The joy of DBAs

Highs, lows, successes & appreciative clients—Richard Spector shares his personal experience of damages-based agreements

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IN BRIEF

- Presents a solicitor's personal experience of running damages-based agreement cases.
- A low experience was where satellite litigation reduced the fee despite the case succeeding.
- Outcomes are mainly positive, with good returns especially where cases settle early, and strengthens bonds between solicitor and client.

I have always thought of myself as one of the few solicitors who is a leading proponent of damages-based agreements (DBAs). DBAs are a form of fee agreement whereby the solicitor acts on a no-win no-fee basis and is entitled to a percentage of any damages recovered by the client.

DBAs were introduced by the Damages-Based Agreements Regulations 2013, SI 2013/609, and have not proven overly popular among solicitors so far. Solicitors have been reluctant to take on the additional risk of a DBA where, if they lose, they get nothing at all and, if they win, their fees depend on the amount of damages recovered. Damages are always strongly contested and the assessment of damages at the outset of the case when the DBA is entered into can be vastly different from the assessment of damages nearer to trial.

Drawbacks

There are other negatives at play to deter solicitors. For example, the DBA requires the solicitor to pay out for counsel's fees and the solicitors get their payment initially from the costs awarded (if costs are awarded), meaning a solicitor may have to wait years for costs assessment before they become entitled to their fees. Most concerning for solicitors is that if the DBA breaches the regulations (and the regulations are confusing in how they are drafted), then a successful challenge to the DBA will mean the solicitor is paid zero even after years of hard work and a successful outcome for the client. This encourages satellite litigation.

I have been on the end of such satellite litigation. My firm (actually, my ex-firm) entered into a DBA in the summer of 2013 to act for the claimant in a large case in the High Court. Our two leading counsel were also party to the DBA, and I think it was probably the first large-scale DBA in England. I also do not know of any other DBAs where counsel have been party to the same DBA as the solicitors. The case went to a seven-week trial in the summer of 2016. Judgment was handed down in September 2016 and we achieved a successful result for our client. Our client was awarded approximately £10m including interest. Despite this success, our client, which was an offshore company, had debts of more than the sum it was awarded and the creditors pulled the plug. They appointed KPMG as trustees in bankruptcy.

> *"The DBA is the only fee structure which is a true joint venture between client & solicitor"*

KPMG challenged the DBA, which in turn led the defendants to support that challenge because they realised that if it succeeded then their liability for adverse costs would be zero. This was a real problem, because I think KPMG took their stance to try and force us to negotiate down the sum due under the DBA, but once the defendants realised the benefit to them it, was impossible to do a deal as the defendants saw that, on a costs risk analysis, it was financially worth it to them to challenge the DBA in court. Initially KPMG said they would pay the solicitors but not the barristers. They then changed their stance and challenged both solicitors and barristers. We instructed Herbert Smith Freehills to act for us on what I understand was their first DBA. On the second day of a three-day trial, the defendants settled with us. Although we achieved a successful outcome the result was that we had to pay Herbert Smith Freehills, so we ended up with much less than we should have received under the DBA with the defendants.

The benefits of DBAs

Despite that experience, I have continued to act on DBAs and have found them to be a very positive experience so far. Of course, there can be a financial advantage if you pick and choose your cases correctly. If a case has good quantum and it settles early, then the fees can be very good; although litigation often doesn't follow logic, meaning cases that should settle early end up at trial where quantum comes under great scrutiny.

The key driver for me on DBAs is the client experience. There is no other fee structure which provides you with the client experience that you have with a DBA. The other no-win no-fee structure is a conditional fee agreement known as a CFA which is an agreement where the client is only liable to pay the solicitor if the claim is successful. Under a CFA, the client will pay the solicitor its costs (ie the costs incurred on an hourly rate basis) plus an uplift on those costs as a success fee. This means that the fees charged by the solicitor are based on time incurred by the solicitor, and those fees plus the success fee are due regardless of whether the claim is successful to the tune of £1 of £1,000,000. Other fee structures are hourly rates or fixed

fees, and those are payable by the client regardless of the outcome.

The DBA is genuinely like a joint venture between solicitor and client. If the client is successful, then so is the solicitor. Similarly, if the client fails to win or achieve a good recovery, then the solicitor gets paid nothing or very little. The solicitor and client are in it together. They win and lose together. What the solicitor gets paid is linked only to what the client recovers. Clients increasingly want their solicitor to take on some of the risk and generally solicitors in this country have fought against this but, as time goes on, I think the solicitor has to take some of the risk, and if that is managed well then the gain can be great—and not just financially. Of course, a solicitor has to put in the same effort regardless of the fee structure, but optically for the client the DBA means the solicitor will want not just to win for you, but to get you the best possible outcome. Further, when acting on a CFA or an hourly rate, the client may sometimes think (wrongly or rightly) that the solicitor is doing certain things to rack up time and costs, but under the DBA the client does not have that concern. In some senses the solicitor is taking on more risk than the client, because if the case is unsuccessful or damages are low then the solicitor has done a lot of work for little or no payment. A successful DBA takes the client relationship further than any other form of fee arrangement between solicitor and client. It solidifies and moves forward a relationship where the client sees their solicitor as someone who is working genuinely in their best interests and wants the best for them. Even when the DBA is unsuccessful, the client will appreciate the relationship that was formed under the DBA.

> *"The solicitor & client are in it together"*

The DBA is the only fee structure which is a true joint venture between client and solicitor and it really is unique. There are no other fee structures which are determined only by exactly what the client recovers. Solicitors have always been of the mindset that we should be paid by reference to the work we have done; that does make sense, but you can understand the client's desire for payment to be linked to what the client actually gets. If a solicitor picks a good case on a DBA that settles early then the solicitor can sometimes earn far more than the time they have spent, and even in that situation my experience is the client has been more than happy because they appreciate the risk the solicitor took.

When taking on a case on a DBA, the solicitor needs to have a good idea of the range of quantum, prospects of success and prospects of recoverability. If those all add up, then DBAs present a real opportunity for solicitors to solidify and enhance their client relationships with a financially satisfactory result. I have focused on DBAs for high-value complex litigation, and I think I am one of the few advocating that. The risks involved in high-value complex litigation include a potentially drastic change in quantum as the case progresses. In my experience, however, as long as you choose the right cases and do not overload on them then the benefit outweighs the risk, and it is a fantastic way to build your practice and your relationship with your clients. NLJ

Richard Spector, partner and dispute resolution lawyer at law firm Spector Constant and Williams (*www.scwlegal.co.uk*).