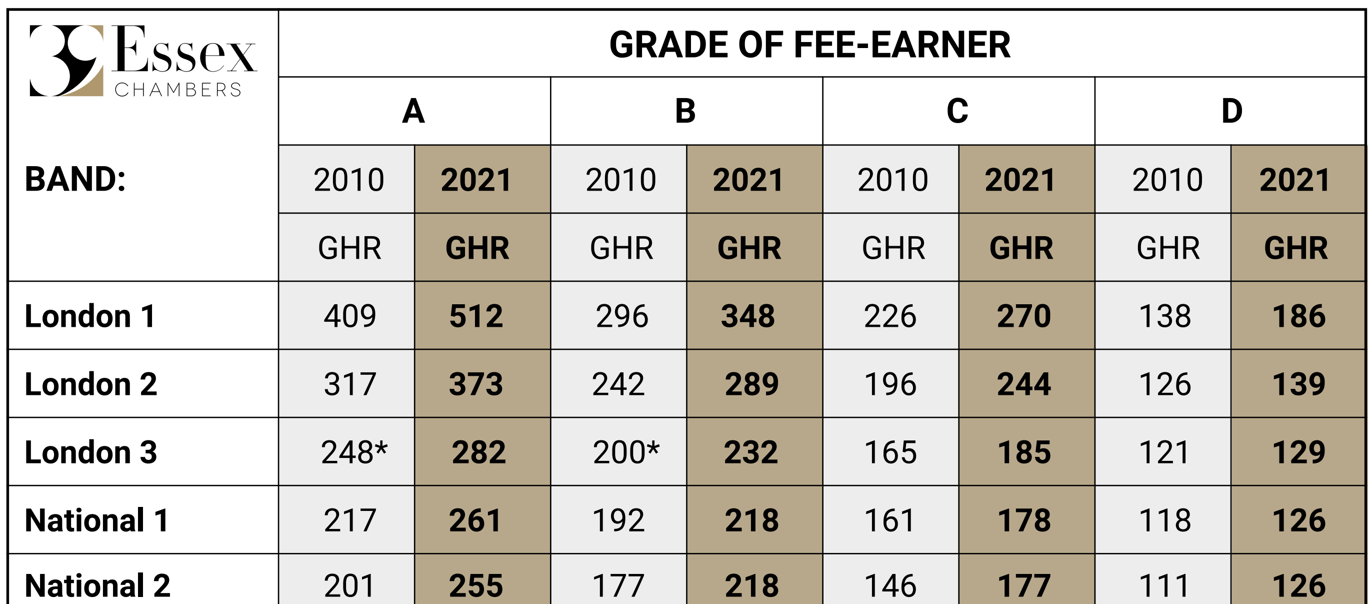
39 Essex CHAMBERS

3+9=Costs
October 2021

INTRODUCTION

EDITOR: Shaman Kapoor

Welcome to the 4th Edition of 39 Essex Chambers' Costs Newsletter. As always, there is much to report but we have focussed on what we consider to be the unmissable over the past 6 months. The new Guideline Hourly Rates have been published and "in effect" from 1 October 2021. Here is a summary table of what they were in 2010 and what they are now in 2021:



39 Essex CHAMBERS	GRADE OF FEE-EARNER							
	A		B		C		D	
BAND:	2010	**2021**	2010	**2021**	2010	**2021**	2010	**2021**
	GHR	**GHR**	GHR	**GHR**	GHR	**GHR**	GHR	**GHR**
London 1	409	**512**	296	**348**	226	**270**	138	**186**
London 2	317	**373**	242	**289**	196	**244**	126	**139**
London 3	248*	**282**	200*	**232**	165	**185**	121	**129**
National 1	217	**261**	192	**218**	161	**178**	118	**126**
National 2	201	**255**	177	**218**	146	**177**	111	**126**

What does "in effect" mean? How will they apply to work done before 1 October 2021, which will surely be the question at assessments for some time yet? Mathematical pro-rata? Or retrospective effect? They are still only guidelines and we are bound to continue to see different approaches in practice at detailed assessment. The question is all the more pressing and relevant at summary assessment and so we will keep an eye out for interesting developments.

In this Edition, we grapple with an issue which crops up much less frequently, but is very important, namely the distinction between a Contentious Business Agreement and a Non-Contentious Business Agreement and the formalities relating to them. That distinction is an important preliminary question if considering a challenge that the agreement was or was not "fair and reasonable" and therefore susceptible to being set aside. To this end we review Acupay and Tripipatkul.

Still with retainers, we review the Court of Appeal's judgment in Lexlaw relating to Damages Based Agreements which appears to encourage the use of DBAs and possibly also hybrid DBAs. Technical breaches should not deny access to justice. Is the landscape clearer now?

Moving on from retainers, we review recent cases relating to funding.

First, we review *Edwards v Slater & Gordon* where the Court examined the funding arrangements for costs litigation offered to clients who pursued low value claims. Those arrangements included an indemnity for adverse costs in circumstances where ATE was not available, by contrast to other arrangements with disbursement funding commonly found in personal injury litigation.

Second, we review the circumstances in which a cross-undertaking might be required in damages by a defendant seeking security for costs, where the claimants were liable for an enhanced return on any security paid out by the litigation funder, as in *Rowe v Ingenious Media Holdings*.

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Third, we provide a short review of *Laser Trust v CFL Finance Ltd* on the operation of the 'Arkin cap'.

