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Jenkins v Young Brothers Transport Ltd

[2006] EWHC 151 (QB)

QUEEN'S BENCH DIVISION

RAFFERTY J SITTING WITH MASTER WRIGHT AND GREGORY COX AS ASSESSORS

6, 21 FEBRUARY 2006

Solicitor - Costs - Conditional fee agreement - Client entering into conditional fee agreement with firm of solicitors - Solicitor acting on behalf of client moving to new firm and taking client with her - Whether conditional fee agreement capable of being assigned.

The claimant brought a claim against the defendant for damages for personal injury. He entered into a conditional fee agreement with a firm of solicitors. The solicitor who acted on his behalf moved from that firm to another several years later and the next year moved to a third firm. On each occasion the conditional fee agreement was purportedly assigned to the new firm as the claimant wished to follow the solicitor to her new firms. The case was settled and judgment entered for the claimant with costs to be assessed. On the basis that the benefit of a contract could be assigned, but that as a general rule the burden could not assigned, the defendant contended that where a solicitor made a professional move taking with her to her new firm a client on a conditional fee agreement the agreement could not be lawfully assigned to the new firm and the client was obliged to enter into a new agreement with the new firm. It considered that it could not be liable for costs after the date of the first assignment as the second and third firms were not entitled to recover their costs from the claimant and consequently he was not entitled to recover those costs from the defendant. On the trial of a preliminary issue the master found that the benefits to each new firm in receiving payment were directly conditional on its obligations in the conditional fee agreement, namely doing the work and acting in the client's best interests, so falling within the exception to the general rule, and awarded the claimant his costs up to and after the date of the first assignment.

Held - Where the events underlying the assignment were the trust and confidence a client had in his solicitor a conditional fee agreement could be assigned by one firm of solicitors. Under the agreement in the instant case the first firm had been obliged to act in the client's best interests and to secure for him in his claim for damages the best possible outcome; it had been entitled to the benefit of payment for work done only if his claim were successful. It followed that the benefit of being paid was conditional upon and inextricably linked to the meeting by the first firm of its burden of ensuring to the best of its ability that the client succeeded in his claim so that the benefit and burden of the conditional fee agreement could be assigned as within an exception to the general rule. Accordingly, the appeal would be dismissed (see [28]-[31], [44], below).

Rhone v Stephens [1994] 2 All ER 65 and *Halsall v Brizell* [1957] 1 All ER 371 considered.

Notes

For the meaning of 'conditional fee agreement' and the nature of the agreement, see Supp to 44(1) *Halsbury's Laws* (4th edn reissue) paras 188-189, for personal contracts and covenants, see 6 *Halsbury's Laws* (4th edn) (2003 reissue) para 90, and for the burden of covenants running at law, see 16(2) *Halsbury's Laws* (4th edn reissue) para 614, note 12.

Cases referred to in judgment

Austerberry v Oldham Corp (1885) 29 Ch D 750, CA.

Halsall v Brizell [1957] 1 All ER 371, [1957] Ch 169, [1957] 2 WLR 123.

London & Clydeside Estates Ltd v Aberdeen DC [1979] 3 All ER 876, [1980] 1 WLR 182, HL.

Rhone v Stephens [1994] 2 All ER 65, [1994] 2 AC 310, [1994] 2 WLR 429, HL.

Sharratt v London Central Bus Co Ltd (*The Accident Group Test Cases*), *Hollins v Russell* [2003] EWCA Civ 718, [2003] 4 All ER 590, [2003] 1 WLR 2487.

Thamesmead Town Ltd v Allotey (1998) 30 HLR 1052, CA.

Tito v Waddell, Tito v A-G (*No 2*) [1977] 3 All ER 129, [1977] Ch 106, [1977] 2 WLR 496.

Tolhurst v Associated Portland Cement Manufacturers (*1900*) *Ltd, Associated Portland Cement Manufacturers* (*1900*) *Ltd v Tolhurst* [1902] 2 KB 660, CA; *affd* [1903] AC 414, HL.

Appeal

The defendant, Young Brothers Transport Ltd, appealed from the decision of Master Campbell on 22 June 2005 determining in favour of the claimant, Geoffrey Jenkins, a preliminary issue on the detailed assessment of costs following the settlement of the respondent's claim against the appellant on terms of damages and costs. The facts are set out in the judgment.

