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SCCO rules conditional fee agreements in personal injury case were validly assigned

Mohammed Azim v. Tradewise Insurance Services Ltd
[2016] EWHC B20 (Costs)

Article by David Bowden

Master Leonard sitting in the Senior Courts Costs Office of the High Court has determined that conditional fee agreements had been validly assigned from one firm of solicitors to another. Mr Azim had 3 different firms represent him in a low value personal injuries case. After it was settled, the defendant sought to argue that no costs were due. Mr Azim's solicitors had all acted on a 'no win, no fee' basis. This means that his solicitors will not only collect their profit costs from the insurer on the other side but also the 100% success fee on these. This will apply to all profit costs charged by all 3 firms of solicitors. The solicitors transfer document and client letter were held to be sufficiently clear about the transfer. The judge expressly ruled that this was not a novation.

Mohammed Azim v. Tradewise Insurance Services Limited
[2016] EWHC B20 (Costs) 22 August 2016
High Court of Justice, Senior Courts Costs Office (Master Leonard)

What are the facts?
This was a routine low value personal injury claim for trivial damages caused by a very minor motor accident in 2011. The claimant appears to have gone straight from accident & emergency of the hospital to a firm of solicitors. Less than 2 days after the car accident, a firm of solicitors agreed to act for him on a '*no win, no fee'* conditional fee agreement ('CFA'). This was a pre-LASPO CFA and provided the usual extravagant uplift of 100% success fee and no doubt after an 'after event insurance' premium from the other side.

The claim was settled in January 2015 when the claimant accepted a Part 36 offer of £3500. A bill of costs was drawn up and the paying party disputed liability to pay any costs because it claimed the CFA had not been validly assigned.

How did Mr Azim fund his case?
Mr Azim was funded by CFAs throughout. His low value claim did however need the services of 3 different firms of solicitors to achieve this fantastic settlement. The legal representation beauty parade was:

- Minster Law – acted for 13 months from the car accident – under 1st CFA dated 19 October 2011,
- TLW Solicitors – then acted for 20 months – under 2nd CFA dated 17 January 2013, and
- Russell Worth Limited – acted for the last 2 years – claiming costs under the assigned 2nd CFA.

When TLW started acting it got Mr Azim to sign a new CFA. No issue was raised at the costs hearing in relation to recovery of Minster Law's costs.

What happened when Mr Azim had new solicitors appointed to act for him?
You have to feel TLW's pain here. It wrote to Mr Aziz in July 2014 to let him know that

> '*We have recently received an influx of new work as a resulting of securing a new contract, however unfortunately have been unable to replace a couple of key staff who are currently on maternity leave. This means that existing staff have more cases to deal with than we would normally wish.'*

It went on to tell the convalescing Mr Azim that '*We have concluded a business arrangement with a well-established personal injury law firm, Russell Worth Limited'.* Mr Azim was sent a consent form which he completed from his sick bed, signed on 31 August 2014 and returned to TLW authorizing the transfer of his file and papers to Russell Worth.

To complete the transfer, TWA wrote a letter to Russell Worth dated 23 July 2014 which said:

> '*We refer to the conditional fee agreements listed in the attached schedule between us and those persons named for the provision of legal services in respect of personal injury claims ("Contracts"). Pursuant to and for the consideration set out in the Sale and Purchase Agreement between us and you dated 23rd July 2014, we assign all our rights, title, interest and benefit in and to the Contracts to you…'*

The Sale and Purchase Agreement was not disclosed in costs proceedings and it is unclear whether Russell Worth bought TWA's work-in-progress at cost, at a discount or paid a premium for it. If there was a discount, then this could impact on costs recoverable under the indemnity principle.

What were the issues before the costs judge?
Whatever was in the points of dispute and reply by the time of the hearing, the Master had these 3 issues to decide:

- Was the solicitor's retainer terminated before the CFA assignment was made?
- Could the CFA be lawfully assigned in the manner it was?
- Was the CFA assignment effective?

