

Neutral Citation Number: [2022] EWCA Civ 936

Case Nos: CA-2021-000732 and CA-2021-000733

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**INSOLVENCY AND COMPANIES LIST (CHANCERY DIVISION)**  
**MR JUSTICE ZACAROLI**  
**[2021] EWHC 1122 (Ch) and [2021] EWHC 1826(Ch)**

**IN THE MATTER OF EDWARD WOJAKOVSKI**  
**AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 06/07/2022

**Before:**

**LORD JUSTICE MALES**  
**LORD JUSTICE ARNOLD**  
and  
**LADY JUSTICE ANDREWS**

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**Between:**

**CANDEY LIMITED**

**Claimant/  
Appellant**

- and -

**(1) TONSTATE GROUP LIMITED**  
**(2) TONSTATE EDINBURGH LIMITED**  
**(3) DAN-TON INVESTMENTS LIMITED**  
**(4) ARTHUR MATYAS**

**Respondents**

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**Benjamin Williams QC and Stephen Ryan** (instructed by **Candey Ltd**) for the **Appellant**  
**Andrew Fulton QC and Sam Goodman** (instructed by **Rechtschaffen Law**) for the  
**Respondents**

Hearing date: 10 May 2022  
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**Approved Judgment**

*This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10am on 6<sup>th</sup> July 2022.*



## LADY JUSTICE ANDREWS:

### INTRODUCTION

1. In response to the recommendations in Lord Justice Jackson’s 2009 report on civil litigation costs, Section 45 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”) made amendments to section 58AA of the Courts and Legal Services Act 1990 (“the 1990 Act”). These amendments, among other matters, legalised damages-based agreements (“DBAs”) as a means of remuneration of a party’s legal representatives in civil litigation. In consequence, it is now permissible for a claimant (which expression, for the purposes of this judgment, includes a counterclaiming defendant) to enter into an agreement with his solicitors to pay them a percentage of whatever he recovers from his opponent if he wins. However, in order to be enforceable, the DBA must strictly comply with the requirements of the relevant Regulations made by the Lord Chancellor pursuant to his powers under s.58AA(5) of the 1990 Act.
2. This appeal raises the apparently novel question whether it is lawful for a party *against* whom a claim is made (i.e. the defendant to a claim or counterclaim) to enter into an agreement that, if he succeeds in defending that claim in whole or in part, he will pay his legal representatives a percentage of the money or the value of the assets that he has *resisted* having to pay or transfer to his opponent. There is no dispute that such an agreement would be unlawful at common law. Consequently that issue turns on the interpretation of s.58AA of the 1990 Act and the Damages-Based Agreements Regulations 2013, SI 2013 No. 609 (“the 2013 Regulations”).
3. The context in which the issue arises can be summarised as follows. The Appellant, Candey Ltd. (“the Solicitors”) acted for Mr Edward Wojakovski in a complex legal dispute, pursuant to a DBA dated 20 September 2019. There were three separate and related actions, more particularly described later in this judgment. One was a claim brought against Mr Wojakovski for the rescission of transfers to him by the other shareholders, a Mr and Mrs Matyas, of shares in a property investment company named Tonstate Group Limited (“TGL”). I shall refer to this as “the Shares Claim”. At the time the dispute arose, Mr Wojakovski owned 50% of the shares in TGL, and Mr and Mrs Matyas, his parents-in-law, the remaining 50%.
4. In consequence of a settlement of the Shares Claim, which was embodied in a Consent Order dated 21 May 2020, Mr Wojakovski transferred 75% of the shares he held in TGL to Mr and Mrs Matyas and to his estranged wife Nadine. He retained 25% of his previous 50% shareholding (22,500 shares). Thus he was partially successful in resisting the claim against him in that action, which was for the return of *all* the shares. Mr and Mrs Matyas and Nadine also agreed not to dispute his title to the retained shares, nor to use their voting rights under TGL’s articles of association to issue any further shares so as to dilute that minority (12½%) shareholding.
5. Mr Wojakovski was subsequently declared bankrupt. The Solicitors claimed that by virtue of the DBA they were entitled to be paid a percentage of the value of the 22,500 shares that he had retained in TGL. They sought a charge over the shares under section 73 of the Solicitors Act 1974, and claimed that their charge took priority over a final charging order which had been made by consent in favour of the Respondents on 21 July 2020.

6. In a judgment handed down on 30 April 2021 (“the April judgment”) [2021] [2021] EWHC 1122 (Ch) Mr Justice Zacaroli (“the Judge”) held that the DBA only entitled the Solicitors to payment from Mr Wojakovski if he recovered something from an opposing party in or as a consequence of the proceedings. It did not entitle them to payment if Mr Wojakovski retained some or all of the shares that were claimed from him. Moreover, even if (contrary to that conclusion) the DBA did entitle the Solicitors to payment of a percentage of the value of the retained shares, it was not an agreement permitted by the 2013 Regulations, and therefore would be unenforceable to that extent.
7. In a subsequent judgment delivered on 2 July 2021 (“the July judgment”) [2021] EWHC 1826 (Ch), the Judge held (on the hypothesis that his conclusions in the April judgment were wrong) that although the Solicitors had an equitable interest in the shares from the making of the consent order on 21 May 2020 which settled the Shares Claim, it was defeated by the final charging order in favour of the Respondents, which was acquired for value without notice of their lien.
8. The Solicitors appealed against both judgments with the permission of Lord Justice Singh. They raised four grounds of appeal, namely:
  - (1) The Judge was wrong to find that no entitlement to payment arose under the DBA;
  - (2) The Judge was wrong to find that, even if the DBA was to be construed so as to entitle the Solicitors to payment it was unenforceable because a necessary prerequisite under the Regulations is recovery from the other side;
  - (3) Alternatively to (2), the Judge was wrong to find that the Regulations were not *ultra vires* in prohibiting a DBA unless it provided for payment as a proportion of amounts recovered from another party to the legal proceedings;
  - (4) The Judge was wrong to find that the final charging order took precedence over the Solicitors’ lien.
9. By way of Respondents’ Notice, in answer to Grounds 1-3 the Respondents raised a legal argument that they had not raised before the Judge, namely, that if the DBA were construed in the manner contended for by the Solicitors, it would be contrary to the primary legislation as well as contrary to the 2013 Regulations. They contend that the definition of “damages-based agreements” in section 58AA(3) of the 1990 Act cannot extend to the defence of what counsel for the Respondents, Mr Fulton QC, termed an “incoming” claim (i.e. a claim made against the client).
10. The fourth ground of appeal raised complex legal arguments which would not arise for determination unless the Solicitors succeeded in demonstrating that the Judge was wrong on both the construction and enforceability issues, and that they were entitled to payment under the DBA and thus to a charge over the shares. Accordingly, at the hearing of the appeal, we invited counsel to address us on the first three grounds, in order that after consideration of all the legal arguments concerning the interpretation

