Case No: HC-2016-000259

Neutral Citation Number:

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (ChD)

Royal Courts of Justice
The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 10/7/2020

Before:

HHJ PARFITT (sitting as a judge of the High Court)

- -

Between:

LEXLAW LTD	**Claimant**
- and -	
MRS SHAISTA ZUBERI	**Defendant**

- -

JUDGMENT

- -

Hearing date: 7 July 2020

Chris Snell (instructed by **Lexlaw Solicitors & Barristers**) for the **Claimant**

Adrian Davies (instructed by **Connaughts**) for the **Defendant**

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 2.00 pm on 10 July 2020.

HHJ Parfitt:

Introduction

1. The Claimant solicitors sue their former client for payment under a damages-based agreement dated 15 April 2014 ("the Agreement"). On 26 June 2018, Master Clark ordered a preliminary issue trial of the Defendant's allegation that clause 6.2 of the Agreement made it unenforceable because it obliged the Defendant to pay sums to the Claimant other than the payments allowed by regulations 4(1) and/or 4(3) of the Damages-Based Agreements Regulations 2013 ("the 2013 Regulations"). This is my judgment on that preliminary issue.

2. Clause 6.2 of the Agreement states: *…you may terminate this Agreement at any time. However, you are then liable to pay the Costs and Expenses incurred up to the date of termination…*

3. Regulation 4(1) of the 2013 Regulations says: *…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)…counsel's fees, that have been paid or are payable by another party…; and (b) any expenses…net of any amount…paid or payable by another party…*

4. The problem presented by this case is a known one. At p34 of the volume that accompanies the White Book, Costs & Funding Following the Civil Justice Reforms: Questions & Answers, 6th ed, the authors say: *It was hoped that some guidance would be provided by…Lexlaw v Zuberi…Amongst other arguments was that the DBA was unenforceable because it included a provision making the client liable to pay costs and expenses to the date of termination…this is an important point and is seen as one of the key uncertainties preventing the wider use of DBAs…*

5. I have been provided with Cook On Costs 2020, chapter 7 "Damages-Based Agreements" which gives an overview of damages-based agreements, their history and difficulties with their implementation. It appears from that work that there are various problems and proposals for improvement are already before government.

6. The scope of this judgment is the discrete and limited question about whether the relevant legislation in April 2014 made unenforceable the Agreement because the Agreement included an obligation on the Defendant to pay the Claimant's incurred time costs and expenses if the Defendant exercised a contractual right to terminate.

7. I have been much assisted by the written and oral arguments from Mr Snell for the Claimant and Mr Davies for the Defendant.

General Background

8. I have taken this account from the statements of case. I do not understand it to be controversial but whether controversial or not, it is background only and not relevant at any subsequent trial.

9. On 14 May 2008, the Defendant borrowed £2,321,800 from Nat West Bank / RBS ("the Banks") secured over properties she owned and due for repayment on 2 April 2013. As part of that transaction she entered into a 10 year interest rate hedging product dated 23 May 2008. The transaction and/or the Defendant's business was not a success and by Spring 2012 receivers had been appointed and the Defendant's properties were placed in auction.

10. In May 2012, the Defendant instructed the Claimant to act for her in claims against the Banks. A claim was made which included an injunction to prevent the sale of the properties but this was refused on 29 May 2012 ("the Chancery Claim").

11. In June 2012, the FSA announced an agreement with various banks, including RBS, involving a review into the miss-selling of derivative products to SMEs.

12. On 21 August 2012, the Claimant told the Defendant that her claim should be investigated further and this could be done for a fixed fee of £12,500. The Claimant continued to act for the Defendant. Although the Defendant says she was not entirely happy.

13. The Chancery Claim was stayed on 20 November 2012 pending that review.

14. The outcome of the Banks' review was made available in February 2014 and an initial offer was made to the Defendant which she did not find acceptable.

15. In March 2014, the parties discussed a fee proposal moving forward of a damages-based agreement. This was discussed at a meeting on 15 April 2014. What was said at that meeting is controversial but what is common ground is that the Defendant signed the Agreement.

16. The relationship between the Claimant and the Defendant did not flourish (but that and the circumstances around it are disputed). The Claimant says it was acting for the Defendant and engaging with the Banks, including at a meeting on 29 April 2015 during which the Banks said an improved offer would be made.

17. On 18 May 2015, the Defendant sought to terminate her retainer with the Claimant but the Claimant did not accept that termination as bringing the Agreement to an end (I have assumed that since the Claimant claims its recoveries based payment under the Agreement in this claim).

18. On 7 July 2015, the Banks made an improved final offer which was acceptable to the Defendant.

19. On 31 July 2015, the Claimant issued its invoice which is the subject of this claim based on the settlement agreed by the Defendant with the Banks.