Finally, we round up this edition with a review of the Supreme Court judgment in *Ho v Adelekun*. We analyse the Court's judgment dealing with the defendant's claim for set-off of an adverse costs order against the claimant's costs and damages in a case where the claimant had QOCS protection. More work for the Civil Procedure Rules Committee!

That's it for now. Happy reading!

WHEN IS A CONTENTIOUS (OR NON-CONTENTIOUS) BUSINESS AGREEMENT FAIR AND REASONABLE (AND OTHER STORIES)?

Simon Edwards

It is not often that you get cases about either Contentious Business Agreements ("CBAs") or Non-contentious Business Agreements ("NCBAs") but, recently, there have been a few (two in the SCCO and two in the High Court). This flurry of judicial activity is helpful in that it serves to remind us of the principles involved and also of the approach that the courts will follow when considering these agreements.

What are CBAs and NCBAs?

For this, we need first to turn to section 87, Solicitors Act 1974 ("the Act"). "contentious business" is defined as:

> *"Business done, whether as a solicitor or advocate, in or for the purposes of proceedings begun before a court or before an arbitrator not being business which falls within the definition of non-contentious or common form probate business contained in section 128 of the Senior Courts Act 1981."*

Non-Contentious Business is defined as:

> *"Any business done as a solicitor which is not contentious business, as defined in section 87 of the Act."*

The primary distinction between a CBA and NCBA, therefore, is in relation to the type of work done. The dividing line occurs when proceedings are begun before a court or before an arbitrator. Any other work, for example, before a tribunal, does not count as contentious business. As regards pre-commencement work, if work is done before proceedings are begun for the purposes of proceedings that are subsequently begun, then that work is contentious business but if no proceedings are begun, it is non-contentious.

The next question then is what, respectively, constitutes a CBA or an NCBA? Section 57 of the Act contains the requirements for a NCBA. Sub-section 3 requires the agreement to be in writing and signed by the person to be bound or his agent in that behalf. Sub-section 2 then goes on to allow the parties to agree remuneration by a gross sum, by reference to an hourly rate, by commission or percentage, by salary or otherwise and that it may include or exclude disbursements, taxes, fees or other matters.

Before the advent of CFAs and then DBAs, this provision enabled solicitors in non-contentious business to act on a conditional or contingency basis and became quite popular, for example, in employment tribunals (the latter now regulated).

So far as CBAs are concerned, section 59 of the Act requires the agreement to be in writing (although it does not have to be signed) and it may provide that the solicitor be remunerated by a gross sum or by reference to an hourly rate, or by a salary or otherwise and whether at a higher or lower rate than that at which he would otherwise have been entitled to be remunerated.

The latter is a very wide definition and could easily encompass many solicitors' retainers in contentious work. That is because most, although by no means all, will provide for the solicitor to be remunerated by reference to an hourly rate. This would have a rather surprising effect because, pursuant to section 60(1) of the Act, the costs of a solicitor in any case where a CBA has been made shall not be subject to assessment.

We shall look into the circumstances in which a CBA may be "*reopened*" below, but the courts have considered the issue of whether or not any agreement that satisfies the broad definition in section 59 is, therefore, necessarily a CBA. That happened in *Acupay System LLC v Stephenson Harwood LLP* [2021] EWHC B11 (Costs). This was a case before Costs Judge Leonard, where the client had entered into a CFA and brought a wide-ranging challenge to it. One of the issues the court

had to determine was whether the CFA was a CBA.

The agreement contained a clause to the effect that it was not a CBA within the meaning of section 59, Solicitors Act 1974, but the client argued that that was irrelevant and that if the agreement was within the very broad definition of section 59, then it had to be a CBA whether the parties wanted it to be or not.

This would, as the client had to concede, mean that many, if not most, retainers in contentious business would, necessarily, be a CBA.

To try to get around that slightly awkward conclusion, the client sought to argue that a solicitor in such circumstances could not rely on the clause to seek to prevent an assessment under section 70 of the Act. That was not a particularly attractive argument and the court came to the conclusion that if both parties agree that the provisions of the Solicitors Act in relation to CBAs should not apply to their agreement, there was no reason why they should not be able to reduce that to writing and for that agreement to be effective.

The importance of such a clause in a solicitor's retainer was highlighted in *Healys LLP v Partridge and Anor* [2019] EWHC 2471 (Ch). In that case, the parties had entered into a CFA, but without the statement set out above saying that it was not a CBA. The solicitors started a Part 7 action on the bill and the client took the point that that was not permissible by virtue of section 61 of the Act.

That provision, at sub-section 1, provides that no action shall be brought on any CBA, but that either party may apply for the CBA to be enforced or set aside and if, on such an application, the court is of the opinion that the agreement is in all respects fair and reasonable, the court may enforce it.

The court, in that case, held that this CFA was a CBA because it did not say it was not and, otherwise, its terms were within the definition of section 59. The issue was technical in a sense, in that the court simply directed that the matter proceed by way of a Part 8 claim, but it opened the door to the client being able to argue that the agreement was not fair or reasonable and should, in the circumstances, therefore, be set aside.

The Enforcement of CBAs

As set out above, section 61 governs the enforcement of CBAs. If a solicitor's retainer in contentious business is a CBA, then the solicitor cannot simply issue a Part 7 claim and, for example, obtain default judgment or, indeed, summary judgement. The solicitor must proceed by way of section 61 by making a Part 8 claim for the enforcement of the agreement.

On that application, the court is bound to consider whether the CBA is fair and reasonable, and if, and only if, the court considers that it is, can the court proceed to enforce it by way, for example, of a judgment in favour of the solicitor.