and validity of the DBA, we could take stock of the situation and decide whether it was necessary for the Court to hear argument on the fourth ground.

11. In the event, after hearing the arguments on the DBA issues, we formed the clear view that the appeal should be dismissed on each of the first three grounds. In those circumstances, there was no longer any basis for an appeal against the July judgment, as the premise on which that aspect of the case had proceeded did not arise. We therefore informed counsel that the appeals would be dismissed, for reasons to be provided in reserved judgments.
12. These are my reasons for joining with my Lords in that conclusion.

### THE RELEVANT LEGISLATION

13. Although they could not be used in court proceedings, prior to 2009 “no win, no fee” agreements by a claimant to pay his representatives a percentage of the damages recovered if he was successful were commonly used by solicitors and claims managers in cases before the employment tribunal. Section 58AA of the 1990 Act, in its original form, was inserted by section 154(2) of the Coroners and Justice Act 2009, in order to make provision for the regulation of such agreements, which at that time were only permitted if they related to “an employment matter.” An “employment matter” was defined as “a matter that is, or could become, the subject of proceedings before an employment tribunal.” The Damages-Based Agreements Regulations 2010 (SI 2010 No. 1206) set out the original requirements for an enforceable DBA relating to an employment matter.
14. Section 45 of LASPO extended DBAs to all forms of civil litigation by amending s.58AA. The 2013 Regulations replaced the 2010 Regulations with effect from 1 April 2013. They include specific provisions relating to DBAs used in employment-related matters.
15. Section 58AA of the 1990 Act, in its current form, is entitled “Damages-based agreements” (the previous version was entitled “Damages-based agreements relating to employment matters”). The language of that section is very little different from the previous version, the changes mainly reflecting the removal of the requirement for the DBA to “relate to an employment matter.” It provides, so far as material, as follows:
  - (1) A damages-based agreement which... satisfies the conditions in subsection (4) is not unenforceable by reason only of it being a damages-based agreement.
  - (2) But ... 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 the 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...

(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;

...

(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

....

Subsection (7) is concerned with what the legal representative receives from the client under the DBA. It therefore does not assist in the interpretation of “specified financial benefit”.

16. Regulation 3 of the 2013 Regulations sets out the requirements prescribed for the purposes of section 58AA(4)(c) of the 1990 Act, namely, that the terms and conditions of a DBA must specify:

a) the claim or proceedings or parts of them to which the agreement relates;

b) the circumstances in which the representative’s payment, expenses and costs, or part of them are payable; and

- c) the reason for setting the amount of the payment at the level agreed...

17. “Payment” is defined in Regulation 1(2) as:

“ 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, in respect of any claim or proceedings to which these regulations apply other than an employment matter, any disbursements incurred by the representative in respect of counsel’s fees.”

One of the advantages that a DBA has over other forms of contingency fee arrangements is that, in civil litigation (other than employment matters) the solicitors are responsible for funding counsel’s fees.

18. Regulation 4 prescribes the financial limits on the amount which a DBA (other than one relating to an employment matter) can require the client to pay. Paragraph (3) of that Regulation provides that for claims or proceedings other than claims for personal injuries:

“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.”

However, that limit only applies to claims or proceedings at first instance (paragraph (4)).

19. The Explanatory Memorandum to the 2013 Regulations, which was laid before Parliament with the Regulations, and can be used as an aid to their interpretation in case of ambiguity, describes a DBA as: “a private funding arrangement between a representative and the client whereby the representative’s agreed fee (“payment”) is contingent upon the success of the case, and is determined as a percentage of the compensation received by the client.” It explains that the Regulations prescribe the requirements with which an agreement between the client and representative must comply in order to be an enforceable DBA.

20. Paragraph 2.3 of the Explanatory Memorandum summarises those requirements as follows:

“

- i) in all cases, the matters which the terms and conditions of an agreement must specify, including the reason for setting the payment at the agreed level (Regulation 3);
- ii) in civil litigation, stating the maximum payment (as a percentage of damages recovered and including VAT) that the representative may take from the claimant’s damages (namely, in personal injury cases, 25% of the damages specified in these Regulations, and in all other civil litigation, 50% of the

damages ultimately recovered by the claimant), as well as what the payment is intended to cover (Regulation 4). ”

21. Consistently with the Explanatory Memorandum, the Explanatory Note to the Regulations describes a DBA as a type of ‘no win, no fee’ agreement under which a representative (as defined) can recover an agreed percentage of the client’s damages if the case is won (“the payment”), but will receive nothing if the case is lost. It explains that Regulation 3 applies to all DBAs and specifies the requirements of a DBA, and that Regulation 4, which applies to all DBAs other than those which relate to employment matters, provides that the payment from a client’s damages shall be the sum agreed to be paid (which, where relevant, will include any disbursements incurred by the representative in respect of counsel’s fees) net of any costs (including fixed costs) or sum in respect of counsel’s fees, payable to the representative by another party to the proceedings.

