In the County Court at Liverpool
Case number: A13YJ811

APPEAL NO 96/2015

BETWEEN

DENISE JONES

Claimant /Appellant

and

SPIRE HEALTHCARE LIMITED

Defendant/ Respondent

~~~~

APPEAL NO 97/2015

BETWEEN

DENISE JONES

Claimant /Respondent

and

SPIRE HEALTHCARE LIMITED

Defendant/ Appellant

Before **His Honour Judge Graham Wood QC**

Mr Robert Marven (instructed by SGI Legal LLP) for the Claimant
Mr Andrew Hogan (instructed by DAC Beachcroft Claims) for the Defendant

Hearing date: 16th December 2015 and 19th April 2016

.....

Appeal Judgment

.....
~~~~

His Honour Judge Graham Wood QC

Introduction

1. The main issue on these appeals is whether or not an insolvent firm of solicitors can validly assign its entitlement and responsibility under a conditional fee agreement (CFA) with a client to another firm of solicitors. If it cannot, and the CFA becomes a *novation*, it must follow that costs incurred by the insolvent firm and potentially recoverable together with any future costs incurred by the assignee in the event of the client's success are lost forever if a statutory change leads to the unenforceability of the CFA, to the disadvantage of any creditor in the administration, and to the advantage of an opposing party who might escape a substantial liability for costs in the event of losing the case.

2. The appeal lies, with permission, from the decision of District Judge Jenkinson given on 11th September 2015 to both parties. The decision is reflected in the order of 15th September. In effect, he decided that the benefit of the retainer inherent in the CFA was validly assigned but the burden was not, which meant that the Claimant's new firm under the purported assignment, SGI Legal LLP could recover costs incurred by the now dissolved firm Barnetts, but had no entitlement to any subsequent costs incurred by itself, because there was no valid retainer. Whilst the specific assignment to which the Claimant was a party was a novation based upon the original terms of the CFA, because it did not comply with the CFA regulations, it was not enforceable as a retainer, and accordingly costs could not be recovered on that basis either.

3. The Claimant (and I shall refer to this appellant throughout in such terms) appeals in relation to the disallowance of the post-assignment costs, and the Defendant (similarly referred) appeals in relation to the allowance of the pre-assignment costs. Two separate appeals, therefore, have been pursued, but they have been rolled up into the same hearing and dealt with at the same time.

4. The court has been made aware that this is an appeal of some significance, because the claim involved is one of several hundred which were pursued under CFAs with the now defunct firm, and in respect of which the point has not previously been taken for those bills already assessed, but which might be taken in respect of future assessments. Insofar as SGI Legal LLP paid a significant consideration to acquire the work in progress, referred to under a generic deed of assignment, it stands to lose out substantially if costs cannot be recovered for that work both pre-and post-assignment. There are also other cases awaiting my decision, and it appears that a higher appellate court may become engaged on the grounds that this is a matter of public importance and wider ramification.

5. Time did not permit the hearing of argument in relation to the Defendant's appeal on the "assignment of benefit" issue on the one day set down for the hearing in December 2015, and accordingly the matter was adjourned for separate argument on an agreed date in April 2016 after submissions were received in relation to the Claimant's appeal.

Background

6. Barnetts were a well-known local firm of solicitors with a broad practice which included personal injury litigation. They had a number of clients who had been signed up to conditional fee agreements pursuant to the regulations then in force. For reasons which do not require elaboration, from about 2013 the firm found itself in significant financial difficulties and an administrator was appointed to ensure that creditors were paid, assets realised, and any work in progress was able to achieve maximum value. Clearly those cases for personal injury litigants who were party to conditional fee agreements amounted to "work in progress", but unlike private clients, because of the nature of the retainer, there was no entitlement to actual payment for services until success has been achieved in the litigation.

7. The court has not been made privy to the negotiations which preceded the final dissolution of the partnership, but at some time prior to January 2014 SGI Legal LLP agreed with Leonard Curtis Recovery Ltd, the administrators, to acquire the personal injury portfolio of Barnetts for an unstated consideration. It was likely that the consideration would have reflected the value of the retainers for the work in progress and the fees which could be recovered in the event of success being achieved in those cases. Accordingly, a deed of assignment was drawn up between SGI Legal and Barnetts in administration, the terms of which were carefully drafted by specialist counsel, and the effect of which was to transfer the rights and responsibilities (i.e. the benefits and burdens) of a number of specified retainers from the latter to the former by which the cases were to be continued as ongoing business under the same CFAs.

8. The Claimant was one such client who had been injured in an accident at work in 2011. She signed a Law Society model CFA agreement with Barnetts on 1st February 2012 which provided for a success fee. However, it was also modified to provide that the Claimant would receive her damages in full without any deduction. This modification is said to be relevant, and will be considered in more detail when I address the question of the CFA regulations and the **Legal Aid Sentencing and Punishment of Offenders Act 2012** (LASPO). Although a partner was assigned to the case, most of the work was undertaken by a more junior fee earner, Mr Christopher Eccles, when Barnetts remained engaged.

9. The Claimant was happy to move to SGI Legal when the portfolio of PI work was transferred and the situation was explained to her, and signed a separate deed of assignment on 29th January 2014, a week or so after the generic deed of assignment between Barnetts and SGI Legal. Thus from this point onwards the Claimant was represented by SGI Legal, seemingly under a CFA agreement, although it would appear that Mr Eccles, despite moving to SGI Legal, did not play a significant role as fee earner when the claim was continued.

10. Eventually the Claimant's personal injury claim was resolved when she accepted a Part 36 offer in the sum of £17,500 in October 2014. Clearly an entitlement to costs in principle

arose, and bills were drawn up. In the absence of agreement, the matter proceeded to detailed assessment, with the principal point taken by the Defendant paying party that the Claimant receiving party was not entitled to any costs in the absence of a valid retainer. The efficacy of both the generic and specific deeds of assignment were not in dispute, insofar as they expressed in valid terms what was required for a lawful assignment, but the main objection incorporated into a supplementary point of dispute (drafted by counsel) was that the CFA was not capable of assignment because it amounted to a contract for personal service and did not come within the exception of trust and confidence which could be inferred from the decision of **Jenkins v Young Brothers Transport Ltd [2006] EWHC 151** and the judgment of Rafferty J (as she then was). Further, it could not be said that the benefit and burdens were inextricably linked, and thus the general rule not permitting assignments of burdens in the circumstances would apply. If the assignment amounted to a novation, insofar as it permitted the recovery of a success fee, this was contrary to section 44 of LASPO and associated regulations, rendering it unenforceable as a CFA agreement. Without such an agreement there was no retainer, and thus no costs could be awarded.

11. It was this preliminary issue which came before the district judge in September 2015.

The judgment of District Judge Jenkinson

12. This was a detailed and well-reasoned judgment from the experienced regional costs judge. Clearly, uppermost in his mind, was the applicability of the *ratio* in the **Jenkins** case, and in particular whether it could be regarded as a decision which provided a general exception to the rule in relation to assignment in personal contracts, or whether it was decided on its specific facts. This is why he addressed in some detail in the early part of his judgment the role of the specific fee earner Christopher Eccles both before and after the file was transferred from Barnetts to SGI Legal.

13. Unlike the situation which prevailed in the **Jenkins** case, where it had been the movement of the specific fee earner through three firms, and who was intimately connected with the case and the client, he noted the situation here, which was that Mr Eccles had played only a minor role after the transfer, and that certainly the agreement of the Claimant was not based upon any particular trust or confidence she had reposed in Mr Eccles.

14. At paragraph 8 he made the following finding:

> "……In that regard, I find as a fact, and on a balance of probabilities, that any decision by the Claimant to transfer her instructions to SGI Legal LLP was motivated by the unexpected insolvency of her former solicitors, and the ease of continuing her claim through an equally competent personal injury firm, who already had the file, and who were prepared to continue to act on the same basis. I find that the decision was in no way influenced by the transfer of Mr Eccles to SGI Legal LLP, even if Ms Jones knew about this, which on the evidence available I consider it unlikely that she did."

15. The learned district judge went on to consider the basis upon which Rafferty J had arrived at the conclusion in relation to the general rule that the benefit and burden in personal contracts could not be assigned, namely that it was derived from a principle that benefit and burden were inextricably linked under the terms of the agreement, and that there had been a line of authorities fortifying such an exception, but noted the qualification that the court's decision was based upon the "*facts of the case*". At paragraph 15, he stated,

> "However, I am satisfied that the instant case is distinguishable from that of Jenkins. Rafferty J specifically stated, at paragraph 31 of her judgment (extracted at paragraph 12 (above)) that she was leaving open the issue of whether or not a CFA could be assigned absent the particular relationship of trust and confidence that Mr Jenkins and his solicitor enjoyed."

