

Case No: JR 1503592

IN THE HIGH COURT OF JUSTICE

**SENIOR COURTS COSTS OFFICE**

Thomas More Building

Royal Courts of Justice

London, WC2A 2LL

Date: 18/02/2016

**Before**:

MASTER ROWLEY, COSTS JUDGE

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**Between:**

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|  | **Aileen Webb** | Claimant |
|  | **- and -** |  |
|  | **London Borough of Bromley** | Defendant |

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**Robert Marven (instructed by Phoenix Legal Services Ltd) for the Claimant**

**Matthew Smith (instructed by DWF) for the Defendant**

Hearing date: 6 November 2015

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MASTER ROWLEY, COSTS JUDGE

**Master Rowley:**

1. This judgment concerns a challenge by the claimant to a provisional assessment carried out by me on 23 September 2015. There is only one challenge to that assessment but it is a fundamental one. It relates to the first point of dispute taken by the defendant regarding the assignment of the claimant’s CFA from Lefevre LLP to Glamorgan Law LLP on 30 January 2014. Having considered the defendant’s point of dispute, the claimant’s reply and the documents on the file, I made the following provisional assessment:

*“Having seen the assignment - over which C asserts privilege - it is clear that there has been, if anything, a novation rather than an assignment and therefore a new agreement between C and Glamorgan Law. The new agreement does not comply with the CFA Order 2013 and is unenforceable. No quantum meruit applies. No fees, other than disbursements paid directly by C are recoverable in part 2.”*

1. It is now clear that the document described as an assignment between the claimant and Glamorgan Law was in fact lodged with the court in error. Privilege has been waived since the provisional assessment and a document described as an assignment between Lefevre LLP and Glamorgan Law LLP has also been produced. In addition to this further document, I have had the benefit of cogent submissions from Mr Marven for the claimant and Mr Smith for the defendant. In these circumstances, the provisional assessment cannot stand and I need to start afresh.
2. The relevant chronology is as follows:

14th of March 2012 – date of accident

23 March 2012 – Lefevre LLP instructed

11 June 2012 – CFA between the claimant and Lefevre LLP

19 July 2013 – Anthony Collins of Lefevre LLP died

July 2013 to Jan 2014 - the claimant’s case was conducted by Alice Anderson under the supervision of Peter Davies

30 January 2014 – Lefevre LLP ceased trading

30 January 2014 – assignment between the claimant and Glamorgan Law LLP

30 January 2014 – assignment between Lefevre LLP and Glamorgan Law LLP

6 June 2014 – consent order reflecting the terms of settlement between the claimant and defendant

1. A witness statement from John Peter Davies dated 2 November 2015 supports the claimant’s challenge to the provisional assessment. Mr Davies knew Anthony Collins from a previous firm and became partners in Lefevre solicitors in about 2005. (Mr Davies was also a partner in Glamorgan Law LLP). They were the only two partners in Lefevre LLP and therefore when Mr Collins died, Mr Davies, who is based in Cardiff, recruited Ms Anderson to work in Lefevre LLP’s offices in Kent.
2. Mr Davies says that he supervised Ms Anderson’s work from her employment in July 2013 or thereabouts until Lefevre LLP ceased trading in January 2014. Ms Anderson is described as being an experienced litigator but not one who had in-depth experience of personal injury cases. Mr Davies describes discussing cases with Ms Anderson “on an almost daily basis”, particularly the personal injury cases. He says that he became familiar with the claimant’s case during this time. He was provided by Ms Anderson with a detailed note regarding all ongoing civil litigation cases at the beginning of November 2013. A copy of the part of that note which relates to the claimant’s case is exhibited to Mr Davies’ statement.
3. Ms Anderson found herself new employers prior to January 2014 and she indicated to Mr Davies that they would be interested in taking on some of the civil litigation cases but not those involving personal injury where a CFA had been entered into prior to April 2013. As a result, Mr Davies states that he contacted four clients, including the claimant, by telephone with a view to offering them the opportunity for Mr Davies to continue to deal with them at Glamorgan Law LLP. Copies of telephone attendance notes dated 21 November 2013 and 9 December 2013 are attached to his witness statement.
4. Mr Davies’ attendance note for 21 November 2013 reads:

