Neutral Citation Number: [2017] EWCA Civ 1980

Case No: A2/2016/2717

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT
AT KINGSTON UPON HULL
District Judge Besford

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/12/2017

Before :

LADY JUSTICE GLOSTER
Vice President of the Court of Appeal, Civil Division
LORD JUSTICE DAVIS
and
LORD JUSTICE BEATSON

- -

Between :

ALINA BUDANA	**Appellant**
- and -	
THE LEEDS TEACHING HOSPITALS NHS TRUST	**Respondent**
- and -	
THE LAW SOCIETY	**Intervener**

- -
- -

Nicholas Bacon QC and Nico Leslie (instructed by **Victory Legal Costs Solicitors**) for the **Appellant**
Roger Mallalieu (instructed by **Acumension Limited**) for the **Respondent**
David Holland QC and Ms Galina Ward (instructed by **Irwin Mitchell LLP**) for the **Intervener**

Hearing date(s): 5 July 2017

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Approved Judgment

Lady Justice Gloster :

Introduction

1. This appeal raises important issues as to how a solicitors' retainer under a Conditional Fee Agreement ("CFA") may be transferred from one firm to another, following changes to litigation funding resulting from the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"). It comprises an appeal by Ms Alina Budana ("the claimant") against one part of the order of District Judge Besford ("the judge") dated 4 February 2016, and a cross-appeal by The Leeds Teaching Hospitals NHS Trust ("the defendant") against a different part of the same order.

2. The decision below has attracted widespread comment in the legal press. Because of its importance, by order of HHJ Robinson dated 22 June 2016, and this court having accepted jurisdiction, the appeal was transferred from the County Court to the Court of Appeal under the "leapfrog" procedure provided by what is now CPR 52.23. Subsequently, the Law Society was granted permission to intervene by Lewison LJ.

Factual background

3. On 6 November 2011, the claimant tripped and fell whilst attending the defendant's hospital. She was heavily pregnant at the time and suffered damage to her ligaments as a result of her fall. The cause of the accident was an area of defective pavement within the control of the defendant.

4. On 2 December 2011, the claimant instructed Baker Rees ("BR"), solicitors, to pursue a claim for damages on her behalf. On the same date she entered into a CFA with BR under which she among other things agreed to pay a 100% success fee in the event that she won her case (which subsequently she duly did). However, her obligation to pay such success fee was capped by reference to the amount she recovered from the defendants to the action. I will refer to this CFA as "the BR CFA". The BR CFA had attached to it Terms and Conditions which related exclusively to the fees chargeable for the work to be carried out by BR. Thereafter BR acted on behalf of the claimant. A letter of claim was sent on 1 February 2012, and liability was admitted on 17 May 2012.

5. However, during the course of their retainer, BR decided that personal injury litigation was no longer economically viable, as a result of the LASPO reforms. BR wrote to the claimant on 22 March 2013 explaining that, due to the reforms, they believed that only "the biggest personal injury firms will be able to continue to operate" and proposing to transfer her case to a larger and more specialist firm, Neil Hudgell Ltd ("NH"), unless the claimant instructed them otherwise. The letter included the following terms:

> "In light of the impending reforms, we have decided to stop handling personal injury litigation. When making this decision we were concerned to make sure that our existing clients were properly protected. To this end, we have put in place a process to transfer your case to a firm of solicitors (Neil Hudgell) who

> are specialists in personal injury litigation and who intend to continue this type of work. ……
>
> Neil Hudgell will continue to act for you on the same no win, no fee agreement that you had with us. Please note that to avoid any unnecessary delay and to protect your case, we will automatically transfer your file to Neil Hudgell Ltd on 25th March unless you instruct us otherwise."

6. The claimant did not instruct BR otherwise.

7. On 25 March 2013, BR and NH entered an agreement ("the Transfer Agreement") for the sale to, and purchase by, NH of BR's "book" of personal injury business. The sale was for value. The material provisions of the Transfer Agreement for present purposes were as follows:

   i) "Business" was defined as:

   > "the business of a solicitor's practice carried on by the Seller as a sole practitioner at the Transfer Date and known as both Baker Rees and Baker Rees Injury Lawyers";

   ii) "The Engagements" were defined as:

   > "the benefit (subject to the burden to the extent that the same remains unperformed as at the Transfer Date) of the engagements of the Seller which are the part of the Business which comprises the personal injury department caseload of the Seller and which at the Transfer Date remained to be performed in whole or in part and is listed in Schedule 1 (and including any associated AEI Policies and all files and papers relating to the Engagements…)";

   the claimant's name was included in Schedule 1;

   iii) "Engagement Goodwill" was defined as:

   > "at the Transfer Date that part of the Goodwill of the Business of the Seller that relates solely to the Engagements;"

   iv) Clause 2 of the Transfer Agreement provided as follows:

   > "**Sale and Assignment of the Engagements**
   >
   > 2.1 The Seller agrees to sell with full title guarantee and the Buyer agrees to buy, relying on the Warranties, with effect from Completion the Engagements, the Engagement Goodwill, the Engagement Information and the Supplier Contracts.
   >
   > The Seller agrees to assign to the Buyer all such right, title and interest that it has at the Transfer Date in or relating to the Engagements and in this regard shall on the execution and

exchange of this Agreement deliver up to the Buyer a completed and executed Deed of Assignment in the form set out at Schedule 4 hereof."

v) Clause 7 of the Transfer agreement provided as follows:

"**Position after Completion**

7.1. Both parties to this Agreement agree that they do not consider the Buyer to be a successor practice (for the purposes of the Solicitors Indemnity Insurance Rules 2009 and 2010) and they will take all such steps and undertake all such actions reasonably necessary to avoid the Buyer being considered such a successor practice.

7.2. As from the Transfer Date the Buyer shall be entitled to all profits earned and all income and other sums receivable in respect of any period after the Transfer Date and to bear all losses and to pay all outgoings and be responsible for all liabilities incurred, in carrying on the Engagements.

7.3. Save in respect of any matter relating to a claim under professional indemnity insurance, nothing in this Agreement shall pass to the Buyer, or shall be construed as acceptance by the Buyer of, any liability, debt or other obligation of the Seller, (whether accrued, absolute, contingent, known or unknown) for anything done or omitted to be done before Completion in the course of or in connection with the Engagements or the Business and the Seller now:

7.3.1. indemnifies and hold the Buyer harmless against any and all obligations and liabilities arising therefrom; and

7.3.2. will perform any obligation falling due for performance or which should have been performed before Completion insofar as it is able to do so and the Buyer consents.

……

7.6. The Buyer covenants with and undertakes to the Seller that whilst any of the Engagements are still active the Buyer will diligently and professionally progress the same and so far as the Buyer is able so to…"

vi) Clause 14 provided as follows:

> "**Engagements**
>
> 14.1. All Engagements which can be lawfully assigned by the Seller without the consent of any third party shall be assigned to the Buyer with effect from the Transfer Date.
>
> 14.2. Insofar as any of the Engagements cannot be transferred to the Buyer except by an assignment made with the consent of another party or by novation, then (without prejudice to any other rights of the Buyer) the following provisions shall apply:-
>
> 14.2.1. this Agreement shall not constitute an assignment or an attempted assignment of the Engagement if the assignment or attempted assignment would constitute a breach of the Engagement;
>
> 14.2.2. the Seller and the Buyer shall (at their own expense) use all reasonable endeavours to obtain, any such consent or novation;
>
> 14.2.3. until such Engagement is transferred to the Buyer, the Seller shall subcontract its obligations under the Engagement to the Buyer and shall deal with such Engagement in accordance with the requests of the Buyer. The Seller shall ensure that all benefits received by it under the Engagement (if any) are passed to the Buyer until such Engagement is transferred to the Buyer;
>
> 14.3. The Buyer shall, if the Seller shall so request, join in the execution of any novation of any such Engagement to the Buyer……."

8. On the same day the same parties entered into a Master Deed of Assignment ("the Master Deed") for the transfer by BR to NH of cases listed in a schedule, which included the claimant's claim. Under the terms of the Master Deed BR (referred to in the deed as "the Previous Legal Representative") purported to assign a number of retainers in respect of personal injury claims and associated CFA agreements (including that with the claimant) to NH (referred to in the deed as "the Legal Representatives"). The material provisions of the Master Deed for present purposes were as follows:

i) the definitions clause stated that:

> "a reference to any "Retainer" is a reference to any contract of retainer (being a conditional fee agreement, private retainer, implied retainer, or retainer or otherwise) made within the context of the Business by the Previous Legal Representatives (or vice versa agents) with their clients or former clients listed in Schedule A to this Deed (hereinafter referred to as "the Clients"); ……

References to "the Engagements" are references to the business of supply of legal services to and in respect of the Clients as defined in the Transfer Agreement dated [25th] March 2013 and made between the Previous Legal Representative and the Legal Representative by the Previous Legal Representative before [25th]March 2013;"

ii) the recitals stated:

"**RECITALS**

Upon the Previous Legal Representative transferring the Engagements to the Legal Representative in accordance with the terms of the Transfer Agreement, and those Engagements and the Clients referred to therein now being represented by the Legal Representative in such a way as to preserve the Engagements, it is recorded:

a. That this Deed effects a transfer of the rights under all Retainers such that those Retainers (including any accrued rights, and including the benefits and obligations thereof) hitherto held/borne by the Previous Legal Representative, are assigned to the Legal Representative. It is recorded that the Legal Representative may enforce its right to any costs debt arising out of the Retainers, and that they may do so in the name of the Previous Legal Representative or the Legal Representative.

b. This Deed relates solely to the Retainers and the rights and costs associated with the Retainers of the Clients listed in Schedule A to this Deed; the term "costs" includes profit costs, base costs, additional liabilities, disbursements, fees, expenses, interest, or any other monies payable as a result of the provision of legal services.

c. For the avoidance of doubt, the Deed effects a transfer of rights that have not already been enforced by the Previous Legal Representative; it does not effect a transfer of rights to those costs that have already been paid to and accounted for by the Previous Legal Representative.

d. For the avoidance of doubt, the effect of the above is that a Retainer made by the Previous Legal Representative remains binding and enforceable upon the Client and the Legal Representative, the effect of this deed being only that the rights and liabilities, benefits and burdens created by the Retainer are assigned to the Legal Representative. By this Deed the

> Legal Representative will continue to provide the business of the supply of legal services to the Client pursuant to the Retainer."

iii) Insofar as relevant, the operative clauses of the Master Deed provided:

> "1. Retainers shall be dealt with in the following way:
>
> a. This Deed constitutes an assignment to the Legal Representative [i.e. NH] of the benefit and burden hitherto held/borne by the Previous Legal Representative [i.e. BR] of all the Retainers …. That assignment will take effect from 25th March 2013. That assignment will take place regardless of whether express notice is given to the relevant Client. The assignment will act in the following way:
>
> (i) Any and all benefits hitherto held/borne by the Previous Legal Representative (including any right to a costs debts, and any right to claim a costs debt upon the happening of some future event ……) which have accrued under the Retainer in question will be assigned to the Legal Representative;
>
> (ii) Any and all obligations hitherto held/borne by the Previous Legal Representative (including any obligation to supply legal services ……) which exist under the Retainer in question are transferred to the Legal Representative, whereupon the Previous Legal Representative is relieved of that burden as if that obligation had always been borne by the Legal Representative
>
> ……..
>
> 2. The Legal Representative shall use their reasonable endeavours to obtain all necessary consents for and subsequently to effect the assignment of each of the Retainers referred to above. The Previous Legal Representative shall at the Legal Representative's request, give the Legal Representative reasonable help for this purpose.
>
> 3. For the avoidance of doubt it is the intention of the Parties that all costs (to include profit costs, base costs, additional liabilities, disbursements, fees, expenses, interest or any other monies payable as a result of the provision of legal services) whether incurred as at the date of this Deed or yet to be incurred, will be/become payable by the client to the Legal Representative under the Retainer in accordance with the terms of the Retainer.