Nicholas Orr (instructed by QM Solicitors) for the appellant.

Alexander Hutton (instructed by Thomson Snell & Passmore) for the respondent.

Cur adv vult

21 February 2006. The following judgment was delivered.

RAFFERTY J.

[1]

This is an appeal from the decision of Master Campbell who on 22 June 2005 determined the preliminary issue on detailed assessment in the respondent's favour when he awarded to him his costs not only up to but after 1 April 2002.

[2]

That decision involved a finding that the conditional fee agreement (CFA) made on 7 August 2000 between the respondent and Girlings had been assigned firstly by Girlings to TG Baynes (TGB) and subsequently by TGB to Thomson Snell & Passmore (TSP). On 22 August 2005 the appellant was on the papers granted an extension of time and permission to appeal by Fulford J. The facts supporting the action need not concern us.

[2006] 2 All ER 798 at 800

[3]

The chronology is as follows:

[4]

The course of action which was taken by the solicitors was the result of Frances Pierce (FP) the solicitor who acted throughout on behalf of the respondent, moving from Girlings to TGB and then to TSP.

[5]

Raised before us were two principal issues: (i) Where a solicitor makes a professional move, taking with her to her new firm a client on a CFA, can the CFA lawfully be assigned to the new firm or is the client obliged to enter into a new CFA with the new firm? (ii) If the CFA cannot lawfully be assigned, does it follow that no costs incurred after the purported assignment can be recovered from the paying party? Master Campbell found for the respondent on the first, that the CFA was lawfully assigned, and that were he wrong then it did not follow that costs after the purported assignment must be disallowed.

[2006] 2 All ER 798 at 801

[6]

The first is a question of whether the master were wrong in law, the second turns upon his knowledge and experience as a specialist costs judge. Hence, before this court could interfere with his finding that there was no materially adverse effect on the interests of the client or the administration of justice, it would have to conclude that his was a decision 'outside the generous ambit within which reasonable disagreement is possible'.

[7]

The master set out the salient facts as follows: (a) when FP moved from Girlings to TGB, if the client moved and had terminated the CFA Girlings could have elected to enforce payment of its basic charges and disbursements in full at that stage, despite the client having thought himself safe from payment unless he won. A lawful assignment of the CFA avoided this unhappy position because it continued in existence with the new firm. (b) The respondent had been taken through all the consumer protection requirements in the Conditional Fee Agreements Regulations 2000, SI 2000/692 before he entered the original CFA with Girlings. (c) By letter dated 20 May 2002 TGB made it clear to him that the terms of the original CFA continued in all respects, save that it was now with them, the new firm. A number of matters was explained once again in the letter and the respondent signed it to show his agreement to its terms. (d) When FP moved from TGB to TSP the respondent was again sent a detailed letter explaining the position, how he was to be charged and in

what circumstances. Again he can have been left in no doubt that he was liable for costs to TSP on precisely the same basis as he had been at TGB and Girlings before. Again, he signed that agreement.

[8]

Master Campbell described the appellant as advancing an 'unabashedly and unashamedly technical objection' to the costs of TGB and TSP. The submission by Mr Alexander Hutton for the respondent is that it was and remains entirely meritless and is simply a device to avoid liability under the costs order. Though this is arguably not relevant to issue 1, that the CFA was lawfully assigned, it is undoubtedly relevant to issue 2, that it did not in any event follow that costs after the purported assignment must be disallowed.

ASSIGNMENT

[9]

Mr Orr who did not appear below contends for the appellant that there can have been no assignment and that what, if anything, took place was a novation, new agreements with TGB and with TSP. It is conceded that the CFA as between Mr Jenkins and Girlings was valid and complied with s 58 of the Courts and Legal Services Act 1990 (as substituted by the s 27 of the Access to Justice Act 1999) and the 2000 regulations. If however the appellant can establish that the respondent is not for whatever reason liable to pay TGB or TSP, then the indemnity principle would protect the appellant from paying their costs notwithstanding its consent on 14 October 2003 to an order to pay costs subject to detailed assessment.