In cases where the CBA provides for the remuneration of the solicitor to be by reference to an hourly rate, then sub-section 4B provides that the court may enquire, without having to determine whether the CBA is unfair or unreasonable, into the number of hours of work by the solicitor and whether the number of hours of work by him was excessive. Without overturning the CBA as unfair or unreasonable, the court would have no power to question hourly rates or, in a CFA, any success fee.

In circumstances where a client had unsuccessfully challenged a CBA on the basis of fairness or reasonability, the court, having found against the client, could, where the CBA provided for remuneration on the basis of an hourly rate, give a judgment in favour of the solicitor for an amount to be assessed in the way described above, but with an interim payment.

Enforcement of NCBAs

The enforcement of NCBAs is somewhat more straightforward. Section 57(4) of the Act provides that the agreement may be sued and recovered on or set aside in the like manner and on the like grounds as an agreement not relating to the remuneration of the solicitor. Thus, in relation to NCBAs, the solicitor is free to start a Part 7 claim

with all the advantages that has.

The court, however, is given the power under sub-section 5 of section 57 where the client objects to the NCBA as unfair or unreasonable, to enquire into the facts and certify them to the court, and if from that certificate it appears just to the court that the agreement should be set aside or the amount payable under it reduced, the court may so order and may give such consequential directions as it thinks fit.

That somewhat convoluted provision allows the court, in effect, to set aside a NCBA on the grounds that it is either not fair or is unreasonable.

Where the NCBA provides for remuneration to be by reference to an hourly rate, the court can, in a way similar to under a CBA, enquire into the number of hours' work by the solicitor and whether the number of hours worked by him was excessive.

The effect of setting aside a CBA or NCBA
As regards an NCBA, section 57(5) enables the court to set aside the agreement or reduce the amount payable. A similar power is given in relation to CBAs under section 61(4).

The latter option was considered, albeit briefly, by Costs Judge Brown in *Tripipatkul v WH Lawrence Limited* [2021] EWHC B13 (Costs). There he had found that the CFA was neither fair nor reasonable, but declined simply to reduce the amount payable because he felt that an assessment was the only way of arriving at a fair and reasonable amount payable, see paragraph 114 of the judgment. If, however, the only real contention had been as to the amount of the success fee, then it is easy to see how the court, on an enquiry into fairness and reasonableness, could simply reduce the amount of the bill by the requisite reduction required for the success fee.

Short of such a straightforward way of assessing the fair and reasonable reduction, it seems that where the CBA or NCBA is set aside, the court would have to direct an assessment in which the court would have to consider the fundamental question of what fees were reasonable in amount and had been reasonably incurred.

Fair and Reasonable?
What is either fair or reasonable is, of course, a value judgement and is likely very much to be determined on the facts of each given case. In all the recent cases, however, the courts have started with the guidance given in the late 19th century in respect of provisions which were in similar terms to the current provisions and found in sections 8 and 9 of the Attorneys & Solicitors Act 1870. In *Re Stuart, ex parte Cathcart* (1893) 2 QB 201, Lord Esher MR held:

> *"With regard to the fairness of such an agreement, it appears to me that this refers to the mode of obtaining the agreement, and that if a solicitor makes an agreement with a client who fully understands and appreciates that agreement that satisfies the requirement as to fairness. But the agreement must also be reasonable, and in determining whether it is so the matters covered by the expression 'fair' cannot be reintroduced. As to this part of the requirements of the statute, I am of the opinion that the meaning is that when an agreement is challenged the solicitor must not only satisfy the court that the agreement was absolutely fair with regard to the way in which it was obtained, but must satisfy the court that the terms of that agreement are reasonable. If in the opinion of the court they are not reasonable, having regard to the kind of work which the solicitor has to do under the agreement, the court are bound to say that the solicitor, as an officer of the court, has no right to an unreasonable payment for the work which he has done, and ought not to have made an agreement for remuneration in such a manner."*

Thus, the first point to make is that "*fairness*" and "*reasonableness*" are two distinct concepts which have to be dealt with separately.

In B*olt Burdon Solicitors v Tariq* [2016] EWHC 811 (QB), Spencer J was concerned with a NCBA

where the client was seeking compensation from a bank under the Financial Conduct Authority Redress Scheme on the basis that he had been mis-sold an interest rate swap. The client and the solicitor entered into a contingency fee agreement, providing for the solicitors to receive 50% of any compensation recovered plus disbursements. The value of the work done on a time basis would have been about £50,000, but half of the amount of the compensation was just over £400,000.

As regards fairness, in that case the court found that the agreement had been properly explained to the client and the client fully understood it. As regards reasonableness, the court found that the agreement had represented a speculative joint business venture in which the solicitors were being asked to take all the risk with the client being exposed to no risk at all, and that when the client first approached the solicitors the prospects of any recovery at all were "*extremely bleak*". It is noteworthy that the court did not limit itself when considering the reasonableness of the charge to consideration of the work done, it also took account of the risk the solicitors were taking.

Returning to the *Tripipatkul* case, this concerned a fixed fee agreement of £250,000 plus VAT in respect of a dispute between the client, an experienced property investor, and a long leaseholder of two flats in a building of which she owned the freehold.

As regards fairness, at paragraph 109 of the judgment, the court considered that the client had not been provided with sufficient information to be able to consider the reasonableness of the terms and was not in a position to consider the same. The court considered it required more than simply advice as to the effect of entering into a fixed fee agreement. Further, in paragraph 110, the court took into account the fact that the client was already a client of the solicitor when the fixed fee agreement was entered into (in contrast to the *Bolt Burdon* case), that meant that the solicitor stood in the position of a fiduciary and, therefore, fully informed consent was required and the court was not satisfied that fully or adequately informed consent had been given.

