

AnthonyGold



Housing Costs & Funding: CFAs and DBAs

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Funding & Costs

- Funding
 - CFAs
 - DBAs
- Adverse costs
 - QOCS
 - ATE
 - Sibthorpe indemnity
 - Client

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About me

David Marshall

- Managing Partner, Anthony Gold, still runs a part caseload
- Chair of the Law Society's Civil Justice Committee
- Civil Justice Council Costs Committee
- Past APIL President
- Author
 - Jordans Personal Injury looseleaf – General Editor & contributor (costs & funding)
 - APIL Jordans Personal Injury Costs & Funding (2014) – co-author
 - Law Society Costs & Funding Handbook (forthcoming) – contributor

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Unlawful contingency fee agreements

- No common law contingency fees for contentious work
 - (*Auwad v Geraghty & Co (a firm) [2000] 1 All ER 608*).
- So, if outside the statutory protection, all costs payable under the funding arrangement (by client or between the parties) are unenforceable
 - *Garrett v Halton BC; Myatt and others v NCB [2006] EWCA Civ 1017*

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CFA (Conditional Fee Agreement)

- Courts & Legal Services Act 1990 (s58 as amended)
- First permitted in 1995
- Access to Justice Act 1999
 - Recoverable success fee
 - Costs Wars
 - 'CFA Lite'
- Jackson Report

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Legal Aid Sentencing & Punishment of Offenders Act 2012 (LASPO)

- S44 makes Success Fees irrecoverable
 - Except, temporarily (?) for mesothelioma, insolvency, defamation
- CLSA 1990 (as amended)
 - Any success fee is an uplift to be applied to base costs in 'specified circumstances' (i.e. in those circumstances which are specified within the CFA).
- The Conditional Fee Agreements Order 2013
 - Maximum Success Fee 100%
 - Cap on success fees relating to damages **for personal injury cases only**
 - Is a housing claim which includes PI a 'claim for personal injuries'?
- CLSA 1990 s58A (1) – no CFAs in criminal proceedings:
 - apart from proceedings under section 82 of the Environmental Protection Act 1990
 - No success fee permitted

CFA's: Form of CFA

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- Only statutory requirement as to form is that the CFA must be in writing.
- To establish that a written agreement was in fact provided to and its terms were agreed to by the client, it is good practice that a CFA is signed by both solicitor and client.
- No particular form of agreement is required.
- However, it is important that the agreement adequately deals with all eventualities - especially rights to charge
- Courts have consistently upheld the Law Society's model agreement
- Needs variation for Housing work – especially post-Jackson version
- Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2014

CFA's in Housing Cases

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- Damages claims - Disrepair
- Beware counterclaims (e.g. for rent)
- Defence – possession – no funds to pay a success fee?
- Non-damages claims – judicial review - Part 36 10% uplift
- EPA claims – nil Success Fee
- No win, lower fee
- No win, fixed fee
- Voluntary caps
 - Success Fee on base costs
 - But voluntarily capped as a percentage of damages recovered (eg 50%)
 - Including/excluding other deductions?
 - Solicitor and client costs
 - After the event insurance premium

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Specific points to decide

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- Are you charging a success fee?
- How do you set/explain success fees?
- What are your basic hourly rates? GHRs? Why? Process for increase?
- Will you charge solicitor and client costs on an hourly rate basis?
- Will you offer voluntary cap on unrecovered costs? How much & on what?
- Do you want to charge some fees even if you lose?
 - 'No win, lower fee' or 'No win Fixed fee'?
 - Does the client understand?
- Will you ask the client to pay disbursements on account?
- What about counsel's fees and success fees? APIL/PIBA 9?
- What happens to your fees on a Part 36 offer you advise rejecting but is not beaten? Does the client pay no costs after the offer, or still pay base costs? How does this relate to risk and your success fee?

CFA's – A 50% voluntary cap is NOT a fixed charge on damages

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CFA 50% SF 50% Cap	Base Costs Sol & client	Damages	Fee	Client retains
SO =	2,000	10,000	3,000 (2,000+500)	9,000
NOT	2,000	10,000	7,000 (2,000+5,000)	5,000

Success fee is 50% of £2,000 (£1,000), not 50% of £10,000 (£5,000)
Two percentages (success fee and cap), one applied to costs and the other to damages, is very confusing for clients (and lawyers?!)

Success Fees

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- How do you set a success fee?
- Individualised risk
- 100% for every case?
- What is the success fee for?
- The relevance of pre-April case-law?
- Staging?
- Ready reckoner?
 - Cook on Costs
- The Market

Damages-based Agreements (DBA)

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'Don't Bother Agreements'?

What is a Damages-based Agreement?

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- Jackson
 - “Solicitors and counsel should be permitted to enter into contingency fee agreements with their clients on the Ontario model.”
 - “It is desirable that as many funding methods as possible should be available to litigants.”

