Zuberi v Lexlaw Limited; The General Council of the Bar of England and Wales (Intervener):

Court of Appeal – LJJs Lewison; Newey; Coulson

14 January 2021

Damages Based Agreements:

- **Enforceability;**
- **Lawfulness of Termination Fees;**
- **Hybrid DBAS.**

1. In its judgment handed down on 14 January 2021 the Court of Appeal has unanimously upheld the validity of a Damages Based Agreement ("**DBA**") which included a clause providing that – in the event of early termination of the DBA by the client – the client was liable to pay the solicitors' time charges at an hourly rate for time spent working on the claim together with the costs of instructing third parties (such as Counsel) and other disbursements.

2. Since the inception of the DBA Regulations 2013 (the "**Regulations**") the widely held view was that the charging of termination fees was prohibited by the Regulations; such that a DBA including a provision allowing solicitors to charge for work done in the event of early termination was unlawful and any DBA including such a provision unenforceable.

3. The result, as recorded by Lewison LJ at §21 of the judgment, has been to cause *"considerable uncertainty in the legal profession; and a widespread fear that if a client terminates a retainer, the lawyer will end up not being paid anything for what might have been months or even years of work"* such that *"neither the Bar Council nor the Law Society has provided a model form of DBA."*

4. In three separate judgments – that of Lewison and Newey LJJ are particularly full in their reasoning – the Court of Appeal has confirmed the earlier decision of the High Court [1], concluding that the Regulations do not prohibit a solicitor from charging fees in the event of early termination of the DBA. The Regulations are not, according to the Court of Appeal, intended to regulate the issue of fees chargeable on termination *at all*.

[1] HHJ Parfitt sitting as a Judge of the High Court: [20202] EWHC 1855 (Ch)

a. Lewison LJ concluded at §43 that: *"…time costs as such are outside the scope of the Regulations, except where they are brought in as an additional requirement of a DBA in exercise of the power under section 58AA(4)(c)"* The additional requirement currently only applies to claims proceeding before the employment tribunal – see Regulation 8.

b. Newey LJ concluded at §71 - §73 that: *"In my view, regulation 4 of the 2013 Regulations does not bite on termination provisions … as Mr Snell said in his skeleton argument:*

"the legislature … felt it necessary to regulate the extent of the costs and expenses that could be charged by those conducting employment tribunal proceeds as an additional requirement to the other matters regulated in the respect of DBAs in an employment tribunal context. There are no additional requirements in respect of civil proceedings; i.e. termination fees in civil litigation are not regulated by the [2013 Regulations]."

c. Coulson LJ at §78, expressly agreed with the approach adopted by LJ Lewison and concluded that the Regulations *"do not address termination at all."*

5. It is, therefore, now clear beyond doubt that termination fees are not caught by the Regulations and any DBA including such a term will be enforceable.

Other Matters

6. However, the Court of Appeal goes a little further than dealing with termination fees alone. In particular, the Court considered (albeit it did not come to any firm conclusion on the issue(s)):

a. What a DBA actually is.

i. Lewison LJ, with whom Coulson LJ agrees, considered that there are 2 possible views of what a DBA consists of - §33.

"One view is that if a contract of retainer contains any provisions which entitles the lawyer to a share of recoveries, then the whole contract of retainer is a DBA. In other words, a DBA is a contract which includes a provision for sharing recoveries. But another view is that if a contract of retainer contains a provision which entitles a lawyer to a share of recoveries; but also contains other provisions which provide for payment on a different basis, or other terms which do not deal with payment at all, only those provisions in the contract of retainer which deal with payment out of recoveries amount to the DBA."

ii. Both LJJ Lewison (§34) and Coulson (§77) consider that a DBA is only that part of the retainer which entitles to a share of recoveries; thus adopting a *"narrow meaning"* Coulson LJ describing the DBA as:

"the agreement between the parties relating to the payment as defined in the Regulations, namely that "part of the sum recovered in respect of the claim or damages awarded that the client agrees to pay the representative. Other elements of the agreement between the solicitor and the client l… have nothing to do with the payment as defined in the Regulations and are therefore not part of the DBA itself."

iii. Newey LJ departs company with the majority on the question of what a DBA is. He prefers a wider interpretation of what a DBA is; suggesting that the legislative description of what a DBA is *"extends to any agreement under which a solicitor can become entitled to a share of recoveries and, in particular, encompasses an agreement which also provides for the solicitor to be paid on a different basis."* (§66)

7. The debate as to what a DBA is cannot be seen as purely academic. It plays a significant part in the discussion of:

a. An agreement which includes a provision which offends the current Regulations in some way would remain enforceable if the offending provision(s) were severed from the agreement itself – *see Lewison LJ §5 – 8* where he concluded that even if the clause in the DBA viz. termination fees offended the Regulations it would have been severed at common law such that the remainder of the agreement would be enforceable; *and*

b. The permissibility of hybrid DBAs.

