

**CLIENT PROTECTION AND THE ABILITY TO CHALLENGE COSTS CHARGED UNDER A  
DAMAGES BASED AGREEMENT**

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**Introduction**

As part of our remit under Lord Justice Jackson's Terms of Reference we are required to:

“(ii) To make recommendations as to what, if any, regulations ought to be made in the public interest under s.58AA (3) and (4)...”

One of the considerations includes the degree to which, if at all, regulations / rules are required in respect of assessment as between solicitor and client of the fees and expenses payable under a DBA. There will doubtless be some cases where legal representatives secure unreasonably high percentage payments in their DBA's and it is important that a framework exists to enable clients to challenge such fees in appropriate cases.

In this paper we consider whether any new specific provisions are required beyond those currently in place as applied to conventional solicitor and client retainers and CFA's to accommodate the introduction of DBA's.

**Summary of our recommendations**

In our view the existing DBA Regulations 2010 provide sufficient regulatory control over the obligation on solicitors to advise their clients of the client's right to an assessment of any costs incurred under a DBA. Thus, specific regulation / rules relating to DBA's are not required beyond perhaps “sign-post” regulation to either the provisions of section 70 Solicitors Act 1974 (rights of party chargeable to seek an assessment of his solicitors

costs) or sections 59-64 of the Solicitors Act 1974 (challenging costs under a contentious business agreement).

These two sets of provisions are mentioned because either could provide a route through which a party to a DBA could challenge the costs payable under it. In our view it is the former provisions which apply rather than the latter but we refer to them both so that others are take account of all possible options.

The latter mentioned provisions (sections 59-64) apply to “contentious business agreements”. For the reasons we explain below the view may be taken that a DBA falls outside the remit of these provisions and that the more preferable route would be to “sign-post” through SRA rules/guidance the provisions of s.70 as being the appropriate statutory route under which a client may challenge the fees payable under a DBA.

Section 70 applies to any solicitors’ retainers and in our view that would certainly include DBA’s.

## **Materials**

We attach to this paper a recital of sections 59-64 and 70 of the Solicitors Act 1974.

## **Effect of the Solicitors Act 1974**

The Solicitors Act 1974 enables any client of a solicitor to apply to the court for an assessment of his/her solicitor’s costs.

There are time limits for doing so. In summary an application can be issued without any condition within one month of receiving an invoice from the solicitor; after the expiry of twelve months from delivery of the invoice the client would have to show “special circumstances” to bring in an assessment. We do not consider that these time limits present any particular difficulty in the context of a DBA over any other retainer.

Final invoices in DBA cases are unlikely to be issued until the conclusion of the proceedings as it is only then that the contingent element of the fee will become due (on success).

Accordingly, clients who enter into a DBA will have an existing statutory right to challenge the level of the costs charged by the solicitor under the DBA. This includes the percentage “payment”<sup>1</sup>.

There are two potential avenues within the Solicitors Act 1974 which are open to a client to challenge the fees incurred under a DBA. Section 70 is the most obvious one and the one which we consider to be the more applicable.

Sections 59-64 of the Solicitors Act 1974 provide a separate route to challenge the fees incurred under a “contentious business agreement”. It is arguable that a DBA can be a “contentious business agreement”. A contentious business agreement is an agreement in writing between a solicitor and his client as to his remuneration in respect of contentious business done or to be done providing that he shall be remunerated by a gross sum or hourly rate or otherwise. The particular attraction of ss.59-64 is that they provide a pre-existing statutory right to a client to challenge the reasonableness of hourly rates charged under a DBA (section 60(1)) and the reasonableness fairness of the contingency fee element (s.61(2)). So these provisions could apply to a hybrid DBA which is partly hourly rates and partly contingency fee/share of the damages.

However, we are concerned that it might be said that a DBA could fall outside the provisions of these sections leaving the client with no enforceable remedies for two reasons:

- (1) traditionally a conditional fee agreement (an agreement legitimised by the same primary legislation (s.58 CLSA 1990 as amended)) has not been characterized as a contentious business agreement. The standard Law Society wording provides:

“ Other points

The parties acknowledge and agree that this agreement is not a Contentious Business Agreement within the terms of the Solicitors Act 1974. “

- (2) Section 59(2)(b) provides that nothing in the above sections shall give validity to an agreement under which a solicitor is employed to prosecute an action where he stipulates for payment only in the event of success.

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<sup>1</sup> The term used to refer to the % fee: s.1(2) DBA Regulations 2010.

(3) Section 58AA applies DBA's to "proceedings" which includes proceedings whether commenced or contemplated (s.47(9) LASPO). Not all DBA's could therefore be contentious business agreements within the meaning of s.60 Solicitors Act 1974 as contentious business is defined in s.87 of the Solicitors Act 1974 as:

"contentious business" means business done, whether as solicitor or advocate, in or for the purposes of proceedings begun before a court or before an arbitrator, not being business which falls within the definition of non-contentious or common form probate business contained in section 128 of the Senior Courts Act 1981;

For the above reasons we are of the view that s.70 provides the correct route by which a client could apply to challenge the costs incurred under a DBA.