20. The Claimant seeks payment under the Agreement of £125,123.14. Among other things, the Defendant seeks to set aside the Agreement because of misrepresentation and undue influence. The Claimant's case is that the Defendant wanted the Agreement because she could not otherwise afford to pay the Claimant to pursue her claim against the Banks. There are other issues in dispute, including for example the correct calculation of the financial benefit received by the Defendant

from the Banks as a result of the settlement (the Claimant says £1,013,168.39; the Defendant says £389,168.39). The difference being attributable to sums said to be written off by the Banks as part of the settlement.

21. This judgment is concerned only with the preliminary issue provided for by Master Clark.

The Law

22. The 2013 Regulations were made pursuant to an amended section 58AA of the Courts and Legal Services Act 1990 ("Section 58AA" and "the CLSA"). The relevant version of Section 58AA was introduced into the CLSA on 19 January 2013. It says:

> 58AA **Damages-based agreements**
>
> (1) A damages-based agreement which satisfies the conditions in subsection (4) is not unenforceable by reason only of its being a damages-based agreement.
>
> (2) But (subject to subsection (9)) a damages-based agreement which does not satisfy those conditions is unenforceable.
>
> (3) For the purposes of this section—
>
> > (a) a damages-based agreement is an agreement between a person providing advocacy services, litigation services or claims management services and the recipient of those services which provides that—
> >
> > > (i) the recipient is to make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided, and
> > >
> > > (ii) the amount of that payment is to be determined by reference to the amount of the financial benefit obtained;
>
> (4) The agreement—
>
> > (a) must be in writing;
> >
> > (aa) must not relate to proceedings which by virtue of section 58A(1) and (2) cannot be the subject of an enforceable conditional fee agreement or to proceedings of a description prescribed by the Lord Chancellor;
> >
> > (b) if regulations so provide, must not provide for a payment above a prescribed amount or for a payment above an amount calculated in a prescribed manner;
> >
> > (c) must comply with such other requirements as to its terms and conditions as are prescribed; and

(d) must be made only after the person providing services under the agreement has complied with such requirements (if any) as may be prescribed as to the provision of information.

(5) Regulations under subsection (4) are to be made by the Lord Chancellor and may make different provision in relation to different descriptions of agreements.

(6) Before making regulations under subsection (4) the Lord Chancellor must consult—

(a) the designated judges,

(b) the General Council of the Bar,

(c) the Law Society, and

(d) such other bodies as the Lord Chancellor considers appropriate.

(6A) Rules of court may make provision with respect to the assessment of costs in proceedings where a party in whose favour a costs order is made has entered into a damages-based agreement in connection with the proceedings.

(7) In this section—

"payment" includes a transfer of assets and any other transfer of money's worth (and the reference in subsection (4)(b) to a payment above a prescribed amount, or above an amount calculated in a prescribed manner, is to be construed accordingly);

"claims management services" has the same meaning as in Part 2 of the Compensation Act 2006 (see section 4(2) of that Act).

(7A) In this section (and in the definitions of "advocacy services" and "litigation services" as they apply for the purposes of this section) "proceedings" includes any sort of proceedings for resolving disputes (and not just proceedings in a court), whether commenced or contemplated.

(8) Nothing in this section applies to an agreement entered into before the coming into force of the first regulations made under subsection (4).

(9) Where section 57 of the Solicitors Act 1974 (non-contentious business agreements between solicitor and client) applies to a damages-based agreement other than one relating to an employment matter, subsections (1) and (2) of this section do not make it unenforceable.

(10) For the purposes of subsection (9) a damages-based agreement relates to an employment matter if the matter in relation to which the services are provided is a matter that is, or could become, the subject of proceedings before an employment tribunal.

23. I was referred to most of the 2013 Regulations but have not set them out in full. However, as relevant to the decision in this judgment and the main arguments the essential parts of the 2013 Regulations are (without headings and with my summary for ease of understanding in square brackets):

> (2) In these Regulations…
>
> "costs" means the total of the representatives time reasonably spent, in respect of the claim or proceedings, multiplied by the reasonable hourly rate of remuneration of the representative;
>
> "expenses" means disbursements incurred by the representative…
>
> "payment" means that part of the sum recovered in respect of the claim or damages awarded that the client agrees to pay the representative, and excludes expenses but includes…counsel's fees
>
> [regulation 1(4) excludes non-contentious business]
>
> [regulation 1(5) identifies which parts of the 2013 Regulations apply to employment matters (Regs. 5, 6, 7 and 8) and which do not (Reg. 4)]
>
> 3. The requirements for the purposes of section 58AA(4)(c) of the Act are that the terms and conditions of a damages-based agreement must specify – (a) the claim…to which it relates; (b) the circumstances in which the representatives payment, expenses and costs, or part of them, are payable; and (c) the reasons for setting the amount of the payment at the level agreed…
>
> 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)…counsel's fees, that have been paid or are payable by another party…and (b) any expenses incurred by the representative, net of any amount which has been paid or is payable by another party…
>
> (2) [Provision is made for the source of payment for PI cases and for the amount of the payment to be capped inclusive of VAT at 25% of certain heads of damage]
>
> (3) …in any other claim or proceedings…a damages-based agreement must not provide for a payment above an amount which, including VAT, is equal to 50% of the sums ultimately recovered by the client.
>
> 5. [Sets out information requirements prescribed for employment matters only pursuant to section 58AA(4)(d) of the CLSA]
>
> …
>
> 7. In an employment matters, a damages-based agreement must not provide for a payment above an amount which, including VAT, is equal to 35% of the sums ultimately recovered…

