Neutral Citation Number: [2025] EWHC 2311 (KB)

Case No: KA-2025-000017

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
On appeal from Costs Judge Brown

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/09/2025

Before :
Mr Justice Dexter Dias

- -

Between :

LOUISE MICHELLE REEVES	**Claimant/ Respondent**
- and –	
SIMON KEVIN FRAIN (aka SIMON KEVIN REEVES aka BILL REEVES)	**Defendants/ Appellants**
MARK RYAN MCKINNON	

- -
- -

Robert Marven KC (instructed by Stokoe Partnership, Solicitors) for the **Claimant/Respondent**
Ben Quiney KC (instructed by LLP Solicitors) for the **Defendants/Appellants**

Hearing dates: 29 July 2025
(*Judgment circulated in draft: 22 August 2025*
Received back from counsel: 29 August 2025)

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JUDGMENT

Remote hand-down: this judgment was handed down remotely at 10.30 am on Wednesday 10 September 2025 by circulation to the parties or their representatives by e-mail and release to the National Archives.

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THE HON. MR JUSTICE DEXTER DIAS

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Mr Justice Dexter Dias :

1. This is the judgment of the court in a costs appeal.

2. The appeal is from the order of Costs Judge Brown ("the Judge") handed down on 21 January 2025.

3. To assist the parties and the public to follow the main lines of the court's reasoning, the text is divided into six sections, as set out in the table of contents above. The table is hyperlinked to aid swift navigation.

I - Introduction

4. The appellants are Simon Kevin Frain and Mark Ryan McKinnon. They were the defendants in the main action, contested probate proceedings involving a dispute about which of two wills of Kevin Patrick Frain (also known as Kevin Patrick Reeves ("**the deceased**")) was valid. The first appellant Simon Frain is the deceased's son; the second appellant Mark McKinnon is his grandson. The respondent is Louise Michelle Reeves, the deceased's daughter, and the

claimant in the main action. The appellants are represented by Mr Quiney KC, the respondent by Mr Marven KC. The court is grateful to counsel for their helpful submissions. As is the practice in certain costs appeals, the court sat with a costs judge. The court sat with Senior Costs Judge Rowley. The court is grateful to him for his time. The judgment remains entirely my responsibility.

5. Having issued proceedings in the Chancery Division, Ms Reeves asked the court to pronounce in favour of a 2014 will in solemn form of law. There had been an earlier will executed in 2012, but the 2014 will radically altered the structure and balance of the bequests, granting her 80 per cent of the £100 million estate while substantially reducing the bequests to the appellants.

6. A crucial issue was whether the deceased's cognitive and literacy abilities allowed him to comprehend the 2014 will, raising questions about undue influence and true testamentary intention. The trial judge was Green J. After a lengthy trial, he upheld the validity of the 2012 will and made an order granting probate accordingly (*Reeves v Drew & Ors.* [2022] EWHC 159 (Ch)).

7. Therefore, he rejected the claimant's case that the 2014 will which contained an "80/20 split" (as Green J termed it (para 380) in her favour reflected Kevin Frain's true testamentary intention. This seismic shift in the bequeathing under the new will had been "tucked away at the bottom of the first page in the most bland of terms" (para 241). In consequence, for the purposes of costs, Ms Reeves is the paying party and the appellants the receiving parties. Green J decided that Ms Reeves should pay 70 per cent of the appellants' costs on an indemnity basis, to be assessed.

8. An application for contempt proceedings was made against Ms Reeves and a solicitor. It was alleged that Ms Reeves knowingly made false statements. The application was refused at permission stage by Joanna Smith J in a judgment dated 19 January 2023 ([2023] EWHC 73 (Ch)).

9. The main claim costs claimed by the appellants are in the region of £1.3 million. The dispute in this case arises from the way in which their solicitors, the London Litigation Partnership t/a LLP Solicitors, were engaged and the action funded. The dispute centres around the terms of the letters of engagement dated 16 February 2021 and the Damages-Based Agreement ("DBA") dated 16 February 2021 between Simon Frain and LLP Solicitors, and the letters of engagement dated 9 December 2020 and the DBA dated 16 December 2020 between Ryan McKinnon and LLP Solicitors.

10. At the costs hearing, the Judge held the two DBAs to be unenforceable. The DBAs purported to remunerate the legal representatives by granting them specified percentages. This was set out at Clause 10.1 of the DBAs:

> "If you win you agree to pay us [10% for Simon Reeves; 24% for Mark McKinnon] of any money and any non-monetary award or settlement received."

11. His decision came after a two-day hearing before him on 6-7 November 2024. The focus was on the meaning and effect of the DBAs when read with the relevant statutory framework, which includes 58AA of the Courts and Legal Services Act 1990 ("**the Act**") and the Damages-Based Agreements Regulations 2013 (SI 2013/609) ("**the Regulations**") (together, "**the DBA Rules**"). The issues, facts and decision in the main claim are relevant to the costs appeal determination. It is of great advantage that the background facts have been set out in detail in Green J's judgment, and I draw on his careful exposition with gratitude.

II - Issues

12. I have considered two prime issues in the appeal. I use the numeration adopted by the Judge and the framing used by the parties before me:

> **Issue 1**: Under the relevant rules, is payment only permitted out of sums recovered by the client from another party?
>
> **Issue 2**: Must the "payment" include counsel's fees which may not be charged as expenses?

13. Numerous arguments and sub-arguments, running in diverse directions, were laid before the court. This is a testament to the thoroughness of counsel. However, I emphasise that I shall not deal with all of them as some fall away, some are essentially duplicative, and some to my mind bear little relevance to the cardinal questions I must determine. I thank counsel for their industry.

14. The test in this appeal is the standard appeal test: whether the Judge's decision on the law was "wrong" (CPR 52.21). Accordingly, this is not a review of the Judge's evaluation or discretion. It is a hard-edged question. The court must determine the law itself. The two DBAs are materially the same and stand or fall together. Unless the appellants succeed on both grounds of appeal, the appeal must fail. This is because the DBAs would be fundamentally tainted with illegality by non-compliance with the DBA Rules and thus unenforceable.

III – Background Facts

15. Green J's judgment extends to 112 pages. I extract the most relevant passages from it for the purposes of this costs appeal:

"1. Kevin Patrick Reeves (aka Kevin Patrick Frain) (the deceased or Kevin) was an extraordinary man who during his life built a fortune of up to £100 million from nothing. He died, unexpectedly, on 3 February 2019 at the age of 71 although he had been unwell for many years with chronic obstructive pulmonary disease, COPD, or emphysema. His death has unleashed a bitter feud between his children and grandchildren that culminated in a three week trial during which I heard from 49 witnesses about whether a will made by the deceased on 7 January 2014 (the 2014 will) was his valid last will and testament.

2. The Claimant, Ms Louise Reeves (the Claimant or Louise) is the youngest daughter of the deceased. She seeks to uphold the 2014 will and asks the Court to pronounce in favour of it in solemn form of law. Under the 2014 will, the Claimant received a specific property and the deceased's Rolls Royce Phantom but most significantly she was left 80% of the deceased's residuary estate. Her half-sister, Lisa Murray, the Third Defendant (Lisa) was left the remaining 20% of the residuary estate, together with a specific property. Lisa supports the Claimant in these proceedings and gave evidence for her.

3. On the other side and opposing probate being granted of the 2014 will is the Second Defendant, Simon Frain (aka Simon Reeves, aka Bill Reeves) (Bill) who is the second son of the deceased. He says that the deceased did not know and approve the contents of the 2014 will; alternatively that it was procured and executed by the deceased as a result of undue influence exercised by the Claimant on him. Bill seeks to propound an earlier will made on 18 April 2012 (the 2012 will) by which the deceased's residuary estate was split as to 80% between the Claimant, Lisa and Bill (ie 26.67% to each child) and the remaining 20% was split equally between the Fourth and Fifth Defendants (Ryan and Ria, respectively). Ryan and Ria are both grandchildren of the deceased as their father is Mark Reeves (Mark), the eldest son of the deceased. Mark was estranged from the deceased and did not feature in any will of the deceased. Ryan is separately represented in these proceedings but wholeheartedly supports Bill's case.

12. There are now only two broad issues for determination:

(1) Whether the deceased knew and approved the contents of the 2014 will; and

(2) Whether the deceased's execution of the 2014 will was the result of the exercise by the Claimant of undue influence.

20. The deceased's rags to riches story is quite incredible. He was born on 29 October 1947 and was given up by his biological mother (Beatrice Frain) as an orphan to the local convent. He was then fostered to a large family with the surname Reeves and they had Irish traveller origins. The deceased's foster mother died when he was 10. It is believed that by the time he was 12, he had left school, although he probably did not attend much before that. It is said on behalf of the Defendants that, as a result, he never learned to read or write.

21. But he clearly possessed a sharp mind and tremendous business acumen. Everyone has attested to his skill with figures and there is little doubt that he used this and his ability to spot an opportunity and exploit it to his very great advantage. He was a tough no-nonsense negotiator and it brought him enormous success. His main business was property dealing, predominantly in the Southampton area where he lived, but he also dealt in cars, shares and currencies, making his own investment/trading decisions.

27. Largely because the Claimant sided with Mark against her father, she and the deceased also fell out and did not speak for 4/5 years between 2004 and 2009, when the Claimant was 18 to 23 years old. The deceased disapproved of the people the Claimant was mixing and going out with in particular her relationship with a Mr Stephen McCarthy who was part of a well-known crime family in Southampton. The Claimant suffered an horrific injury during this period by being glassed in a pub by another woman in a random attack but the deceased responded to this by using the memorable but highly disturbing phrase "lay with dogs and you get fleas". To say that of your daughter shows how offensive the deceased could be. If you were really out of favour with him, he would completely cut you off and have nothing to do with you. He would have no qualms about removing such a person from his will. The Claimant even said in her witness statement that during that time the deceased told her she was getting "f***ing nothing" if she sided with Mark.