## **Rules/Regulations**

The current DBA regulations provide at regulation 4, inter alia:

### ***Information to be given before an agreement is made***

4.—(1) Before a damages-based agreement is signed the representative must—

(a) inform the client, in writing, about the matters in paragraph (2); and

(b) provide such further explanation, advice or other information about any of those matters as the client may request.

(2) Those matters are—

(a) the circumstances in which the client may seek a review of the costs and expenses of the representative and the procedure for doing so;

It might be thought that this is sufficient to cover the horizontal extension of the DBA regulations to all proceedings.

Alternatively, the wording could be improved to say (addition in red):

“(a) the circumstances in which the client may seek **an assessment or** review of the costs and expenses of the representative and the procedure for doing so;

Rules / Guidance Notes issued by the SRA could then signpost solicitors to section 70 of the Solicitors Act 1974.

NICHOLAS BACON QC

29 May 2012

## ATTACHMENT MATERIALS

### Solicitors Act 1974, sections 59-64

Section 59 Solicitors Act 1974 provides:

#### *Contentious business*

#### **59 Contentious business agreements.**

(1) Subject to subsection (2), a solicitor may make an agreement in writing with his client as to his remuneration in respect of any contentious business done, or to be done, by him (in this Act referred to as a "contentious business agreement") providing that he shall be remunerated by a gross sum or by reference to an hourly rate, or by a salary, or otherwise, and whether at a higher or lower rate than that at which he would otherwise have been entitled to be remunerated.

(2) Nothing in this section or in sections 60 to 63 shall give validity to—

(a) any purchase by a solicitor of the interest, or any part of the interest, of his client in any action, suit or other contentious proceeding; or

(b) any agreement by which a solicitor retained or employed to prosecute any action, suit or other contentious proceeding, stipulates for payment only in the event of success in that action, suit or proceeding; or

(c) any disposition, contract, settlement, conveyance, delivery, dealing or transfer which under the law relating to bankruptcy is invalid against a trustee or creditor in any bankruptcy or composition.

#### **60. Effect of contentious business agreements.**

(1) Subject to the provisions of this section and to sections 61 to 63, the costs of a solicitor in any case where a contentious business agreement has been made shall not be subject to taxation or (except in the case of an agreement which provides for the solicitor to be remunerated by reference to an hourly rate) to the provisions of section 69.

(2) Subject to subsection (3), a contentious business agreement shall not affect the amount of, or any rights or remedies for the recovery of, any costs payable by the client to, or to the client by, any person other than the solicitor, and that person may, unless he has otherwise agreed, require any such costs to be taxed according to the rules for their taxation for the time being in force.

(3) A client shall not be entitled to recover from any other person under an order for the payment of any costs to which a contentious business agreement relates more than the amount payable by him to his solicitor in respect of those costs under the agreement.

(4) A contentious business agreement shall be deemed to exclude any claim by the solicitor in respect of the business to which it relates other than—

(a) a claim for the agreed costs; or

(b) a claim for such costs as are expressly excepted from the agreement.

(5) A provision in a contentious business agreement that the solicitor shall not be liable for his negligence, or that of any employee of his, shall be void if the client is a natural person who, in entering that agreement, is acting for purposes which are outside his trade, business or profession.

(6) A provision in a contentious business agreement that the solicitor shall be relieved from any responsibility to which he would otherwise be subject as a solicitor shall be void.

#### **61. Enforcement of contentious business agreements.**

(1) No action shall be brought on any contentious business agreement, but on the application of any person who—

(a) is a party to the agreement or the representative of such a party; or

(b) is or is alleged to be liable to pay, or is or claims to be entitled to be paid, the costs due or alleged to be due in respect of the business to which the agreement relates,

the court may enforce or set aside the agreement and determine every question as to its validity or effect.

(2) On any application under subsection (1), the court—

(a) if it is of the opinion that the agreement is in all respects fair and reasonable, may enforce it;

(b) if it is of the opinion that the agreement is in any respect unfair or unreasonable, may set it aside and order the costs covered by it to be assessed as if it had never been made;

(c) in any case, may make such order as to the costs of the application as it thinks fit.

(3) If the business covered by a contentious business agreement (not being an agreement to which section 62 applies) is business done, or to be done, in any action, a client who is a party to the agreement may make application to a costs officer of the court for the agreement to be examined.

(4) A costs officer before whom an agreement is laid under subsection (3) shall examine it and may either allow it, or, if he is of the opinion that the agreement is unfair or unreasonable, require the opinion of the court to be taken on it, and the court may allow the agreement or reduce the amount payable under it, or set it aside and order the costs covered by it to be assessed as if it had never been made.

(4A) Subsection (4B) applies where a contentious business agreement provides for the remuneration of the solicitor to be by reference to an hourly rate.

(4B) If on the assessment of any costs the agreement is relied on by the solicitor and the client objects to the amount of the costs (but is not alleging that the agreement is unfair or unreasonable), the costs officer may enquire into—

(a) the number of hours worked by the solicitor; and

(b) whether the number of hours worked by him was excessive.

