29 March 2017

PRESS SUMMARY

Plevin (Respondent) v Paragon Personal Finance Limited (Appellant) [2017] UKSC 23
On appeal from [2013] EWCA Civ 1658

JUSTICES: Lady Hale (Deputy President), Lord Clarke, Lord Sumption, Lord Carnwath, Lord Hodge

BACKGROUND TO THE APPEAL

This judgment relates to a review of the costs assessment that followed the decision of the Supreme Court in *Plevin (Respondent) v Paragon Personal Finance Limited (Appellant)* [2014] UKSC 61. The respondent's solicitors were acting under a conditional fee agreement ("CFA") with after the event insurance ("ATE"). The recoverability of a success fee under a CFA and the ATE insurance premium depended on the costs regime which was, subject to transitional provisions, brought to an end on 1 April 2013 by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO").

The respondent had entered into a CFA with her original solicitors, Miller Gardner, on 19 June 2008. Subsequently there were two changes of solicitor, both of which arose out of organisational changes within the same firm. Specified assets were transferred by written agreement on both occasions from the new to the old firm.

The original CFA covered all proceedings up to and including trial, as well as all steps taken to seek leave to appeal from an adverse result at trial. Accordingly, the respondent and Miller Gardner entered into a deed of variation extending the CFA to cover the conduct of the appeal to the Court of Appeal on 8 August 2013. A similar deed was entered into on 3 January 2014 when leave to appeal to the Supreme Court had been given. Likewise, the ATE policy was originally concluded on 29 October 2008, and was then 'topped up' for the appeals to the Court of Appeal and Supreme Court.

Costs in the Supreme Court were assessed by Master O'Hare and Mrs Registrar di Mambro at £751,463.84, including £31,378.92 for the solicitors' success fee and £531,235 for the ATE insurance premium. Rule 53 of the Supreme Court Rules 2009 provides for a party dissatisfied with an assessment of costs made at an oral hearing to apply for any question of principle arising from an assessment to be reviewed by a single Justice, who may refer the matter to a panel of Justices. The appellant applied for a review of costs on two such grounds: (i) in relation to the success fee, the CFA was not validly assigned to the firms that replaced the respondent's original solicitors on the record; and (ii) in relation to both the success fee and the ATE premium, these were not recoverable because they were payable under arrangements made by the respondent after LASPO came into force. The application for review came before Lord Sumption, who referred it to the full panel.

JUDGMENT

By a majority of 4 to 1, the Supreme Court affirms the assessment of the costs officers. Lord Sumption gives the judgment, with which Lady Hale, Lord Clarke and Lord Carnwath agree. Lord Hodge writes a dissenting judgment.

REASONS FOR THE JUDGMENT

The appellant's first argument that the CFA was not validly assigned on either occasion when the respondent's solicitors underwent reorganisation was rightly rejected by the costs officers **[4]**. The CFA was in principle assignable. The appellant's argument is that the term "*Work in Progress*" in the transfer agreements includes only work already done at the transfer date. If this were correct, it would mean that the only right of the successor firm was to bill the clients for work done before date, leaving them with no solicitor to act for them thenceforth **[6]**. This cannot have been intended and, in any event, shortly after both transfers the new firm wrote to the respondent, referring to the CFA and saying they would continue to represent her on the same terms and conditions as before **[8]**.

As to the recoverability of the success fee, the appellant's argument was that the variations of the CFA of August 2013 and January 2014 were new agreements for the provision of litigation services entered into after 1 April 2013 (and so were not covered by the transitional provisions of section 44(6) of LASPO). This argument was rejected. The "*matter that is the subject of the proceedings*" in section 44(6)(a) means the underlying dispute. The two deeds of variation provided for litigation services in relation to the same underlying dispute as the CFA, albeit at the appellate stages **[12]**. Both deeds are expressly agreed to be a variation of the CFA, rather than to discharge it **[13]**. Further, they were not a sham designed to avoid the operation of section 44(4) of LASPO **[14]**.

The recoverability of the ATE premium turns on the meaning of section 46(3) of LASPO, which is worded slightly differently from section 44(6). Section 46(3) refers to an insurance policy "*in relation to the proceedings*" and not to the *subject matter* of the proceedings; i.e. the requisite link is with the proceedings, themselves. Before 1 April 2013 there was an ATE policy in place, but not at that point in relation to the appeals before the Court of Appeal or Supreme Court. The critical question was therefore whether the two appeals constituted part of the same 'proceedings' as the trial **[17]**.

For some purposes, such as assessing costs, the trial and successive appeals do constitute distinct proceedings **[18]**. However, the meaning of 'proceedings' must depend on its statutory context and the underlying purpose of the provision **[19]**. The starting point is that as a matter of ordinary language one would say that the proceedings were brought in support of a claim and were not over until the courts had fully disposed of that claim; it is synonymous with 'action'. Answering the question posed by section 46(3) of LASPO is not assisted by the fact that costs are separately assessed in relation to each stage **[20]**. The purpose of the transitional provisions of LASPO is to preserve rights and expectations vested under the previous law. That purpose would be defeated by a rigid distinction between different stages of the same litigation. An insured claimant who succeeds at trial and becomes the respondent to an appeal is locked into litigation; if the top-up premium is not recoverable, it would retrospectively alter the balance of risks on the basis of which the litigation was begun **[21]**. The difference in the language between sections 44(6) and 47(2) on the one hand and section 46(3) on the other are not significant in this regard; and there is no rational reason why the legislation should have wished to limit the transitional provisions in section 46(3) to a particular stage in litigation, while extending those in sections 44(6) and 47(2) to arrangements relating to the underlying 'matter' **[22]**.

Lord Hodge agrees with Lord Sumption on the question of the assignment of the CFAs but dissents on the interpretation of LASPO **[25]**. He interprets the transitional provisions as protecting only the pre-existing contractual rights in place before LASPO came into force **[26]**: (i) the transitional protection cannot depend on whether the contract for a success fee at later stages is achieved by varying or assigning the CFA or entering into a new one **[24]**; (ii) the wording of section 46(3) focuses on the scope of the pre-existing costs insurance policy, and the question to be asked is "what are the proceedings in relation to which the party has obtained a costs insurance policy?" **[35]**; and (iii) the public policy in the transitional sub-sections can be reconciled if the words "*the proceedings*" in section 46(4) are construed as referring to such proceedings as were covered by the pre-commencement day insurance policy **[36]**.

References in square brackets are to paragraphs in the judgment