NOTE RE TERMS OF REFERENCE FOR THE CJC WORKING GROUP ON CONTINGENCY FEES

1. Introduction. I am asked by the Civil Justice Council ("CJC") what should be the terms of reference for this new working group. In this note "s. 58AA" is a reference to section 58AA of the Courts and Legal Services Act 1990, as it will be if section 44 of LASPO is enacted. The term "DBA" means a damages-based agreement, as defined in s. 58AA. The term "lawyer" includes solicitor, barrister, legal executive, costs lawyer and any similar legal representative.

2. Terms of reference. Whilst the decision must be for the CJC Council, I would suggest that the terms of reference should include the following:

(i) To consider the conflicting interests which are in play when proceedings are brought or defended on a DBA,[1] in particular the interests of the clients, the lawyers, those whom the lawyers instruct and opposing parties.

(ii) To make recommendations as to what, if any, regulations ought to be made in the public interest under s. 58AA (3) and (4), for example limiting the percentage that the lawyers should be entitled to recover or requiring court approval in certain circumstances.[2]

(iii) To make recommendations as to what, if any, rules of court in relation to assessment of costs ought to be made in the public interest under s. 58AA (6).

(iv) To make recommendations as to what matters should be provided for in any DBA.

(v) To consider whether, and if so in what circumstances, a lawyer acting under a DBA should be liable for adverse costs.

(vi) To consider whether it should be possible to enter partial DBAs, analogous to the "no win, low fee" CFAs.

(vii) To consider whether there should be an obligation to notify opposing parties that the lawyers have entered into a DBA.

(viii) To take account of the experience of DBAs (a) in employment tribunal cases in England and Wales and (b) in the courts of Ontario, liaising as appropriate with both judges and practitioners in those jurisdictions.

3. Matters to be provided for in DBA. The matters to be provided for in a DBA must include, I should have thought, (a) the definition of success; (b) how the lawyers' reward is to be calculated and whether it is to be the total remuneration or an addition to the amount of costs recovered; (c) by whom disbursements are to be paid; (d) as between lawyer and client, who is responsible for adverse costs; (e) how to resolve disputes between lawyer and client in relation to settlement; (f) in what circumstances

[1] A defendant may enter a DBA, agreeing to pay his lawyers a percentage of the damages avoided.
[2] Cf s. 16 of the Solicitors Act RSO 1990 in Ontario, set out on page 631 of the Costs Review Preliminary Report.

(i) the lawyer or (ii) the client can terminate the DBA. No doubt much else will occur to the working group, when they settle down to their task and tease out the issues and practicalities.

4. Residual liability for adverse costs. If the lawyer stands to receive a share of the proceeds of the litigation, then the question arises whether – if the client fails to pay – the lawyer should be liable for adverse costs on *Arkin* principles. If so, there is the further question of whether CPR rule 48.2 requires amendment or is sufficient as it stands. If there is no such liability, then litigation funders may be able to bypass their existing liability for adverse costs by buying up law firms and funding litigation through the mechanism of DBAs.

5. Overseas experience. A large number of overseas jurisdictions permit DBAs, as identified in chapter 12 of the Costs Review Final Report. Further details of some of these jurisdictions, in particular Ontario,[3] are given in the Preliminary Report. The working group may find it helpful to look at the experience and the costs rules of those jurisdictions. In the unlikely event that it is of any use, I can lend to the working group a copy of the Ontario Annual Practice 2008-9, which was used when drafting the Preliminary Report.

6. Employment tribunals. The working group may also care to study the operation of DBAs in employment tribunal cases, although that is not a costs-shifting jurisdiction. For an account of the use of DBAs in employment tribunals, see chapter 50 of the Preliminary Report.

7. Urgency. The months are now passing like jet aircraft and almost before we know it April 2013 will have arrived. I would therefore suggest that the working group should report by July 2012, in order to allow time for consideration of its recommendations and implementation.

Rupert Jackson 1st March 2012

[3] See chapter 61