4. All Parties hereby consent to the disclosure of this Deed and any associated Deeds/documentation as might exist to a Court competent jurisdiction and any opponent (and/or legal representative) in any proceedings related to the Retainer.

Consideration

5. This Deed will be regarded as being part of the transaction effected by the Transfer Agreement and in this regard, the consideration for the transfer of the Previous Legal Representative's Engagements and rights to the Legal Representative shall be on the terms as defined in that agreement.

6. In the alternative, the consideration for the transfer of the Previous Legal Representative's Engagements and rights to the Legal Representative shall be the assumption by the Legal Representative of the Previous Legal Representative's liabilities under the Retainer.

Debtors and Disbursements

7. The Legal Representative shall pay disbursements or expenses as and when they fall due for payment (in accordance with the usual practice of the Previous Legal Representative in the conduct of the Engagements).

8. The Previous Legal Representative shall immediately pay to the Legal Representative any costs received by them in respect of costs due from any person who is a debtor of costs to the Previous Legal Representative and/or the Legal Representative, or where appropriate, a debtor of costs to any of their Clients listed in Schedule A hereto.

Successors and assigns

9. This Deed shall be binding on and shall endure for the benefit of the successors in title, assignees and personal representative of each of the Parties.

10. The benefit of this Deed shall be freely assignable by the Legal Representative, and following any such assignment, all references in this Deed to the Legal Representative shall be deemed to include its assignees.

Severability

11. If any provision of this Deed or any Retainer affected by it is held by any competent Court or tribunal to be invalid, illegal or unenforceable in whole or in part for whatever reason, then for the purpose of the proceedings in which such finding was made, it shall be deemed to be severed

> from the Deed or, as the case may be, Retainer, to the extent only of such invalidity, illegality or unenforceability, and the remaining provisions of the Deed or Retainer and the remainder of the provision in question shall continue in full force and effect unimpaired by such severance."

9. On 31 March 2013, NH contacted the claimant over the telephone to tell her that her case had been transferred to NH and likewise to inform her that her case would continue under the same conditional fee agreement as she had had previously. She agreed to this proposal and, on 10 April 2013, signed and returned:

   i) a letter of instruction acknowledging receipt of NH's client care letter and terms of business and stating that she wished NH "to start work straightaway, in place of BR"; and

   ii) a deed of assignment as between her and NH, although the deed in fact bore the date 31 March 2013; I refer to this as the "second deed".

10. The material provisions of the second deed for present purposes were as follows:

   i) under the heading "Collateral Documentation" it was agreed:

   > "A. This deed is to be read in conjunction with …..the Master Deed, the terms of which are affirmed and ratified by this Deed, and a copy of which is attached to this Deed.";

   ii) Under the heading "interpretation and definitions" it was provided:

   > "B. In this Deed, unless the context otherwise requires, the interpretation and definitions referred to in the Master Deed are adopted.
   >
   > "C. References to "the Claim" are references to the claim or potential claim for damages as detailed within the client's Retainer."
   >
   > "D. References to "the Client's Retainer" are references to the Conditional Fee Arrangement between the client and Baker Rees relating to a claim for compensation for personal injury and consequential loss arising from an accident on 6th November 2011."

   iii) The recitals provided as follows:

   > **"RECITALS**
   >
   > F. Upon the Previous Legal Representative transferring conduct of the Claim to the Legal Representative, it is recorded:
   >
   > a. That the client instructed the Previous Legal Representative to pursue a claim for damages in

respect of Personal injury and consequential loss arising from an accident on 6th November 2011 pursuant to the Client's Retainer under which the Previous Legal Representative agreed to provide legal services to the Client in relation to the claim described therein.

b. That this Deed effects a transfer of the rights under the Client's Retainer such that that retainer (including any accrued rights, and including the benefits and obligations thereof) hitherto held/borne by the Previous Legal Representative, is assigned to the Legal Representative or, in the event of there being no assignment for whatever reason, are held in trust for the Legal Representative's sole benefit. It is recorded that the Legal Representative may enforce its right to any costs debt arising out of the Retainers, and that they may do so in the name of the Previous Legal Representative or the Legal Representative. It is recorded that this assignment reflects the intentions of the client and the Legal Representative.

c. This Deed relates solely to the Client's Retainer and the rights and costs associated with the Client's Retainer; the term **"costs"** include profit costs, base costs, additional liabilities, disbursements, fees, expenses, interest, or any other monies payable as a result of the provision of legal services.

d. For the avoidance of doubt, the Deed effects a transfer of rights that have not already been enforced by the Previous Legal Representative; it does not effect a transfer of rights to those costs that have already been paid to and accounted for by the Previous Legal Representative.

e. For the avoidance of doubt, the effect of this Deed is that the Client's Retainer entered into by the Previous Legal Representative remains binding and enforceable upon the Client and the Legal Representative, the effect of this deed being only that the rights and liabilities, benefits and burdens created by the Client's Retainer hitherto held/borne by the Previous Legal Representative, are assigned to the Legal Representative. By this Deed the Legal Representative, are assigned to the Legal Representative."

iv) The operative provisions of the second deed provided as follows:

"Retainers

1. Retainers shall be dealt with in the following way:

    a. By this Deed the Client affirms and ratifies the assignment detailed in the Master Deed and all terms set out in this Deed, and the Legal Representative confirms it will continue to provide legal services to the Client pursuant to the Client's Retainer.

    b. This Deed constitutes an assignment to the Legal Representative of the benefit and burden hitherto held/borne by the Previous Legal Representative of the Client's Retainer such that the Legal Representative has the right to enforce a right to any costs debt arising out of the Client's Retainer, that right being exercisable in the name of the Previous Legal Representative or in its own name. That assignment will take effect from 22 March 2013. The assignment will act in the following way:

        i. Any and all benefits hitherto held/borne by the Previous Legal Representative (including any right to a costs debt, and any right to claim a costs debt upon the happening of some future event, and any rights to claim other monies) which have accrued under the Client's Retainer are assigned to the Legal Representative;

        ii. Any and all obligation hitherto held/borne by the Previous Legal Representative (including any obligation to supply legal services or to disburse monies for services provided by third parties) which exist under the Client's Retainer are transferred to the Legal Representative, whereupon the Previous Legal Representative is relieved of that burden as if that obligation had always been borne by the Legal Representative;

        iii. For the avoidance of doubt the Client wishes to the Legal Representative to continue with conduct of the Claim and the Client will continue to provide instructions as required by the Client's Retainer.

    c. As from 22 March 2013 the Previous Legal Representative will hold on trust the accrued benefit of or relating to any Retainer which cannot be

> assigned without the consent of a third party or which cannot be assigned or has not been assigned or has been imperfectly assigned for any other reason; the sole beneficiary of that trust will be the Legal Representative. All profits and losses arising from those Retainers shall belong to and be borne by the Legal Representative.
>
> 2. …….
>
> 3. For the avoidance of doubt it is the intention of the Parties that all costs (to include profit costs, base costs, additional liabilities, disbursements, fees, expenses, interest, or any other monies payable as a result of the provision of legal services) whether incurred as at the date of this Deed or yet to be incurred, will be/become payable by the Client to the Legal Representative under the Client's Retainer in accordance with the terms of the Client's Retainer.
>
> **Consideration**
>
> 4. The consideration for the transfer of the Previous Legal Representative's assets and right to the Legal Representative shall be the assumption by the Legal Representative of the Previous Legal Representative's liabilities under the Retainer."

11. Clause 8 included a severability clause in normal format. Clause 9 provided that the second deed would not become binding until 31 March 2013 and that the fact that the claimant or NR might have signed the second deed before or after that date was "irrelevant for the purposes of interpreting the Deed or determining when it was made."

12. On 1 April 2013 NH went on the record as acting for the claimant, although, as mentioned, it was not until 10 April 2013 that the claimant signed letters of instruction and the second deed in favour of NH.

13. On 17 May 2013, the claimant signed an alternative CFA with NH. Whilst this CFA was dated 25 March 2013, it is common ground that it took the form of a post-LASPO CFA, and provided for a zero success fee. I will refer to this contract between the claimant and NH as the "NH CFA". The NH CFA was expressed to be:

> "only effective in the event that the Deed of Assignment [the second deed] sent to you previously does not have the effect of allowing recovery of our costs in connection with the claim detailed below..".

14. Subsequently, NH, on behalf of the claimant, settled her damages claim for £4,150 plus costs to be agreed. On 7 November 2013 the claimant issued Part 8 proceedings against the defendant in order to obtain an order for costs. On 11 December 2013 the claimant obtained an order for costs, to be subject to detailed assessment if not agreed.

15. In the course of the detailed assessment various issues arose including that which arises on the appeal, namely whether the purported assignment of the BR CFA to NH was effective as a matter of law.

LASPO

16. The events relevant to the appeal took place in the period surrounding the coming into force of LASPO on 1 April 2013. The key provision of LASPO for present purposes is section 44, which abolished the recovery of CFA success fees. This is subject to a transitional provision, section 44(6), which provides that the success fee would continue to be recoverable in respect of "a conditional fee agreement entered into before [1 April 2013]".

17. Previously, section 27 of the Access to Justice Act 1999 had amended the Courts and Legal Services Act 1990 by inserting new sections 58 and 58A. These authorised conditional fee agreements between litigants and their legal representatives, which might include provision for a success fee. Section 58A(6) provided that rules of court might provide for the success fee to be recoverable as costs. Section 29 also provided that, where ATE insurance was in place against the risk of incurring liability for costs, rules of court might provide for the premium to be recoverable as costs. Rules of court were subsequently made requiring both the success fee and the ATE premium to be included in the costs awarded to a party. At the relevant time, the rules were contained in CPR Part 44. These arrangements were abrogated by LASPO which amended the Courts and Legal Services Act 1990. Section 58A(6) of the Courts and Legal Services Act 1990 (as amended by section 44(4) of LASPO) now provides that a success fee may not be recoverable as costs. These changes came into force on 1 April 2013, subject to transitional provisions.

18. The critical transitional provision, section 44(6) of LASPO, provides that the amendment of the 1990 Act to prevent the inclusion of a success fee in the assessed costs

> "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."

19. The Conditional Fee Agreements Order 2013 (2013 No. 689) ("the Order") also came into force on 1 April 2013. Under articles 4 and 5 of the Order, and sections 58(1) and

58(3)(c) of the Courts and Legal Services Act 1990, the success fee percentage in personal injuries cases must not exceed 25% of a claimant's general damages and past financial loss; otherwise, the CFA is not enforceable and no costs can be recovered. Again, there is a transitional provision, article 6, which provides that this cap does not apply to CFAs "entered into before [1 April 2013]".

