Neutral Citation Number: [2018] EWCA Civ 1376

Case Nos: A2/2016/4536 & A2/2017/0046

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT CARDIFF
HH Judge Curran QC
District Judge Marshall Phillips
Claim No: 3YQ14606

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/06/2018

Before :

LORD JUSTICE PATTEN
and
LORD JUSTICE HAMBLEN

- -

Between :

DREW MALONE	**Appellant/ Claimant**
- and -	
BIRMINGHAM COMMUNITY NHS TRUST	**Respondent/ Defendant**

- -
- -

Benjamin Williams QC (instructed by **NewLaw Solicitors**) for the **Appellant/Claimant**
Richard Booth QC and Michael Deacon (instructed by **Acumension Ltd**) for the **Respondent/Defendant**

Hearing date : 24 May 2018

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Judgment Approved

Lord Justice Hamblen :

Introduction

1. This appeal concerns the proper construction of a CFA and specifically whether, as the judges held below, it was limited to proceedings brought against the only potential defendant named in the CFA itself.

Factual background

2. The appellant claimant was a prisoner at HMP Birmingham. He claimed that whilst in prison there was a negligent failure between August 2010 and January 2011 to diagnose that he had testicular cancer.

3. At that time the prison was operated by the Ministry of Justice but health care services were provided by two NHS trusts, Birmingham Community NHS Trust (the respondent defendant) and Birmingham and Solihull Mental Health Foundation Trust ("BSFT").

4. The claimant initially appointed Ross Aldridge solicitors to conduct his claim and on 5 July 2011 they agreed a CFA with him. They experienced difficulties in identifying the correct defendant, corresponding with both the prison governor and the NHSLA.

5. In March 2012 New Law solicitors were instructed in place of Ross Aldridge. They also identified that there was uncertainty over the correct defendant.

6. New Law were unable to make contact with the claimant for several months. However, on 16 January 2013 the claimant met with them and signed a CFA. He was also supplied with New Law's standard terms of business.

7. New Law corresponded with both the prison and prison medical authorities concerning the claim, but there remained some uncertainty about the body which had been responsible for the claimant's medical care. This is reflected by the fact that when proceedings were issued on 16 August 2013 all three potential defendants were named, the Ministry of Justice, the defendant and BSFT. The claimant personally signed the claim form.

8. On 4 October 2013, the defendant acknowledged that it was responsible for the claimant's treatment. It was accordingly the only defendant served with the proceedings. The other defendants were removed from the proceedings by an order dated 28 January 2014.

9. The defendant settled the claim for £10,000 plus costs by a Tomlin order dated 20 March 2014.

Procedural background

10. After the case was settled a detailed assessment was commenced. The defendant asserted that no costs were payable to the claimant because the only potential defendant named in the CFA was the Home Office and the CFA was accordingly

limited to a claim against the Home Office/Ministry of Justice. It did not cover a claim against a health trust, such as the defendant.

11. In a judgment dated 27 April 2015 DJ Phillips, the regional costs judge for Wales, held that as a matter of construction the CFA excluded a claim against the defendant. He also found that no retainer other than the CFA could be inferred. He therefore held that no costs were recoverable because the claimant had no contractual liability to pay New Law for the work done in bringing the claim against the defendant.

12. Permission to appeal was granted on paper by HHJ Seys Llewelyn QC, the designated civil judge for Wales.

13. The appeal on the issue of coverage was dismissed by HHJ Curran QC ("the judge") in a judgment dated 25 September 2015.

14. Permission to appeal was given on the papers by Briggs LJ by order dated 28 July 2017.

The CFA

15. The CFA was on the Law Society standard form with various typed insertions. The most relevant provisions are as follows:

> "Conditional Fee Agreement
>
> This agreement is a binding legal contract between you and NewLaw solicitors. Before you sign, please read everything carefully. This agreement must be read in conjunction with the enclosed document "Conditional Fee Agreements: What you need to know", which has been produced by the Law Society.
>
> …
>
> What is covered by this agreement
>
> > ·All work conducted on your behalf following your instructions provided on [sic] regarding your claim against Home Office for damages for personal injury suffered in 2010. (underlining added)
>
> …
>
> What is not covered by this agreement
>
> ·Any counterclaim against you.
>
> ·Any appeal you make against the final judgment order."
>
> Paying us
>
> If you win your claim, you pay our basic charges, our disbursements and a success fee. You are entitled to seek recovery from your opponent of part or all of our basic charges, our disbursements, a success fee and insurance

> premium as set out in the document "Conditional Fee Agreements: What you need to know.""

