

# Damages based agreements

## DESIRABLE CLARITY FROM THE COURT OF APPEAL

### Introduction

Damages based agreements (DBAs) were introduced as part of the Jackson reforms in 2013 and were intended to provide an alternative means of funding litigation, thereby increasing access to justice. The concept of the retainer is that if successful, the legal representative charges a percentage share of the recoveries. However use of DBAs has not been widespread due to a number of factors; they are only really of use for higher value claims, solicitors must be certain of the value of the claim from the outset to ensure there is no shortfall when it settles and perhaps most importantly of all, the Regulations governing the agreements were considered difficult to interpret.

Since their introduction, there has been a good deal of debate as to whether a DBA could include terms and conditions providing for payment on a basis other than a share of the recoveries in the event the agreement is

terminated by a client. This was clearly an unsatisfactory state of affairs as if such a clause impacted upon the validity of the DBA, potentially rendering it unenforceable, this would be yet another deterrent to a solicitor offering this type of funding agreement.

However the recent decision of [\*Zuberi v Lexlaw Ltd \[2021\] EWCA Civ 16 \(15 January 2021\)\*](#) in the Court of Appeal has now confirmed that DBAs can include a clause which entitles the legal representative to payment for time spent upon termination. The facts were as follows:

Mrs Zuberi borrowed money from a bank. She subsequently brought a claim against the bank alleging that she had been mis sold certain financial products. She retained Lexlaw to act on her behalf under the terms of a written agreement. Eventually the bank made an offer to settle her claim, which she accepted. Under the written agreement Lexlaw were entitled to 12% of



any sum recovered plus expenses (such as disbursements). Lexlaw's case was that the sum due was just under £130,000. However, Clause 6.2 of the agreement provided:

*"With the exception of the circumstances set out in clause 6.3 ... you may terminate this Agreement at any time. However, you are liable to pay the Costs and the Expenses incurred up to the date of termination of this Agreement within one month of delivery of our bill to you."*

Mrs Zuberi argued that the inclusion of this clause rendered the DBA unenforceable as it was in breach of the DBA Regulations, namely Regulation 4(1), which provides that a DBA: "...must not require an amount to be paid by the client other than" the DBA "payment" i.e. the legal representative's agreed percentage share of the damages.

When the case came before HH Judge Parfitt sitting as a High Court judge, he ruled that there was no bar on a DBA containing terms permitting for payment upon termination. Mrs Zuberi appealed this decision and the Court of Appeal unanimously dismissed the appeal, concluding that Regulation 4 (1) did not prevent an agreement to pay time costs if the DBA was terminated before a right to share in the proceeds of the litigation has arisen.

#### **Commentary:**

**Although unanimous in their decision, the Court of Appeal judges arrived at their conclusion for different reasons. Two of the judges concluded that there should properly be a narrow interpretation of the term "DBA", and that this related solely to the provisions in the retainer dealing with payment out of recoveries. The other judge did not agree with this view, finding that a "DBA" constituted the entire retainer. If the majority view is correct, this would permit solicitors to enter into "hybrid" DBAs, allowing them to claim both the percentage share of recoveries if successful and draft the retainer to combine this with another fee.**

**It remains to be seen whether this case will in fact encourage solicitors to enter into more DBAs in future and fulfil the original objective of giving impecunious litigants wider access to justice.**



**For further information about this case or our dispute resolution services, please contact Gill Nevin directly.**

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