16. At paragraph 17 he went on to say:

> "For that reason, I do not consider that the narrow exception to the general rule against the assignment of personal contracts, to the extent that such exception is imputed by Jenkins, applies here. Rather, in my judgment, the existing well established common law applies, and such an assignment is not possible."

17. The reason to which he was referring was his previous finding that there had been no personal trust and confidence reposed in the fee earner, as in the Jenkins case, and that the issue as to whether or not a CFA generally could be assigned had been left open.

18. Whilst not accepting that the burden could be assigned, nevertheless the district judge had regard to the extremely wide severability clause in the generic deed of assignment, and in so far as it was accepted that the agreement was not technically deficient, the benefit, which was effectively the entitlement to an existing chose in action (future payment of fees) could still be assigned. This meant that fees incurred by Barnetts up until the date of transfer were recoverable under a valid CFA then in existence, the benefit of which was assigned. His reasoning was expressed in these terms:

> "Whilst the right to be paid under the conditional fee agreement may be dependent upon ultimate success in the case:-
>
> i. Success as triggered by the definition of "win" within the CFA was effectively a certainty given that liability had long since been conceded. The position is therefore effectively the transfer of an existing chose in action of future payment, rather than a mere expectancy;
>
> ii. In any event, there has been consideration between the parties."

19. It is this finding which is the subject of challenge in the Defendant's appeal.

20. The learned district judge then went on to address the issue as to whether or not the assigned CFA agreement, which was now to be regarded as a novation, could be LASPO compliant notwithstanding the fact that it sought a success fee, because of the qualification

added by the original solicitors to the effect that the client will "*receive 100% of your damages - we will not take a penny*". The argument which he was addressing, *inter alia*, was whether or not the balance of the provisions in the conditional fee agreement, which permitted success fee recovery (other than the allowable maximum of 25% from damages under the new regime) could effectively be severed from the agreement, read in conjunction with the letter which was forwarded to the Claimant and when she originally signed the agreement which made it plain that there was no recovery from her damages. In other words, whilst an old style CFA agreement which was on its face impermissible, with recovery now no longer available from a Defendant under the new regime, it was nevertheless enforceable because recovery from the client itself was excluded. In relation to this argument he made the following observation at paragraph 23:

> "….I have regard, however, to the fact that the above 1990 Act, as supplemented by the 2013 Order, are clearly intended, in this regard, to facilitate the protection of the consumer, i.e. Ms Jones. Parliament envisaged that Ms Jones should have the benefit of an agreement which makes it clear on the face of it that any success fee is capped as provided for in the 2013 Order. The consumer should not be expected to finely construe the conditional fee agreement through the eyes of a lawyer, and to assume that ultimate and possibly judicial interpretation of apparently conflicting clauses within that agreement would be interpreted so as to limit the success fee to 25%. The uncertainty arises from the fact that the original solicitors, Barnetts, have apparently taken the Law Society model CFA as their starting point, and amended it so as to incorporate an intention not to take any of the Claimant's damages. However they have not deleted clauses therein which clearly otherwise would give rise to scope for deduction. In summary, the Claimant consumer is faced with the CFA that is at best equivocal, but with scope for the solicitors to claim a deduction from her damages that may exceed the statutory 25% cap in place at the time of the novation (and hence the entering of that CFA) without the benefit of that agreement clearly spelling out the statutory limitation to her."

21. The judge summarises his decision in paragraph 25:

> "In summary, therefore, I find as follows:-
>
> b) The conditional fee agreement between Ms Jones and Barnetts has not been assigned to SGI Legal LLP. Accordingly, and on simple application of the indemnity principle, it is not possible to base a claim for costs incurred by SGI Legal LLP parasitic to the terms of that CFA, valid as it was when entered with Barnetts;
>
> c) The benefit of the retainer between Barnetts and Ms Jones has been validly assigned to SGI Legal LLP, and the Claimant is accordingly entitled to claim the costs incurred by Barnetts;
>
> d) The agreement between Ms Jones and SGI Legal LLP was a novation, based on the terms of the original CFA with Barnetts, but taking effect from 27 January 2014. However, at that stage the CFA fell foul of the regulations which had been amended since the date that the CFA was originally validly entered with Barnetts. It is accordingly rendered unenforceable by section 58 (1) of the 1990 Act, and there is therefore no enforceable retainer upon which a claim for the costs incurred by SGI Legal LLP can be based."

The respective appeals

22. Before dealing with the arguments in detail and the relevant law, it would be helpful to summarise the structure of the respective appeals and how the issues have been addressed.

23. On the Claimant's appeal, Mr Marven's principal argument is that both the benefit and burden of the original CFA were inextricably linked, and thus capable of being assigned. He places heavy reliance on the authority of **Jenkins v Young Brothers Transport Ltd** and the judgment of Rafferty J. In this respect the district judge was wrong to distinguish it , and accordingly there was a valid retainer, and enforceable CFA, and SGI Legal LLP is entitled to base costs and uplift not only in relation to the costs incurred at the date of the assignment, (those of Barnetts) but also subsequently.

24. If the court agrees with this argument, it is unnecessary to consider the matter further. However, his first "fallback" position, which assumes that the CFA becomes a novation, and thus a new contract with SGI Legal LLP, is that it does not require construction for compliance with the new CFA regulations, because the transitional provisions of LASPO enable a broad and purposive statutory interpretation, and the important date for the purposes of application of those regulations is the date that the "arrangement" was entered into, which was before the coming into force of LASPO (1 April 2013) and not the date of the novated or deemed agreement. This is an argument which was not pursued before the district judge. Apart from the fact that the Defendant challenges this as a sustainable legal approach, it is not accepted that a party can advance a new point on appeal, even where it is purely a legal issue, i.e. a matter of "red letter law".

25. A secondary fallback position, if the court does not accept this, is that the terms of the agreement are sufficiently clear for this to be an enforceable post-LASPO agreement, and that the provision relating to the recovery of a success fee from damages of no more than 25% has not been breached because there is no recovery of any solicitor costs or other expenses at all in the agreement. His tertiary fallback position, if the court is disinclined to accept this, is one whereby any offending provisions are severed from the agreement. This also differs from the way in which the matter was approached before the district judge.

26. On the Defendants' appeal, Mr Hogan of counsel challenges the conclusion of the learned costs judge that whilst the burden cannot be assigned, the benefit which Barnetts enjoyed under the CFA until their dissolution could be, and that pre-assignment costs could be recovered accordingly. His argument is based upon the premise that at the time of assignment there was no right to be paid, only a contingent expectation that in due course such an entitlement might arise and that a contingent interest is incapable of assignment.

27. I shall deal with the arguments on the respective appeals in more detail later in this judgment.

THE CLAIMANT'S APPEAL

The legal background

28. It is approrpriate to understanding what lies behind this case to start with the relevant statutory provisions which deal with CFA agreements.

29. Section 58 of the **Courts and Legal Services Act 1990 (CLSA)** permitted conditional fee agreements allowing for success fees which satisfied a number of conditions which included requirements prescribed from time to time by the Lord Chancellor. These were contained in regulations which evolved over the years. However the main difference between CFAs which were entered into before 1st April 2013 and those entered into subsequently was that the success fee, previously recoverable from the losing party, was now only recoverable from damages received by the successful party, subject to a statutory maximum of 25%. This is because the section was revised by section 44 of the **Legal Aid, Sentencing, and Punishment of Offenders Act 2012** (LASPO). As revised, the section, now reads:

> **58 Conditional fee agreements**.
>
> (1) A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a conditional fee agreement; but (subject to subsection (5)) any other conditional fee agreement shall be unenforceable.
>
> (2) For the purposes of this section and section 58A—
>
> (a) a conditional fee agreement is an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances; and
>
> (b) a conditional fee agreement provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances.
>
> (3) The following conditions are applicable to every conditional fee agreement—
>
> (a) it must be in writing;
>
> (b) it must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement; and
>
> (c) it must comply with such requirements (if any) as may be prescribed by the Lord Chancellor.
>
> (4) The following further conditions are applicable to a conditional fee agreement which provides for a success fee—
>
> (a) it must relate to proceedings of a description specified by order made by the Lord Chancellor;

(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; and

(c) that percentage must not exceed the percentage specified in relation to the description of proceedings to which the agreement relates by order made by the Lord Chancellor.

(4A) The additional conditions are applicable to a conditional fee agreement which—

(a)provides for a success fee, and

(b)relates to proceedings of a description specified by order made by the Lord Chancellor for the purposes of this subsection.

