

**THE 2019 DBA REFORM PROJECT**

***EXPLANATORY MEMORANDUM***

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***October 2019***

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This memo draws out the key points of the draft Damages-based Agreements Regulations 2019 ('the 2019 DBA Regulations'); explains why various departures from the Damages-based Agreements Regulations 2013 ('the 2013 DBA Regulations') have been made in the draft; and notes where further consultation may be particularly necessary.

These draft 2019 DBA Regulations do not purport to be the final word on this complex and controversial area of civil justice. Rather, it is to be hoped that the text will move the area forward, by addressing the key issues which have arisen in relation to the 2013 DBA Regulations, and by providing an opportunity for feedback at, and following, the conference on Thursday, 17 October; and by further consultation, should the government wish to take the matter forward via the execution of a new version of the Damages-Based Agreements Regulations.

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For the purposes of the reform project, the authors have adopted the definition of a damages-based agreement (DBA) which is stated in the *Explanatory Memorandum* to the 2013 DBA Regulations, [2.1]:

*A DBA is a private funding arrangement between a representative and a client whereby the representative's agreed fee ('the payment') is contingent upon the success of the case, and is determined as a percentage of the compensation received by the client.*

## Regulation 1(2):

### **Definition of 'expenses':**

**Paragraph (a):** Those expenses which are incurred by the legal representative are referred to as 'disbursements' in these Regulations. Court filing fees are cited as an example of such disbursements because of the very significant amounts which those fees can represent, depending upon the value of the claim. A few other illustrative examples (e.g., transcript fees, translation fees), mentioned by way of information, are not intended to constitute an exhaustive list of expenses, but may assist clients to appreciate what else may constitute expenses, for (as discussed shortly) these are payable by the client over and above the DBA payment. Also, it is implicitly acknowledged in the definition that, when an expert is engaged, there are a number of tasks that may be performed, other than report writing, and that **all** of that constitutes 'fees paid or payable to an expert' which are expenses for the purposes of the 2019 DBA Regulations.

**Paragraph (b):** For the avoidance of doubt, it is clarified that an ATE premium for which the client is responsible is outside the DBA payment too.

**Paragraph (c):** Expenses may be incurred by the representative or by the client, depending upon the specific arrangements of the case. For example, in some cases, the client will pay counsel's fees and the expert's fees directly, whereas in other cases, those very same expenses will be paid for by the legal representative on the client's behalf. Although it was probably implicit in the 2013 DBA Regulations that the client was liable for self-incurred expenses, the 2019 DBA Regulations make it plain that the client's own directly-incurred expenses lie outside the DBA payment.

### **Definition of 'financial benefit':**

### **Definition of 'money or money's worth':**

The 2013 DBA Regulations defines the DBA payment as 'that part of the sum recovered in respect of the claim or damages awarded' (per Reg 1(2)).

However, that is **not** the wording that was used in the overarching Courts and Legal Services Act 1990 (CLSA 1990), s 58AA(3)(a)(i). That sub-section refers to a client's obtaining 'a specified financial benefit'. Immediately, it is clear that a 'financial benefit' could be different from a 'sum recovered', because a financial benefit could constitute real or personal property, or some chose in action. In addition, it could be that a claim does not have to be paid by the defendant because it was met by a good defence (dealt with below), which may also constitute a 'specified financial benefit' to that defendant.

Hence, in the 2019 DBA Regulations, per Reg 1(2), the term, 'financial benefit', is defined to mean 'money or money's worth', instead of the 'sum recovered in respect of the claim or damages awarded'. This not only brings the 2019 DBA Regulations into line with the overarching Act, but it also expands the possible use of DBAs in the marketplace by defendants, which the CLSA 1990 always contemplated.

That change is carried through to other parts of the 2019 DBA Regulations too — e.g., the definition of 'payment' in Reg 1(2); what the DBA needs to state, per Reg 3(d); what is payable if a financial benefit is, or is not, recovered by the client, per Reg 4(1); and the statutorily-set percentages that apply to DBAs, per s 4(3) and 4(4).

Turning our attention specifically to the definition of 'financial benefit':

**Paragraph (a):** If the claim is about retrieving a Renoir, or establishing an equitable entitlement to a trust fund or to some constructive trust over the marital home, or achieving an order that the claimant was entitled to part of a goldmine, say — then all of those things are 'financial benefits' (but they are not 'sums recovered'). They are also describable as 'money's worth'.

That phrase is used in s 55AA(7) of the CLSA 1990, in the definition of 'payment', i.e., that a payment includes 'a transfer of assets and any other transfer of *money's worth*' (emphasis added). However, the phrase, '*money's worth*', is actually not defined in the CLSA 1990, nor in the Interpretation Act 1978, Sch 1, 'Words and Expressions Defined'.