As regards reasonableness, there were various reasons why the court considered the agreement unreasonable. Again, there was a distinction with the *Bolt Burdon* case because of the lack of risk involved and, therefore, the court was happier to go behind the amount agreed and look at how it stood in relation to the anticipated work. At paragraph 87, the court found that the figure of £250,000 was very substantially in excess of what the court would expect to see charged for the work done and the work to be done. The court held that a consideration of the likely course of the appeal suggested that the fees claimed were grossly excessive, considering that no more than £10,000 to £15,000 would have been a reasonable pre-estimate of costs.

It is easy to see the distinction between those two cases, namely that in the *Bolt Burdon* case there was a business joint venture where the solicitors were taking a significant risk. The justification in the latter case was that the client had not paid and that the solicitor could have ceased acting and, therefore, the imposition of a large fixed fee was reasonable. In that regard, the court considered that that was not a factor that could be taken into account in reasonableness on the basis of *ex parte Cathcart*.

Returning, lastly, to the *Acupay* case, there, in the alternative, the court held that the agreement, even if it was a CBA, was both fair and reasonable. Again, the case is very fact specific but highlights were that the client fully understood and had a full explanation of the agreement. The court held that independent legal advice was not a pre-requisite to informed consent. The court further held that the client had been fully informed as to the likely costs of the litigation.

The contrasting results of the above cases simply illustrate the contrasting facts, but the approach of the courts in each has been similar. These cases help to elucidate the court's approach and reaffirm the continuing authority of *ex parte Cathcart*.

IS IT SAFE TO STEP INTO THE WORLD OF DBAs YET?

Shaman Kapoor

This article puts in the spotlight the Court of Appeal case of *Zuberi v Lexlaw Limited, intervened by The General Council of the Bar of England and Wales* [2021] EWCA Civ 16. The Court of Appeal's opening paragraph sets the scene:

> *"A client enters into a contract of retainer with solicitors to prosecute a claim. The contract provides that in the event of success the solicitors will be entitled to a share of the recoveries. The client achieves success by means of a settlement of the claim; and the solicitors claim their share. But the contract also contains a clause which says that if the client terminates the retainer prematurely (which she did not), she must pay the solicitors' normal fees and disbursements. Does the existence of that clause invalidate the whole contract?"*

Key Facts

Mrs. Zuberi borrowed money from a bank. She subsequently brought a claim against the bank alleging that she had been missold certain financial products. She retained Lexlaw to act on her behalf under the terms of a written agreement. An offer was eventually made by the bank to settle her claim and Mrs. Zuberi accepted.

Win – clause 9.1

The retainer provided that Lexlaw were entitled to 12% of any sum recovered plus expenses (such as disbursements). Lexlaw claimed that the sum due amounted to just under £130,000.

Lose – clause 10

The retainer also provided that if the claim was lost, the client was liable to pay expenses only.

Termination – clause 6.2

The retainer went on to provide that in the event of termination, the client would pay Costs (time charged at an hourly rate) and Expenses (instructing third parties and disbursements) up to the date of termination within 1 month of delivery their bill.

Common Law

Retainers under which a lawyer was entitled to share in the client's recoveries in contentious work have been prohibited on grounds of public policy as being champertous at common law. (Legislation has created islands of legality in this sea of illegality, see for example conditional fee agreements.) Where all of the terms of a contract are illegal or contrary to public policy, the contract is unenforceable. However, if certain provisions can be severed so as to distinguish the legal from the illegal, then the residual legal contract can be enforced.

Citing the Supreme Court in *Tillman v Egon Zehnder Ltd* [2019] UKSC 32, the Court of Appeal set out the criteria that must be fulfilled before severance is possible:

a) The offending provision can be removed without modifying or adding to other terms of the agreement;

b) The remaining terms continue to be supported by adequate consideration; and

c) The removal of the unenforceable part of the contract does not change the nature of the contract, such that it is not the sort of contract that the parties entered into at all.

Legislative framework

Sir Rupert Jackson's review of the civil costs regime recommended as many funding methods as possible to be available to litigants to promote access to justice. Upon the Government's take up of those recommendations, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 amended the Courts and Legal Services Act 1990 ("CLSA") so as to permit lawyers to enter into DBAs in contentious litigation with effect from 19 January 2013, but subject to stringent limits. The latest version of the applicable regulations are the Damages-Based Agreement Regulations 2013 and the appeal turned on the interpretation of Regulation 4 which provided:

(4)

(1) ...a damages-based agreement must not require an amount to be paid by the client other than –

a) The payment, net of-

(i) Any costs...; and

(ii) Where relevant, any sum in respect of disbursements incurred by the representative in respect of counsel's fees, that have been paid or are payable by another party to the proceedings by agreement or order; and

b) Any expenses incurred by the representative, net of any amount which has been paid or is payable by another party to the proceedings by agreement or order.

"Payment" is defined by the Regulations as that part of the sum recovered in respect of the claim or damages awarded that the client agrees to pay the representative.

Different limits imposed upon DBAs by reference to a percentage of damages apply depending on the subject matter and in this case the limit was set by Regulation 4(3), namely, including VAT, payment equal to 50% of the sums ultimately recovered by the client.