[10]

Mr Orr accepted that but for the, as he puts it, purported CFA, TGB and TSP would arguably have been entitled to quantum meruit payment for work done irrespective of our findings on the validity or otherwise of the purported assignments. This route was not open to us and, as far as the costs incurred by TGB and TSP are concerned this is an all or nothing case. Either TGB and/or TSP are not entitled to recover their costs (including success fee) at all from Mr Jenkins (and consequently he is not entitled to recover those costs from the appellant) or they are entitled to recover the whole of their costs from Mr Jenkins and consequently from the appellant, subject to detailed assessment. It is open to us to find that the costs of TGB but not of TSP are recoverable.

[11]

Master Campbell considered the issue, necessarily not as extensively argued before him as before us, of whether the CFA could be assigned and after considering *Rhone v Stephens* [1994] 2 All ER 65, [1994] 2 AC 310 in particular, held that the assignments were valid. It is submitted by Mr Orr that Master Campbell's decision was wrong in law for the reasons set out in the grounds of appeal, in his skeleton argument and orally. We have considered the arguments afresh.

[12]

Mr Orr referred us to Treitel, *The Law of Contract* (6th edn, 1983 and 9th edn, 1995) pp 610-620, with emphasis upon the principle that contracts personal in nature and in particular involving personal skill and confidence cannot be assigned. In support of that contention he referred us to the judgment of Collins MR in *Tolhurst v Associated Portland Cement Manufacturers* (*1900*) *Ltd, Associated Portland Cement Manufacturers* (*1900*) *Ltd v Tolhurst* [1902] 2 KB 660 at 668:

> 'The special right of ignoring altogether the consent of the person on whom the obligation lies ... would seem in principle and in common justice to be confined to those cases where it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it ...'

[13]

The example Treitel gives of a publisher not being entitled to assign the benefit of an author's contract to write a book if the author relied on the publisher's skill and judgment as a publisher is illustrative and a point to which we shall return.

[14]

Both counsel referred us to *Rhone v Stephens* and to *Tito v Waddell, Tito v A-G* (*No 2*) [1977] 3 All ER 129, [1977] Ch 106 and Mr Orr to *Thamesmead Town Ltd v Allotey* (1998) 30 HLR 1052. It is common ground that the benefit of a contract can be assigned but that, subject to limited exceptions, the general rule is that the burden cannot. The parties differed as to the extent of those exceptions. Mr Orr accepted that there was an exception to the general *Rhone v Stephens* rule where the exercise of a right is expressly or impliedly conditional on the performance of a covenant and the performance of the covenant is related to the right. Mr Hutton submits that the benefit of a contract is a chose in action and thus capable of assignment under s 136 of the Law of Property Act 1925 so long as the requirements of that Act are complied with, namely: (i) it must be absolute; (ii) it must be in writing under the hand of the assignor; (iii) express notice in writing thereof must be given to the debtor, requirements Master Campbell found to have been satisfied. Mr Orr submits that the only chose in action which existed at the date of the agreements was such debt as then existed in favour of the assigning parties and that the burden of a contract is not a chose in action capable of being assigned under s 136 so that the master was wrong in law in treating the burden of the CFA as capable of assignment.

[15]

In general, in contrast to the benefit, the burden of a contract may not be assigned without the consent of all three parties involved, (see *Tolhurst v Associated Portland Cement Manufacturers* (*1900*) *Ltd*). However in *Tito v Waddell* [1977] 3 All ER 129 at 291, [1977] Ch 106 at 302 Megarry V-C held that there was more than one exception:

> 'First, for the reasons I have given, I think there is ample authority for holding that there has become established in the law what I have called the pure principle of benefit and burden. Second, I also think that this principle is distinct from the conditional benefit cases, and cases of burdens annexed to property. Although language speaking of benefit and burden is sometimes

> used in the latter classes of case, I do not think it is really apt, and it is liable to confuse. In such cases the rule is really a rule of "all or none", an inelegant but convenient expression that may be used for brevity. A burden that has been made a condition of the benefit, or is annexed to property, simply passes with it: if you take the benefit or the property you must take it as it stands, with all its appendages, good or bad. It is only where the benefit and the burden are independent that the pure principle of benefit and burden can apply.
>
> Third, it is a question of construction of the instrument or transaction, depending on the intention that has been manifested in it, whether or not it has created a conditional benefit or a burden annexed to property. If it has, that is an end of the matter ...'