(4B) The additional conditions are that—

(a) the agreement must provide that the success fee is subject to a maximum limit,

(b) the maximum limit must be expressed as a percentage of the descriptions of damages awarded in the proceedings that are specified in the agreement,

(c) that percentage must not exceed the percentage specified by order made by the Lord Chancellor in relation to the proceedings or calculated in a manner so specified, and

(d) those descriptions of damages may only include descriptions of damages specified by order made by the Lord Chancellor in relation to the proceedings."

(5)……..

30. There is a further section in LASPO to which reference must be made because it is relevant to the secondary argument advanced by the Claimant;

44 Conditional fee agreements: success fees

(6) The amendment made by subsection (4) does not prevent a costs order including provision in relation to a success fee payable by a person ("P") under a conditional fee agreement entered into before the day on which that subsection comes into force ("the commencement day") if—

(a) the agreement was entered into specifically for the purposes of the provision to P of advocacy or litigation services in connection with the matter that is the subject of the proceedings in which the costs order is made, or

(b) advocacy or litigation services were provided to P under the agreement in connection with that matter before the commencement day.

31. The court has been referred to a number of extracts from leading textbooks dealing with contractual assignment. In the context of this case, the court is concerned with *choses in*

action, that is non-tangible property and future entitlements, or present entitlements realisable in the future. The general principles do not appear to be in dispute and can be distilled as follows:

32. The benefit of a contract, other than one which involves personal skill and confidence dependent upon a particular individual discharging obligations under it, can be assigned, whereas the burden cannot, subject to certain exceptions. One of those exceptions arises where the benefits and burdens are inextricably linked, for instance where entitlement to the right or benefit is dependent or conditional upon the discharge of certain responsibilities.

33. In the case which has been central to the discussions before this court and the court below, namely **Jenkins**, (*supra*) a question arose as to whether or not a CFA could be validly assigned to two subsequent firms of solicitors than that which was party to the original agreement. Essentially there was a specific solicitor and fee earner who had handled the claim throughout, and who moved from Firm A, to Firm B and subsequently Firm C in each case taking the claimant with her. There were two purported assignments of the CFA. After the claim had settled, a similar objection was raised as in the present case to the entitlement to costs, on the basis that there had been no valid assignment. In fact there are a number of similarities between the two cases, with the same argument being pursued as to the absence of any valid retainer and thus breach of the indemnity principle entitling costs, although there was no insolvency of the original firm involved. Whilst the claimant had given his consent to the transfer of his file on the assignment, his representation could have been continued by Firm A. It was argued by the defendant paying party that any new contracts which existed were novations and that they did not comply with section 58 of **CLSA** (although for different reasons as advanced in this case).

34. At first instance, Master Campbell found in favour of the receiving party claimant that the CFAs had been validly assigned and the claimant recovered his costs in their entirety. The defendant paying party appealed and the matter was dealt with before Rafferty J and two assessors. Because the case has been poured over in submissions, it requires a little scrutiny.

35. After reviewing the respective arguments of counsel, and the exceptions to the general rule that a contractual burden cannot be assigned as opposed to a contractual benefit, the judge identified the sources of the defined exceptions, referring to **Rhone v Stephens [1994] 2 AC 310 and Tito v Waddell (no2) 1977 Ch 106**. At paragraph 15 she said:

> 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, (Tolhurst). However in **Tito v Waddell** page 302B et seq 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 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 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 the 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 principles 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 to the matter…""

36. Whilst observing that Sir Robert Megarry VC in that case, referred not only to an exception based upon "*conditional benefit*", i.e. where the burden has been made a condition of the benefit, but also to the wider exception of "*pure principle of benefit*" where both were independent and distinct, usually applicable in the case of covenants of land, the judge noted that the wider principle had been disapproved of in the later case of **Rhone v Stevens**, which determined that in such circumstances there should be reciprocal benefits and burdens. Accordingly she endorsed the concept that the condition must be relevant to the exercise of the right. In paragraphs 17 and 18, she said:

> 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**) but was independent of any benefits. Lord Templeman said at 322H:
>
> > "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*** and ***Rhone*** were considered in the judgment of Peter Gibson LJ in ***Thamesmead Town Ltd v Allotely 30 HLR 1052***
>
> > "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".

37. When arriving at a conclusion on the issue of assignment, in paragraph 28 the learned judge set out a matter which was relevant to the approach which was being taken:

> 28……..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.

38. This is a paragraph on which Mr Hogan on behalf of the Defendant places heavy reliance, as qualifying the ratio of the decision provided in the following paragraphs:

> "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 Part 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 said, the condition was relevant to the exercise of the right. In our judgment, upon the facts (*my emphasis*) 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 13th August 2002 and 1st 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."

39. Having considered the matter by reference to the general principles of conditional benefit and the established authorities, the learned judge concluded her discussion on the first question of the validity of the assignment by providing a further qualification.

> "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."

40. The question for this court will be whether or not this observation, which was *per curiam* undermines the *ratio decidendi*, making it of limited application.

41. Whilst the decision in **Jenkins** has not been overruled, or subject of any subsequent contrary ruling, in the case of **Davies v Jones [2009] EWCA Civ 1164**, there was an observation made by the court which is said by the Defendant to have diminished its usefulness as a statement of principle in respect of the assignment of conditional fee agreements.

42. In brief outline **Davies** was a case involving various transactions for the sale of land from a private owner to Lidl for the construction of a supermarket. The owner had been required to acquire the freehold from the claimants before completing his sale to the

supermarket. As part of that agreement, the owner had been entitled to withhold £100,000 from the purchase price pending the completion of ground clearance works. These were not undertaken by him, however, because it was thought efficacious to assign his interest in the acquisition of the land directly to Lidl, who proceeded thereafter to complete the ground clearance works. When they did not pay the retention of £100,000 to the freeholders upon that completion (believing that the cost of clearance was substantially greater than the £30,000 which had been anticipated and was closer to £200,000) a question arose as to whether or not there was a burden on the part of the supermarket chain in relation to that retention, having acquired a benefit in the transfer of the land to them (i.e. the benefit which had been assigned by the owner). The judge at first instance accepted that there was no express provision on the part of the assignee agreeing to accept the burden of repaying the retention, but found that there was a "clear understanding". The facts do not require any further scrutiny for present purposes.

43. The court considered in some detail a similar line of authorities to those addressed in the **Jenkins** case, although this case was more directly concerned with covenants in relation to the sale of land rather than a personal contract situation. The Chancellor, Sir Andrew Morritt held that the exception to the general rule that a burden could not be assigned was not so wide as to permit the imposition of a burden when land was acquired where benefits were otherwise taken (in other words the so-called "pure principle of benefit"). He summarised the position as follows, drawing on **Rhone v Stephens** and **Thamesmead v Allotey**, but also confirming that the correct considerations were applied in the Jenkins case, in paragraph 27:

> **"**27. **Rhone v Stephens** and **Thamesmead Town Ltd v Allotey** are binding on us. They establish a number of propositions the application of which are exemplified in the other cases to which I have referred, namely **Halsall v Brizell,** that part of **Tito v Waddell** which was not disapproved in **Rhone v Stephens**, **Jenkins v Young Bros Transport Ltd** and **Baybut v Eccle Riggs Country Park Ltd**. In my view those propositions are:
>
> > (1) The benefit and burden must be conferred in or by the same transaction. In the case of benefits and burdens in relation to land it is almost inevitable that the transaction in question will be effected by one or more deeds or other documents.
> > (2) The receipt or enjoyment of the benefit must be relevant to the imposition of the burden in the sense that the former must be conditional on or reciprocal to the latter. Whether that requirement is satisfied is a question of construction of the deeds or other documents where the question arises in the case of land or the terms of the transaction, if not reduced to writing, in other cases. In each case it will depend on the express terms of the transaction and any implications to be derived from them.
> > (3) The person on whom the burden is alleged to have been imposed must have or have had the opportunity of rejecting or disclaiming the benefit, not merely the right to receive the benefit."

44. Thus the importance of the deed giving rise to the transaction was emphasised. However, whilst summarising the effect of the decision in **Jenkins**, he provided a qualification which is said to create an implicit disapproval of the court's approach in that case, thus diminishing its value (paragraph 25).

> "25…….The Defendant in the action [**Jenkins**] contended that he should not be made to pay the costs due under the CFA after its first assignment because the Claimant was not liable to pay them.

That contention failed before the costs judge and Rafferty J sitting with assessors. The latter concluded that the benefit and burden of the CFA might be assigned because:

> "The benefit of being paid was inextricably linked to the meeting by Girlings of its burden of ensuring to the best of its ability that the Claimant succeeded."

