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Court of Appeal reserves judgment on costs recovery where funding changed from legal aid to CFA pre LASPO

Hyde v. Milton Keynes NHS Foundation Trust
A2/2016/0542

Article by David Bowden

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Court of Appeal reserves judgment on costs recovery where legal aid funding changed to CFA
Hyde v. Milton Keynes NHS Foundation Trust - A2/2016/0542

Executive speed read summary
This is a clinical negligence claim. 3 firms of solicitors acted for the patient over 6 years. Liability was conceded by the NHS in September 2013. The patient was legally aided but the financial limit of cover was reached and the Legal Services Commission refused to extend funding. In March 2013 just before the LASPO changes came into force, the patient entered into a CFA with her solicitors and counsel providing for a success fee and ATE premium. The solicitors did not seek a discharge of her legal aid certificate. Damages were agreed at £325k and a bill of costs was served seeking over £252k costs. The NHS said the CFA was invalid because the patient remained legally aided. The NHS refused to pay anything other than base costs. Master Rowley rejected this submission and a first appeal by the NHS to Soole J was also dismissed. The Court of Appeal has now heard a 2nd appeal because it raises an important point of principle. At the hearing, the 3 judges said all the prior cases on legal aid concerned the 'scope' of a legal aid certificate but this involved a novel point. The NHS said permitting a CFA to be taken out concurrently with legal aid funding was not permitted for very sound regulatory reasons and a finding otherwise would leave the system open to abuse. Judgement has been reserved and is expected in July 2017.

Hyde v. Milton Keynes NHS Foundation Trust
A2/2016/0542 *4 April 2017*
Court of Appeal, Civil Division (Lords Justices Davis, Lewison and McCombe)

What are the facts of the case?
Hyde brought a clinical negligence claim against the NHS defendant arising out of an event which occurred on 18 February 2008. During the course of the claim, Hyde instructed 3 different firms of solicitors:

- Scrivenger Seabrook - On 17 March 2008 Hyde instructed them until August 2009,
- Osborne Morris & Morgan from 15 October 2009, and
- Ashton KCJ (formerly known as Kester Cunningham John) from 1 April 2011 onwards.

How was the case funded?
From 10 July 2008 Hyde had the benefit of a CLS funding certificate and was legally aided. Hyde eventually started proceedings in August 2011. The financial limit on the certificate was £39,400 which was increased to £43,000 in November 2012. Hyde's solicitors had a 'Very High Costs Case' ('VHCC') contract with the Legal Services Commission ('LSC'). By letter dated 20 November 2012 the LSC refused to increase the funding limitation on the Hyde's certificate any more. Her solicitors attempted to persuade the LSC to change its decision were unsuccessful. Her solicitors said the funding level was insufficient to cover expert reports and their profit costs to trial.

Hyde and her solicitors then entered into a CFA dated 25 March 2013 and an 'after the event' (ATE) policy was issued the following day. The solicitors claimed a success fee of 50% from 25 March 2013 and counsel claimed a 100% success fee from 15 March 2015.

How did compensation in the case come to be agreed?
The NHS initially denied liability but in July 2012 breach of duty was admitted by the defendant. A consent order was filed on the issue of liability dated 30 July 2012. On 12 July 2012 the NHS made an offer to settle for £100,000 and then made a Part 36 offer of £150,000 on 15 August 2012. On 29 April 2013 the NHS increased its offer to £275,000. At a joint settlement meeting in November 2013 Hyde offered to accept £325,000 which the NHS accepted. The settlement was reflected in a consent order dated January 2014.

What costs were incurred?
On 31 March 2014 Hyde served a Notice of Commencement of costs assessment proceedings. She sought total costs of £252,704.73 for the 5½ years of her litigation against the NHS that her 3 firms of solicitors claimed to have incurred.

What about 'after the event' insurance?
When the funding was changed from legal aid to CFA in March 2013, Hyde's solicitors also arranged for an ATE insurance policy to be taken out. It should be noted that breach of duty had been admitted 9 months earlier and so this was an ultra-low risk case for an insurer as Hyde was bound to recover some damages - it was only the amount that needed assessing. Neither the skeleton arguments for the

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appeal nor the judgments below record the identity of the ATE insurer or the amount of cover. At the hearing the paying party's counsel said the ATE premium was £60,000.