[16]

Megarry V-C thus concluded that there was an exception to the rule that only the benefit may pass when the burden has been made a condition of the benefit, a 'conditional benefit' case or, as he called it, 'all or none'. He also held that there was a yet wider exception to the rule in what he called the 'pure principle of burden and benefit', where the burden of the contract was independent from the benefit, the two not dependent on each other but distinct, a concept disapproved of in *Rhone v Stephens* [1994] 2 All ER 65 at 73, [1994] 2 AC 310 at 322 where Lord Templeman said:

> 'Mr Munby also sought to persuade your Lordships that the effect of the decision in [*Austerberry v Oldham Corp* (1885) 29 Ch D 750] had been blunted by the "pure principle of benefit and burden" distilled by Megarry V-C from the authorities in *Tito v Waddell* (*No 2*) ... I am not prepared to recognise the "pure principle" that any party deriving any benefit from a conveyance must accept any burden in the same conveyance. Megarry V-C relied on the decision of Upjohn J in *Halsall v Brizell* [1957] 1 All ER 371, [1957] Ch 169. In that case the defendant's predecessor in title had been granted the right to use the estate roads and sewers and had covenanted to pay a due proportion for the maintenance of these facilities. It was held that the defendant could not exercise the rights without paying his costs of ensuring that they could be exercised. Conditions can be attached to the exercise of a power in express terms or by implication. *Halsall v Brizell* was just such a case and I have no difficulty in whole-heartedly agreeing with the decision. It does not follow that any condition can be rendered enforceable by attaching it to a right nor does it follow that every burden imposed by a conveyance may be enforced by depriving the covenantor's successor in title of every benefit which he enjoyed thereunder. The condition must be relevant to the exercise of the right. In *Halsall v Brizell* there were reciprocal benefits and burdens ...'

[17]

In *Rhone v Stephens* a house was split into two and the owner sold the smaller. The conveyance contained a provision that he covenanted for himself and his successors in title an obligation to maintain that part of the roof over the sold property. The covenant was not reciprocal in terms of burdens conditional on benefits (cf *Halsall v Brizell*) but was independent of any benefits. Lord Templeman said ([1994] 2 All ER 65 at 73, [1994] 2 AC 310 at 322-323:

> 'In *Halsall v Brizell* the defendant could, at least in theory, choose between enjoying the right and paying his proportion of the cost or alternatively giving up the right and saving his money. In the present case the owners of

> Walford House could not in theory or in practice be deprived of the benefit of the mutual rights of support if they failed to repair the roof.'

Mr Hutton does not rely on the 'pure principle of benefit and burden' but on that of 'conditional benefits' as an exception to the general rule.

[18]

Tito v Waddell, Tito v A-G (*No 2*) [1977] 3 All ER 129, [1977] Ch 106 and *Rhone v Stephens* were considered in the judgment of Peter Gibson LJ in *Thamesmead Town Ltd v Allotey* (1998) 30 HLR 1052 at 1060:

> 'Lord Templeman made clear that for a burden to be enforceable it must be relevant to the benefit. He said that simply to attach a right to a condition for payment would not render that condition enforceable. Similarly it is not possible to enforce every burden in a conveyance by depriving the covenantor's successors in title of every benefit which he enjoyed under the conveyance. There must be a correlation between the burden and the benefit which the successor has chosen to take. Lord Templeman plainly rejected the notion that taking a benefit under a conveyance was sufficient to make every burden of the conveyance enforceable.'

[19]

Master Campbell found that the benefits to the new firm in receiving payment were directly conditional on its obligations in the CFA, that is doing the work, acting in the client's best interests etc. In other words he concluded that this is a *Halsall v Brizell* case where the benefits are conditional on the burden, rather than a *Rhone v Stephens* case where the burden was wholly independent and not related to the benefits. He did not rely on the now disapproved of 'pure principle of benefit and burden' as providing the relevant exception to the general rule, but found that the burden of the CFA, namely the requirements upon the solicitors to prepare the case on behalf of the respondent, was dependent on the benefit of the CFA, namely the right to be paid in certain circumstances. The two were inextricably linked and thus, as he put it:

> 'It is clear from the terms of the deeds of agreement and new agreement ... that the taking of the benefit of the contract (the right to be paid costs) is subject to the burden of the contract (continuing to act for Mr Jenkins). In my view that burden is also directly relevant to the right to be paid and the test in *Rhone v Stephens* is met.'

