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Are Defendants entitled to pre-issue/ pre-service costs?

The Civil Procedure Rules and the more recent Jackson reforms emphasise early settlement of disputes without legal proceedings.

Pre-action protocols have been developed in a number of areas to this end, although these are often criticised as promoting the front-loading of costs. The Protocols include some specific provisions that relate to the recovery of a Claimant's pre-action costs and the law relating to the recovery of pre-action costs by a Claimant is fairly well settled. Costs practitioners will be familiar with the line of case law beginning with *Bright's Trustee v Sellar [1904] 1 Ch 369* through to *Re Gibson's Settlement Trusts: Mellors and Another v Gibson and Others [1981] Ch 179*.

What then of a Claimant's liability to a Defendant in costs?

The Supreme Court Act 1981 S.51 now provides simply that "costs of and incidental to proceedings are in the discretion of the Court." CPR 44.2 contains the Court's general discretion as to costs.

It seems therefore that the rules provide little specific assistance in this area and that case law will be of particular relevance.

In circumstances where a claim is abandoned prior to the issue of proceedings, costs will not usually be recoverable by a Defendant. In *McGlinn v Waltham Contractors Limited & Others [2006] 1 CLR 27* HHJ Coulson QC noted that:

"Unless circumstances are exceptional, and thereby give rise to some sort of unreasonable conduct, costs incurred by a Defendant at the pre-action protocol stage in successfully persuading a claimant to abandon a claim, whether in whole or in part, are not costs incidental to any subsequent proceedings, if, in those subsequent proceedings, such claims do not feature at all."

With regard to proceedings, CPR 38.6 (1) provides that:

"Unless the Court orders otherwise, a Claimant who discontinues is liable for the costs which the Defendant, against whom the Claimant discontinued, incurred on or before the date on which notice of discontinuance was served on the Defendant."

One would expect therefore that in circumstances where proceedings have been served and the Claimant has then served a notice of discontinuance, that a Defendant should expect to recover, in principle, his pre-action costs. However, in *Citation PlC v Ellis Whittam Ltd [2012] EWHC 764 (QB)*, Mr Justice Tugendhat considered in the particular circumstances, whereby proceedings had been served (though in the Judge's opinion where they ought not to have been) that the Defendant should only recover costs incurred after service, on the basis that:

"The fact that the Claimant did commence proceedings in this case ought not to lead to the result that it becomes liable to pay to the Defendant costs which it would not have been liable to pay if it had not commenced proceedings."

While the decision in *Citation* has been criticised the case demonstrates the extent of the Court's discretion in this area.

One might consider the trigger point for a Claimant's liability for costs to be, as it was held to be in the *Citation* case, the service of proceedings. After all the Defendant is not involved in the claim in any real sense until proceedings are served and once issued a claim will lapse if not served within the specified period (with no requirement to discontinue the claim). On the other hand it is uncontroversial that the Court has discretion from the point of issue. A Defendant made aware of the issue of proceedings could be expected to take steps to defend the claim and CPR 7.7 provides that a Defendant may make an application for service of a claim form, once issued.

In *Clydesdale Bank Plc v Kinleigh Folkard & Hayward [2014] EWHC (Ch)*, a claim form had been issued due to limitation. The parties agreed a number of extensions for service, by way of consent orders that provided for no order as to costs. Negotiations took place and offers were put forward which included costs consequences.

The claim was not pursued and Master Bragge held, considering *McGlinn* and *Citation*, that the Defendant should be entitled to recover costs, to include pre-action costs that were incidental to the proceedings. It is clear from the Judgment that the Court had in mind that costs had been very much a "live issue."

In *Webb Resolutions v Countrywide Surveyors [2016] Ch Div (4 May 2016)*, proceedings were issued due to limitation and substantial work was carried out pre-action, such that the Claimant's costs were disproportionate upon issue. In considering whether to exercise discretion the Master considered that under the rules the issue of proceedings generally operates to change the position as regards liability for costs and had particular regard to the Claimant's disproportionate conduct in awarding the Defendant costs, to include pre-action costs.

The decision to award costs in circumstances where proceedings are issued but not served is accordingly a matter for the discretion of the Court with no presumption under the rules one way or another, little guidance, and some degree of conflict within the relevant case law. The case law does demonstrate however the importance of adopting a careful approach to commencing litigation, particularly in circumstances where this is taken as a tactical step to encourage settlement. The cases also provide some guidance as to the factors a Court will consider in deciding whether to award costs in such circumstances.

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Assigning CFAs – Burden or benefit?

The transfer of work occurs frequently and in many varied circumstances, for example the transfer of instructions between firms, firms converting to LLPs, mergers, and insolvency. Any transfer of a CFA by way of an assignment needs to be considered very carefully.

Why? Because the rules and objections regarding assignments are deeply entrenched in contract law. The two main objections are as follows:-

1. The solicitor's CFA is a personal contract and is arguably incapable of being assigned. Any contract which compels a client to engage with a different firm of solicitors not of their choosing is not possible.

