REGULATION OF DBA'S

This paper addresses the question of what elements the Damages-Based Agreements Regulations 2010 may be applied to damages-based agreements (DBA's) for claims other than claims relating to employment matters as defined by the 2010 Regulations.

The starting point is the recommendation elsewhere that the regulation of DBA's should reflect the current regulation of CFA's, i.e. that there should be a light touch of regulation leaving the majority of the regulation subject to the Code of Conduct for Solicitors. It is important, in looking at the question of regulatory control of DBA's, to note that in accordance with the amended version of Section 58AA, a DBA is an agreement between the client and someone providing advocacy and litigation services but also those providing claims management services. They of course will not fall within the regulation of the Code of Conduct and some consideration needs to be given to the regulation of agreements with claims management services.

One approach to that element is that those providing claims management services should be subject to the specific requirements of the current DBA Regulations, but those providing advocacy services or litigation services should not be so subject. One way of doing that may be to amend the Compensation (Claims Management Services) Regulations 2006. Those were made in accordance with the Compensation Act 2006. The Regulations are overseen by the Claims Management Regulator who was appointed under Section 5 of the Act. The amendment of the Regulations and the Rules (which the Regulator can make under Regulation 22) is quite attractive in that it directs itself specifically to authorised claims management companies.

Finally on the point, "claims management services" is defined in Section 4(2) of the Act as meaning "advice or other services in relation to the making of a claim". Section 4(2)(c) goes on to define what a claim is for these purposes.

Subject to that, the DBA Regulations 2010 set out both the requirements of an enforceable DBA and the information that is to be given before the agreement is made. Both are compulsory.

Regulation 2 sets out the requirements of an agreement. They are that the agreement specify:-

- the claim or proceedings or parts of them to which the agreement relates;

- the circumstances in which the representative's payment, expenses and costs, or part of them, are payable; and

- the reason for setting the amount of payment at the level agreed, including having regard to, where appropriate, whether the claim or proceedings is one of several similar claims or proceedings.

These reflect to some extent the previous requirements for CFA's under the Conditional Fee Agreements Regulations 2000 (SI692). Regulation 2 of the 2000 Regulations applied to all CFA's and contained the first two items included within the DBA Regulations. Regulation 3 of the 2000 Regulations provided specifically for CFA's with a success fee. Regulation 3(1) provided similarly as the third element included above in the DBA Regulations.

Subject to their application to claims management services, I would question whether these requirements should be included for wider DBA's over and above those for employment matters.

If the Regulations are to be reviewed wholesale, one might also question whether these provisions should be included for employment matters in any event but that is not within the remit.

The information that is to be given before an agreement is made is contained within Regulation 3 of the 2010 Regulations. Again, Regulation 3 reflects the former provisions of the CFA Regulations 2000. In those Regulations the requirements were set out in Regulation 4.

Annexed is a copy of the DBA Regulations. It may be worth considering each of the provisions of Regulation 3 individually. The specifics are listed in Regulation 3(2).

2(a) This element is probably covered by the Code of Conduct. Offhand I have not looked at the Claims Management Services Regulations to see the way in which any costs that they apply can be reviewed. Some consideration would have to be given to that in any event. Overall, in accordance with the CFA regime, I would suggest that we do not provide for this on wider DBA's. I would question, as above, whether it is entirely necessary for employment DBA's in any event.

2(b) This is employment specific and not relevant to wider DBA's.

2(c) This is a professional requirement in any event under the Code of Conduct. I have not looked at and do not know the requirements of the Bar Code of Conduct. That needs to be considered.

2(d) Again, this would be a professional requirement under the Code of Conduct.

2(e) The provision of estimates is a much debated question but is again the subject of the Code of Conduct which provides professional obligations.

Regulation 4 specifically deals with additional causes of action. Again, professional obligations have somewhat overtaken this because solicitors are required to set out in their letter of engagement what services are to be provided. That needs to be kept under review by solicitors in the event of change.

Regulation 5 sets the maximum sum for costs that can be charged by the solicitor (including VAT) at 35% of the monies recovered. In personal injury there is the proposal that there should be a limit of 25%. Clearly that will need specific provision within the Regulations. In doing so those Regulations would have to make clear exactly what the limit is. I believe that Regulation 5 as it currently stands is a little uncertain in its terms.

The other question under Regulation 5 is how the 25% stands against costs recovered. The current intention is that it should include costs recovered. Again that will have to be made quite clear in a new regulation.

Regulation 6 deals with terms and conditions of termination. The standard CFA between solicitor and client contains much about termination and the circumstances in which the agreement may be terminated. I believe this is an element that is best left to the agreement between solicitors and the client. Under the standard CFA, if the agreement is terminated by the client, it is usual that the solicitor may elect whether or not to continue under the agreement for their eventual charges or to simply charge at that point for time expended in the usual way. That seems a reasonable provision as opposed to the provision within Regulation 6 which says that if the agreement is terminated (and it appears in any circumstances), the representative is obliged to charge simply the costs and expenses of work undertaken and is no longer entitled to charge a percentage. That may actually not be to the

benefit of either party in the circumstances, although one can see some rationale for it in the future conduct of the proceedings.

Conclusion

1. There should be a light touch. It is important to ensure that CFA's and DBA's have generally the same regulatory outcome.

2. The DBA Regulations 2010 should not apply wholesale to DBA's outside employment matters. Question whether they should indeed continue in relation to employment matters.

3. Agreements with claims management companies should be regulated but this may be done through the Claims Management Services Regulations and Rules.

4. There should be one set of regulations replacing the DBA Regulations 2010 but those regulations may be of a much more simple nature than the current DBA Regulations. In particular, those regulations will need to address the question of a cap on the percentage that may be charged.