[20]

The submission for the respondent is that the master applied the correct test and correctly concluded that the burden and benefits were relevant to and dependent on each other. If that be right, so the argument continues, then the CFA was assignable on the principle of 'conditional benefits', just as in *Halsall v Brizell* the right to use the road and sewer (the benefit) was made subject to the condition of payment for the maintenance of those facilities (the burden).

[21]

If the master were wrong that there had been a lawful assignment, the agreed result would be that there was no continuing assigned agreement and that the respondent had a new contract with each of TGB and TSP respectively by novation of the CFA.

[22]

Mr Orr contends that the client care/retainer letters sent by TGB on 20 May 2002 and by TSP on 22 April 2003 did not amount to agreements between the respondent and those solicitors that the latter would work on the same terms as within the CFA, an argument not before the master. He further submits that the client care letters did not create contracts which involved a CFA on identical terms to that with Girlings, pointing to the reference in the letter from TSP to

Mr Jenkins to increased hourly rates and to the disbursement provision making Mr Jenkins liable for them. Mr Hutton contends that the letters created contracts on the same terms as the CFA as evidenced by the following--TSP's letter of retainer dated 22 April 2003:

> '... We have agreed to act on your behalf under a Conditional Fee Agreement with a success fee. The terms of this Agreement are set out in the Agreement itself and the broad implications of the Agreement are explained further in the conditional fee letters you have already received ... "success fee". This is dealt with in the Conditional Fee Agreement ...'

There are then repeated references to 'the Conditional Fee Agreement' and its terms before the letter is signed by both solicitor and client.

[23]

Mr Hutton poses the rhetorical question 'On what terms did the respondent instruct either TGB or TSP if not those set out in the CFA?' Each he points out is a detailed letter of retainer rehearsing its effect and echoing the oral process correctly put in place whilst FP was at Girlings. He submits that plain upon the face of the documents are both the circumstances in which the respondent may be liable for costs and repeated references to terms of the CFA.

COMPLIANCE WITH SECTION 58

[24]

Were the master wrong and were there no valid assignment, then the question arises as to compliance with s 58 of the 1990 Act (as amended) and the 2000 regulations made thereunder. The alleged breaches (A) and the rejoinder (B) to each are:

(A) There was no attempt to explain to the respondent that he was entering into a new CFA.

(B) It had been explained to the respondent that albeit in relation to new solicitors he was agreeing to be bound by the same terms as in the original CFA, as referred to in each letter of retainer;

(A) There was no attempt to set out the terms of the CFA in writing.

(B) The effect of the signed CFA was in large part recited within each letter in which was express incorporation of its terms;

(A) There was no reconsideration of the success fee.

(B) Though this is correct, it is appropriate to be argued on detailed assessment;

(A) There was no attempted compliance with reg 4 of the 2000 regulations.

(B) There was part-compliance with reg 4 in that the letters set out the effect of the CFA. It was accepted that there was a deficiency, that is the omission of oral repetition. The respondent was already aware of the reg 4 matters since it is accepted that during her time at Girlings FP had complied with the requirement for orality.

(A) There was a complete failure to comply with s 58 of the 1990 Act and regs 2 and 3 (as well as 4).

(B) There was substantial compliance in the letters and by reference to the CFA.

(A) *London & Clydeside Estates Ltd v Aberdeen DC* [1979] 3 All ER 876 at 882, [1980] 1 WLR 182 at 188 establishes mandatory compliance with s 58, and that a total failure to comply with a significant part of a requirement cannot be regarded as substantial compliance.

(B) This ignores the Court of Appeal in *Sharratt v London Central Bus Co Ltd* (*The Accident Group Test Cases*)*, Hollins v Russell* [2003] EWCA Civ 718 at [107], [2003] 4

All ER 590 at [107], [2003] 1 WLR 2487 in relation to alleged breaches of s 58 and the 2000 regulations:

> '... Costs judges should accordingly ask themselves the following question: has the particular departure from a regulation pursuant to s 58(3)(c) of the 1990 Act or a requirement in s 58, either on its own or in conjunction with any other such departure in this case, had a materially adverse effect either upon the protection afforded to the client or upon the proper administration of justice? If the answer is Yes the conditions have not been satisfied. If the answer is No then the departure is immaterial and (assuming that there is no other reason to conclude otherwise) the conditions have been satisfied.'