*“I rang Mrs Webb in relation to her claim against the Council. She told me that she was aware of my role as Tony’s former partner. She indicated that Alice Anderson had discussed with her the fact that Lefevre would be closing down. She understood that she would need to find other solicitors. I told her that it was for her to decide who she wanted to act for her. I told her that there was a possibility that Alice Anderson would be joining another firm in London and that she may be prepared to take on her case.*

*In the alternative, I indicated to her that I would be prepared to take on her case at Glamorgan Law, although I was based in Cardiff. I told her that I visited London about 2 or 3 times per month to do with my judicial and tribunal work and also meet with clients.*

*She expressed her sadness about Tony Collins’ passing. I told her that Tony and I had worked together for nearly 30 years. It was a sad day that I had to arrange for what was essentially his firm to be closed down.*

*I stressed to Mrs Webb that she was not under any pressure to instruct me to continue to deal with the case but that we would all be grateful if she could decide in the next couple of weeks what she wanted to do.*

*She thanked me for my call and indicated that she would get back to me as soon as I (sic) could.”*

1. The telephone note for 9 December 2013 states that *“she had decided to appoint my firm to take over the case.… I told her that I would contact her upon my return in the early New Year and assured her that in the meantime, the case would be looked after by Alice Anderson.”*
2. There is no real dispute between the parties as to the chronology set out above or indeed the evidence of Mr Davies. The parties do disagree as to whether or not the evidence I have set out demonstrates that the client had a degree of trust and confidence in Mr Davies. That issue relates to the decision of Rafferty J (as she then was) in the case of Jenkins v Young Bros Transport Ltd [2006] EWHC 151 (QB), but it is not the only issue for either party.
3. Mr Marven’s main position is that the case of Jenkins demonstrates a wide enough principle that a burden under a CFA which is sufficiently connected to a benefit in that CFA enables that burden to be assignable under the law of contract. The facts in terms of the rights and responsibilities under this CFA are indistinguishable from the case of Jenkins, and since Jenkins is a binding authority upon me, I should follow that authority and find that the CFA is validly assigned from one firm of solicitors to another. Mr Marven points out that the defendant does not appear to challenge the wording of the assignment itself and therefore, assuming that I find an assignment to be a legal possibility, then there are no issues to be taken regarding the form of wording used.
4. In order to make good his argument, Mr Marven started with the holding as recorded in the Weekly Law Reports’ version of the Jenkins decision. There it is stated that *“the general rule that benefit could be assigned but that burden could not were subject to a limited exception where the exercise of the right was expressly or impliedly conditional on the performance of the covenant and the performance of the covenant was related to the right; that the benefit of being paid was conditional upon and inextricably linked to the meeting by the original firm of solicitors of its burden of ensuring to the best of its ability that the claimant succeeded in his claim; and that, accordingly, both benefit and the burden of the conditional fee agreement could be assigned as within an exception to the general rule.”*
5. In contrast, it was only stated per curiam that *“the fact that the contract involved personal skill and confidence was no bar to its assignment since the claimant’s motive in following his solicitor to her new firms was his trust and confidence in her skill, expertise and professional judgment. Whether, absent that trust and confidence, a conditional fee agreement could validly be assigned is not a matter on which it has been necessary to reach a conclusion.”*
6. At paragraph 14 of Jenkins, the parties’ rival contentions are set up, according to Mr Marven. Whereas it was common ground that the benefit of the contract could be assigned but that, subject to limited exceptions, the burden could not, “the parties differed as to the extent of those exceptions.” Mr Marven referred me to several passages within the decision where the need for the burden to be inextricably linked to the benefit came from various previous decisions. He then took me to the decision beginning at paragraph 28 of the judgment which reveals that, since the facts in the case were considered to be singular, the court had not derived assistance from the authorities on assignment to which it had been referred. What was significant in the court’s conclusion was the intention behind the course adopted by the claimant and his solicitor. The claimant had wished to follow his solicitor to her new firms “and with good reason. Three firms agreed with him and with one another.” The court accepted that it was the original CFA which needed to be considered when looking at the benefit and burden of the contract that are intended to be passed to the new party. Having set out some of those terms the court then stated that *“it follows that the benefit of being paid was conditional upon and inextricably linked to the meeting by Girlings of its burden of ensuring to the best of its ability that Mr Jenkins succeeded. As Lord Templeman in Rhone v Stephens [1994] 2 AC 310 said, the condition was relevant to the exercise of the right. In our judgment, upon the facts in this case the benefit and burden of the CFA could be assigned as within an exception to the general rule.”*
