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CHAMPIONING CHAMPERTY—COURT OF APPEAL REFUSES TO ALLOW NOVEL FUNDING ARRANGEMENT (FARRAR V CANDEY)

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Dispute Resolution analysis: This Court of Appeal decision is very significant for lawyers who might seek to develop fee agreements beyond those allowed by the Courts and Legal Services Act 1990 (CLSA 1990). The Court of Appeal upheld the judgment of Mr Justice Marcus Smith, who had held that a firm of solicitors which had been acting for a claimant in litigation pursuant to a damages-based agreement (DBA) and subsequently a conditional fee agreement (CFA) could not validly take an assignment of their client's cause of action. Binding authority established that the assignment was invalid and unenforceable. Parliament, being well aware of the common law rules, had decided to relax them to allow for compliant DBAs and CFAs, but no further. Written by Anastasia Tropsha, associate at PCB Byrne LLP.

Farrar v Candey Ltd and another [2022] EWCA Civ 295 (11 March 2022)

What are the practical implications of this case?

The legal profession has experienced significant change in recent years with court hearings and affidavit swearing taking place online, partnerships becoming alternative business structures and publicly traded businesses. What has remained unchanged are fundamental rules of ethics, in particular the cornerstone principles as regards conflicts and champerty. Solicitors who are acting in litigation cannot take an assignment of the case prior to judgment and put themselves into a position where the interest of the client may not be aligned with their own. They cannot, in the words of Smith J, 'undermine the purity of justice' and therefore CFAs and DBAs, which are exempt from the general common law position by virtue of CLSA 1990, remain the only acceptable forms of alternative fee structure. Firms and clients would be well advised to check any existing arrangements for compliance with the rules and keep the court's strict interpretation in mind when drafting such agreements. Perhaps business arrangements with third-party litigation funders may create structures which are not subject to the stricter test applicable to lawyers and reduce the risk of such assignments being found void.

What was the background?

The claimant, Mr Farrar, died in October 2019, having commenced these proceedings against the defendant, Mr Miller, in 2014. A firm of solicitors (Candey) acted for Mr Farrar in the proceedings, which were funded by a DBA between Mr Farrar and Candey, subsequently amended to a CFA. Mr Farrar exhausted his funds and was no longer able to finance his claim and he therefore assigned the claim to Candey, to whom he owed legal fees.

Under the terms of the assignment, the CFA was terminated. Any recoveries were agreed to be distributed as follows: (a) payment of any after-the-event (ATE) insurance premium; (b) double Candey's legal costs in the present proceedings plus Candey's costs in certain other matters (subject to a maximum of 50% of the recoveries after deducting the ATE premium and £125,000); (c) the balance to Mr Farrar.

Candey sought to be substituted for Mr Farrar as claimant on the basis that Mr Farrar had assigned his claim against Mr Miller to Candey. Mr Miller opposed the application, arguing that the assignment was void on the grounds of champerty and the first instance court agreed.

Candey appealed on the grounds that either (i) the judge applied the wrong test or (ii) even if the judge applied the correct test in asking whether the assignment was contrary to public policy, he was wrong to conclude that it was. The first ground was not pursued in oral submissions.

What did the court decide?

As to the second ground, Candey's argument was that the court should recognise that an assignment such as the present one was no longer contrary to public policy. The Court of Appeal was unanimous in rejecting that argument. It held that:

- the Court of Appeal is bound by its decision in *Pittman v Prudential Deposit Bank* (1896) 13 TLR 110, which provides that 'a solicitor acting for a client in legal proceedings may not validly take an assignment of the client's cause of action prior to judgment' (para [51]); and

- the court is also bound by *Awwad v Geraghty* [2001] QB 570 and *Rees v Gateley Waring* [2014] EWCA 1351, which establish that 'a champertous agreement not sanctioned by the 1990 Act remains contrary to public policy and is therefore unenforceable' (para [51]).

Candey argued that the court was not bound by its own precedents in circumstances where the underlying public policy had changed. However, they were unable to cite any supporting authority and in any event the decisions in *Awwad* and *Rees* established that there had been no relevant change in public policy. Lord Justice Arnold, delivering the unanimous judgment of the court, stated that even if he had the freedom to depart from previous authorities, he would not do so. Parliament, being well aware of the common law rules, had relaxed them only so far as CLSA 1990, ss 58 and 58AA provided.

The first instance judge's conclusion on the facts that the assignment was offensive to justice could not affect the outcome of the appeal, so the Court of Appeal did not need to decide whether it was correct. However, Arnold LJ made the obiter comment that 'it is far from obvious to me that [the judge's] concerns were misplaced'. (para [53])

Case details

- Court: Court of Appeal, Civil Division
- Judges: Lady Justice Simler, Lord Justice Arnold and Lord Justice Phillips
- Date of judgment: 11 March 2022

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