Hence, a useful and workable definition of 'money's worth', to encompass the Renoir, the constructive trust, the goldmine, etc, is now contained in Reg 1(2) of the 2019 DBA Regulations.

Again, this amendment brings the 2019 DBA Regulations into line with the overarching Act under which the DBA Regulations are promulgated.

**Paragraph (b):** This amendment makes it plain that the financial benefit obtained by the client must exclude recoverable costs, i.e., the DBA payment cannot be calculated by reference to what costs are paid or are payable by the opponent. That point had been uncertain under the 2013 DBA Regulations, because the DBA payment was calculated as a percentage of ‘the sums ultimately recovered by the client’. That phrase could have technically included the client’s recovery of recoverable costs and expenses.

To avoid this conundrum and to remove any possible uncertainty on this point, paragraph (b) means that: suppose that D pays C damages of £10,000; and recoverable costs of £2,000; the DBA percentage attaches only to the £10,000 of damages, and is not calculable on the entirety of the £12,000 recovered.

#### ***Definition of ‘irrecoverable counsel’s fees’:***

This is a new definition, and is necessary because, in Reg 4(1)(b)(iv), any irrecoverable counsel’s fees which were incurred by the representative as a disbursement can be recovered, only to a cap of 30% of those fees, in the event that no financial benefit is recovered by the client at all. Hence, in the event of a losing case, counsel may recover up to 30% of his fees if the parties so agree, but can recover no more than that. Irrevocable counsel’s fees are those that are not payable by the opponent.

#### ***Definition of ‘irrecoverable expenses’:***

This is a new definition. It is necessary because, in Reg 4(2)(a), the deductions from the financial benefit obtained by the client cannot exceed the DBA payment plus irrecoverable expenses, unless the unusual circumstances in Reg 4(2)(b) apply.

#### ***Definition of ‘irrecoverable representative’s costs’:***

This is a new definition, and equates to the work-in-progress costs that are irrecoverable from the opponent. The definition is relevant in two respects. First, these costs must be offset against the DBA payment, per Reg 4(1)(a)(ii)(A). Secondly, in the event that the client loses, there will be no financial

benefit recovered by the client – but the client may be liable to pay the representative the irrecoverable costs, but only to a cap of 30%, per Reg 4(1)(b)(ii). Hence, in the event of a losing case, the representative may recover up to 30% of the costs incurred in relation to the case – only if the parties so agree – but can recover no more than that.

***Definition of ‘payment’:***

This is the DBA payment itself, i.e., the amount of the financial benefit (money or money’s worth) which the client agrees to pay to the representative who has entered into the DBA with the client.

***Definition of ‘recoverable counsel’s fees’:***

This is a new definition. It is necessary because, in the event that there is no financial benefit recovered by the client in the claim or proceedings to which the DBA relates, any recoverable counsel’s fees are to be paid by the client to counsel. It will, of course, be unlikely that there will be any recoverable costs in the event that the case loses. But it is possible that an order for recoverable costs may be made in an interim application, even though the client ultimately loses the case and recovers no financial benefit. It would be unfair if the order for recoverable counsel’s fees was not satisfied, and paid to the representative. Hence, Reg 4(1)(b)(iii) provides that the DBA may specify that any such amount is part of what is payable under the DBA in the event that the client did not recover any financial benefit.

***Definition of ‘recoverable representative’s costs’:***

This is a new definition. It is necessary because, under the ‘Success Fee’ model implemented in the 2019 DBA Regulations, the recoverable costs are outside the DBA payment, and not within it, per Reg 4(1)(a)(i).

In the event that an order for costs is made against the opponent, i.e., the costs are payable, but are not paid by the opponent (for whatever reason), then that sum is still within the definition of recoverable representative’s costs, because they are ‘payable’. Hence, that sum still falls outside the DBA payment, i.e., it is not for the solicitor to have to offset those unpaid recoverable costs against the DBA payment under Reg 4(1)(a)(ii). They are recoverable representative’s costs, not irrecoverable costs.

In addition, in the event that the client recovers no financial benefit, it is possible that an interim costs order in the client's favour may have occurred in an interim application. If so, then it is fair that the client is required to pay that sum to the representative – notwithstanding that the claim lost overall – and that (unlikely) eventuality is provided for in Reg 4(1)(b)(i).

**Regulation 1(4):**

**Paragraph (b):** Employment matters were governed by the DBA Regulations 2010 (now repealed), and are currently governed by the 2013 DBA Regulations.