7. The Court of Appeal in Davies and Others v Jones and Another [2009] EWCA Civ 1164 considered, amongst others, the case of Jenkins at paragraph 25 onwards. Mr Marven drew my attention to the fact that the description of the Jenkins case at paragraph 25 contained no reference to the need for personal trust and confidence in the particular solicitor. Rafferty J’s decision was described by The Chancellor as being that *“the benefit and burden of the CFA might be assigned because ‘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 [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.”*
8. At paragraph 27 of Davies the test set out by the older cases such as Rhone v Stephens was said not to be “disapproved” by the Jenkins case, amongst others.
9. From these authorities, Mr Marven submitted that the burden under a contract can be assigned where that burden is sufficiently closely connected to the benefit that was also being assigned. Here the CFA was assigned between the solicitors by an agreement which is not criticised in itself. The case law demonstrates that an assignment can take place where the benefit and burden are inextricably linked and the decision in Jenkins demonstrates that this can occur in the context of a CFA. As a result, the claimant’s entitlement to seek costs under the CFA, once assigned to Glamorgan Law LLP in Part 2 of the bill of costs ought to be recoverable in principle.
10. Mr Marven asserted that the need for personal trust and confidence under a personal contract was an Aunt Sally set up by the defendant in Jenkins. In any event, the rationale of personal contracts was not an exception to the rule that the burden could not be assigned. In fact it was an exception to the rule that benefits could be assigned. In other words, the benefit of a contract which was peculiarly personal to one party could not always be assigned to a third party by the other contracting party. Mr Marven gave the example of a motor insurance contract where the insured wished to transfer the benefit of that contract of insurance to another driver. The contract of insurance had been written on the basis of the personal circumstances of the motorist. The benefit of that contract could not be assigned to another motorist. On this point Mr Marven also relied upon passages from Chapter 24 of The Law of Assignment by Marcus Smith QC and, in particular, the approach taken in the decision of Shayler v Woolf [1946] 1 Ch 320 (CA) to illustrate his point.
11. Mr Marven’s secondary position was that the evidence set out above was sufficient to demonstrate that this case was factually materially the same as Jenkins. Mr Marven did not go so far as to say that Mr Davies had had day-to-day control of the case but that he had had a measure of conduct before the transfer and the claimant transferred the case to him because of the trust and confidence she reposed in him.
12. The fact that the claimant had consented to the assignment did not, in Mr Marven’s submission, render the transfer of the case to be a novation of the agreement rather than an assignment. In Jenkins the client had signed client care letters in respect of both transfers demonstrating his agreement. One of those client care letters was signed prior to the assignment being signed and the other was signed after the assignment was created. The defendant’s case regarding novation was therefore undermined by the factual similarity between Jenkins and the present case.
13. Mr Smith’s skeleton argument sets out the material facts in much the same terms as I have set them out above in this judgment. Mr Smith then submitted that the evidence was very clear that a novation has occurred on the basis that the parties clearly approached the transfer of instructions by obtaining the agreement of the claimant to both firms of solicitors. As such it was a consensual re-contracting. Despite the description of the document as being an assignment, the involvement and consent of the claimant prevented the process from being an assignment even if a provider of services such as this could validly transfer its rights and obligations to another provider without the customer’s consent.
14. In his submissions, Mr Smith amplified his skeleton argument on the issue of novation. He said that he had not put forward as a proposition of law that the claimant’s consent prevented the transfer being an assignment rather than a novation. But on the facts of this case, Mr Smith’s view was that the claimant and her old solicitors had agreed to terminate their relationship and the claimant and her new solicitors had agreed to start a new relationship. The assignment between the claimant and Glamorgan Law LLP was just about sufficient to amount to a conditional fee agreement that amounted to a retainer for Part 2 of the bill.
15. Having said that this argument ought to conclude the matter, Mr Smith then went on to deal with the issues raised by the Jenkins decision. The evidence here, in Mr Smith’s submission, was not at all like the evidence in Jenkins. The telephone attendance note for the call on 21 November 2013 smacked of being the first time Mr Davies had ever spoken to the client. Therefore the central element in Jenkins of a long-standing relationship creating trust and confidence was not present. Instead, what was present was a solicitor able to contract on behalf of both firms who asked the claimant whether she would like to come to the second firm in which he was a partner. She said that she would and that was unarguably a new contracting. If it been an assignment there would have been a letter or telephone call to say that the CFA was now with Glamorgan Law LLP and that hopefully the claimant would be happy with this but if she was not she would have to go elsewhere.
