Current Costs Issues
Seminar: Thursday 3rd March 2016
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ASSIGNMENT OF CFAs

Why is this important?

1. Attempted assignments of CFAs crop up in a number of different circumstances. A client may wish to transfer his instructions to a new firm because the fee earner dealing with his case has gone to that firm. A solicitor's partnership may wish to "*convert*" into a LLP. Two firms of solicitors (or two solicitors' LLPs) may wish to merge and, upon the merger, create a new vehicle, probably an LLP, to run the business. A well-capitalised business may wish to take over, as an ongoing concern, all or part of the business of an existing firm of solicitors. In those circumstances, the well-funded business may set up a new LLP to take over the business of those firms or parts of firms it takes over. A firm of solicitors or a solicitor's LLP may go out of business and the insolvency practitioners winding up that business may wish to "*sell*" the "*book*" of CFAs to another solicitor's business, whether a partnership or an LLP. With the restructuring of the legal market that has taken place in the last decade, the occasions upon which such transactions as these have taken place must be very numerous.

2. In each case, where solicitor's business A seeks to assign a CFA to solicitor's business B, whatever the reason for that attempted assignment, the legal effect is

the same. The client's retainer is being transferred (to use a neutral word) from one legal entity to another.

3. If that retainer is not a conditional retainer, then no problem arises. The work in progress can be assigned as a debt and the client can simply choose whether to enter into a new retainer with solicitor B.

4. Until 1st November 2005, when the Conditional Fee Agreements Regulations 2000 were revoked, whether or not a CFA could be assigned potentially affected the enforceability of a solicitor's retainer. This was as illustrated in the well-known case of *Jenkins v Young Brothers Transport Limited* [2006] 1 WLR 3189; [2006] EWHC 151 (QB).

5. That was a case where a client had followed a solicitor through three firms. The initial CFA was valid, the solicitors having complied with the 2000 Regulations. If the attempt at assigning the CFA from firm 1 to firm 2 and then to firm 3 had been unsuccessful, then it was accepted that there had been no compliance with the 2000 Regulations in respect of any new conditional retainer coming into effect when the client moved to the new firms. Without such compliance, the retainer would have been unenforceable.

6. The Judge (Rafferty J, as she then was, sitting with assessors on appeal from Master Campbell), dealt with the two usual objections to the assignability of a solicitor's retainer. The first objection is that a solicitor's retainer is a personal contract and, therefore, incapable of being assigned. The second objection is that only the benefit of a contract can be assigned and not the burden.

7. In each case, the Judge felt able to hold that the case was an exception to those general rules. So far as the fact that the retainer was a personal contract was concerned, she held that assignment was possible in that case because the client retained trust and confidence in the person who was moving from firm to firm. In relation to the non-assignability of the burden of a contract, the Judge held that the burden of the solicitor's duty to perform the retainer was inextricably linked up with the benefit, namely the ability to charge the client fees.

8. Whatever the merits of that decision, it was not challenged in relation to any assignment of a CFA entered into before 1st November 2005. It must be, at least, doubtful whether there are any cases still being run on CFAs that old.

9. After 1st November 2005, the matter became less important. That is because the only requirement for a valid CFA thereafter was that it be in writing and it specify a success fee of no more than 100%. Thus, a client continuing to instruct a new firm of solicitors on the basis of the old firm of solicitors' CFA would instruct those solicitors on the basis of a valid retainer. The only possible difference would be in relation to the assessment of the success fee which, if there were a new retainer, would have to be assessed as at the date of that new retainer. Given that many success fees became fixed, that issue too became of less importance and I am aware of no case where this argument has been run in order to justify a potentially lower success fee.

10. Everything changed, of course, on 1st April 2013 when, in relation to personal injury matters, the new Regulations required strict limits on the amount of the success fee chargeable to the client and no part of the success fee was

recoverable from the paying party. Thus, if, after 31st March 2013, there was an attempt to assign a pre 1st April 2013 CFA, then the argument was open that if the attempt was unsuccessful, there was a new agreement and two results followed. The first was that no success fee under the new agreement could be recovered from the paying party. The second was that if the new CFA was simply on the terms of the pre 1st April 2013 CFA, then it would be unenforceable because its provisions concerning the recoverability of the success fee from the client would not comply with the new Regulations.

What is all the fuss about? Why cannot CFAs be routinely assigned?

11. Fairly trenchant views to that effect were stated by the author of an article in the Solicitors Journal entitled "*The Modern Day CFA*" in January 2016. The argument appeared to proceed along the lines that the reality was that, at least in low value cases, a client's retainer with the solicitor was little more than a commodity which should be readily assignable.

12. The problem with this approach is that the barriers to the successful assignment of a solicitor's retainer (whether conditional or otherwise) are deeply entrenched in the law of contract. So far as the non-assignability of the burden of a contract is concerned, that can be seen most clearly in property law. Where, for example, upon the assignment of a freehold there is also the assignment of a right of way, but subject to contributing to its cost, the assignee cannot be compelled to contribute to the cost of the right of way unless he also takes the benefit of the right of way. In other words, despite the purported assignment of both the benefit of the right of way and the burden, the assignee cannot be compelled to take either

and can elect not to take the benefit of the right of way and, therefore, be free of any obligation to contribute to its upkeep.

13. The second, well-rooted, objection to the assignability of the solicitors is that it is a personal contract and it is not possible by an assignment in effect to compel the client to accept the services of a different firm of solicitors.

14. These difficulties in the way of the assignment of the solicitor's retainer prompted many commentators over the years to sound cautionary notes in relation to the authority of the ***Jenkins*** case, even in its limited circumstances. The suggestion was that, in effect, what was happening was not an assignment but a novation. That would result in a new contract between the client and the new firm of solicitors, and inevitably that contract, if conditional, would have to comply with the then current Regulations in order to be enforceable.