The use of DBAs in employment matters is longstanding; they are not experiencing problems in that sector, so far as the reviewers are aware; and employment matters are quite different from commercial and personal injury matters, in that counsel is often not used, there is no costs-recovery in the usual course, and the amounts recovered tend to be lower (i.e., <£10,000). For these various reasons, the 2019 DBA Regulations exclude employment matters, as defined in s 58AA(10) of the CLSA 1990, from their ambit, and Reg 1(4)(b) makes that plain.

Should the government wish to take the present reform proposals forward, then it will be up to the government to decide whether the DBA Regulations 2010 should be re-enacted, or the DBA Regulations 2013 amended and continued, in order to cater for the use of DBAs in employment matters. The latter course is suggested in Reg 2.

**Paragraph (c):** It is not intended that litigation funding agreements entered into between a client and a third party funder should be caught by the 2019 DBA Regulations, and nor is it intended that these should be inadvertently treated as DBAs. For that reason, a litigation funding agreement, as defined in Reg 1(4)(c) and in accordance with s 58B of the CLSA 1990 (unenacted), is expressly excluded from the ambit of the 2019 DBA Regulations.

**Regulation 1(5):**

It is already provided, in s 47C(8) of the Competition Act 1998, that:

*A damages-based agreement is unenforceable if it relates to opt-out collective proceedings.*

It was government policy that legal representatives who act on behalf of a representative claimant who is prosecuting an opt-out collective proceeding under the regime for competition law grievances which was implemented on 1 October 2015 by virtue of the Consumer Rights Act 2015, Sch 8, should not be able to charge a percentage contingency fee for doing so.

The representative action contained in CPR 19.6 avails a representative claimant of the possibility of commencing a suit on behalf of a class of persons who share the ‘same interest’ as that representative. Given that a representative action may be commenced on behalf of, potentially, a very large class of persons; for damages-per-class-member (albeit more restrictively-assessed than applies in other litigation); and on the basis that class members who do not wish to be bound by the outcome of the representative action are permitted to opt-out of the representative action (see, most recently, *Lloyd v Google LLC* [2019] EWCA Civ 1599 (2 Oct 2019)), a representative action under CPR 19.6 and an opt-out collective proceedings under the Competition Act 1998 can be reasonably closely aligned.

For the purposes of consistency, it is suggested that the policy of barring the use of DBAs should be applied equally to both regimes. Hence, the suggestion of the new Reg 1(5) of the 2019 DBA Regulations.

**Regulation 2:**

As noted above, employment matters are excluded from the ambit of the 2019 DBA Regulations.

**Regulation 3:**

This is the provision which sets out the prescribed content of the DBA, insofar as the 2019 DBA Regulations stipulate. The provision is deliberately quite light-handed, so as to avoid the prospect that a DBA will inadvertently omit to mention one of the prescribed matters and, hence, be rendered unenforceable.

There are **six (6)** prescribed matters which a DBA must mention. Dealing with each in turn:

**Paragraph (a):** Re appeals, it is already provided in the 2019 DBA Regulations that the DBA statutory caps shall only apply to claims or proceedings at first instance, per Reg 4(5). A different DBA, or a different funding arrangement altogether (e.g., a CFA, or an hourly retainer), can be entered into for any appeal arising from the claim or proceedings. However, paragraph (a) provides that the DBA should state whether or not the DBA applies to appeals arising from the claim or proceedings to which the initial DBA relates. If it does, then the DBA should state what the DBA payment will be for any appeal. The bargaining position would presumably be relatively equal at the outset when the DBA is being negotiated; and if the quantum of the DBA payment for an appeal is not stipulated at the outset, then it could lead to satellite litigation, especially if the client's damages are reduced on appeal. However, if the DBA does not apply to any appeal arising, then that should also be stated in the DBA, so that the parties are cognisant that the legal costs associated with an appeal will have to be separately negotiated.

Re the topic of counterclaims: if a client defeats a counterclaim made against it, then that is a 'financial benefit', because it's a 'money's worth' (i.e., the client doesn't have to pay the counterclaim), as discussed previously. It will be up to the client and the representative to negotiate whether a DBA is entered into for a claim, and a separate DBA for the counterclaim; or whether the DBA payment depends upon the net effect of the claim and counterclaim. To reiterate, the relevant phrase to which the DBA payment attaches is whether the client receives a 'financial benefit', and not 'a sum recovered'. This allows considerable flexibility for the client and the representative to negotiate and to agree what constitutes a financial benefit in the context of the particular case in which the DBA is being used.

**Paragraph (b):** This provision explicitly contemplates that DBAs can be used by a defendant (D) to a claim, so that D's legal representative can claim a DBA payment for successfully defending that claim. This brings the 2019 DBA Regulations into line with the CLSA 1990, s 58AA(3), which also envisaged that DBAs could be used **by defendants**.