Plainly an inextricable link between benefit and burden would satisfy the tests formulated in all the earlier cases. That is sufficient for present purposes, though I have some doubt whether the relevant benefit and burden were correctly described. [*my emphasis*]

Submissions

45. The court has been greatly assisted by the comprehensive and skilfully pursued arguments by both counsel in this complex and evolving area of law.

Claimant

46. On behalf on the Claimant, Mr Marven, as indicated, submits that the **Jenkins** case provides sound propositions of law in relation to the inextricable link of benefit and burden where conditional fee agreements are assigned, and despite the reticence of the court in that case to define any more general principle for application, and deciding it "only on the facts", nevertheless the ratio is based upon an interpretation of the law which cannot be restricted only to those cases where personal trust and confidence was reposed.

47. He refers to the fact that there is very little difference between the terms of the CFA in the **Jenkins** case, and the CFA here which was purportedly assigned. If there was no deficiency in the deed of assignment, there can be no logical basis for distinction. What is important, he says, is whether the construction of the document allows such a conclusion, and if it did in Jenkins, then it must do so here. He relies upon the importance of construction as confirmed in the **Davies** case by Sir Andrew Morritt.

48. Insofar as Rafferty J regarded the rule against assignment in contracts involving personal skill and confidence as not providing an impediment where the purpose of the assignment was to preserve the relationship, this observation was ancillary to her principal conclusion. In any event, the protection afforded by the rule in personal contracts was unnecessary where consent had been provided by the counterparty, the very person who would need such protection. He relies upon the observation of Collins MR in **Tolhurst v Associated Portland Cement Manufacturers [1902] 2 KB 660**, quoted by Rafferty J in the **Jenkins** case, as well as in others:

> "the special right of ignoring altogether the consent of the person upon 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"

49. This would mean, says Mr Marven, that if the focus is properly on the person for whose benefit the obligation is to be performed, the principle is not so much concerned with an

exception to the general rule that a *burden* cannot be assigned, so much as an exception to the general rule that a *benefit* can be assigned without the consent of the counterparty.

50. Applying such a consideration to this case, it is submitted that the learned district judge, assuming that he was not persuaded that **Jenkins** was wrongly decided, should not have been drawn into the distraction of making a distinction based purely on the motivation of the Claimant as to why she agreed to the assignment. If **Jenkins** provided a sound principle, it would be undesirable and likely to generate significant uncertainty if a court had to investigate in each and every case why it was that a Claimant agreed to the assignment of the CFA and the qualitative level of the trust and confidence reposed.

51. If this principal argument does not find favour with the court, Mr Marven advances, in the first place, an additional argument based upon "LASPO" enforceability, which was not pursued before the judge at first instance. This, he submits he is entitled to do so, because it is a matter of pure law, relying on the observation of Arden LJ in **Crane v Sky In-Home Limited [2008] EWCA Civ 978**

> "The circumstances in which a party may seek to raise a new point on appeal are no doubt many and various, and the court will no doubt have to consider each case individually. However, the principle that permission to raise a new point should not be given lightly is likely to apply in every case, save where there is a point of law which does not involve any further evidence and which involves little variation in the case which the party has already had to meet (see *Pittalis v Grant* [1989] QB 605). (If the point succeeds, the losing party may be protected by a special order as to costs.) Sometimes a party will seek to raise a new point because of some other development in the law in other litigation, which he could not fairly have anticipated at the time of the trial. In some cases, the court may wish to take into account the importance of the point raised. Likewise, in the *Paramount* case cited by Mr Macpherson, one of the factors which influenced the Privy Council was the fact that it was in the public interest to allow a public body, which would otherwise end up liable to pay large sums, to raise on appeal a point of construction involving no new evidence."

52. Mr Marven argues that this new point is a matter of legal construction and will not cause any prejudice to the Defendant. Essentially he relies upon section 44(6) of **LASPO** (set out above) and contends that this is a transitional provision which should be interpreted purposively (relying on the approach of the House of Lords in **Barclays Mercantile Business Finance v Mawson (Inspector of Taxes) [2005] 1 AC 684**).

53. Put simply, his argument is that because the Claimant entered into her CFA agreement prior to 1st April 2013, and yet her CFA became a novation, or a new agreement, it could not have been intended that she fitted into a hybrid category, that is one who could neither recover a success fee from the Defendant, and at the same time not have the advantage of qualified one-way costs shifting (QOCS). If for whatever reason a new CFA has to be entered into, the purpose of the transitional provision should be that a person who had taken out the original CFA prior to 1st April 2013 should have the full benefit of the previous provisions.

54. As I have indicated, this was not an argument pursued before District Judge Jenkinson. His alternative argument was that even if the post **LASPO** regime applies, nevertheless the agreement could not be interpreted in such a way that it rendered the Claimant liable to pay a success fee which was not recoverable inter partes. This is because of the qualification in the agreement which stated in bold type that the Claimant would not have any deduction from the damages which she received. If there was no success fee recoverable from the Claimant, certainly there could not be one recoverable from the Defendant, and thus the agreement did not fall foul of section 58 of **CLSA**, particularly if the agreement was read in conjunction with the explanatory letter sent to the Claimant by SGI legal on 21st January 2014 when they took over conduct of the case. This specifically stated that the CFA agreement would remain in place. Quite apart from the 25% cap being exceeded, the agreement did not allow for the recovery of <u>any</u> success fee from the damages.

55. In this respect, he submits that the judge was wrong to say that the agreement was equivocal, because there was no alternative provision which allowed for recovery of a success fee. He was also wrong, says Mr Marven, to regard the CFA as not enforceable because it was not sufficiently clear. There was no obligation under the statutory provisions on a solicitor to provide an explanation or information as to the meaning of a CFA agreement.

56. If there had been any breach, it was immaterial, and could be ignored. He relies upon **Garrett v Halton Borough Council [2006] EWCA Civ 1017** in which the Court of Appeal provided guidance on the approach which should be taken where there had been non-compliance with the CFA regulations, and conditions imposed. Whilst it was unnecessary for prejudice to be found, and the harsh consequence of non-compliance was not a relevant factor, nevertheless it was still appropriate to consider whether there had been sufficient compliance.

57. His final argument relies upon severance. Essentially, he contends that if he is wrong about the construction of the agreement, nevertheless any offending clauses can be severed adopting the "blue pencil" test. The judge was wrong to exclude such an approach by relying upon the case of **Oyston v RBS (SCCO, 16.5.06)** which was a wholly exceptional case. The judge, he says, elided the severance and the construction point.

<u>Defendant</u>

58. On behalf on the Defendant, in relation to the Claimant's appeal, Mr Hogan of counsel responds as follows.

59. He submits that this problem arose because of a fundamental failure by SGI legal when it took over the personal injury portfolio of Barnetts, being aware that there had been a significant change in success fee recoverability. It would have been open to them, if they had appreciated that such agreements could not be assigned, to commence new CFA agreements with each of the clients, which would then be subject to the post **LASPO** regime, but to make those agreements retrospective in terms of costs recoverability. He points out that when this

matter was first argued before the district judge, evidence was relied upon, so it would seem, to bring the case within the peculiar facts of **Jenkins**, referring to the personal trust placed in the fee earner, and it has only been subsequently that the Claimant has argued that **Jenkins** should be of more general application. However, he describes **Jenkins** as an "*island of possibility in a sea of impossibility*" in the light of the law which must be applied arising from the general rules prohibiting the assignment of a burden in a contract.

60. The principle, he submits, is stated succinctly in the case of **Crane v Wittenborg CA 1999**:

> "26. Assignment is a recognised concept in English law. As a matter of private law, it is only the benefit, and not (without novation or fresh contract) the burden of a contract that may be assigned. Even then, the general principle is that there can be no assignment of the benefit of a personal contract."

61. He also refers to the statement of the general rule in the seminal textbook "**The Law of Assignment" [second edition]** by **Smith QC and Leslie**.

62. As far as the case of **Jenkins** is concerned, the court does not need to go so far as to say that it is wrongly decided. In this respect the judge was correct to confine it to its very narrow facts, rather than as a case broadening the exception to a general rule almost invariably applied. However he maintains that when addressing conditional benefit, Rafferty J was in fact wrongly adopting the pure doctrine approach to benefit and burden, which is why such a description was questioned in the case of **Davies v Jones**.

63. Even if an assignment had taken place, Mr Hogan submits that the relevant requirements set out in the case of **Davies** have not been met in that there is a narrow construction to the concept of reciprocity if there is to be a conditional element to the benefit. There will always be reciprocity in any contract in that every benefit can have a correlating burden and vice versa.

