

Factor in Factortame—funding and champerty for creative litigation lawyers (Farrar (deceased) v Candey Ltd and another)

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Dispute Resolution analysis: This judgment analyses a novel litigation financing arrangement between a claimant and his solicitors in the context of recent developments in the area of permitted financing agreements. Mr Justice Marcus Smith held that the assignment of a claim by a client to his solicitors was void under common law champerty principles where the assignment replaced a damages-based agreement (DBA) and subsequent conditional fee agreement (CFA), but was not itself compliant with the statutory requirements for a DBA or a CFA. Written by Natalie Todd, partner, and Anastasia Tropsha, lawyer, at PCB Byrne LLP.

Farrar (deceased) v Candey Ltd and another [\[2021\] EWHC 1950 \(Ch\)](#)

What are the practical implications of this case?

This case provides a reminder of the test for champerty (in particular where the contract is between lawyer and client) and the need to ensure that any litigation funding arrangements comply with the statutory rules.

There is a very hard distinction between potentially champertous transactions between non-lawyers and those involving agreements with lawyers. In the non-lawyer cases, the court will look at the totality of the transaction and assess whether the assigned cause of action is ancillary to a property right or interest, or the assignee had a genuine commercial interest in taking the assignment and in enforcing it for their own benefit. If that is the case, the assignment is valid (*Trendtex Trading v Credit Suisse* [1982] 1 AC 679 at 703). It will also analyse a transaction in its contemporaneous context, given that the public policy dimension ‘must reflect the times’ (*Martell v Consett Iron Co Ltd* [1955] 1 Ch 363 at 382).

Agreements between client and lawyer, however, are assessed according to whether they are sanctioned by statute. Marcus Smith J recognised that the times have changed considerably in the case of litigation funding, as the need for and importance of access to justice has rendered proper and lawful transactions which would previously have been seen as champertous (para [18], see also *JEB Recoveries LLP v Binstock* [\[2015\] EWHC 1063 \(Ch\)](#) at [65] and *Akhmedova v Akhmedov* [\[2020\] EWHC 1526 \(Fam\)](#)). Nonetheless, an assignment of the claim by a client to a lawyer (including a share of the proceeds) is a step too far as this arrangement is not authorised by the [Courts and Legal Services Act 1990 \(CLSA 1990\)](#).

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.

By this application, 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.

Under *R (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8)* [2002] EWCA Civ 932, a person is guilty of champerty when they support litigation in which they have no legitimate concern without just cause or excuse and stipulate for a share of the proceeds of the action or suit. This rule applies to all contracts within its scope, including assignments of rights to litigate or of causes of action, which could be void if found to infringe the rules of champerty.

What did the court decide?

If the assignment was valid, then it was an assignment within [section 136](#) of the Law of Property Act 1925, which permits an assignee of a debt to bring proceedings in their own name. The assignment was absolute, despite there being an obligation as to the distribution of recoveries. No *formal* notice of assignment was required: what was required was an express written notice, and that had been given by way of an application to substitute Candey for Mr Farrar.

The assignment was not a CFA or a DBA within the meaning of [CLSA 1990](#). However, Candey put forward two bases for saying that it was in the public interest and not champertous. First, Candey argued that the assignment was similar in effect to a proper DBA and was in the public interest. The recognition of DBAs and CFAs by the [CLSA 1990](#) and the judicial recognition that times had changed and access to justice is important rendered the assignment something in the public interest.

Marcus Smith J noted that there was a difference between cases where the allegation of champerty related to a non-party conducting litigation and those concerning agreements with lawyers (*Sibthorpe v Southwark LBC* [2011] EWCA Civ 25). In the latter case, such agreements are contrary to public policy and void unless sanctioned by statute. In the present case the assignment was not sanctioned by the CSLA 1990 and was void as a champertous transaction.

Second, Candey argued that the assignment was a continuation by other means of a perfectly proper DBA.

Marcus Smith J adopted the balancing approach which would apply to arrangements with a non-lawyer and weighed the benefits of improved access to justice against the drawbacks of undermining the purity of justice. In the judge's view, the assignment could not be justified and was champertous, despite the shift in approach concerning litigation funding. The judge also held that the reasoning in *Sibthorpe* applied with equal force to a transaction which replaces a CSLA 1990 compliant DBA or CFA but which is not itself compliant. The assignment was therefore void.

Case details

- Court: Business and Property Courts of England and Wales, Business List (ChD), High Court of Justice
- Judge: Mr Justice Marcus Smith
- Date of judgment: 16 July 2021

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