

Shifting the burden—the CFA assignment issue goes on

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Dispute Resolution analysis: Can an insolvent solicitor's firm assign its portfolio of personal injury clients under a conditional fee agreement (CFA) to a new firm? David Bowden, freelance independent consultant, comments on the consequences of the reserved judgment handed down on 11 May 2016 and talks to Nick McDonnell, legal services director at Just Costs Solicitors about what lessons can be learned from Denise Jones v Spire Healthcare Limited.

Original news

Denise Jones v Spire Healthcare Limited(unreported)

What is background to this case?

David Bowden (DB): This is yet another costs case in which a paying party disputed that a CFA had been validly assigned from one firm of solicitors to another. If the CFA was not validly assigned then neither success fee nor the after the event (ATE) insurance premium would be recoverable. In two other cases this year judges have ruled such purported assignments invalid, see News Analysis: Costs wars—drawing a line under pre-LASPO 2012 CFAs and Costs Wars—return of the post-LASPO CFA assignment attack.

What are the facts relevant to costs in this case?

DB: The claimant brought a personal injury claim and signed a CFA with Barnetts solicitors. That firm became insolvent and its business was sold to SGI Legal LLP (SGI). A deed of assignment purporting to assign the benefit and burden of 228 personal injury retainers was executed. SGI also got the claimant to sign a deed of assignment assigning the benefit and obligations of her retainer with Barnetts to SGI. The solicitor with the conduct of the case went to work for SGI. The assignment took place after April 2013.

What had the Jenkins case previously decided?

DB: *Jenkins v Young Brothers Transport Ltd* [2006] EWHC 151 (QB), [2006] 2 All ER 798, is a High Court decision of Rafferty J on appeal where she sat with Master Wright and Gregory Cox as two assessors. 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. In dismissing the appeal, Rafferty J held that the CFA had been validly assigned to the new firm.

What did regional costs judge decide?

DB: Judge Jenkinson decided that the CFA had not been assigned but that there had been a novation instead. See News Analysis: Novated CFA? Is it still valid? (*Jones v Spire Healthcare*).

What was the issue on this appeal?

DB: The issue is whether or not an insolvent firm of solicitors can validly assign its entitlement to fees under a CFA to another solicitors' firm or not. If it could not and the CFA is a novation, costs incurred by the insolvent firm and future costs incurred by the assignee in the event of the client's success are lost forever because of the changes made by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012). This outcome would not only be detrimental to creditors but also the opposing party would receive a windfall because it may escape a substantial liability for costs if it lost.

What did the appeal judge decide?

Nick McDonnell (NM): There is a general principle that a contract involving personal skill and confidence is incapable of being assigned because it is a contract for personal services. However, *Jenkins* provides an exception to this general principle where there was specific trust and confidence in a particular fee earner. HHJ Wood QC therefore found that the regional costs judge below was wrong to find *Jenkins* was not binding upon him. This was so even if the facts in the two cases were distinguishable.

HHJ Wood QC ruled it would be unduly restrictive and overly legalistic to deny the parties the effect of what they had intended. Moreover, this was the case where three parties were involved. It was noted that SGI (as assignee) and Barnetts (as assignor) together with the recipient of the benefit (the claimant) all agreed to the transposition of the burdens and the benefits of the CFA contract.

What will happen next?

DB: HHJ Wood QC has remitted the case back to the regional costs judge so that he can give further directions as to the conduct of the detailed assessment.

How does this judgment potentially impact other cases?

NM: The judgment is carefully considered and is clear in how its conclusions have been reached. While this decision may not bind other courts, it is likely to be very persuasive. This is particularly the case given the conclusions of HHJ Wood QC on the assignment point seem fair and pragmatic in light of all the circumstances.

Will there be an appeal?

NM: At the point of writing, no appeal has been lodged. Any appeal would be a second appeal and would lie with the Court of Appeal. The issue is clearly one that has not only generated interest in the legal costs community but is one which is relevant to many cases in the post 1 April 2013 era. However, Spire Healthcare may not have the appetite to pursue a second appeal. If the defendant were a large public body, for example, then the prospects of an appeal being brought may be greater. Time will tell.

DB: HHJ Wood QC notes that 'it appears that a higher appellate court may become engaged on the grounds that this is a matter of public importance and wider ramification'. On 3 May 2016, the Court of Appeal granted permission to appeal *Hyde v Milton Keynes NHS Foundation Trust* [2015] EWHC B17 (Costs) but this concerns a slightly different issue of whether it was reasonable to terminate legal aid funding and take out a CFA before the LASPO 2012 changes took effect.

What should lawyers do next?

NM: *Spire Healthcare* can be relied upon by receiving parties as being persuasive in opposing challenges to claims for costs where assignment arguments have been raised. Lawyers wishing to challenge a paying party's claim for costs on behalf of their clients using assignment arguments may experience difficulties in light of *Spire Healthcare*. If an appeal were to be lodged with the Court of Appeal and permission to appeal was given then many cases involving this issue could very well be stayed for quite some time until that second appeal has been determined.

Interviewed by David Bowden.

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