Analysis

Interestingly, the Regulations went on to permit termination provisions in the case of employment matters, in which case "costs" based on the conventional time spent at an hourly rate would be permitted. However, the presence of specific regulation to only employment matters strongly suggested the absence of generic application, such that a natural reading of the Regulations appeared to mean that "costs" in the event of termination would offend the definition of a DBA in regulation 4(1). The critical words being *"...must not require an amount to be paid by the client other than..."*.

The drafting of the Regulations has long been considered to be the greatest problem in the wider use of DBAs, described by the Court of Appeal as *"far from comprehensive"* and not *"the draftsman's finest hour"*.

Lewison LJ applied a purposive approach to the construction of the legislation having regard to the context and scheme of the legislation as a whole and considered the Court not confined to the literal interpretation. The question was said to always be "whether the relevant provisions of statute, on its true construction, applies to the facts as found". He went on to assert the general presumption that Parliament did not intend to make changes to the common law except expressly or by necessary implication.

Lewison LJ considered the two possible views of DBAs: (i) that if any of the contract of retainer contains provisions about the entitlement of the representative to a share of recoveries, then the whole contract of retainer is a DBA; or (ii) that if a contract of retainer has provisions entitling a representative to a share of recoveries, but also contains other provisions which provide for payment on a different basis, or other terms which do not deal with payment at all, **only those provisions in the contract of retainer which deal with payment out of recoveries amount to the DBA.** Lewison LJ preferred the latter.

This view has surprised some, but what it does show is a willingness amongst the Court of Appeal to find a workable route for DBAs.

The words "*other than*" in the Regulations appear to be express (and the explanatory note to the Regulations reiterates that failing to comply with the Regulations would mean that the DBA will not be enforceable and the representative will receive no payment). But what is not express is the disapplication of the common law position on severance. And Lewison LJ considered that the conditions of severance were "amply fulfilled in this case". He considered that clause 6.2 (pertaining to termination) could have been

severed thus leaving the remainder of the contract enforceable. [There was little more consideration of the severance point particularly because the point had not been taken on appeal.]

Lewison LJ seemed to go even further to suggest that a DBA might or might not preclude or limit the representative from charging fees if the claim were lost. So, on this analysis, it seems we can have DBAs with "costs" on termination; and DBAs with "costs" (discounted or not) in the event of a loss. Has the landscape shifted to accommodate "upside, upside" for the representative? Could this be even 'better' than CFAs with success fees?

Perhaps not, in the eyes of Newey LJ. Dissenting with the reasoning of Lewison LJ, he took the view that the legislation was inconsistent with hybrid DBAs pointing out that the alternative approach appeared to suggest that a retainer could indeed provide for both half of recoveries and full-time costs in the event of the claim succeeding. This was considered to be inconsistent with the construction of the legislation, its history and its terms, particularly having regard to the genesis of the scheme that had been borne out of "no fee" in the event of a "no win".

But Newey LJ came to the same overall conclusion (that the DBA in this case was compliant) based on the view that clause 6.2 did not fall foul of the Regulations. Reasoning for that conclusion included that the Regulations were not intended to apply to an early termination given that when they were introduced to the House of Lords, they were said to replicate the 2010 regulations save for the cap imposed by Regulation 4, and the 2010 regulations had at regulation 6 specific provision for costs and expenses in the event of early termination.

Coulson LJ reinforced the point of view that the term DBA should be given a narrow meaning. He considered that other terms, not relating to payment such as the location of where the work will be done or expenses or even termination provisions had nothing to do with the payment as defined in the Regulations, and therefore not a part of the DBA itself.

Coulson LJ considered that if his approach was too narrow an interpretation, then he would agree with the approach of Newey LJ. He also described the suggestion that a termination clause rendered the retainer entirely unenforceable as commercial nonsense and commercial suicide for the lawyer in the face of what was the statutory purpose of the scheme, namely, to encourage the use of DBAs.

What we see in this judgment is impressive gymnastics to support the use of DBAs which can only encourage the profession, notwithstanding the problematic regulations. Of course, there remain considerable limitations, and the contrasting approach of the Court of Appeal underscores the need for care in drafting such agreements. One might have hoped for even greater clarity, but perhaps we will only have that once the Regulations in their current form are replaced (which work is ongoing and currently subject to an independent review). Whilst it is clear that termination provisions do not conflict with the Regulations, and that some members of the Court of Appeal have appetite for upholding hybrid-DBAs, the different approaches demonstrate still the possibility of a range of outcome. Proceed, but proceed with care.

SOLICITOR'S INDEMNITY FOR ADVERSE COSTS – CHAMPERTY?

Nicola Greaney

A recent decision of Master Rowley gives some insight into the court's attitude to fee arrangements that are on offer from solicitors to attract clients in low value litigation. *Edwards & Ors v Slater & Gordon UK Limited* [2021] EWHC B19 (Costs) was concerned with claims for solicitor-own client assessment brought by former Slater and Gordon (S and G) clients pursuant to section 70 of the Solicitors Act 1974, represented by Clear Legal (trading as Checkmylegalfees).

The fee model on offer from Clear Legal included the option of a CFA Lite with an indemnity against adverse costs orders. S and G are facing multiple claims brought by Clear Legal by claimants who challenge deductions made from their damages to pay S and G's fees. 10 cases are proceedings as test cases. Master Rowley was asked to determine the claimants' application for standard disclosure by list because they seek to raise informed consent arguments on the basis that the S and G sign up process was "lightning fast" and they were not given the information that it would be expected that a solicitor would provide. In particular, the claimants sought the recordings of the sign up calls. Master Rowley granted the application and rejected S and G's argument that CPR Part 31 did not apply to Solicitors Act proceedings or there was some other point of principle as to why disclosure should not be ordered. The confirmation that CPR Part 31 applies to Solicitors Act proceedings is welcome. Master Rowley made clear that he would have used his general case management powers to have ordered disclosure in any event.