16. In respect of Jenkins, Mr Smith also reviewed paragraphs 28 onwards of Rafferty J’s decision. He referred to the comment made that the authorities reviewed in Jenkins were ones from which the court said it had not derived assistance but that it was the intention of the parties that was significant. Those parties – the three firms of solicitors and the claimant – had agreed with each other about the transfers. Such agreement in fact pointed towards a novation having taken place.
17. The remainder of paragraph 28 suggested, in Mr Smith’s view, that the court found it repugnant that an outsider (the defendant) should challenge the propriety of an agreement which had not been challenged by either party within it. The court referred to “a novel approach to the administration of justice” and it was clearly one which the court found to have no merit. In paragraph 30, and having found the authorities provided no assistance, the judgment then referred to the inextricable linking of benefits and burdens as set out in Rhone v Stephens.
18. In Mr Smith’s submission, the two sentences in paragraph 31 of Jenkins - *“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”* - showed that the issue of trust and confidence was absolutely central to the decision-making process. The court expressly stated that it did not have to reach a conclusion on whether a CFA could be validly assigned absent that trust and confidence. In Mr Smith’s submissions, no general principle could be extracted from this ratio and it was entirely fact specific.
19. Mr Smith further pointed to sections later in the judgment regarding materiality of breach and success fees which did not need to be included given the decision that the assignment was valid. A more cogent analysis would have been for the court to find that novations had occurred but with no material breach of Regulation 4 of the CFA Regulations 2000. This would still have enabled the claimant to have recovered his solicitor’s fees.
20. In Mr Smith’s submission, a general principle as broad as Mr Marven had suggested could be extracted from Jenkins, would mean that the “exception” would in fact be the norm. As long as the burden was inextricably linked to the benefit then that burden could always be assigned which was not the general position. Mr Smith took me at some length through the decision in Davies v Jones. He described it as a case where the end party was said to be bound by obligations that should have been dealt with by the intermediary (the defendant in that case). The court found that, in the absence of a covenant in the transfer from the intermediary to the end party binding that end party to perform and observe the intermediary’s obligations, those obligations could not be imposed on the end party but remained the obligations of the intermediary alone.
21. Mr Smith also took me to the facts of Rhone v Stephens. There, the obligation sought to be imposed was that of repairing the roof. Lord Templeman considered that to be an independent provision and that the reciprocal benefits and burdens regarding support of the adjoining property were not sufficiently intertwined with the repairing of the roof for that burden to be assigned with the other benefits.
22. Mr Smith said that Equity had to be involved in these property cases because they occurred many years after the original events had occurred and dealt with property rights. A subsequent purchaser might not want to comply with obligations previously undertaken and it was not always possible or appropriate simply to strip the new owner of the property in order to enforce the right. The court was driven, via Equity to decide whether or not the exercise of a right required dealing with the burden as well. This was very different from cases involving services such as the present case. In Mr Smith’s submission, if the Jenkins decision had been decided on the basis set out by Mr Marven, then the Court of Appeal in Davies could simply have followed that approach and dealt with the case very simply and easily. However, the court did not do so and instead, made its criticism of the identification by Rafferty J of the correct benefit and burden in Jenkins.
23. In paragraph 21 I have recorded Mr Smith’s submission that the assignment document between the claimant and Glamorgan Law LLP was, according to the defendant, just about sufficient to create a CFA. On the face of it, therefore, there would not appear to be any purpose in the defendant’s challenge to the claimant’s costs. Underlying the argument so far set out, however, is the point that a new agreement entered into on 30 January 2014 would fall within the regime that came into play on 1 April 2013. That regime rendered irrecoverable success fees in CFAs in cases such as this. A novation would therefore mean a new agreement had been created post 1 April 2013 and any success fee claimed would be irrecoverable. An assignment would mean that the CFA continued from June 2012 and the success fee would continue to be recoverable in all parts of the bill.
24. Mr Marven said that the Jenkins case also involved a significant underlying issue which was impacted by whether the CFA had been assigned or novated. The importance of the distinction related to the CFA Regulations 2000 which applied at the time and which required certain formalities to be undertaken prior to CFAs being entered into or varied. Those formalities had not taken place on the transfer of the CFA to the second and third firms. Therefore if the transfers were found to be novations of the original contract they would have been invalid and therefore render the CFA unenforceable in respect of the second and third firms’ costs. That was the contest between the parties and, in Mr Marven’s submission, it was clear from the decision in Jenkins that the court preferred the assignment rather than the novation argument.