16. The appeal turns on the proper construction of the underlined words ("the critical wording"). Although we were referred to other provisions of the CFA, they have no direct relevance. It is, however, to be noted that the rest of the CFA did not refer to any specific defendant. Various references were made to succeeding against an "opponent" but this term was not defined.

The grounds of appeal

17. The grounds of appeal are that the judge was wrong in law to conclude that the claimant's CFA did not cover his claim against the defendant. The judge should have held that:

    (1) The function of the critical wording was merely to identify the claim to which the CFA related, and not to limit the scope of the CFA to a claim against the Home Office and no other entity;

    (2) In any event, construed in context, the reference to "Home Office" was a reference to the public authority or authorities responsible for the claimant's welfare as a prisoner at HMP Birmingham, and this included the defendant, which was admittedly responsible for medical services at HMP Birmingham.

Ground 1 – Whether the critical wording limited the scope of the CFA to a claim against the Home Office.

18. We were referred to a number of authorities concerning the proper approach to construction, including *ICS Ltd v West Bromwich Building Society* [1998] 1 WLR 896; *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101 and *Wood v Capita Insurance Services* [2017] UKSC 24; [2017] AC 1173.

19. The latest guidance is to be found in *Wood* at [10]-[15] of the judgment of Lord Hodge, with whom Lord Neuberger, Lord Mance, Lord Clarke and Lord Sumption agreed. He stated as follows at [11]-[13]:

> "11. ….Interpretation is, as Lord Clarke JSC stated in the *Rainy Sky* case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause….
>
> 12 This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the *Arnold* case, para 77 citing *In re Sigma Finance Corpn [2010] 1 All ER 571* , para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis

> commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.
>
> 13 Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance…."

20. Textualism and contextualism are accordingly both tools to be used to ascertain the objective meaning of the words used and the relative importance of these tools will vary according to the circumstances, including the quality and expertise of the drafting.

21. In the present case, the insertions made to the CFA demonstrate poor quality drafting and little attention to detail. The critical wording consists of only one sentence and yet it contains three manifest mistakes: (i) the omission of the date of the instructions and (ii) the omission of the definite article before "Home Office" and (iii) the description of the claim as being against "Home Office". The Home Office had not been responsible for operating prisons for some years.

22. In accordance with the guidance provided in *Wood,* the interpretation of such an agreement is likely to call for more emphasis on the factual matrix and contextual considerations and less principal emphasis on close textual analysis.

23. It was and is accepted by the defendant that the reference to "Home Office" was a misnomer and that it should be treated as referring to the government authority responsible for HMP Birmingham, the Ministry of Justice.

24. Considering first textual matters, much turns on whether the words "regarding your claim against Home Office" are properly to be read as relating to and qualifying "all work conducted on your behalf" or the "instructions provided".

25. The claimant contends that these words relate to the instructions provided. Mr Benjamin Williams QC for the claimant submits that the reference to "Home Office" did not purport to and did not limit the scope of the CFA. Rather, it simply identified the instructions which had been received from the claimant. Those instructions were indeed "regarding" a claim against the "Home Office" and thus the prison authority. The CFA was to cover all work done following those instructions. They did not limit the solicitors to pursuing a particular defendant or prison authority.

26. The defendant contends that these words relate to the work to be conducted. Mr Richard Booth QC for the defendant submits that the only defendant specified in the

CFA is the Home Office and it is only claims against that defendant which are covered by it. It would have been the most straightforward exercise to include another defendant, or to state that other defendants may be subsequently added, or indeed to make it clear that the identity of the defendant was as yet unknown and define the work by reference to the cause of action being advanced. Instead, the CFA makes a positive choice to specify the defendant as the "Home Office", and it follows that it should not be construed so as to apply to a claim against any other defendant.

27. This was essentially the reasoning of the judge who held that the section of the CFA entitled "What is covered by this agreement" was not "merely descriptive of the work covered, to the extent that it can be said to include ascertainment of the appropriate defendant, as it might have been if no proposed defendant had been named. It identifies the defendant to be sued. That plainly restricts the ambit of the work to be done to that extent, and does not contemplate work done in pursuing other unnamed defendants."