The 2013 DBA Regulations precluded that possibility, by referring to the DBA payment as a percentage of 'the sums ultimately recovered' by the client. That meant that the 2013 DBA Regulations could only apply where D had a counterclaim, and not where D successfully defended a claim via a good and valid defence. However, as explained previously, D will achieve a 'financial benefit' where D does

not have to pay the claim which was mounted against it by the claimant. Consequentially, D's representative can achieve a DBA payment, because of the definition of the 'payment' in Reg 1(2), viz, 'part of the financial benefit obtained'.

**Paragraph (c):** The items to which the representative is statutorily entitled, where the client recovers a financial benefit, and where the client does not, are set out in Regulation 4(1) of the 2019 DBA Regulations.

For every particular case, the DBA itself must state the amounts to which the representative will be entitled, where a financial benefit is obtained by the client; or where a financial benefit is not obtained at all. If it is intended that the legal representative will be entitled to *some* recovery of costs and expenses, in the event that there is no recovery by the client of any financial benefit (i.e., that the legal representative and the client have entered into a hybrid DBA), then that agreement must be set out in the DBA itself, by virtue of paragraph (c).

**Paragraph (d):** The DBA must state the financial benefit to which the agreement relates. It is necessary that the financial benefit be *described* in the DBA, whether it is money or 'money's worth'. However, the provision does not require that the Renoir, the constructive trust over the marital home, or the goldmine, say, be valued in the DBA itself. The date upon which, and the methodology by which, the financial benefit is valued will need to be specified in the DBA, but that is for negotiation between the client and the representative, and is not for the Regulations to prescribe. Hence, the Renoir, etc, could be valued, for the purposes of the DBA, at the time that the DBA is entered into; at the time that the financial benefit is actually obtained by the client; or at some other agreed date.

Where a defendant uses a DBA as a means of paying its legal representative, the financial benefit is triggered by a successful defence of that claim. Again, the DBA does not need to set out the precise value of that financial benefit (and, indeed, it may not be known until trial or settlement, given that some defences are partial only, and not complete). Whether the client (defendant) and the representative choose to quantify that financial benefit in the DBA as being, e.g., the reserve that was set aside by D (or its insurer) to cover the claim, or the amount of the claim that was successfully defended, or via some other methodology, will be for those parties to agree in the DBA. The Regulations are deliberately and consciously not prescriptive about how that amount is calculated. For the purposes of paragraph (d), it

will be sufficient if the DBA describes the financial benefit as being referable to the extent to which the claim brought against the client is successfully defended.

**Paragraph (e):** The client and the representative will undoubtedly have regard to a variety of matters when setting the percentage of the DBA payment, such as: the complexity of the claim or proceeding; the prospective length of the proceeding; the risk of not succeeding in the claim; or whether the amount of the DBA payment depends upon the stage at which the claim or proceeding is concluded. However, the 2019 DBA Regulations themselves do not mandatorily require the client and the representative to have regard to a closed (mandatory) or open (indicative) list of factors. The particular factors to which the client and the representative have regard, when setting the DBA payment, will depend upon a case-by-case negotiation, and once agreed upon, they must be specified in the DBA.

**Paragraph (f):** The Regulations state separately, at Regulation 6 (opening words), that the general rights of termination which apply under Contract Law continue to apply to DBAs which are regulated by the 2019 DBA Regulations. Unreasonable behaviour is the only ground of termination which is stipulated by the 2019 Regulations themselves (per Regulation 6(1)).

However, in the event that the DBA is terminated for any ground whatsoever (whether negotiated between the client and the representative, or arising by operation of law), the circumstances in which a representative is entitled to any payment of costs, expenses or counsel's fees must be stated in the DBA. This is important, given that no DBA payment will be triggered, should the DBA be terminated prior to the client's obtaining any financial benefit.

**Regulation 4(1):**

This is a crucial regulation, stipulating the amounts to which a representative will be entitled under a DBA. Paragraph (1)(a) refers to those cases in which the client recovers a financial benefit; whilst paragraph (1)(b) refers to the circumstance in which the client recovers no financial benefit.

**Paragraph (a):** In the event that a client obtains a financial benefit, the client is liable to pay the representative **three** separate sums under the DBA:

- recoverable representative’s costs;
- the DBA payment; and
- expenses.

**Paragraph (a)(i):** This paragraph makes it plain that the so-called ‘Success fee model’ applies, i.e., that recoverable costs are outside of, and additional to, the DBA payment. This is different from the position under the 2013 DBA Regulations, in which the so-called ‘Ontario model’ applies, and which requires that the DBA payment includes recoverable costs. As a result of the implementation of the Success fee model, the statutorily-set caps for the DBA payment have been reduced in the 2019 DBA Regulations in order to prevent over-compensation of the legal representative (see below).