8. [Sets out terms and conditions relevant to termination other than under the general law which must be contained in damages-based agreements for employment matters, pursuant to section 58AA(4)(c) of the CLSA and including]…

(2) If the agreement is terminated, the representatives may not charge the client more than the representative's costs and expenses for the work undertaken in respect of the client's claim or proceedings.

The Agreement of 15 April 2014

24. I quote and/or summarise the material parts of the Agreement. The gist was to provide the mechanism by which the Claimant would act for and be paid by the Defendant in respect of her dispute with the Banks, with the essence being that the Claimant would be paid by sharing in the Defendant's recoveries from a successful conclusion.

Definitions:

Claim: your action or proposed action to resolve your dispute against the Opponent in relation to the Swap by way of litigation (with claim number HC12E02152) or the Review

Costs: our charges for the time we have spent working on the Claim, which are calculated in accordance with the hourly rates set out in clause 11 below

Expenses: the cost of instructing third parties, such as experts, and our disbursements as set out in clause 8 below, incurred in connection with the pursuit of the Claim

Lose: you lose the Claim if both of the following events occur – (a) No settlement is reached between you and the Opponent in relation to the Claim; and (b) The court dismisses the Claim without making any award of damages in your favour.

Payment: 12% of the sums recovered and/or damages awarded and/or any sums netted off or set-off against your liabilities to the Opponent in respect of the Claim (including but not limited to any cost of terminating an interest rate hedging product and any consequential losses), which you agree to pay us in the event of a Win. The Payment excludes Expenses but includes counsel's fees and VAT.

Review: the Opponents' review of interest rate hedging products…

Win: you win the Claim if either of the following events occur (whether via litigation or the Review): (a) A Settlement is reached in relation to the Claim; or (b) The Court makes an award of damages in your favour in the Claim.

2. **The Purpose of this Agreement**

You enter this agreement with us for the pursuit of the Claim against the Opponent for the mis-selling of the Swap by litigation…and/or the Review…

…

6. **Early Termination of this Agreement**

6.2 ...you may terminate this Agreement at any time. However, you are then liable to pay the Costs and the Expenses incurred up to the date of termination of this Agreement within one month's delivery of our bill to you…

6.4 We can terminate this Agreement if we consider that you have not behaved reasonably…You will then be liable to pay the Costs and Expenses incurred up to the date of termination of this Agreement within one month of delivery of our bill to you….

6.6 If this Agreement ends in any of the circumstances referred to in this clause 6…You will be free to deal with the Claim on your own behalf…However, until we are paid any money that has become due…we are entitled to a lien...

8. Expenses

8.1 You are responsible for paying Expenses…regardless of whether you win or lose the Claim….

9. If you Win

9.1 If you win, you agree to pay us the Payment (which includes VAT and counsel's fees) and any outstanding Expenses...

9.3 If the Costs are paid or payable by the Opponent…we will be entitled to retain the Costs, and the amount of the Payment will be reduced accordingly.

10. If you Lose

If you lose the Claim, you only have to pay us the Expenses...

11. Calculation of Our Costs

11.1 If you are ordered to pay Costs or we are entitled to claim Costs from you…these costs will be calculated by reference to the hourly rates set out below...

25. This judgment is concerned with one of the payment obligations relative to potential outcomes that are included in the Agreement. I can summarise those payment obligations as follows (using the definitions from the Agreement):

    a. If the claim is successful, then the client will have to pay (a) 12% of the gains made including counsel's fees and VAT (b) less any sums payable by the other side in respect of costs and (c) expenses.

b. If the claim fails only expenses are payable.

c. If the client terminates the agreement under clause 6.2, then the client must pay the solicitor's costs and expenses.

d. The solicitor has a contractual right to terminate if it is considered that the client has behaved unreasonably and then the client must pay the solicitor's costs and expenses.

It is only "c.", clause 6,.2, which is alleged by the Defendant to make the Agreement unenforceable. I have heard no argument on and make no findings about any other parts of the Agreement.

