DBA Regulations

I have considered the Damages-Based Agreements Regulations and the manner in which they may be re-written for the purposes of including DBA's for all claims over and above employment matters.

My understanding of the decisions that have been made and questions that may arise are:-

1. All DBA's will be included within the one regulation.

2. There will be no reference to CFA's which will be the subject of separate regulation in order to deal with the changes in Section 44(2) LASPO.

   The regulations will include claims management services. These will not be the subject of separate regulation, although I have referred to that below.

   As far as possible there should be an even playing field between CFA's and DBA's. A greater regulation of one over the other will skew practice. The regulation of CFA's will be lighter because there is no regulation of what should be included within the agreement save for sections 58 and 58A (as amended by section 44(2) LASPO).

3. There will be a limit of 25% of recovered damages for lawyers' fees in personal injury claims. This 25% includes solicitors and barristers plus VAT but not expenses. Counsel's fees are not an additional expense to be borne by the client. This is a matter of policy but there may be some question in many cases whether this makes the pursuit of claims commercially viable for those providing reserved services. The result may be that solicitors will restrict their instructions to counsel when it may eat into an already limited pot. It is to be noted that the level for employment matters is

35% which includes VAT. My understanding is that by specific exclusion it may not include the barrister's fees.

The other question that needs addressing in the draft is when a claim amounts to a claim for personal injuries. The definition used in the CPR is wide-ranging and appears to include all claims in which any claim is made for personal injuries. Such a claim may actually be insubstantial compared to the main claim but, as drafted using the CPR definition, a claim for persona injuries includes any proceedings in which such a claim is made whether it be substantive or subsidiary.

Based on the principle that solicitors' and barristers' fees are included in the maximum costs that may be recovered, I have also included claims management services. My understanding of the principal activities of the claims management companies is that they provide three main services;

- Services in which the CMC pursues claims direct with the respondent usually following a regulatory decision or agreement such as PPI claims;

- Services rendered in pursuing claims through non-reserved activities, such as representing clients before the FOS (which may be combined with the above); and

- Services requiring litigation in which case the claim is referred to solicitors.

In the first two, the CMC charges a contingency fee. Solicitors too may already be charging in that way for similar services. That form of agreement is currently not specifically regulated. It will be under the new DBA regulations. Subject to that, these forms of agreement will continue, often not involving either legal or advocacy services.

For litigation services the CMC charges the solicitors a referral commission. This will become unlawful in April 2013. The likely scenario after that date will be that many CMC's will form ABS's with solicitors. In that event they will become regulated by the SRA or such other regulator as will be authorised. Those that do not take this course will levy charges for services rendered which will be an overhead expenditure for the solicitor.

Accordingly it may well be an unlikely scenario in which there will be a claim in which litigation, advocacy and claims management services are provided but I have provided for such an event to the effect that the three together will not exceed the maximum.

4. The 25% will be inclusive of costs recovered. This is the Ontario model. Views have differed in the Working Party on the adoption of that model but my understanding is that the majority endorse the concept that the 25% includes costs recovered. There are two questions that arise. First, costs recovered will include the expenses which are not part of the 25% and some consideration needs to be given to that element. Second, is finalising whether or not the 25% can be exceeded in the event of costs being recovered in excess of that percentage. This seems an unlikely event in personal injury but may throw up some questions under the indemnity principle about the ability to recover costs in excess of the percentage. As currently drafted, I see that the 25% is an absolute maximum so that costs may not be recovered in excess of it. I have to say that some might question whether or not that is appropriate based on the principle that the client is guaranteed 75% of the damages. If costs are recovered in excess of the 25% this would not eat into the damages and causes the client no loss.

5. The cap of 25% will relate to all recoveries including past losses, general damages as well as future care and future losses. This will place some strain on the reference in the draft to damages that are "recovered". As elsewhere, the word "recovered"

could be interpreted as a cash recovery. At the time at which the costs become payable, however, future care and future losses will not necessarily have been paid.

6. The DBA Regulations as currently constructed talk of a percentage of sums recovered. I take this to refer to cash recoveries. I have referred to this below.

7. Some thought may need to be given to the indemnity principle. We are familiar with the principle that a winning party may only recover costs for which he is liable. DBA's and the recovery of "base" costs may skew this picture somewhat because of the slip between the client's liability and the costs recoverable. The indemnity principle is a common law principle. The Rule Committee can disapply it in accordance with section 31 Access to Justice Act. Lord Justice Jackson suggested the principle should be abrogated but subject to amendments to the CPR 44.

8. The 25% maximum for personal injury claims will not include disbursements and in particular will not include the ATE premium if there is any. It will include VAT on the fees provided by the lawyers or claims management companies. In the event that the contingency fee is payable (because the claim will have succeeded), the client will recover the base costs and disbursements but not the ATE premium.

9. There is no limit provided in the draft on the costs payable by the client as a percentage of recovered damages in claims other than personal injury. The Working Party considered whether there should be a 50% cap in non-personal injury claims in which the client is a consumer or SME. Opinion was provided on this element. It was not concluded. I have not included a draft to this effect. If we were to do so we would need to put in some definitions on the characteristics of the client which will invoke the cap. Presumably otherwise it would work very much like the personal injury cap at 25%.

