MEMORANDUM #2

To: The MOJ/CJC Damages-based Agreements Working Group
From: Rachael Mulheron
Date: 1 July 2012
Re: Whether recoverable costs are part of the contingency fee amount

Dear Colleagues,

As mentioned in our last meeting, I've checked as to whether there was any indication in various sources — the MOJ report which responded to Jackson's costs report; Hansard accompanying the LASPO Bill 2011; the explanatory notes to the LASPO Act 2012; or the Jackson reports themselves — as to whether it was anticipated that the Ontario model, or the Success Fee model, would be applied in England.

To illustrate the scenario:

- solicitor and C enter into a 25% contingency fee agreement
- C recovers £100,000 in damages from D
- C recovers £10,000 in costs from D

- the question is whether the solicitor can recover £25,000 from the damages + £10,000 from D (the Success Fee model), **or** whether the solicitor can only recover £25,000 all up (£15,000 from the damages + £10,000 from D (the Ontario model))?

Dealing with each in turn:

MOJ Report

A DBA must provide that the client is '**to make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter**' (per s 58AA(3)(a)(i) of the Courts and Legal Services Act 1990). In s 58AA(3)(a)(ii), '**the amount of that payment [to the person providing the services] is to be determined by reference to the amount of the financial benefit obtained**'.

I wondered whether recoverable costs could indeed be part of the '**specified financial benefit in connection with the matter**', or not.

There is an interesting reference in the MOJ's paper, *Proposals for Reform of Civil Litigation Funding and Costs in England and Wales* (2011), para 221:

> DBAs therefore allow representatives to claim a proportion of their clients' award of damages as their fee [fn 116], and are therefore suitable mainly for use in cases where the claimant receives damages or some other specified financial benefit.

> Fn 116 reads: These agreements could be structured so that fees are calculated by reference to certain financial awards or benefits received as a result of the case, rather than damages (e.g., in an employment case relating to reinstatement, by reference to a percentage of the client's salary on reinstatement).

This passage doesn't seem to contemplate that recoverable costs could be part and parcel of the 'specified financial benefit' in that Act — but, notably, that example provided in fn 116 is not exhaustive.

I can't find any other reference, in any other source such as Hansard or governmental papers, where 'specified financial benefit' is expanded upon or defined.

Hansard for the LASPO Act 2012

There only seem to be a few references to the cap and DBAs, and they aren't very conclusive.

When damages-based agreements were first introduced in the LASPO Bill, they were in cl 42, and of that clause, Jonathan Djanogly stated (per HC Hansard (Public Bills Committee), 13 Sep 2011, col 556):

> Alternatively, the claimant's solicitor might agree to fund disbursements in exchange for an increased success fee or an increased share of the damages where the claimant uses a damages-based agreement, which we propose to permit for all civil litigation in clause 42. Subject to an overall cap on the amount of damages, that may be taken as a success fee, set at 25% of damages, excluding damages for future care and loss.

The reference in this passage to 'success fee' may mean that the Government contemplated the Success Fee model? But the reference is brief, and not conclusive.

Explanatory Memorandum

The Explanatory Notes which accompany the LASPO Act 2012 do not provide any assistance. As originally introduced, 'Damages-based Agreements' were provided for in cl 42 of the Bill. Para 249 of the Explanatory Notes to the Bill provided that:

> Section 58AA(4) also sets out other conditions that must be met for a DBA to be enforceable. The amendments made by subsections (6) and (7) of this clause make clear that the Lord Chancellor may, but need not, prescribe the information which a legal representative must provide to a claimant prior to entering a DBA and the maximum amount which may be paid under the DBA from the claimant's damages.

These notes are repeated in the Explanatory Notes accompanying the Act itself (at para 292). They don't seem to clarify things one way or the other, as to whether it is the Ontario model or the Success Fee model which applies.

Jackson Reports (Preliminary and Final)

Memorandum #1 (at pp 3–4) discusses the terms of the Ontario model, and how that was described by Jackson LJ (by reference to ch 61 of the Preliminary Report).

There are a couple of statements in the Final Report, 'Contingency Fees', ch 12, in which Jackson LJ definitely endorses 'the satisfactory Canadian experience of contingency fee agreements in personal injury cases' (at para 4.11).

In so far as to whether the Success Fee model or the Ontario model should apply in English law under the new DBA regime, I can't find anything in the Preliminary Report, 'Contingency Fees', ch 20, on this point (although maybe I'm missing it in some of the language used). However, in ch 61 of the Preliminary Report, at para 4.3, Jackson LJ describes the Ontario model of percentage contingency fee in this way — which precisely accords with this Working Group's understanding of 'the Ontario model':

> The contingency fee charged is often in the region of 20% (although in some cases it may go up to 30%). I understand from practitioners that in such cases the costs awarded by the court often turn out to be very close to 15% of the damages. Thus in a typical personal injuries case (where the defendant agrees or is ordered to pay damages and costs) the claimant may end up losing about 5% of his damages as a contribution to costs. This does not appear to be a source of general concern or complaint.

If the Success Fee model applied to the abovementioned scenario, then the claimant's solicitor would be entitled to the 20% of damages as the 'success fee', and with the recoverable costs (i.e., the amount close to 15% of the damages) in addition to that. Under the Ontario model, however, the recoverable costs are part and parcel of the totality of 20% recoverable by the claimant's lawyer.

Conclusion

These references from potentially helpful sources — the MOJ report which responded to Jackson's costs report; Hansard accompanying the LASPO Bill 2011; the explanatory notes to the LASPO Act 2012; or the Jackson reports themselves — provide **no** conclusive indication as to whether it was anticipated that the Ontario model, or the Success Fee model, would be applied in England, so far as can be currently ascertained.

I had always assumed, until our meeting last week, that the contingency fee amount would be a 'success fee', on top of the recoverable party and party costs (i.e., the Success Fee model), and I agree with Colin, for the reasons which he states in his very helpful memorandum, that the Success Fee model has many advantages over the Ontario model, particularly where the amount of damages is likely to be modest.

However, and somewhat surprisingly, this point doesn't seem to have been picked up and explicitly dealt with, in the abovementioned sources.

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