The Success fee model is preferred for the 2019 DBA Regulations for **four** key reasons:

1. as a concept, it is far easier to explain to clients, particularly to those who have had no prior experience of litigation;
2. the Success fee model avoids the consequences of the indemnity principle. That is, if the DBA payment payable to the legal representative is less than the amount of recoverable costs, then the opponent is not obliged to pay those recoverable costs — i.e., the DBA payment represents a ceiling on the recoverable costs to which the client is entitled, under the Ontario model, and can represent a significant windfall to the losing opponent, by enabling that losing opponent to escape the consequences of an award of recoverable costs against that opponent. By contrast, under the Success Fee model, that scenario will not arise, as recoverable costs are paid *in addition to* the DBA payment;
3. without the indemnity principle in operation, an opponent has less motivation to challenge the enforceability of a DBA, which will reduce the prospect of satellite litigation surrounding DBAs; and
4. the Success fee model is likely to enhance access to justice in low-value claims. Where the recoverable costs are quite high for a legally-complex claim, compared with the DBA payment accruing from a low-value claim, then the viability of that claim correspondingly reduces. The DBA payment is being ‘eaten up’ by the recoverable costs. By contrast, a legal representative

who prosecutes, and wins, a low-value claim is not ‘punished’ by the Success fee model; the DBA payment and the recoverable costs are both payable, as separate items, by the unsuccessful opponent.

**Paragraph (a)(ii):** This paragraph makes it plain that the DBA payment itself contains, **within** that cap, **three** items:

<b>The DBA payment includes the following:</b>
■ irrecoverable representative’s costs (i.e., costs incurred by the representative which <i>are not payable</i> by any other party)
■ counsel’s fees, whether recoverable or irrecoverable, and
■ VAT which is not recoverable by the client from another party

Anything remaining, after deduction of those three items, is profit accruing to the legal representative.

Dealing with each deduction in turn:

**Irrecoverable costs.** In the event that the client wins, i.e., recovers a financial benefit, there will most likely be recoverable representative’s costs, and irrecoverable representative’s costs. The recoverable costs are outside the DBA payment, given that the Success Fee model applies. That is provided for in Reg 4(1)(a)(i). Any irrecoverable costs incurred by the representative, i.e., those which are not payable by the opponent, must be set off against the DBA payment, per Reg 4(1)(a)(ii)(A). The client is not liable for those costs, over and above the DBA payment. It is the representative who bears the risk of irrecoverable costs, not the client. If the claim or proceedings is conducted inefficiently, then it is conceivable that the DBA payment could be consumed almost entirely of irrecoverable costs; that is the representative’s risk.

**Counsel’s fees.** The second ‘item’ which lies inside the DBA payment are counsel’s fees, where those fees are incurred by the representative. Even where there is an irrecoverable portion of counsel’s fees, the entirety of counsel’s fees lies within the DBA payment, and the client is not liable for any separate payment of counsel’s fee, whether recoverable or irrecoverable. Of course, the larger the counsel’s fee,

the lower the solicitor's recovery under the DBA, because the DBA payment is being 'consumed' by that counsel's fee; but that will be for the solicitor and counsel to resolve between them. It is not an issue that affects the client, as Reg 4(1)(a)(ii)(B) makes plain.

Where counsel is engaged **directly** by the client (cutting out the solicitor), as per payment basis C or D of the CLLS/Combar General Terms and Conditions for the Supply of Legal Services by Barristers to Solicitors in Commercial Matters, then that fee would not fall within the DBA payment in Reg 4(1)(a)(ii)(B), because it is not 'a sum in respect of disbursements *incurred by the representative* in respect of counsel's fees', and hence, the solicitor would not be responsible for that sum out of his or her DBA payment. If directly engaged, counsel's fees would be outside the cap. It would either be an expense under Regulation 4(1)(a)(iii), or it could be arranged via a separate DBA entered into between client and counsel, which would be governed by Regulation 5 (discussed below).

**VAT.** The third item which falls inside the DBA payment is any VAT payment which is not recoverable by the client from any other party. It is acknowledged that the inclusion of VAT within the DBA payment could render some claims, especially low-value personal injury claims, infeasible to conduct on a DBA basis, because including VAT within the cap would reduce a 25% cap to, effectively, a 20% cap. However, notwithstanding these concerns, the suitable response may be to seek further consultation upon the DBA cap which applies to personal injury claims, rather than to remove VAT from being inside the DBA payment.

For present purposes, the Regulation makes it plain that VAT lies within the DBA payment, but only in circumstances where the VAT was not recoverable by the client from elsewhere. If that VAT is recoverable from another party, then for the sake of fairness, the VAT sum should be excluded from the DBA payment, i.e., the representative's income from the DBA payment will be correspondingly increased.