Decision

1. At the end of Mr Marven’s submissions, I asked him what would occur if the insurance company in his motor insurance example had been asked to consent to transfer the insurance to another motorist and they had agreed to do so. Would that be a novation or an assignment? Mr Marven responded that it could be either and that in certain contractual situations it was permissible to take more than one route to achieve a particular end. He gave me the example of a new contract or a variation of an existing contract.
2. I accept that in some situations two contractual routes to the same destination may be possible. Equally, however it is clear that there may be fundamental differences between the two routes taken. The classic example is Street v Mountford [1985] AC 809 where two parties a relationship agreed to reduce their relationship to writing in respect of occupancy of premises. The categorisation of that agreement as being a licence rather than a lease was very important, even though either contractual route was theoretically possible.
3. In the 32nd edition of Chitty at paragraph 19-089 the editors state that *“the effect of a novation is not to assign or transfer a right or liability, but rather to extinguish the original contract and replace it by another.… As novation is different from assignment, it follows that the rule that assignment is “subject to equities” does not apply to novation.”* It seems to me that the relationship between assignment and a novation is more akin to, for example, a lease and licence than it is to the example given to me by Mr Marven. Accordingly, consideration of the factual matrix requires me to conclude that either an assignment or a novation took place: it is not open to me to find that the facts could admit of either interpretation.
4. As I have set out above, Mr Marven’s submission is that consent of the non-assigning party is not fatal to the document being an assignment. Mr Smith did not submit that consent was fatal to an assignment either. It is clear that in this case the claimant did provide her consent to the transfer from Lefevre LLP to Glamorgan Law LLP and it would seem therefore, based on both counsel’s submissions, that an assignment could take place in those circumstances.
5. However, my reading of the definition of novation in the commentaries suggests that consent of all the parties is a determining feature of a document being a novation rather than an assignment. For example, in the Law of Assignment (second edition) by Marcus Smith QC at paragraph 5.105 a novation is described in the following terms:

*“Provided the parties to the contract consent, contracts of any kind may be transferred. Novation takes place where the contracting parties agree that a third party – who must also agree – shall stand on the relation of either of them to the other. This is not an assignment because the consent of all three parties is necessary and, more importantly, because the rights and obligations under the original contract are not transferred. Rather, a new contract comes into being, and it is this new contract that is the source of the rights and obligations of the parties to it. The fact that a new contract comes into being is clearly demonstrated by the requirement that it be supported by consideration.”*

1. Similarly, according to Chitty at paragraph 19 – 087 novation is described in these terms:

*“Novation takes place where the two contracting parties agree that a third, who also agrees, shall stand in the relation of either of them to the other. There is a new contract and it is therefore essential that the consent of all parties shall be obtained: in this necessity for consent lies the most important difference between novation and assignment.…”*