20. Finally, section 58 (2) defines a conditional fee agreement for the purposes of section 58 and section 58A as:

> "(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".

Respective positions of the parties

21. It is these provisions which gave rise to the costs dispute. The claimant's position is that she was entitled to recover her costs under the BR CFA, including the success fee, from the defendant. This was because, the claimant said, she had assigned the BR CFA to her subsequent solicitors, NH, who continued to supply legal services to the claimant under that contract. Accordingly, since the BR CFA had been entered into before 1 April 2013, the claimant was seeking to recover in respect of a pre-LASPO CFA with the result that section 44(6) of LASPO and article 6 of the Order applied.

22. The position of the defendant, which resists paying the success fee, is that the claimant could recover only her base costs under the NH CFA, and not any costs or success fee under the BR CFA. On the defendant's case, the BR CFA was terminated following the 22 March letter; alternatively, the defendant submits that, even if the BR CFA had survived, it could not have been transferred to NH by assignment but, instead, could only have been novated after 1 April 2013. The novated contract was therefore a *new* contract entered into post-LASPO, and thus it fell foul of section 44 of LASPO and articles 4 and 5 of the Order. Accordingly, the defendant contends that the only enforceable contract under which NH supplied legal services and in respect of which the claimant could recover costs was the NH CFA.

The judgment below

23. As I have already mentioned, after various interlocutory orders the matter came before the judge on 14 September 2015, and he gave judgment on 4 February 2016. His key determinations were as follows:

    i) First, the judge held that the BR CFA was terminated "without good reason" by the 22 March letter: see [41]-[46] and [64] of the judgment. Because a solicitor's retainer, as evidenced by the BR CFA, was an entire contract, he held that, if BR wrongly terminated the retainer, it was not entitled to any payment for services rendered to date and there was "no obligation to undertake future services". Accordingly, there was no extant contract which could thereafter be transferred, whether by assignment or novation: see [64] of the judgment. It followed that neither BR nor NH were entitled to be paid for the work that they undertook in respect of the BR CFA.

ii) Second, the judge held that if, contrary to his first conclusion, the BR CFA survived after 22 March, there would have been an effective assignment of that CFA to NH: see [38]-[40] of the judgment. The nub of the judge's reasoning was that he was bound to accept that it was possible to transfer a CFA from one firm of solicitors to another by assignment, notwithstanding that it was a contract for personal skills, in accordance with the decision of Rafferty J in *Jenkins v Young Bros Transport Ltd* [2006] EWHC 151 (QB); see [47]-[56] of the judgment. However, despite this, he also went on to hold that the consequence of the claimant's subsequent ratification of the first deed was that there was indeed a novation of the existing retainer, with the result that NH had been substituted in the place of BR under the terms of a new contract; see [57] - [62] of the judgment. Accordingly, there was no BR CFA in existence as at 1 April 2013.

24. The claimant has appealed the judge's termination decision. The defendant has cross-appealed in relation to the judge's determination that the BR CFA had been validly assigned.

The issues on the appeal as identified by the parties

25. The parties identified the following four principal issues as arising on the appeal and the cross-appeal:

(1) Was the BR CFA terminated by the 22 March letter? ("Issue 1").

(2) If the BR CFA was not terminated, was the transfer of the BR CFA effective as an assignment (as opposed to a novation)? ("Issue 2").

(3) On the premise that the BR CFA was not terminated, but that the transfer took effect as a novation, should section 44 of LASPO nevertheless be interpreted so as to include a CFA entered into before 1 April and novated after 1 April 2013? ("Issue 3").

(4) If, instead, the BR CFA was indeed terminated, was the claimant liable to pay NH for the work done by BR under the NH CFA in any event? ("Issue 4").

Submissions

Common ground

26. Before summarising the parties' submissions, I outline the apparent degree of common ground between them in relation to the relevant law, so as to identify the points of disagreement. Neither party disputed the following three propositions in relation to assignment, stated at a broad level of generality.

i) First, whereas an unqualified benefit of a contract usually can be freely assigned, the burden of a contract usually cannot be assigned: *Scarf v Jardine* (1882) 7 App Cas 345 at 351 per Lord Selborne; *Tolhurst v Associated Portland Cement* [1902] 2 KB 660 at 668, per Collins MR; *Southway Ltd v Wolff* [1991] 57 BLR 33 at 52-3, per Bingham LJ; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 103, per Lord Browne-Wilkinson.

ii) Second, the benefit of a personal contract cannot usually be assigned: *Chitty on Contracts* at paras 19-055-19-056 and *Tolhurst v Portland Cement* at 668 supra.

iii) Third, where a right under a contract was conditional upon, or qualified by, performance of some obligation in return for which the right has been granted, an assignee of the benefit of such right will only be entitled to exercise the right subject to performance of the burden: *Tito v Waddell (No 2)* [1977] 1 Ch 106 at 290, per Megarry V-C; *Rhone v Stephens* [1994] 2 AC 310 at 322, per Lord Templeman; *Davies v Jones* [2010] 1 P&CR 22 at [27], per Morritt Ch. That principle is referred to in the authorities as "the conditional benefit principle".

The claimant's submissions

27. The written and oral submissions advanced by Mr Bacon QC, on behalf of the claimant, in respect of the above four issues may be summarised as follows.

i) On issue (1), he submitted that the 22 March letter was not a wrongful termination but a proposal to transfer the BR CFA to NH. Put at its very highest, there may have been a repudiatory breach of contract by BR, on the basis of which the claimant would have been *entitled* to terminate the BR CFA; but she did not do so. Thus the BR CFA continued in existence and was available to be assigned in accordance with the decision in *Jenkins*.

ii) On issue (2), he submitted that, drawing in part on the analysis of Professor Tolhurst in *The Assignment of Contractual Rights* (2nd ed.), the conditional benefit principle would be satisfied, with the result that the benefit and the burden of a contract would be assignable, in either or both of the following two situations:

a) where the benefit of the contract was connected or relevant to the burden of the contract, so that the former could not be transferred without the latter: this depended only on an analysis of the underlying contract (here the BR CFA) to determine whether, as a matter of construction, an assignment of the benefit of that contract (the right to be paid) must necessarily carry with it an assignment of the burden (the obligation to provide legal services). The doctrinal basis of this situation was therefore an inextricable link between benefit and burden: even if the assignment took place without the assignee's agreement, the assignee could not receive the benefit without the burden; and/ or

b) where: an assignor (here BR) has obligations under the underlying contract; there is an assignment to the assignee (NH); the assignee promises to perform the burden of that contract, either as part of that assignment or as part of a collateral agreement between the assignee and the counterparty to the original contract (here the claimant); and the counterparty is entitled to enforce the assignee's agreement to perform the burden of the contract. This situation therefore depended not only on the nature of the underlying contract, but also on the terms of the assignment between assignor and assignee, together with any

collateral agreement between assignee and counterparty. The doctrinal basis for an assignment in this situation was therefore the intention and agreement of all parties, including the assignee.

Mr Bacon further submitted that the facts of this case satisfied both limbs of the conditional benefit principle, with the result that both the benefit and burden of the BR CFA (that is to say, the entire contract) was assignable under either limb in accordance with the decision of Rafferty J in *Jenkins*. Finally, on issue (2), the claimant submitted that the general prohibition against assigning the benefit of a personal contract did not preclude an assignment of the BR CFA.

iii) On issue (3), on the hypothesis that there had been a novation, Mr Bacon submitted that section 44(6) of LASPO and article 6 of the Order should be interpreted so as to include a CFA entered into before 1 April and novated after 1 April 2013.

iv) On issue (4), Mr Bacon submitted that clause 3 of the second deed, entered into by the claimant and NH on 10 April 2013, had the effect that the claimant was liable to pay NH for the work done by BR, independently of the BR CFA.

The intervener's submissions

28. Mr Holland QC, on behalf the Law Society, made separate submissions, principally on issues (2) and (3), supporting the position of the claimant. In relation to issue (2), he submitted that *Jenkins* was rightly decided and that it was possible for a solicitor's firm lawfully to assign a CFA, such that it takes the benefit of payment in the event of success but is obliged, as a condition of obtaining that benefit, to perform the obligations under such retainer. He submitted that such approach was a principled and pragmatic application of the conditional benefit principle. In relation to issue (3), Mr Holland endorsed the appellant's construction of section 44(6) of LASPO. Importantly, the Law Society also emphasised the public policy considerations that made each of its approaches both orthodox and desirable. More generally, Mr Holland submitted that whether a transfer of rights and obligations amounted to an assignment or novation depended on the construction of the relevant instruments in order to identify the objectively ascertainable intentions of the parties.

The defendant's submissions

29. Mr Mallalieu's written and oral submissions for the defendant may be summarised as follows, again by reference to the four issues I have identified:

i) On issue (1), the position after 25 March was that BR had ceased to work on the claimant's papers and withdrawn from its retainer. Accordingly, since this was an entire obligations contract, the claimant had no liability to BR for the work done under the partly performed retainer. The retainer had come to an end and there was no BR CFA to assign.

ii) On issue (2), the conditional benefit principle was confined to a situation where a benefit had been validly assigned but the burden in question was merely ancillary to that contractual benefit. The principle was a limited

exception to an otherwise total prohibition on the assignment of a burden, by annexing it to a valid assignment of benefit, and it did not permit an assignment of the benefit and burden of the BR CFA. Here, since a CFA was a personal contract, the benefit of it could not lawfully be assigned. But even if it could, where one party to a contract was substituted by another then that had necessarily to be categorised as a novation.

iii) On issue (3), there was no need for the strained construction contended for by the claimant. The transitional provisions were clear, and a bright line approach provided certainty. This construction did not produce injustice or impede the right of access to the courts.

iv) On issue (4), clause 3 of the second deed merely purported to preserve any liability which the claimant owed to BR: it did not create a liability which had been extinguished. Thus this argument added nothing to issue (1): either the claimant would win on issue (1) or lose on both.

Analysis and determination

The economic environment in which personal injury litigation is conducted today

30. In my judgment, the issues which fall for determination in this case have to be approached with an appreciation of the economic environment in which personal injury litigation is conducted today. There are a variety of circumstances in which, for perfectly legitimate reasons, the need to assign a CFA may arise. In his witness statement dated 12 January 2017, and served on behalf of the Law Society as intervenor, Mr David Marshall, Chairman of the Law Society's Civil Justice Committee, explains that, as a result of the Jackson reforms introduced by LASPO and various other instruments, many (particularly smaller) solicitors firms either ceased to do personal injury work altogether or ceased to deal with the "high volume/low value" claims which form the vast bulk of the personal injury market. Indeed, that was the expected result of the 2013 reforms. The Law Society estimates that there are many thousands, and perhaps tens of thousands, of claimants in the same position as the claimant in the present case and whose pre-1 April 2013 CFAs were purportedly assigned by one firm of solicitors to another.