28. But they were reconciled in 2009 and the Claimant moved in with the deceased. She said that they thereafter had a very good, loving relationship and they went many times to Spain together. The Claimant said that the

> deceased wanted her to take over the business and he was training her up to do that. She had qualified as a hairdresser but from about 2011 onwards the deceased had wanted her to stop hairdressing and to work in and learn how to run his business. This, she said, is what was behind the 2014 will.
>
> 31. Despite his evident serious ill-health, his death at home on 3 February 2019 was unexpected and quite sudden.
>
> 446. As a result of my finding that the Claimant has not proved that the deceased knew and approved the contents of the 2014 will, I must pronounce against the force and validity of the 2014 will. There is no dispute that the 2012 will was a validly executed will and I therefore pronounce for the 2012 will in solemn form of law."

IV - Issue 1

16. On Issue 1, I consider in turn (A) the meaning of "payment"; (B) "ultimately"; (C) "recovery"; before identifying the ratio in *Candey Ltd v Tonstate Group Ltd* [2022] EWCA Civ 936 ("*Candey*"); and (E) reaching the court's conclusion on the issue.

17. The parties dispute the meaning of key terms in the Act and Regulations. Among them are "financial benefit" and "payment". Financial benefit is not defined in the Act, nor in the Regulations. Payment is defined in both the Act and the Regulations. The term payment is defined using different words in the two provisions. The Judge's decision about DBA validity rested on questions of hard-edge law: what financial benefit means; whether contingent benefits are permitted financial benefits for DBAs; the meaning of payment in the DBA Rules. I consider all this in turn. However, the determination of meanings must be made in the context of the statutory objectives under the Act and the underlying law of champerty. Section 17 of the Act provides:

> "17 The statutory objective and the general principle
>
> (1) The general objective of this Part is the development of legal services in England and Wales (and in particular the development of advocacy, litigation, conveyancing and probate services) by making provision for new or better ways of providing such services and a wider choice of persons providing them, while maintaining the proper and efficient administration of justice."

18. This was considered by Lady Rose (while dissenting) in *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] UKSC 28 at para 149:

> "The parties drew our attention to two recent cases considering the application of section 58AA. They illustrate, in my view, the courts' awareness that provisions enacted to enable "new or better ways" for legal services to be provided should not be used either by the client to avoid paying their own lawyers for successful work done pursuant to the retainer or by the opponent to disrupt the proceedings and avoid the adverse costs consequences that normally follow from having fought and lost."

19. These "new or better ways" were developed by Parliament against a wide historic prohibition contained in the law of champerty. The common law concept of champerty has not been abolished, but exists as an indispensable legal context to this case. In *Sibthorpe v Southwark LBC* [2011] 1 WLR (CA), Lord Neuberger of Abbotsbury MR addressed the underlying law on champerty (paras 15-17):

> "**The law relating to champertous agreements with those conducting litigation**
>
> 15 As Lord Phillips of Worth Matravers MR said, when giving the judgment of the Court of Appeal in *R (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8)* [2003] QB 381, 399, para 31, although no longer a crime, "champerty survives as a rule of public policy capable of rendering a contract unenforceable". He went on to explain in the next paragraph of his judgment, quoting from the then current edition of *Chitty on Contracts*, 28th ed (1999), vol 1, para 17-050: "A person is guilty of maintenance if he supports litigation in which he has no legitimate concern without just cause or excuse." It has also been described as "wanton and officious intermeddling with the disputes of others . . . where the assistance [the maintainer] renders to the one or the other party is without justification or excuse" by Fletcher Moulton LJ in *British Cash and Parcel Conveyors Ltd v Lamson Store Service Co Ltd* [1908] 1 KB 1006, 1014.
>
> 16 In *Factortame (No 8)* [2003] QB 381, 399, para 32, Lord Phillips MR went on to say, quoting again from *Chitty*, op cit that "Champerty occurs when the person maintaining another stipulates for a share of the proceeds of the action or suit". It will be necessary to examine that definition of champerty a little more closely in para 52 and following below, but it is to be noted that Lord Phillips MR added: "Because the question of whether maintenance and

> champerty can be justified is one of public policy, the law must be kept under review as public policy changes."
>
> 17 A type of contract which has relatively often given rise to an allegation of champerty or maintenance is one between a claimant in a piece of litigation and the person conducting the litigation (almost always a solicitor or barrister) on the claimant's behalf. At any rate until the recent past, the law had set its face against those who conduct litigation placing themselves in a position where they could profit from their clients' success. As Lord Denning MR put it in *Wallersteiner v Moir (No 2)* [1975] QB 373, 393, "English law has never sanctioned an agreement by which a lawyer is remunerated on the basis of a 'contingency fee', that is he gets paid the fee if he wins, but not if he loses", describing this as champerty. He relied at p 394 on a dictum of Lord Esher MR in *Pittman v Prudential Deposit Bank Ltd* (1896) 13 TLR 110, 111:
>
> > "In order to preserve the honour and honesty of the profession it was a rule of law which the court had laid down and would always insist upon that a solicitor could not make an arrangement of any kind with his client during the litigation he was conducting so as to give him any advantage in respect of the result of that litigation."

20. So much for the historical legal context. Lord Neuberger went on to consider more recent developments that have modified or created exceptions to the underlying prohibition.

> "28 Having explained the facts, Lord Phillips of Worth Matravers MR turned to "the nature of the services provided", and began by saying, at para 23, that "When we come to consider the law of champerty we shall find that its application requires an analysis of the facts of the particular case. Special principles apply to those who are entitled to have the conduct of litigation, and in particular to solicitors". He then went on to consider whether Grant Thornton had "been providing services which are customarily provided to litigants by solicitors", and after saying at para 27 that they had "done nothing for which they required authority under section 28 of the 1990 Act or which offended against section 20 of the [Solicitors Act 1974]", he concluded that "Their services have been ancillary to the conduct of the litigation by [the applicants' solicitors]".

29 After a little further discussion about Grant Thornton's role in that litigation, Lord Phillips MR turned to "the law of champerty", and began with the passage quoted in para 15 above, and, after citing what Oliver LJ said in the *Trendtex* case [1980] QB 629, 663, as to the "clear requirement" that officers of the court should not put themselves in a position of potential conflict with their duties to the court, he continued at paras 34-36:

> "34. The introduction of conditional fees shows that even this requirement of public policy is no longer absolute. This case raises the question of whether the requirement extends to expert witnesses or others in a position to influence the conduct of litigation and, if it does, whether on the facts of the present case the agreements concluded by Grant Thornton can be justified.
> 35. [Reference is here made to an observation of Lord Denning MR in *In re Trepca Mines Ltd* (No 2) [1963] Ch 199, 219-220].
> 36. Where the law expressly restricts the circumstances in which agreements in support of litigation are lawful, this provides a powerful indication of the limits of public policy in analogous situations. Where this is not the case, then we believe one must today look at the facts of the particular case and consider whether those facts suggest that the agreement in question might tempt the allegedly champertous maintainer for his personal gain to inflame the damages, to suppress evidence, to suborn witnesses or otherwise to undermine the ends of justice.""

21. More recently, in *Diag Human v Volterra* [2023] EWCA Civ 1107 ("*Diag Human*") Stuart-Smith LJ, giving the lead judgment of the court, said at paras 17-18:

> "17. Until 1990 it was axiomatic that contingency fee agreements entered into by lawyers with their clients were illegal and contrary to public policy, because they gave lawyers an interest in the outcome of the litigation that could create conflicts between the lawyer's interests and those of their client. That axiomatic position was authoritatively restated by Buckley LJ in *Wallersteiner v Moir (No. 2)* [1975] 1 QB 373 at 401D-E.
>
> 18. Because one of the foundations for the public policy rule was the need to avoid conflicts of interest, what is

> prohibited at common law is not merely entering into an agreement tainted by maintenance or champerty but also acting in accordance with such an agreement. "If anything is against public policy it is the solicitor undertaking *or continuing to act* for a party in litigation in circumstances where the solicitor stands to gain more from the action if it is won than if it is lost.": see *Awwad* v *Geraghty & Co* [2001] QB 570, 594B–C per Schiemann LJ (emphasis added)."

22. Stuart-Smith LJ continued at para 26:

> "26. Even if it were open to us in the light of these authoritative statements to enter the choppy waters of public policy, which in my view it is not, I can detect nothing other than the solicitors' speculative hope upon which it would be possible to base an assertion that public policy has changed since either *Wallersteiner v Moir (No. 2)* or the more recent cases of Awwad, Sibthorpe and Farrar which reaffirmed it. Any further modification of public policy in this area is for Parliament to establish and define: it is not for this court to attempt. This must be borne in mind when considering the issue of severance, not least because many of the authorities about severance are cases about restrictive covenants in contracts of employment, where the nature and scope of public policy are not the same as in the field of champertous retainers of solicitors."

23. For my part, it is helpful to set out these authoritative decisions of the higher courts. CFAs and DBAs are closely defined and regulated exceptions to the still-existing champerty prohibition. Great effort has been taken by Parliament to delimit the scope of the statutory exceptions. As Lewison LJ memorably put it in *Lexlaw Ltd v Zuberi* [2021] 1 WLR 2729 ("*Zuberi*") at para 26, the legislation created

> "… "islands of legality in a sea of illegality", carefully balancing difficult and sensitive competing policy considerations"

24. I would add that beside the authorities that confirm this point, the framing of the words of the statute reinforces the default position. The Act says at section 58AA(1) that a DBA is "not unenforceable" simply by reason of being a DBA. By implication, a DBA needs something more. As we will see, whether it is enforceable depends on its satisfying not just the statutory conditions but the requirements in the Regulations. It is noteworthy that the same formulation is used for CFAs under section 58(1). The policy behind the legal authorisation of DBAs (and indeed earlier CFAs) is to promote access to justice by enabling new models for clients to fund legal representation. This was to be accomplished, as the now-repealed section 17 of the Act stated,

> "by making provision for new or better ways of providing such services and a wider choice of persons providing them, while maintaining the proper and efficient administration of justice"

25. In any event, this overarching objective has been confirmed in Lewison LJ's judgment in *Zuberi* at para 276 (proposition 9), where it is described as being to "promote access to justice". Although the choice by the appellants here was to use DBAs, they could have instructed solicitors under CFAs. That was their clear choice.