64. Assuming that there was no valid assignment of the burden, but this was a novation, Mr Hogan goes on to address the enforceability of the terms of the conditional fee agreement as it now stands under **CLSA** and **LASPO**.

65. It is not accepted that the Claimant can pursue a new argument not raised before the district judge, in this respect touching upon the purpose of construction of section 6 of **LASPO** advanced by Mr Marven, then it cannot have been the intention of the legislator to have created a hybrid CFA agreement where a party was deprived of QOCS yet at the same time could not recover a success fee from the other party. He submits that the same case relied upon by the Claimant (**Crane**) establishes the principle that raising a new ground of appeal which is evidentially prejudicial was inappropriate. The Defendant has been prevented from investigating material which would have assisted in either confirming or negating the purpose of the transitional provision.

66. Even without this material, he submits that the Claimant's argument is spurious. In arriving at a purposive construction, the statute should be taken as a whole and the particularly section given its literal meaning. In particular the Claimant has been wrong to focus on sections 44 (4) and (6) of **LASPO** which deal with the recoverability of success fees, because the formality requirements are prescribed by section 58 of **CLSA** and the **Conditional Fee Amendment Order 2013** (**CFAO**) making it clear that the amendments applied to *all* conditional fee agreements commenced after the 1 April 2013. There was a distinction to be drawn with a collective conditional fee agreement where what mattered was the date when the work started, as opposed to an individual conditional fee agreement where the inception date was crucial. Whilst it might give rise to hardship in a few cases, this should not lead to an irrational or strained construction of the obvious words of this section.

67. In relation to the balance of the Claimant's argument, and in particular whether the novated agreement is still enforceable under **LASPO** (the only relevant contract documentation being the agreement entered into on 3rd February 2012) he bases his response on the strictures of section 58 of **CLSA** which refer to the conditions provided for in **CFAO** 2013 and which deal with the maximum limit of the success fee; it must be expressed in terms of a percentage of damages. On any interpretation the relevant CFA is non-compliant because at best it renders that the Claimant liable to pay a success fee, albeit one where there is a waiver if there is any shortfall on recovery.

68. Mr Hogan submits that the learned district judge was correct to identify the consumer protection aspect of the statutory regime and the need for clarity which here was lacking. He also relied upon the case of **Garrett v Halton Borough Council (***supra***)**, which established the principle that when considering whether conditional fee agreements were compliant with the statutory conditions, whilst trivial or immaterial departures from the requirements could be ignored, the fact that a failure did not cause a particular prejudice to a client in a particular case did not render it immaterial. Here, he submits, the judge was right to regard this CFA as ambiguous at best, and which did not enable the Claimant, as a consumer, to understand how the conflicting clauses were to be interpreted in relation to the potential recovery of success fees.

69. The Claimant's ultimate fallback position, to rely upon a blue pencil severance, was impermissible in relation to a CFA on the basis of **Oyston v Royal Bank of Scotland PLC [***supra***]**, in which respect the learned judge was entirely right in his conclusion.

Discussion

70. A significant amount of the argument before this court, and seemingly before the court below, involved an analysis of the *ratio* in the **Jenkins** case, and in particular whether or not any principle established could be regarded as relevant only to its own peculiar facts. Whilst it is suggested that the case has been wrongly decided, and reference is made to implied criticism in the later case of **Jones v Davies**, it goes without saying that if there is an applicable *ratio*, this court, as one of inferior jurisdiction, is bound by it.

71. It does not appear to be in dispute that a solicitor's retainer involves a contract for personal services, and therefore is a personal contract. The assignment of both benefit and burden can only be effected in exceptional circumstances because of the nature of the personal obligations involved and in any event with tripartite consent. The general rule which appears to create an exception to the restriction on the assignment of a burden as opposed to benefit appears to have evolved in cases where the recipient of an assigned benefit has had imposed on him or her a reciprocal or corresponding burden. In such circumstances, the principles in the cases involving covenants in conveyances and such like were developed, including "pure principle of benefit and burden" (subsequently disapproved) and "conditional benefit".

72. It is important to distinguish, it seems to me, between the species of personal contracts which require a more restrictive approach generally on the question of assignment, and the concept of "*personal trust and confidence*" which is said to be the feature which drove the conclusion in the **Jenkins** case, and which made the decision singular on the facts. It is to be noted that in paragraphs 29 and 30 of the judgment of Rafferty J, insofar as those paragraphs purport to convey the ratio, there is no reference to a qualification of the exception to the general rule that this was a personal contract. In other words, the court was approaching its decision by applying (or purporting to apply, and I acknowledge that counsel submits that the court was in error in so doing) general principles of conditional benefit culled from the earlier authorities.

73. In my judgment and on careful reading of those paragraphs, Rafferty J was not seeking to qualify the exception to the general rule against the assignment of the burden of a contract to specific situations where personal trust and confidence could be established so much as to set a context in which it applied to the facts of the case. The analysis of the authorities which established the concepts of conditional benefit, reciprocity and relevance are not referred by her as relating to non-personal contracts. It seems to me that paragraph 30 lies at the crux of the decision. The judge made it plain that the benefit of being paid was conditional upon and inextricably linked to the burden of performance under the conditional fee agreement so as to enable an assignment to take place. In my judgment having followed the development of the exception through those authorities culminating in **Rhone v Stephens** and **Thamesmead Town Ltd v Allotey**, the judge was doing no more than applying the principles which they established to the facts of the case before her. It was open to the judge to conclude that the personal trust and confidence was a necessary element where the contract was a personal one, as opposed to a compelling context, and without it the assignment would not be valid. She did not go so far as to say that, and in my judgment the ratio of her decision was not so qualified.

74. Furthermore, although there is a veiled criticism in the subsequent decision of **Jones v Davies** in relation Rafferty J's descriptions of benefit and burden, in that case the Chancellor did not go so far as to say that **Jenkins** depended on its own peculiar facts, when it was open to him so to do. Instead he confirmed that it was one of a line of authorities that had elucidated the test of correlation between benefits and burdens and relevance established in the earlier cases, and the principle of "an inextricable link" was consistent with that.

75. In the circumstances, I believe that the learned district judge was wrong to regard **Jenkins** as not providing a *ratio decidendi* which was binding upon him, and unequivocal, and proceeding on the basis that it was necessary for a court to establish the same context of trust and confidence which had prevailed in that case. In my judgment there is a sufficiently clear ratio, even if the present facts are distinguishable.

76. Whilst the reference in paragraph 28 of the judgment in **Jenkins** to the intention behind the course adopted relates to the wish of Mr Jenkins to follow his solicitor from one firm to another, in my judgment it is similarly impossible to ignore what was intended by the arrangement entered into in this case. Rules restricting burden assignment were clearly devised to protect the non-participating counterparty. This is clear from the **Tolhurst** case. In circumstances where there is tripartite involvement to the extent that not only do the assignee and the assignor agree to the shifting of the burden, but so too does the recipient of the benefit (here the Claimant) and a separate deed of assignment is entered into in relation to her own conditional fee agreement, it would be an unduly restrictive and overly legalistic approach to deny the parties the effect of what they intended.

77. Of course the courts should be vigilant to ensure that arrangements have not been entered into to bypass rule changes to avoid financial disadvantage and enhance profit, but the fact remains that when her former solicitors went into receivership the Claimant was faced with a choice. She was not obliged to transfer her instruction to SGI Legal, which would have involved entering into a new **LASPO** compliant CFA agreement with potential deduction from her damages of up to 25%. Whilst a **Simmonds v Castle** uplift, together with QOCS and thus the elimination or the need for an insurance premium might have provided some parity, it should be assumed that she was advised of her best interests when she entered her own deed of assignment. Therefore this court can proceed in confidence that no party affected by the arrangement had been unwitting or unwilling. The loss of a potential windfall to an ultimate paying party who might challenge the assignment at a later point, or face paying costs under a more expensive old-style CFA is of course wholly irrelevant.

78. There is a further matter which has influenced my decision that the ratio in **Jenkins** is not qualified in the way suggested. In his decision, the learned district judge was drawn into making an assessment as to the role of various fee earners, and the continuity of involvement. In particular, he made findings of fact as to the motivation of the Claimant in her own agreement to assign the CFA from Barnetts to SGI Legal. In this respect I agree with Mr Marven that if the efficacy of an assignment depended upon a qualitative assessment of the degree of trust and confidence, this would generate considerable uncertainty, leading to potential satellite costs litigation whenever a retainer is challenged on the basis of purported CFA assignment, with the court being required to investigate in every case the nature of the relationship between the client and the solicitor. It is axiomatic that case handling these days is conducted at a distance, and it would be very difficult to identify those cases where a particular client had been insistent on the continuity of a specific fee earner. Of course every case depends upon its own particular facts, but in my judgment it would be wrong to qualify this particular exception to the general rule based upon an inextricable link between burden and benefit, by making a finding of trust and confidence a pre-requisite.