10. The limit for employment matters will remain as currently provided in the existing regulations.

I refer to each of the regulations:-

Regulation 1

I have included here a definition of employment matters. This is lifted from the Act itself but I thought it might be worth repeating.

I have included a definition of personal injury claims because of the carve-out for those claims for the maximum recovery of costs. The definition comes out of the Limitation Act 1980. It is rather long but perhaps that is necessary. The one question that I have is to what extent one includes claims that have personal injury as a small element and catch-all for the main claim. I have in mind, for instance, that we may pursue claims on behalf of consumers in relation to perhaps a fraud and we may include within them the mental distress resulting from the particular events. Clearly the personal injury is a very minor point to complete the claim. Does that action thereby become a personal injury action for the purposes of the cap? If it did then it is likely that the claim for the personal injury (which is thin in any event) would not be pursued.

Regulation 2

I have amended Regulation 2 slightly although it might be thought that we should change this regulation further to ensure it does not give the impression that, for all claims, compliance with Regulations 3, 4, 5, 6 and 7 is necessary. I do not think that is the case but someone might think this needs some clarification.

Regulation 3

I have retained this in its entirety. My own view is that we should not extend this provision to all DBA's but I understand the rationale behind wanting to do so. Accordingly,

I have drafted it on the basis that the requirements of an agreement will apply broadly to all DBA's.

Regulation 4

The new Regulation 4 applies to employment matters only. It is in my view not possible to make this apply to claims management services because of the differentiation between what is being provided by the representative. Regulation 4 therefore simply reflects what was in the previous regulations but applies it only to employment matters in the new regulation.

Regulation 5

This will be a new regulation dealing with information to be given by claims management companies. This is by no means straightforward. There has to be a differentiation between claims management companies and other DBA's because of the lighter touch of professional requirements on claims management companies. I have included a reference to regulations made under the Compensation Act. I am not sure that this is appropriate and might breach the concept of trying to put everything into the one regulation. On the other hand, it is quite a nice sure hand to make a reference back to the regulations and rules that have been made by the claims management regulator.

As things stand I have not established in my own mind whether there is any mechanism for reviewing the costs and expenses of claims management companies. The reference in the original regulations here, which will still apply to employment matters, is obviously to the provision of legal services which may be assessed under the Solicitors Act. There is, I believe, no equivalent for claims management companies and thus this provision probably has no application. It would need to be considered whether one should be included in some fashion.

I have included a requirement that the claims management company provides information about the complaints process in the event of complaints which would include the quantification of costs. This is an idea for debate.

I have included the requirement to give information about all other methods of funding. I believe that to be appropriate to claims management companies and highly desirable.

Both the last two sub-regulations refer to expenses. I believe that in fact claims management companies do not seek to recover expenses and simply work on a percentage of recovery. These provisions may be of no relevance to claims management companies.

Regulation 6

I have limited this regulation to employment matters because this is the status quo. I have also included claims management services. I have not made this of any wider application because there is no requirement for a CFA to be signed.

Regulation 7

This regulation, along with the following two regulations, deals with the maximum percentage that can be taken for costs.

As above, I have included the costs of solicitors, barristers and claims management companies within the relevant limit. I have reiterated the point in 7(3) because there is general confusion as to whether counsel's fees are a disbursement.

I have continued the concept of the percentage being of the sum recovered. I presume that refers to cash recoveries. In litigation that concept has caused some problems with the indemnity principle.

Carrying through the principle above, the maximum limit for personal injury will not include disbursements, VAT or the expense of insurance. This differentiates this limit from the limit on employment matters. The limit in employment matters is being retained.

The definition of "sums recovered" requires some thought in its interaction with the concept that "recovered" may refer to cash actually recovered.

Regulation 8

This repeats the current position under the DBA Regulations but limits it to employment matters for the purposes of the new regulations. I presume that the word "recovered" means actually recovered in cash rather than recovered by award. I should say that I'm not sure this is appropriate because it means that the representative is taking an additional risk based upon the creditworthiness of the respondent. For a CFA that would increase the risk assessment for the purposes of the success fee.

Regulation 9

This regulation reflects the existing regulation that applies to employment matters but clearly many more questions arise which are likely to be the subject of challenge. I have covered those in the opening notes. They all need consideration in the drafting of this particular regulation. In personal injury the likelihood of there being a problem with the creditworthiness of the defendant is much less but it still may be a factor to be taken into account in assessing the risk.

Regulation 10

This deals with termination. I have not included anything other than employment matters in this regulation. I must say, even there, I am not sure of the purpose of it. This is an element that is always dealt with in CFA's with solicitors and one would expect that to be

carried through as a contractual position in DBA's. It seems to me that, as phrased, this regulation could be open to abuse by clients terminating agreements at strategic times in the process. In any event I have retained it for employments matters. I do not know how this sits with claims management services, which again needs some consideration.

David Greene