What objections were taken by the paying party in the Points of Dispute?
These were the 2 linked principal objections taken by the paying party in the Points of Dispute and which formed its case for resisting costs recovery in all 3 courts:

- Whether at the time the CFA was entered into, Hyde's solicitor was properly to be regarded as a person providing 'funded' services within the scope of section 22 of the Access to Justice Act 1999, and
- If so what effect (if any) this had on Hyde's ability to recover costs incurred from her CFA from the NHS as paying party.

Who acted in this case in the Court of Appeal?
Mr Vikram Sachdeva QC of 39 Essex Chambers (who appeared in both courts below) was instructed by Acumension for the NHS as paying party and appellant. Mr Roger Mallalieu of 4 New Square (who also appeared in both courts below) was instructed by Ashton KCJ for Hyde as the receiving party and respondent to this appeal.

Who was in Court?
Neither Mrs Hyde nor anyone from her solicitors attended the appeal hearing. Representatives from both the appellant and its solicitors were in court and were able to give some concise last minute instructions to their counsel on the interventions that were raised by the 3 judges on the panel.

What did the Master Rowley in the SCCO below rule?
In his reserved judgment dated 1 July 2015 Master Rowley found in favour of the receiving party patient - **[2015] EWHC B17 (Costs).** He ruled that the CFAs were valid and enforceable and that the NHS had to pay such costs and success fees as assessed under them.

What other rulings have there been on this point?

- *LXM v Mid-Essex Hospital Services NHS Trust* **[2010] EWHC 90185** (Master Gordon-Saker, SCCO, 11 May 2010) - reasonable for the receiving party to discharge LSC certificate and take out CFA,
- *Yesil v. Doncaster & Bassetlaw Hospitals NHS Foundation Trust* (Regional Costs Judge Ian Besford, High Court, QBD, Hull, 24 February 2014) - no success fee or ATE can be recovered by solicitors where a client is given insufficient advice about the consequences of changing from legal aid to CFA funding, and
- *Kai Surrey v. Barnet and Chase Farm Hospitals NHS Trust* **[2015] EWHC B16 (Costs**) – (Master Rowley, SCCO, 10 August 2015) **-** Switch from public funding to CFA was not reasonable,

It should be noted that *Kai Surrey* has been granted permission to appeal. The Court of Appeal has given it a 2 day time estimate but no date has yet been fixed for the hearing.

What were the grounds of appeal?
Hyde as receiving party in her skeleton argument refined her grounds so that she was asking the Court of Appeal to determine these 4 questions;

- Who has the power to formally discharge a legal aid certificate – is it solely the LSC?
- In the absence of formal discharge, in what other situations has the law found a client is no longer an assisted person?
- Should the law recognize a further exception to the requirement of formal discharge where the subsequent private retainer is with the same solicitor on the record named on the LSC certificate?
- Can a client and solicitor terminate LSC funding without reference back to the LSC? If not, is any subsequent private CFA retainer unenforceable?

What ruling did Mr Justice Soole give?
Mr Justice Soole sitting with Master O'Hare as an assessor in the High Court, Queen's Bench Division on 20 January 2016 **[2016] EWHC 72 (QB)** on first appeal dismissed the appeal of NHS as paying party. He agreed with Master Rowley that the legal aid certificate had been discharged by conduct and said there had been no need for the equivalent of a '*burial certificate'* from the LSC noting:

> '*While the correct and wise procedural course would have been to obtain a discharge of the certificate, the position was in substance the same as if the authorised funds had been completely exhausted. The funds*

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were approaching exhaustion, the LSC had refused further funding and the case could only proceed if alternative funding were obtained.'

In these circumstances, Soole J said Master Rowley had rightly held that there was no question of an attempt to top up a legal aid certificate nor of any other form of abuse of the system.

By what route did this case arrive in the Court of Appeal?
On 3 May 20116 Lord Justice Burnett granted permission for a 2nd appeal on the papers under CPR part 52.7 on the basis that the appeal '*raised an important point of principle regarding the enforceability of CFAs which are entered into before the discharge of a public funding certificate'*.