79. For these reasons, I allow the appeal, and find that the learned district judge was wrong as a matter of law to conclude that the assignment of the burden of this CFA was not possible.

80. In these circumstances, it might be considered unnecessary to address the subsidiary arguments advanced on behalf of the Claimant. However, lest I am wrong in my assessment of the ratio in the **Jenkins** case, (acknowledging the importance of this matter, the existence of conflicting judgments in the county court and the likelihood of an appeal), I propose to deal with them briefly. In particular significant energy was devoted to these arguments by counsel.

81. First of all, whilst noting Mr Hogan's objection to the admission of a new ground of appeal based upon an interpretation of **section 44** not previously advanced, and the potential prejudice, nevertheless insofar as it was considered by this court *de bene esse*, and in the context of an appeal which is concerned with legal challenges only, it is not appropriate to exclude the argument purely on the basis that it should have been raised in the court below. In any event, I believe it to be without merit. There will inevitably be cases when rule changes are implemented where parties are disadvantaged. This is particularly true in the prescriptive world of conditional fee agreements. I agree with Mr Hogan that the purposive interpretation sought by Mr Marven is a strained one, and that the "date of the agreement" provision is unequivocal. I have no doubt that if it had been the intention of Parliament to provide more protective transitional provisions to cover agreements which might have fallen between two stools, so to speak, this would have been spelt out in clear terms.

82. In relation to the agreement interpretation sought by Mr Marven, and his argument that in conjunction with the accompanying letter, the specific reference to the client receiving her damages in full without any deduction allows this court to conclude that the novated CFA does not breach the new provisions, in my judgment this is similarly without merit. It seems to me that the learned district judge was entirely correct to consider the novated agreement in the context of the intention of Parliament to provide consumer protection which in itself should not have required a client to construe potentially conflicting clauses through the eyes of a lawyer. A degree of certainty was required, and I am quite satisfied that the interpretation pursued by Mr Marven would be so strained as to make certainty impossible. In this respect the learned district judge was right to state that the novated agreement would only have been compliant if it specified the statutory cap of 25%. In my judgment, the Claimant is not assisted by **Garrett v Halton Borough Council**. Although the breach was not was prejudicial to the client, it was nevertheless not immaterial, because it left the construction of the agreement in a state of considerable uncertainty.

83. Whilst the severance argument was the ultimate fallback position for Mr Marven, and pursued with a degree of detected ambivalence, it seems to me, as Mr Hogan contends, that the decision in **Oyston,** although that of a senior costs master, is persuasive. The learned district judge was right not to sever any offending clauses.

84. Accordingly, in the event that this was not an effective assignment (and I am wrong in my interpretation of the **Jenkins** ratio), in my judgment as a novated agreement the CFA would not have been compliant with **section 58** because the amended requirements imposed by LASPO were not fulfilled. In this respect the learned district judge's conclusions cannot be faulted.

DEFENDANT'S APPEAL

85. I now turn to the Defendant's appeal. As indicated, this is based upon the district judge's finding that the benefit of the conditional fee agreement had been validly assigned by Barnetts to SGI Legal LLP, thus entitling the Claimant to recovery of costs for the work undertaken by Barnetts.

86. Central to the Defendant's argument is the chronology of the resolution of the claim against the background of Barnetts' dissolution. Mr Hogan acknowledges that there is a very narrow time window which enables him to advance his submissions.

87. The generic deed of assignment, as well as the Claimant's own specific assignment was executed in January 2014. At this point Barnetts were still in existence as a legal entity. An admission of liability had already been made in the claim and it is understood that an interim payment had also been received. In other words, the claim was proceeding to a likely successful conclusion. Throughout 2014, SGI Legal were attempting to resolve matters, as the solicitors now responsible, and in September a Part 36 offer was received. However before it was accepted, Barnetts went into liquidation (24th September 2014). On 3rd October, some nine days later, the Claimant accepted the Part 36 offer, and thus her claim was brought to finality and an entitlement to costs arose under the relevant conditional fee agreement (if valid).

88. However, on the Defendant's argument, this timing is highly relevant, because at the time of that entitlement Barnetts had ceased to exist. While accepting that as a matter of law the benefit of a contract could be assigned, at the time that this particular assignment had been executed, there was no existing right to be paid under the CFA, but a mere contingent expectation that they would be paid on the Claimant's ultimate success. Thus as a matter of law this could have amounted to no more than a promise to assign a contingent expectation arising at some point in the future, which is only enforceable in equity, inter alia, if at the time that it becomes realisable, the assignor is still in existence to fulfil its promise, or to be compelled by specific performance so to do.

89. I shall analyse this argument in a little more detail and the Claimant's response to the same shortly. First it is necessary to identify the relevant part of the judgment of District Judge Jenkinson which is being challenged.

> "18. It is, however, possible to assign the benefit as opposed to the burden of such a contract. Taking the examples summarised at paragraph 10 (above), as is made clear from the cases cited at paragraph 19-055 of the 31st Edition of Chitty on Contract, if the author has actually transferred the copyright in

the work to the publisher, he can assign that as an item of property, and that wages or salary due to the employee are normally assignable.

19. The paying party, whilst contending that the assignment is actually a novation, does not contend that to the extent that it represents a valid assignment, it is technically deficient in any way. For that reason I am of the view that the benefit of the conditional fee agreement (the right to be paid in the event of the claim being successful) has been validly assigned to SGI Legal LLP and that the Claimant is entitled to recover the costs that would otherwise have been payable to Barnetts as a consequence of the subsequent settlement of this case. To the extent that it is necessary to consider these issues:-

(a) I am of the view that the extremely wide severability clause at paragraph 11 of the agreement between the administrators of Barnetts and SGI Legal LLP (as echoed at paragraph 8 of the agreement between SGI Legal LLP and Ms Jones) mean that even if the burden of the CFA cannot be transferred, the transfer of the benefit remains unaffected if it otherwise could be transferred;

(b) Whilst the right to be paid under the conditional fee agreement may be dependent upon ultimate success in the case:-

i. Success as triggered by the definition of "win" within the CFA was effectively a certainty given that liability had long since been conceded. The position is therefore effectively the transfer of an existing chose in action of future payment, rather than a mere expectancy;

ii. In any event, there has been consideration between the parties."

90. It is agreed between counsel (the same advocates who appeared before the court below) that the shortness of this particular aspect of the judgment reflects the fact that the "benefit" argument, as I shall call it, was not pursued to anywhere near the same extent as before this court, or by reference to the numerous authorities to which I have been referred. It encompassed brief submissions at the end of a full day. Accordingly there is no criticism of District Judge Jenkinson for the brevity of his reasoning. However, whilst it is accepted that the learned judge was correct in his statement of the general principle in paragraph 18, it is to be noted that the wide severability clause and its relevance does not form part of any argument pursued on this appeal.

91. The effect of this decision was that whilst there was no valid retainer for the post-assignment period entitling the Claimant to recover the costs of SGI Legal because the burden had not been transferred (see above), nevertheless he allowed the Claimant to recover the costs of Barnetts for the pre-assignment period, effectively passing into the hands of SGI Legal those costs, the entitlement to which he accepted had been validly assigned.

92. The relevant law on the assignment of benefit is accurately summarised in counsel's arguments and does not require separate elucidation by me. I now turn to those arguments.

Submissions

Defendant

93. Again, the legal matrix for Mr Hogan's submissions is succinctly set out in the second edition of the "**Law of Assignment**" by Marcus Smith QC in Part 1, this time at paragraph 2.100 and following:

> **"Significance of the distinction**
>
> English law draws a distinction between a present or existing chose in action and a future chose or "mere expectancy". The former can be assigned. The latter cannot be assigned, since there is no existing property right to assign. However, as will be seen, equity will enforce a promise to assign a future chose in action, provided this promise is supported by consideration. In such a case there will be an assignment of the property the moment it comes into the hands of the assignor.
>
> **The nature of the distinction**
>
> The distinction between the present and the future chose can be a difficult and an elusive one. A right to an intangible that is presently enforceable against the debtor is, clearly, a present chose in action and can be assigned. At the other extreme, there can be no rights over an intangible that does not presently exist, even if it may do so in the future and such a future right cannot be assigned."

