Tough assignment

Colin Campbell asks if we now have all the answers on CFA assignment

Until 1 April 2013, it did not matter much if the client moved to another firm, the solicitors changed their name, or the case was sold to another practice: there was no imperative to assign any conditional fee agreement that existed between the old firm and the client, to the new. The solicitor taking over the case could simply make a fresh CFA with the client and claim a success fee and any after-the-event insurance premium ('additional liabilities') from the opponent if the client won the case.

If the prospects of winning or losing had changed, for example because the case was now being fought tooth and nail, that success fee could even be higher than the one sought in the original CFA, so there was no need for any assignment in order to preserve the right to claim additional liabilities from the loser.

CFAs UNDER THE LASPO REGIME

Section 44(4) Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) and the Conditional Fee Agreements Order (2013 no 689) (the order) changed all that, with effect from 1 April 2013. They abrogated the entitlement to recover additional liabilities in most types of litigation (with a carve-out for mesothelioma, privacy and insolvency) including personal injury; and responsibility for payment of any success fee (capped at 25% of damages in personal injury) or ATE premium shifted away from the opponent, and on to the client.

The problem? Thousands, or even tens of thousands of claimants were caught in the middle. They had made CFAs before 1 April 2013, but after that date, if circumstances changed – for example, if their solicitor had moved firms and the client wanted to go too, or the firm had closed its litigation department and could no longer handle the work, or the name of the solicitors' firm had altered – then where this had happened, and the retainer with the original solicitor had ended, any new CFA would be subject to the post s.44(4) LASPO regime.

What happened when that new CFA was signed? Through no fault of the client but because of LASPO, their damages would thereby become the source of payment for the success fee and any newly incepted ATE premium, instead of the losing opponent. Add to that the fact that a claimant who had entered into a pre-1 April 2013 CFA (laboriously defined as a 'pre-existing funding arrangement') was not permitted to benefit from 'QOCS protection' by virtue of CPR 47.17 ('Qualified One Way Costs Shifting': lose a personal injury claim and the defendant cannot enforce their costs order without the court's permission), and a claimant stuck in the middle now faced the worst of both regimes:

- Win the case and any additional liabilities under the new CFA are for your account out of damages
- Lose the case and there is no QOCS protection if the ATE cover is not available or runs out.

Rotten timing you might think. How could this be avoided?

CFAs AND ASSIGNMENT UNDER *JENKINS*

A lawyer-like way to do this, so it was thought, was to assign the original CFA to the new firm on the basis that the same terms would continue to apply. There would be no need for a fresh contract of retainer: in law-speak that meant no novation, but on the contrary, a transfer of the existing retainer to the new firm on identical terms. By those means, the benefit of the contract (the right to be paid costs) was subject to the burden of the contract (the obligation to act for the client). Provided the new firm completed its side of the bargain and continued to represent the client, on a win, both firms would be entitled to the spoils of the victory, namely to the recovery of the success fees and any ATE premiums from the loser, leaving the client's damages untouched.

So far, so good – and for a decade, such arrangements worked due to Rafferty J's decision in *Jenkins v Young Brothers Transport Ltd* [2006] 3 Costs LR 495. It had addressed a situation in which the client's solicitor had moved firms not once but twice, taking Mr Jenkins and his CFA as well, his decision reflecting the trust and confidence he had in his solicitor of choice.

No problem with that, held the judge: even though the CFA was a contract for personal services, both the benefit and the burden could be assigned, if that was what everyone wanted (which they did), in which case the court was not going to interfere. Anyway, as an alternative to assignment, with no LASPO to worry about, it was open to the new firm to make a fresh CFA with the client on the same or on different terms, as they wished; and irrespective of which CFA applied, the loser was on the hook for the additional liabilities. Jenkins was therefore largely uncontroversial in its application.