Legal Aid Sentencing & Punishment of Offenders Act 2013

- Section 45
- A fee contingent on the outcome, calculated by reference to the damages recovered
- Previously only employment tribunal cases

Damages-based Agreements Regulations 2013

Damages-Based Agreements (DBA)

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- S45 LASPO
- Damages Based Agreements Regulations 2013
- “Ontario” Model
- Indemnity Principle applies
- Cap
 - PI: 25% (general Damages and past loss only) – inc. housing with PI?
 - Employment : 35%
 - Other (so includes housing with no PI element): 50%
- Counsel’s fees must be within the cap (except employment when an expense so on top)
- Other expenses (inc ATE) are on top
- Appeals 100%

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DBAs – A 50% DBA fee is NOT a fixed charge on damages

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DBA – 50%	Base Costs	Damages	Fee	Client retains
SO =	2,000	10,000	5,000 (2,000 + 3,000)	7,000
NOT	2,000	10,000	7,000 (2,000+5,000)	5,000

Clients (and lawyers?) might expect a 50% DBA to lead to a 50% deduction from damages. Not so (unless there is no cost shifting).

Indemnity principle applies to DBAs under CPR 44.18.

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- Damages: £10,000
- DBA Fee 50% (£5,000)
- Between the parties time costs: £7,500
- D pays £5,000. Solicitor writes off £2,500
- ‘Client protection’ ... Or ‘loser protection.’
- DBAs work best in a non-costs shifting environment like the employment tribunal or the small claims track

Other problems

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- Can you terminate? On breach client pays... what?
 - DBA fee... when and on what?
 - Quantum meruit... where?
- Change solicitor?
 - Can it be assigned?
 - Can it be varied to allow payment of agreed fee?
- Hybrid Agreements
 - Can you have a no win, lower fee DBA?
 - (Arguably?) under a DBA the only fee that can be charged is the DBA fee
- Problematic drafting of DBA Regulations
 - If unenforceable, likely no costs payable (per Myatt/Garrett), not quantum meruit (as per Ontario)

Adverse costs

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- ‘No win, no fee’ is less than half the story:
 - Client pays more fees if they do win; and
 - If they lose, potentially liable for winner’s costs (although not for own lawyer’s fee)
 - Ombudsman Report – January 2014
- Client liability for adverse costs:
 - Client has to pay;
 - ‘After the event’ insurance (ATE);
 - QOCS (Qualified One Way Costs Shifting) for Personal Injury only;
 - Solicitor indemnity?
 - Agreed (Sibthorpe & Morris v Southwark)?
 - Implied?

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Qualified One-way Costs Shifting (QOCS) CPR 44 Part II

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In a claim for 'personal injuries' (CPR 44.14),
subject to [CPR 44.15 & 16]

- "...orders for costs made against a claimant may be enforced without the permission of the court but only to the extent of" [damages and interest]

So, if no damages, no costs order

Unless CPR 44.15 or CPR 44.16

QOCS - Mixed claims

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- CPR 44.13 (1)
- "This Section applies to proceedings which include a claim for damages – (a) for personal injuries;"
- CPR 44.16 (2)
- Orders for costs made against the claimant may be enforced up to the full extent of such orders with the permission of the court, and to the extent that it considers just, where...
- (b) a claim is made for the benefit of the claimant other than a claim to which this Section applies."
- So, client cannot know until the end if they will have to pay:
 - Nothing
 - Some
 - All

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After the event insurance

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- Pre-April 2013, premium recoverable as costs if the client wins;
- Post-April 2013, premium irrecoverable so must be paid by the client out of damages if the client wins;
- If the client loses, most (but not all) ATE premiums are not payable, but:
 - Note policy excess
- Consider premium/cover
- Client must choose whether to insure or instead to risk 'blood out of a stone' arguments to avoiding paying out

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Solicitor indemnity?

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- Actual Indemnity
 - *Sibthorpe & Morris v LB Southwark* [2011] EWCA Civ 25
 - Why?
- Deemed Indemnity?
 - *Hodgson & Ors v Imperial Tobacco Ltd & Ors* [1998] EWCA Civ 224
 - *Myatt & Ors v National Coal Board* [2007] EWCA Civ 307
 - *Germany v Flatman/Barchester Healthcare v Weddall* [2011] EWHC 2945 (QB)

How do you explain it all to the client?

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- Alternative funding methods - if a success fee is to be charged, other options:
 - If the client has sufficient funds, and has a very strong claim, the client might choose to pay privately to avoid having to pay a success fee;
 - Before the event legal expenses insurance;
 - Legal Aid – but is this now really a practical option for housing disrepair?
- CFA v DBA:
 - not required to offer DBAs to clients (but say some firms might?)
- Adverse costs – client choice
- **A careful File Note is essential**

Conclusions

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- CFAs are viable as a replacement for legal aid or private funding for damages cases (e.g. disrepair)
 - Success Fees & Caps
 - Varying the Law Society's model agreement
- Can be used for non-damages cases
 - Part 36 10% uplift?
 - No win, lower fee; no win, fixed fee
 - EPA – nil success fee
- DBAs are 'Don't bother agreements', except
 - MOJ review?
 - Non-costs shifting environments (e.g. small claims)
- Remember adverse costs advice

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