The submission is that Master Campbell posed to himself the question in exactly those terms so that it cannot be said that he erred in law, and accurately concluded that 'Materiality' is simply and only the materiality of the effect of the departures on the client's protection or the administration of justice.

[25]

Mr Orr in contending that events went well beyond a material departure describes s 58 as for the benefit and protection of both parties to the litigation so that it is not sufficient for the court merely to conclude that no harm might have come of non-compliance. Mr Hutton argues that it is hard to see how s 58 could be designed to operate for the benefit and protection of the appellant upon a reading of *Hollins v Russell* at [105]:

> '... In approaching the meaning of the words "satisfies all of the conditions ..." we can be confident that Parliament would not have meant to render unenforceable a CFA which adequately meets the requirements which were designed to safeguard the administration of justice, protect the client, and acknowledge the legitimate interests of the other party to the litigation. The other party to the litigation has no legitimate interest in seeking to avoid his proper obligations by seizing on an apparent breach of the requirements which is immaterial in the context of the other two purposes of the statutory regulation.'

Hence the respondent submits that the appellant is seizing on an apparent breach of the requirements and thereby seeking to avoid its proper obligations.

[26]

The master found that: (i) far from there being a materially adverse effect on the protection afforded to the respondent or upon the proper administration of justice, the course adopted had positive advantages in both respects; (ii) the respondent was not adversely affected by a failure to go through, with the same fee-earner, reg 4 twice or three times, arguably an exercise without point and leading to increased costs possibly irrecoverable on assessment; (iii) such following of the fee-earner to new firms resulted in a saving of costs, which cannot be adverse to the proper administration of justice; (iv) not terminating the CFA avoided any difficulty as to the ATE policy and potential further expense when buying another policy; (v) the respondent was protected from his previous solicitors seeking payment of their basic charges and disbursements upon termination of the CFA, and from their power to exercise a lien to prevent his new solicitors conducting the case until the respondent had paid those costs (see para 11 of the CFA). Mr Orr submitted that this was something of a red herring since Girlings and later TGB agreed to participate in the purported assignments (something they did not necessarily have to do) and would, in all likelihood, have agreed to defer demanding payment of their basic charges and disbursements from Mr Jenkins until the conclusion of the case in any event.

[27]

When FP moved to TGB and Mr Jenkins wished to move with her, cl 2.2 of the 13 August 2002 agreement between the respective solicitors must have reflected his instructions: '2.2 The Client has requested that Baynes take over conduct of the Claim and Girlings have agreed with the Client's consent, to transfer the benefit and burden of the Agreement to Baynes.' Our conclusion is fortified by Mr Jenkins following FP not

only to TGB but also to TSP. Girlings agreed to Mr Jenkins moving to TGB with her. Had it been otherwise Mr Jenkins could have been put to his election; continue to instruct Girlings or terminate the CFA with the attendance consequences set out at cl 10(d): 'Paying us if you end this agreement'. The position was essentially reproduced when FP moved to TSP.

DECISION ON THE FIRST ISSUE

[28]

Since as will by now be apparent the facts in this case are singular we have not derived assistance from the authorities on assignment to which we were referred. Significant in our conclusion is the intention behind the course adopted. Mr Jenkins wished to follow FP to her new firms and with good reason. Three firms agreed with him and with one another. All this is relevant to our conclusion on the argument advanced by Mr Orr that a contract involving personal skill and confidence cannot be assigned. We are confident that the directing motive for Mr Jenkins was his confidence in FP's skill, expertise and professional judgment and that what was put in place was intended to give effect to it. He sought to preserve and rely upon the trust and confidence he had in FP and in our judgment it would be a novel approach to the administration of justice were this court to seek on its merits to interfere with a professional relationship whose propriety and worth has never been challenged.

[29]

We return to the issue of assignment of burdens and Mr Orr is correct in urging us to look to the original CFA when we consider benefit and burden. Girlings were under the general burdens of a solicitor acting for a client under a CFA, imposed in part in its section 6 'Our responsibilities' and by rules of professional conduct. Girlings was obliged to act in Mr Jenkins's best interests and to secure for him in his claim for damages the best possible outcome. By virtue of the CFA Girlings was entitled to the benefit of payment for work done only if his claim were successful. The CFA section 'Paying us' reads where relevant 'If you win your claim you pay our basic charges, our disbursements and a success fee ...' and there are provisions for the calculation of costs and for any failure to beat a Pt 36 offer.