#### THE DBA AND THE UNDERLYING LITIGATION

22. In 2019, Mr Wojakowski was involved in three actions concerning TGL, other companies in the Tonstate group, and companies in a related group known as the THHL group, namely:
- i) A derivative action issued on 6 March 2018 by the Respondents to this appeal, inter alia seeking the return of money wrongfully extracted from the companies by Mr Wojakowski (“the Main Action”). Mr Wojakowski made a substantial counterclaim and a number of additional claims in this action.
  - ii) An unfair prejudice petition issued on 10 August 2018 by Mr Wojakowski, seeking various orders against Mr and Mrs Matyas and other entities in the Tonstate group, including an order that he should buy out Mr and Mrs Matyas’ shares (“the Petition”); and
  - iii) The Shares Claim, which was commenced by Mr and Mrs Matyas on 7 February 2019.

The history of those disputes is conveniently summarised by the Judge at [8] of the April judgment. The following overview will suffice for the purposes of this judgment.

23. Mr Wojakowski’s ownership of 50% of the shares in TGL predated the dispute and the ensuing legal proceedings. By the time the Main Action was commenced, the entire Tonstate group was effectively deadlocked. It was common ground in the litigation that for years, both Mr Matyas and Mr Wojakowski had been extracting funds from the group without lawful authorisation. Mr Wojakowski alleged that all the extractions that he made were done with Mr Matyas’s knowledge and consent, which Mr Matyas denied. Mr Wojakowski’s shareholding in TGL had been transferred to him by Mr and Mrs Matyas, who alleged that they would not have done so had they known that Mr Wojakowski, the managing director of TGL at the time of the transfer, had been extracting monies from TGL and other companies within the group.
24. Mr Wojakowski was initially represented by Mishcon de Reya LLP, but he was unable to continue to pay them. After acting in person for a period, he approached the



Solicitors to ascertain if they would be willing to act for him on a contingency fee basis. On 20 September 2019 Mr Wojakovski and the Solicitors entered into the DBA, which is a single-page document comprising nine unnumbered paragraphs. For convenience, the Judge referred to them as paragraphs 1 to 9. I shall do likewise.

25. The document is entitled “Damages Based Agreement”. Paragraph 1 identifies the parties, and provides that “this Damages Based Agreement” is subject to the Solicitors’ standard terms of business as amended (which were annexed to the DBA, and are in certain respects inconsistent with it) “which are subject to this agreement”. Thus, as the Judge held, the terms of the DBA take precedence. However, nothing turns on this.

26. So far as is material, Paragraph 2 provides as follows:

“as you do not wish to pay our hourly rate charges, as they are incurred, we agree to share risk in accordance with this DBA. In the event you recover any damages, monies, costs incurred by your previous lawyers, other sums and/or derive any benefits (excluding our hourly rate costs and counsel’s fees) (the “**Proceeds**”) in or arising out of all the current Court proceedings to which you are currently a party, and in respect of your commercial relationship with your father in law Arthur Matyas and in respect of the Tonstate Group generally, to include [certain defined proceedings] and any claims against [certain named individuals] (together “**your Opponents**”), whether by court order, agreement, settlement or otherwise, you will pay us 25% of the Proceeds + VAT if applicable (“**the Payment**”) net of any historic tax liabilities due to HMRC by Tonstate group companies, and any tax related to these companies should HMRC pursue you.”

27. Paragraph 4 sets out the reasons for setting the payment at that level, namely that it:

“reflects our risk of not being paid anything even if you succeed at trial, the complexity of the matter, the emotional war that exists between the parties, the volume of material and our liability to pay Counsel’s fees”.

However, this is subject to paragraph 7, which states that the Solicitors will provide in-house counsel to act for Mr Wojakovski at their own cost.

28. Paragraph 5 states that “if we are unable to recover any monies you will not be liable to pay us anything”.

29. Paragraph 8 provides that:

“You may terminate this agreement at any time but if you go on to recover any monies or derive any benefits from your Opponents you shall be liable to pay us, at our election, either (a) the Payment or (b) our hourly rate costs and expenses up to the date of termination. You undertake to ensure that any Proceeds shall be paid to any successor firm’s client account to be held subject to the terms of this agreement.

We may terminate this agreement at any time on reasonable notice but only for good reason.”

30. Paragraph 9 states that the agreement is:

“equivalent to a multiplicity of retainers intended by the parties to cover at least 15 different claims and is divisible and separable: a termination of one retainer in respect of a single claim is not a termination of any others.”