LASPO MOVES IN

That all changed on 1 April 2013 with LASPO, which brought *Jenkins* into sharp focus and in particular, whether it had been correctly decided. Much book-worming and legal research unearthed cases that had not been drawn to the court's attention, most likely because the LASPO consequences had not then existed. They raised some particularly ticklish points:

- Was a personal contract such as a CFA capable of being assigned as a matter of law? *Tolhurst v Portland Cement* [1903] AC 414 doubted that it could (per Lord MacNagthen at 420)
- Could or did the 'conditional benefit' principle apply (the running of the benefit and burden)?
- Was the consent of the client required, as was the case in *Jenkins* who had trust and confidence in his solicitor, to make any permitted assignment effective?

Depending on the answer to those questions, significant sums in additional liabilities might cease to be payable by losing parties, which for the most part would be insurance companies or hard-pressed NHS Trusts. If *Jenkins* was a good sense, pragamatic decision which had looked at where the justice of the situation lay rather than at the niceities of the law, with the advent of LASPO, the stakes were now much higher. Little wonder then, that *Budana* has been such an eagerly awaited decision.

BUDANA V THE LEEDS TEACHING HOSPITALS NHS TRUST [2017] 6 COSTS LR 1135

The facts in *Budana* are straightforward. Firm A acted for Ms Budana in a personal injury claim under a pre-LASPO CFA with a 100% success fee. By 22 March 2013, it had decided that it would no longer handle personal injury work and had written to Ms Budana telling her that. It had also entered into an agreement for the sale and purchase of its business by Firm B, including Ms Budana's claim. Her consent was sought and given, and a deed of assignment had been executed with the successor firm under which Firm B agreed to provide all the legal services under the CFA in place of Firm A.

'Can't be done' said the Trust. Any such arrangement would involve

a termination of the original CFA and a novation – so the obligations of the first firm would be discharged, and LASPO would apply to any and all retainers with the new firm made on or after 1 April 2013. In any case as a matter of law, it was not possible to assign the burden of a personal contract for services such as a CFA – see *Tolhurst v Portland Cement* [1903] AC 414.

Below, the district judge had found that on giving up personal injury work, Ms Budana's solicitor had terminated the CFA; and when she was introduced to Firm B, there was no CFA left to assign, so the firm went unpaid.

If that decision stood, thousands of other cases that had been stayed pending the decision in *Budana* would suffer the same fate. In many of those, the need to assign had only arisen because solicitors had either changed the name of the firm, merged or had sold their book of business to a successor firm. It had not been driven by a deliberate decision on the part of the client to change legal advisers.

WHO WAS RIGHT? WHAT THE COURT OF APPEAL SAID…

But first, a digression. Another eagerly awaited decision has been *BNM v MGN* [2017] 6 Costs LO 829. That appeal concerned proportionality, and the expectation was that the Court of Appeal would provide useful guidance about how the 'new' proportionality rule in CPR 44.3(5), in force also from 1 April 2013, should be applied. No such guidance was given, and fears grew in the legal profession that *Budana* might turn out to be a similar damp squib. Worse still, it began to be feared that the court might adopt a legalistic approach, and follow the law irrespective of where it took them – even if that was over the precipice – rather than looking at where the justice of the situation lay, and then working out whether there was a route in law that would enable the court to achieve a result that did justice. After all, as Davis LJ was to observe [80]: '… an overall conclusion in favour of the defendant would appeal to no sense of the merits. It

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would mean that the claimant will be deprived of costs to which she might ordinarily expect to have been entitled. It would mean that the defendant is absolved from paying those costs by virtue of adventitious technicality'.