A - Meaning of "payment"

26. The dispute between the parties about what payments are permitted under DBAs lies at the heart of Issue 1. Central to the appellants' argument is a difference in the definition of payment in the Act and the Regulations. To assist evaluating the arguments, it repays setting the two definitions out side-by-side. Section 58AA(7) provides:

> "(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)"

27. Regulation 1(2) provides:

> "… "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, 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"

28. On any view, these are two different definitions. The appellants submit that using the definition under the Act, the declaration of the validity of the 2012 will which favours the appellants produces a financial benefit to the appellants. Their position is materially and substantially better as a result of Green J's order than if the 2014 will, as the respondent sought, was pronounced the valid instrument. The appellants argue that the favourable decision creates a contingent right for the solicitors to a future sum that they will benefit from in due course. The respondent submits that the declaration made by Green J in favour of the appellants cannot result in any lawful permitted payment under the Regulations and this makes the DBAs unenforceable.

29. There are various routes to a conclusion about what kinds of payments are permitted under DBAs. The term "money's worth" is not defined in the Act. The term "transfer of assets" is not defined in the Act. Neither term is mentioned in the Regulations. One distinction between the Act and the Regulations in the definition of payment is that the Act specifies what is "include[d]" whereas the Regulations provide a definition of payment that appears to be comprehensive ("payment" *means* that part of the sum recovered in respect of the claim damages awarded" (emphasis provided)). As for transfer of assets or money's worth, they are plainly not damages awarded. Thus, they must fall under "sums recovered". Much discussed before the Judge was the hypothetical of a dispute over the ownership of a Rembrandt painting (judgment below, para 68). The Judge, to my mind correctly, concluded that the painting could not be the subject of a DBA. Without more, it is difficult to stretch the meaning of a recovered sum to include the transfer of a painting. A painting is not a "sum". This problem should not be glossed over. The Regulations have been subject at times to disobliging comment from the higher courts. For example, Coulson LJ states in *Zuberi* at para 74:

> "I agree with my Lords that the appeal in this case should be dismissed. Because their reasoning is different, and because nobody can pretend that these Regulations represent the draftsman's finest hour, it is appropriate if I add a few words to explain my own approach to the issues."

30. Despite infelicities, the Regulations have the force of law and this court must ascertain their meaning. To begin the task, I note that the most fundamental precepts of statutory interpretation were not in dispute between the parties, nor could sensibly be. Lord Bingham famously said in *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 that the court should not be confined to a literal interpretation of a particular provision giving rise to difficulty. He said at para 8:

> "… It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

31. A further core principle of interpretation is that the delegated legislation should be interpreted in light of the enabling act. *Bennion, Bailey and Norbury on Statutory Interpretation* (8th Edn.) ("*Bennion*") deals with this at para 3.17:

> "3.17 The general principles of interpretation that apply to Acts apply equally to delegated legislation, but with the additional consideration that since delegated legislation derives its authority from the enabling Act it must be interpreted in light of that Act."

32. Using these interpretive tools, it seems to require the infliction of considerable violence on the clear regulatory definition of payment to accommodate the transfer of assets or money's worth. The better conclusion appears to be that the Regulations define and delimit the permitted applications of the Act and this is a choice Parliament has deliberately made. Support for this suggestion comes from rationale for the Regulations and the history of their enactment. Newey LJ sets the scene in *Zuberi* at para 53:

> "53 Provision for the regulation of DBAs was first introduced by section 154 of the Coroners and Justice Act 2009, which inserted a new section 58AA into the 1990 Act. This version of section 58AA was limited to DBAs relating to employment matters, but was otherwise in much the same [as the current version]"

33. Therefore, the 2013 Regulations were approved by Parliament to replace earlier regulations approved in 2010. Thus, the 2013 Regulations were not Parliament's first attempt at regulating DBAs. When Parliament considered the draft 2013 Regulations placed before it, it was not proceeding from a standing start. The version of the 2013 Regulations are the result of further scrutiny, as helpfully explained by Newey LJ at para 61:

> "A working group of the Civil Justice Council considered DBAs in a report published in August 2015 (The Damages-Based Agreements Reform Project: Drafting and Policy Issues). The working group had been asked to make recommendations to the Government on whether the 2013 Regulations could be made more effective by some improvements"

34. Thus, the Regulations relevant to the determination, having the force of law, in detail specify which types of DBAs are "permitted". They act to ensure that DBAs are "properly regulated" (borrowing the phrase from the Jackson Report). Another rule of interpretation is applicable, which has a statutory basis rather than being one of the many tools of interpretation that have grown around the daily interpretive tasks of the courts. The Interpretation Act 1978 provides at section 11:

> "11 Construction of subordinate legislation.
>
> Where an Act confers power to make subordinate legislation, expressions used in that legislation have, unless the contrary intention appears, the meaning which they bear in the Act."

35. Courts will generally proceed on the assumption that the legislative purpose underlying delegated legislation is consistent with that of the enabling Act. If the Regulations provide a definition of payment that is materially at odds with the statutory definition, that might constitute a contrary intention. While the regulation needs to be interpreted in light of the enabling statute, if there is a clear contrary intention, that must be given legal effect. That nettle must be grasped. However, it seems to me that the position is more nuanced. On plain reading, the definition of payment in the Regulations is different and narrower than in the Act. To understand that difference, one must understand the interrelationship between the Act and the Regulations and their different functions. The Act creates a statutory exception to champerty. It does so by deeming certain arrangements for the payment of representatives to be made from financial benefits obtained in the proceedings not to be unenforceable merely by their creation; the regulations carefully limit what are the permissible types or expressions of that exception, that is, the requirements of permissibility. That there was a need for regulations is clear from the broad terms in which the Act was drafted. Section 58AA deems not unenforceable representative-client payment arrangements where "the amount of that payment is to be determined by reference to the amount of the financial benefit obtained". Given that one of the objectives has been to promote access to justice while ensuring adequate protection from excessive legal costs falling on clients, there was an obvious need for regulation. The terms "by reference to" provides no meaningful protection to the public. The necessary protection came in regulations. The 2013 Regulations specify the level of permitted payments (regulation 4) and the permitted source of those payments (regulation 1(2)). While I accept the appellants' submission that the term financial benefit in the Act is "open-textured", the payments that are permitted under the Regulations are not. For very good reason, the Lord Chancellor sought precision and his approach was approved by both Houses of Parliament.

36. The appellants submit, with commendable directness, that "the notion of something being contingent should not be a block to the validity of a DBA". However, the submission is confronted by the clear words of the Regulations. The respondent submits that "Parliament did not legislate for a free-for-all". While I might not phrase it in quite the same way, I agree that the Regulations do not allow any room for contingent benefits. In many ways, the facts of this case illustrate the point perfectly: nothing has been transferred from the respondent (the opposing party) to the appellants; nothing has been recovered; one will has been pronounced valid over another. However, prior to the grant of probate, without even having to consider that the deceased's estate has not

been distributed, neither the respondent nor the appellants possessed any of the assets. It strains ordinary canons of interpretation to find that such a state of affairs falls within the Regulations, as it must. For as the appellants recognise, the Regulations "cannot be ignored". Indeed, section 4(3) of the Act states in terms that the DBA "must comply with such other requirements as to its terms and conditions as are prescribed". The appellants submit that the Regulations "elaborate" the statutory definition without contradicting it. It seems to me, as the Court of Appeal said in *Candey*, that the Regulations in fact prescribe the permitted payments.

37. To understand this further, and although regulation 4 is the key regulation for this case, it is instructive to examine the regulation immediately preceding it. I include the relevant part of the Act and Regulation 3 that fleshes it out. Section 58AA(4)(c) provides that for a DBA:

> "(4) The agreement—
> …
> (c) must comply with such other requirements as to its terms and conditions as are prescribed"

38. Regulation 3 provides:

> "Requirements of an agreement in respect of all damages-based agreements
> 3. The requirements prescribed 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 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, which, in an employment matter, shall include having regard to, where appropriate, whether the claim or proceedings is one of several similar claims or proceedings."

39. Therefore, it is the Regulations that effect the prescribing. So at regulation 3(b), a requirement is imposed to specify the circumstances of the representative's payment and requirement applies to "all damages-based agreements". In regulation 3(c), the justification ("reason") for setting the level of payment at the amount specified in the DBA must be explained. The Regulations do not, therefore, simply deal with the question of permitted payments in passing. The Regulations regulate the payments. This is made clearer still from a consideration of regulation 4. Regulation 4(1) nets off from the payment that the representative receives from the client the costs received by the representative from other parties. Regulation 4(2) deals with personal injury cases and sets a ceiling on the payment of 25 per cent of the damages ultimately

recovered. (I will deal with the dispute about the term "ultimately" shortly). Regulation 4(3) deals with non-personal injury cases. It sets a ceiling on the payment made to the representative from the client of 50 per cent of the sums ultimately recovered. This distinction between regulations 4(2) and 4(3) between personal injury cases (damages) and others (sums recovered) mirrors perfectly the definition of payment in the interpretation regulation (regulation 1(2)), where the same distinction is made. These are, to my mind, detailed and comprehensive regulations. The definition purports to cover the entirety of permitted payments (damages awarded or sums recovered). There is no room for transfer of assets or money's worth. The "ceiling" regulation, regulation 4, does not provide any requirement or ceiling for situations where assets or other money's worth are purported to be transferred to the representative. This immediately poses a sharp problem. What is the ceiling on the transfer to the representative? Is it to be 25 per cent, 50 per cent or some other figure? Given the open field in the absence of relevant regulation, it could conceivably be higher. It could be 99 per cent. That would not be prohibited by any regulation since no regulation covers this alternative basis of payment. It seems to me that this is highly revealing. The purpose of the ceiling regulations is to provide certainty to clients and protection from excessive payment to their representatives. There is no protection under the regulations if there is a transfer of assets or money's worth. I judge this to be a strong indicator that such payments are not permitted under the Regulations. The silence in the Regulations about the ceilings on such payments cannot have been an oversight by both Houses of Parliament when approving the Regulations with a view to improving the effectiveness of DBA regulation. I judge therefore that the contrary indication in the definition of payment under the rules not to be some infelicity of drafting or oversight. It is better understood as a narrower and deliberately specific definition of what types of payment are permitted and the degree of protection that the client receives (25 and 50 per cent respectively). The way out of this stark problem that the appellants seek is by the notion of conditional right and the interpretation of the word "ultimately" in regulation 4(3).

