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Court of Appeal rules that profit costs are due under CFA taken out whilst legal aid funding was in place

Hyde v. Milton Keynes NHS Foundation Trust
[2017] EWCA Civ 399

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Executive speed read summary

This is a clinical negligence claim. 3 firms of solicitors acted for the patient over 6 years. Liability was conceded by the NHS in September 2013. The patient was legally aided but the financial limit of cover was reached and the Legal Services Commission refused to extend funding. In March 2013 just before the LASPO changes came into force, the patient entered into a CFA with her solicitors and counsel providing for a success fee and ATE premium. The solicitors did not seek a discharge of her legal aid certificate. Damages were agreed at £325k and a bill of costs was served seeking over £252k costs. The NHS said the CFA was invalid because the patient remained legally aided. The NHS refused to pay anything other than base costs. Master Rowley rejected this submission and a first appeal by the NHS to Soole J was also dismissed. On 2nd appeal the Court of Appeal has now upheld the ruling of the 2 lower courts. Lord Justice Davis noted that 'justice and fairness are the key'. He ruled that there had been no concurrency and there had been no period of time when the solicitors could take payment both under the CFA and the undischarged legal aid certificate.

Hyde v. Milton Keynes NHS Foundation Trust
[2017] EWCA Civ 399 *23 May 2017*
Court of Appeal, Civil Division (Lords Justices Davis, Lewison and McCombe)

What are the facts of the case?

Hyde brought a clinical negligence claim against the NHS defendant arising out of an event which occurred on 18 February 2008. During the course of the claim, Hyde instructed 3 different firms of solicitors:

- Scrivenger Seabrook - On 17 March 2008 Hyde instructed them until August 2009,
- Osborne Morris & Morgan from 15 October 2009, and
- Ashton KCJ (formerly known as Kester Cunningham John) from 1 April 2011 onwards.

How was the case funded?

From 10 July 2008 Hyde had the benefit of a CLS funding certificate and was legally aided. Hyde eventually started proceedings in August 2011. The financial limit on the certificate was £39,400 which was increased to £43,000 in November 2012. Hyde's solicitors had a 'Very High Costs Case' ('VHCC') contract with the Legal Services Commission ('LSC'). By letter dated 20 November 2012 the LSC refused to increase the funding limitation on the Hyde's certificate any more. Her solicitors attempted to persuade the LSC to change its decision were unsuccessful. Her solicitors said the funding level was insufficient to cover expert reports and their profit costs to trial.

Hyde and her solicitors then entered into a CFA dated 25 March 2013 and an 'after the event' (ATE) policy was issued the following day. The solicitors claimed a success fee of 50% from 25 March 2013 and counsel claimed a 100% success fee from 15 March 2015.

How did compensation in the case come to be agreed?

The NHS initially denied liability but in July 2012 breach of duty was admitted by the defendant. A consent order was filed on the issue of liability dated 30 July 2012. On 12 July 2012 the NHS made an offer to settle for £100,000 and then made a Part 36 offer of £150,000 on 15 August 2012. On 29 April 2013 the NHS increased its offer to £275,000. At a joint settlement meeting in November 2013 Hyde offered to accept £325,000 which the NHS accepted. The settlement was reflected in a consent order dated January 2014.

What costs were incurred?

On 31 March 2014 Hyde served a Notice of Commencement of costs assessment proceedings. She sought total costs of £252,704.73 for the 5½ years of her litigation against the NHS that her 3 firms of solicitors claimed to have incurred.

What about 'after the event' insurance?

When the funding was changed from legal aid to CFA in March 2013, Hyde's solicitors also arranged for an ATE insurance policy to be taken out. It should be noted that breach of duty had been admitted 9 months earlier and so this was an ultra-low risk case for an insurer as Hyde was bound to recover some damages - it was only the amount that needed assessing. At the hearing the paying party's counsel said the ATE premium was £60,000.

What objections were taken by the paying party in the Points of Dispute?

These were the 2 linked principal objections taken by the paying party in the Points of Dispute and which formed its case for resisting costs recovery in all 3 courts:

- Whether at the time the CFA was entered into, Hyde's solicitor was properly to be regarded as a person providing 'funded' services within the scope of section 22 of the Access to Justice Act 1999, and
- If so what effect (if any) this had on Hyde's ability to recover costs incurred from her CFA from the NHS as paying party.

What did the Master Rowley in the SCCO below rule?
In his reserved judgment dated 1 July 2015 Master Rowley found in favour of the receiving party patient - **[2015] EWHC B17 (Costs).** He ruled that the CFAs were valid and enforceable and that the NHS had to pay such costs and success fees as assessed under them.

