but may take a percentage of the damages awarded to their client as their fee if the case is successful. DBAs are similar to CFAs in that they are each 'no win no fee' agreements, but in a DBA the lawyer's payment is linked to the damages awarded, whereas in a CFA it is linked to the costs recovered. This means that DBAs are actually a simpler and clearer concept for most clients as it means if they win their lawyer will simply take a percentage of their damages as their fee versus the base fees and success fees used for CFAs.
Prior to LASPO, DBAs were only used to fund employment tribunals.

Section 45 of LASPO introduced DBAs as a funding method for all civil cases.
Hybrid DBAs are a form of funding arrangement, which some commercial lawyers supported, that would allow DBAs to be combined with another form of funding so that it is not a true 'no win no fee' agreement. Typically, hybrid DBAs are sought to be used in higher value commercial litigation, where the lawyer would receive a proportion of the damages if successful but would nevertheless receive some payment from the client if unsuccessful.

114. DBAs were proposed by Sir Rupert Jackson as an alternative funding method for civil cases, outside of employment tribunals, to increase funding options thereby meeting the aim of promoting access to justice at proportionate cost (**Objective 3**). [fn 48: Sir Rupert Jackson, 'Final Report', p. 131.]

115. However, as stated in the initial assessment, DBAs were 'intended as an additional form of funding in appropriate cases, not an alternative form of funding in every case'. [fn 49: Initial Assessment (Annex A).] It was the Government's view at the time that DBAs were not designed to be an alternative to CFAs for mainstream fast and multi-track PI cases, for example.

116. Almost all respondents, across the spectrum, agreed that DBAs are rarely used and that the current DBA regulations are not effective. There was unanimous support amongst respondents that the regulations would benefit from reform and redrafting to ensure DBAs are a more viable funding method for a greater number of cases. Where respondents and stakeholders elaborated on specific concerns they cited issues including: the lack of payment of a reasonable sum for work done on termination [fn 50: 'quantum meruit']; uncertainty around early termination and the indemnity principle; uncertainty around whether the 'sequential' hybrid DBAs are allowed under the current Regulations; and the payment of counsel's fees amongst others that needed addressing before they are seen as being more attractive. As such, most respondents on DBAs endorsed the conclusions and recommendations of the Civil Justice Council's (CJC's) Working Group on DBAs, chaired by Professor Rachael Mulheron, which produced a detailed report on these issues in 2015. [fn 51: Civil Justice Council, 'The Damages-Based Agreements Reform Project', https://www.judiciary.uk/wp-content/uploads/2015/09/dba-reform-project-cjc-aug-2015.pdf (August 2015).]

117. A claimant personal injury group advocated the use of a tapered approach to the percentage cap for DBAs, as proposed by Sheriff Principal Taylor in Scotland. [fn 52: Sheriff Principal James A. Taylor, 'Taylor Review: Review of Expenses and Funding of Civil Litigation in Scotland' (September 2013), https://www2.gov.scot/Publications/2013/10/8023/downloads#res438205.]

118. In addition, we received a number of representations from commercial litigators and their representatives specifically relating to the use of hybrid DBAs for commercial litigation. Some argued that there was no reason to ban the use of hybrid DBAs, since its effects are already being replicated by third-party litigation funders who can provide hybrid DBAs to lawyers, which is an additional deduction from the client's damages. Many commercial lawyers stated that it was unfair that third-party litigation funders could offer hybrid DBAs, but lawyers were precluded from entering into such an arrangement with their clients. In addition, commercial litigators also cited that a hybrid DBA, which is suitable in high-value complex commercial litigation, would enable the law firm to receive some income on an ongoing basis, since most of these cases took several years to conclude. As such, hybrid DBAs would provide a potential solution to easing cash flow problems in such cases.

119. Other reasons in favour of hybrid DBAs included the risk sharing appetite of commercial clients, including international clients. They stated that international clients, who preferred to settle their disputes in this jurisdiction, were left feeling frustrated that they were unable to negotiate flexible funding arrangements with their lawyers, which they could do in other jurisdictions. According to some, this was putting England and Wales at a competitive disadvantage as an international centre for dispute resolution.

120. This general view of allowing hybrid DBAs was also supported by Sir Rupert Jackson at the CJC seminar.

121. However, some commercial lawyers also cautioned against allowing hybrid DBAs and stated that this type of funding arrangement was in the lawyer's interest and not the clients. It was argued that lawyers could structure a CFA in a similar way to a hybrid DBA, which would arguably compensate law firms sufficiently well for their risk. For example, a representative of claimant lawyers who undertake complex injury cases said: '*a number of CFAs will be staged with a 100% success fee should the matter prove sufficiently*

contentious to proceed to trial, but with materially lower or even zero success fee for cases that settle early or are subject to early binding admission'. In addition, it was argued that a vibrant, sophisticated third-party litigation funding market has developed in this jurisdiction which provides direct funding to both clients and lawyers and, as such, there was no need to introduce hybrid DBAs.

122. It is worth noting that Professor Rachael Mulheron, a former member of the CJC and chair of its DBA Working Group, and Nicholas Bacon QC, have jointly commenced an independent review of the drafting of the DBA Regulations and are expected to publish draft revisions later in 2019.

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