B - Meaning of "ultimately"

40. The appellants' submission is that the word "ultimately" in regulation 4(3) indicates that conditional rights or payments are permissible. Therefore, it is possible for the payment to the representative not to be a sum recovered within the proceedings, but a vested or conditional right to a future sum once the asset or money's worth has been realised or liquidated after the proceedings in which the representative has been instructed have ended. It is the word "ultimately" that is said to be vital. The submission is that the word reveals the possibility of a contingency of recovery (or perhaps on the appellants' case, receipt). It seems to me that two contexts are required before the submission can be evaluated. First, the entirety of the provision:

> "(3) Subject to paragraph (4), in any other claim or proceedings to which this regulation applies, 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."

41. This makes clear that regulation 4(3) is directed at claims and proceedings other than those elsewhere specified in the regulation 4. Here the second context is important. Regulation 4(3) needs to be read in the context of its immediately preceding provision. Regulation 4(2) provides:

> "(2) In a claim for personal injuries—
> (a) the only sums recovered by the client from which the payment shall be met are—
> > (i) general damages for pain, suffering and loss of amenity ["PSLA"]; and
> > (ii) damages for pecuniary loss other than future pecuniary loss,
> > net of any sums recoverable by the Compensation Recovery Unit of the Department for Work and Pensions ["CRU"] ; and
>
> (b) subject to paragraph (4), a damages-based agreement must not provide for a payment above an amount which, including VAT, is equal to 25% of the combined sums in paragraph (2)(a)(i) and (ii) which are ultimately recovered by the client."

42. One sees how the provision is structured. Once CRU is deducted, the recovered sums from which the representative may be paid by the client are limited to general damages for PSLA and damages for pecuniary loss (other than future such loss). The meaning of "ultimately" in the term "ultimately recovered by the client" is clear. It relates back to the regulation 1(2) definition of payment. Valid payment to the representative can be through one of two routes, one of which is "damages awarded". Putting regulation 1(2) together with regulation 4(2) – a contextual interpretation – the meaning of ultimately is clear. It may well be that the damages awarded do not equate to those claimed earlier in proceedings. By the end of the proceedings – "ultimately" – the sums recovered in the personal injury claim are determined. The DBA cannot provide for payment to the representative over 25 per cent of the combined awarded general damages and pecuniary loss amounts. There is no contingency in the sense of a future financial benefit beyond the end of proceedings. It is the damages awarded by the end of proceedings that is the relevant factor.

43. Turning then to regulation 4(3), the term ultimately is used again, now for cases that do not involve damages for personal injury. It would be curious indeed if in this immediately following provision the intention is to authorise validity of an entirely different kind of financial benefit, not one recovered during the course of the proceedings in which the representative has acted, but in some further proceedings or at some future undetermined point. I cannot find that the word ultimately should be used in two strikingly different senses in two immediately adjacent provisions within the same regulation.

44. Furthermore, it seems to me unlikely that if contingent rights, that is the receipt at some future point of a "sum", could be sufficient to meet the definition approved by both Houses of Parliament in the Regulations, that this would not be made clear. This is because a future sum from a contingent right does not obviously fit the clear words of the payment definition in regulation 1(2). This further elucidation would be expected if the contingent rights construction were valid as it makes little sense otherwise that a "sum recovered" should include a sum later to be received. I note what Lewison LJ said in *Zuberi* at para 34:

> "First, the object of the legislation was to permit the remuneration of lawyers by means of a share of recoveries."

45. Recoveries, to my mind, does not include future receipts beyond the end of proceedings that may or may not require further proceedings. It does not include a declaration about which of two wills is effective. I note how specific the Regulations are in specifying the percentages above which the payment cannot go. This must be in an attempt to provide clarity and protection for the client. I cannot think that the spectre of future payments that remain to be quantified at some future unspecified date beyond the end of the proceedings offers clarity or protection.

46. The appellants submit that if there are competing wide or narrow interpretations of the statute and regulations, then "the Judge should have adopted the wider". I am not persuaded that the contest here is between a wide and narrow construction. It is more accurately understood as a dispute about whether contingent rights where there is no sum recovered during proceedings (let alone from the opposing party) meets the definition under regulation 1(2). To me, the appellants' construction does not entail interpreting the regulation widely, but rewriting it. That is impermissible. The interpretation that the Judge reached does not render financial benefit under section 58AA "shorn of meaning", nor does it mean that only "claims for liquidated damages" can be the subject of DBAs. Regulation 1(2) explicitly offers the alternative to damages awarded of sums recovered.

47. At para 37.1 of their skeleton argument, the appellants set out a series of contingent rights that are "valuable in nature". These include stock options and bonus payments and as the appellants put it, "Rights under SPAs which are contingent on various outcomes or performance of the business sold." The last example illustrates the problem. Given that this is not a damages awarded situation, one asks what the sum recovered by the client is that constitutes the payment to the representative. There appears to be nothing by the end of proceedings if the outcome depends on "various outcomes" or the future performance of the business sold. This seems to present the same problem as the validity of the will declaration situation. It does not meet the clear definition spelled out in the delegated legislation.

48. It is submitted that the Judge determined that "only ascertainable monetary claims can be the subject of a DBA" and this is an erroneous interpretation since all claims are contingent at the point of contracting. It seems to me that read as a whole the Judge decided that what is necessary is for there to be some recovery by the client by the end of proceedings. Indeed, at para 37.3 the appellants note that a general damages claim "does not crystallise until the date of Judgment or settlement". That is the key point. There is the crystallisation of a sum recovered by the end of proceedings and that is capable of forming the payment by the client to the representative.

49. I deal next with a submission made by the appellants that the Regulations should be interpreted to avoid "absurdity" as there is a presumption against absurdity. Reliance was place on *Bennion* at para 13.1:

> "(1) The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by the legislature. Here, the courts give a very wide meaning to the concept of "absurdity", using it to include virtually any result which is impossible, unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief.
>
> The strength of the presumption against absurdity depends on the degree to which a particular construction produces an unreasonable result.
>
> The presumption may of course be displaced, as the ultimate objective is to ascertain the legislative intention."

50. In similar vein, Lord Millett said in *R (Edison First Power Ltd) v Central Valuation Officer* [2003] UKHL 20 at para 116, "[the] more unreasonable a result, the less likely it is that Parliament intended it …". Two points are pertinent. First, the presumption may be displaced. Second, the legislative intention includes widening access to justice while at the same time ensuring proper protection of recipients (clients) of legal services and particularly members of the public. It is submitted by the appellants that the Judge's interpretation of the Regulations produced such an "absurd" result because it resulted an unreasonably harsh outcome for the appellants. Their solicitors could receive no payments under the DBAs. The answer to that is that it has been repeated that the qualifying conditions for statutory exceptions to champerty such as CFAs may result in an outcome that is "uncompromising", as the Court of Appeal said at para 27 of *Garrett v Halton BC* [2006] EWCA Civ 1017 ("*Garrett*"). It repays setting down a fuller extract from judgment of Dyson LJ (as he then was), explaining as it does the justification for outcomes that may appear harsh (paras 27-28, 30):

> "27 … The starting point must be the language of section 58(1) and (3) of the 1990 Act. It is clear and

uncompromising: if one or more of the applicable conditions is not satisfied, then the CFA is unenforceable. Parliament could have adopted a different model. It could, for example, have provided that where an applicable condition is not satisfied, the CFA will only be enforceable with the permission of the court or upon such terms as the court thinks fit. There is nothing inherently improbable in a statutory scheme which provides that, if the applicable conditions are not satisfied, the CFA shall be unenforceable with the consequence that the solicitor will not be entitled to payment for his services. Such a scheme can yield harsh results in certain circumstances, especially if the client has not suffered any actual loss as a result of the breach. It can also produce results which, at first sight, may seem odd: see the point made by Mr Bacon mentioned at para 26 above. But the scheme is designed to protect clients and to encourage solicitors to comply with detailed statutory requirements which are clearly intended to achieve that purpose. The fact that it may produce harsh or surprising results in individual cases is not necessarily a good reason for construing the statutory provisions in such a way as will avoid such results.

28 Our attention was drawn to other statutory regimes which introduce a bar on the enforcement of rights which can operate harshly in certain circumstances. Thus, in *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, the House of Lords was concerned with a claim based on a loan agreement between a pawnbroker and a borrower. The pawnbroker sought repayment of the loan. Relying on section 127(3) of the Consumer Credit Act 1974, the borrower claimed that the loan was unenforceable because the agreement did not contain all the prescribed terms. This was a harsh result for the pawnbroker, since the borrower could not point to any prejudice suffered by her as a result of the failure to include all the prescribed terms in the agreement. Lord Nicholls of Birkenhead said, at paras 72-74:

> "72. Undoubtedly, as illustrated by the facts of the present case, section 127(3) may be drastic, even harsh, in its adverse consequences for a lender. He loses all his rights under the agreement, including his rights to any security which has been lodged. Conversely, the borrower acquires what can only be described as a windfall. He keeps the money and recovers his security. These consequences apply just as much where the lender was acting in good faith

throughout and the error was due to a mistaken reading of the complex statutory requirements as in cases of deliberate non-compliance. These consequences also apply where, as in the present case, the borrower suffered no prejudice as a result of the non- compliance as they do where the borrower was misled. Parliament was painting here with a broad brush.

73. The unattractive feature of this approach is that it will sometimes involve punishing the blameless pour encourager les autres. On its face, considered in the context of one particular case, a sanction having this effect is difficult to justify. The Moneylenders Act 1927 adopted a similarly severe approach. Infringement of statutory requirements rendered the loan and any security unenforceable. So did the Hire Purchase Act 1965, although to a lesser extent. This approach was roundly condemned in the Crowther report (Report of the Committee on Consumer Credit, under the presidency of Lord Crowther, March 1971) (Cmnd 4596), vol 1, p311, para 6.11.4: "It offends every notion of justice or fairness that because of some technical slip which in no way prejudices him, a borrower, having received a substantial sum of money, should be entitled to retain or spend it without any obligation to repay a single penny."