What ruling did Mr Justice Soole give?
Mr Justice Soole sitting with Master O'Hare as an assessor in the High Court, Queen's Bench Division on 20 January 2016 **[2016] EWHC 72 (QB)** on first appeal dismissed the appeal of NHS as paying party. He agreed with Master Rowley that the legal aid certificate had been discharged by conduct and said there had been no need for the equivalent of a '*burial certificate'* from the LSC noting:

> '*While the correct and wise procedural course would have been to obtain a discharge of the certificate, the position was in substance the same as if the authorised funds had been completely exhausted. The funds were approaching exhaustion, the LSC had refused further funding and the case could only proceed if alternative funding were obtained*.'

In these circumstances, Soole J said Master Rowley had rightly held that there was no question of an attempt to top up a legal aid certificate nor of any other form of abuse of the system.

What does the legislation provide?
The Access to Justice Act 1999 ('AJA') contains a number of critical provisions. These are:

- Section 10 '***Terms of provision of funded services'***: *(1) An individual for whom services are funded by the Commission as part of the Community Legal Service shall not be required to make any payment in respect of the services except where regulations otherwise provide.*'
- Section 11 '***Costs in funded cases'***: *(1) Except in prescribed circumstances, costs ordered against an individual in relation to any proceedings or part of proceedings funded for him shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including—(a) the financial resources of all the parties to the proceedings, and (b) their conduct in connection with the dispute to which the proceedings relate'*,
- Section 22 '**Position of service providers and other parties etc': '***(1) Except as expressly provided by regulations, the fact that services provided for an individual are or could be funded by the Commission as part of the Community Legal Service or Criminal Defence Service shall not affect—(a) the relationship between that individual and the person by whom they are provided or any privilege arising out of that relationship, or (b) any right which that individual may have to be indemnified in respect of expenses incurred by him by any other person'*.
- Section 22(2) – '*A person who provides services funded by the Commission as part of the Community Legal Service or Criminal Defence Service shall not take any payment in respect of the services apart from—(a) that made by way of that funding, and (b) any authorised by the Commission to be taken'*.

Are there any prior authorities of relevance?
Yes. These are the main authorities referred to in the judgement:

> *Littaur v. Steggles Palmer* **[1986] 1 WLR 287** (Court of Appeal – Ackner, Parker & Cairns LJJ)
> *Where a certificate granted legal aid only for a specific step in litigation, the 'proceedings' in connection with which the certificate was issued were for the purpose of regulation 65 of the Legal Aid (General) Regulations 1980, the step or aspect of that litigation for which legal aid had been thereby granted and not the action as a whole. Once the work covered by a legal aid certificate had been completed, the certificate ceased to have effect and there was no obligation on the assisted person's solicitor to apply for its discharge.*
>
> *Turner v. Plasplugs Limited* **[1996] 2 All ER 939** (Court of Appeal - Sir Thomas Bingham MR, Schiemann and Peter Gibson LJJ)
> *In the absence of a legal aid certificate covering the issuing of proceedings, a litigant did not have the benefit of legal aid. He could only claim assistance up to the accomplishment of the relevant procedural steps. Once those steps were completed his certificate was spent. There was no need for it to be discharged. The litigant could not claim protection as a legally assisted person under section 17 of the Legal Aid Act 1988 for actions taken in excess of the permitted steps unless he gained an extension to the certificate from the legal aid committee.*

Burridge v. Stafford **[2000] 1 WLR 927** (Court of Appeal – Lord Woolf MR, Butler-Sloss and Robert Walker LJJ)
The fact that a litigant's legal aid certificate had not been discharged was not determinative of whether the litigant was a legally assisted person for the purposes of the Legal Aid Act 1988. A person ceased to be a legally assisted person within the meaning of section 2 at least from the date that he started to act in person.

Merrick v. Law Society **[2007] EWHC 2997 (Admin)** (Divisional Court - Thomas LJ & Gross J)
Regulation 64 of the Civil Legal Aid (General) Regulations 1989 was clearly worded. It was designed to prevent an abuse of the fact that legal aid had been granted and it prohibited a solicitor from receiving a payment from a client for work done during the currency of a legal aid certificate.