8. Hybrid DBAs could take a number of forms.

a. A 'sequential DBA': a form of retainer where a client agrees to pay hourly rates up until a certain stage in proceedings; but thereafter agrees that the solicitor will be remunerated by reference to a share of recoveries. An example is given by Lewison LJ at §38:

"Suppose that a client approaches a solicitor and says that they have a claim that they wish to prosecute; that they can pay normal time charges up to close of pleadings; but that if the case foes any further they can only continue if the lawyer's payment is limited to a share of the recoveries. I can see no objection to regarding that part of the overall agreement relating to recoveries, rather than the whole contract of retainer, as amounting to a DBA. In those circumstances, the effect of regulation 4 would control that part of the contract of retainer which dealt with the share of recoveries, but not that part which dealt with time charges,"

b. A 'concurrent DBA': a form of retainer where hourly rates (likely discounted) are paid alongside a percentage share of the proceeds of recovery.

9. Taking Lewison LJ's approach to the definition of a DBA (endorsed by Coulson LJ) neither form of hybrid DBA is prohibited by the Regulations. Indeed, taking the approach to its logical conclusion, on Lewison and Coulson LJJ's definition of a DBA, there would be nothing to prevent a solicitor agreeing in the retainer:

a. That in the event of success payment will be made by reference to a percentage of recovery; *but*

b. In the event of failure of the claim, the client will make payment by reference to the solicitor's hourly rates multiplied by time spent.

10. Thus, Lewison LJ makes clear his conclusion *"means that the current Regulations do not deal with a lawyer's remuneration in the event that the client pursues a case to trial and loses … In other words, it could be a requirement of a DBA that it was part of an overall contract of retainer which either preclude (or limited) a lawyer from charging fees if the claim were lost."*

11. Newey LJ then sets out the result of Lewison LJ's approach (§64):

> *"The implication, as I understand it, is that neither 'sequential hybrid DBAs' nor 'concurrent hybrid DBAs … are at present barred. There is 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 be entitled to both half of recoveries and full-time costs in the event of the claim succeeding."*

12. For the reasons he goes on to explain, Newey LJ disapproves of that approach – hence his conclusion that a wide definition of a DBA ought to be adopted as opposed to the narrow approach preferred by Lewison and Coulson LJJ. He does, however, take the view that the legislation can be read as sanctioning sequential hybrid DBAs, but not concurrent hybrid DBAs (§70(iii)).

Conclusion

13. In summary:

a. It is now clear beyond doubt that a DBA which allows a solicitor to charge fees in the event of termination of the DBA does not offend the Regulations. Termination fees are thus permissible.

b. Each member of the Court takes the view that hybrid sequential DBAs are permissible and do not offend the Regulations.

c. The majority of the Court (Newey LJ dissenting) take the view that hybrid concurrent DBAs are permissible and do not offend the Regulations.

d. Indeed, the majority of the Court (Newey LJ dissenting) take the view that there is nothing unlawful in a retainer allowing a solicitor to charge time cost fees in the event of a loss, but a percentage of recoveries in the event of success.

e. In the event that a DBA has been entered into on terms which might offend the Regulations, it is likely that the offending term would be severed so that the remainder of the contract would be enforceable in any event.

14. One debate which was had (at least in the written argument), but which is not reflected in the judgment, is whether it is time for the Court to re-visit the principles found in cases such as *Awwad v Geraghty & Co [2001] Q.B. 570* and *Langsam v Beachcroft LLP [2011] EWHC 1451 (Ch)* – namely the argument that it is against public policy to permit a quantum meruit claim where a contingent fee agreement is found to be unenforceable. As the Court expressly recognises – and as the Privy Council recorded in *Kellar v Williams [2004] UKPC 30,* public policy changes over the years and it may now be time to reconsider the accepted prohibition in the light of modern practising conditions. However, that is an argument for another day.

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