(5) Where the amount agreed under any contentious business agreement is paid by or on behalf of the client or by any person entitled to do so, the person making the payment may at any time within twelve months from the date of payment, or within such further time as appears to the court to be reasonable, apply to the court, and, if it appears to the court that the special circumstances of the case require it to be re-opened, the court may, on such terms as may be just, re-open it and order the costs covered by

the agreement to be assessed and the whole or any part of the amount received by the solicitor to be repaid by him.

(6) In this section and in sections 62 and 63 “the court” means—

(a) in relation to an agreement under which any business has been done in any court having jurisdiction to enforce and set aside agreements, any such court in which any of that business has been done;

(b) in relation to an agreement under which no business has been done in any such court, and under which more than £50 is payable, the High Court;

(c) in relation to an agreement under which no business has been done in any such court and under which not more than £50 is payable, any county court which would, but for the provisions of subsection (1) prohibiting the bringing of an action on the agreement, have had jurisdiction in any action on it;

and for the avoidance of doubt it is hereby declared that in paragraph (a) “court having jurisdiction to enforce and set aside agreements” includes a county court.

## **62 Contentious business agreements by certain representatives.**

(1) Where the client who makes a contentious business agreement makes it as a representative of a person whose property will be chargeable with the whole or part of the amount payable under the agreement, the agreement shall be laid before a costs officer of the court before payment.

(2) A costs officer before whom an agreement is laid under subsection (1) shall examine it and may either allow it, or, if he is of the opinion that it is unfair or unreasonable, require the opinion of the court to be taken on it, and the court may allow the agreement or reduce the amount payable under it, or set it aside and order the costs covered by it to be assessed as if it had never been made.

(3) A client who makes a contentious business agreement as mentioned in subsection (1) and pays the whole or any part of the amount payable under the agreement without it being allowed by the officer or by the court shall be liable at any time to account to the person whose property is charged with the whole or any part of the amount so paid for the sum so charged, and the solicitor who accepts the payment may be ordered by the court to refund the amount received by him.

(4) A client makes a contentious business agreement as the representative of another person if he makes it—

(a) as his guardian,

(b) as a trustee for him under a deed or will,

(c) as a deputy for him appointed by the Court of Protection with powers in relation to his property and affairs, or

(d) as another person authorised under that Act to act on his behalf.

## **63 Effect on contentious business agreement of death, incapability or change of solicitor.**

(1) If, after some business has been done under a contentious business agreement but before the solicitor has wholly performed it—



(a) the solicitor dies, or becomes incapable of acting; or

(b) the client changes his solicitor (as, notwithstanding the agreement, he shall be entitled to do),

any party to, or the representative of any party to, the agreement may apply to the court, and the court shall have the same jurisdiction as to enforcing the agreement so far as it has been performed, or setting it aside, as the court would have had if the solicitor had not died or become incapable of acting, or the client had not changed his solicitor.

(2) The court, notwithstanding that it is of the opinion that the agreement is in all respects fair and reasonable, may order the amount due in respect of business under the agreement to be ascertained by assessment, and in that case—

(a) the costs officer, in ascertaining that amount, shall have regard so far as may be to the terms of the agreement; and

(b) payment of the amount found by him to be due may be enforced in the same manner as if the agreement had been completely performed.

(3) If in such a case as is mentioned in subsection (1)(b) an order is made for the assessment of the amount due to the solicitor in respect of the business done under the agreement, the court shall direct the costs officer to have regard to the circumstances under which the change of solicitor has taken place, and the costs officer, unless he is of the opinion that there has been no default, negligence, improper delay or other conduct on the part of the solicitor, or any of his employees, affording the client reasonable ground for changing his solicitor, shall not allow to the solicitor the full amount of the remuneration agreed to be paid to him.

#### **64 Effect on contentious business agreement of death, incapability or change of solicitor.**

(1) If, after some business has been done under a contentious business agreement but before the solicitor has wholly performed it—

(a) the solicitor dies, or becomes incapable of acting; or

(b) the client changes his solicitor (as, notwithstanding the agreement, he shall be entitled to do),

any party to, or the representative of any party to, the agreement may apply to the court, and the court shall have the same jurisdiction as to enforcing the agreement so far as it has been performed, or setting it aside, as the court would have had if the solicitor had not died or become incapable of acting, or the client had not changed his solicitor.

(2) The court, notwithstanding that it is of the opinion that the agreement is in all respects fair and reasonable, may order the amount due in respect of business under the agreement to be ascertained by taxation, and in that case—

(a) the taxing officer, in ascertaining that amount, shall have regard so far as may be to the terms of the agreement; and

(b) payment of the amount found by him to be due may be enforced in the same manner as if the agreement had been completely performed.

(3) If in such a case as is mentioned in subsection (1)(b) an order is made for the taxation of the amount due to the solicitor in respect of the business done under the agreement, the court shall direct the taxing officer to have regard to the circumstances under which the change of solicitor has taken

place, and the taxing officer, unless he is of the opinion that there has been no default, negligence, improper delay or other conduct on the part of the solicitor, or any of his employees, affording the client reasonable ground for changing his solicitor, shall not allow to the solicitor the full amount of the remuneration agreed to be paid to him.