S and G made a cross-application for a stay of the proceedings or in the alternative, an application for security for costs against Clear Legal, on the basis that Clear Legal were unlawfully providing insurance to at least some claimants and/or acting champertously. The basis of S and G's argument was that Clear Legal did not have the wherewithal to meet adverse orders for costs, is a company made of straw as far as the indemnity is concerned (for those claimants that had one) and has left those claimants who are not indemnified unaware of their potential liabilities for costs.
A central plank of S and G's case was that the indemnity offered to some claimants for adverse costs amounted to insurance which was unlawful because Clear Legal is not a regulated entity.
Master Rowley roundly rejected the argument that Clear Legal was offering a contract of insurance.
The real difficulty for S and G as regards the insurance argument was the decision in *Morris and Sibthorpe v Southwark LBC* [2010] EWHC 901 (QB) heard by MacDuff J sitting with assessors (which went on appeal on the champerty point and the CoA dismissed the appeal). In *Sibthorpe*, Council tenants challenged the Council's failure to carry out repairs and instructed solicitors under CFAs who offered an indemnity against the risk of having to pay the Council's costs if they lost their claims. MacDuff J held in his judgment that there was no contract of insurance. It was a contract for legal services and the indemnity clause was only a "subsidiary part of the contract". S and G sought to distinguish the decision on its facts on the basis that (i) the number of claims brought against S and G showed that the indemnity could be called upon in significant numbers (whereas the court in *Sibthorpe* had said it would be used rarely) and (ii) the higher hourly rate paid by the claimants for the indemnity in this case amounted to a premium. Master Rowley noted that the insurance point was based upon a paucity of evidence and a single sentence in the overall covering letter (welcome pack), albeit repeated, that said that the justification for the hourly rate was in part the indemnity offered by the solicitors. Clear Legal's documentation also stated that the same hourly rate was charged if no indemnity was offered and if they acted on a privately paying basis.

Master Rowley observed that many of the claims brought by Clear Legal were for modest sums and would be settled in the pre-proceedings environment (to which separate contingency

fee arrangements applied). He rejected on the facts the argument that the indemnity offered was likely to have a significant impact on Clear Legal's business on the basis that the cost was spread over the entire case-load of indemnified and non-indemnified claims. He was not satisfied that there was a payment analogous to a premium which would provide consideration for a contract of insurance. Even if he was wrong about that, he concluded that the indemnity was entirely subsidiary so that it was a contract for legal services and not insurance.

He rejected the champerty argument for similar reasons. He said that there was nothing in the arrangements that came close to "trafficking in litigation". Indeed, he noted the witness evidence filed on behalf of Clear Legal that ATE insurance was not available and said that position was not surprising given the low value of the claims and the expectation that they would be stoutly defended. The need for an indemnity was a logical one in the absence of the availability of ATE. As the Court of Appeal found in Sibthorpe, the solicitor's interest in the litigation was solely a negative one. Clear Legal were offering a CFA Lite in "terms which solicitors up and down the country are prepared to offer their clients".

Master Rowley further rejected S and G's alternative application for security for costs. The gateway in rule 25.14 was not met in showing that Clear Legal have contributed to the claimants' costs in order to obtain a share of sums recovered by the claimants. S and G had not shown that Clear Legal had stepped outside its legal advisor role such that a section 51 (non-party costs) order was probable at this stage.

The decision of Master Rowley is a sensible one that recognizes the real difficulties in the current legal market for individuals that want to bring claims for which ATE cover is available and where QOWCS does not apply. Solicitors have sought to come up with solutions to assist such as an indemnity for adverse costs and the courts are unlikely to stand in the way of pragmatic measures such as these.

Readers may observe by contrast that the courts have been less willing to recognise the practical realities for impecunious claimants who finance disbursements in personal injury litigation by taking out loans. In *Godfrey v Automotive Products Ltd* last year, District Judge Baldwin sitting as Regional Costs Judge on an oral review of a provisional assessment, followed the general trend in personal injury cases of not allowing pre-judgment interest (17 December 2020). Whilst he accepted that a discretion to make the award existed (r. 44.2(6)(g)), as was recognized in the group litigation context in *Jones v Secretary of State for Energy & Climate Change* [2014] 3 All ER 956, he did not exercise his discretion to do so. He observed that the standard approach in personal injury cases was to award Judgment Act interest from the date of the costs order which provided an element of noticeable over-compensation at 8% given the current level of base rates and therefore, off-set to a not insignificant extent any under-compensation from not awarding pre-judgment interest. The dichotomy between the approach in the Commercial Court (where pre-judgment interest at a commercial rate is generally awarded) and the civil courts in most personal injury litigation persists. It is fair to say that the claimant in Godfrey had not made good his evidential case for a real and genuine need for financing his disbursements by loans but equally it is clear as things stand, that a court will require persuasive evidence that takes the case out of the run of the mill personal injury category before making any award of pre-judgment interest. It may be that a claimant would have greater success in a high value personal injury claim where there was a need for instructing a number of experts. But for many, the cost of disbursement funding loans (or at least some of the cost) will continue to come out of their damages.

CROSS-UNDERTAKING WHEN SEEKING SECURITY FOR COSTS?