Mohammadi v. Shellpoint Trustees Ltd and Anston Investments Ltd **[2009] EWHC 1098 (Ch)** (High Court, Chancery Division - Briggs J and assessors Master O'Hare & David Harris, Solicitor)
During any period when acting in person, a litigant is not a legally assisted person, even though she was actively seeking to reinstate her legal aid certificate. It makes no difference that a litigant obtained the services of a new firm of solicitors under her reinstated certificates. The litigant is not a legally assisted person during any period after a firm of solicitors which had ceased to act for her had communicated that fact to the other side's solicitors. The reinstatement of a legal aid certificate for the purposes of enabling new solicitors to act does not have the effect retrospectively, that the litigant is deemed to have been a legally assisted person for the purposes of s 17 during the period between the discharge and the reinstatement of the certificates or during any period between the termination of the old firm's retainer and the commencement of the new firm's retainer.

Rayner v. The Lord Chancellor **[2015] EWCA Civ 1124** (Court of Appeal - McCombe, Gloster and Underhill LJJ)
The phrase 'costs … attributable to the [funded] part of the proceedings' more naturally means costs incurred during that part. It was reasonably clear that the draftsman of the regulations proceeded on the basis that the criteria governing the qualification of the funded party for cost protection and those governing the liability of the LSC for the costs of the unfunded party should match. The whole structure of regulation 5 of the Community Legal Service (Cost Protection) Regulations 2000 rests on the basis that costs protection is in place as regards the selfsame costs of the unfunded party for which the LSC is to be potentially liable.

Who did the Court of Appeal rule?
Lord Justice Davis gave the unanimous judgment of the court. He started by noting that the NHS appeared to have argued below that the patient '*could recover no costs at all for work done in the period covered by the CFA'*, but he said that '*such an outcome can scarcely appeal to any sense of the merits*'.

Although he agreed that the NHS's submissions had '*clarity and certainty'* nevertheless Davis LJ ruled that he saw '*problems in the way of this bright line approach advocated'*. Firstly Davis LJ said that the NHS's approach mean that '*in the absence of discharge of the funding certificate, the CFA is to be regarded as unenforceable'* but he said that '*such a consequence cannot readily be spelled out from the wording of s. 10 and s. 22 of the 1999 Act or the Regulations'* but rather the opposite was the case because '*the language of the statute does not state that to be the consequence'* and the '*prohibition is on the obligation to make, and entitlement to receive, payments for services on a concurrent basis'*.

Davis LJ went on to note that '*it was inherent in the making of the CFA that it indeed from its commencement entirely superseded the public funding for the services being provided and precluded the solicitors from claiming on the LSC for such services so provided'*. Davis LJ also found a 2nd problem with the NHS's submissions because he ruled that these were '*undermined by authority'* and there had been '*instances where it is established that a private retainer is still enforceable even where the funding certificate has not been formally discharged'*.

Davis LJ then anaylsed what he saw was the true position from the decisions in *Littaur, Turner, Burridge, Mohammadi* and *Rayner* (summarized above). He ruled that these authorities were '*at all events flatly against an inflexible conclusion that a party in all cases is necessarily to be regarded as a legally assisted person until, or in the absence of, a formal discharge of the certificate*'. As to the NHS's argument as to '*clarity and certainty'*, Davis LJ brushed this aside ruling that whilst this argument '*in itself it has attractions*' it was '*undermined by the approach'* taken in the authorities which '*ultimately are focused on the justice and fairness of the individual outcome in each case, on substance rather than form*'.

However Davis LJ ruled that this case was '*capable of distinction on the facts from the previous authorities*' because the prior cases '*essentially related to the scope of the funding certificate'*. Davis LJ noted that there was '*no objective criterion at the time available to establish whether, or when, that limit latterly increased to £43,000 had been reached'*. Nevertheless Davis LJ ruled that in his view the NHS's submission were '*much too narrow'* and they were '*not reflective of the way the previous cases have developed*' and the conclusion argued for was '*not compelled… by the provisions of sections 10 and 22 of the 1999 Act*'. He said that as a '*matter of reality and substance, the CFA had for all purposes replaced the previous public funding*'. Finally on this point, Davis LJ observed that the absence of a certificate of discharge was merely '*evidential*' and '*not conclusive'*.

As to assessing the date when a legal aid certificate had ceased to have effect, Davis LJ said that '*there may be a potential difficulty in some cases in assessing the date on which a party ceases to be legally assisted*' but that '*no doubt ordinarily an appropriate date may well be the notification to the opposing party, given the potential importance of the matter'* and that inflexibility was '*to be avoided in order to cover instances where an inflexible approach could bring about injustice'*.

Applying this to the present case, Davis LJ said that he saw 'no real difficulty' because for him 'justice and fairness are the key'. Concluding, Davis LJ ruled that:

> '*there was in truth, given the facts and circumstances, no concurrency. There was no period of time when, with regard to the services being provided to the client, the solicitors could, let alone did, take payment both under the private retainer constituted by the CFA and under the (undischarged) funding certificate'*.

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