Happily the court did not adopt a course shackled by legal technicality. Instead it found, as Gloster LJ put it at [46], that: '… There is no reason in principle why rights and benefits under a firm of solicitors' contracts with its clients or its books of business should not be capable of assignment in today's business environment… Given the circumstances in which most claimant personal injury litigation is now conducted… the CFA between a client and his solicitor in such a case lacks the features of a personal contract. What the client wants is representation by a competent practitioner…'

Applying what Davis LJ described as a 'broad interpretive approach' to the meaning of s.44 LASPO and the CFA Order, the court held that:

- The CFA had not been terminated by the letter of 22 March 2013
- *per* Davis LJ , there had been an assignment of Ms Budana's CFA; *per* Gloster and Beatson LJJ there had been a novation, but the difference did not matter because:
- the new retainer with Firm B was not affected by s.44(4) LASPO since the purpose of the transitional provisions of the act had been to preserve vested rights and expectations arising from the previous law
- It would be an over-technical application of the doctrine of novation to prevent a claimant who had begun a claim under a pre-1 April CFA from recovering costs in respect of a success fee simply because it had been transferred to a new firm.
- The CFA was not a contract for personal services: what the client wanted was representation by a competent practice, not necessarily by a specific individual as had been the case in Jenkins
- The three parties (the two firms and Ms Budana) had agreed that the CFA was to remain in force as an operative contractual instrument as between her and the successor firm with the result that, in the event of a win, the lawyers would be paid their success fees (and insurers their ATE premiums) by the loser and not by the client out of damages

THE CONSEQUENCES

All good news for the thousands or tens of thousands of claimants holding their breath awaiting the outcome in *Budana*, whose cases had been stayed while they waited to find out whether LASPO and the novation argument would affect their claims for costs with fatal consequences.

NOW THE RUB!

It appears from the judgment that in *Budana*, the solicitors' paperwork was in apple-pie order. It included:

- a letter to the client explaining everything and asking for Ms Budana's consent to the instruction of the successor firm, which she gave
- a Transfer Agreement under which the business of the first firm was transferred to the successor firm
- a Master Deed between both firms assigning the book of personal injury cases including Ms Budana's claim
- a deed of assignment between Ms Budana and the successor firm under which the solicitor agreed to provide all the legal services under the CFA in place of the original firm, thereby solving the 115-year-old Tolhurst problem
- the going onto the court record of the successor firm on 1 April 2013.

With such good paperwork (the bush telegraph reported that it was said in court that it was almost too good), the court was not prepared to defeat the parties' intention by an over technical application of the doctrine of novation. But, said Gloster LJ (and here is the rub) [74]: '… obviously, whether or not any relevant CFA under which the success fee was payable to a new firm, could be characterised, as in the present case, as "payable under a conditional fee agreement entered into before 1 April 2013", would depend on the precise terms of the relevant contractual arrangement entered into between the parties, and whether the new firm was indeed prepared to operate "under" the terms of the previous CFA.'

The inference to be drawn from that is that properly drafted transfers of pre 1 April 2013 retainers and CFAs will be treated as being unaffected by LASPO.

Suppose, then, that the terms of the relevant contractual arrangements are not in apple-pie order. In this context, it is critical that the consent of the client is obtained (see judgment at [74] and [115]). If it is not, or if the client is not consulted, is ignored or is simply presented with a fait accompli, it is difficult to see how any valid transfer of terms can take place, since at no point will the client have been given the opportunity to say 'I am not happy with the new arrangements and wish to go elsewhere'.

SO TO THE FUTURE

To those thousands or even tens of thousands of claimants who now stand to benefit from the decision in *Budana*, a caution. *Budana* may have answered the question of law, but issues of fact will still remain critical. If corners have been cut, details omitted or most importantly, if the client has been left out of the deal, the transfer of terms from the old firm to the new are at risk of not working.

Not only that, but the original solicitor who has tried to assign the CFA may instead thereby have unilaterally terminated it, arguably in circumstances amounting to a repudiation, in which case the firm will go unpaid, even if the claimant goes on to win the case.

So the moral of the story going forward is: check your paperwork. Despite the decision in *Budana*, if it does not pass muster, it may result in the solicitors losing the lot - and having to whistle in the wind for their costs.

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