2. Only the benefit of a contract can be assigned and not the burden.

The Jenkins Exception

In *Jenkins v Young Brothers Transport Ltd [2006] EWHC 151 (QB)*, the Court held that the benefit and burden of the CFA could be assigned in circumstances where one firm has assigned the CFA to another firm in order to honour the client's desire to follow a fee earner from firm to firm; the benefit of earning the fees being inextricably linked with the burden of having to perform the work/retainer.

Whilst this decision is often criticised as being inconsistent with contract law, it has for a long time, been relied on as authority for a valid assignment where a client has followed his or her Solicitor to another firm.

What's the post-Jackson problem?

From 1 April 2013, new regulations have imposed strict limits on success fees recoverable from the paying parties and this has exposed problems with some cases where a pre 1 April 2013 CFA (Pre LASPO CFA) has purportedly been assigned after that date.

Webb v London Borough of Bromley (SCCO 18 February 2016, Master Rowley) was a case where the Claimant had instructed a firm under a pre-LASPO CFA, which was purportedly assigned after LASPO. It was held by the Court that the degree of trust and confidence between the claimant and her Solicitor Partner was not akin to the manner of that in Jenkins and this meant that a new contract had been formed rather than an assignment of the existing contract. This represented a novation rather than an assignment.

If novation occurs rather than assignment, this creates a host of potential issues:

- The initial CFA comes under scrutiny, and arguments present themselves as to if the retainer was terminated prior to the assignment;

(see *Budana v Leeds Teaching Hospitals NHS Trust*, were the initial CFA retainer was terminated before it was assigned, meaning that there was no valid CFA to be transferred).

- Novation of any pre LASPO CFA would be post LASPO, and therefore no success fee would be recoverable from the paying party and;

- If the novation simply transferred the terms of the initial pre LASPO CFA, the post LASPO CFA would be unenforceable because it would fail to adhere to the new regulations governing the recoverability of success fees, e.g. the failure to limit the success fee to 25% of general damages for PSLA and past pecuniary loss.

Are there further exceptions?

Jones –v- Spire Healthcare Ltd (2016) Liverpool County Court (HHJ Graham Wood QC on appeal), addressed the question of whether an insolvent firm of solicitors could validly assign its entitlement and responsibility under a CFA with a client to another firm of solicitors. District Judge Jenkinson at first instance ruled that while the benefit of the retainer was validly assigned, the burden was not, and therefore there was no valid assignment. However, on appeal the Claimant argued that both the benefit and burden of the original CFA were inextricably linked and thus capable of being assigned, attracting both pre and post-assignment costs. HHJ Wood ruled that:

"It would be unduly restrictive and overly legalistic to deny the parties the effect of what they intended..... Rules restricting burden assignment were clearly devised to protect the non-participating counterparty .....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."

The Court therefore determined that it was possible to assign both the burden and the benefit of a CFA. The court confirmed that in this matter a valid retainer had remained in place allowing for the recovery of costs incurred either side of the assignment.

In *Mohammed Azim -v- Tradewise Insurance Services Limited [2016] EWHC B20 (Costs)*, there had been three firms of solicitors representing the Claimant. The first was Minster Law who acted under a CFA dated 19 October 2012. The second was TLW Solicitors under a CFA dated 17 January 2013, and the third was Russell Worth Limited to which the second solicitor's CFA was assigned on 23 July 2014. The Defendant relied upon on the 'burden rule', with neither party submitting that this matter was covered by the *Jenkins* exception.

The Master's considerations were twofold, could the CFA be lawfully assigned and if so, was the assignment effective?

In determining whether the parties could lawfully assign the CFA, the Master ultimately followed the approach in *Jones*. He identified '*no obstacle, in the principles governing assignment of the benefit and burden of contracts, to the validity of a bona fide, arms-length CFA assignment in the circumstances of this case.*'

In determining if the assignment was effective, the Master considered the provisions under section 136 of the Law of Property Act 1925 and found that while notice must be provided, this notice could be in advance of, at the same time as, or after the assignment; any delay however in providing notice could impact on an assignment.

He found that the assignment of the TLW CFA *was* valid and that there *was* an assignment of the TLW CFA, *not* a novation.

This judgment provides another example of a CFA being validly assigned between solicitors without falling down over the 'burden rule', even when Jenkins does not apply, arguably broadening the test governing the lawfulness of assignments and demonstrating they should not be dependent on there being an ongoing relationship of trust and confidence, but on the following factors:

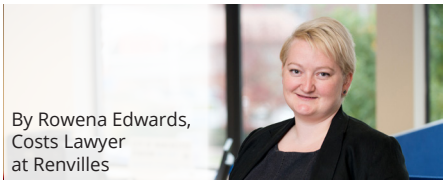
- Whether there is an inextricable link between the burden and benefit

- The intention of the parties-

- Compliance with section 136 of the Law of Property Act 1925

Burden or Benefit – conclusions

Azim may be a welcome decision for receiving parties who have sought to assign pre LASPO CFAs under the old rules, post LASPO. It suggests a push by the Courts to overcome what is a legal technicality restricting the burden of assignments, originally devised to protect the non-participating counterparties, by now giving consideration to the actual intention of the parties. However, the issue is far from over and until there is a Court of Appeal decision, assignments will still need to be approached with a 'health warning'.



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