74. Despite this criticism I have no difficulty in accepting that in suitable instances it is open to Parliament, when Parliament considers the public interest so requires, to decide that compliance with certain formalities is an essential prerequisite to enforcement of certain types of agreements. This course is open to Parliament even though this will sometimes yield a seemingly unreasonable result in a particular case. Considered overall, this course may well be a proportionate response in practice to a perceived social problem. Parliament may consider the response should be a uniform solution across the board. A tailor-made response, fitting the facts of each case as decided in an application to the court, may not be appropriate. This may be considered an insufficient incentive and insufficient deterrent. And it may fail to protect consumers adequately."

> …
>
> 30 In our view, this is the approach which should be adopted in relation to section 58(1) and (3) of the 1990 Act. To use the words of Lord Nicholls, Parliament was painting with a broad brush. It must be taken to have deliberately decided not to distinguish between cases of non-compliance which are innocent and those which are negligent or committed in bad faith, nor between those which cause prejudice (in the sense of actual loss) and those which do not. It would have been open to Parliament to distinguish between such cases, but it chose not to do so. The conditions stated in section 58(3)(c) and in particular the requirements prescribed in the 2000 Regulations are for the protection of solicitors' clients. Parliament considered that the need to safeguard the interests of clients was so important that it should be secured by providing that, if any of the conditions were not satisfied, the CFA would not be enforceable and the solicitor would not be paid. To use the words of Lord Nicholls again, this is an approach of punishing solicitors pour encourager les autres. Such a policy is tough, but it is not irrational. The public interest in protecting solicitors' clients required that the satisfaction of the statutory conditions was an essential prerequisite to the enforcement of CFAs. It is to be noted that in September 1999, the Lord Chancellor issued a consultation paper entitled Conditional Fees: Sharing the Risks of Litigation. The Law Society and the senior costs judge responded that the Law Society's new Client Care Code adequately covered the need to provide additional information about CFAs. But in the view of the Government, such was the need to ensure client protection that this response was not accepted."

51. While the DBA Rules are designed to facilitate the said "new or better ways" to promote access to justice, it is not at any expense. It is clear from Dyson LJ's judgment that compliance with "statutory conditions" for CFAs is essential to their enforceability, despite or in the face of harsh consequences in individual cases. Wider public interest considerations for the effective protection of the public exist. I cannot see that these imperatives, so thoroughly outlined by the Court of Appeal in *Garrett*, have any lesser application to the DBA regime. Therefore, I cannot accept the claims of purported "absurdity". Compliance with the statutory conditions may be "tough", but as the Court of Appeal clearly stated, it is not "irrational". The fact is that only DBAs that comply with the rules are enforceable. The case *of Jones v Caradon Catnic* [2005] EWCA Civ 1821 is instructive. It is referenced in *Garrett* at paras 40-42:

> "40 We should refer to the decision of this court in *Jones v Caradon Catnic Ltd* [2005] EWCA Civ 1821. The claimants' solicitors claimed a success fee of 120% which exceeded the maximum prescribed by the Conditional Fee Agreements Order 2000 (SI 2000/823). The court held that there was a clear breach of the 1990 Act and the 2000 Order. Was it a material breach as explained by *Hollins v Russell*? Construing the CFA as a whole, the court held that there was no question that the client would ever have to pay a success fee of more than 100%. Accordingly, "this was not a case in which our attention should be devoted to consumer protection or client protection". Rather, it was a case in which the issue was "whether the breach was material or not, to the administration of justice": para 29.
> 41 Brooke LJ said, at para 32, that the breach was material in that sense: it was "on any showing, a more serious breach compared with the trivial breaches set out in the two cases to which I have referred" (these were the first two cases in *Hollins v Russell*). Laws LJ agreed. He said that he could not characterise the breach in the instant case as a "marginal" failure to respect the statute. To disregard the specified 100% limit was inimical to the administration of justice "even if in the result it could be shown that no one would be the loser": para 35. If the court were to treat this violation as marginal, it would be acting "flat against the grain of the legislature's policy objectives attained by section 58(1)": para 36.
>
> 42 It is true that this decision is not based on the client protection limb of the question stated in para 107 of *Hollins v Russell* [2003] 1 WLR 2487. It shows that, in deciding whether there has been an adverse effect upon the proper administration of justice, the court does not consider whether actual prejudice has been caused to the claimant or indeed anyone else."

52. Furthermore, while I accept the general principle advanced by the appellants that any ambiguity should be resolved to produce a fair result, I do not find any ambiguity in the DBA Rules. There are different definitions of payment. However, it is in the Regulations that we find what practical applications of the limited exception to champerty created by section 58AA are permissible.

53. I should add that I have not found the citation of *Allen v Thorn Electrical* [1968] 1 QB 487 to be of any great relevance. The well-known proposition, reaching all the way back to *Entick v Carrington* (1765) 19 ST TR 30, is that one cannot remove legal rights without the clear words of a statute. I do not see how any rights of the appellants are removed by the Act or the Regulations or indeed by the Judge's decision on the unenforceability of the DBAs. The appellants acknowledge that "the statute does not deprive them of any rights".

54. The appellants further submit that if there are two rival and incompatible interpretations and one produces, as the appellants put it, "unreason or hardship", this points to the other fairer interpretation. There is no lack of reason in the Judge's decision, nor in the Act or Regulations. I can see that if the DBAs are unenforceable, that would operate harshly against the appellants' solicitors, who plainly have undertaken a large amount of work. However, there was a clear choice. The solicitors could have taken on instructions under CFAs. They chose not to. It seems to me that the DBA Rules are clear and the consequences of non-compliance very well known.

C - Meaning of "recovered"

55. Turning to *Candey*, the appellants seek to invoke the Court of Appeal's analysis in support of their case. It is submitted that the defendants were "materially richer" following the court's declaration, even though that enrichment is contingent. Their financial benefit is different to the impermissible share of the defendant's retention in *Candey*, and falls within the term financial benefit under the Act. The appellants cite para 55 of the judgment of Andrews LJ, as confirmation of their wide interpretation of financial benefit. Andrews LJ stated:

> "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)."

56. It seems to be that this extract runs contrary to the appellants' case. What Andrews LJ is clarifying is that, as no one disputes, DBAs can apply to cases beyond those where damages are awarded. Regulation 1(2) makes that clear. But what is significant in the extract is that Andrews LJ speaks of other forms of "financial recovery". The appellants submit that this passage in *Candey* supports their case as "other forms" is broad enough to include the "financial benefit" they received following the order of Green J determining the validity of the earlier will. One must not read a court judgment scripturally; it is not a statute. However, for my part, the key word is "recovery". This is taken from regulation 1(2). The common feature of damages awarded and debts and other forms of financial recovery is that something has come to the client that is quantified, can therefore be ascertained, and readily passed on to the representative. The difficulty for the appellants is to identify what can tangibly be passed on to the solicitors by the client at the end of the index proceedings. If one adds, as I judge must be done, the further definitional requirement that what is to be passed on as payment to the client's legal representatives must be what is recovered from the other party, the fatal flaws in the appellants' position are laid bare. In any event, it is clear from reading Andrews LJ's judgment as a whole that the term financial recovery gains colour from the other terms she mentions, such as damages or debt that is received from "the other party". She says so in terms in the same paragraph and it bears repeating:

> "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."

57. The notion of something being transferred ("obtained") from the opposing party is vital, it seems to me, following *Candey*. A more extensive survey of the Court of Appeal's judgment confirms this position and cuts across the appellants' case. Andrews LJ traced the origins of DBAs, noting at para 45:

> "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 para 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, Jackson LJ confirms in para 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."

58. Therefore, from the outset in the Jackson Report, there is reference to representatives ("lawyers") being paid out of sums recovered by the client in the proceedings. There is no mention of contingent rights as opposed to contingency fees (that is, contingent on successful outcome). Andrews LJ continued at para 46:

> "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 26 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" (Hansard (HL Debates), 26 February 2013, col 134). He made a similar statement in a letter of 5

> March 2013 which was placed in the library of both Houses of Parliament."

59. Both Houses of Parliament approved the Regulations that were placed before them in the form that came into force on 1 April 2013. Once more, it is noticeable that there is no mention of contingent rights. Andrews LJ continued at para 51:

> "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."

60. Once more, we see the importance of recovery "from the opposing party", something absent in this case. It is useful here to set out relevant extracts from both the Explanatory Note and the Explanatory Memorandum. Such documents are legitimate aids to interpretation, but do not have the force of law (see *Bennion* at para 24.24 on "external aids to interpretation", which I need not repeat here; see also Lord Steyn in *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38). The Explanatory Note to the Regulations recognises that "This note is not part of the Order". It proceeds to state:

> "These Regulations prescribe the requirements with which a damages-based agreement ("DBA") must comply in order to be enforceable under section 58AA of the Courts and Legal Services Act1990 (c.41) ("the Act")."

61. The word "must" should be noted. The way in which payment is defined is comprehensive ("means") rather than being inclusive, as in the statutory definition. The permitted bases for payment with which the DBA must comply are set out in the regulation 1(2) definition and the limits in regulation 4. The Explanatory Note continues:

> "DBAs are a type of 'no win, no fee' agreement under which a representative (defined in these Regulations as a person providing the advocacy services, litigation services or claims management services to which the DBA relates) can recover an agreed percentage of a client's damages if

> the case is won ("the payment"), but will receive nothing if the case is lost."

62. As to the Explanatory Memorandum, it was reviewed in *Candey* at paras 19-20:

> "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 Para 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)."

63. One might add that there is nothing in the Jackson Report, the Parliamentary debate or either the Explanatory Note or Explanatory Memorandum indicating that contingent rights with a payment to the representative at some unspecified time in the future was envisaged. I note and respectfully adopt Andrews LJ's emphasis of the payment of "a percentage of what [s/]he recovers from the opposing party". To the question what has been recovered from the respondent here, the answer is nothing. Prior to Green J's pronouncement, the respondent did not "have" the assets or rights under the 2014 will she claimed was effective. The destination of the assets in the estate remained undetermined pending the decision of the Chancery Division. The assets remain undistributed.