The Arguments

26. Mr Davies' argument is based on the language of regulation 4(1) and that it might be right has been recognised by various commentators as a reason why damages-based agreements have not proved popular (see for example Cook, On Costs at paragraph 7.18[1] and Friston, On Costs, 3rd ed, at paragraph 20.151). Since the Agreement contains an obligation on the client to pay the solicitor's costs and expenses if the client exercises the contractual right to terminate, the Agreement provides for "an amount to be paid by the client" which is other than the payment calculated as in regulation 4(1). Consequently, the Agreement does not comply with the 2013 Regulations and under section 58AA(2) it is unenforceable. Mr Davies reminds the court that this conclusion is not effected by the fact that clause 6.2 of the Agreement turned out not to be relevant, what matters is whether its presence in the Agreement was contrary to the statutory requirements so as to have "a materially adverse effect on the protection afforded to the client or on the proper administration of justice" (Garrett v Halton Borough Council [2006] EWCA Civ 1017 [37]). The clear intention of Parliament, says Mr Davies, was to protect clients from having to make any payment to lawyers other than that allowed under the 2013 Regulations – clause 6.2 in the Agreement runs directly contrary to that intention.

27. Mr Snell disagrees. The language of regulation 4(1) of the 2013 Regulations is limited to its subject matter, which is the extent to which the representative can share in the proceeds of the litigation. Mr Snell relies in this respect on the language and structure of the 2013 Regulations as a whole, the context of the 2013 Regulations and Section 58AA and the wider context in which those provisions became part of the law represented by other admissible materials. Seen in that context, it is plain that the intention of Parliament so far as general civil litigation matters were concerned was to apply a light regulatory touch and only legislate in so far as was necessary to create the allowed for sharing of the proceeds of disputes.

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[1] Mr Davies' skeleton said that Cook supported his client's position. I don't think this is right (I quote from paragraph 7.18): *Why the use of a quantum meruit approach is not equally good for civil cases…is hard to fathom…It may be* [a protest about detailed draft regs] *which made the Government's draftsman decide to put the bare minimum into the Regulations…allowing the parties to contract on any further aspects…civil litigation lawyers would be well advised to consider following the employment matter provisions when drafting their DBA.* I expect the Claimant would say that was what they tried to do in the Agreement.

Clause 6.2 of the Agreement is wholly outside that regulatory intent: it has nothing to do with the basis upon which the proceeds of the dispute might be shared between the representative and the client and so was a matter on which, in this case, the solicitor and the client were able to contract as they wished, at least so far as the 2013 Regulations were concerned.

Discussion

28. The court is concerned with the proper construction of the 2013 Regulations. I agree with Mr Snell that it is both necessary and helpful to see those Regulations in context.

29. The relevant principles of construction were not in dispute and can be found in Bennion, On Statutory Interpretation, 7th edition, at section 3.13 (the intention of the legislature as indicated in the enabling Act is the prime guide to the meaning of delegated legislation but the process of construction is the same); section 11.1 (the presumption in favour of purposive construction); section 24.1 (in interpreting an Act consideration should be given to the state of the law before the Act and any report or materials that indicate the Act's purpose (including official reports, proceedings on a Bill and explanatory notes) at least so as to identify the background and mischief intended to be addressed); and, section 24.11 (it would only be when the *Pepper v Hart* criteria were met that regard to Hansard could be had for the purpose of determining the meaning of a provision).

30. The Hansard material relied on by the Claimant before me was only made available to the Defendant when Mr Davies received Mr Snell's skeleton argument, the day before the hearing. Mr Davies referred me to *the Practice Direction (Hansard Citation)*, [1995] 1 WLR 192 which provides for 5 clear working days' notice of *Pepper v Hart* material. Mr Snell commented that it should have been obvious to the Defendant that such material might be relevant and the Defendant could have obtained any such material as she wanted. I do think that it would have been preferable that the Defendant had more notice of the contextual material that the Claimant intended to rely upon but I do not think any relevant prejudice has arisen as a consequence and like Mr Snell I agree that none of this material should have been surprising. Furthermore, for reasons which will become clear, I do not think that the Hansard material comes within the *Pepper v Hart* exception and so is not subject to the Practice Direction and its 5 day notice requirement. Mr Davies suggested the court could adjourn or could provide for further written submissions if *Pepper v Hart* material became relevant. I did not consider either course necessary to ensure the hearing proceeded fairly and consistently with the overriding objective. I remain of that view.

31. Section 58AA and the 2013 Regulations extended damages-based agreements to general civil litigation, rather than being limited to employment matters as they had been since 2010. This was done by the 2013 Regulations replacing the previous 2010 Regulations and providing the basis for permitted damages-based agreements in both general civil litigation and employment matters. In both restrictions are set out on the payments that can be made by clients from dispute recoveries but only in employment matters do the 2013 Regulations require particular terms and conditions dealing with termination. The Claimant says this difference is of direct

relevance to the proper understanding of regulation 4 of the 2013 Regulations. I agree.

