

NB: What follows is not legal advice and should not be relied upon as such

The Issue

1. A number of recent decisions have once again brought to the fore the costs risks that can arise as a result of the transfer of personal injury clients between firms of solicitors (including when a firm changes its status, e.g. to become an LLP). Such transfers often involve the assignment of an existing Conditional Fee Agreement (CFA).

The Background

2. The issue had largely lain dormant since the decision of Mrs Justice Rafferty in Jenkins v Young Brothers Transport Ltd [2006] EWHC 151 (QB), in which she found that the burden of a CFA¹ could be assigned, by way of an exception to the general rule that the burden of performing a personal contract, such as between a solicitor and client, cannot be assigned. Rafferty J emphasized the relationship of trust and confidence the claimant had in his solicitor based on that solicitor's uninterrupted conduct of the litigation despite moving between firms. The judgment left room for argument whether, absent that trust and confidence, a CFA could be assigned.
3. As a result of the funding changes introduced by LASPO, solicitors who, after 1/4/13, take over cases in which there is a pre-LASPO CFA, have a strong incentive to seek to continue the original CFA so that they too can benefit from the fruits of a recoverable success fee. Assignment of the CFA provides the only mechanism to do so.

Recent Case-Law

4. In consequence there has been a renewed interest in the Jenkins decision which has led to it being re-examined in a spate of recent first instance decisions:-

¹ i.e. the obligation upon a solicitor to undertake work for his client, in order to receive the benefit of the contract (namely the right to be paid)

- Jones v Spire Healthcare Limited, DJ Jenkinson, Liverpool County Court, 11 September 2015 in which an assignment took place when the original firm became insolvent and the administrators sold the firm's PI cases to a new firm.
- Budana v The Leeds Teaching Hospitals NHS Trust DJ Besford, Kingston Upon Hull County Court, 4 February 2016 in which the assignment took place following the original firm's decision to exit the PI market;
- Webb v London Borough of Bromley Master Rowley, SCCO in which the original firm ceased trading following the death of one of its two partners.

5. The approach and analysis of the law by each of the judges is different. It is not the purpose of this brief Note to examine those judgments in detail. There is however one common result: at first instance, the purported assignment was held to be ineffective in achieving its desired result. In both Jones and Webb the 'new' solicitors failed to recover any of their post-assignment costs. In Budana the costs of the original solicitors were disallowed and no success fee was recovered by the second solicitors, though they were able to rely on a "fall-back" CFA to recover their base costs.
6. On 11th May 2016 HHJ Wood QC allowed the appeal of the Claimant in the Jones case (and dismissed the cross-appeal of the Defendant). He held that both the burden and benefit of the CFA were validly assigned such that both pre and post-assignment costs were recoverable. The Defendant is **not** seeking permission to appeal this decision to the Court of Appeal. The Budana case remains under appeal (to a County Court judge) whereas Webb is not, so will remain a first instance decision.
7. Notwithstanding the outcome of the appeal in Jones, the law in this area remains in a state of uncertainty and flux.

The Issue for Counsel

8. The standard terms of APIL/PIBA CFAs (both pre and post 1/4/13) provide as follows:-

“This agreement shall automatically terminate if the solicitor’s agreement with the client is terminated before the conclusion of the case”.

9. Thus if Counsel has signed a CFA with the first solicitor which is found to have been terminated and has not signed a CFA with the second solicitor, there may be no valid retainer upon which Counsel can rely to recover his or her fees in relation to work done after termination of the first retainer.²

Suggested Action

10. Counsel may wish to consider the following:-

- (1) Identifying those cases in which, for any reason, there has been a change in your instructing solicitors and establishing what arrangements were made between the solicitors when transferring the case;
- (2) Ascertaining whether the underlying claim is on-going (if it has already settled it is probably too late to take any action that alters your funding arrangements).
- (3) Ascertaining whether or not you have a pre-LASPO CFA with success fee which you are seeking to preserve as this may influence the approach you wish to take.
- (4) Whether to enter a new (LASPO compliant) CFA with the second solicitors in respect of work done post-assignment. This can be retrospective in its effect. Consideration needs to be given to the effect of entering into a new CFA on the right to recover fees under the first retainer. The use of a “fall-back” CFA (which comes into effect only if the original CFA is found to have been terminated) may need to be considered.
- (5) Discussing these issues with your instructing solicitors to ensure that they too have properly considered their position both in relation to assignments already undertaken and any forthcoming transfers of clients.
- (6) Bear in mind that as yet the state of the law on this issue is unclear and you cannot give definitive advice to clients on it: The Association of Costs Lawyers has indicated that County Courts country-wide are staying hundreds of cases pending the Appeals in Jones and Budana.

6th June 2016

² Counsel should be able to recover fees (including success fee) up to the date of termination if the case ends successfully in accordance with the standard terms of APIL / PIBA CFA agreements.