31. Mr Wojakovski subsequently suffered a number of serious setbacks in the underlying litigation. Following Mr Wojakovski’s admission that the extractions of money that he made from the companies were for the purposes of a fraud on HMRC, the Judge ruled that even if all the shareholders in the Tonstate Group had consented to those extractions, their consent would not afford Mr Wojakovski a defence to the Main Action. There being no other defence, on 20 November 2019 the Judge granted judgment against Mr Wojakovski in that action, in a sum of just under £13 million plus interest. In addition he ordered an account to be taken of all payments wrongfully extracted by Mr Wojakovski from the Tonstate Group companies. Those orders were temporarily stayed.
32. Subsequently Mr Matyas consented to an account being ordered against him in the same terms, and agreed to repay such amounts as he accepted he had wrongfully extracted from the Tonstate Group companies – part of the relief that Mr Wojakovski had sought in the Main Action. This was formalised in an order made by the Judge on 16 January 2020, which also gave case management directions. These included a direction that there should be a trial of the Shares Claim, together with certain of the claims made by Mr Wojakovski in the Main Action, referred to as the “Additional Claims”. The Petition was stayed pending determination of those claims, and the stay on payment of the judgment debt was extended to 31 March 2020.
33. At a further case management hearing on 2 March 2020, the trial was listed for 18 June 2020. Costs orders were made against Mr Wojakovski in favour of TGL (approximately £24,000) and Mr Matyas (approximately £38,000 plus VAT). Those sums were payable by 30 March 2020. In addition, Mr Wojakovski was ordered to pay £135,000 into court as security for the costs of the Sixth Defendant to the Petition, also by 30 March 2020. He failed to make any of those payments or to pay the judgment debt (by now in excess of £15 million) by the extended deadline of 31 March.
34. On 12 May 2020, the definition of “the Payment” in the DBA was amended to “29% of the Proceeds + VAT if applicable”. A further amendment to the DBA, which is immaterial for present purposes, was made on or around 20 May; among other matters it deleted paragraph 3 and the Solicitors agreed to act for Mr Wojakovski in insolvency and costs proceedings. On 21 May 2020 the Shares Claim was settled on the terms to which I have already alluded. The settlement agreement also settled the Additional Claims.
35. On 2 June 2020, the Respondents filed an application for an interim charging order over the 22,500 shares that Mr Wojakovski had retained. That was granted on 10

June. On 7 July 2020 the Solicitors, on behalf of Mr Wojakovski, consented to a final charging order, which was made on 21 July 2020.

36. A bankruptcy petition was presented against Mr Wojakovski by one of the defendants to the Petition on 18 August 2020. The Judge made a bankruptcy order on that petition on 15 October 2020.
37. The end result was, as the Judge put it at [21] of the April judgment, that Mr Wojakovski “resoundingly lost most of the litigation, he is subject to a judgment to pay at least £13 million, and he failed to recover anything at all from [the Respondents] or any other party”.

### THE JUDGMENT ON THE DBA ISSUES

38. In the April judgment, the Judge rejected the submission of Mr Williams QC on behalf of the Solicitors that the retention of the shares was “a benefit derived in or arising out of the proceedings” within the meaning of paragraph 2 of the DBA. He held that, as a matter of construction, the phrase “derive any benefits from the litigation” was limited to such benefits as Mr Wojakovski *recovered* from another party in or as a consequence of the litigation. “Proceeds”, as defined in paragraph 2 of the DBA, was intended to encapsulate recovery made against other parties in the litigation, and this view was supported by paragraphs 5 and 8.
39. Among other matters, the Judge rejected Mr Williams’ argument that this construction made no commercial sense. He pointed out at [32] and [33] that in substance Mr Wojakovski’s claims across the litigation were for money, because once both he and Mr Matyas had accounted for the monies that each had wrongfully extracted from the companies, the overall reckoning between them would result in a substantial payment in Mr Wojakovski’s favour. Thus there was a prospect of Mr Wojakovski recovering a financial benefit from the litigation from which to pay the Solicitors.
40. The Judge went on to accept Mr Fulton’s argument on behalf of the Respondents that, even if the DBA were to be construed so as to entitle the Solicitors to payment because Mr Wojakovski retained some shares in consequence of the settlement, it was unenforceable because such a contractual bargain did not comply with the requirements of the 2013 Regulations. In essence, he held at [50] that Regulation 4 made it a prerequisite to there being an obligation on the client pursuant to a permitted DBA, that a “sum” is “recovered” by the client. At [53] to [58] he rejected Mr Williams’ alternative submission that if that was its effect, Regulation 4 was ultra vires.
41. The Judge summarised his conclusions at [59]. The fact that Mr Wojakovski had retained the shares did not entitle the Solicitors to any payment under the DBA and, there being no other recovery by him in or arising out of the proceedings, they had no entitlement to payment of anything under that agreement. If, contrary to those conclusions, the shares did constitute “Proceeds” as a matter of true construction of the DBA, the DBA would not be enforceable, at least to that extent, because it did not comply with the requirements of the 2013 Regulations.
42. For the sake of completeness, the Judge went on to reject Mr Fulton’s further submission that the DBA was unenforceable in any event for non-compliance with

Regulation 3(c) or Regulation 4(1) of those Regulations. Those arguments were not the subject of a cross-appeal, and I need say nothing further about them.

ARE DBAS IN RESPECT OF INCOMING CLAIMS PERMISSIBLE?