Daniel Kozelko

In *Rowe v Ingenious Media Holdings* [2021] EWCA Civ 29; [2021] 1 WLR 3189 the Court of Appeal considered the circumstances in which a defendant seeking security for costs should be required to provide a cross-undertaking in damages. The case makes clear that the making of a cross-undertaking will require exceptional circumstances, especially when a litigation funder is involved, and also provides some useful commentary on general costs principles.

The underlying facts were that the Ingenious Defendants had promoted and operated certain tax efficient schemes in which the Claimants had invested. Subsequently, the Upper Tribunal held that the schemes were ineffective, and the Claimants brought claims against the Ingenious Defendants and various advisors. Therium, a litigation funder, had provided finance to 250 Claimants ("the Funded Stewarts Claimants"). The Ingenious Defendants and their advisors (together "the Security Defendants") sought security for costs against Therium under CPR r25.14.

Therium and the Funded Stewarts Claimants had agreed that Therium would provide the security for costs (if ordered) and any additional costs. If the Funded Stewarts Claimants were to succeed in their claims, Therium would recover the Security for costs and a sum representing 2½ times the security for costs (called "the Enhanced Return"). The Enhanced Return would be funded out of any damages recovered by the Funded Stewarts Claimants.

In his first judgment Nugee J made the order for security for costs, but refused to require a cross-undertaking in damages for any losses consequential on the order. He was particularly resistant to the suggestion that such an undertaking should be provided to protect the Enhanced Return. That decision was appealed by the Funded Stewarts Claimants. In his second judgment, Nugee J did require a cross-undertaking to cover "the External Costs" (which primarily related to the cost of bonding the existing ATE premiums). That decision was cross-appealed by the Security Defendants.

The judgment of the Court of Appeal was given by Popplewell LJ, with whom Floyd and Henderson LJJ agreed. They dismissed the appeal and allowed the cross-appeal.

Popplewell LJ first considered whether there was jurisdiction to require a cross-undertaking. He noted that nothing in the CPR or Practice Directions provided for cross-undertakings as condition of an order for security for costs. However, the Commercial Court Guide did have a statement indicating that this could be ordered. It was noted that a court does not order a cross-undertaking, but instead requires it to be given; it is essentially a condition applied to an order. As such, Popplewell LJ concluded that the provision applicable to jurisdiction for requiring a cross-undertaking was CPR r3.1(3), that provision allowing a condition to be applied to an order made under CPR r3.1(2).

Popplewell LJ then went on to consider the general principle of requiring a cross-undertaking as part of making an order for security for costs. Generally, claimants are not insulated from having to bear the costs or losses incurred as a result of pursuing claims in civil litigation. This is so both for the costs of conducting litigation, and the expenses incurred as a result of funding those costs. Losses caused to a claimant or defendant in funding litigation generally lie where they fall. A cross-undertaking effectively reallocates this risk from one party to another. Thus it is an exceptional departure from the general principle.

Having concluded that the background suggests a cross-undertaking is at the very least an exceptional remedy, he went on to consider whether Article 6 ECHR changed anything. He concluded that it did not. Case law addressing

security for costs had already established human rights compliance, particularly because of the principle that such an order would not be permitted to stifle a claim. He also considered any analogy with an interim injunction or freezing injunction was inapposite. These types of order were an exceptional remedy aimed at restraining a defendant in the use of their assets. It is not aimed at litigation funding, which is an ordinary incident of civil litigation. Finally, Popplewell LJ identified various practical difficulties would arise if cross-undertakings became the norm. As such, he held cross-undertaking should not be required in return for an order for security save in rare and exceptional circumstances.

Turning to litigation funders, Popplewell LJ considered that the circumstances needed for requiring such a cross-undertaking should be even rarer and more exceptional. Case law establishes that the costs of litigation funders in providing a claimant money to be put up for security for costs should not be treated any differently from other costs incurred by the funder in funding the costs of litigation. Commercial funders are not motivated by considerations of access to justice; they are investors looking to make a return on investment. Such litigation funders ought to be properly capitalised in order to meet adverse costs orders if the claim fails. They should be in a position to defeat any application for an order for security by providing ability to meet the costs.

The Association of Litigation Funders recognises it is a critical feature of the business of litigation funding that funders should have adequate resources to meet potential liabilities. It follows properly run commercial funders should rarely if ever be ordered to put up security. The problem on these facts was that Therium had failed to show its business was structured to meet the costs orders. A principle that cross-undertakings will not be required where orders for security are made against under-capitalised commercial funders can be expected to incentivise improvements in the way that market operates. To provide cross-undertakings would incentivise funders to be deliberately reticent about financial means.

On the facts, there was nothing exceptional in this case. As such, Popplewell LJ dismissed the appeal and allowed the cross-appeal, meaning that there was no cross-undertaking required as a condition of the order for security for costs.

LASER TRUST V CFL FINANCE LTD [2021] EWHC 1404 – THIRD-PARTY COSTS ORDERS AND WATERING DOWN THE 'ARKIN CAP'

Jack Holborn

How much should a commercial funder have to pay if the party they back lost the litigation? Should those costs be capped at what the funder actually paid in respect of the losing party's costs, as was suggested in *Arkin v Borchard Lines Ltd* [2005] 1 WLR 3055?

Those were the questions for the High Court considering what order to make against a third-party funder in litigation regarding a dispute over a bankruptcy petition. The receiving party (Laser Trust) had the benefit of costs orders against CFL Finance Ltd, some £330,000 of which remained outstanding along with interest. Documentation showing the funding arrangements between CFL and Colosseum were before the Court, which on paper showed "control [over the litigation] of an extraordinarily high order". Colosseum and CFL – who were not represented at the hearing – had not given "a completely full and frank answer" as to "the extent to which Colosseum ran the show".

