Costs wars—drawing a line under pre-LASPO 2012 CFAs

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Dispute Resolution analysis: A regional costs judge (RCJ) has ruled a purported transfer invalid on the basis that, although a conditional fee agreement (CFA) is capable of being assigned, the CFAs had terminated prior to the assignment, meaning there was no CFA to be assigned. David Bowden, freelance independent consultant, discusses with Alex Bagnall, associate at Just Costs Solicitors, what lessons can be learned from Alina Budana v The Leeds Teaching Hospitals NHS Trust.

What is background to this case?

David Bowden (DB): A solicitor's firm had a number of personal injury clients which it was acting for on a 'no win, no fee' basis. It decided to withdraw from this market when the changes in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012) came into force in April 2013.

Another firm was appointed to take the clients, cases and files. It was said that the CFAs had been assigned from the first firm to the second. The RCJ ruled that, although a CFA is capable of being assigned, the CFAs had actually terminated prior to the assignment. This meant there was no CFA to be assigned. Moreover the 'entire contract' principle prevented any costs being recovered under the terminated CFA. The consequence of this ruling is that the new firm cannot recover any success fee from the other side where it has been successful on a transferred claim.

The provisions of LASPO 2012, Pt 2 came into force on 1 April 2013. Before that date, solicitors could enter into a CFA with clients and were entitled to claim a success fee of up to 100% of their base costs from the other side if they were successful. Where an 'After The Event' (ATE) insurance policy had been taken out to cover an unsuccessful claim, the cost of that too could be recovered from the other side where a client was successful.

For clients entering into a CFA on or after 1 April 2013, then (subject to limited exceptions) neither success fees nor ATE premiums can be recovered from the other side, even on successful claims. Instead, success fees and ATE premiums can only be recovered out of any damages that a client may be awarded. As a result, a number of firms that specialised in volume personal injury cases decided that the LASPO 2012 changes meant that this work was no longer sufficiently profitable for them.

This is what happened here. The claimant, Budana, had signed a CFA with Baker Rees solicitors in December 2012 so they could pursue her claim for damages for slipping on a pavement outside a hospital. Baker Rees wrote to Budana by letter dated 22 March 2012 saying 'In light of the impending reforms, we have decided to stop handling personal injury litigation…'. Baker Rees sold its portfolio of personal injury claims to another solicitors firm, Neil Hudgell Limited. This was done by a master deed between the two firms dated 25 March 2013. Budana signed on or after 10 April 2013 a deed affirming this assignment of her CFA.

To hedge their bets, Neil Hudgell got Budana to sign another CFA (post LASPO 2012) on 17 May 2013. This second CFA provided for a 0% success fee but was stated to be 'only effective in the event that the Deed of Assignment sent to you previously does not have the effect of allowing recovery of our costs in connection with the claim…'. Budana subsequently agreed to accept £4,150 in compensation with her costs being paid in addition.

What were the key issues before the RCJ?

DB: The RCJ had to decide if the assignment of the CFA had been effective as a matter of law. There were two other issues as well. One related to the adequacy of enquiries that the solicitors had made as to whether their client had taken out the ATE policy 'before the event'. In a separate judgment, the RCJ ruled in Budana's favour on this. Before the hearing the two sides conceded a technical point as to whether the CFA complied with The Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008, SI 2008/1816.

As to the validity of the CFA transfer, the RCJ split this into these four issues:

- Was the CFA assignment valid in law?

- At the time of the transfer, was there still a valid CFA in existence to assign?
- Can a CFA be assigned in law? And if the claimant agrees, is it a novation?
- What are the consequences for both the CFAs?

What had the Jenkins case previously decided?

DB: The RCJ had to follow the much-criticised decision in *Jenkins v Young Brothers Transport Ltd* [2006] EWHC 151 (QB), [2006] 2 All ER 798. This was a High Court decision of Rafferty J on appeal where she sat with Master Wright and Gregory Cox as two assessors. It was an appeal from Master Campbell in the Senior Courts Costs Office.

In *Jenkins*, a fee-earner had moved firms twice and each time she had taken her client with her. The client had entered into a CFA with the first firm of solicitors. The client wanted the fee-earner to carry on representing him and for that to continue on a 'no win, no fee' basis that his CFA provided. Each time the client was sent a letter by the fee earner's new firm stating that the CFA remained in force, but it was now with the new firm. Rafferty J, in dismissing the appeal held that the CFA had been validly assigned to the new firm.

What did the RCJ decide?