1. Neither of these commentaries, as far as I can see, specifically states that an assignment does not take place where consent has been given. But it does seem to me from the foregoing paragraphs of the commentaries that once all the parties are in agreement, the new contracting party and the non-assigning party are in reality entering into their own legal relationship having established all the classic components of a contract between themselves.
2. In contrast, the commentaries’ description of assignments relate either to transfers of property as Mr Smith described, or to the assignment of debts so that the new contracting party can seek to recover the money owed. In neither situation is there any attempt to deal with the non-assigning party and so the question of consent does not apply.
3. It does not appear to me that the decision in Jenkins seeks to deal with the issue of consent either. Whilst Mr Marven said that it was the defendant’s position that a novation had occurred, it seems to me that the defendant’s counsel’s arguments were aimed simply at the question of whether the assignment was a lawful one or not. Paragraph 21 of the judgment records that the parties were agreed that if there was no signed agreement then the claimant had entered into a new contract with the second and third firms by novation of the CFA. There is no discussion or finding as far as I can see in relation to the issue of consent that the claimant clearly gave by signing the client care letters.
4. The fundamental distinction between a novation and an assignment is whether the first contract is brought to an end with a second contract beginning, possibly seamlessly, with the new contracting party. In Jenkins, it is clear that the claimant wished to follow the solicitor who was dealing with his case from one firm to the next and as such did not want to end that relationship. The fact that the solicitor was housed in a different firm of solicitors made no difference to that position.
5. Here the claimant found herself in the unfortunate position of being required to change firms of solicitors as a result of the untimely death of Mr Collins. He was not only the solicitor dealing with her case but also effectively the sole principal of the firm. Mr Davies’ attendance note refers to the closing down of “what was essentially his [Mr Collins] firm.” Having employed a solicitor to deal with the day-to-day conduct of cases so that Lefevre LLP could continue to trade “for the benefit of Anthony’s widow” until January 2014, the firm was closed down at that point. Mr Smith submitted that on the facts of this case the claimant and Lefevre LLP agreed to terminate the relationship and that the new solicitors agreed to start a new relationship. Mr Marven did not accept that categorisation and said that there was nothing in the evidence to indicate any termination of the retainer and relied on the deed erroneously completed by the claimant with Glamorgan Law LLP in this respect.
6. It seems to me that the discussions regarding the closure of Lefevre LLP can only be described as an intention to end the relationship between the claimant and the first solicitors because there was no option but to do so. The fact that the claimant was prepared to instruct Glamorgan Law LLP does not seem to me to evidence any intention of the claimant to continue with the original firm. At most, it indicates a wish for Mr Davies to continue with the case. Unlike in the case of Jenkins, where Ms Pearce ran the claimant’s case herself, I do not accept, based on the evidence, that Mr Davies can be described as running the claimant’s case here. I agree with Mr Smith’s assertion that the telephone note suggests that Mr Davies was introducing himself to the claimant in November 2013 and the fact that he may have been familiar with the case through his discussions with Ms Anderson does not change that position.
7. It also seems to me that the claimant, faced with the closure of her solicitors firm was always likely to accept the offer from another solicitor who was familiar with her case to take on that case, rather than for the claimant to have to find a new solicitor. But the nature of the attendance note in November 2013 is, in my view, clearly one where the claimant is being asked to consider her options. It might have been that Ms Anderson alighted at a firm which would take the case on. It might have been that the claimant looked for another firm closer to her home. The requirements of the SRA Code of Conduct in terms of the client’s entitlement to choose her solicitor makes it virtually impossible for one firm to take over the case load of another firm without the consent of the client. Consent might have been sought, as Mr Smith suggested, after the transfer had taken place and on the basis that if the client did not wish to accept the fait accompli she would have to find another firm. But that is not how this transfer took place. The choice of further representation was laid squarely at the claimant’s door. It seems clear to me that it was a termination of one retainer and a new contracting of a second retainer. In my judgment, it was undoubtedly a novation of the CFA and not an assignment of it.
8. In case I am wrong that a novation has occurred, I should deal with the question of whether a valid assignment had taken place. For the reasons I have just given, I do not accept that the claimant reposed her trust and confidence in Mr Davies in a manner akin to that of Mr Jenkins and his solicitor. If anyone were to have enjoyed that trust and confidence it would be Ms Anderson who did not transfer to Glamorgan Law LLP.
9. In my view the decision in Jenkins is not as broad as Mr Marven urged me to conclude. The broad statement of principle in the holding is of course simply the Law Report writer’s description of the holding and it is their decision to decide that the issue of the personal contract was only per curiam. Within the body of the judgment itself, Rafferty J traces the history of the discredited “pure principle of burden and benefit” and its revision to the narrower “conditional benefit” test where the burden needs to be closely connected to the particular benefit. The description in paragraph 30 of the benefit and burden is in my judgment a broad one. It is in essence little more than payment of money for work carried out. That does not seem to me to be consistent with the general presumption that a burden cannot be assigned and decisions such as that of the House of Lords in Rhone v Stephens as relied upon by Mr Smith. Indeed Rafferty J concludes that the authorities had not assisted her in her decision and instead it was based on the intention of the parties to continue their relationship. I accept Mr Smith’s categorisation of the sentences in paragraph 31 as being central to the decision. It seems to me that the only reading of this decision is that the trust and confidence Mr Jenkins had in Ms Pearce was crucial. Where, as here, that trust and confidence is lacking, the decision in Jenkins is not binding upon me because the facts are clearly distinguishable. As such, the attempt to assign the burden of the contract along with the benefit fails in any event.

