

# CONTENTS OF THE DBA

This paper is some initial thought on the contents of the damages-based agreements (DBA). I am not sure what is intended as to whether there should be some prescribed or standard form. The Law Society produced a standard form but this ran into the sand because it is quite difficult to prescribe each and every agreement, the nature of which may be subjective.

The contents obviously also need to be considered against the background of the DBA Regulations and whether there will be prescribed contents. Even if they are not prescribed, one would expect to see within a DBA the requirements set out in Regulation 2 of the DBA Regulations 2010.

Subject to that, the normal provisions of a CFA are:-

1. Definitions. This is an important element, particularly in defining the claim and success under the agreement.
2. What is covered by the agreement. This was a regulatory requirement and is included within the standard CFA, although the Regulations have been repealed.
3. What is not covered by the agreement.
4. The payment of fees to the firm. This covers both the limitation of the firm's fees, which in a DBA will be a limitation on the percentage. It also sets out what is defined as a success. If there is to be a limit on the percentage then that limit will be on cash recovered, as set out in the DBA Regulations, so that success for those purposes will be cash-based rather than simply obtaining judgment. A CFA is often based on obtaining judgment rather than success in recovering money. That will change because of the provisions of Section 44(2) of LASPO for CFA's. The other important element of the calculation of the success fee for a CFA is the reasons why it has been set at the amount it has. Those reasons are then set out in the schedule. This would need to be included for DBA's with particular emphasis on those DBA's which are not subject to a maximum percentage. If the percentage is uncapped then clearly the solicitor will have to explain why they have proposed a predetermined percentage of the damages recovered.

5. Termination. The complicated part of the CFA is often the termination provisions. This covers both termination by the client and the firm and what may happen as a result of that termination.
6. Recovery of costs. The standard agreement provides what happens when an order for costs is made in favour of the client. One important element of that is what happens in the event of summary assessment. Under the standard CFA the costs can be recovered when they are summarily assessed during the course of the proceedings. There is no reason why this should not be similarly applied to the DBA.
7. Payment of interim or provisional damages and liabilities for the other side's costs. Rather like summary assessment, the standard CFA includes what may happen on the recovery of interim or provisional damages. This clause also deals with the payment of costs by the client to the other side. Again this is a fairly vital element in a CFA because the solicitor will want to ensure that the other side's costs are paid on a summary assessment, failing which there may be a strikeout or a stay. The position may be different if a Sibthorpe agreement has been entered into. This would provide for the solicitor effectively to indemnify the client and clearly that element would have to be set out in any standard agreement.
8. The firm's responsibilities.
9. The client's responsibilities.
10. Removal from record of an action.

These are just some initial thoughts.