Supreme Court decides on assignment and variation of CFAs

April 2017

In *Plevin v Paragon Personal Finance Limited* the Supreme Court determined that a CFA had been validly assigned to a new firm and that variations to it after 1 April 2013 were not new agreements. Equally, the premium on an ATE policy topped up for appeals after 1 April 2013 was recoverable.

Background

This concerns a review of the costs assessment which followed the Supreme Court's earlier decision in *Plevin v Paragon Personal Finance Limited*. The claimant Mrs Plevin brought a claim in the County Court concerning the unfair relationship provisions of the Consumer Credit Act 1974 and alleged misselling of payment protection insurance. She lost at first instance, but won in the Court of Appeal and was awarded £4,500. This was upheld by the Supreme Court. When her costs were assessed Mrs Plevin recovered the success fee and ATE premium even though her CFA had been assigned twice and the ATE policy and the CFA had been varied after 1 April 2013 to top them up for the appeals.

Facts

In 2008 Mrs Plevin entered into a CFA with her solicitors. They were then a partnership trading under the name Miller Gardner. She also took out an ATE policy to protect her against an adverse costs order. Neither made provision for substantive appeals against any first instance judgment. The recovery of CFA success fees and ATE premiums was brought to an end by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

The changes took effect from 1 April 2013 but were subject to transitional provisions which:

- allowed recovery of success fees from CFAs entered into before 1 April 2013 if "the agreement was entered into specifically for the purposes of the provision…of… litigation services in connection with the matter that is the subject of the proceedings in which the costs order is made" (section 44(6)(a) of LASPO) and
- allowed recovery of ATE premiums in relation to policies taken out "in relation to the proceedings before [1 April 2013]" (section 46(3) of LASPO).

Miller Gardner subsequently underwent two "organisational changes". First it terminated the partnership and transferred its business to an LLP. It then ceased practising as an LLP and transferred its business to a limited company. These were described by Lord Sumption as "two technical changes of solicitor" and it appears that the same solicitor continued to

Any comments or queries?

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act for the claimant. Upon each transfer of business the assets of the existing entity were transferred by written transfer agreements which included the assignment of "Work in Progress".

The 2008 CFA covered all proceedings up to and including the first trial, as well as any steps taken to seek permission to appeal. After 1 April 2013 Mrs Plevin and the then current Miller Gardner entity entered into two deeds of variation extending the CFA to cover the conduct of the appeals to the Court of Appeal and Supreme Court. Similarly, the 2008 ATE policy was "topped up" for each appeal.

Costs assessment

The costs of the case were assessed by Master O'Hare and Mrs Registrar di Mambro at £751,463.84, including £531,235 for the ATE insurance premium and £31,378.92 for the solicitors' success fee. These sums were wholly disproportionate to the sum of £4,500 that Mrs Plevin won. Paragon's application for review of the costs assessment was made on two grounds:

- it challenged the recovery of the success fee saying that the CFA was made with the solicitors originally instructed and was not validly assigned to the two firms which replaced them
- it challenged any recovery of the success fee and ATE premium pursuant to the variations to the CFA and ATE policy made after 1 April 2013.

The Supreme Court decision

The judgment was given by Lord Sumption. All of the Justices, save one, agreed with him. Lord Hodge dissented in relation to the ATE premium.

Lord Sumption held that the challenge to the validity of the assignment was without any merit. It was not in dispute that the CFA was assignable but the defendant had argued that the assignment of "Work in Progress" on each occasion only included work already done at the transfer date. It did not include work to be done thereafter. However, if that had been correct, the assignee's only right would have been to bill for the outstanding work and Mrs Plevin's solicitors would still be the defunct prior firm. Lord Sumption held that that could not have been the intention of either assignment.

He went on to hold that the same result would have been achieved even if the assignment had only transferred the past work in progress. This is because after each assignment the new entity wrote to the clamant telling her about the change, noting the CFA and recording that they would "continue to represent [her] on the same terms and conditions as previously".

Lord Sumption also held against the defendant in relation to the recoverability of the success fee. Paragon had argued that the 2013 and 2014 variations of the CFA were new agreements for the provision of litigation services entered into after 1 April 2013. As such, they would fall outside of the scope of the transitional provisions of LASPO. Lord Sumption considered the "matter that is the subject of the proceedings" in the transitional provisions meant the underlying dispute; although the two deeds of variation concerned the appeals they were for services in relation to the same "underlying dispute". The deeds did not have the effect of discharging the CFA but rather varying it.

The recovery of the ATE premium turned on the interpretation of the wording requiring an insurance policy to be "in relation to the proceedings" (as distinguished from relating to the subject matter of the proceedings - required for the CFA). Paragon's argument was that if the appeals constituted separate "proceedings" then there was no relevant policy in place prior to 1 April 2013 and accordingly section 44(6) would not be engaged. The crucial question was therefore whether the two appeals constituted part of the same proceedings as the trial.

Lord Sumption held that they did. He noted that although for some purposes (particularly in awarding and assessing costs) the trial and successive appeals constituted separate proceedings, the underlying purpose of the transitional provisions was to preserve rights under the previous law. A rigid distinction between different stages of the same litigation would defeat that purpose. Further, an insured claimant who succeeds at trial and becomes the respondent to an appeal is locked into litigation. Disallowing the recovery of the ATE premium would retrospectively alter the balance of risks on which the litigation was begun.

Lord Hodge, dissenting, preferred the view that the transitional provisions only protected the pre-existing contractual rights in place before LASPO came into force. He was particularly troubled by the different wording used for the success fee and the ATE premium in those provisions.

Comment

There have been a number of recent authorities on the assignment of CFAs. This case involved "organisational changes" with the same firm rather than assignment to a new firm. It turned on the construction of the particular agreement and is not likely to be hugely helpful in other cases. The obiter suggestion that the assignment would have been effected in any event because of the communications between the new firm and the client is something that firms may seek to rely on where everything else fails.

Permitting the variation of CFAs and ATE policies is helpful to claimants and avoids a risk hazard emerging on appeals in litigation relying on stage limited CFAs and policies. The effect of the decision is going to become less relevant very quickly as that tranche of CFAs and ATE policies fades away. And, so too, cases in which the court awards £751,463 costs on a claim recovery of £4,500.

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