Jones v Spire Healthcare Limited

15. Matters finally came to a head in September last year. It is perhaps surprising that they did not do so sooner.

16. On 11th September 2015, District Judge Jenkinson in the County Court at Liverpool gave judgment on a particular issue in a detailed assessment concerning the assignability of a CFA.

17. The circumstances were that on 3rd February 2012, the Claimant entered into a CFA with Barnetts Solicitors. Barnetts Solicitors became insolvent and

administrators were appointed. On 21st January 2014, the administrators assigned the benefit and obligations of 228 retainers that Barnetts had with various clients, including Ms Jones, to SGI Legal LLP.

18. SGI Legal LLP wrote to Ms Jones, explaining that her claim had been transferred to them and stating that they were prepared to act for her on the basis of the CFA that she had with Barnetts, but it was a matter for her to decide to instruct SGI Legal LLP or not.

19. The District Judge enquired into the facts and held that Ms Jones' decision to continue to instruct SGI Legal LLP was not motivated by any trust and confidence she had with the fee earner who had been conducting her case. That fee earner, along with other employees, was transferred to SGI Legal LLP, but Ms Jones was unaware of that and, as a matter of fact, a different fee earner more or less took over her case.

20. In those circumstances, the District Judge held that the case was distinguishable from ***Jenkins*** and that the general rule applied, and that what had happened was not an assignment but, rather, a novation. The new retainer was on the same terms as the old and, therefore, did not comply with the new Regulations.

21. The result was that none of the work done by SGI Legal LLP was recoverable. The District Judge held, however, that the assignment of the conditional work in progress was valid so that costs in relation to work done by Barnetts were recoverable.

22. The Claimant appealed and, unfortunately for the purposes of this talk, the appeal is still pending. It is, in fact, part heard and the resumed hearing is not expected until April. In any event, given the importance to SGI Legal LLP, and in numerous other cases, it can be expected that there will be a further appeal to the Court of Appeal (the current appeal is being heard by a Circuit Judge).

What to do now?

23. Assignments of CFAs post 31st March 2013 have, or should have, always carried a health warning. The health warning is even more acute now and the sensible course in relation to any proposed transaction must be to wait for the appeal to be heard (and maybe wait for any further appeal too).

24. In some cases that is not practical.

25. Where the situation is that of a takeover, merger or "*conversion*" to LLP status, it may be that it is possible (and would be safer) to keep the original entity alive for the purpose of carrying out the work on the CFAs. It would be possible to arrange for much of that work to be done by the new entity as agent for the old entity.

26. It is well settled that the costs of a solicitor agent are not a disbursement but are profit costs (see *In Re Pomeroy v Turner* [1897] 1 Ch 287) and that position is carried forward into the new Costs Practice Direction 47 at section 5.22(6).

27. The success fee should be claimable on the agent's work (see *Crane v Canons Leisure Centre* [2008] 1 WLR 2549; [2007] EWCA Civ 1352).

28. Such an arrangement is not possible in all circumstances. Plainly, it is not possible where the original solicitor's business becomes insolvent. Plainly also, different considerations will apply where a fee earner moves and the client wants to move with that fee earner.

29. In the latter circumstances, the safer course is probably simply to enter into a new, post 31st March 2013 compliant retainer. In the former circumstances, there may be more commercial sense in seeking to attempt an assignment, but with adequate fall-back positions to make sure that if the assignment is held invalid, any new CFA complies.

Barristers & Assigned CFAs

30. A barrister's CFA is with the solicitor. If the legal entity with whom the barrister entered into the CFA changes, then the question arises whether the barrister needs to enter into a new CFA with the new entity or whether in some way the barrister's CFA with the old solicitor's entity can be assigned to the new one.

31. There is a fundamental problem, in my view, in relation to barristers' CFAs entered into before 1st February 2013. Almost invariably, such CFAs were declared to be not contracts enforceable at law. From 1st February 2013, the default position for barristers became that they did contract with the solicitors, but it is likely that many (if not most) CFAs that barristers entered into between 1st February 2013 and 31st March 2013 will have contained the old provision that the CFA was not a contract.

32. Quite apart from the difficulties set out above in relation to assignability of personal contracts and the assignment of a burden as well as a benefit, it seems to me that it is conceptually impossible to assign something which is not a contract. There are no contractual rights to be assigned.

What should paying parties be doing?

33. Clearly, paying parties should be seeking to identify any circumstances where there might have been an assignment of a CFA (including that of a barrister). Where such circumstances may arise, then requests for information would be appropriate to seek to determine the basis upon which it is said any retainer was transferred and the basis upon which it is said that the retainer is, in effect, still a pre 1st April 2013 retainer.

34. Such issues, however, will (at least now) probably have to await the determination of the appeal in *Jones v Spire Healthcare Limited*, unless the facts are different and it is felt that it is sensible to have further determinations on differing facts so that a cohort of cases can go to the Court of Appeal.

35. Indeed there is another case already on its way to appeal. That is a decision of Regional Costs Judge Besford in the County Court at Kingston Upon Hull in *Budana v Leeds Teaching Hospitals NHS Trust* 4th February 2016. In that case, there was an attempt at a wholesale assignment of a book of CFAs just before 1st April 2013.

36. The Judge held that the original solicitors had terminated their retainer before the attempted assignment so there was nothing to assign. Absent that termination, the Judge would have held the assignment valid considering himself bound by *Jenkins* even though no element of trust and confidence was involved. He held further that the backup agreement with the claimant to the effect that if there was no valid assignment, then there was a post LASPO compliant CFA between the claimant and the new solicitors worked so that the new solicitors were entitled to their base fees. The original solicitors got nothing. There is to be an appeal and a cross appeal.

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