64. While para 55 of *Candey* is relied on by the appellants, it is worthy of revisiting it in light of the more detailed exposition of the judgment now undertaken, along with the full paragraph:

> "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."

65. This seems to me to be important. Using the Court of Appeal's analysis, the question is what had been "obtained" by the appellants from the "opposing party", that is, the respondent, from whom nothing has been obtained. Following the pronouncement about the validity of the 2012 will, the respondent, to borrow Andrew LJ's words, is "not required to make a payment or transfer of assets to the opposing party" (here parties: the appellants). This point is underlined at para 59, where the Court of Appeal said:

> "As the Judge held at para 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."

66. In similar vein the court continued at para 62:

> "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." (emphasis provided)

67. Then in the second half of para 62 comes what, to my mind, is a key passage:

> "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 section 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."

68. The Court of Appeal states in terms that it is not enough to fall within the definition of the Act. To be enforceable, given the surrounding sea of illegality, the DBA must also satisfy "the requirements of the Regulations". Once more, the Court of Appeal emphasises recovery from the opposing party. This is crucial since the amount of payment to the legal representatives is directly referable to the amount of financial benefit "obtained", which I take to be actually recovered and not as a future contingent event (whether through future proceedings or otherwise). This is what the phrase in the Regulations about sum "recovered in respect of the claim or damages" means on a natural and plain reading. It does not bear the weight of a future contingency construction.

69. I turn to the final extracts from the judgment in *Candey*. It is necessary to set out the submissions of that appellant-defendant before turning the Court of Appeal's conclusion. One instantly sees how similar the arguments rejected in *Candey* are to those advanced to this court. For that reason, they merit reproducing here:

> "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 section 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 section 58AA referred to in para 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 section 58AA(7) (which envisages that the representatives can be paid under a DBA by the transfer or

> 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."

70. The Court of Appeal then provides its response to the submissions at paras 64-65:

> "64 In addition to the points on interpretation of section 58AA referred to in para 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 section 58AA(7) (which envisages that the representatives can be paid under a DBA by the transfer or 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."

71. Therefore, the Court of Appeal has said that the scheme of the Act is to permit DBAs "in principle". To return to the common law context in which DBAs sit, the operation of the Act deems in principle as not unenforceable certain agreements between clients and representatives that pay for litigation and other legal services through what was called during the hearing before me "a share of the fruits of the proceedings". But once one moves past the principle to the practical application of the principle, one must ensure further compliance with the Regulations. This seems to be what the Court of Appeal has ruled in *Candey*. The authorisation for the creation of the Regulations is set out in the preamble to the Regulations:

> "The Lord Chancellor in exercise of the powers conferred by sections 58AA(4) and (5) and 120(3) of the Courts and Legal Services Act 1990(1), having consulted in

> accordance with section 58AA(6) of that Act, makes the following Regulations, a draft of which has been in accordance with section 120(4)(2) of that Act laid before and approved by resolution of each House of Parliament."

72. The Act is clear that any such approved and consequently enacted regulations may specify the terms of permitted DBAs (section 1 of the Act). It is these regulations, drafted by the Lord Chancellor and approved by each House of Parliament in accordance with the Act, that as the Court of Appeal states distinguishes between "the types of DBA that can and cannot be made". On this analysis from the Court of Appeal, the Regulations delimit the permitted "types" of DBA. This answers the question why the definition of payment under the Regulations is narrower than the definition under the Act. It is deliberately so. To the extent that it evinces a deliberate "contrary intention" for the purposes of section 11 of the Interpretation Act 1978, it is to define which types of DBAs are permitted by defining what can validly form the payment to the representative. I can accept the appellants' submission that the Act and the Regulations should exist "in harmony". The answer to the claimed disharmony between them is that they are directed at different things. The empowering act creates a new exception to common law champerty. The Regulations specify what types of DBAs within the broad exception are in fact permitted.

73. What is permitted under the Regulations is plain, to my mind: either damages awarded or sums recovered in the sense articulated by Andrews LJ in *Candey* and as envisaged in the Jackson Report. At no point is there any pronouncement or indication that a contingent right can properly amount to the valid basis of payment from the client to the representative or provider of legal services. I find this is unsurprising: it is difficult to understand a contingent right as a recovery, but this is particularly so when nothing has in fact been recovered from the opposing party, as Andrews LJ mentions, but instead there has been the declaration of the validity of one will over another. The Regulations, therefore, delimit and define which types of financial benefit are permitted in DBAs.

D - Ratio of *Candey*

74. I now consider the legal effect on me of the decision in *Candey*, having received submissions about its ratio. On behalf of the respondent, it is submitted that *Candey* is binding on this court. I cannot think that there is much controversy about that. But it begs the essential question about the scope of its binding effect. That requires determination of its ratio.

75. The identification of the ratio of a decision can be made using the invaluable analysis of Leggatt LJ (as he then was) in *R (Youngsam) v Parole Board* [2019] EWCA Civ 229 ("*Youngsam*") at paras 48-59. Working through the *Youngsam* rubric, it seems to me that the ruling of law ("rule of law") is that for an enforceable DBA there must be recovery of a specified financial benefit from the opposing party. This is why mere retention was insufficient. In coming to that ruling of law, the Court of

Appeal said in terms that there is no inconsistency between the Act and the Regulations. The Regulations define and delimit what payments are permissible. A retention does not fit the definition of payment in the Regulations.

76. There may be argument whether what the Court of Appeal said about the consistency of the Regulations with the statute are "part of the essential reasoning upon which the outcome depends" (*Therium Litigation Funding AIC v Bugsby Property LLC* [2023] EWHC 2627 (Comm) ("*Therium*") at para 99, per Jacobs J). It seems to me likely that the consistency point is part and parcel of the Court of Appeal's decision in *Candey*. But even if these observations are obiter, they follow full argument before a strong court. I find at the very least that they are highly persuasive, while likely to be binding. The difference is immaterial in these circumstances. There needs to be something that is recovered from the opposing party. The appellants recovered nothing from the respondent following the declaration of Green J. Not that the proposition needs further confirmation, but in *Zuberi*, Newey LJ reviewed key aspects of DBAs from para 56, beginning with the pre-DBA situation:

> "56 When the House of Lords was invited to approve the 2010 Regulations on 25 March 2010, the minister speaking to them, Lord Bach, said:
>
> > "A damages-based agreement is a type of contingency or "no win, no fee" agreement, under which a representative agrees to act for a client in return for a percentage of any damages recovered by the client. If damages are not awarded, the representative is not paid. These agreements are of course different from conditional fee agreements, or CFAs. CFAs are typically used in court proceedings, and allow for an uplift or success fee on top of the representative's normal fee.
>
> I emphasise that damages-based agreements are not permitted in court proceedings or litigation and that the regulations will not change this. They are, however, commonly used by solicitors and claims managers in proceedings before the employment tribunal. The Courts and Legal Services Act 1990, as amended, controls the use of damages-based agreements to claims that are capable of being heard by the employment tribunal . . .
>
> 57 In his Final Report, Sir Rupert Jackson recommended that lawyers should be permitted to enter into "contingency fee agreements" with their clients in relation to civil litigation. "Contingency fee" was

defined in the glossary as "A lawyer's fee calculated as a percentage of monies recovered, with no fee payable if the client loses". Sir Rupert Jackson said this about contingency fees in the executive summary:

> "3.2 Contingency fees (chapter 12)
> A contingency fee agreement may be described 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. Lawyers are not presently permitted to act on a contingency fee basis in "contentious" business.
> 3.3 It is my recommendation that lawyers should be able to enter into contingency fee agreements with clients for contentious business, provided that:
> ● the unsuccessful party in the proceedings, if ordered to pay the successful party's costs, is only required to pay an amount for costs reflecting what would be a conventional amount, with any difference to be borne by the successful party; and
> ● the terms on which contingency fee agreements may be entered into are regulated, to safeguard the interests of clients.
>
> Permitting the use of contingency fee agreements increases the types of litigation funding available to litigants, which should thereby increase access to justice."

Sir Rupert Jackson explained in para 4.1 of chapter 12 that he had concluded that "both solicitors and counsel should be permitted to enter into contingency fee agreements with their clients on the Ontario model". He also, however, considered that such arrangements should be "properly regulated". He said in para 4.6 of chapter 12:

> "The three matters identified by the MoJ in its consultation paper CP 10/9 are the principal matters which will require regulation. In my view the regulations which the MoJ is planning to introduce in respect of contingency fees in tribunal proceedings should be suitably adapted for the purpose of court proceedings. The

> regulations should (i) introduce a requirement that clear and transparent advice and information be provided to consumers on costs, other expenses and other methods of funding available; (ii) provide a maximum percentage of the damages that can be recovered in fees from the award; and (iii) control the use of unfair terms and conditions."

77. I draw to a close my analysis of Issue 1 with a practicality. As the DBAs are drafted, and on the construction encouraged by the appellants, there can be no understanding of whether the solicitors' charges calculated by the formula of "time x hourly rates" are limited by the percentage of the damages to which the solicitors are entitled. Until the financial benefit is determined, the amount payable to the solicitors cannot be ascertained. This presents obstacles for an inter partes costs assessment and indeed costs assessment between the client and solicitor. This is a practical consideration that points away from the validity of the contingent benefit argument. It seems to me that if such an arrangement were to be "permitted" under the Act and Regulations, it would have been spelled out. It carries with it significant uncertainty and one might expect mechanisms for valuation of contingency and at least an indication of the types of contingent benefit that might be permissible. As it stands, in vivid contrast to debt and damages, one must rely on speculation. Parliament had the opportunity in the Act, and especially in the fine-tuning of arrangements in the process of regulation approval, to authorise contingent benefits. It did not. Instead, I judge that Parliament set out its clear intention about what qualifies as a permitted DBA in the Regulations.

78. There are further difficulties when one reaches the "counsel's fees as expenses" argument in Issue 2 that I must come to, with a potential breach of the 50 per cent limit in regulation 4(3) for non-personal injury cases.