28. As a matter of language, in my judgment the most natural reading of the critical wording is that the CFA covers "all work conducted" on the claimant's behalf which follows from the "instructions provided" in respect of his claim "against Home Office". In other words, as Mr Williams submits, the reference to "Home Office" is descriptive of the instructions received rather than of the work to be done. It relates to past instructions rather than future work.

29. This construction is supported by the contractual context. As is clear, no great care has been taken in relation to the drafting of the critical wording. This is consistent with the wording being descriptive rather than prescriptive. If the intention had been to define and limit the coverage of the CFA to claims against a particular defendant, greater care and precision would be expected and, in particular, one would not expect the named defendant to be an entity which was obviously inappropriate. Although Mr Booth suggests that the CFA involves a "positive choice" being made as to the defendant, this is not consistent with the obvious misnomer of that defendant.

30. It is also supported by broader contextual matters. In particular:

    (1) The CFA was entered into at an early stage and before proceedings were commenced. This is unsurprising, as a client is likely to want the protection of conditional fee terms before the solicitor starts work. At this stage of proceedings, as the facts of this case illustrate, the identity of the ultimate defendant(s) may be unclear. In such circumstances it is intrinsically unlikely that a reference to a named opponent in the description of the claim would be intended to limit the CFA to proceedings against that opponent, rather than simply to serve to describe the claim.

    (2) It is generally in both the client's and the solicitor's interest that the CFA covers the relevant work. That is the reason for having the CFA. It is therefore in neither party's interest to seek to impose strict definitional limits which may exclude foreseeable work, particularly, as here, at an early and embryonic stage of a claim.

    (3) In this particular case there was uncertainty as to the appropriate defendant when the CFA was entered into. This makes it all the less likely that the inapt

reference to "Home Office" was intended to limit the CFA to a claim against that entity. The proper entity to be sued was one of the main questions which the solicitor was being appointed to determine.

(4) In the present case there was also no commercial reason to limit the claim to a particular defendant because, for example, of solvency concerns. All the potential defendants to the claim were public authorities responsible for aspects of the regime at HMP Birmingham. They could be no doubt that any of the potential defendants would have been financially able to meet the claim, and thus no reason for the solicitors to exclude them from consideration.

31. The defendant places considerable reliance on the decision of HHJ Stewart QC (as he then was) in *Law v Liverpool City Council* [2005] EWHC 90020 (costs), as did the judges below. In that case the CFA was stated to cover: "Your claim against Liverpool City Council for damages for personal injury suffered on 26th March 2003". Proceedings were brought against the Council as the occupier of the property where the injury was suffered and a defence was served. Subsequently the Council stated that the property had been transferred shortly prior to the accident to a housing association, which was then added as a second defendant. The claim continued against both defendants and was settled by them, with both defendants acknowledging liability in principle for costs, subject to any points about the CFA. The housing association contended that as the CFA had never been varied to include it, there was no CFA in relation to the claim against it.

32. HHJ Stewart QC held that the claim against the housing association was not covered by the CFA. His stated starting point was that a CFA which covers a claim against one defendant cannot be construed to encompass a claim against another defendant. He said that the fact that parties are often added to claims should be dealt with by careful drafting of the CFA or by appropriate amendments.

33. There are a number of obvious differences between that case and the present one. In particular: (i) the wording used was more specific and restrictive - "Your claim against Liverpool City Council…"; (ii) there was no apparent careless drafting; (iii) the Council was an appropriate defendant; (iv) the Council remained a defendant up to and including settlement. It is also to be noted that the argument that the wording used was meant to be merely descriptive rather than prescriptive does not appear to have been raised. HHJ Stewart QC's starting point bypassed that issue. In any event, little assistance is to be derived on issues of construction such as this from different cases, on different facts, involving materially different wording.

Conclusion

34. Balancing the indications given by all the various matters identified above, in my judgment both textual and contextual considerations lead to the conclusion that the CFA is properly to be construed as not being limited to a claim against the Home Office/Ministry of Justice.

35. I would therefore allow the appeal on the first ground of appeal. In these circumstances it is not necessary to deal with the second ground of appeal.

Lord Justice Patten:

36. I agree.