43. I understand why, as a matter of logic, the construction of the DBA was considered by the Judge before he turned to the question whether, in principle, the 2013 Regulations permit an agreement by which a defendant is to pay his legal representatives out of money or assets which he has resisted paying or transferring to his opponent in the litigation. Unsurprisingly, the issues on appeal were addressed in the same order by counsel at the hearing and in their skeleton arguments.
44. However, this appeal is not just concerned with the correct interpretation of a contract entered into between Mr Wojakovski and the Solicitors; it raises issues of wider public importance. I would prefer to address those issues first. It would not matter whether the legislation permits a client to enter into a DBA in respect of an incoming claim if, on its true construction, the DBA in this case is not an agreement of that type. But it is equally true that if the legislation does not permit DBAs in respect of incoming claims, it does not matter if the DBA in this case *is* an agreement of that type. Therefore I will begin by considering the submissions on Grounds 2 and 3 of the Grounds of Appeal.
45. It was common ground before us that there is nothing in the Jackson Report that supports the concept of a DBA being entered into by a defendant in respect of an incoming claim. The Jackson Report recommended that lawyers should be able to enter into contingency fee agreements with clients for contentious business, subject to certain conditions, including the Regulation of their terms. A “contingency fee agreement” was described in paragraph 3.2 of the introductory chapter as one under which “the client’s lawyer is only paid if his or her client’s claim is successful, and then the lawyer is paid out of the settlement sum or damages awarded, usually as a percentage of that amount.” In Chapter 12, which is devoted to the specific topic of contingency fees, Lord Justice Jackson confirms in paragraph 1.1 that he uses the term “contingency fees” in its narrower sense to denote fees which (a) are payable if the client wins and (b) are calculated as a percentage of the sums *recovered*.
46. It was also common ground that, apart from the single entry to which I shall refer, there was nothing of assistance in Hansard, because all the relevant Parliamentary debates proceeded on the assumption that DBAs would be used only by claimants. However Hansard does record that, in answer to a specific question about whether DBAs could be used by defendants, the Minister of State, Lord McNally, made a statement in the House of Lords on 20 February 2013 (during the passage of the 2013 Regulations) to the effect that neither the Act nor the Regulations enable defendants to use DBAs, “*not least because a DBA is enforceable only where the agreement makes provision for the payment of the fee from damages awarded*”. He made a similar statement in a letter of 5 March 2013 which was placed in the library of both Houses of Parliament.
47. The Judge regarded the Minister’s statement as being relevant to the scope of the Regulations under discussion, though it is clear that he placed little weight on it. Mr Williams submitted that that statement took matters no further. The legal issue turns

on the true construction of section 58AA and of the Regulations, and not what a Minister believed their effect to be.

48. Although the discussion in the Jackson Report of contingency fee agreements in general, and DBAs in particular, is centred around claimants, and there is an underlying assumption that such agreements would be used only by claimants, in recommending that they should be made lawful, Lord Justice Jackson expressed the view in paragraph 4.2 of Chapter 12 that it was desirable that as many funding methods as possible should be available to “litigants”. Mr Williams placed some reliance upon that observation. He pointed out that, whilst there is nothing in any of the materials that could be used as an aid to the construction of section 58AA or of the 2013 Regulations which specifically contemplates that defendants would avail themselves of this form of funding, there is likewise nothing which expressly indicates that such an arrangement should be *prevented*. No thought was given as to whether DBAs should be available to defendants; it does not seem to have occurred to anyone (apart from Lord Beecham, who asked the question of Lord McNally) that this was a possibility. Mr Williams submitted that if a DBA with a defendant could be made to work, it should be allowed to, as it would facilitate access to justice.
49. Mr Fulton submitted that, in focusing on the lack of express disapproval or prohibition of such arrangements, Mr Williams was approaching the issue from the wrong perspective. The legislative changes introduced by LASPO had to be considered against the background of the unenforceability of contingency fee arrangements at common law, and how the legislation evolved from regulating a limited exception enabling individuals to fund employment-related claims against their employers in the specialist tribunals, to adoption of the recommendations in the Jackson Report. The only agreements of this type that it was considered should be made lawful were agreements by claimants. Borrowing a phrase used by Lord Justice Lewison in *Zuberi v Lexlaw* [2021] EWCA Civ 16 at [26], the legislation created “islands of legality in a sea of illegality”, carefully balancing difficult and sensitive competing policy considerations.
50. Therefore, if Mr Williams could not point to anything which demonstrated that Parliament had turned its mind specifically to the introduction of enforceable agreements between defendants and their lawyers that, if successful, the defendants would pay the lawyers’ fees from their own funds or other assets even if they recovered nothing from the opposing party which could be used for that purpose, this was fatal to his argument, even before one turned to consider the language of the statute or the 2013 Regulations. It was impossible to expand the exceptions to the common law prohibition beyond the clear legislative intent.
51. There seems to me to be considerable force in those submissions, since it cannot be inferred that Parliament created an exception to a long-established common law prohibition by accident or oversight. The fact that there is nothing in the Jackson Report, the Parliamentary debates or in the Explanatory Memorandum to suggest that it was ever envisaged at the time of the legislative changes that litigation funding arrangements of this particular nature should be permitted, is a powerful indication that this was *not* Parliament’s intention. On the contrary, the focus in the Jackson Report is upon permitting a successful client to pay his lawyers a percentage of what he recovers from the opposing party, which is something altogether different.