What does the legislation provide?
The Access to Justice Act 1999 ('AJA') contains a number of critical provisions. These are:

- Section 10 '***Terms of provision of funded services'***: *(1) An individual for whom services are funded by the Commission as part of the Community Legal Service shall not be required to make any payment in respect of the services except where regulations otherwise provide.*'
- Section 11 '***Costs in funded cases'***: (*1) Except in prescribed circumstances, costs ordered against an individual in relation to any proceedings or part of proceedings funded for him shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including—(a) the financial resources of all the parties to the proceedings, and (b) their conduct in connection with the dispute to which the proceedings relate'*,
- Section 22 '**Position of service providers and other parties etc':** *'(1) Except as expressly provided by regulations, the fact that services provided for an individual are or could be funded by the Commission as part of the Community Legal Service or Criminal Defence Service shall not affect—(a) the relationship between that individual and the person by whom they are provided or any privilege arising out of that relationship, or (b) any right which that individual may have to be indemnified in respect of expenses incurred by him by any other person'*.
- Section 22(2) – '*A person who provides services funded by the Commission as part of the Community Legal Service or Criminal Defence Service shall not take any payment in respect of the services apart from—(a) that made by way of that funding, and (b) any authorised by the Commission to be taken'*.

What submissions did the NHS appellants as paying party make?
These are the summary of the written submissions made by the NHS:

- The absence of a formal discharge of a legal aid certificate is not determinative in this case,
- It would have been better and clearer if the receiving party's solicitors had sought an expedited discharge of her legal aid certificate and served notice of discharge on the NHS,
- The reason for not seeking a discharge of the legal aid certificate has never been explained by Hyde,
- At the date Hyde purported to enter into the CFA she had not ceased to be an assisted party in receipt of legal aid funding,
- This is a unique case and does not fit within any of the other categories of cases involving legal aid that the courts had previously considered. All the other cases about legal aid involved work done or not done outside the scope of the certificate. This is not the case here where there is ambiguity as to whether the legal aid certificate was ever discharged and if so what was the effective date,
- Whether a litigant remains an assisted person receiving legal aid is not a pure question of fact,
- The Access to Justice Act 1999 prohibits a funded individual from being required to make any payment in respect of funded services,
- It is contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system,
- Solicitors acting for legally aided clients are not entitled to look to that client for payment, and
- Denial of the validity of the CFA would only deprive the receiving party of any success fee or ATE recoverability and not base costs.

At the hearing the paying party's counsel conceded that the NHS was '*not saying it was not reasonable to change to CFA from legal aid funding*'. He also pressed the point that allowing a CFA to be taken out during the currency of legal aid funding would open up the system to abuse, that legal aid prevented funds from being taken (or topped up) from a client and this was a regulatory matter that the SDT would treat very seriously. Their submission is the CFA is unenforceable as to '*additional liabilities'* be they success fees or ATE premiums but not in relation to an obligation to pay such base costs as the cost judge will assess. The paying party submitted that this was the 1st case to reach either the Court of

Appeal or High court where solicitors were '*seeking to argue that a private retainer is enforceable'* during the currency of legal aid funding.

What submissions did the patient respondent as receiving party make?
Very broadly the receiving party submitted that both courts below came to the right conclusion on this for the reasons which they gave. This was expanded into these submissions:

- By taking out a CFA, Hyde was making a definitive switch from having services provided to her on a legally aided funded basis to a private basis from the date her CFA took effect,
- Hyde's solicitor was no longer providing funded services to her from that date and any issue in relation to 'topping up' falls away,
- Previous cases on spent legal aid certificates are only examples of circumstances where a court has accepted that a litigant is no longer regarded as legally aided despite the absence of a formal notice of discharge certificate. There is no closed category of case where this can be established,
- The Legal Aid regulations requiring formal discharge exist for purposes beyond those in section 22of the Access to Justice Act 1999. Non-compliance with the AJA has no effect on the contractual relationship between Hyde and her solicitors or her right to recover costs,
- Service of the N251 Notice of Funding Arrangement satisfies any notice requirement that the case is no longer funded by legal aid,
- Service of a N251 will invariably post date the change of funding date and failure to provide notice of change before the change takes effect cannot of itself render any CFA funded services unenforceable, and
- The timing of the N251 is irrelevant provided a costs judge can be satisfied that there has been no overlap of funding between legal aid and CFA funding. A costs judge will have the solicitors file and will be able to check this before assessing costs.