What did the costs judge rule in *Budana*?
Regional costs judge Besford ruled a purported transfer of a CFA invalid on the basis that, although a CFA is capable of being assigned, the CFAs had terminated prior to the assignment, meaning there was no CFA to be assigned. The RCJ accepted he was bound to follow *Jenkins*. He accepted that the benefit of a contract may be assigned but (subject to limited exceptions) the burden may not.

The RCJ said the facts in *Jenkins* '*are far removed from the commercial wholesale disposal of clients as in this case*'. The RCJ declined to distinguish *Jenkins* and said that its ratio was '*unambiguous*'. Applying *Jenkins* the RCJ ruled that the CFA transfer '*was valid in law*'. However, the RCJ ruled that at the time of the purported transfer to the new solicitors there was no longer a valid CFA in place with the old firm to transfer. The RCJ made much of the client letter where it said '*we have decided to stop handling personal injury litigation'*. The RCJ says this letter is '*unambiguous*' and notes that: '*There was no offer or suggestion that they would continue to act pending her instructions or even that that they would give a reasonable amount of time for the claimant to consider her position before ceasing to act*.' Because of this, the RCJ ruled that there was no CFA in existence as of 25 March 2013 to transfer.

Are there any other prior authorities of relevance?
These authorities are relevant in this case.

Jenkins v. Young Brothers Transport Ltd **[2006] EWHC 151 (QB)** High Court (Rafferty J and Master Wright and Gregory Cox as assessors)
Where the events underlying the assignment were the trust and confidence a client had in his solicitor, a CFA could be assigned by one firm of solicitors. Under the agreement here the 1st firm had been obliged to act in the client's best interests and to secure for him in his claim for damages the best possible outcome. It had been entitled to payment for work done only if his claim were successful. It followed that the benefit of being paid was conditional upon and inextricably linked to the meeting by the 1st firm of its burden of ensuring to the best of its ability that the client succeeded in his claim so that the benefit and burden of the CFA could be assigned as within an exception to the general rule. The appeal was dismissed.

Jones v. Spire Healthcare Ltd **(2016)** Unreported Liverpool County Court (HHJ Graham Wood QC on appeal)
The court is concerned with *choses in action,* that is non-tangible property and future entitlements, or present entitlements realisable in the future. The benefit of a contract (other than one which involves personal skill and confidence dependent upon a particular individual discharging obligations under it), can be assigned, whereas the burden cannot, subject to certain exceptions. One of those exceptions arises where the benefits and burdens are inextricably linked - for instance where entitlement to the right or benefit is dependent or conditional upon the discharge of certain responsibilities."

Here the receiving party's original solicitors had gone into administration. Her new solicitors entered into a global deed of assignment under which the benefits and burdens of a number of specified retainers (including that of the receiving party) were said to be transferred. A week later, a separate deed of assignment was then signed by the receiving party.

Judge Wood QC ruled the assignment to be valid. If the efficacy of a CFA assignment depended upon a qualitative assessment of the degree of trust and confidence, this would generate considerable uncertainty, leading to potential satellite costs litigation whenever a retainer is challenged on this basis, with the court being required to investigate in every case the nature of the relationship between the client and the solicitor

Webb v. Bromley LBC **[2016] Lexis Citation 14** SCCO (Master Rowley)
This was a personal injury case where the solicitor's firm acted on a 'no win, no fee' or CFA basis. The matter was transferred to a new firm. In costs proceedings before Master Rowley, it was disputed that there had been a valid assignment of the CFA. He ruled that there was no valid assignment of the CFA meaning that the solicitors were unable to recover a success fee even though they has succeeded in obtaining compensation for their client.

What did the paying party say?
The paying party said the case was on all fours with *Webb* and *Budana.* The client was given no real choice. A portfolio of clients was transferred from one firm to another. The CFA had been terminated before it was transferred.