E - Conclusion: Issue 1

79. It seems to me that faithfully applying the logic and analysis in *Candey*, the DBAs in this case are unenforceable for want of recovery of anything from the respondent before the end of the proceedings. There were two issues in the trial before Green J. First, whether the deceased knew and approved of the 2014 will; second, whether the execution of the 2014 was the result of the claimant's (respondent's) undue influence. He ruled in favour of the appellants on the first issue and against them on the second. No assets were transferred. Nothing changed hands. Nothing was recovered by the appellants from the respondent.

80. I have no hesitation in concluding that the DBAs in the instant case do not meet the requirements under the Regulations for permitted payment as set out in Regulation 1(2) and Regulation 4. On this basis, therefore, both DBAs are unlawful and unenforceable. Insisting on compliance with the statutory conditions (including requirements in the Regulations) might have results that are "uncompromising", but although the outcome may be "tough" in *Garrett*

terms, the outcome is not "irrational", or unreasonable, as the appellants submit. The twin objectives of effective protection of clients and the proper administration of justice decisively and overwhelmingly outweigh the effect on the legal representatives in this case. There is no absurdity. Indeed, I judge that it would be wrong in principle to authorise irresolute, inconsistent and half-hearted compliance with the Act and the Regulations. I remind myself of the comment by Stuart-Smith LJ in *Diag Human*. It is not for this court to seek to dilute or "modify" the public policy contained in the Act and Regulations, a key objective of which being to achieve effective protection of the public through the strict enforcement of the conditions in the Act and requirements in the Regulations.

81. The DBAs being unlawful and unenforceable on this basis, this ground of appeal fails. In consequence, the appeal fails. Nevertheless, I proceed to consider the second issue before the court.

V – Issue 2

82. On Issue 2, I consider in turn (A) the prime question arising; (B) the case of *Zuberi*; (C) material breach; and (D) severance; before (E) coming to the court's conclusion on the issue.

A - Prime question

83. The prime question in Issue 2 is whether the payment to the solicitors (the representatives) under a lawful DBA must include counsel's fees or whether it is legitimate to charge them as expenses in addition to the payment. The starting-point is an examination of the content of the instant DBAs. Without reciting all the relevant clauses, the clauses touching on this issue include Clause 1 that defines "expenses" as including "the cost of instructing … barristers" and Clauses 9.2 and 9.2.5. These state:

> "Expenses typically include … Fees paid to a barrister. These may be for advice given in a conference, or for representing you at a hearing. If your case settles shortly before a hearing, and your barrister has already undertaken the preparation for that hearing, then you may still have to pay for part of their fee."

84. The question becomes whether the expenses (disbursement) arrangement under the instant DBAs is compliant with the Act and/or the Regulations. The Act does not deal with this point. Therefore, one turns to the Regulations. The appellants submit that the Regulations "do not proscribe the payment of counsel's fees in addition to the payment by the client to the solicitors". The submission is alternatively put as "there is no positive proscription in the regulations that prevents counsel's fees be charged or included as expenses." The rationale for this argued-for construction is that fees to counsel "are expensive" and the uncertainty about how much the cost of counsel would

have "a chilling effect" on the willingness of solicitors to agree to DBAs, so defeating the statutory objective of greater access to justice.

85. To evaluate this submission, one must begin with the Regulations themselves and revisit the precise framing of regulation 1(2). I omit for this analysis irrelevant text:

> "… "payment" … excludes expenses but includes … any disbursements incurred by the representative in respect of counsel's fees"

86. Regulation 1(2), therefore, excludes expenses from the payment. It is the latter part of the definition that poses difficulties for the appellants' construction. When asked to deal with this apparent problem, the response was that the definition is being "elevated" into "something more draconian than the language can bear" since regulation 4 does not expressly prohibit the payment of counsel's fees outside the contingency payment. I cannot accept this submission. The regulation 1(2) definition is clear and unambiguous. The point of a definition is to define. On the question of expenses, it does so clearly. The payment to the representative under the DBA must include (any) counsel's fees. In the instant case, the DBAs purport to charge counsel's fees in addition to the payment. That, for my part, is proscribed by the Regulations. I have received no convincing argument to the contrary.

87. One is, therefore, left with clauses in the DBAs that offend the express terms of the Regulations. Faced with this potential difficulty, the appellants advance further arguments. I consider them in turn.

B - *Zuberi*

88. The appellants argue that parties are entitled to agree as an expression of their freedom to contract that counsel's fees should be charged as expenses. Relying on *Zuberi,* it is submitted that client and lawyer may "structure the allocation of risks as to the cost of litigation so long as the central concept of the contingency payment remains at the heart of the agreement." The appellants submit that the lay clients and solicitors have freely contracted that counsel's fees should be deemed an expense and thus beyond the bounds of the DBA contingency payment. This is because "it could be commercially very serious not to provide for who pays counsel's fees." It is submitted, that as in *Zuberi*, this separate bargain may be treated as distinct from the DBA. The appellants cite Lewison LJ at para 33:

> "… a DBA is a contract which includes a provision for sharing recoveries. But another view is that if a contract of retainer contains a provision which entitles a lawyer to a share of recoveries; but also contains other provisions which provide for payment on a different basis, or other terms which do not deal with payment at all, only those provisions in the contract of retainer which deal with payment out of recoveries amount to the DBA."

89. The submission is that if the parties expressly choose to classify counsel's fees as an expense in the DBA, then they are entitled to do so outside the core DBA provisions regulating payment of a share of the financial benefit. On this analysis, the arrangements for counsel's fees amount to a collateral agreement as to where the risk of under recovery of counsel's fees will fall, and the client has agreed to that risk. This is a legitimate "two-speed" or hybrid agreement, and the expenses clauses should be permitted to stand separately from the core DBA. The respondent disputes this interpretation of *Zuberi*.

Conclusion: Zuberi

90. It seems to me that the hybridity claimed for is misconceived. While it is correct that in *Zuberi* the Court of Appeal held that a DBA may be only part of the wider retainer or arrangements between the client and representative, in this case the situation is materially different. Counsel's fees are very different to termination provisions. It is clear from an informed and full reading of *Zuberi* that Lewison LJ had something very different to determine than the question in this case. The *Zuberi* issue is set out by Lewison LJ with clarity in para 1:

> "1 A client enters into a contract of retainer with solicitors to prosecute a claim. The contract provides that in the event of success the solicitors will be entitled to a share of the recoveries. The client achieves success by means of a settlement of the claim; and the solicitors claim their share. But the contract also contains a clause which says that if the client terminates the retainer prematurely (which she did not), she must pay the solicitors' normal fees and disbursements. Does the existence of that clause invalidate the whole contract? Judge Parfitt held that it did not."

91. The Court of Appeal ultimately affirmed the decision of the trial judge. The clause in question was:

> "With the exception of the circumstances set out in clause 6.3 . . . you may terminate this Agreement at any time. However, you are liable to pay the Costs and the Expenses incurred up to the date of termination of this Agreement within one month of delivery of our bill to you."

92. Therefore, Mrs Zuberi did not terminate early. She relied on the early termination clause to claim that the DBA was unenforceable. The majority of the court (Newey and Coulson LJJ) held that regulation 4 of the 2013 Regulations had no application to provisions in a contract of retainer which dealt with termination of the retainer. Accordingly, if the termination clause was part of the DBA, it did not fall foul of the 2013 Regulations (paras 71-73). However, regulation 1(2) states in unmistakable terms that counsel's fees are included in the payment. There is every good reason for this to be the case.

It promotes certainty to the client; it prevents excessive legal costs. These were matters of concern in the evolution of the DBA as a limited exception to the illegality of champerty.

93. I find for these reasons that the reliance placed on *Zuberi* is misplaced and the analogy with early termination clauses cannot be drawn. Lewison LJ recognised in terms that his reasoning was not essential to the decision ("Postscript", para 50) and thus it should not be viewed as integral to the ratio in *Zuberi* ("I have, since writing the above, had the benefit of reading the judgment of Newey LJ in draft. I agree with him that the underlying policy was to arrive at the result that he has reached."). The Regulations are clear: counsel's fees are part of the payment. Thus, payment of counsel's fees as expenses is unlawful on the face of the delegated legislation that has the force of law. It would appear illogical and wrong in principle that you could contract to do what is otherwise unlawful.

94. I cannot accept that counsel's fees were lawfully hived off from the DBAs. The *Zuberi* argument fails.

C - Material breach

95. In their skeleton argument, the appellants submit that if the charging of counsel's fees as expenses was against the Regulations, such a breach would not be material. Further, such breach does not inevitably lead to a finding that each DBA is unenforceable. The test is set out in the well-known case of *Hollins v Russell* [2003] 1 WLR 2487, where at para 107 the court said that the question is whether or not the breach "had a materially adverse effect either upon the protection afforded to the client or upon the proper administration of justice." The Court of Appeal examined the need for strict enforcement in the context of material breach in *Garrett* at para 31:

> "31 The only mitigation of this strict approach is that, as was made clear in *Hollins v Russell*, the breach must be material in the sense described at para 107 of the judgment. Thus, literal but trivial and immaterial departures from the statutory requirements did not amount to a failure to satisfy the statutory conditions. It is unnecessary to decide whether the test stated at para 107 was no more than an application of the principle that the law is not concerned with very small things."

96. In the appellants skeleton argument (para 74), it was submitted that if the parties have "struck a deal" treating counsel's fees as expenses, that is not a material breach of the regulations. The respondent disputed that such breaches were immaterial. While the respondent made submissions doubting whether may properly read across the relevance of materiality in CFA cases, it became unnecessary for me to resolve these matters because during the course of oral argument the appellants conceded that their materiality submission was "difficult" to sustain. This must be right. Charging counsel's

fees is a clear and obviously material breach of the Regulations. The appellants were correct not to maintain the materiality argument.

