Costs Wars—return of the post-LASPO CFA assignment attack

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Dispute Resolution analysis: David Bowden, freelance independent consultant, comments on the consequences of Webb v London Borough of Bromley and talks to Matthew Smith, a specialist costs barrister at Kings Chambers in Manchester, about the lessons that can be learned from this case.

Original news

Webb v Bromley London Borough [2016] Lexis Citation 14

This was a personal injury case where the solicitor's firm acted on a 'no win, no fee' or conditional fee agreement (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. A costs judge 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 were the facts in this case?

David Bowden (DB): Ms Webb, the claimant, had an accident on 14 March 2012. She promptly instructed a two partner firm (the original firm), to act for her to claim compensation. The claimant signed a CFA with the original firm on 11 June 2012 which provided for a success fee of up to 100% of her base costs to be recovered from the other side if she was successful.

After the death of the partner dealing with the matter, a fee earner looked after the claim. In January 2014, the original firm ceased trading and the remaining partner became a partner in a different firm (the new firm). The Partner telephoned the claimant to find out what she wanted to do. The claimant agreed for the new firm to carry on with her compensation claim resulting in two assignment documents each dated 30 January 2014—one between the claimant and the new firm, and the other between the original and new firms.

In June 2014, terms of settlement were agreed for the claimant. The consent order provided for her costs to be assessed, if not agreed.

The provisions of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012) 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. For clients entering into a CFA on or after 1 April 2013, then (subject to limited exceptions) neither success fees nor after the event (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.

What issues were in dispute at the costs hearing?

DB: The only issue in dispute was the true nature of the assignment of the CFA in January 2014. The parties' positions were:

- claimant (the receiving party)—it was a valid transfer of the CFA from the original firm to the new firm
- defendant (paying party)—there had not been an assignment at all. Instead, there had been a novation resulting in a new retainer in January 2014 between the claimant and the new firm, the defendant also raised a subsidiary issue as to whether the CFA was valid at all

What had the Jenkins case previously decided?

DB: The judge 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 Court Costs Office (SCCO).

In *Jenkins*, a client entered into a CFA. The fee-earner then moved firms twice, each time taking her client with her as 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 submissions did the receiving party make?

DB: The receiving party said there had been a valid assignment of the CFA in January 2014 such that the new firm was entitled to a success fee on its base costs. The Partner's evidence was critical in dealing with how the case had been transferred. In extracts from an attendant note, the relevant part said:

'I rang Mrs Webb in relation to her claim against the Council. She told me that she was aware of my role as Tony's former partner. She indicated that the fee earner had discussed with her the fact that [the original firm] would be closing down. She understood that she would need to find other solicitors. I told her that it was for her to decide who she wanted to act for her. I told her that there was a possibility that [the fee earner} would be joining another firm in London and that she may be prepared to take on her case. In the alternative, I indicated to her that I would be prepared to take on her case at [the new firm], although I was based in Cardiff. I told her that I visited London about two or three times per month to do with my judicial and tribunal work and also meet with clients…I stressed to Mrs Webb that she was not under any pressure to instruct me to continue to deal with the case but that we would all be grateful if she could decide in the next couple of weeks what she wanted to do.'

The receiving party said of *Jenkins*:

- it was binding on a costs judge in the SCCO
- the facts (in terms of rights and responsibilities) were indistinguishable here from *Jenkins*, and
- the costs judge should find the CFA to have been validly assigned

The receiving party said Sir Andrew Morritt's judgment in *Davies v Jones* [2009] EWCA Civ 1164, [2010] 2 All ER 755 contained no reference to the need for personal trust and confidence in the particular solicitor handling the case. It said the burden of a CFA can be assigned where it is 'sufficiently closely connected to the benefit that was also being assigned'. It said the need for such 'personal trust and confidence' was an Aunt Sally set up by the defendant in *Jenkins*.

It said the facts here were materially the same as in *Jenkins*. The Partner had been the supervising partner, who, although he did not have day-to-day conduct of the case, had a measure of conduct and was aware of the case before the case was transferred to the new firm.

What submissions did the paying party make?

DB: The paying party said there had not been an assignment at all but rather there was a novation of the retainer in January 2014. There had been consent of all three parties—the claimant, the original firm and the new firm—to this novation. As there was a novation, there was a new retainer with the new firm. This retainer being made after the LASPO 2012 changes came into effect meant that a success fee was not recoverable from the paying party.

The paying party said the attendance note of the telephone conversation between the Partner and the claimant showed that there was a material difference to *Jenkins*. The Partner had not had the conduct of the case. This was wholly different to *Jenkins*, where a fee earner with the actual conduct of the case had moved firms. Here the claimant had not reposed confidence in the fee earner—indeed the attendance note documents that the fee earner was giving the claimant to choice to leave and have her claim dealt with by another firm local to her in Kent rather than his new firm in Cardiff.

What ruling did the judge make on the main issue?

DB: The costs judge ruled in the paying party's favour and said there had been a novation and not an assignment of the CFA. This meant that the new firm could not recover a success fee from the paying party.

The costs judge noted the commentary in the leading textbooks. Firstly in 'Chitty on Contracts (32nd edition)' where it says at para 19–087:

'Novation takes place where the two contracting parties agree that a third, who also agrees, shall stand in the relation of either of them to the other. There is a new contract and it is therefore essential that the consent of all parties shall be obtained: in this necessity for consent lies the most important difference between novation and assignment.…'

And also at paragraph 19–089:

'The effect of a novation is not to assign or transfer a right or liability, but rather to extinguish the original contract and replace it by another.…As novation is different from assignment, it follows that the rule that assignment is "subject to equities" does not apply to novation.'