31. In addition, the court is entitled to have regard to the fact that, as described in Mr. Marshall's statement, the way in which firms of solicitors doing claimants' personal injury work have to operate has radically altered in the last 15 to 20 years, particularly since the changes made by the Access to Justice Act 1999. Mr Marshall's evidence shows that there have been a number of challenges which practitioners working in the personal injury field have faced since the introduction of the Jackson reforms, and in particular the introduction of fixed recoverable costs. These have included the need for solicitors firms to have greater access to working capital and guaranteed volumes of work.

32. In a report produced by the Law Society in 2013 entitled "Legal Services – Key Markets", the likely need for a change in business models was predicted. At page 131 the report said:

> "Business models based on generating high volume with the low-cost base are most likely to adapt."

and on page 136 that:

> "It is likely that some PI departments, and some firms relying heavily on portal work, will close. In the future, firms may be divided into brackets: a smaller number of high-volume portal suppliers and other specialising in complex cases falling outside portal processes".

33. Moreover, as can be seen from the Law Society's 2016 report entitled "The Future of Legal Services" and also from the Solicitors Regulation Authority's report entitled "An Assessment of the Market for Personal Injury", published in October 2016, those predictions have been largely borne out. Currently much of the lower value personal injury work is now handled as commoditised work by a smaller number of large firms. On page 15 of the former report, it states that

> "costs and procedural change in the personal injury (PI) market have had serious consequences for solicitors practising in traditional firms offering PI services. Changes to this market have fostered a volume factory approach which has "undermined consumer confidence and may well further undermine the reputation of solicitors in this sector".

The latter report, in its key findings as summarised in its Executive Summary, at page iii, states:

> "while the majority of PI firms are small, the market has experienced increased consolidation, following a number of mergers and acquisitions, together with the introduction of Alternative Business Structures"

34. Mr Marshall further points out that the way in which some firms are responding to the effect of the reforms is by changing their structure, for example by merging, while others diversify their business or simply leave the market, whether by choice or following the collapse of their business. This has necessarily lead to a substantial number of arrangements, very similar to those in the instant case, whereby portfolios of personal injury retainers are transferred from an existing firm to a new, or successor, firm.

35. There is thus a wide variety of circumstances in which issues similar to those in the present case might arise; for example: the instructed firm might have ceased to practise in a particular area (as is the case on the instant facts); a client may have wished for their case to continue to be dealt with by an individual solicitor who had moved firms (as in *Jenkins*); conversely, a client might have lost confidence in one firm and wished to instruct a new firm; or the instructed firm might have become a new entity through merger (as in *Plevin v Paragon Personal Finance Limited* [2017] UKSC 23, [2017] 1 WLR 1249) or by the incorporation of a firm which had previously existed as a partnership.

36. Mr Marshall's witness statement, and the submissions presented on behalf of Law Society, refer to the fact that, since, and based upon, the decision in *Jenkins*, it had been the Law Society's view, and widely assumed by the profession, that it was perfectly possible lawfully (with the assent of the client) to assign a CFA with the result that the terms of the existing CFA would continue to apply on the same terms after assignment as before the effective date of the assignment, but nonetheless be applicable to the retainer between the client and the assignee firm. Of course, that of itself cannot be the basis for the legitimacy of such arrangements but it is nonetheless a relevant background fact to be taken into account when one comes to consider the correct characterisation of the arrangements.

Issue (1): Termination

37. I can deal with this issue shortly since in my judgment it is clear that the BR CFA was not terminated by BR's conduct, and that the judge erred in law in reaching the contrary conclusion.

38. As the claimant submitted, neither the 22 March letter nor any (purported or actual) transfer of the BR CFA could amount to a termination of the contract without the claimant having elected to treat the contract as terminated. It is trite law that a repudiatory breach by one party cannot unilaterally terminate the contract. Instead, the innocent party may elect between termination and affirmation of the contract. Unless and until the innocent party terminates the contract, it subsists. This basic proposition of contract law has been recently reaffirmed in *Société Générale, London Branch v Geys* [2012] UKSC 63, [2013] 1 AC 523.

39. Accordingly, in my judgment, the BR CFA undoubtedly subsisted after the 22 March 2013 letter, the Master Deed and the second deed – even assuming (without deciding) that these individually or collectively amounted to a repudiatory breach of contract. Even if BR had indeed wished to end the contract, or their obligations thereunder, they could not, in the particular circumstances of the case, do so unilaterally.

40. Moreover, in my judgment the claimant did not terminate the contract but instead affirmed it by the second deed and her conduct more generally. On the instant facts, which are not in dispute, the terms of the documentation clearly show that the claimant did not elect to terminate her contract with BR, but instead decided to preserve and, to use a neutral word, transfer it. Of course, that per se is not determinative of whether that transfer must be characterised as a novation, which would involve a discharge of the original contract. But, on these facts, it is sufficient to determine that the claimant did not terminate the contract in response to such repudiatory breach, if any, as there might have been by BR.

41. The BR CFA therefore survived and BR remained entitled to payment, if it fulfilled its entire obligations under the contract. The defendant (rightly) did not submit that, even if the contract was affirmed and was fully performed, the breach would itself amount to a failure to fulfil BR's entire obligations under the contract.

Issue (2) Assignment or novation

Issue (3) Section 44 of LASPO

42. Issue (2) and issue (3) were the focal points of the appeal, since we were told that there are likely to be very significant numbers of analogous cases where an extant CFA had been transferred from one firm of solicitors to another, whether before or after 1 April 2013.

43. Rather than baldly stating issue (2) as "assignment or novation", I prefer to articulate the actual issue to be determined under this head, and indeed under issue (3), as:

> whether, for the purposes of the transitional provisions of section 44(6) of LASPO, the fee payable by the claimant to NH, under the "transfer" arrangements between BR, NH, and the claimant, was "a success fee payable by ….[the claimant] under a conditional fee agreement entered into before" 1 April 2013.

As may be seen, therefore, I take the view that the real question is whether the true effect of the contractual arrangements between the parties means that the claimant had to pay a success fee under a conditional fee agreement entered into before 1 April 2013.

44. The analysis ("the novation analysis") propounded by the respondent (i.e. the defendant) argues that the claimant can have no remaining liability under the BR CFA to pay the success fee. I summarise it as follows - although it was not precisely put in this way by Mr Mallalieu:

i) It was not legally possible for BR to assign even its *rights or benefits* under the BR CFA, since a solicitor-client retainer was personal in nature and accordingly incapable of assignment; that was because its contractual rights to payment involved the firm's personal skill or personal qualifications as a solicitor; see e.g. *O'Brien v Benson's Hosiery* [1980] AC 562; *Griffith v Tower Publishing Co Ltd* [1897] 1 Ch 21 and Snell's Equity, 33rd Edition, 3-049.

ii) In any event, even if such rights were capable of assignment, the express terms of the Master Deed as between BR and NH, and the second deed as between NH and the claimant, in so far as they purported to provide for an *assignment* of BR's *obligations* or *burden* under "the Retainers" (as defined in the master deed), or under "the Client's Retainer" (as defined in the second deed) could not have had any legal effect as such. It is trite law that the burden of a contract cannot in principle be transferred without the consent of the other party, which has the effect of discharging the original contractor: see e.g. per Sir R. Collins M.R. in *Tolhurst v Associated Portland Cement Manufacturers Ltd supra* .

iii) Moreover, the actual language used in the contractual documents in the present case expressly envisaged the *discharge* of BR from any outstanding obligations or liabilities under the Retainers/the Client's Retainer/the Engagements, once the assignment had taken place; see, for example, clause 1 a (ii) of the Master Deed and clause 1 b ii of the second deed.

iv) Thus the effect of that to which the parties agreed was a novation, that is to say the creation of a new contract as between NH and the claimant and the discharge of BR from all its previous obligations under the Client's Retainer,

so far as the claimant (and indeed any other client) was concerned. The effect of such a novation was not to assign or transfer BR's rights and liabilities (the BR CFA), but rather to extinguish them altogether and replace them by another new retainer as between NH and the claimant; see Chitty on Contracts, 32nd Edition at 19-089.

v) Accordingly, there was no obligation on the part of NH to provide services under the BR CFA (i.e. the Client's Retainer). That being the case, as from the date of the second deed, the claimant was no longer under any liability to pay a success fee under the BR CFA; any liability which she might have to pay NH for the services which it provided arose under the terms of the NH CFA.

45. For the reasons set out below, I reject this analysis, at least in part, and the conclusion to which it leads. However, nor do I accept the argument propounded by Mr Bacon, on behalf of the claimant, that somehow recourse to the conditional benefit principle enables the court in this case to conclude that there has been no novation, but simply an assignment of rights coupled with an obligation on NH's part to perform the relevant legal services if it wanted to obtain payment of the conditional fee under the BR CFA. In my judgment, the correct analysis is much more finely nuanced, but ultimately simpler, than either party contended. My analysis, and my reasons for reaching the conclusions which I do, are as follows.

Assignability of rights and benefits under contracts of retainer

46. First, in my judgment, there is no reason in principle why *rights and benefits* under a firm of solicitors' contracts with its clients, or its books of business, should not be capable of assignment in today's business environment, for the practical reasons set out in the Law Society's submissions and evidence (and subject to any statutory or regulatory prohibitions to the contrary, which were not suggested to be applicable in the present case). I do not consider that the question of assignability of rights and benefits is limited to a situation where the client's solicitor moves to a different firm (as in *Jenkins*), or one where there are a series of technical assignments to successor firms (as in *Plevin*). It would include situations such as the present where a third party firm buys an existing firm's goodwill and work in progress.

47. Whereas generally a contract between a solicitor and his client might well be regarded as a personal contract from the point of view of both the solicitor and the client, the question is fact specific and depends on the individual retainer. Given the circumstances in which most claimant personal injury litigation is now conducted (as explained in the Law Society's evidence and indeed as emerges from the facts of this appeal), the CFA between a client and his solicitor in such a case lacks the features of a personal contract. What the client wants is representation by a competent practitioner and not necessarily representation by a specific individual (whom he or she may probably never meet).

48. However, as the Law Society itself pointed out, the element of consent was crucial. Neither the Law Society nor Mr Bacon on behalf of the claimant suggested that the transfer of the claimant's and other clients' CFAs could take place without the consent of individual clients. That necessarily gives rise to the question whether the provision of consent by the client gives rise to a new and novated contract and, if so, on what terms.

49. In my judgment, the decision of the Supreme Court in *Plevin* supports the conclusion, at least to a certain extent, that rights under a solicitors' retainer are assignable, notwithstanding any personal element. It was accepted by all members[1] of the Supreme Court in that case and not, I think, merely on the basis of the concession referred to at [5] of the judgment, that a solicitor's rights to work in progress under existing contracts with clients, including CFAs, could be the subject of an assignment and could include the right to bill for future work carried out after the transfer date under those CFAs.