**No double recovery.** In the event of a financial benefit being obtained by the client, the representative is **only** entitled to the three matters described in Regulation 4(1)(a), *viz*: recoverable costs recovered from the opponent; the DBA payment; and expenses, whether incurred by the representative or by the client. The representative is not entitled to *any other costs or expenses whatsoever*. Hence, if the client and the representative have entered into a discounted hourly retainer in addition to the DBA (as is permitted under the 2019 DBA Regulations) — under a hybrid DBA — then there is **no** possibility of double recovery by

the representative. Where the representative has been paid as the case progresses, under the discounted hourly rate retainer, Reg 4(1)(a) sets out the position at the conclusion of the matter.

Any recoverable representative's costs are paid by the opponent (and, to reiterate, are outside the DBA payment). To the extent that those were already paid as WIP by the client to the representative as the matter progressed on account, those recoverable costs must be repaid by the representative to the client. Otherwise, should the representative retain the recoverable costs from the opponent **and** also the WIP which was paid as the matter progressed, the representative would infringe Regulation 4(1)(a). Any such conduct would render the DBA unenforceable, as the representative would be over-compensated. Regulation 4(1)(a) is very plain: the representative is **only** entitled to: recoverable costs; the DBA payment; and expenses.

This means that, whilst there may be two types of agreement for payment mentioned in the fee agreement — a discounted hourly rate and a DBA — a representative will not recover twice for the same legal services rendered.

**Paragraph (a)(iii):** In addition to recoverable costs and the DBA payment, the client is liable to pay any expenses which were incurred by either the representative or by the client in prosecution of the claim or proceeding. Expenses are **always** payable by the client over and above the DBA payment and the recoverable costs. The revamped definition of 'expenses' under Regulation 1(2) has been discussed previously.

It will be recalled that counsel's fees are not normally an expense. However, in circumstances where counsel is engaged directly by the client, then that is not a 'disbursement incurred by the representative', but is 'a fee of [that] description ... incurred directly by the client' (per paragraph (c) of the definition of 'expenses'). In those circumstances, counsel's fees would be an expense that must be paid in addition to the DBA payment.

**Paragraph (b):** This is the part of the payment Regulation which applies if the client does **not** recover any financial benefit, as that is defined in Reg 1(2).

The 2019 DBA Regulations provide explicitly for hybrid DBAs. In other words, it is possible for the legal representative to enter into an agreement with the client for payment of costs as the matter

progresses — for example, under a retainer charging the client a discounted hourly rate. Any such ancillary agreement must be negotiated by the representative with the client.

The reasoning for permitting hybrid DBAs — i.e., to allow WIP costs to be paid by the client as the case progresses — are two-fold. Hybrid DBAs:

- (i) ensure that, for long-running matters, the solicitor can at least keep **some** money coming in, albeit at a discounted rate (which money is paid on account, and offset against the DBA payment if it turns out to be irrecoverable in the event of success; and which money is partially retainable if there is no success in the claim); and
- (ii) circumvent the need for solicitors to enter into ‘side agreements’ with third party funders who pay the law firm the WIP as the case progresses under ‘hybrid DBAs’, but who then may take percentage cuts from both the solicitor and from the client too. The permission for hybrid DBAs under the 2019 DBA Regulations is intended to remove the need for any such practices.

As a result of hybrid DBAs, and pursuant to Regulation 4(1)(b), even should no financial benefit be obtained by the client in the claim or proceedings — whether because no award of a financial benefit is made in favour of the client, or such an award is made but the client does not receive any of the financial benefit — the client may be liable to pay **five** items, as listed in (i)-(v).

*First*, with respect to the representative who entered into the DBA with the client, there may be a costs order in favour of the client arising from an interim application (even though the case, overall, lost). That sum is payable by the client to the representative.

*Secondly*, in relation to the ‘irrecoverable representative’s costs’ incurred during the course of the claim or proceedings, the parties may agree that the representative is entitled to a portion of those costs in the event that the claim loses, but any such payment should not exceed 30% of the costs incurred in prosecuting the unsuccessful claim. It means that the representative can charge the client fees as he goes, under a discounted retainer, but in the event of no financial benefit being obtained, there will be no recoverable representative’s costs in the norm. There will only be irrecoverable representative costs, and the representative can only retain 30% of those costs.

*Thirdly*, where counsel has been engaged on a disbursements basis (and not on a direct DBA), there may be an interim costs order in favour of the client in respect of counsel's fees, even though the claim may lose overall. If that should occur, then it is fair that any such sum be paid by the client to counsel. Of course, the DBA is an agreement between the client and the representative who is charging the DBA. It is open to those parties to agree, in the DBA, that no recovery will be payable to counsel in the event that there is no financial benefit recovered by the client. Counsel is an external party to that agreement. It is anticipated that a solicitor who is charging the DBA (the representative) and counsel will enter into their own agreement in respect of what is payable in the event that there is no financial benefit recovered by the client.

