



Robert Wright
Civil Litigation Funding & Costs
Ministry of Justice
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Dear Robert,

Part 2 of the Legal Aid, Sentencing & Punishment of Offenders (LASPO) Act 2012: Regulations

Thank you for the opportunity to comment on the draft Regulations arising from the LASPO Act. A small group drawn from the CJC's working group on Damages Based Agreements (DBAs) has considered this matter and make a number of comments which it is hoped will be of use.

The focus for our attention was the DBA Regulations, but we draw attention to the resonance of some of these points for the CFA Regulations.

Our approach has been to look at issues, and then suggest amendments to the regulations, and this response is structured on that basis for clarity, rather than dealing with points section-by-section without the rationale.

1) Application of the Regulations

The Draft Regulations as currently worded do not apply to non-contentious DBAs – see 1(4). We disagree with this – this would leave clients in such proceedings without regulatory protection e.g. in cases which settle, such clients would not have had the benefit of the clauses on information to be given before an agreement is made and others. The CJC working group recommended DBA Regulations should cover all DBAs. We would therefore suggest inserting in Section 1 that:

These Regulations apply to all Damages-Based Agreements, whether proceedings have commenced or not.

2) Relationship of recoverable cost and contingency fee

The current drafting adopts the Ontario model' in relation to personal injury cases, whereby recoverable fees are to be deducted from the contingency fee – as opposed to the 'success fee model' whereby the contingency fee is treated as a success fee and retained by a solicitor on top of the recoverable costs awarded, meaning less damages for the client and more for the solicitor. It should be noted that our reading of the current drafting is that for all other non-personal injury cases the success fee model may apply.

Assuming drafting is reflective of the policy view, we would still suggest rewording Section 6(1) so that it applies to all DBA funded claims as follows:

Payment

6.- (1) In any claim –

(a) the amount to be paid by the client to the representative shall be –

3) What comes out of the Contingency Fee Cap?

We felt there was a lack of clarity in various parts of the Regulations as to what sums would be coming out of the contingency fee (i.e. within the cap) and which sums have to be paid by the client to their representative on top of the contingency fee (i.e. outside the cap).

Counsel's fees are not disbursements, as suggested by Section 1(2) and should be treated in the same way as solicitors fees . After-the-event insurance premiums should also be cited as an expense in this section. We feel the key distinction is between the representative's own work and the costs incurred by the representative on the client's behalf, such as experts' fees. At the moment the wording gives rise to confusion – in 1(2) 'payment' excludes 'expenses' which includes counsel's fees, but in 6(1)(a)(ii) it says counsel's fees are outside the payment.

We suggest the following form of words if the intention is in fact that such expenses should be outside the cap, with the remainder of this section unchanged:

1.(2)

“expenses” means disbursements incurred by the representative, including the expense of obtaining an expert's report and any After-The-Event insurance premium;

6 (1) (a)

(ii) any expenses net of any amount in respect of those expenses which has been paid or is payable by another party to the proceedings by agreement or order,

If the intention, however, is for counsel's fees to be inside the cap then the regulations will need some redrafting.

The explanatory note for Regulation 6 also needs further examination, depending on the final draft.

4) What does the 25% cap cover?

It is assumed that the draft Regulations represent a policy shift from Jackson LJ's Review recommendation that 'damages referable to future costs or losses' be excluded from the global damages before the 25% cap could be applied.

Assuming this is the policy direction, we are concerned that the current formula would exclude other heads of damages (e.g. aggregated damages, where a personal injury resulted from assault and battery) not linked to future costs and losses.

We would suggest this is addressed in Regulation 6(1)(b), perhaps by reversing the drafting so that the 25% is attached to all damages other than damages referable to future costs or losses.

We feel that the current wording of 6(1)(b) will give rise to actions seeking to establish what 'future pecuniary loss' covers – it may be better to provide a definition of what is meant and not to be included under this heading to head off actions.

5) Information given to the client

We consider that the information given to clients before agreements are made should apply to all cases conducted under DBAs, not just personal injury. We would like to suggest revising and rearranging Regulation 4 to read as follows:

(2) Those matters are-

(a) In all claims, how the payment is calculated.

(i) the circumstances in which the client may seek a review of costs and expenses of the representative and the procedure for doing so;

(ii) whether other methods of pursuing the claim or financing the proceedings, including-

(aa) advice under the Community Legal Service

(bb) legal expenses insurance;

(cc) pro bono representation;

(dd) trade union representation; or

(ee) third party litigation funding

are available, and if so, how they apply to the client and the claim or proceedings in question and in all cases-

(then take in existing (i) and (ii))

(b) in an employment matter, the dispute resolution service provided by ACAS in regard to actual and potential claims.

Please note our addition of (ee) above in relation to third party funding.

6) Additional causes of action

We would amend Regulation 5 to cover all DBAs, not just employment ones (the explanatory note would also need changing):

5. Any amendment to a damages based-agreement to cover additional causes of action must be in writing and signed by the client and the representative.

7) Termination of the Agreement

Similarly, we would amend Regulation 7 to cover all DBAs, not just employment ones (the explanatory note would also need changing):

7(1) The additional requirements...

We hope that these comments will prove to be of use. I am extremely grateful to Mike Napier, Peter Smith and above all Rachael Mulheron for giving this issue their expert attention.

Yours sincerely,

Peter Farr
Secretary,
Civil Justice Council