50. Lord Sumption noted at [5] that it was "common ground that the CFA was in principle assignable" without doubting the correctness of that proposition. In circumstances where there had been two successive transfers of business and retainers of a solicitor's firm to a successor entity of a similar name, Lord Sumption proceeded on the basis that there had indeed been a valid transfer by assignment from one entity to another. He said at [4] - [8]:

> "4. Mrs Plevin entered into a CFA with her original solicitors, Miller Gardner, on 19 June 2008. Subsequently there were two technical changes of solicitor. They were technical because they both arose out of organisational changes within the same firm. In July 2009, the partners of Miller Gardner reconstituted themselves as an LLP. This was done by appointing administrators of the old partnership, who entered into an agreement with a new firm, Miller Gardner LLP, transferring specified assets to it. In April 2012, Miller Gardner LLP transferred its business to a limited company, Miller Gardner Ltd, under an agreement in similar terms. **The point taken by Paragon is that on neither occasion was the CFA validly assigned to the new firm. There was therefore, they say, no effective retainer at the time when costs were incurred in the Supreme Court.**[2] The costs judges rejected this argument. I can deal with this point shortly, for in my view it has no merit and was rightly rejected.
>
> 5. It is common ground that the CFA was in principle assignable. Paragon's argument is based on the terms to the two successive transfer agreements made between the successive Miller Gardner entities.
>
> 6. The operative clause of the 2009 transfer agreement was Clause 2.1, which transferred ten categories of asset to the new firm "to the intent that the Buyer shall from the Transfer Date carry on the Business as a going concern." The only relevant category of assets for present purposes is "the Work in Progress". This is defined in Clause 1.1 as meaning "all partly completed goods or services allocated by the Seller or the Administrators to the Contracts." "Contracts" means "the contracts, instructions, orders and engagements placed with the

[1] Lord Hodge dissented on a different point; see [25] of his judgment,
[2] All bold text is my emphasis.

> Seller … by its clients insofar as they have not been fully performed by the Transfer Date." Paragon's argument is that "Work in Progress" includes only work already done at the transfer date. It does not, they say, cover further work on the same matter done thereafter. If this were correct, it would mean that the only right of the successor firm was to bill the clients for work done before the transfer date, leaving them with no solicitor to act for them other than the defunct shell of the old firm. This plainly cannot have been intended. The point about work in progress is that it is in progress, and Clause 2.1 expressly transfers the work in progress "to the intent that the Buyer shall from the Transfer Date carry on the Business as a going concern."
>
> 7. The relevant provisions of the 2012 transfer agreement are substantially the same, except that the words just quoted are absent. However, the intention that the practice should be carried on is equally plain.
>
> 8. It is right to add that even if the argument were sound, it would lead nowhere. Shortly after each transfer, on 30 July 2009 and 30 April 2012, the new firm wrote to Mrs Plevin informing her about the change, referring to the CFA and saying that they would "continue to represent you on the same terms and conditions as previously." Mrs Plevin plainly assented to that by continuing to instruct them."

51. Although neither party suggested that *Plevin* was a binding authority to the effect that rights under a CFA were assignable, the decision in my view at least supports three important propositions relevant to the determination of the present case:

    i) that as a matter of law *rights and benefits* under a CFA together with the benefits of any accompanying retainer are capable of assignment, notwithstanding the fact that a client may place trust and confidence in her solicitor;

    ii) that an original CFA can remain in existence, as a contract valid as its date of creation, notwithstanding its transfer as between successive firms of solicitors; and

    iii) that even if a client subsequently assents to such transfer, as Mrs Plevin did, nonetheless the client's original CFA remains in existence as a contract valid as its original date.

52. The fact that in *Plevin* there was only a technical change of solicitor, by reason of the two changes in the legal status of the firm, can, in my view, make no substantive difference to the application of the above propositions to the present case, where the transfer was to a new firm. Of course, because the respective dates of Mrs Plevin's assent to the two assignments preceded 1 April 2013, it would have made no difference for Paragon to have argued that the correct analysis of the relevant events were successive novations of the original CFA, with a new contract coming into being

as at the respective dates of her assents to the two assignments. That is presumably why determination of the first issue was confined to an argument of construction of the relevant deeds of assignment, as opposed to any argument based on the assignment/novation dichotomy. For that reason, the extent to which the decision in *Plevin* can be relied upon as supporting the claimant's position in the present case is necessarily limited.

Non-applicability of the conditional benefit principle in the present case

53. Second, I do not consider that the conditional benefit principle is applicable or of relevance in the present circumstances. It operates in a situation where the issue is whether an assignee of rights under a contract, or the successors in title of a covenantor who has given covenants in relation to land, are *obliged* to perform the positive obligations of their assignor, or predecessor in title, under the relevant contract or conveyance. One of the requirements is that 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. As was common ground in the argument before us, such assignees or successors are indeed so obliged, in circumstances where the rights which they have acquired or taken the benefit of, are conditionally dependent on the discharge or performance of the relevant positive obligations. The principle is discussed in Chitty (ibid) at 19-080 and has recently been applied and/or considered by this court *inter alia* in *Davies v Jones* [2010] 1 P&CR 22: see for a clear definition of the principle per Sir Andrew Morritt Ch at [27]; see also per Patten LJ in *Wilkinson v Kerdene* [2013] EWCA Civ 44 and *Elwood v Goodman* [2014] Ch 442.

54. But in the present case the issue is not whether *NH as assignee of BR's rights* under the BR CFA was obliged to perform the legal services under that CFA as a result of the application of the conditional benefit principle; rather the issue is whether, in the events which happened, and, in particular, given the terms of the Master Deed and the second deed, *and* the Claimant (who was not an assignee) had an *obligation* to pay for NH's legal services under the terms of a contract pre-existing as at 1 April 2013 (i.e. the BR CFA).

55. This is not a case, unlike the normal conditional benefit cases, where the assignee or successor in title has no privity of contract or privity of estate with the obligee who is the beneficiary of the relevant obligation. On the contrary, under the terms of the second deed the claimant and NH expressly agreed (i) that all obligations under the BR CFA to provide legal services in relation to the claim would be transferred to the latter; (ii) that it would in the future continue with the conduct of the claim and the provisions of legal services under the BR CFA; and (iii) that BR would be discharged from all its obligations under the BR CFA. Thus, there is no doubt that NH was indeed under an obligation to provide legal services to the claimant under the terms of the second deed. Given that the parties have expressly provided by contractual means as to the imposition of liabilities on NH going forward, there is in my judgment no room for the application of the conditional benefit principle which operates to impose a specific obligation on an assignee/successor in title at the suit of the beneficiary of the obligation in circumstances where there is no contractual or property nexus between the two parties. In other words, in order to determine the rights and obligations of the parties in the present case, one has to look at the actual contractual arrangements between them, and analyse their effect, not at the counter-factual of

what might have happened if there had been no such arrangements and the law had stepped in.

Jenkins

56. Third, insofar as a consideration of *Jenkins* is necessary for present purposes, I, like Sir Andrew Morritt Ch. in *Davies v Jones* at [25][3], have some difficulty with the analysis of Rafferty J in the former case. I do not accept Mr Bacon's submission that the Court of Appeal in *Davies* approved the reasoning of Rafferty J in *Jenkins*. Sir Andrew Morritt Ch merely cited *Jenkins* as an example of the application of the principle and, at the highest, approved Rafferty J's formulation of the test as requiring an "inextricable link between benefit and burden", which indeed is a requirement for the principle to be applicable.

57. Although this court is not bound by the decision in *Jenkins*, and although I have reached my conclusion by adopting a different analysis, it is right that I should explain why in my view Rafferty J's reasoning is not correct. I do so because, according to the Law Society's evidence, the legal profession has operated for many years on the basis that it may be assumed to be correct.

58. The facts in *Jenkins* were as follows*:*

> "On 14 October 2003 the claim of the claimant, Geoffrey Jenkins, against the defendant, Young Bros Transport Ltd, was settled on terms of damages of £445,000 with costs to be assessed on the standard basis. On 22 June 2005, the costs judge, Master Campbell, determined a preliminary issue on detailed assessment in favour of the claimant by awarding him his costs not only up to but also after 1 April 2002, the date from which the first of two assignments of a conditional fee agreement ("CFA") entered into between the claimant and his solicitor, Frances Pierce, was to have taken effect under a purported assignment from Ms Pierce's former firm, Girlings, to her new firm, T G Baynes. A further purported assignment to another firm, Thomson Snell & Passmore, had been made on 1 April 2003.
>
> The defendant appealed on the grounds, inter alia, that (1) the benefit and burden of the CFA could not be validly assigned either to T G Baynes or to Thomson Snell & Passmore with the consequence that there was not privity of contract between the claimant and either of those firms; (2) the agreements purported to carry out transactions which required the claimant to be a party for them to be effective; (3) if the agreements were to give rise to contractual obligations as between T G Baynes and Thomson Snell & Passmore on the one hand and the claimant on the other, that could only be on the basis that new contracts were created; (4) any such new contract would have required

[3] Where he said "though I have some doubt whether the relevant benefit and burden were correctly described" - i.e. in *Jenkins.*

> compliance with section 58 of the Courts and Legal Services Act 1990 as amended and the Conditional Fee Agreements Regulations 2000 (SI 2000/692), and there was no such compliance; and (5) in consequence, neither T G Baynes nor Thomson Snell & Passmore could enforce the CFA against the claimant and the claimant could not, therefore, recover from the defendant those costs incurred after 1 April 2002."

59. As it can be seen, whether there had been an assignment or a novation of the CFA was in issue because of the defendant's, as paying party, argument that if there had been a novation there had been no compliance with the provisions of section 58 of the Courts and Legal Services Act 1990 and the relevant CFA Regulations 2000. At the time of both successive assignments, client care letters were signed by the claimant which made it clear that the CFA was to be assigned to the new firm. Although the report does not reveal the terms of those letters, clearly the claimant by signing the letters was assenting to the transfers of the CFA.

60. Rafferty J defined the issues as follows:

> "5 Raised before us were two principal issues. (1) Where a solicitor makes a professional move, taking with her to her new firm a client on a CFA, can the CFA lawfully be assigned to the new firm or is the client obliged to enter into a new CFA with the new firm? (2) If the CFA cannot lawfully be assigned, does it follow that no costs incurred after the purported assignment can be recovered from the paying party? Master Campbell found for the claimant on the first, that the CFA was lawfully assigned, and that, were he wrong, then it did not follow that costs after the purported assignment must be disallowed."

61. Having considered the relevant authorities, Rafferty J essentially agreed with the Master. Her reasoning can be seen from the following paragraphs:

> "19 Master Campbell found that the benefits to the new firm in receiving payment were directly conditional on its obligations in the CFA, that is doing the work, acting in the client's best interests etc. In other words he concluded that this is a *Halsall v Brizell* case where the benefits are conditional on the burden, rather than a *Rhone v Stephens* case where the burden was wholly independent and not related to the benefits. He did not rely on the now disapproved of "pure principle of benefit and burden" as providing the relevant exception to the general rule, but found that the burden of the CFA, namely the requirements upon the solicitors to prepare the case on behalf of the claimant, was dependent on the benefit of the CFA, namely the right to be paid in certain circumstances. The two were inextricably linked and thus, as he put it:
>
> "It is clear from the terms of the deeds of agreement and new agreement … that the taking of the benefit of the contract (the right to be paid costs) is subject to the burden of the contract

(continuing to act for Mr Jenkins). In my view that burden is also directly relevant to the right to be paid and the test in *Rhone v Stephens* [1994] 2 AC 310 is met."