Secondly, in 'Law of Assignment by Marcus Smith QC (2nd edition)' where it says at s 5.105:

'Provided the parties to the contract consent, contracts of any kind may be transferred. Novation takes place where the contracting parties agree that a third party—who must also agree—shall stand on the relation of either of them to the other. This is not an assignment because the consent of all three parties is necessary and, more importantly, because the rights and obligations under the original contract are not transferred. Rather, a new contract comes into being, and it is this new contract that is the source of the rights and obligations of the parties to it. The fact that a new contract comes into being is clearly demonstrated by the requirement that it be supported by consideration.'

The costs judge found that:

'Here the claimant found herself in the unfortunate position of being required to change firms of solicitors as a result of the untimely death of Mr Collins. He was not only the solicitor dealing with her case but also effectively the sole principal of the firm'.

The costs judge found that the discussions regarding the closure of the original firm 'can only be described as an intention to end the relationship' between the claimant and the original firm.

As to the critical telephone conversation with the Partner, the costs judge said the claimant 'was always likely to accept the offer from another solicitor who was familiar with the case'. He ruled that:

'The choice of further representation was laid squarely at the claimant's door. It seems clear to me that it was a termination of one retainer and a new contracting of a second retainer. In my judgment, it was undoubtedly a novation of the CFA and not an assignment of it'.

The costs judge ruled that the degree of trust and confidence between the claimant and the Partner was not akin to the manner of that in *Jenkins*. This was a crucial distinction for the judge who ruled that *Jenkins* was not binding upon him because the facts were distinguishable. For this reason, he said 'the attempt to assign the burden of the contract along with the benefit fails in any event'.

What ruling did the judge make on the other issue?

DB: On the side issue as to whether the CFA was valid at all, the receiving party said the CFA provided for a success fee of up to 100%. However, section 58 (4)(b) of the Courts and Legal Services Act 1990 provides:

'58 Conditional fee agreements.

(4)The following further conditions are applicable to a conditional fee agreement which provides for a success fee—(b) it must state the percentage by which the amount of the fees which would be payable if it were not a conditional fee agreement is to be increased.'

Article 5 of the Conditional Fee Agreements Order 2013, SI 2013/689 provides that:

'Amount of success fee in specified proceedings

5—(1) In relation to the proceedings specified in article 4, the percentage prescribed for the

purposes of section 58(4B)(c) of the Act is—(a) in proceedings at first instance, 25%...'

The paying party said that on the basis that the agreement constitutes a CFA made after 1 April 2013 then it did not comply with these provisions (as it provided for a success fee of 100%) and was unenforceable. The costs judge agreed with the receiving party that the January 2014 assignment did not comply with the Conditional Fee Agreements Order 2013.

What can dispute resolution practitioners learn from this ruling?

DB: It is interesting to note that the costs judge reached the same decision on the papers at a provisional assessment of costs. Even after a hearing at which both sides were represented, where skeleton arguments were exchanged, there were oral submissions, a number of authorities and a reserved judgment—the costs judge still came to the same conclusion on the main point.

As with other recent costs cases, it is unsatisfactory that whether or not additional liabilities are recovered for pre LASPO 2012 CFAs that have been transferred to another firm after April 2013 depends on picking over in some detail the facts, circumstances, documentation and dates about the transfer. Absent a clear ruling from the Court of Appeal, it remains difficult to give clear advice to clients on the recoverability of additional liabilities.

Matthew Smith (MS): Until the law is clarified, it is unsafe to rely on the notion that both the benefits and burdens under a contract of retainer can effectively be assigned to another. The fundamental problem in the present case is that assignment in the present context usually involves one contracting party passing its entitlement to the benefit under contract to another. The other contracting party is not a party to that.

In the present case, the transfer of instructions was achieved by obtaining the agreement of the claimant and both firms of solicitors. It was found that this was a re-contracting. Put colloquially, the claimant should have been left out of the contracting picture. It would still have been possible to notify the claimant about what had happened and to provide her with the opportunity to instruct other solicitors if she so wished. That is always a client's option.

How does this decision fit in with other recent developments in the costs area?

MS: The issues surrounding assignment are going to take some time to resolve. The appeal in *Jones v Spire Health Care* [2015] Lexis Citation 238 before HHJ Wood QC is due to resume in Liverpool on 19 April 2016. On 4 February 2016, District Judge Besford, regional costs judge in Hull, gave judgment in *Budana v The Leeds Teaching Hospitals NHS Trust*. See previous Lexis PSL news piece of 9 February 2016 Costs wars—drawing a line under pre-LASPO 2012 CFAs.

In that case, the claimant's solicitors had written to her to tell her that they had decided to stop handling personal injury litigation before they purported to assign the benefits and burdens of the contract of retainer to other solicitors. While the judge accepted that an assignment would have been possible he concluded that the first solicitors had by their letter terminated the retainer so that there were no continuing benefits and burdens to assign.

It can safely be said that prudence demands avoiding the issue where at all possible. Where it is not, fall back agreements are necessary to deal with any attempted assignment that might fail and expert advice is to be recommended.

DB: The Supreme Court in *Knauer (Widower and Administrator of the Estate of Sally Ann Knauer) v Ministry of Justice* [2016] UKSC 9, [2016] All ER (D) 218 (Feb) observed that:

'It is important that litigants and their advisers know, as surely as possible, what the law is. Particularly at a time when the cost of litigating can be very substantial, certainty and consistency are very precious commodities in the law'.

Hopefully this message can percolate down to costs judges very soon too.

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