LASPO

1. If I found myself against his main submissions, Mr Marven’s final argument involved an exhortation that I should interpret Section 44 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (“LASPO”) in a purposive manner. Section 44(6) contains the saving provision which continues to allow for the recoverability of success fees on CFAs in costs orders made after 1 April 2013 where the CFA has been made prior to 1 April 2013 and if “(a) the agreement was entered into specifically for the purposes of the provision to P [the claimant] of advocacy or litigation services in connection with the matter that is the subject of the proceedings in which the cost order is made…”
2. Mr Marven asked me to interpret the word “agreement” at the beginning of that subsection to include the claimant’s agreement with her solicitors overall. In other words, the CFAs with both firms of solicitors constituted a single “agreement” for the purposes of s44(6) LASPO.
3. The reason that a purposive approach to the Act should be undertaken would be to avoid what Mr Marven described as a hybrid claimant. He submitted that the purpose of LASPO was for claimants to run their cases under either the pre-or post LASPO arrangements. If success fees and ATE premiums were not to be recoverable then the claimant should have the protection of QOCS and the benefit of the 10% increase on damages arising from Simmons v Castle [2012] EWCA Civ 1288. A literal interpretation of LASPO would mean that the success fee of the second CFA would not be recoverable and therefore would have to be paid by the claimant. Yet she would not have the benefit of any Simmons damages or QOCS protection because of the first CFA. As such she was falling between two stools and that was desperately unfair.
4. Mr Smith’s overall response to that argument was to suggest that I was being asked to import a considerable number of words into the Act (or the subsidiary CFA Regulations 2013 which are in identical terms so far as is relevant) in circumstances where the wording was perfectly clear. On a narrower note, Mr Smith also submitted that the QOCS position in CPR 44.17 is not yet resolved and so the claimant may in fact have had that protection in any event.
5. In my judgment the provisions of LASPO are entirely clear and do not require, nor should be subject to, a purposive interpretation in the manner Mr Marven requests. Whilst there are undoubtedly parties for whom the transitional provisions cause some hardship, that is no reason to seek to construe the statutory provision in any way other than by its plain meaning. CFAs entered into from 1 April 2013 onwards are made on the basis that the success fee is a matter between the solicitor and his client. The recoverability of the success fee is a thing of the past save for very limited exceptions. A personal injury claim of the sort involved in this case is not one of those exceptions. Given my decision that the claimant entered into a new agreement with Glamorgan Law LLP in January 2014, the success fee in relation to that agreement is not recoverable.