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

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

……

Decision on the first issue

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

29 We return to the issue of assignment of burdens and Mr Orr is correct in urging us to look to the original CFA when we consider benefit and burden. Girlings was 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: "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 CPR Pt 36 offer.
>
> 30 It follows that the benefit of being paid was conditional upon and inextricably linked to the meeting by Girlings of its burden of ensuring to the best of its ability that Mr Jenkins succeeded. As Lord Templeman in Rhone v Stephens [1994] 2 AC 310 said, the condition was relevant to the exercise of the right. In our judgment, upon the facts in this case the benefit and burden of the CFA could be assigned as within an exception to the general rule. There is no issue taken with Master Campbell's judgment that the formal requirements were met. He was entitled to find valid the agreements of 13 August 2002 and 1 April 2003 and that TGB and TSP are entitled, subject to the comments below, to be paid by Mr Jenkins. It follows that, subject to detailed assessment, he is entitled to recover those charges from the defendant.
>
> 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."

62. My difficulty with the reasoning of Rafferty J in *Jenkins* may be summarised as follows:

i) In her articulation of the issues (see [5] above), she assumes, in my view wrongly, that unless the CFA is "assigned" to the new firm, the consequence inevitably will be that the client "is obliged to enter into a new CFA with the new firm". As will be seen below, I do not consider this to be the case.

ii) She does not adequately explain why she was not bound by the relevant authorities, both in the House of Lords and in the Court of Appeal, to the effect that, whilst the benefit of, or rights under, a contract are assignable (see for example *Tolhurst v Portland Cement* [1903] AC 414 per Lord MacNaghten at 420), obligations or burdens under a contract are not; and that, if the beneficiary of the obligations agrees to an assignment of the obligations, that amounts to a novation of the contract; see for example (as to the non-assignability of burdens under contracts): *ibid* [1902] 2 KB 660 per Sir Richard Collins MR at 66 [1994] 1 AC 85 (HL)) per Lord Browne-Wilkinson at 103; and in particular per Bingham LJ in *Southway Ltd v Wolff* [1991] 57 BLR 33 (at 52-3) who said:

> "It is in general permissible for A, who has entered into a contract with B, to assign the benefit of that contract to C. This does not require the consent of B, since in the ordinary way it

> does not matter to B whether the benefit of the contract is enjoyed by A or by a third party of A's choice such as C. But it is elementary law that A cannot without the consent of B assign the burden of the contract to C, because B has contracted for performance by A and he cannot be required against his will to accept performance by C or anyone other than A. If A wishes to assign the burden of the contract to C he must obtain the consent of B, upon which the contract is novated by the substitution of C for A as a contracting party."

iii) She does not explain or analyse why, given Mr Jenkins' apparent consent to the transfer of the CFA, there was no novation of the CFA or, as I prefer to put it, agreement that the successor firms would continue to operate on the terms of the original, existing CFA. As the Law Society's arguments made clear in this case, it would not recognise the validity of any transfer or "assignment" of a client's case or retainer from one firm to a new firm in the absence of the client's consent.

iv) She assumes, wrongly in my view, that the conditional benefit principle involves an "*assignment* of obligations", whereas in fact it involves no such thing. Rather, it involves *the imposition by law* on a contractual assignee or successor in title of a positive obligation under the relevant contract or conveyance, notwithstanding the absence of any contractual or "estate" obligation to the third party beneficiary of the obligation.

v) In her analysis, she focuses on the question whether the solicitors were liable to perform the obligations under the CFA, rather than on the question which was relevant for the operation of the indemnity principle, namely whether Mr Jenkins was under an obligation to pay the solicitors, and if so, under the terms of which contractual instrument.

vi) In my view Rafferty J wrongly sought to enlarge the scope, or the application, of the conditional benefit principle. The authorities show that it is a rule of limited scope; see e.g. *Rhone v Stephens* [1994] 2 AC 310. The imposition of the burden does not occur merely as a result of the taking of an incidental benefit, but only where a conscious decision is taken to exercise the benefit in circumstances where the burden that follows is directly related and correlates with the benefit taken; see e.g. *Thamesmead Town Ltd v Allotey* (1998) 20 HLR 1052 at 1060. Her view appears to have been that, simply because the solicitors' benefit – the right to payment – was conditional on the burden (undertaking the work), the principle applied. If that was the correct analysis, it is difficult to see why the burdens or obligations in any contract would not be capable of assignment. As Mr Mallalieu submitted, her analysis does no more than identify the essential nature of a contract for services, namely that the right to payment arises from performance of the relevant service. If that is sufficient conditionality, then the effect of Rafferty J's judgment goes far wider even than the 'pure' benefit and burden principle which was rightly identified as being flawed and was rejected by the House of Lord in *Rhone v Stephens.*

63. Accordingly, whilst I do not consider that the fact that, in *Jenkins*, the successive transfers to different firms of solicitors arose because the individual solicitor involved in Mr Jenkins' case, in whom he reposed trust and confidence, decided to move firms, is a reason for distinguishing *Jenkins,* I do not consider that the case, or the reasoning in it, assists our analysis in the present case.

The correct analysis in the present case

64. I turn now to address what, in my view, is the correct contractual analysis of the events in the present case. I do so bearing in mind that the issue to be decided is whether, for the purposes of the transitional provisions of section 44(6) of LASPO, the fee payable by the claimant to NH, under the "transfer" arrangements between BR, NH, and the claimant, was "a success fee payable by ….[the claimant] under a conditional fee agreement entered into before" 1 April 2013.

65. In my judgment, there can be little doubt that, on 10 April 2013 the claimant entered into a new contract with NH (and probably also BR) pursuant to the terms of the second deed and the letter of instruction. (I assume[4], without deciding, that prior to that date the claimant was not contractually committed to being represented by NH and that, accordingly, no contract as between the claimant and NH came into existence before the critical date of 1 April 2013). Under the terms of the second deed, by which she ratified the Master Deed, the claimant agreed to the transfer of the rights and obligations of BR under the BR CFA to NH, on the express terms *inter alia* that:

    i) the BR CFA remained "binding and enforceable" as between the claimant and NH;

    ii) the only effect of the second deed was that all the rights and liabilities, benefits and burdens created by the BR CFA were assigned to NH, so that:

        a) all benefits including all accrued rights to cost debts contingent "upon the happening of some future event", previously held by BR, were transferred to NH;

        b) likewise, all obligations previously borne by BR under the BR CFA were transferred to NH, on the basis that BR was discharged from all obligations thereunder as if the obligations had always been borne by NH;

        c) NH would continue with the conduct of the claimant's claim and supply legal services pursuant to the BR CFA, on the basis that the claimant would continue to provide instructions as required by the BR CFA; and

    iii) the transfer would take effect retrospectively from 22 March 2013.

[4] As did the judge; see paragraph 8 of his judgment.

66. That contract was, in accordance with the authorities on novation to which I have referred above[5] and by which this court is bound, a new contract as between all three parties, involving, as it did, the discharge of BR from all obligations under the BR CFA and the consent of the claimant to NH assuming such obligations. As was accepted by both counsel for the Law Society and for the appellant, there could have been no transfer of the retainer without the express consent of the claimant; and, on the authorities by which this court is bound, that gives rise to a new contract.

67. Mr Bacon sought to rely on a statement in Guest on the Law of Assignment (2015), second edition at 9-01 that:

> "A contract may specifically provide that one or both parties may assign to a third party some or all of their obligations under the contract"

and referred to the case of *Essar Steel Ltd v Argo Fund Ltd* [2006] EWCA Civ 241, cited in Guest, as authority for his argument that there was no novation in circumstances where a contract expressly provides for a possible future substitution of parties.

68. However, the fact that a contract may expressly provide for the possibility of future transfer of one party's obligations (which the BR CFA did not), and require no further consent on the part of the counterparty when the transferee satisfying the required description is proposed, does not mean there is no novation. The issue in *Essar Steel* concerned the meaning and effect of a provision in an unsecured standard industry syndicated loan agreement, between Essar, as borrower, and a syndicate of nine lenders, restricting the syndicate members' entitlement to transfer their rights and obligations under the agreement to entities that were within the definition of "bank or other financial institution". The question as to whether a transfer of obligations of one syndicate member's obligations to one transferee involved a new contract or partial novation, or what the ongoing status was of the loan agreement as between the existing members and the borrower simply did not arise. However, it is clear from the judgment of Auld LJ, with whom both Rix and Hallett LJJ agreed, that insofar as the contractual machinery provided for assignment of *obligations*, this amounted -at least *quoad* the borrower and the transferring lender and transferee - to a novation. Thus Auld LJ said

> "18. Clause 27 of the Agreement provided for two modes by which Syndicate members could pass their *rights* under the Agreement to another, one by way of assignment on notice to Essar, **the other by way of transfer, which also operated to transfer *obligations as well as rights*, amounting to a novation.** As to assignment, the Agreement imposed no restriction save as to documentation and notice to Essar, clause 33.1 expressly providing that, where the context permitted, "any 'Bank'" should be construed so as to include "without limitation … Transferees and assigns in accordance with their respective interests". As to transfer, the context did not permit

[5] *Tolhurst v Associated Portland Cement*; *Southway v Wolff*; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd.*

> such limitless construction, since clause 1, the interpretation clause, defined a "Transferee" as:
>
> "*a bank or other financial institution* to which [a Syndicate member] seeks to transfer all or part of such [member's] rights and obligations hereunder in accordance with the provisions of this Agreement." [my emphasis]
>
> 19. Clause 27 provided, so far as material:
>
> "27.1 This Agreement shall be binding upon, and inure to the benefit of each party hereto and their respective successors, Transferees and assignees. … Any Bank may, subject to the execution and completion of such documents as the [Syndicate members'] Agent may specify and with notice to the Borrower, assign all or any of its rights and benefits hereunder or, subject to the payment to the Agent of a transfer fee of $250, transfer in accordance with Clause 27.2 all or any of its rights, benefits and obligations hereunder.
>
> ……
>
> 63. If it were necessary to do so, I would uphold the Judge's reasons for rejection of Mr Howard's submissions in support of Argo's alternative case under this head. Clause 27 provides two quite distinct modes by which syndicate members could – to use a neutral term for this purpose – pass debts, in the sense of the right to repayment of them, to another. The first, for which clause 27.1 provided, was assignment subject to no restriction as to the class of assignee, **and the second, for which clause 27.2 provided was transfer – novation – imposing, albeit, in my view, loosely, a restriction as to who could be a transferee**. In entering into the Agreement containing two such separate modes by which the Syndicate members could trade their debt in the secondary debt market, Essar and they must be taken to have intended two alternative and mutually exclusive modes of doing it. Such an intention was consistent with English law, which, by clause 32.1 of the Agreement governed its construction. **In English law a distinguishing feature of novation from assignment is that the effect of novation is not to assign or transfer a right or liability, but to extinguish the original contract and replace it by another: see Chitty on Contracts, 29th ed. Vol 1, paras 19-085 – 19-087."**

69. As I have already said, in the present case the actual contractual arrangements cannot simply be disregarded, nor can the conditional benefit principle be applied to produce a result inconsistent with the reality of such arrangements, even if it was appropriate to do so, which I do not think it is.

70. However, in my judgment the fact that there was a new contract does *not* mean that, for the purposes of section 44(6) of LASPO, the success fee payable by the claimant to NH, as a result of the contractual arrangements, did not qualify as "a success fee payable by …. [the claimant] *under a conditional fee agreement entered into before*" 1 April 2013.