52. However, in my judgment the matter is put beyond doubt by the definition of “damages-based agreement” in s.58AA(3) of the primary statute. In order to qualify as a DBA, the agreement must provide for payment by the recipient of the services if he or she “obtains a specified financial benefit” from the litigation.
53. Mr Williams submitted that the primary legislation is neutral and can be interpreted as permitting defendants to enter into DBAs. The definition in section 58AA (3) refers to “the recipient” of the advocacy services, litigation services or claims management services. It is not limited to the provision of services to *claimants*. There was no reason why the dismissal of a claim in whole or in part should not be regarded as conferring “a specified financial benefit” on the defendant. If he successfully defends the claim, he gains something of advantage, because he gets to keep his money or other property.
54. That submission ignores the fact that the successful defendant is financially no better off than he was at the start of the litigation. Indeed he may be considerably worse off, because he may have had to pay something to the claimant, even if the claim did not succeed in full. In Mr Wojakowski’s case, he had to part with most of his shares in TGL.
55. In my judgment, the language of the statute is clear. I accept that the draftsman chose to refer to the “recipient of the services” rather than to the “claimant” – possibly to cater for the possibility that a DBA might be made in respect of what Mr Fulton described as an “outgoing” claim by a defendant, i.e. a counterclaim. I also accept that the phrase “specified financial benefit” is not confined to damages. Thus the expression “damages-based agreement” cannot be interpreted literally, as only applying to cases in which damages are paid (and not to debts or other forms of financial recovery). However, the word “obtains” envisages the litigant acquiring something that they do not already possess – by necessary implication, from the opposing party. That language is not apposite to describe a situation in which the defendant *retains* money or other assets of value, or is not required to make a payment or transfer of assets to the opposing party, even if this is the consequence of successfully resisting a claim for debt or damages, or a claim to those assets.
56. As Lord Justice Arnold observed in the course of the oral argument, a defendant facing a claim for £12 million who only has to pay £5 million under a judgment or settlement agreement, is still £5 million worse off than he was at the start of the litigation. Moreover it cannot be sensibly contended that he has “obtained” £7 million in connection with the litigation from which to pay his lawyers up to 50% - i.e. £3.5 million. It is no answer to my Lord’s point that if, in such a case, the client did not in fact have £7 million, the lawyers would not be paid.
57. An agreement between a defendant and his solicitors which makes provision for payment to the latter of a percentage of any sum (or of the value of any asset) which is claimed *from* him, and which in consequence of the outcome of the litigation he does not have to pay or transfer to the opposing party, is not a “damages-based agreement” as defined by section 58AA(3). Because it is not permitted by the statute such an arrangement is unlawful and unenforceable. Therefore, there is no need to consider whether an agreement of that nature satisfies the conditions in subsection (4), including whether it meets the requirements of the 2013 Regulations.

58. However, and as one might expect, the language of the Regulations is entirely consistent with that interpretation of section 58AA. “Payment” is defined in Regulation 1(2) as “that part of the sum *recovered* in respect of *the claim or damages awarded* that the client agrees to pay the representative (my emphasis). Regulation 4 (1) prohibits a DBA from requiring an amount to be paid by the client other than the payment (as so defined) net of costs, disbursements or expenses recoverable from another party to the proceedings. Regulation 4(3) puts the matter beyond doubt by restricting the payment to a percentage of “the *sums ultimately recovered* by the client”.
59. As the Judge held at [50], that means it is a necessary prerequisite to the entitlement of a representative to payment under a DBA that the client has made a recovery from the other side to the litigation. As he said, the other materials to which he referred at [46], including the Explanatory Memorandum and the Explanatory Note, and Lord McNally’s statement, are consistent with that conclusion, but do not need to be relied on in order to reach it.
60. Mr Williams realistically accepted that the natural reading of the language of the Regulations supported the Respondents’ case. His principal argument on interpretation was based on the premise (which I have already rejected) that the 1990 Act permits (non-counterclaiming) defendants, as well as claimants, to enter into DBAs, and that the language of s.58AA is neutral. On that premise, he submitted that the Regulations should not be construed as restricting or prohibiting that which is permitted in principle by the statute. If the requirements of the Regulations conflicted with the statute, non-compliance with those requirements could not result in the DBA being unenforceable, as the primary legislation takes precedence.
61. Mr Williams submitted that Regulation 4 was not intended to confine or restrict the scope of DBAs, but rather to legislate for the maximum level of DBA payment permitted in accordance with s.58AA(4)(b). Therefore, the Judge placed too much weight on the provision in Regulation 4(1) that a DBA must not require an amount to be paid by the client other than “the payment” (net of certain amounts) and expenses incurred by the representative.
62. I am unable to accept those submissions. The argument falls at the first hurdle because the statute does not permit this type of agreement, for the reasons I have already stated. The Regulations do not conflict with the statute, but are entirely consistent with the concept that a DBA provides for payment to the representative to be made only from what is recovered by the client from the opposing party, and then only up to a prescribed percentage of the amount so recovered. That is the fundamental premise upon which the Regulations were enacted. In order to be enforceable, a DBA must not only fall within the statutory definition, but also satisfy the conditions in s.58AA(4), including the requirements of the Regulations. A DBA which provided for payment to be made when there is no financial recovery from the opposing party would not do so.
63. Mr Williams’ ultra vires argument likewise depended upon the premise that the Regulations conflicted with the statute. Mr Williams submitted that the definition of “payment” in the Regulations and the word “recovered” were ultra vires because they went well beyond the requirement in s.58AA(4)(c) that a DBA should comply with “such other requirements as to its terms and conditions as are prescribed.” That only

permitted the Regulation of the terms of a DBA as defined in the primary statute, and not the prescription of terms and conditions which had the effect of limiting the types of DBA which could be enforced.

64. In addition to the points on interpretation of s.58AA referred to in paragraph 52 above, Mr Williams contended that the expression “specified financial benefit” in section 58AA(3) (which is wide enough to embrace the benefit of retaining an asset of value) and the definition of “payment” in s.58AA(7) (which envisages that the representatives can be paid under a DBA by the transfer of assets or any other transfer of money’s worth by the client) are in conflict with what the Regulations in fact permit to be used as the source of payment under the DBA.
65. This argument appeared to me to be based on a misconception of the function and scope of the Regulations, and their relationship with section 58AA, even if the premise upon which it is based – namely, that the statutory definition of a DBA embraces this type of agreement - were correct. The scheme of the Act was to permit DBAs (as defined) *in principle*, but then to confer a power on the Lord Chancellor to make Regulations which would include distinguishing between the types of DBA which can and cannot be made. The 2013 Regulations have only permitted agreements which provide for the representatives to be remunerated from sums recovered from the opposing party in respect of a claim (or counterclaim) made by the client, including, but not limited, to damages, which is entirely in line with the recommendations made in the Jackson Report.
66. I would therefore dismiss the appeal on Grounds 2 and 3.