*Fourthly*, in relation to counsel's fees which are incurred in the cause of a losing case, and which are irrecoverable, similarly the parties may agree that counsel is entitled to a portion of that fee in the event that the claim loses, but any such payment should not exceed 30% of the fee incurred in prosecuting the unsuccessful claim. (Of course, if the client does recover a financial benefit, then the entirety of counsel's fee is contained within the DBA payment.)

*Fifthly*, any expenses incurred by the representative or by the client are also payable, in the event that no financial benefit is obtained by the client. Expenses are always payable by the client, win or lose.

Regulation 4(1)(b)(iii) and (v) also removes any concern that the solicitor would be 'on the hook' for expert's fees, counsel's fees, etc, if either the client's claim is lost, or if a judgment is awarded in the client's favour but cannot be enforced. In other words, the paragraphs obviate any unfairness accruing to the client's solicitor, that the client could escape paying expenses properly incurred or counsel's fees properly incurred, which the solicitor had funded, simply because the judgment could not be enforced or because the client had lost the case. It is the client who must pay these sums, even where no financial benefit is obtained.

To reiterate, the DBA must state whether the solicitor can retain any of the discounted hourly rate amounts, even if the case loses, per Regulation 3(c). If so provided in the DBA, it is lawful for the solicitor to 'bank' up to 30% of the fees earned from the retainer, even if no financial benefit is achieved from the litigation. In other words, the payment of some of the solicitor's costs and expenses is lawful,

regardless of whether or not the client receives any of the ‘financial benefit’ stated in the DBA, but the DBA must state that, or else the DBA will be unenforceable, because it will not comply with Reg 3(c).

#### **Regulation 4(2):**

Perceiving a DBA from a client’s perspective, in the usual case, the most that the client can lose from his or her damages or other financial benefit is the DBA payment, and any irrecoverable expenses. Recoverable expenses are, of course, payable by the opponent. That is what is provided for in Reg 4(2)(a).

However, it is conceivable that some or all of a recoverable costs order against the opponent, in favour of the client, may remain unpaid. The opponent may go bust, or otherwise be unable to meet that costs order. The client remains ‘on the hook’ for that payment, and that is what underlies Reg 4(2)(b). If any of the recoverable costs order against the defendant remains unpaid, then the client remains liable for it, and that sum may be deducted from the financial benefit obtained by the client. In most cases, the client’s only deductions from the financial benefit will be the DBA payment and irrecoverable expenses. But, in these unusual cases in which the opponent does not pay a representative’s recoverable costs, Reg 4(2)(b) applies, and the recoverable representative’s costs may be deducted from the financial benefit too.

#### **Regulation 4(3):**

This regulation focusses upon DBAs as they apply to personal injury claims.

**Paragraph (a)(i):** This Regulation deals with the sum to which the percentage of the DBA will apply, in order to calculate the DBA payment. The purpose of the Jackson reforms was to ensure that future care costs should be untouched by the DBA deduction; those damages should be preserved for the welfare of the injured claimant.

However, the way in which the 2013 DBA Regulations were drafted was arguably the wrong way around. What is necessary is that future pecuniary costs should be precluded from that sum to which the

DBA percentage applies. Instead, the 2013 DBA Regulations provided that the DBA calculation should only apply to PSLA and past pecuniary damages.

The difficulty with that drafting approach was that there could feasibly be heads of damages awarded in personal injury cases which have nothing to do with future pecuniary costs (to remain untouched) — and yet, which are not PSLA or past pecuniaries either. For the DBA calculation to apply to such heads of damage would not offend the policy which underpinned the Jackson reforms. Such heads of damage could include:

- the conventional sum ('the *Rees* award'), where the personal autonomy of the claimant was infringed (e.g., parental claimants who bring a wrongful conception claim); and
- an award of either:
  - aggravated damages, or
  - exemplary damages,

either of which is entirely possible, as a matter of precedent, in the case of intentional torts which cause personal injury.

The 2019 DBA Regulations have been re-drafted on the assumption that it would be acceptable as a policy matter to allow the DBA payment to 'attach' to the abovementioned heads of damage.

Hence, Reg 4(3)(a)(i) is redrafted to ensure that the DBA percentage does not apply to damages obtained by the client for future pecuniary loss, but can apply to everything else.