94. The author goes on to expand the distinction at paragraph 2.105.

> "The distinction between present and future choses thus resolves itself into a three-fold classification: (i) presently enforceable rights; (ii) rights presently existing but enforceable only in the future; (iii) rights which do not exist at all (but may do so in the future). Choses falling into the first two categories are present choses; the third category describes things that are not rights at all. Choses falling into the first category of presently enforceable rights are in practice straightforward to identify. It is the distinction between rights presently existing but enforceable only in the future and future rights that present difficulties and that needs to be considered in greater detail.
>
> **The distinction between future choses and rights enforceable in the future**
>
> The distinction between future choses and rights enforceable in the future turns on existence and not enforceability. Rights enforceable in the future exist in the present. They grow out of a present legal relationship. They exist as future rights, even if they are contingent and not certain to occur. The nature of the contingent right - all the circumstances that will transform a potential right into a presently enforceable right - is defined by the presently existing legal relationship ..."

95. I make no apology for setting out this extract in full because as a statement of law it is not challenged, and lies behind the submissions made by both parties. In short, Mr Hogan submits that the chose in question here is in the third of Smith's categories, whereas Mr Marven argues that it is in the second.

96. Mr Hogan takes as his starting point the CFA agreement which is extracted in bundle 1 at page 257 and following. In particular he refers to the definition of "win" at page 262, which requires the claim for damages to be *finally decided* in favour of the Claimant either by

a court decision, or an agreement to pay damages. Accordingly, whilst there had been an admission, and an interim payment when Barnetts still existed, the case had not been "won" at that time, and it was only "won" when the Part 36 offer was eventually accepted, at which time Barnetts had been dissolved. At no point prior to then would Barnetts had been entitled to submit a bill. They had at best a contingent expectation that they would be paid if success was achieved in the case.

97. Because admissions could be withdrawn, causation issues could arise, and a variety of other contingencies could apply, there was not the sufficient degree of certainty which would enable this to be described as a contingent debt. He submits that the nature of the contractual relationship is crucial. Reference was made to the case of **Marron** v **Ingles[1980] WLR 983**, a decision of the House of Lords which dealt with the potential tax liability arising on the future sale of shares. The facts are not particularly important as much as the approach endorsed by Lord Wilberforce at paragraph 80.

> "First, was there a debt in September 1970? In my opinion there was not. No case was cited, and I should be surprised if one could be found in which a contingent right (which might never be realised) to receive an unascertainable amount of money at an unknown date has been considered to be a debt — and no meaning however untechnical of that word could, to my satisfaction, include such a right."

98. It is submitted that the situation prevailing here is similarly uncertain, so as to put the potential entitlement of Barnetts into the third category described by Smith. Accordingly, says Mr Hogan, the court should be focused on the circumstances in which equity might step in to make this an enforceable agreement or promise to assign.

99. Mr Hogan makes reference to three other authorities which are not entirely consistent with each other, but from which he believes that the principle that a right which is contingent on the happening of a possible future event is not capable of being assigned, is sustainable.

100. The first and most recent of these is the case of **Raffaissen Zentralbank v Five Star Trading LLC [2001] EWCA Civ 68**, a case which involved the assignment of marine insurance policies. The question arose as to whether or not such assignments were valid, when the insured event occurred, namely a ship collision, and in circumstances where the proceeds (insurance monies) were a particular interest to the party arresting the ship. Whilst it was accepted that an assignment of the insurance proceeds had been effective in equity, in relation to the assignment of a future chose, the Court of Appeal did not accept that there was any statutory basis for recognising the assignment. Mance LJ said at paragraph 75:

> "The distinction between present claims (which category includes rights that may mature in future under a presently existing contract) and future claims is not always easy. But future insurance claims which depend on future casualties which may never occur appear to me to fall clearly into the latter category and not to be assignable under s.136: see the discussion in Chitty at paras. 20-028 and 20-029."

101. Mr Hogan acknowledged the earlier conflicting authority of **Glegg v Blomley [1912] 3KB 474**, a case in which the plaintiff sought to execute a deed of assignment of her rights in

two separate actions, one of slander, one of misrepresentation, to her husband, to whom she had been indebted. It was held that such an assignment was not one of an expectancy, even though there was no certainty that the plaintiff would have won the respective actions, but one of property (i.e. a present chose in action) being the fruits of the action as and when recovered.

102. Insofar as there was an inconsistency, Mr Hogan submitted that an ostensibly supporting authority, namely the Commonwealth decision of **Shepherd v Federal Commissioner of Taxation [1965] 11 CLR 365** holds the key and may provide some scope for resolution. In this case, which was again related to taxation, the court was concerned with the question as to whether or not the purported assignment of royalties arising from the manufacture of castors under a licence agreement, in circumstances where sales and profits were uncertain and unpredicted, amounted to an attempt to assign an expectancy, as opposed to existing and identifiable property. It held the latter. However there were two helpful observations in the judgment of Kitto J upon which Mr Hogan relied. The first related to the pre-eminence of the agreement which gave rise to the arrangement and its terms which involved a question of construction. A similar approach to construction is invited in the present case. The second is an extension of the "fruits" analogy drawn in the **Glegg** case. At page 386, Kitto J said:

> "….Market conditions would then determine how successful his efforts to sell would be. But whatever he might do or desire to do, the existence of the appellant's contractual right would be unaffected, though the quantum of its product might be. The tree, though not the fruit, existed at the date of the assignment as a proprietary right of the appellants of which he was competent to dispose; and he assigned 90 percentum of the tree."

103. Mr Hogan's simple point arising from this observation is that in the case of a conditional fee agreement where the entitlement to costs did not arise until a win, not even the tree existed at the time of assignment.

104. If as Mr Hogan contends, this was a mere expectancy, there could still be resort to equity because the purported assignment would be construed as a promise to assign at some future date. As long as a promise of this nature is supported by consideration, equity will enforce the promise at the time that the property or future chose becomes a present chose in the hands of the assignor. The difficulty here, says Mr Hogan, is that it did not become a present chose until the case was won, which was nine days after Barnetts ceased to exist. As a proposition this is not controversial, if any entitlement under the CFA was a mere expectancy, although as will be seen, Mr Marven on behalf of the Claimant submits that this is not necessarily the case.

105. Finally, insofar as the Claimant seeks to circumvent the requirement of immediate entitlement by reference to an obligation to pay the disbursements regardless of success within the terms of the CFA agreement, Mr Hogan submits that this should be construed as no more than a simple right to be reimbursed, and thus is more suitably considered as part of the burden on any assignment.

Claimant

106. The Claimant pursues a series of descending alternative arguments, starting with the primary submission that the entitlement under the CFA was a contingent debt, as described in **Marren v Ingles**, and thus a present chose in action which could be assigned as a benefit. Mr Marven submits that a contingent debt is assignable even if it might never be paid, and to support this proposition he relies upon the authorities referred to above, namely **Glegg** and **Shepherd** and seeks to distinguish **Raiffeissen**.

107. Mr Marven submits that whilst payment under a CFA is conditional upon success, it is nevertheless a present entitlement and does not fall into the prohibited category (iii) described by Smith QC. It could not be categorised as a right which may exist in the future because it is based upon the terms of the CFA, even if ultimately payment may be nil. To reinforce his argument, he refers to the fact that there is at the very least an entitlement to the payment of disbursements.

108. He draws comfort from the ratio of the decision in **Glegg**, where the object of the assignment was the fruit of an action already commenced but which could fail altogether. In **Shepherd** a similar situation arose where ultimately the entitlement to payment might be nil, although on the basis of the agreement it was clearly identified as a present entitlement. He distinguished **Raiffeisen** on the ground that what the parties sought to assign was a possible future claim rather than one which was already in existence, and in the context of insured casualties this is entirely understandable; a situation giving rise to payment may never exist, whereas for a conditional fee agreement the entitlement is identified, even if ultimately nothing may be received.

109. Mr Marven moves from general principles to submit that on the facts of this case there was sufficient to enable near certainty of payment to create a present chose in action. As the judge at first instance did, he relies upon the admission of liability which occurred a year before dissolution. Furthermore, there had been an interim payment, and, submits Mr Marven, it would be fanciful to suggest that there was any prospect of non-recovery of costs. The withdrawal of any admission of liability, or challenges to causation could be discounted. Thus, even if this court were to conclude that as a matter of law a conditional fee agreement gave rise to a future entitlement which was only an expectation of payment, on these particular facts payment was a certainty, and at the time of the assignment there was a present chose in action, being the benefit to the costs which would ultimately be paid.

110. Because the assignment was supported by consideration, and in this respect he relies upon the finding of the learned district judge (although this is not really disputed) if it was to be construed as an agreement to assign, the principal requirement was satisfied, and it was an answer to the Defendant's argument that Barnetts no longer existed at the time any assignment arose (acceptance of the payment into court) and there was nevertheless a present

chose in action long before this stage; Barnett's were not in dissolution when it became obvious that the Claimant would win her claim.