At the hearing the receiving party's counsel conceded that the LSC '*may not know about the CFA'* and he accepted that this was a risk.

Were any new points advanced at this appeal hearing?
Yes.

By the end of the hearing, leading counsel for the receiving party had persuaded all 3 judges and his opponent to accept that all the other cases about legal aid funding in the authorities bundle were what Lord Justice Lewison described as 'scope' cases. The effect of this is that the Court of Appeal knows that it is now deciding a novel point. So whilst the Court of Appeal will pay due regard to prior case law in this, it will not be hemmed in by them in arriving at its judgement. For this reason, the outcome of this appeal is too close to call.

Was there a Respondent's Notice?
No. Nor was there a cross appeal or any applications to submit new evidence.

What authorities were referred to in oral argument?
These authorities are relevant in this case:

Littau v. Steggles Palmer **[1986] 1 WLR 287** (Court of Appeal – Ackner, Parker & Cairns LJJ)
Where a certificate granted legal aid only for a specific step in litigation, the 'proceedings' in connection with which the certificate was issued were for the purpose of regulation 65 of the Legal Aid (General) Regulations 1980, the step or aspect of that litigation for which legal aid had been thereby granted and not the action as a whole. Once the work covered by a legal aid certificate had been completed, the certificate ceased to have effect and there was no obligation on the assisted person's solicitor to apply for its discharge.

Turner v. Plasplugs Limited **[1996] 2 All ER 939** (Court of Appeal - Sir Thomas Bingham MR, Schiemann and Peter Gibson LJJ)
In the absence of a legal aid certificate covering the issuing of proceedings, a litigant did not have the benefit of legal aid. He could only claim assistance up to the accomplishment of the relevant procedural steps. Once those steps were completed his certificate was spent. There was no need for it to be discharged. The litigant could not claim protection as a legally assisted person under section 17 of the Legal Aid Act 1988 for actions taken in excess of the permitted steps unless he gained an extension to the certificate from the legal aid committee.

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Burridge v. Stafford **[2000] 1 WLR 927** (Court of Appeal – Lord Woolf MR, Butler-Sloss and Robert Walker LJJ)
The fact that a litigant's legal aid certificate had not been discharged was not determinative of whether the litigant was a legally assisted person for the purposes of the Legal Aid Act 1988. A person ceased to be a legally assisted person within the meaning of section 2 at least from the date that he started to act in person.

Stacy v. Player **[2004] EWCA Civ 241** (Court of Appeal – Lord Phillips MR, May and Jonathan Parker LJJ)
A litigant had private funding for proceedings relating to a preliminary issue arising out of a sale of a business contract. That litigant also had a Civil Legal Aid Certificate. A question arose whether that certificate extended to cover the costs of the preliminary issue. Regulation 64 of the Civil Legal Aid (General) Regulations 1989 did not prevent a court ordering that the other side pay the litigant's costs.

Merrick v. Law Society **[2007] EWHC 2997 (Admin)** (Divisional Court - Thomas LJ & Gross J)
Regulation 64 of the Civil Legal Aid (General) Regulations 1989 was clearly worded. It was designed to prevent an abuse of the fact that legal aid had been granted and it prohibited a solicitor from receiving a payment from a client for work done during the currency of a legal aid certificate.

Mohammadi v. Shellpoint Trustees Ltd and Anston Investments Ltd **[2009] EWHC 1098 (Ch)** (High Court, Chancery Division - Briggs J and assessors Master O'Hare & David Harris, Solicitor)
During any period when acting in person, a litigant is not a legally assisted person, even though she was actively seeking to reinstate her legal aid certificate. It makes no difference that a litigant obtained the services of a new firm of solicitors under her reinstated certificates. The litigant is not a legally assisted person during any period after a firm of solicitors which had ceased to act for her had communicated that fact to the other side's solicitors. The reinstatement of a legal aid certificate for the purposes of enabling new solicitors to act does not have the effect retrospectively, that the litigant is deemed to have been a legally assisted person for the purposes of s 17 during the period between the discharge and the reinstatement of the certificates or during any period between the termination of the old firm's retainer and the commencement of the new firm's retainer.