DID THE DBA ENTITLE THE SOLICITORS TO BE PAID A PERCENTAGE OF THE VALUE OF THE RETAINED SHARES?

67. The agreement between the Solicitors and Mr Wojakovski is not well drafted; the draftsman appears to have prioritised brevity over clarity and consistency. However, it purports to be a DBA, it is so entitled, and therefore even before turning to its express terms it would naturally be understood as intending to provide for the solicitors to be paid a percentage of any sum that the client recovers in the litigation - because that is all that the legislation, both primary and secondary, permits. It can be assumed that the parties would not have intended to enter into a “DBA” which falls outside the definition in section 58AA of the 1990 Act or which does not comply with the 2013 Regulations, and is therefore unenforceable.
68. Mr Wojakovski was not just a passive defendant to incoming claims. Besides his claim in the Petition, which among other matters sought to buy out the Matyas’ shareholding in TGL, he had made claims for money – including a substantial counterclaim in the Main Action. There was a risk that he would recover nothing at the end of the day, but there was also a prospect that he might recover a substantial payment on the eventual dissolution of his joint venture with Mr Matyas, when all the accounts were taken, as the Judge pointed out at [32].
69. Paragraph 2 of the DBA envisages that the Solicitors are entitled to one “Payment” as defined. That entitlement arises only in the event that Mr Wojakovski recovers a payment or “derives a benefit” in or from the litigation – which in context must mean a financial benefit to which the stipulated percentage can be applied. In other words,



he must gain something from the litigation that he does not already have. The Solicitors then get the stipulated percentage of whatever he receives.

70. The use of the word “Proceeds” as shorthand for such payments or benefits is a further indication that the parties intended payment to be made out of a financial recovery from one or more of the opposing parties. I am unable to accept Mr Williams’ submission that “Proceeds” is just a collective term which covers both the recovery of “new” money and the retention of valuable assets or money claimed against the client by way of damages or pursuant to an account. It is a wholly inapt word to describe something which is in no sense part of the fruits of the litigation.
71. Mr Williams contended that it can be inferred that the reference to “deriving a benefit” must have been included in the DBA to reflect the fact that the Shares Claim could never result in any financial payment to Mr Wojakovski. However, that cannot be right. The retention of some of the shares that were the subject of the Shares Claim is not a benefit that is derived from the litigation (let alone from “your Opponents” as expressly envisaged in paragraph 8) for the reasons given by the Judge at [24]. The shares belonged to Mr Wojakovski at all material times; he avoided an additional *detriment* by having to transfer 22,500 of them to Mr and Mrs Matyas, but he gained nothing. In fact he was substantially worse off financially, because he had to part with 75% of his shares in TGL. Whilst in a sense he could be said to be in a better position than he might have been at the end of the litigation, because he did not lose all his shares, which might have happened if the claim had fought to trial, that is obviously not the sense in which “benefit” is used in paragraph 2.
72. The other terms of the settlement agreement take the argument no further. In a sense Mr Wojakovski gained something from those terms, in that his (new) position as a minority shareholder was protected, which it would not have been had he simply been left with the 22,500 shares. The value of his shareholding could not be diluted; but it could not have been diluted when he still owned half the shares in TGL. The promises made by the transferees under the settlement agreement prevented him suffering a detriment in consequence of moving from a position where he could use his votes to block any hostile resolutions by the other shareholders, to one where he could no longer do so. They conferred no measurable financial benefit upon Mr Wojakovski. In any event the Solicitors’ claim is not based upon the value of any such “benefit” – they are seeking a percentage of the value of the shares.
73. Paragraph 4 of the DBA explains the reasons for setting the Payment at the specified level, in compliance with Regulation 3; they include “our risk of not being paid anything even if you succeed at trial”. That recognizes that success – such as, for example, success in the Shares Claim - may not yield any recovery from the losing party (from which the Solicitors would be paid). Paragraph 2 reflects the recognition of that risk, which must include the risk that any sum awarded in favour of Mr Wojakovski might well be smaller than sums awarded against him, and not just the enforcement risk, as Mr Williams submitted. Moreover, as Lord Justice Males observed in the course of argument, “success at trial” is not the same thing as losing less badly than you might have done.
74. The “no win, no fee” nature of the bargain was clearly explained in paragraph 5. Mr Wojakovski was told in terms that: “if we are unable to recover any monies you will not be liable to pay us anything”. That must mean that if the Solicitors are unable to

recover any monies from an opposing party which that party is liable to pay Mr Wojakovski, they will not seek payment from him. That was the commercial risk that they took. Mr Williams submitted that this was clearly a reference to the enforcement risk, but there is no reason why this paragraph should be interpreted as confined to that risk; the Solicitors would equally be “unable to recover” if their client’s opponents were not liable to pay him anything (including as the result of a set-off). Paragraph 5 reflects the practical reality that it is normally the solicitors, in the first instance, who receive payment of any damages or other judgment debts and who are tasked with enforcement if the money is not paid voluntarily.