32. Mr Snell's starting point was the Review of Civil Litigation Costs: Final Report by Lord Justice Jackson of December 2009 ("the Jackson Report"). This report was initiated by the Master of the Rolls rather than Parliament but I agree that it is part of the contextual background which led to the relevant changes to the CLSA. In particular, as Mr Snell emphasised, the Jackson Report's recommendations included, so far as agreements that allowed the sharing of litigation proceeds was concerned, a so-called "Ontario model". The essence of that model, in my words, was that the amount of dispute proceeds shared by agreement with the representative should take account of normal costs shifting, where applicable.

33. The Jackson Report is also relevant because it identifies, at chapter 12, paragraph 4.6, regulatory concerns that the Ministry of Justice had expressed in its consultation paper CP 10/9 arising from the introduction of contingency fees in the tribunal context. These included wanting to provide a maximum percentage of the recoveries that would be payable to representatives and controlling the use of unfair terms and conditions. Mr Snell rightly identifies these regulatory concerns as informing the material law.

34. The first damages-based agreements introduced by amendment to the CLSA related to employment tribunals. The amendment came into effect on 19 November 2009 and the relevant regulations were the Damages Based Agreement Regulations 2010. For present purposes what is of particular relevance is that these reflected the regulatory concerns identified by the Ministry of Justice and referred to in the Jackson report: including in particular, prescribing a maximum % of an award which would be payable to the representative, and providing other prescribed terms and conditions which dealt with termination (it is not necessary to recite all of those but they included that if the agreement was terminated *the representative may not charge the client more than the representative's costs and expenses for work undertaken…*).

35. On 26 February 2013, the House of Lords considered what was to become the 2013 Regulations. Lord McNally moved that the Grand Committee report to the House that it had considered the 2013 Regulations. Lord McNally explained that damages-based agreements had been allowed in employment matters and the intent, as recommended by the Jackson Report, was to extend them to all areas of civil litigation. Lord McNally explained that regulations 5 to 8 replicated the detailed provisions applicable to employment matters from the existing regulations because "employment matters may be undertaken by non-lawyers…on the other hand, civil litigation can be undertaken only by qualified legal representatives, who are subject to regulation by their professional bodies…It is therefore considered that further regulation at this stage is not required".

36. Later during the same Grand Committee consideration and in answer to questions asked by their Lordships, Lord McNally explained that the government did not consider too much regulation was appropriate for civil litigation because of the oversight given by professional regulators (especially since a failure to meet a provision in the instrument would make an agreement unenforceable) and so in

particular it was not necessary in the general civil litigation area for the regulations to address termination requirements [my emphasis]. These detailed safeguards were to protect clients potentially dealing with non-lawyers in the employment context but not necessary for those dealing with lawyers who were subject to professional regulation.

37. Mr Snell says that it would be directly contrary to this "light touch" regulatory approach if the meaning of regulation 4(1) was as argued by the Defendant.

38. Mr Davies addressed these comments of Lord McNally, by making the point that oversight by the Law Society and/or Bar Council was not directly relevant to the terms and conditions that might be agreed between a client and a solicitor. I can see that so far as it goes but I do not think it a relevant answer to the point being made by Mr Snell. The government's presentation of what was to become the 2013 Regulations demonstrate that the consumer protection aspect of the regulatory regime's purpose was considered to be adequately covered in the civil litigation context because of the existence of professional regulatory bodies. This did not apply in the employment context to the same extent because of non-regulated service providers. In material particular, the government expressly said it was not considered necessary to regulate about the requirements for termination in general civil litigation but only in employment matters. The existence of the Law Society and the Bar Council provided regulatory protections and so specific legislation about terms and conditions was not considered necessary.

39. Finally, before turning to the CLSA and the 2013 Regulations, I agree with Mr Davies that it is useful to remember that agreements for the sharing of the proceeds of litigation are unlawful unless they fall within statutory exceptions. The introduction of damages-based agreements provides such an exception. For Mr Davies this meant that the Claimant must prove that the Agreement comes within that exception. But leaving that forensic point to one side, what this particular context point emphasises is that the general intention of Parliament was to allow clients and representatives to share the proceeds of litigation. In order to do that it was the sharing the proceeds aspect of client / representative agreements that was essential because it was that aspect that would otherwise make such agreements unlawful.

40. It is therefore unsurprising that the starting point of Section 58AA at subsection (1) is to make damages-based agreements enforceable so long as they satisfy the conditions in subsection (4).

41. Section 58AA(3) defines "damages-based agreement" for the purpose of section 58AA as agreements where the recipient of certain services agrees to pay an amount of the financial benefit obtained from those services to the service provider and where the amount "is to be determined by reference to the amount of the financial benefit obtained".

42. Section 58AA(4) sets out the conditions on which damages-based agreements are to be enforceable. As material to the present discussion these include: "(b) if regulations so provide, must not provide for a payment above a prescribed amount or for payment above an amount calculated in a prescribed manner" ("the Payment

Condition") and (c) "must comply with such other requirements as to its terms and conditions as are prescribed" ("the T&C Condition").