In light of this the Court considered it could draw an inference of "extreme control by Colosseum", which was the "natural inference" of the funding agreement. Marcus Smith J found that "the interest of Colosseum in these proceeding was so great that the so-called *Arkin-cap*... should not apply". Colosseum was ordered to pay the costs in the amount already assessed.

What to draw from this? Firstly, it is clear that the

Arkin cap is a guide rather than a binding rule in cases where there is a commercial funder – an unsurprising conclusion in light of the Court of Appeal's decision in *Chapelgate Credit Opportunity Master Fund Ltd v James Money* [2020] EWCA Civ 246. The broad discretion remains depending upon the level of control exercised by the funder, and no doubt the interest of the funder in the outcome of the litigation.

However, it also highlights the potential importance of frank and open responses by third party funders where their role is challenged, and of preparing evidence in response to any application. The Court can only draw on the evidence it has before it. An agreement on paper may well give a funder control over the litigation in principle, but if the practice was different there are arguments to be made – for application of the *Arkin* cap or some other limit on the order.

SET-OFF AND QOCS: THE FINAL WORD IN *HO*

Judith Ayling QC

On 6 October 2021 the Supreme Court (Lord Briggs, Lady Arden, Lord Kitchin, Lord Burrows and Lady Rose) gave judgment in *Ho v Adelekun* [2021] UKSC 3. APIL intervened. The judgment seems finally to put to rest the controversy which has existed since the introduction of QOCS on 1 April 2013 about its interaction with the set-off provision in CPR 44.12.

The Supreme Court expressed doubt about being asked to hear the question at all, because the fact that two eminently constituted Courts of Appeal (in *Howe v MIB and Ho v Adelekun* below) had differed profoundly about the interpretation of a provision of the CPR suggested there was an ambiguity which needed to be sorted by the Civil Procedure Rule Committee. But having been asked to determine the question, and permission having been given, it did so.

Ms Adelekun was injured in a RTA. She accepted a Part 36 offer of £30,000 with the Defendant therefore to pay her costs of the claim, and following *Cartwright v Venduct Engineering Ltd* [2018] EWCA Civ 1654 there was no court order for damages against which any costs in favour of the Defendant could be set off. A dispute arose as to whether those should be fixed costs under CPR 45 IIIA or on the standard basis – the difference was some £25,000. That question was resolved in the Defendant's favour at first instance, overturned on first appeal, but then finally again decided in the Defendant's favour by the Court of Appeal. The Defendant's costs of succeeding in that assessment dispute were some £48,600. She could not set them off against damages because of Cartwright, and so sought to set them off against the fixed costs of some £16,700. The Court of Appeal allowed the set-off, considering it was bound by *Howe v MIB*. The Supreme Court reversed this decision and *Howe v MIB* [2020] Costs LR 297 is no longer good law.

The short answer is that awards of costs in the Defendant's favour may be enforced only up to an amount equivalent to the aggregate of court orders for damages and costs in favour of the Claimant, save where the QOCS exceptions apply. The Court's power to make costs orders under CPR 44.2 (whether at trial, at pre-trial interim hearings, at the conclusion of contested costs proceedings post-trial or later still on appeal) is not directly affected by QOCS, but rather the scheme is focussed entirely on what a Defendant can do by way of enforcement of a costs order once obtained. CPR 44.14 did not in terms operate as a total ban on set-off of opposing costs orders, but imposed a monetary cap. So if the Claimant were awarded damages of £20,000 in damages and interest, but the Defendant had costs orders in aggregate for £30,000, it could set off its damages liability against the Claimant's costs liability but only up to £20,000; if the Defendant had already paid damages of £20,000 over before its costs were assessed, then it could enforce costs orders by any other available means (set-off being in practice unavailable) but only up to £20,000. Therefore the established jurisdiction to direct set-off of costs against costs under rule 44.12 was

not displaced by QOCS, but damages and interest operated as a cap, as above.

In reaching its decision, the Supreme Court stated that if there were policy consequences, that was a matter for the Civil Procedure Rule Committee to put right. The purpose of QOCS had been to seek to rebalance an inherently tilted playing field, the question was how far that levelling process had been intended to go, and the Court was simply to decide a question of construction.

At least there is certainty. Some unfairness will result. Here the Defendant could not enforce any of her substantial costs award. But the Supreme Court held that any apparent unfairness in an individual case such as this was part and parcel of the overall QOCS scheme.The judgment removes one unfairness to Claimants which was possible had CPR 44.12 applied untrammelled by QOCS. See *Faulkner v Secretary of State for Business, Energy and Industrial Strategy* [2020] EWHC 296 where the Court refused to exercise its discretion under CPR 44.12 and Howe to order set-off, where the Defendant had tried and failed to set aside a Notice of Discontinuance so as to have the claim struck out and deprive the Claimant of QOCS protection: the application was very weak and its bid to strike out the resurrected claim doomed to fail. Any set-off would effectively have entitled the Defendant free of costs risk in making a weak application, and so the discretion was not exercised.

It remains to be seen what the Civil Procedure Rules Committee will make of this!

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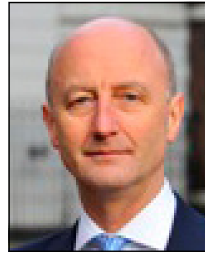

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