75. Mr Williams submitted that the fact that the Solicitors would not get paid for the work they had done on the Main Action should not stop them from being rewarded for the partially successful defence of the Shares Claim. On the Judge’s interpretation, they would not be rewarded even if they had successfully defended that claim at trial. One would generally expect the Solicitors to be remunerated under a “no win, no fee” agreement for the work they carried out if the client won. However that argument begs the question of what contractual bargain they actually made with their client. They may have offset the downside of receiving no specific payment for work done on the Shares Claim against the upside of what they would stand to gain by way of remuneration for the work done on the litigation as a whole if, at the end of the day, Mr Wojakovski recovered a substantial sum on the dissolution of the joint venture.
76. Against a background where a DBA is only lawfully available as a means of remuneration when there is a financial recovery from the client’s opponent, it follows that for any claim where the client is merely a defendant, the reality is that the lawyers would have little choice but to look to the opposing party to pay their costs if their client succeeds, and absorb any shortfall themselves. Under this DBA, the only other possible source of payment would be any sums recovered in respect of the costs of their predecessors.
77. The Judge acknowledged the point made by Mr Williams that paragraph 5 only refers to the recovery of “monies” whereas the definition of “Proceeds” in paragraph 2 is wider (“damages, monies, costs incurred by your previous lawyers, other sums and/or ... benefits”). However, as the Judge said at [31] “monies” was just an infelicitous shorthand for what might be recovered. I agree with him that paragraph 5, though not the operative provision, refers to the importance of *recovering* something and thus supports the conclusion that paragraph 2 is intended to encapsulate a financial recovery.
78. I also agree with the point made by the Judge at [35] that paragraph 8 of the DBA also supports that construction, because it makes it clear that Mr Wojakovski will remain liable to pay something to the solicitors post-termination by him of the DBA (either the “Payment” as defined or their hourly rate for work done prior to termination) if he goes on to “recover any monies or derive any benefit *from your opponents*”. The expression “your opponents” is defined in paragraph 2.
79. I reject Mr Williams’ contention that the retention of the shares was a “benefit derived from your opponents”. “Benefit” means “financial benefit” and title to the shares was not bestowed on Mr Wojakovski by the settlement agreement. The settlement may have put paid to any claim that those shares belonged to Mr and Mrs Matyas, but Mr

Wojakovski was entitled to the shares (and to their value in his hands) throughout, as he was the registered shareholder.

80. Mr Williams sought to rely on paragraph 9 of the DBA, contending that it provided for a separate DBA in respect of each claim (including the Shares Claim) and that the Judge's interpretation flouted common sense by making that paragraph meaningless in the case of the Shares Claim. The Judge regarded this provision of the DBA as essentially neutral, for the reasons he gives at [36]. I consider that paragraph 9 does not support the Solicitors' construction. It simply records that the agreement is equivalent to a multiplicity of retainers and covers all claims in the litigation. It protects the Solicitors against the argument that the termination of their retainer in respect of one of the claims brings the DBA to an end. However, it does *not* say that the DBA provisions apply to each claim separately and divisibly. Therefore the Judge did not err by failing to consider paragraph 2 of the DBA as it applied specifically to the Shares Claim.
81. Indeed, the "umbrella" nature of paragraph 9 could be seen as an indication that the DBA was concerned with the overall position reached at the end of the day, so that if (for example) Mr Wojakovski had to pay £13 million in one action, but obtained judgment for £4 million on one of his other claims, the Solicitors would be paid nothing, rather than a percentage of the £4 million. That is a plausible construction, and to me it makes more commercial sense, because even if there were no set-off it is highly unlikely that there would be any recovery of the £4 million. However it is unnecessary to decide if it is correct.
82. The final point relied on by the Judge was the absence of any contractual mechanism for the valuation of the shares, which he regarded as suggesting it was unlikely the parties envisaged that "Proceeds" would include any shares retained by Mr Wojakovski: see the April judgment at [40]. We probed with Mr Williams the basis on which the Solicitors' invoice for £2 million was calculated. We were told it was a very crude calculation based on the statutory accounts, and that the figure was "not set in stone". The valuation of shares in private companies (particularly a minority shareholding) is a notoriously tricky exercise and may be deeply contentious. I consider it highly unlikely that the parties to the DBA contemplated that the calculation of the "Payment" would depend upon the engagement of forensic accountants and possibly a new set of proceedings to determine the value of the shares.
83. The Judge's construction of the DBA as depending upon a recovery from the opponent(s) to the litigation was plainly correct. Therefore I would dismiss the appeal on Ground 1 also.

## CONCLUSION

84. For the reasons stated, it is not possible for a defendant to litigation to enter into an enforceable agreement with his legal representatives that he will pay them a percentage of such part of the sums or assets claimed from him as he has resisted paying or transferring to his opponents. Such an agreement is not a "Damages-based Agreement" as defined by s.58AA(3) of the 1990 Act and cannot comply with the requirements of the 2013 Regulations. In any event, for the reasons stated above, that was not what Mr Wojakovski agreed with the Solicitors. Therefore the Judge was

right to find that they have no entitlement to be paid a percentage of the value of the shares retained under the settlement agreement. That being so, there is no right to a charge over the shares and the issue of which charge takes priority does not arise. For those reasons I would dismiss both appeals.

LORD JUSTICE ARNOLD:

85. I agree.

LORD JUSTICE MALES:

86. I also agree. In particular, as Lady Justice Andrews explains, an agreement between a non-counterclaiming defendant and his solicitors is not capable of being a lawful “damages-based agreement” as defined by section 58AA(3) of the 1990 Act. Where a defendant does counterclaim, a damages-based agreement will only be enforceable if the defendant obtains a financial benefit by making a recovery from the claimant.

87. To my mind the submissions made on behalf of the Solicitors in this case are a variant of “heads I win, tails you lose”. They mean that a client who loses his case must pay the sum claimed to the claimant, but if he wins, he must still pay up to half the sum claimed to his solicitors. There is, therefore, no good outcome for a client who enters into such an agreement. Win or lose, he faces financial disaster. It is not surprising that legislation aimed at promoting access to justice should not permit such agreements.