71. It is clear, from the expressly stated terms in the Master Deed and the second deed, that, objectively construed, the intention of the parties was that NH should simply be substituted in BR's place, as solicitors acting in connection with the claimant's claim, under and subject to the same terms of the existing (and so far as the parties were concerned, at least) continuing retainer - i.e. the BR CFA. That CFA was intended to remain in force as an operative contractual instrument as between NH and the claimant, and pursuant to which, if the case was won or settled, it was intended that NH should be able to enforce the previously accrued, and accruing, rights to conditional fees, which had indeed been assigned to it by BR. An analogy could be drawn with the effects of a novation in the type of syndicated loan situation exemplified in *Essar Steel*, where one participating syndicate member transfers its obligations to a third party. Whatever the technicalities of novation as a concept, the original syndicated loan agreement remains as a continuing operating contractual instrument between the borrower and all parties.

72. In those circumstances, the fact that, technically, there may have been a novation of the BR CFA after 1 April 2013 does not predicate that the success fee payable by the claimant to NH could not qualify as "a success fee payable by …. [the claimant] under a conditional fee agreement entered into before" 1 April 2013. The clear expectation of both parties, as evidenced by their agreement and stated intentions, as set out in the second deed and the surrounding correspondence, was that, in relation to the claimant's claim, their contractual relations would, as previously in relation to BR, be governed by the continuing terms of the BR CFA.

73. Accordingly I accept the claimant's submissions in relation to the construction of section 44 of LASPO. It is clear that the modern approach to statutory interpretation takes account of the apparent policy of that legislation: *Regina (Quintavalle) v Secretary Of State* [2003] AC 687 at [7]; and *Barclays Mercantile v Mawson* [2005] 1 AC 684 at [28]. Moreover, the policy of LASPO is also clear. In *Plevin* Lord Sumption, giving judgment for the majority, stated at [21] that:

> "The purpose of the transitional provisions of LASPO, in relation to both success fees and ATE premiums, is to preserve vested rights and expectations arising from the previous law. That purpose would be defeated by a rigid distinction between different stages of the same litigation."

74. Similarly, in my judgment, that purpose would be defeated by an overtechnical application of the doctrine of novation so as to prevent any litigant, who had begun a claim under a CFA prior to 1 April 2013, from recovering costs in respect of a success fee, simply because a novation had occurred as a result of a change in the constitution of the firm of solicitors acting for her, or as a result of conduct of her claim case being transferred, for whatever reason, to a new firm of solicitors. Obviously, whether or not any relevant CFA under which the success fee was payable to a new firm could be characterised, as in the present case, as "payable under a conditional fee agreement

entered into before" 1 April 2013, would depend on the precise terms of the relevant contractual arrangements entered into between the parties and whether the new firm was indeed intended to operate "under" the terms of the previous CFA. But where, as here, the parties expressly provide by their contractual arrangements that their vested rights and expectations, under the previous CFA entered into under the previous law, should be continued, I see no difficulty in construing section 44 to give effect to that intention.

75. As Mr Holland QC, on behalf of the Law Society, submitted, such a construction was necessary in order to achieve the intention expressed by Parliament: namely, a division between litigants who had instructed solicitors before LASPO came into force, whose rights and expectations would be preserved, and those who had done so post-LASPO, who would lose some of the advantages of the pre-LASPO regime but receive some mitigating benefits. The defendant's argument would mean the worst of both worlds for the claimant: she would lose the pre-LASPO regime advantages but receive none of the mitigating benefits. This would place the claimant into a third category of litigant which Parliament had not intended to create. Indeed, whilst it is not necessary to decide the point, the result suggested by the defendant may impede the constitutional right of access to the court for those in a similar position to the claimant.

76. I do not accept the defendant's submission that this construction reflected merely a policy of saving solicitors from a commercially undesirable outcome, which could have been avoided if the claimant's original solicitors had managed their affairs properly. The result which I conclude is the correct one reflects the purpose of the legislation to produce a dichotomy between pre- and post-LASPO cases.

77. Accordingly, I conclude in the claimant's favour that the success fee payable to NH was payable under a conditional fee agreement entered into before 1 April 2013.

Issue (4) Liability under the NH CFA

78. In light of my conclusions on issues (1)-(3), it is not necessary to consider issue (4).

Disposition

79. For the above reasons, I would allow the appeal and dismiss the cross-appeal (the latter for different reasons than the judge).

Lord Justice Davis :

80. I agree that this appeal should be allowed. However my reasons for so concluding, and for concluding that the cross-appeal should be dismissed, are not in all respects the reasons of Gloster LJ.

81. It has to be said that an overall conclusion in favour of the defendant would appeal to no sense of the merits. It would mean that the claimant will be deprived of costs to which she might ordinarily expect to have been entitled. It would mean that the defendant is absolved from paying those costs by virtue of adventitious technicality. Further, for the reasons explained in the evidence filed on behalf of the Law Society, and as recounted in the judgment of Gloster LJ, there are many other claimants and

firms of solicitors who potentially may be seriously – perhaps, in some instances, irreparably – affected if the defendant's arguments on the cross-appeal (if not also on the appeal) are upheld.

82. The defendant would in effect say: so be it. But the words "so be it" rarely receive enthusiastic reception by the courts. The question therefore is whether correct legal principles, properly applied to the facts and contractual arrangements of this case, compel the conclusions for which the defendant argues. If they do then that, of course, is the end of the matter.

83. Gloster LJ has fully summarised the background, the provisions of the contractual documentation, the relevant provisions of LASPO and the Order and the competing submissions. I would perhaps add, by way of comment on the contractual documentation, that I did not read it as connoting a total discharge of BR from all its liabilities and obligations: for instance, as I read it, BR would remain liable for any breach by it of its duty of care owed to the claimant before it ceased to act for her.

84. I would say at the outset that I accept that a contract of retainer of this particular kind is to be read as an entire contract. Further (and as all parties were agreed) I accept that the consent of the claimant to NH acting instead of BR was essential.

First ground

85. I am of the clear view that, with respect, the decision of the judge below on the issue of termination was erroneous.

86. It is debateable whether the letter of 22 March 2013 – sent for good and understandable reasons - was of itself terminatory of the contractual retainer. At all events, it gave the claimant the opportunity to "instruct otherwise" with regard to the proposed arrangements. She never did. Thereafter, it is true, BR entered into the Transfer Agreement and Master Deed of Assignment on 25 March 2013. But at no stage did the claimant then treat what had happened as repudiatory of the contractual retainer and accept such repudiation. To the contrary, she explicitly affirmed the arrangements by thereafter entering into the letter of instruction and deed on 10 April 2013.

87. Consequently the BR CFA had not been terminated. I wholly agree with the reasoning of Gloster LJ on this aspect of the case.

88. That, then, leads to the critical issues raised on the cross-appeal by the defendant.

Second ground

89. The argument of Mr Mallalieu, to whose excellent submissions I would pay tribute, founded itself on statements made in a number of the authorities in this field. Thus Lord Browne-Wilkinson in the *Linden Gardens v Lenesta Sludge* case, reflecting what had been said by, for example, Sir Richard Henn Collins MR in the Court of Appeal in the *Tolhurst v Associated Portland Cement* case, said this at p.103A:

> "It is trite law that it is, in any event, impossible to assign "the contract" as a whole, i.e. including both burden and benefit. The burden of a contract can never be assigned without the

> consent of the other party to the contract in which event such consent will give rise to a novation."

Likewise, in the *Southway Group Ltd v Wolff* case, Bingham LJ said this:

> "It is in general permissible for A, who has entered into a contract with B, to assign the benefit of that contract to C. This does not require the consent of B, since in the ordinary way it does not matter to B whether the benefit of the contract is enjoyed by A or by a third party of A's choice such as C. But it is elementary law that A cannot without the consent of B assign the burden of the contract to C, because B has contracted for performance by A and he cannot be required against his will to accept performance by C or anyone other than A. If A wishes to assign the burden of the contract to C he must obtain the consent of B, upon which the contract is novated by the substitution of C for A as a contracting party."

90. Mr Mallalieu focused on those statements and said: so here. The parties may have wanted to effect an assignment: they may have intended to effect an assignment; but they have in law not achieved an assignment; rather, they have achieved a novated contract. You cannot turn a giraffe into a horse simply by agreement (I put it in my words, not his: but that is what it comes to).

91. I do see the force of these arguments. But ultimately I am not persuaded by them.

92. For one thing, the general principle, enunciated so uncompromisingly by Lord Browne-Wilkinson, is not, in my view, wholly inflexible. Thus if the parties to an agreement expressly agree in it that one party may assign both the benefits and the obligations of performing the contract to another then in my opinion there can be no legal objection to the efficacy of such an assignment, as an assignment, if effected thereafter. For another thing, the doctrine of conditional benefit, as discussed by Gloster LJ and to which I will come, constitutes another potential modification to any so-called general principle. There also, I think, may be potential exceptions or modifications in some cases of equitable assignments and also, possibly, in some cases of vicarious or substituted performance.

93. Be that as it may, it seems to me important that the authorities in this field are clear that ultimately what is critical is the interpretation of the contractual arrangements in question. Indeed, the House of Lords in *Tolhurst v Associated Portland Cement* [1904] AC 414 was absolutely specific on that. And I do not myself see why, where all three parties concerned -claimant, BR and NH – plainly intended and agreed that there should be an assignment so as to preserve the BR CFA and so as not to create a wholly new, replacement, contract that that should be regarded as being, in effect, incapable of achievement. Nor do I see why it should conclusively matter that the consent of the obligee is given at the time of the assignment rather than being given in the original contract in the first place.

94. It is, really, for this short reason that I consider that the actual conclusion in the case of *Jenkins* was correct. In that case the client was, by choice, following his individual solicitor to successive firms. The former firm and new firm in each instance agreed to

this: for this purpose all parties plainly intended and agreed an assignment of the initial CFA. That purported assignment was not to be prevented from taking effect as an assignment simply by reason of all three relevant persons – old firm, new firm, client – being party to the arrangements. As I see it, that was the core of the reasoning of Rafferty J: reinforced, in my view legitimately, by policy reasons and by considerations of access to justice. I agree with her. In my view, therefore, practitioners considering the issue of transfer of CFAs were justified in subsequently acting on that decision as being correct in its conclusion: a conclusion which was just, pragmatic and sensible, given the context.

95. I nevertheless do have some reservations as to some aspects of the reasoning of Rafferty J. For one thing, I do not regard the facts of that case as particularly "singular". For another thing, the emphasis which she put in that case on the trust and confidence between client and solicitor (see in particular paragraph 31 of her judgment) seems to me to invert the normal approach to the assignment of such contracts. I also can see that there are potential queries as to whether the principles of conditional benefit in these circumstances can apply, as such, quite so readily as Rafferty J takes it.

96. In this regard, as to conditional benefit, the House of Lords in *Rhone v Stephens* was clear in rejecting the "pure principle" advocated by Megarry J in *Tito v Waddell (No.2)*. Thus the mere fact that a party derives a benefit under a conveyance does not mean that he is necessarily bound by any burden contained in the some conveyance. More is needed; and, at the least, the burden in question must be relevant to and linked to the exercise of the right in question. Were it otherwise, the entirety of any contract – burdens as well as benefits – would, without more, unilaterally be capable of assignment to a third party: which has never been the law.