Further Argument

1. The foregoing paragraphs represent the judgment I intended to hand down on 6 January 2016. The conclusions I had come to were that the agreement between the claimant and Glamorgan Law LLP could be considered an effective CFA and as such the base costs were recoverable even though I had found that the success fee was not recoverable.
2. Shortly before the hearing, I received a letter from the defendant solicitors and I received submissions from Mr Smith in the same vein at the hearing. The submissions were to the effect that I had overlooked part of Mr Smith’s skeleton argument at the original hearing and as such I had not dealt with the question of whether or not the agreement that Mr Smith had accepted could be construed as a CFA was in fact a valid CFA.
3. Mr Smith’s skeleton put the matter this way. On the basis that the agreement constitutes a CFA made after 1 April 2013 the CFA is unenforceable by virtue of s.58 of the Courts and Legal Services Act 1990. This is so because the CFA provides for a success fee of 100% but does not comply with the conditions in section 58(4B) of that Act which is required given that this was a personal injury claim.
4. The letter received from the defendant solicitors expanded upon that point in the following paragraph:

“By article 5 of the Conditional Fee Agreements Order and s.58(4B)(c) of the Courts and Legal Services Act the maximum prescribed success fee in proceedings at first instance is 25% of the general damages for pain, suffering and loss of amenity and damages for pecuniary loss other than future pecuniary loss (net of CRU). By section 58(1) and 58(4B)(a) & (b) CLSA, it is a condition of enforceability that the CFA state that the success fee is subject to a maximum and that that maximum (i.e. 25% of the descriptions of damages just referred to) be expressed (as a percentage) in the CFA.”

1. Mr Marven’s argument at the hearing to counter the defendant’s point was that this second CFA was simply a continuation of the existing arrangements. Consequently any apparent gaps in the relevant wording were resolved by the understanding that the claimant already had in respect of her CFA arrangements. She was expecting the success fee to be recoverable from the defendant. To the extent that it was not recoverable, it could not be claimed against her based on the existing arrangements.
2. Mr Marven took me through some of the definitions contained in the “what you need to know” companion document to the original CFA to seek to make good his point. In essence he said that the solicitors were unable to recover the CFA from their client. It was not simply a case of having to assume that they would not seek to recover the success fee from their client. It was, according to Mr Marven, inconceivable that Glamorgan Law LLP would recover a success fee from their client if the case was pursued between solicitor and client.
3. Consequently the effect of the arrangement caused no offence to the new regime because it simply removed the recoverable success fee without replacing it with a success fee recoverable against the client.
4. The distinction between the solicitor being unable to recover successfully from the client and simply choosing not to do so (i.e. could not rather than just should not) was drawn by Mr Marven caused me to query whether or not the circumstances of this case were analogous to the Court of Appeal decision in Jones v Caradon Catnic Ltd [2005] EWCA Civ 821. Based on the distinction drawn out, Mr Marven did not think that the case was analogous. However when responding, Mr Smith said that not only was it analogous but a conclusion that the CFA complied with the statutory requirements would, to quote Laws LJ in Jones, go “flat against the grain” of the aim of those Regulations.
5. Mr Marven’s attempt to persuade me that the CFA was compliant with the 2013 Regulations was always going to be an uphill battle. Whilst he marshalled his arguments as well as could be, I suspect it will come as little surprise to him that I do not accept that the document drafted as an assignment between the claimant and Glamorgan Law LLP proves fit for purpose as a CFA between those two parties. The explanation and limitation on the success fee potentially recoverable from the client is a fundamental feature of CFAs post 1 April 2013. It is not something to be left to the vagaries of implication, particularly via an agreement which I have concluded had already come to an end.
6. I do not need to recite any of the case law to confirm that non-compliance with the Regulations is fatal to such an agreement for what is said to be a Draconian sanction is well known. But it is undoubtedly the circumstance here and I need to revise my original conclusion to confirm that in fact Part 2 of the Bill of Costs i.e. those costs relating to Glamorgan Law LLP are not recoverable either as to base costs or as to the success fee.

Conclusion

1. Given that the parties have seen all but the last few paragraphs of this decision previously, I would like to think that any consequential matters could be resolved without the need for parties to attend a further hearing. I have relisted the case for 10 o’clock on 18 February 2016 so that this decision can be formally handed down but I am not expecting any attendance from the parties. If there are any matters that have not been resolved then hopefully they could be dealt with briefly in correspondence. If however attendance at the handing down is expected that I would ask the parties to notify each other and my clerk.