43. Section 58AA(5) is the enabling provision under which the 2013 Regulations were made: "Regulations under subsection (4) are to be made by the Lord Chancellor and may make different provision in relation to different descriptions of agreements".

44. The explanatory notes to the 2013 Regulations set out that the purpose of the 2013 Regulations is to "prescribe the requirements with which a damages-based agreement…must comply in order to be enforceable". They explain that a damages-based agreement allows a service provider to be paid an agreed percentage of a client's damages if the case is successful. They explain that the purpose of the changes in the legislation is to extend damages-based agreements to all civil litigation not just employment matters. They also explain that regulation 4 does not apply to employment matters but regulations 5 to 8 only apply to employment matters.

45. The explanatory notes state that regulation 4 deals with amounts payable from a client's damages, including that those amounts shall be net of recoverable costs and expenses, and that the total amount is subject to a percentage cap (25% of particular heads of loss in PI litigation and 50% otherwise). Mr Snell points out that this description of regulation 4 is limited to the sharing of the proceeds after a successful result. It only describes the Payment Condition.

46. The explanatory notes describe those regulations which apply only to employment matters which includes regulation 8 which sets out those terms and conditions dealing with termination which must be included in an agreement which relates to employment matters.

47. There is no suggestion in the explanatory notes of any intention to exercise the power to make regulations under the T&C Condition regarding termination other than in the employment context. This is consistent with what Lord McNally told the House of Lords on 26 February 2013.

48. Regulation 1 contains definitions. Of most importance for present purposes is the definition of "payment". I also note that "payment" was a defined term in the 2010 Regulations. In both definitions, the purpose is to circumscribe "payment" to the sum payable by the client to the representative from their dispute recovery. So that the 2010 definition says: *a part of the sum recovered…that the client agrees to pay the representative* and the 2013 definition says: *that part of the sum recovered… that the client agrees to pay the representative.*

49. At one point in the oral argument, I understood Mr Davies to argue that clause 6.2 of the Agreement would also be contrary to regulation 4(3) because clause 6.2 provides "for a payment above an amount which, including VAT, is equal to 50% of the sums ultimately recovered". This must be wrong: clause 6.2 of the Agreement has nothing to do with "payment" as it is defined in the 2013 Regulations because it is not about the sharing of the proceeds but about costs recovery on termination of the Agreement. Regardless of the different arguments about the construction of regulation 4(1), there can be no question of clause 6.2 being contrary to regulation 4(3).

50. Regulations 3 and 8 state that they are made pursuant to the power given in section 58AA(4)(c), i.e. the T&C Condition, as I have defined it above.

51. Regulation 3 is of general application to all damages-based agreements. Such agreements must (i) identify the claim or proceedings, (b) "the circumstances in which the representative's payment, expenses and costs, or part of them, are payable", and (c) the reasons why the payment is set at the level agreed.

52. The relevant impact of regulation 8 is that it sets out required terms and conditions that regulate termination in employment matters. This includes that on such termination, the representative can recover from the client their time costs to the date of termination.

53. The express subject of regulation 4, stated in the explanatory notes and the subject heading of that regulation, is "Payment in respect of claims or proceedings other than an employment matter".

54. Since "payment" is defined as set out above, this subject is likely to be limited to the sharing of the spoils of the dispute between the client and the representative. The need to make regulatory provision about that sharing is stated in section 58AA4(b) of the CLSA. The public policy in doing so goes back to the paragraphs of the Jackson Report and Ministry of Justice consultation paper referred to above. It is the obvious point that if the law allows a sharing of litigation spoils then the law should balance the need of clients to receive their damages (which compensate them for wrongs done to them) and the benefit of representatives getting fairly paid for work done (which itself aids access to justice).

55. The differing percentages allowed for different types of work show the legislature applying that policy in particular circumstances and is an example of the "different provision in relation to different descriptions of agreements" referred to in section 58AA(5).

56. It is obvious but worth stating how the various regulations in the 2013 Regulations map back to the enabling powers in subsection 58AA(4): (4)(c) contains the power to regulate as to "terms and conditions" and this is expressly invoked in regulations 3 and 8; (4)(d) contains the power to regulate pre-contract information requirements and is expressly invoked in regulation 5; (4)(b) contains the power to prescribe the maximum amount and calculation method for the representative's damages-based payment and this the ostensible subject of regulations 4 (general civil) and 7 (employment).

57. At this stage in the discussion, the purpose of the various parts of regulation 4 can be readily identified:

    a. The long sentence which makes up 4(1) describes the Ontario model solution where a sum otherwise payable by the client to the representative from recoveries is reduced by loser pays costs and expenses recovery (including counsel's fees) but can be increased by expenses not otherwise paid for. This is the "amount calculated in a prescribed manner" as per subsection 58AA(4)(b).

b. 4(2) provides a further limitation on that payment which is applicable to PI cases, namely the types of damages from which the payment can be met (general damages and not future pecuniary loss) and with a 25% cap. This is an additional calculation requirement and the "prescribed amount" as per section 58AA(4)(b) for a particular type of agreement (as per subsection 58AA(b)).

c. 4(3) provides that other than PI, the relevant cap on that part of the recovery that might potentially be paid to the representative is 50%. This is the "prescribed amount" for other general civil cases.