[30]

It follows that the benefit of being paid was conditional upon and inextricably linked to the meeting by Girlings of its burden of ensuring to the best of its ability that Mr Jenkins succeeded. As Lord Templeman in *Rhone v Stephens* [1994] 2 All ER 65, [1994] 2 AC 310 said, the condition was relevant to the exercise of the right. In our judgment, upon the facts in this case the benefit and burden of the CFA could be assigned as within an exception to the general rule. There is no issue taken with Master Campbell's judgment that the formal requirements were met. He was entitled to find valid the agreements of 13 August 2002 and 1 April 2003 and that TGB and TSP are entitled subject to the comments below to be paid by Mr Jenkins. It follows that subject to detailed assessment he is entitled to recover those charges from the appellant.

[31]

The relationship between client and solicitor involves personal confidence. As we have already rehearsed, what drove these events was the trust and confidence Mr Jenkins had in FP based on her uninterrupted conduct of his

case. Whether, absent that trust and confidence, a CFA could validly be assigned is not a matter upon which it has been necessary for us to reach a conclusion.

[32]

Mr Orr did not contend that even were we to find that the agreements to assign were valid, the new solicitors ought nevertheless to have repeated the advice required by with s 58 of the 1990 Act and the 2000 regulations and although we did not find it necessary to reach a conclusion on it nevertheless we have considered as did Master Campbell whether, were we wrong as to valid assignment, there were material breaches of s 58 of the 1990 Act and the 2000 regulations.

MATERIALITY OF BREACH

[33]

It is common ground that if there be no enforceable retainer as between the respondent and TGB or as between the respondent and TSP then, by operation of the indemnity principle, the solicitors' costs claimed by TGB and TSP cannot be recovered from the appellant. 'Equally it is common ground that to be enforceable a CFA must comply with s 58 and, as the CFA was entered into prior to 1 November 2005, with the relevant provisions of the 2000 regulations.' (Note--the 2000 regulations were revoked on 1 November 2005.) Mr Orr submits that there was no attempt to meet the requirements imposed by s 58 of the 1990 Act when TGB and TSP were appointed to act for the respondent. Mr Hutton, whilst accepting that not every 'i' was dotted and every 't' crossed submits that there was substantial compliance, fortifying his submission by reminding us that the appellant had not sought to identify a materially adverse effect on the protection afforded to the respondent or on the proper administration of justice.

[34]

Sharratt v London Central Bus Co Ltd (*The Accident Group Test Cases*)*, Hollins v Russell* [2003] 4 All ER 590, [2003] 1 WLR 2487 is the leading authority and Master Campbell applied the materiality test therein set out, as we have earlier rehearsed. In concluding that there was no materially adverse effect on the protection afforded to the respondent or upon the proper administration of justice the master exercised his discretion. He is a specialist costs judge with considerable expertise and knowledge in his field, and where he exercises his discretion we should be slow to interfere with his decision, as is made plain by CPR 52.11(3)(a).

[35]

Mr Orr did not identify any specific instances pointing to a materially adverse effect upon the protection afforded to the respondent or upon the proper administration of justice. Rather he, as Mr Williams below, relied upon what he described as a total failure to comply with a significant part of the relevant regulations as set out in *London & Clydeside Estates Ltd v Aberdeen DC* [1979] 3 All ER 876, [1980] 1 WLR 182 which Master Campbell considered in his judgment. In *London & Clydeside Estates Ltd v Aberdeen DC* [1979] 3 All ER 876 at 883, [1980] 1 WLR 182 at 189 Lord Hailsham of St Marylebone LC said:

> 'a total failure to comply with a significant part of a requirement cannot in any circumstances be regarded as "substantial compliance" with the total requirement in such a way as to bring the respondents' contention into effect.'

