# Passing the baton

**Andrew Hogan** looks at the problems surrounding assignment of CFAs

Assignment of conditional fee agreements is a topic that has come to life in recent months, with an increased interest in the applicability, scope or correctness in law of the old High Court case of *Jenkins v Young Brothers Transport* [2006] 1 WLR 3089. A number of cases are currently proceeding through the county court (see news, page 3), asserting that purported assignments are ineffective in law to assign CFAs, with catastrophic effects for the recovery of costs. Undoubtedly this issue is one that will go to the Court of Appeal in 2016. Why then, some two years after the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 – and a decade after the High Court case noted above – has this issue now become one of pressing import?

The reason is not hard to discern. The timing is bound up with the lag between the implementation of LASPO 2012, and cases concluded in the two years since that case, now proceeding to detailed assessment. The perceived problem that assignment of conditional fee agreements was meant to remedy was actually very simple.

Cases incepted under a CFA before 1 April 2013 will carry a recoverable success fee, often of 100%. If a client changed firms of solicitors after 1 April 2013, any new CFA would be subject to the provisions of LASPO 2012 – and even if the agreement provides for a success fee, this will not be recoverable on an *inter partes* basis.

So there was a powerful incentive on the part of solicitors, barristers and costs lawyers to search for a way to preserve the old CFA its recoverable success fee, notwithstanding the change in firms. This would have two benefits. Firstly, it would enhance the recovery of costs in an individual case where a client or an individual solicitor changed firm, so a different legal entity was acting for the client but there was a desire to continue funding the claim on the former basis. Second, this continuity would dramatically increase the value of a 'book' of work in progress, if this were being sold, or indeed, charged, for the purposes of valuing a practice for lending purposes.

## ASSIGNMENT OF CFAS

In recent years, solicitors firms have sought to use the doctrines of legal and equitable assignment to transfer the CFA and its obligations to the new firm. A change in the firm handling the litigation could occur in a number of contexts. First and most obviously, an individual client might wish to transfer firms because they are dissatisfied with the firm they initially instructed. Second, a solicitor may move to another firm, and their clients will loyally follow him. Third, a firm may wish to exit a particular market and sell off its 'book' of work in progress. And sometimes a firm will go bust, and the administrators or liquidators will seek to realise the assets of the firm, by selling the work in progress.

But the route of assignment of a CFA is legally dubious, and many commentators over the years have expressed doubts about whether it is a safe way to proceed. Chancery lawyers have long found the *Jenkins* case noted above to be legally dubious, and characterised it as a decision on 'its own peculiar facts'; always a term of abuse.

The reason for the dubious pedigree of Jenkins is simple: a solicitor's contract of retainer is a personal contract – despite the expressed doubts of those who would regard clients as ready packaged commodities, like pork bellies or orange juice. A personal contract is incapable of assignment, as the obligations it contains must be performed personally, by those who originally made the contract (test the matter this way: could the client assign his CFA to his brother to perform?). There is very longstanding authority going back some two centuries on what constitutes a personal contract, and the rule against assignment.

The consequence of an ineffective assignment will normally be to leave the obligations under the original CFA with the original solicitor, but the new firm of solicitors will probably have created a new contract of retainer – a novation – on the same terms as the old with the client. The problem for the recovery of costs in personal injury claims is that in respect of the first firm of solicitors, they will not have performed their obligations under the CFA, and so will have no accrued right to be paid. Accordingly, the measure of costs they can recover will be nil.

The problem with the novated agreements that the court will apply in the context of the second firm of solicitors, is that based on a pre-1 April 2013 model CFA, deemed to commence when the new firm takes over the case, the retainer will usually fall foul of the post 1 April 2013 formality requirements contained in the Conditional Fee Agreements Order 2013, and be unenforceable. Most obviously, such an agreement will simply not contain the written cap on the success fee that the statutory regime requires.

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In effect, many firms may be sitting on a time bomb in respect of the work in progress they think they have obtained, and the work they have done on the case in their own right.

## FURTHER PROBLEMS

But although issues may start with the question as to whether a CFA is capable of assignment at all – and if it is not assigned, what happens to the original agreement and the costs incurred under it – they certainly do not end there.

Many such arrangements, made as assignments, will have at the same time involved the creation of what is termed a 'backstop' CFA, which will be stated to take effect, if and only if, the purported assignment fails. Such an agreement is an attempt to pre-empt any unenforceability issues which might arise if the court, on detailed assessment, finds that the assignment has failed.

Attempts to save the situation after a costs order has been made may not be possible. Various devices might be contemplated such as a deed of variation, or a deed of rectification, or the use of the doctrine of severance - as were raised under the last round of enforceability challenges, made under the Conditional Fee Agreements Regulations 2000.

In such circumstances, although it may be argued that a deed of variation or a deed of rectification or the doctrine of severability can be used to remove the success fee or otherwise cure any non-compliance with the statutory requirements, those arguments are unlikely to succeed for reasons of public policy; as the acceptance of the arguments would run counter to the statutory scheme regulating CFAs.

## 'WAIVER' OF RIGHTS

A further argument, that is unlikely to have any success, is the notion that a client can be taken to have 'waived' the statutory rights to consumer protection by pursuing a claim for costs based on an unenforceable CFA.

It is accordingly conceptually odd that it can be contended that it is consistent with public policy that a 'back-up' CFA can be used to anticipate and circumvent in advance, an assignment failing and a CFA being found to be unenforceable. Such an agreement is really no more nor less than a client agreeing to waive their rights if the original CFA is found unenforceable, and agreeing to be bound by a new one. Or analogous to an anticipatory severance clause, often found in commercial contracts. That sits uneasily with the goal of consumer protection, that the client's contractual position vis-à-vis his solicitor hinges on whether a third party raises a challenge to the enforceability of the CFA on detailed assessment.

Why would public policy permit such an outcome, when rectification, variation, severance and probably waiver would not be allowed?

Indeed the argument that such a second, inchoate CFA will have such an effect depends on a further, single High Court authority, where the key arguments of public policy do not seem to have been squarely addressed by the High Court judge. If this authority proves readily distinguishable, as it may, then the so-called 'back up' CFA may prove to be no comfort at all. This issue will undoubtedly be litigated, I suspect in the next few months, in one of the cases that is now coming through to detailed assessment.

## ACTING AS AGENT

Another area that no doubt will fall to be argued about in the context of claims for costs, are the cases where a firm of solicitors effectively passes on a client to a new firm of solicitors, which is said to act as agent to the first firm's principal.

In fact, the first firm then fades out of the litigation, as the relationship is simply meant to permit continuation of a CFA without the need to make a new retainer. The so-called 'agent' is to all intents and purposes running the show. This relationship raises some interesting questions – which would probably deserve their own article.

There is still at least a year to run before these issues are finally decided – one way or another – in the appellate courts.

*Andrew Hogan is a barrister at Ropewalk Chambers in Nottingham specialising in costs and funding; blog: www.costsbarister.co.uk*