58. The Defendant's construction of Regulation 4(1) requires it to perform an additional purpose which is to prevent an agreement between the client and the representative that gave the representative their time costs if the client terminated the agreement before a right to share in the proceeds had arisen.

59. The analysis that I have set out above demonstrates that this would be an unlikely result for a number of inter-locking reasons: -

a. There would be an inexplicable difference between employment matter representatives and general civil representatives. The Defendant has suggested no positive reason why the legislature would want to allow employment representatives to recover work done costs on a client termination (regardless of the ultimate outcome of the dispute) but disallow such recovery by non-employment representatives[2].

b. A choice by the legislature to prevent a non-employment representative to get incurred costs on such termination would be inconsistent with the expressed purpose of not needing to regulate as between legal representatives and clients, in contrast with needing to do so in the employment sphere where clients might deal with unregulated service providers.

c. It would be inconsistent with the enabling legislation which provided for regulations to address separately (a) the sharing of recoveries between client and representative and (b) other terms and conditions that might be prescribed. The posited bar on work done costs in a termination situation has nothing to do with (a) but was considered by the legislature to be well within (b) when it prescribed the termination terms for employment

[2] The general probable outcomes in both employment and general civil include (i) dispute continues to success, (ii) dispute continues to failure, (iii) dispute does not continue. Because costs shifting exists in general civil but not in employment matters, a successful employment client gets their damages, having already had to pay time costs to the representative on the termination (no costs shifting) so ends with less damages and with representative paid but the general client gets to keep the full damages without any obligation to make payment (and presumably the other side gets the benefit of the representative having no right to payment of their time costs and so avoids costs shifting because of the indemnity principle). I cannot see how this illustrative example of difference in treatment premised on the Defendant's construction of regulation 4(1) being correct serves the legislative purpose behind introducing damages-based agreements for general civil litigation.

matters. It would be curious to achieve by a side wind that which would most obviously be done using the power to make T&C Conditions, if that was what Parliament wanted to do.

d. It would restrict a general civil representative's time costs recovery in a situation which is not to do with enabling the sharing of the spoils of litigation – i.e. it would impose a limitation on freedom of contract without any justification arising from the express purpose of legalising damages-based agreements.

e. It is an obvious consequence of preventing representatives getting their time costs on a client termination that those representatives would be reluctant to enter into damages-based agreements and that would be contrary to the purpose of making such agreements lawful so as to facilitate access to justice.

f. This would have the knock-on consequence of creating less choice (within regulated representatives) for clients wanting to bring general civil litigation claims than in employment claims, again contrary to the purpose of the expansion of damages-based agreements into general civil litigation.

g. It is no answer to posit client agreements in general civil disputes that would prevent a client from terminating the agreement because that would be an unreasonable fetter on a client's right not to continue with the representative they want and again why regulate in the employment area but not the general civil area if the intention was to be more restrictive of a representative's cost recovery in the civil litigation arena. The legislature did provide regulations for employment matters that recognised but restricted the parties' contractual rights to terminate to protect market participants (regulation 8(3), client termination; regulation 8(4) representative termination).

60. Against these factors is the wording of Regulation 4(1) and in particular "a damages-based agreement must not require an amount to be paid by the client other than – (a) the payment…and (b) any expenses…". [My underlining]. Mr Davies says, simply, clause 6.2 of the Agreement requires the Defendant to pay time costs to the Claimant if she terminates and consequently the Agreement contains a requirement which is not allowed under the 2013 Regulations. Clear wording of that kind trumps the context driven construction urged on the court by the Claimant.

61. I disagree.

62. Primarily, I disagree for the contextual reasons I have summarised above. The suggested construction by the Defendant is inconsistent with the purpose of the legislation and the structure of the CLSA and the 2013 Regulations. It produces a result which, in context, would be irrational and without apparent justification. In a similar way, if the legislature considered it necessary that damages-based agreements should prevent the solicitor recovering time costs in any circumstances other than when the agreement continued to apply at the conclusion of successful litigation then it would have said so in terms and not as a side consequence of addressing a different subject – how sharing the spoils should work.

63. For all those reasons the expression "an amount to be paid by the client" should be construed to be limited so that its subject matter is premised on there being dispute recoveries available for sharing. There is no positive part of the long single sentence that makes up regulation 4(1) which does not contain that assumption: e.g. "payment" has a definition which assumes a "sum recovered"; "costs…including fixed costs…counsel's fees…paid or payable by another party" refers to normal costs shifting; and the reference to "expenses" paid or payable by the other party is the same. All of those regulatory controls over what will be payable by the client to the representative assume a successful outcome.