111. As a further alternative argument Mr Marven makes what he describes as his contractual point. If this was not a valid assignment or an assignment agreement which would be enforced in equity, nevertheless it should be construed as a contract imposing a liability upon the Claimant to pay SGI legal costs which she would have had to pay to Barnetts. This would mean that there was a valid retainer, and the indemnity principle was satisfied. The issues in relation to **LASPO** compliance would be irrelevant because the constructed contractual agreement would amount to an agreement in respect of a liability for services already provided rather than the provision of litigation services prospectively. He relies upon **Wakeling v Harrington [2007] EWHC 1184** in support of this proposition.

Discussion

112. I confess that I do not find this an easy matter to resolve. The judge at first instance clearly based his conclusion upon the qualifying facts of this case, and I am reluctant to do likewise, tempting as it is, in view of the nature of the submissions which were focused upon relevant principles for general application. In particular I am conscious of the fact that other cases which are based upon different factual matrices may well be affected by my decision (unless this matter is appealed).

113. In their arguments, counsel have attempted to find parallels where the courts have been asked to define liabilities dependent upon future contingencies as present choses in action in somewhat different circumstances to those which prevail here. An insurance contract, in my judgment, is entirely different to a conditional fee agreement. The insurer and the insured enter into the arrangement in the expectation that the insured casualty as it has been described, will not occur, with the premium calculated to reflect the risk that it might. Accordingly, there is no expectation, as such, of the event arising. At the other end of the scale, where a product is created, or a work published, royalties are expected from any onward sale. The only issue is the extent of the profit (even thought the possibility remains of "nil" sales). As has been described, it is the *tree* which gives rise to the *fruit.*

114. Perhaps lying somewhere between these two "expectations" is the situation of the lawsuit where an individual has brought proceedings to claim damages for a particular cause of action. Because of the uncertainty of litigation, there is no inherent guarantee of success or certainty of ultimate payment, and yet the courts have permitted the rights to compensation under pending lawsuits to be assigned. It has been argued, in my judgment with a degree of force, that the concluded lawsuit is the situation most akin to that which prevails here.

115. It seems to me that it is important to have regard to the nature of litigation funding which was created by the introduction of conditional fee agreements in 1990. An arrangement which made the ultimate payment of fees for legal services provided dependent on a claim succeeding was not intended to introduce an unnecessarily speculative process into costs recovery. Solicitors (and indeed counsel) are not compelled to take cases which have little or

no prospect of success. Indeed, the converse is true. Although the regime has now changed with new statutory provision and regulation relating to the recovery of a success fee, the principle of "*no win no fee*" has been preserved. It is a principle which incorporates an element of contingency in the sense that if a certain event occurs (the action does not succeed) then the obligation to pay a debt otherwise properly incurred (for the services rendered) is extinguished.

116. It is axiomatic that legal service providers will only take on those cases which they expect to succeed. A risk will always remain of failure, and in the case of pre-**LASPO** CFAs this was a risk which was reflected in the cost of the insurance premium, and the level at which the success fee was set. Furthermore, the terms of the CFA, which is the legal retainer, will prescribe the basis on which the solicitor is to be remunerated, the hourly rates, etc and the debt is incurred as the work is undertaken. In other words it is entirely ascertainable at any given point in time, even though there cannot be certainty that ultimately the debtor will have to pay it. In my judgment it is properly described as a contingent debt arising out of a presently existing legal relationship in which everything is certain save for ultimate payment. As a proposition of law, it is not challenged that contingent debts which may not become payable are nevertheless debts.

117. Whilst the case of **Marren** made it clear that a contingent right which might never be realised to receive an unascertainable amount of money at an unknown date was possessive of too much uncertainty to amount to a present chose in action, in my judgment a conditional fee agreement entitlement does not fall into the same category. As I say, the amount is ascertainable at any given point in time, the point at which it becomes payable is ascertainable (the final conclusion of the case) and the expectation of payment goes beyond a mere hope or possibility (as might exist in the case of an insured peril materialising).

118. Setting aside the post **LAPSO** agreements, it seems to me that there would be an attributable value to any existing CFA agreement which was capable of being assigned from one solicitor to another. There will be cases where ultimate recovery amounts to a near certainty (claims for injuries to passengers for example, subject of course to issues of medical causation etc) and other cases where liability is less certain. These are matters which are likely to be reflected in the consideration paid for any assignment of a conditional fee agreement. (It is immaterial, in my judgment, that a new CFA agreement has been entered into, and thus this aspect does not depend upon the correctness of my decision in relation to the assignment of burden).

119. In my judgment, the proposition that an assignment of the benefit of a CFA agreement could only be effective in equity at the time the contingency arose would have a chilling effect on the efficacy of business arrangements which for a whole host of reasons legal service providers may wish to enter into. If Mr Hogan is correct with his proposition, a solicitor who had a number of CFA agreements in progress but who wished to cease to practise, could not transfer or assign those agreements unless he or they continued to exist as a legal entity. They would have no value for assignment if the solicitor taking over the conduct of the case could not recover the benefit of the work undertaken.

120. As far as the authorities are concerned, as I have indicated, the conditional fee agreement does not fit comfortably with any of these scenarios which establish the basis for distinguishing between a present chose in action and a future expectancy. Indeed, it is acknowledged in these cases, as well as by Marcus Smith QC in his leading textbook that the distinction is not an easy one to make. However, in my judgment it can be established that the uncertainty of entitlement does not render a contingent debt or right unenforceable. It is necessary to look at the broader circumstances including the terms of the agreement which gives rise to the entitlement, as well as the nature of the contingency. I am not assisted by analogies of trees and fruit, which in any event appear to have been developed as an aphoristic way of addressing more speculative situations than that which exists here. Although the uncertainty of any contingency arising on the facts in the case of **Marren** was sufficient to render the debt in that case no more than a future chose in action, as Lord Fraser said at page 990:

> "….the meaning of the word debt depends very much on its context. It is capable including a contingent debt which may never become payable ..."

121. It seems to me that the situation most akin to that which exists in a conditional fee agreement is that of **Glegg**, where the benefit was dependent on a successful outcome of ongoing actions, although there is the obvious distinction that in the case of the CFA there is a direct correlation between the benefit and the work undertaken and of course the benefit is ascertainable at any point in time.

122. Accordingly, in my judgment, the context here, the conditional fee agreement, was one which allowed the contingent debt, referable to an ascertained amount and an ascertained point at which it would be paid in the future, assuming success, to be classified as a present chose in action capable of assignment.

123. If I am wrong about this, and as a matter of general principle the debt is too speculative or unascertainable so as to amount to a mere expectancy, on the peculiar facts of this case I am satisfied that there was sufficient certainty of payment at the time of the deed of assignment against the background of an admission of liability and the receipt of an interim payment so as to allow the benefit to be constructed as a present chose in action. In this respect I agree with District Judge Jenkinson and endorse his reasoning. The suggestion made by Mr. Hogan that admissions of liability could be withdrawn, or causation issues arise is, respectfully, a fanciful one on the facts of this case.

124. It is unnecessary to address the alternative arguments, in particular the contractual point (see paragraph 111) pursued by Mr Marven. However, I should comment briefly on his submission, which was very much by way of a fall back position, that the obligation to pay disbursements would render the agreement as presently enforceable, and not as giving rise to a contingent debt. In this respect I agree with Mr Hogan that this is no more than an obligation to reimburse solicitors for specific expenses which they have incurred and could not be classified as a benefit under the agreement. I do not need to consider by way of mental gymnastics whether it becomes a burden, because it is sufficient for this argument that if the

classification of the CFA benefit depended on construing the disbursements in this way, in my judgment it would not have turned a future chose in action into a present chose. However, for reasons already given it did not so depend.

Conclusion

125. It must follow from the respective decisions above that I allow the Claimant's appeal and dismiss the Defendant's cross-appeal. Both the burden and the benefit of this conditional fee agreement were assigned by Barnetts to SGI Legal, and there was a valid retainer allowing recovery of both pre-and post-assignment costs. The indemnity principle is satisfied.

126. I am conscious that my decision may not be the end of this matter, not least because there are outstanding issues of cost assessment to be resolved. In the first place I remit the matter to the Regional Costs Judge to give appropriate directions on paper. In relation to any ancillary orders on these appeals, I anticipate that these can be agreed, and I invite counsel to submit the terms of a final order, together with any typographical corrections prior to an agreed date for handing down of the judgment.

HHJGWQC
27.4.2016