DB: 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 case law sets out a number of such narrowly construed exceptions where a burden may be assigned. These are considered and set out in *Jenkins* with the exception of a Court of Appeal case which was decided subsequently.

In *Davies v Jones* [2009] EWCA Civ 1164, [2009] All ER (D) 104 (Nov), 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

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* and *Davies* the RCJ ruled that the CFA transfer 'was valid in law'.

However, the RCJ ruled that at the time of the purported transfer to Neil Hudgell there was no longer a valid CFA in place with Baker Rees to transfer. The RCJ made much of the client letter of 22 March 2013 where Baker Rees says '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.

The RCJ says that solicitor's retainers are contracts involving personal skills and are capable of being transferred. The RCJ rules that:

'where a contract is entered into, providing for one party to be released from obligations and another party to take such obligations then the contract is one of novation. The practical substitution…severs the existing contract.'

A submission was made that either clients were covered by the regime that applied before LASPO 2012 came into force or by the new regime. If the CFA transfer was held not to be valid, then a litigant would obtain the benefit of neither the pre- or post-LASPO 2012 scheme and Parliament could not have intended to have create such a third class of litigants. The RCJ dismissed this submission saying that Budana's difficulties 'arise from delays, not the change of rules'.

The RCJ further concluded that there was no good reason for Baker Rees to terminate the CFA. Applying the 'entire contract' principle, he held that no payment whatsoever was due under the first CFA.

Applying his conclusions the RCJ ruled that:

- the first CFA was terminated and no costs were due under it
- Budana was entitled to her costs, disbursements and VAT under the second CFA from 17 May 2013, and
- no success fee was payable by the NHS Trust

How does this judgment potentially impact other cases?

Alex Bagnall (AB): The question of assignments of CFAs is one which is now a regular feature. Thousands (and perhaps tens of thousands) of CFAs were assigned for various reasons as a result of the LASPO 2012 changes.

Paying parties frequently challenge the validity of these assignments by reference to the principle that only the benefit (but not the burden) of a contract can be assigned. Receiving parties rely on the exception seemingly created by *Jenkins*.

Budana is the latest in a number of first instance decisions which deal with the question of assignments of CFAs. The RCJ clearly felt bound by *Jenkins*, and this has been common to the other decisions, although *Jenkins* is a case which can be argued to be applicable only on its own facts.

The fatal blow in *Budana* did not relate to the efficacy of the assignment, but arose out of the RCJ's conclusion that the CFA was terminated before it was assigned. More than that was the RCJ's decision that Baker Rees had terminated the CFA without good reason and with the effect that no costs whatsoever were payable under it.

While *Budana* is a first instance decision, it was decided by a respected RCJ having heard argument from two seriously heavyweight costs counsel. It will carry a significant amount of weight.

Neil Hudgell was able to protect their own fees by entering into a 'back up' CFA after the transfer of the instructions. Had they not done so, the effect of the judgment would have been to prevent any payment being made to them.

Will there be an appeal?

DB: It is abundantly clear from the judgment that the RCJ has doubts as to the correctness of the *Jenkins* decision. Counsel for *Budana* submitted that Rafferty J had mixed up benefits and burdens. The RCJ was unable to squeeze anything out of *Davies* to try and get round *Jenkins* either. It seems highly likely that this decision will be appealed. The standard appeal route from a RCJ would be (as in *Jenkins*) to the High Court. However, this may prove to be a fruitless exercise as *Jenkins* would remain an impediment which another High Court judge cannot overrule.

The Civil Procedure Rules 1998, SI 1998/3132, Pt 52.14 provide that:

'Where the court from or to which an appeal is made or from which permission to appeal is sought ('the relevant court') considers that….(b) there is some other compelling reason for the Court of Appeal to hear it, the relevant court may order the appeal to be transferred to the Court of Appeal.'

If the RCJ does grant permission to appeal, it would seem he will have to decide if the *Jenkins* ruling (which he has doubted the correctness in parts) is a 'compelling reason' to have any appeal transferred directly to the Court of Appeal for hearing.

AB: Issues regarding the effectiveness of assignments look set to be the new 'costs wars'. Practitioners would welcome the clarity and certainty that a Court of Appeal decision in this regard would give.

What should lawyers do next?

AB: Prudent solicitors who are acting pursuant to CFAs which have been assigned will be watching decisions such as *Budana* (and the impending appeal in *Jones v Spire Healthcare*) keenly. Those who have doubts as to the effectiveness of their assignments should be taking advice on any steps which should be taken to ensure that there is an enforceable retainer in place.

Interviewed by David Bowden.

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