97. In the present case, at all events, I can see that it can be said that, in substance, there is not being assigned here the right simply to receive payment of costs, including success fee, in the event of the claimant's claim being successful, to which the professional services required to achieve that success are but an ancillary link. It can be said that, if anything, it is more the other way round: NH took on the obligation of providing professional services to the claimant (in fact, took on the entire contract) in the hope that they would reap the benefit, in the form of costs and success fee, if the claim succeeded. It may be that it was those kinds of considerations which prompted Sir Andrew Morritt Ch. to query in *Davies v Jones* whether the benefit and burden were correctly described in *Jenkins*. Nevertheless I note that the Chancellor cast no doubt on the correctness of the actual decision in *Jenkins*. Indeed, it is to be noted that that the *Jenkins* case (as does the present case) would fulfil the three general propositions set out by the Chancellor in paragraph 27 of his judgment.

98. In the result, the conclusion which I reach in this case does not, I think, depart unacceptably from the principles underlying the application of the doctrine of conditional benefit, to the extent that such principles are applicable. My decision is ultimately based on what I consider to be the effect of the tripartite contractual arrangements, based on the proper interpretation of those contractual arrangements: an effect which all parties clearly intended to achieve. If it is, in legal theory, necessary to style this as an extension of the principle of conditional benefit as applied in the context of CFAs (and I am not altogether sure that it is necessary) then that is an incremental extension which, in the present context of CFAs, I am prepared to

make. But what I think remains critical to the proper outcome for this case is that the parties were intending that the terms of the original BR CFA should continue to apply and have effect: and should do so by way of assignment. The court, in my judgment, should seek to give effect to that. I agree with Judge Graham Wood QC when he said, in the course of his judgment in the County Court in the case of *Jones* v *Spire Healthcare Limited* (11 May 2016) and in which he followed and applied the decision in *Jenkins*, that it would be "unduly restrictive" to deny the parties the effect of what they intended.

99. I might also add that in *Pan Ocean Shipping Co Limited v Creditcorp Limited* [1994] 1 WLR 161 Lord Goff, in approving at p.166 B-D the observations of Neill LJ in the Court of Appeal in that case, seems to have seen no objection in principle to the concept of a tripartite agreement, involving creditors, debtors and assignee, as being capable of constituting an assignment.

100. I also consider that such an approach accords with the approach accepted as available by the Supreme Court in *Plevin*. In *Plevin*, Master O'Hare and Mrs Registrar di Mambro – on a Supreme Court costs matter - had, by their judgment of 11 February 2016, expressly rejected an argument there advanced that the CFA in that case was not assignable. That in principle was not then challenged on further reference to the Supreme Court. But it is clear that Lord Sumption (with whom all other members of the court agreed on this point) accepted that the CFA was indeed in principle assignable – that is to say, the entirety of the CFA. I do not understand that the Supreme Court was limiting its consideration solely to the benefit of the contract: see paragraphs 5 to 8 of Lord Sumption's judgment. Further, Lord Sumption expressly noted that the client (Mrs Plevin) had in that case assented to that, by continuing to instruct the new firm. Whilst it is true that the point argued before us was not argued in the Supreme Court it is, in my opinion, a matter of strong comment that the Supreme Court not only raised no reservation whatsoever to the proposition that the CFA (as a whole) was in principle assignable but, to the contrary, had proceeded on the footing that it was and that it had been validly assigned.

101. This then leads to another point which Mr Mallalieu also has raised in his written argument (although I did not understand him particularly to press it in his oral argument). In his written argument he had suggested that an entire contract of personal services, involving also mutual trust and confidence of a kind found, as he said, in the solicitors' retainer in the present case, is wholly incapable of assignment. But it all depends on how the particular contract is in any particular case to be characterised. In the present case, for the reasons given by Gloster LJ, I agree that is not such an objection here and that this is not such a contract. It also, I add, clearly never had occurred to the Supreme Court in *Plevin* that that sort of point might be an objection to the assignability of the CFA.

102. Ultimately, therefore, I consider that, in the last analysis, it comes down to what the parties intended and agreed in this context of seeking to transfer a CFA. They agreed – claimant, BR, NH – on an assignment of the BR CFA and intended that it, and its provisions, should be preserved, not replaced. I do not see that the law then compels the result nevertheless to be an entirely new replacement contract, by way of novation, wholly superseding the original CFA and thereby controverting the parties' intentions and agreement.

103. Accordingly I would, differing, with respect, from Gloster LJ on this particular aspect of the case, find in favour of the appellant on this ground. I also would approve the conclusion of Rafferty J in *Jenkins.*

104. In so concluding, I do understand, and respect, Mr Mallalieu's appeal to what might be styled black letter law. But black letter law has its downsides as well as its upsides. In very many cases, it no doubt will not much matter whether an arrangement is to be regarded as a tripartite assignment or as a true novation. But in cases where it may matter it will have to be decided by reference to the particular facts and to the terms of the particular contractual arrangements, placed also in their relevant context: be it banking, shipping, consumer credit, real property or whatever.

105. That conclusion means that the defendant's case fails. But I would in any event, and as part of my decision, reject that case on the third ground also.

Third ground

106. I will deal with this relatively shortly.

107. At the conclusion of the argument before us my provisional view had been that if Mr Mallalieu was right on the second ground and if what had been effected here was a novation, in the true technical sense of that term, then he was right as to the consequences to be derived from s. 44 (6) of LASPO and Article 6 of the Order.

108. My thinking had been, in summary, this. A novated contract is a new contract, binding all relevant parties to it. A novated contract extinguishes and supersedes the prior contract and replaces it. Consequently, if what occurred here did give rise to a true novated contract (contrary to my own view) then the claimant's obligation to pay NH, and NH's right to recover costs and fees from the claimant, derived entirely from that novated contract. Accordingly, since, notwithstanding the purported backdating, the claimant had only contractually committed herself to the (presumed) novated contract on 10 April 2013 – that is, after the crucial date of 1 April 2013 - it had seemed to me that any success fee would be payable "under" that novated CFA, which had been "entered into" after 1 April 2013. Moreover, whilst that could give rise to harsh results – in this and other comparable cases – it could not necessarily be described as a wholly senseless interpretation: in that Parliament may, albeit at the risk of unintended casualties, have wanted the certainty of a bright line rule.

109. However, having had the advantage of reading the judgment of Gloster LJ in draft, I am persuaded that that would be too narrow an approach.

110. As she points out, and as I have myself sought to say above, the contractual arrangement between the parties was by reference to the original BR CFA. What was intended and agreed was that NH should continue to act as the claimant's solicitor under and on the terms of the BR CFA: by reference to which the obligations on NH, and its rights to payment, were to be found. Those terms also included the contingently accrued right to fees arising prior to the assignment and which also were the subject of the assignment. Thus in real terms the provisions of the BR CFA in actuality continued to be operative for these purposes: as stated by Gloster LJ in paragraph 72 of her judgment.

111. This, I accept, then involves a broad interpretative approach to the meaning of s. 44(6) and Article 6. However, on reflection, I consider that a broad, purposive approach is justified here. It accords with the clear policy underpinning the transitional provisions of LASPO. As Mr Bacon and Mr Holland submitted and as I agree (in concurrence with Gloster LJ) the contrary approach would tend to frustrate the policy underlying the legislation. The consequence of this contrary approach would, for instance, connote that persons in the position of the claimant would forfeit the rights which they had prior to 1 April 2013 whilst potentially also not obtaining the mitigating benefits available to those entering into their arrangements after 1 April 2013. That surely would be perverse. And I do not think that this point is sufficiently met by the assertion that it was open to parties here to finalise all their arrangements prior to 1 April 2013 or to make some other arrangements.

112. I ought, perhaps, to say that I am all the readier to adopt a broad and purposive approach to this issue of statutory interpretation on the basis and for the reasons advanced by Gloster LJ given that, as will be gathered, I have, for myself, been ready to adopt a broad approach, in the context of CFAs, to the issue of assignment/novation. I regard these two approaches, at all events, as consistent.

Conclusion

113. In conclusion, therefore, for the reasons given above, I would allow the appeal and dismiss the cross-appeal.

Lord Justice Beatson :

114. I respectfully agree with Gloster LJ that the correct analysis of the agreements and arrangements between the claimant, Baker Rees (BR) and Neil Hudgell Ltd (NH) resulted in a novated contract rather than an assignment. I also agree that, although there was a new contract between the Claimant and NH, for the purposes of Section 44 (6) of LASPO the success fee payable to NH qualified as a "success fee payable… under a conditional fee agreement entered into before" 1 April 2013. I therefore agree that this appeal should be allowed and that the cross-appeal should be dismissed. In view of the disagreement between my Lady and my Lord, Lord Justice Davis on the "assignment or novation" issue, I shall explain my reasons in my own words.

115. In this case, as well as it being common ground that the consent of the client to the arrangement is required, it is clear that the language of the contractual documents envisage the discharge of BR from any outstanding obligations or liabilities to the client once the arrangement with NH was in place. Accordingly, two of the hallmarks of assignment are not present.

116. There may be a case for being more relaxed about the assignability of certain solicitor-client contracts which are of a bulk and relatively impersonal nature. It does not, however, follow that the client has not reposed confidence in the solicitor as a professional (whether or not it is confidence in the individual solicitor). If so, the contract will involve the solicitor's professional skill in a way that normally precludes the contract being assignable. Moreover, if there is to be a relaxation of the rules precluding the assignability of solicitor-client contractual relationships, a principle

needs to be identified upon which to do so. I do not consider that one has been identified.

117. I agree with my Lady that the principle of conditional benefit does not apply in the circumstances of this case. My concern about extending the principle is as to the consequences. Tolhurst, in *The Assignment of Contractual Rights* (2nd ed., 2016) states at §6.108 states that "the main requirement of the conditional benefit principle is that there must be a contractual duty or burden that does not merely define a contractual right but is inherent or intrinsic in the right itself". If it sufficed that the duty defined the extent of the contractual right, such as a right to receive some performance (for example payment) which is conditional on some work being done, almost every contract would encapsulate a conditional benefit and the orthodoxy of many years that has stated that a burden cannot be assigned would be rendered otiose.

118. I note that, while Davis LJ considers that the conclusion that he has reached does not depart unacceptably from that principle, his conclusion is ultimately based on the interpretation of the contractual relationships and the consent of all parties to the arrangements. This suggests that the principle upon which relaxation is based is the fact that the client, the putative assignor (BR) and the putative assignee (NH) have consented to the arrangements. There are, however, many statements in the authorities that the burdens under contracts are not assignable without consent, and that the effect of obtaining consent is that the contract is novated: see for example the passage from Bingham LJ's judgment in *Southway Group Ltd* v *Wolff* set out by my Lady at [62(ii)] of her judgment. If, as is the import of the approach of Rafferty J in *Jenkins v Young Bros Transport Ltd* [2006] EWHC 151 (QB), and Davis LJ has concluded in this case, where the client, the putative assignor and the putative assignee consent to the arrangements, the contract can be assigned, any contract will in principle be assignable and the doctrine of novation will be made redundant.

119. It is for those reasons that I have concluded that the arrangement in this case must be analysed as a novation.