SCCO considers validity of assigned CFA (Azim v Tradewise Insurance Services Ltd)

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Dispute Resolution analysis: Christopher McClure, regional manager of The John M Hayes Partnership in Manchester, considers the handed down judgment of the Senior Courts Costs Office (SCCO) in Mohammed Azim v Tradewise Insurance Services Limited and evaluates what lessons can be learned with regards to the valid assignment of a conditional fee arrangement (CFA) from one firm of solicitors to another.

Original news

Mohammed Azim v Tradewise Insurance Services Limited [2016] Lexis Citation 544

This was a routine low value personal injury claim for damages caused by a minor road traffic accident in 2011. The claimant instructed three firms of solicitors under two pre-Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012) CFAs—the second of which was assigned from firm two to firm three. Both CFAs provided for a 100% success fee. The claim was settled in January 2015 when the claimant accepted a Part 36 offer of £3,500. A bill of costs was drawn and the paying party disputed liability to pay any costs under the second CFA on the premise that there had not been a valid assignment of that CFA. This challenge was rejected by the SCCO.

What are the practical implications of the decision?

That timing is crucial. We have seen a number of recent costs cases where challenges have been made to costs recovery on the basis that a CFA has not been validly assigned. This has been especially so where a portfolio of clients of cases has been transferred from one firm to another. In *Azim* the paying party relied on the case of *Alina Budana v The Leeds Teaching Hospitals NHS Trust* (see News Analysis: 'Costs wars—drawing a line under pre-LASPO 2012 CFAs') to support their contention that the second CFA had been terminated and was thus incapable of assignment.

Master Leonard distinguished *Budana* on the premise that the second CFA had not been terminated 'at the time' of the assignment agreement (see also paras [27] and [30] of Master Leonard's judgment). In essence, solicitors would do well to ensure that any assignment instrument is formally executed before providing notification to the client of any unilateral transfer of their file. Closer to home, any valid legal assignment by definition must comply with the relevant provisions of section 136 of the Law of Property Act 1925 (LPA 1925). This requires a properly drafted deed of assignment and notification of that assignment to the client.

What considerations were relevant in determining whether a CFA had been terminated?

The paying party's case for termination of the CFA essentially revolved around the assigning firm's 'unequivocal statement' made to the claimant that they would no longer represent him, as follows:

'We have recently received an influx of new work as a resulting [sic] of securing a new contract, however unfortunately have been unable to replace a couple of key staff […]. Rather than have this impact on the quality of service which you receive or cause any delays to the settlement of your claim, we have put in place arrangements to pass over the handling of your case to another firm […].'

By reference to the decision in *Budana*, such a statement was said by the paying party to constitute a unilateral termination of the retainer in question and the assigning firm had thereby forfeited their right to receive payment from the client. Master Leonard disagreed. As the assignment instrument was 'signed' on 23 July 2014 and notice of that assignment was sent to the claimant on the same date, by definition the claimant would not have received notice of the unilateral transfer of his file until after the assignment had actually happened. Thus the assignment of the second CFA had already occurred by the time the claimant received notice of the unilateral transfer of his file. Such a finding was also sufficient to distinguish the index matter from the case of *Webb v London Borough of Bromley* [2016] (unreported) on the facts.

In many respects the decision in *Azim* is a decision within a decision. Master Leonard did not express any doubt on the correctness of the decision reached in *Budana* but instead distinguished *Azim* on the issue of termination on the basis of the 'quite different' facts. On the facts and by reference to the various authorities on the issue of assignment, the decisions in both *Budana* and *Azim* are probably correct. Certainly solicitors considering the assignment of CFAs will derive assistance from Master Leonard's findings on the relationship between termination and assignment.

Does this judgment provide further assistance in determining whether the assignment of a CFA is lawful?

Jones v Spire Health Care Limited [2016] Lexis Citation 52Jenkins v Young Brothers Transport Limited [2006] EWHC 151 (QB), [2006] 2 All ER 798

The decision in *Azim* adds little value to the authorities on the issue of assignment of CFAs as they presently stand. The decision of HHJ Wood QC in *Jones* has, at least for the time being somewhat settled the interpretation and application of *Jenkins*. Whereas it was previously thought that a CFA could only be assigned where the client's movement from one firm to another was motivated by personal trust and confidence reposed in a particular solicitor, HHJ Wood held that:

> 'In my judgment and on careful reading of those paragraphs, Rafferty J was not seeking to qualify the exception to the general rule against the assignment of the burden of a contract to specific situations where personal trust and confidence could be established so much as to set a context in which it applied to the facts of the case.'

The decision on appeal in *Jones* is not binding upon the SCCO but the decision of Rafferty J in *Jenkins* is. The defendant in *Azim* sought to persuade the court to deviate from *Jones* in its interpretation of *Jenkins* and instead find that *Jenkins* was binding upon it to the extent that a CFA may be assigned only where a solicitor who enjoys the particular trust and confidence of the client moves from one firm to another. Having considered carefully the decisions in both *Budana* and *Jones*, Master Leonard expressly agreed with the reasoning of HHJ Wood QC in the following terms:

'In summary I can identify no obstacle in the principles governing assignment of the benefit and burden of contracts, to the validity of a bone fide, arms-length CFA assignment in the circumstances of this case.'

What is considered in determining the effectiveness of the assignment of a CFA?

It would appear from the judgment in *Azim* that the paying party accepted the findings of HHJ Wood QC in relation to the defendant's cross-appeal in *Jones*—the right to be paid under a CFA falls into that category of rights presently existing but enforceable only in the future. Thus the right to be paid under a CFA can, in principle, be the subject of an assignment providing that it complies with LPA 1925, s 136.

The paying party's submission on the efficacy of the assignment centred on the claimant's failure to disclose all documents pertaining to the assignment instrument. It was argued that, in the absence of full disclosure, the court could not be satisfied that the claimant had discharged the burden upon him to demonstrate that the relevant statutory requirements had been met. Such doubt must be resolved in favour of the paying party in accordance with CPR 44.3(2)(b). The court disagreed and found 'no sound basis for concluding that the assignment of the TLW CFA on 23 July 2014 in any way failed to comply with the provisions of section 136 of the Law of Property Act 1925'.

Does the judgment give guidance on any other issues?

The Master provided guidance on two further issues. First, he dismissed an argument based on the doctrine of vicarious performance:

'I would be unable to accept Mr Smith's argument on vicarious performance because the right of a contracting party to pass its performance obligations on to another person depends upon the circumstances and in particular on the terms and nature of the contract itself. In my view a solicitor is not in a position to do so, at least absent some very specific contractual provision to that effect.'

Second, Master Leonard ruled on the receiving party's submission that claimant would, if the court had found in favour of the defendant, be left without the benefit of either a CFA or of the qualified one-way costs shifting (QOCS) regime set up to preserve access to justice following the abolition of recoverable success fees. Here the Master observed that he was 'required to come to a conclusion on the law as it stands. Consistency with the intention behind the QOCS regime is not a relevant consideration.' Interestingly, this obiter comment appears at odds with the decision of Regional Costs Judge Phillips in *Casseldine v The Diocese of Llandaff Board for Social Responsibility* (claim no 3YU56348). In *Casseldine* a solicitor had terminated a pre-LASPO 2012 CFA thereby rendering void any contractual entitlement to costs but the judge agreed with counsel's submission that the abolition of recoverability of success fees on 1 April 2013 was a 'quid pro quo' for the introduction of QOCS.

Interviewed by David Bowden.

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