[36]

The facts relevant to the issue of compliance are as follows: (i) It is accepted that the respondent was given the correct advice for the purposes of s 58 of the 1990 Act and the 2000 regulations when the CFA was entered into between himself and Girlings; (ii) Mr Hutton, after taking instructions from FP who was

present in court, confirmed that she had given the oral advice to the respondent at the time the CFA was entered into with Girlings; (iii) FP was the solicitor who had conduct of the respondent's case throughout its life and thus during her employments at all three solicitors firms; (iv) TGB on 20 May 2002 sent a client care letter to the respondent in which were a number of important features: (a) It specifically referred the respondent to the CFA between himself and Girlings; (b) It specifically referred to other methods of funding as having been discussed previously; (c) It specifically referred to the policy of ATE insurance; (d) It specifically referred the respondent to his right to a detailed assessment; (e) It was signed by the respondent.

[37]

TSP on 22 April 2003 sent a client care letter to the respondent. It too contains a number of important features: (i) It confirmed that TSP had agreed to act under a CFA and specifically referred the respondent to the CFA itself; (ii) It set out the basis upon which the respondent would be charged, and an increase in the hourly rate to £180; (iii) It gave information about costs estimates, the success fee, ATE insurance, liability for disbursements and termination of the CFA; (iv) It was signed by the respondent.

[38]

It is accepted that FP did not either when TGB or when TSP were instructed repeat the oral advice she had given to the respondent when first he entered into the CFA with Girlings. Master Campbell held:

> 'The fact that FP did not go through the reg 4 procedures when she started at TGB and later at TSP did not have a materially adverse effect on the protection afforded to the respondent or on the proper administration of justice.'

True it is that the letters from TGB and TSP dealt with some but not all the reg 4 issues. They referred to the CFA with Girlings, which itself contained further advice and incorporated the Law Society conditions. Although the letter from TSP does not identify the CFA in as much detail as does that from TGB, the respondent can have been in no doubt that it referred to the CFA entered into with Girlings. There was none other.

DECISION ON MATERIALITY OF BREACH

[39]

Although there were breaches of reg 4, Master Campbell cannot be said to have gone outside the reasonable ambit of his discretion in holding on the facts of this case that they did not have a materially adverse effect upon the protection afforded to the respondent or upon the proper administration of justice. In our judgment this was an unimpeachable exercise of his discretion by an experienced costs judge and it would be wrong to interfere with it.

[40]

Although Master Campbell's judgment deals with reg 4, the points taken by the defendant on appeal go beyond reg 4 and raise breaches of s 58 and regs 2 and 3 of the 2000 regulations. The advice given by Girlings it is accepted complied with s 58 and with all the requirements of the 2000 regulations. That given by TGB and by TSP though not technically perfect in the sense conceded during argument, on an application of the *Sharratt v London Central Bus Co Ltd* test clears the hurdle there set up. That FP had personally given the oral advice required by reg 4 when she was at Girlings and knew as is conceded that written advice had been given is an important feature of this case and of our decision on this issue since FP could as a conse-

quence be satisfied, when she moved to TGB and later to TSP, that the required advice had been properly given. Had she not had

personal conduct of the case throughout then the confidence with which we reach that conclusion would have been reduced.

[41]

In our judgment the letters from TGB and from TSP both as individual documents and by their referral of the respondent to the CFA with Girlings were an attempt to comply with the 2000 regulations. There was no materially adverse effect either upon the protection afforded to the client or upon the proper administration of justice in the particular circumstances of this case and the *Sharratt v London Central Bus Co Ltd* test is satisfied.

[42]

The respondent's solicitors were faced with a difficult decision as to how best to safeguard the respondent's interests when FP moved and he wished to follow her. They sought to take a sensible, practical course positively in the interests of the administration of justice. If the attempted course were wrong in law, the only arguments available to the appellant are in our judgment without merit and technical.

[43]

Other issues raised by the appellant we take shortly. Whether the percentage success fee should have been reassessed in the light of the changing circumstances of the case can be determined by Master Campbell on detailed assessment. Mr Hutton confirmed, on instructions, that TSP will not seek to recover from the respondent that element of the success fee relating to the costs of postponement of payment of charges and disbursements. Whether the increase, when FP moved to TSP, in hourly rate to £180 were reasonable is an issue for Master Campbell.

[44]

For the reasons set out above the appeal is dismissed and the matter will be referred back to Master Campbell to deal with the remaining aspects of the detailed assessment.

Appeal dismissed.

Christian Metcalfe Barrister.