What did the receiving party say?
It said that this was the same as *Jenkins* which was a High Court appeal case binding on this costs judge sitting on a Bow County Court assessment. The client had signed the transfer form and agreed to have his case transferred to Russell Worth. This was a wholly different situation to *Budana* or *Webb*.

What did the Master rule on the main issue on validity of the CFA transfer?
Distinguishing *Budana,* he ruled that *'if the assignment arrangement of 23 July 2014 was in itself valid then there is no sound basis for concluding that the TLW CFA was, at any stage, terminated by TLW.'*

He then agreed with the reasoning in *Jenkins* ruling that:

> '42. *That is reasoning with which I respectfully agree. It seems to me that Rafferty J found limited assistance in the authorities to which she had been referred in applying a principle, which may be said to exist for the benefit of the non-assigning party, to circumstances in which the non-assigning party had every reason to (and did) accept an assignment. Nonetheless she applied established principles in coming to the conclusion that a CFA could be the subject of a valid assignment, and she expressly stopped short of any finding to the effect that a relationship of personal trust and confidence between a particular solicitor and a particular client was a prerequisite to that. For the reasons given by both District Judge Besford and HHJ Graham Wood QC the imposition of any such prerequisite would in my view be inappropriate.*
> 43. *In summary I can identify no obstacle, in the principles governing assignment of the benefit and burden of contracts, to the validity of a bona fide, arms-length CFA assignment in the circumstances of this case.'*

Finally he held that the CFA had been validly assigned and met the necessary formalities under s136 of the Law of Property Act 1925. He ruled that the Sale & Purchase Agreement did not need to be disclosed and that the CFA, the solicitor's letter and the transfer form '*met the statutory requirements'*. For completeness he ruled that '*a novation did not take place'* but rather that the CFA was validly assigned from TLW to Russell Worth instead.

What did the Master rule on vicarious performance?
This argument was dismissed with the Master ruling: '*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.'*

What did the Master say about QOCS?
Finally there was an argument based on qualified one-way costs shifting which was that if the CFA transfer had been ruled invalid then Mr Azim would have been '*left without the benefit of either a CFA or of the QOCS regime set up to preserve access to justice following the abolition, from 1 April 2013, of recoverable success fees*'. This submission was given short shrift with the Master observing: '*I am 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*.'

What is happening with the *Budana* case?
An order was made transferring the appeal against Regional Cost Judge Besford's ruling directly to the Court of Appeal under CPR part 52.14. This transfer was made on a party's submission that *Jenkins* was a High Court authority and an appeal to a High Court judge would be pointless. The Court of Appeal has listed the appeal for a 1 day appeal to float on either 4 or 5 July 2017.

When it hears the appeal it will be constrained in some ways by its earlier ruling in *Davies*. In *Davies v Jones* **[2009] EWCA Civ 1164**, Sir Andrew Morritt, the Chancellor, laid out this three-stage test:

- the benefit and burden must be conferred in or by the same transaction,
- the receipt or enjoyment of the benefit must be relevant to the imposition of the burden in the sense that the former must be conditional on or reciprocal to the latter, and
- the person on whom the burden is alleged to have been imposed must have or have had the opportunity of rejecting or disclaiming the benefit, not merely the right to receive the benefit

What lessons can be learned from this case?
The decision in *Jenkins* has been widely criticised with costs judges seeking ever ingenious ways to circumvent it. It will be useful to finally have a clear ruling from the Court of Appeal on CFA transfers to put the matter beyond doubt given that it has caused so much contentious costs litigation in the last few years. Litigation that has assumed more potency since firms transferred clients or portfolios of them before the LASPO changes took effect in April 2013. It is now that the costs challenges are materialising. The stakes are high because if paying parties can challenge a CFA transfer and say that there is a novation instead, then the liability to pay success fees or ATE premiums by a losing party evaporates.

Here it seems that the transfer agreement and letter from the old solicitors firm to the client was drafted with sufficient care to withstand that sort of challenge.

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