**Paragraph (b)(i):** As already mentioned, the 2019 DBA Regulations encompasses the 'Success fee model', and not the 'Ontario model'. That is, the recoverable representative's costs are outside of, and not within, the DBA payment. As a result, it is suggested, in Regulation 4(3)(b)(i), that the statutorily-set cap for the DBA payment, for personal injury claims, should be reduced from 25% (as stipulated in the 2013 DBA Regulations) to 20%. However, this will suitably be a matter for consultation.

**Paragraph (b)(ii):** Where a defendant insurer defends a personal injury claim, then that scenario is

explicitly covered by Reg 4(3)(b)(ii), and not by Reg 4(3)(b)(i). In other words, the defendant insurer can base its DBA payment upon a 40% cap, and would not be limited to the 20% cap which otherwise applies to representatives who act for claimants in personal injury cases. Nor would a defendant insurer be required to base the DBA payment upon those heads of damages that exclude future care costs. The 20% cap noted in Regulation 4(3)(b)(i), together with the restriction upon the types of heads of damage to which the DBA payment can be calculated, are intended to apply only to where a DBA is being used by a claimant client, and not by a defendant insurer.

Regulation 4(3)(b)(ii) is more appropriate in this context because, in personal injury suits, those will typically be defended by large and commercially-sophisticated insurers, who are in no different a position than insurers who are defending a commercial matter. As a matter of policy, there is no basis for distinguishing between the insurers who defend commercial matters from those who defend personal injury matters — and the former can set DBA payments at a 40% cap, per Reg 4(4) (discussed below). Rather than implicitly leaving defendant insurers who are defending personal injury matters to Reg 4(4), it is clearer to insert a new Reg 4(3)(b)(ii) to provide that defendants who are defending personal injury claims are entitled to the higher 40% cap.

**Regulation 4(4):**

This paragraph applies to those claims or proceeding which are neither employment matters (which are the subject of the 2013 DBA Regulations) nor personal injury matters (which are the subject of Regulation 4(3) of the 2019 DBA Regulations). For such claims, it is suggested that the statutorily-set DBA cap should be 40%. This is reduced from the 50% cap which was stipulated in the 2013 DBA Regulations.

That reduction is considered to be appropriate, given that recoverable costs lie outside the DBA payment under the 2019 DBA Regulations, adhering to the Success fee model, rather than the Ontario, model. The client must pay recoverable costs additional to the DBA payment, and hence, to avoid the 2019 DBA Regulations being too ‘lawyer-friendly’ and too generous, the DBA cap should reduce to prevent over-compensation of the legal representative. It is acknowledged that the suggested 40% cap is appropriate for consultation.

**Regulation 4(5):**

This paragraph stipulates that the DBA statutory caps shall only apply to claims or proceedings at first instance. A different DBA, or a different funding arrangement altogether (e.g., a CFA, or an hourly retainer) can be entered into for any appeal. As already stated, the DBA must state, per Regulation 3(a), whether or not the DBA applies to appeals arising from the claim or proceedings to which the initial DBA relates. If it does, then the DBA should state what those DBAs caps should be for the appeal. If it does not, then Regulation 4(5) allows for an entirely different agreement for the payment of costs and expenses.

**Regulation 5:**

If counsel is to be paid by the client via a direct DBA, then as a matter of fairness, a solicitor's DBA plus a counsel's DBA in relation to the same claim or proceedings should not exceed the statutorily-set DBA caps. For example, it should not be possible for a solicitor to charge a 30% DBA and for counsel to charge another 30% DBA in respect of the same claim. There must be cap upon the maximum that the client can lose of its financial benefit. Regulation 5 embodies a public policy imperative in making sure that the legal representatives acting for the client cannot, in combination, recover more than the statutorily-set caps for DBA payments. Otherwise, the public would rightly ask — for whose benefit is the litigation being conducted?

**Regulation 6:**

Reg 6(1) applies where it is the representative who terminates the DBA. Under any DBA, and legislatively, the legal representative can terminate the DBA if the client has conducted itself, or is conducting itself, unreasonably. If that is the case, then the legal representative may charge costs, according to the circumstances and the methodology stipulated in the DBA, as required to be stated by Regulation 3(f). However, both the grounds of termination of the DBA, and the amount chargeable to the

client in the event of such termination on the representative's part, are subject to a different contractual agreement if that has been negotiated as between representative and client.

Regulation 6(2) applies where it is the client who terminates the DBA. In that event, the provisions of Reg 4(1) that apply in the case of the recovery or non-recovery of a financial benefit do not apply. Rather, in that event, the representative may charge the client the representative costs incurred to the point of termination, expenses incurred to that point, and counsel's fees to that point, if any. It is conceivable that, in a long-running matter, this sum may exceed the amount payable as a DBA payment. In any event, an alternative agreement may be negotiated as between the client and the representative when the DBA is drafted, given the opening words of Reg 6.

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