D - Severance

97. If the expenses clauses were unlawful under the DBA rules and were material, the appellants submitted that the DBAs can be saved by severing the clauses. A minor objection to this argument can be cleared away immediately. The respondent submits that excising the expenses clauses is insufficient as there are references to expenses in the retainer letter ("As you are aware, we will expect you to pay sums for counsel's fees or other disbursements in advance of our incurring the disbursement"). I judge that these references can be readily removed, as can those in the checklists. This presents no insuperable objection. To bolster their argument, the appellants cite *Zuberi* at paras 5-7:

> "The common law
> 5 Retainers under which a lawyer was entitled to a share in the client's recoveries were long prohibited at common law on grounds of public policy on the ground that they were "champertous", although public policy is capable of changing: *Kellar v Williams* [2005] 4 Costs LR 559, para 21.
>
> 6 At common law, where all the terms of a contract are illegal or contrary to public policy, the contract is unenforceable. Where, however, only some of the terms are illegal or contrary to public policy, the court can in some circumstances enforce those parts that are not illegal or contrary to public policy. The general rule is that where you cannot sever the illegal from the legal parts of a contract, the contract is altogether void, but where you can sever them "you may reject the bad part and retain the good": *Chitty on Contracts*, 33rd ed (2019), para 16-237.
>
> 7 The criteria that must be fulfilled before severance is possible are that
> (a) the offending provision can be removed without modifying or adding to other terms of the agreement; (b) the remaining terms continue to be supported by adequate consideration and (c) the removal of the unenforceable part of the contract does not change the nature of the contract, such that it is not the sort of contract that the parties entered into at all: *Egon Zehnder Ltd v Tillman* [2020] AC 154."

98. The severance criteria, also known as the "Beckett test", is also subject to public policy considerations. This was explained by Stuart-Smith LJ in *Diag Human* at paras 62-65:

> "62. Even if I were wrong in this conclusion, I would hold that severance is precluded as contrary to public policy. The principal effect of severance would be to permit partial enforcement of the unenforceable CFA. As was pointed out during submissions, if the client lost the arbitration, the effect of allowing severance would be that the solicitors would recover precisely the same amount of their fees as if the CFA had been held to be enforceable. That is not, in my view, a tolerable outcome. Nor is it any answer to submit that there is no disadvantage to the client in enforcing the discounted fee element in respect of work carried out for and at the client's request. The regime imposed by the 1990 Act is concerned with conflicts of interest giving rise to potential harm to clients: see *Garrett* per Dyson LJ at [38]–[39].
>
> 63. The effect of implementing public policy, as explained by Dyson LJ at [27]– [30] of *Garrett*, cited at [21] above, is that "if the applicable conditions are not satisfied, the CFA shall be unenforceable with the consequence that the solicitor will not be entitled to payment for his services".
>
> 64. *Awwad*, like the present case, involved a CFA of the type that has been described as a "discounted fee agreement". The solicitor in Awwad agreed to charge the client at her normal rate if the client won the litigation and at a lower rate (£90 per hour) if he lost. The agreement was not sanctioned by the 1990 Act. After acceptance of the opponent's Part 36 offer, the client declined to pay the solicitor's bill of costs. The Court of Appeal held that it was contrary to public policy for the solicitor to have acted in pursuance of a fee agreement that was not sanctioned by statute and that the agreement would not be enforced. The solicitors in Awwad, as in this case, submitted that there could be no objection to enforcing the agreement in respect of the discounted element of their fees that were to be payable in any event: see 574F. That argument too was rejected on grounds of public policy: see 594C–E per Schiemann LJ.
>
> 65. It would therefore be contrary both to principle and to authority to allow partial enforcement of the unenforceable CFA in the present case, on grounds of public policy. That precludes any residual arguments in favour of severance."

99. I heard no submission that there was a lack of consideration, consistent with the respondent's realistic approach taken before the Judge that there was consideration (para 118). Thus I examine the other factors. First, the "blue pencil test". The "offending" clause states:

> "expenses: the cost of instructing third parties, such as barristers and experts, any fees payable to the third parties, and our disbursements as set out in Paragraph 9, incurred in connection with the pursuit of your claim[s]."

100. The terms disbursements and expenses are used interchangeably in the Regulations. This follows the approach in comparable regulations (*Jones v Wrexham* [2007] EWCA Civ 1356, paras 28-29). As the Judge noted (para 86), this appears to reflect the historical position that counsel fees, albeit an expense of the solicitor, are often referred to as a disbursement. Thus, the Regulations define expenses as "disbursements incurred by the representatives including the expense of obtaining an expert's report and, in an employment matter only, counsel's fees." The nature of this agreement means that it is not possible to forensically cut out the offending content. The difficulty is that counsel's fees would still potentially be within the terms "third parties" and "our disbursements" and would come back in in that way. Thus, one would have to "modify or add" other terms to the agreement. That is impermissible.

101. Second, removing counsel's fees would effect a very substantial change to the bargain. As stated by Lord Wilson in *Egon Zehnder Ltd v Tillman* [2019] UKSC 32, [2020] AC 154 at para 87, the question may be posed as "whether removal of the provision would not generate any major change". This was a high-value case (£100 million estate) Chancery case. It resulted in a fully contested three-week trial. The suggestion that removal of counsel's fees from the agreement does not "generate" change that is "major" is unconvincing.

102. Finally, I was directed by the respondent to the Court of Appeal's judgment in *Diag Human*. Relying on the judgment of Stuart-Smith LJ at paras 64-66, the proposition is that it is contrary to public policy to use severance to save an agreement that is tainted with illegality. One must immediately make allowance for the fact that *Diag Human* concerned the enforceability of CFAs not DBAs. Nevertheless, the question of principle in respect of severance seems to me to be materially the same. At para 62, the Court of Appeal said that "severance is precluded as contrary to public policy. The principal effect of severance would be to permit partial enforcement of the unenforceable CFA." The court continued at para 63:

> "63. The effect of implementing public policy, as explained by Dyson LJ at [27]–[30] of *Garrett*, cited at [21] above, is that "if the applicable conditions are not satisfied, the CFA shall be unenforceable *with the consequence that the solicitor will not be entitled to payment for his services*"." (original emphasis)

Conclusion: severance

103. I conclude that the DBAs fail the blue pencil test; the removal of counsel's fees would effect a major change to the bargain; and it would be contrary to

public policy to seek to save an agreement that it is fundamentally unlawful and unenforceable through violating one of the core protections for the public through severance. I cannot accept the appellants' argument that "the essential issue" is not whether there has been breach of the Regulations, or whether the solicitors "have failed to properly protect their clients' interests", but rather the essential issue is "simply" how counsel's fees "are treated and who should bear their costs". The argument depends on diminishing the importance of the express provisions in the Regulations aimed at protecting the public. This is why counsel's fees are under the Regulations required to be part of the payment. I judge this to be a central plank of public protection and the "freedom to contract" claimed by the appellants here amounts to a claimed freedom to contract something unlawful. It cannot stand. While greater access to justice is desirable through DBAs, it is not at any cost, and cannot be at the cost of impaired protection of the public.

104. I should add that I have carefully considered the appellants' submissions invoking *Therium*. That was a judgment in a challenge to an interim injunction. The funding arrangements were litigation funding agreements, which are different in nature since they do not involve legal professionals with potential conflicts with their duty to the court as officers. I find nothing in the judgment of Jacobs J that assists the appellants in a very different type of case.

E - Conclusion: Issue 2

105. While I agree that regulation 4 contains a netting off provision, the fact that there is no prohibition there expressly preventing counsel's fees as payable in addition to the DBA contingency payment avails the appellants nothing. Netting off was not Parliament's sole concern. The regulation 1(2) definition is clear. I conclude that there is no credible argument but that to charge counsel's fees as expenses is a clear and direct breach of the Regulations. As the appellants now rightly concede, the breach is material. The appellants cannot rely on an argument by analogy with *Zuberi*: that case dealt with the very different situation of early termination. Beyond that, the DBA cannot be saved by severance because the DBA fails the blue pencil test, with simple excision of the offending clauses insufficient to remedy the defects. The removal of the counsel's fees arrangements generates a major change to the essence of the agreement. Such is the flagrancy and fundamental nature of the breach of the Regulations that I judge it to be contrary to public policy to remove through severance such clauses (even were it possible, which it is not) as they run directly contrary to a cardinal statutory objective of public protection. Such a legal conclusion does not produce an "absurd outcome" contrary to the statutory objective as the appellants claim. The policy imperatives run the opposite way: protecting the public outweighs the creation of a limited and tightly regulated exception to otherwise champertous representative fees arrangements in the name of access to justice. A better reading is that any absurdity of outcome results from the construction contended for by the appellants. They agreed to pay respectively 10 and 24 per cent of their resultant financial benefit (whatever that may finally be) plus expenses. If the appellants' construction is right, they also agreed to pay

hundreds of thousands of pounds for counsel for a 15-day Chancery trial. That may well amount to more than 50 per cent limit under regulation 4(3), resulting in a further breach of the regulations. This will not be established until the value of the will is ascertained. Such a construction offers scant client protection.

106. Therefore, while access to justice remains an important objective, the payment arrangements must be fair, proportionate and not open to abuse or exploitation. That is why counsel's fees are included in the DBA payment as defined by regulation 1(2), which limits freedom to contract in the public interest. As the appellants recognise, the arrangements for DBAs were enacted or approved by Parliament "as the right course" after "long consultation."

107. Therefore, these DBAs are unenforceable due to the counsel's fees arrangements. The appeal fails on this separate basis.

VI - Disposal

108. I summarise my prime conclusions:

> **Issue 1**: there is no payment out of sums recovered; contingent benefits are not compliant with the Regulations. The DBAs are unlawful and unenforceable on this basis. The appeal must fail.
>
> **Issue 2**: the payment for regulation 1(2) purposes must include counsel's fees. The DBAs are unlawful and unenforceable in failing to meet this requirement. The appeal fails on this separate basis.

109. As a result, I have not had to consider the question of wrongful termination or repudiation of the DBAs through LLP's letter of 16 February 2022. Returning to the prime appeal question, the Judge was not wrong in appellate test terms (CPR 52.21) on either issue. His conclusion on each issue was undoubtedly correct.

110. I invite counsel to agree an order to reflect the terms of this judgment.

111. The appeal is dismissed.