64. It was well put by Mr Snell in his skeleton: "the concept of the "cap" on payment is considered to be a distinct concept from that of fees contractually due on termination". I agree. One is dealt with in regulation 4(1), the other falls outside of that which Parliament wanted to regulate other than for employment matters.

65. I regard this outcome as the only construction that achieves the clear purpose of the legislature. It is an example of what Lord Steyn described in *Attorney-General's Reference (no 5 of 2002)* [2004] UKHL 40 at [31]:

> "No explanation for resorting to a purposive construction is necessary. One can confidently assume that Parliament intends its legislation to be interpreted not in the way of a black-letter lawyer, but in a meaningful and purposeful way giving effect to the basic objectives of the legislation" (cited in Bennion, at section 11.1).

66. There is an alternative route to the same result. I consider that a close analysis of the language of section 58AA and Regulation 4(1) also demonstrates that the subject of Regulation 4(1) is limited to the sharing of the spoils payment and no other possible "amount to be paid" between representative and client.

67. I start with section 58AA and its purpose of making lawful agreements to share the spoils of litigation. The section contains its own description of what a "damages based agreement" is and it is a description which focuses on the agreement between the service provider and the client to remunerate the provider with a share of the spoils: subsection 3(a)(i) "…if the recipient obtains a specified financial benefit in connection with the matter in relation to which services are provided" and subsection 3(a)(ii) "…to be determined by reference to the amount of the financial benefit obtained". This is specific to that part of the arrangement between client and service provider which would otherwise be champertous. Subsections (9) and (10) provide further examples where the intention is to be specific to the spoil sharing agreement.

68. However, when section 58AA refers to other aspects of the contractual relationship between the client and the advisor, it does not use the phrase "damages-based agreement" but "The agreement" (twice in subsection (4)); "agreements" in subsection (5) and "an agreement" in subsection (8). All those references to agreements are necessarily inclusive of particular agreements to share the spoils but the choice of language within the statute indicates that "damages based agreement" is limited to the agreement to share the spoils but "agreement" is more general (i.e. all the terms agreed between clients and representatives).

69. Once this difference is carried through into the language of regulation 4(1), then the possible problem identified by the Defendant's construction of the regulation falls away and regulation 4(1) is wholly consistent with the context and structure within which I have construed it above.

70. The referent of "damages-based agreement" in regulation 4(1) is the same as in section 58AA of the CLSA – it is limited to the particular agreement to share the spoils. Once that is understood then the restriction "must not require an amount to be paid by the client other than…" is intended to refer to the particular agreement, otherwise unlawful, to share the spoils of the matter in relation to which services are provided. It has no application to any other aspect of the wider agreement between client and representative. The "amount" can only refer to that which is to be paid from the benefit obtained.

71. I recognise that the distinction I am making is more obviously maintained within section 58AA than it is in the 2013 Regulation. Certainly when the Regulation uses the expression "damages-based agreement" in Regulation 3: "the terms and conditions of a damages-based agreement" no distinction is being made or needs to be made between an agreement which contains a damages based agreement and the otherwise champertous damages-based agreement which is only one term among others agreed. But even then in Regulation 8 when termination is being addressed in the employment context "the agreement" is used to refer to the totality of the contractual relationship and in particular in circumstances where the damages-based agreement part of the relationship will be irrelevant, such as termination. I accept that the "damages-based agreement" and "agreement" do tend to become synonymous in much of the Regulation.

72. Nevertheless, a restricted construction of "damages-based agreement" in Regulation 4(1) is consistent with the definition contained in section 58AA which would be applicable under normal principles of statutory construction and brings Regulation 4(1) squarely into line with the context and structure arguments presented by Mr Snell for the Claimant without doing any violence to the language.

Materiality

73. If I am wrong on either approach to the proper construction of the 2013 Regulation and it was the intention of the 2013 Regulations to make unenforceable an agreement in general civil litigation which would otherwise be champertous because it included an obligation on the client to pay incurred costs and expenses on the client exercising a contractual right of termination then the Agreement would be in material default of this requirement.

74. I have referred to the relevant test from *Garrett* above. The purpose of the legislature would include protecting a solicitor's client from having to pay those solicitor's time costs if the agreement between them was ended by the client and purporting to remove that protection from the Defendant, in her client capacity, could not be overlooked as a mere technicality.

Conclusion

75. For all the reasons above, I determine the preliminary issue in favour of the Claimant: the Agreement is not unenforceable for the reasons currently contained in paragraphs 93 to 101 of the Re-Re-Amended Defence and those paragraphs should be struck out.

76. I invite counsel to agree an order so far as possible and to deal with remaining issues. I note that Master Clark has already made directions for a fourth CCMC to be applied for after the handing down of this judgment.

HHJ Parfitt