



PRESS RELEASE

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DAMAGES-BASED AGREEMENTS (DBAs) PUBLICATION OF CJC RECOMMENDATIONS

The Civil Justice Council (CJC) has today published a report on Damages-Based Agreements (DBAs). *The Damages-Based Agreements Reform Project: Drafting and Policy Issues* sets out a number of recommendations designed to make the statutory regime relating to DBAs simpler and clearer, in order to assist lawyers and their clients who are considering the use of that method of funding.

DBAs (also known as contingency fee agreements) are an option for funding litigation – if the case is successful, the lawyer's fee is calculated as a percentage of the financial benefit obtained; if the case is lost, no fee is payable to the lawyer.

A total of 45 recommendations are made in the report of the CJC working party, chaired by Professor Rachael Mulheron. These include:

- Making a number of technical amendments to the existing regulations, designed to make them clearer, and therefore more attractive, as a funding option;
- Increasing some of the caps on payments for cases – for example, where a defendant successfully defends a personal injury action; and
- Allowing lawyers and clients to agree the 'trigger point' at which a DBA becomes payable, and the circumstances under which it can be terminated.

The group also distinguishes between sequential hybrid DBAs and concurrent hybrid DBAs, in accordance with the Government's terms of reference. In relation to sequential DBAs, the group suggests that the Government should clarify whether, in the event of success, the solicitor can retain the monies recoverable under the non-DBA funding agreement, or whether that sum should be offset against the DBA fee. The group also recommends that the Government should revisit the arguments in favour of concurrent hybrid DBAs.

Following the request by the Ministry of Justice (MoJ) to the CJC, in December 2014, to advise on ways of clarifying the DBA Regulations 2013, the working group approached its work in two parts. In Phase 1, it considered the particular technical points raised by the MoJ, including the particular items – such as counsel's fees and VAT – that fall inside and outside the DBA 'cap'; the use of DBAs by defendants as well as by claimants; and the operation of DBAs for claims, defences, and counterclaims.

In Phase 2 of its work, the group considered the wider questions of Government policy in relation to DBAs. One such issue concerned the use of concurrent hybrid DBAs, with close attention being paid to their advantages and disadvantages. During

this Phase, the group also examined the 'Ontario model' versus the 'success fee' models of how recoverable costs should be dealt with under a DBA; the question of notification of the DBA to the opponent; and whether the indemnity principle should be abrogated for cases funded by DBAs.

The Master of the Rolls welcomed the report:

"I welcome the Government's invitation to the CJC to address some of the issues relating to DBAs, and I now urge it consider further modifications to the regulations to help promote confidence in them as one of the funding arrangements available to those involved in a personal injury or commercial dispute."

"DBAs were envisaged by Lord Justice Jackson in his report *Review of Civil Litigation Costs* (December 2009) as an important funding option available to those wishing to pursue or defend a claim. They have, however, been used infrequently since then by lawyers and their clients as a method of funding litigation. I hope that the changes recommended in this report will encourage the greater use of DBAs.

"Rachael and her team are to be congratulated for grappling so effectively with what are highly technical issues."

Professor Rachael Mulheron, Chairman of the CJC's working party, said:

"DBAs have been used very sparingly by the legal profession since the Jackson reforms took effect in 2013. This has been unfortunate, given that the use of DBAs in contentious litigation was, arguably, the most novel aspect of those 2013 reforms.

"The working group was commissioned to explore the uncertainties which surround the current regulations, and to make recommendations to reduce or to eliminate uncertainties. The group canvassed 20 drafting issues, and 10 policy issues, which it considered would be relevant in the operation of DBAs.

"The CJC hopes that the work undertaken in this Report will help to inform, in a useful and constructive way, the redrafting of the DBA Regulations, to render DBAs a useful funding option in suitable cases. I am grateful for the hard work and support of all the members."

Notes to Editors

1. The membership of the Committee and its terms of reference can be found here www.judiciary.gov.uk/wp-content/uploads/2011/03/cjc-dba-working-party-membership-december-2014.pdf
2. The working group met six times between December 2014 and May 2015.
3. The Civil Justice Council was set up by the Civil Procedure Act 1997, and its functions are listed in section 6 of that Act.
4. This second phase of the CJC's work was undertaken in line with the CJC's statutory function to keep the civil justice system under review.
5. Professor Rachael Mulheron is based at the Department of Law at Queen Mary University of London— see www.law.qmul.ac.uk/staff/mulheron.html

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