Rayner v. The Lord Chancellor **[2015] EWCA Civ 1124** (Court of Appeal - McCombe, Gloster and Underhill LJJ)
The phrase 'costs … attributable to the [funded] part of the proceedings' more naturally means costs incurred during that part. It was reasonably clear that the draftsman of the regulations proceeded on the basis that the criteria governing the qualification of the funded party for cost protection and those governing the liability of the LSC for the costs of the unfunded party should match. The whole structure of regulation 5 of the Community Legal Service (Cost Protection) Regulations 2000 rests on the basis that costs protection is in place as regards the selfsame costs of the unfunded party for which the LSC is to be potentially liable.

What interventions did the judges make? What points seemed to be troubling them?
All 3 judges were very interested in this case and they all asked about the same number of questions.

Lord Justice Davis was the presiding judge and he was the first to ask the questions and he kept up the pressure on both counsel with a series of probing and testing interventions. Davis LJ questioned what would happen if the CFA was found to be unenforceable and whether Hyde would then try and seek to revert to her previous legal aid funding. Davis LJ picked up on the difference in the statutory wording in section 10(1) of the AJA 1999 noting that it was expressed in the negative rather than as an imperative. Davis LJ picked up very quickly that the paying party's real point was the underlying uncertainty of not knowing when (or if) the legal aid certificate had been discharged. During one exchange it was highlighted that Hyde's firm did not need to notify the LSC that it had entered into a CFA with her. Davis LJ wanted to know the statutory provision that prevented Hyde entering into a CFA without first seeking a discharge of her legal aid certificate and Mr Sachdeva said this was section 10 (1) of the AJA 1999. Davis LJ said the paying party was in a different position to the other litigants in the 'scope' cases. Davis LJ asked how many CFAs were taken out in March 2013 to which the receiving party's counsel said it was a '*busy time'* compounded because the LASPO commencement date of 1 April 2013 was also a Sunday.

Lord Justice McCombe is the more experience judge in relation to legal aid funding having been the presiding judge on the panel in *Rayner* and during the hearing a number of interesting recollections of that case surfaced. McCombe LJ was the most supportive of the ruling of Soole J being appealed saying he understood the paying party's submission and this was the 'launch pad' for his decision. McCombe LJ wanted to know how a solicitor was going to get 'top up' funding from a legally aided client to which Mr Sachdeva responded that a lay client would not know that top ups were prohibited.

Before becoming a judge Lord Justice Lewison wrote the seminal text book on contract law '*The Interpretation of Contracts*' which is now coming up to its 6th edition. As well as a number of well gauged questions on the interpretation of the CFA and legal aid retainers, he also pressed a number of other interventions. His first intervention was to establish the legal basis upon which Hyde would be liable to pay under her CFA and this was pressed a number of times both querying whether it was an express or an implied contractual basis. Lewison LJ said that the fact that legal aid would not provide any more funding did not of itself prevent Hyde entering into a CFA. Lewison LJ wanted to know why the currency of the legal aid certificate mattered pointing out that there were parallel proceedings in *Littaur*. Lewison LJ questioned how the NHS would know that the financial limit of a certificate had been reached to which its counsel said it could not know it could only guess. Lewison LJ queried whether the drafting of the CFA could have been improved so it provided it would only take effect from either a date or event when the legal aid cover ceased.

What did the Court say about judgment in this case?
At the end of the hearing Lord Justice Davis said they would take time to consider this case and would send a draft judgment out to counsel in due course. Perhaps unusually for a costs case, all 3 judges were very interested in the perimeter issues that this case highlighted. All 3 judges asked many pertinent questions to both counsel throughout the course of the hearing which lasted almost its full allotted 5 hours. Lord Justice McCombe was on the panel in *Rayner* which is 1 of the cases that both sides relied on as an authority. Although it could appear earlier, the likelihood is that the reserved judgment will be handed down in July 2017 before the summer vacation. The panel also requested a full and clear copy of the original legal aid funding certificate with all qualifications that applied to it.

What about the Kai Surrey case?
This is listed for a 2 day appeal in the Court of Appeal with a 'hear by' date of 27 November 2017 but no date has yet been fixed for the hearing.

4 April 2017

David Bowden is a solicitor-advocate and runs David Bowden Law which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at info@DavidBowdenLaw.com or by telephone on (01462) 431444.

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