Hilary Term
[2017] UKSC 23
On appeal from: [2013] EWCA Civ 1658

JUDGMENT

Plevin (Respondent) *v* Paragon Personal Finance Limited (Appellant)

before

Lady Hale, Deputy President
Lord Clarke
Lord Sumption
Lord Carnwath
Lord Hodge

JUDGMENT GIVEN ON

29 March 2017

Heard on 6 February 2017

Appellant
PJ Kirby QC
Thomas Bell
(Instructed by Harrison Clark Rickerbys Solicitors)

Respondent
Robert Marven
Andrew Clark
(Instructed by Miller Gardner Solicitors)

LORD SUMPTION: (with whom Lady Hale, Lord Clarke and Lord Carnwath agree)

1. On 12 November 2014, this court gave judgment dismissing Paragon's appeal and ordering them to pay Mrs Plevin's costs in the Supreme Court [2014] UKSC 61. Those costs were subsequently assessed by Master O'Hare and Mrs Registrar di Mambro in judgments given by them on 5 February 2015.

2. Costs in the Supreme Court were high, mainly because Mrs Plevin's solicitors were acting under a conditional fee agreement ("CFA"), with after the event insurance ("ATE"). They were assessed at £751,463.84, including £31,378.92 for the solicitors' success fee and £531,235 for the ATE insurance premium. It need hardly be said that these sums are wholly disproportionate to the relatively modest amount at stake, in the event just £4,500. This was a common feature of the costs regime introduced by the Access to Justice Act 1999, which ultimately led to its abrogation on the recommendation of Sir Rupert Jackson's *Review of Litigation Costs* (2010). Subject to transitional provisions, the 1999 costs regime was brought to an end with effect on 1 April 2013 by Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

3. 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. Paragon applied for a review of the costs assessment on two grounds, both of which raise questions of principle. The first ground relates to the success fee. It is said that the CFA was made with the solicitors originally instructed by Mrs Plevin and was not validly assigned to the two firms who successively replaced them on the record. The second ground relates to both the success fee and the ATE premium. It is said that they were not recoverable, because they were payable under arrangements made by Mrs Plevin after the 2012 Act came into force. The application was referred to me as a single Justice. I referred it to the full panel which sat on the substantive appeal, because the second ground raised questions of some general importance. For the same reason, we are dealing with the matter by a formal judgment delivered in open court.

Assignments of the conditional fee agreement

4. Mrs Plevin entered into a CFA with her original solicitors, Miller Gardner, on 19 June 2008. Subsequently there were two technical changes of solicitor. They were technical because they both arose out of organisational changes within the

same firm. In July 2009, the partners of Miller Gardner reconstituted themselves as an LLP. This was done by appointing administrators of the old partnership, who entered into an agreement with a new firm, Miller Gardner LLP, transferring specified assets to it. In April 2012, Miller Gardner LLP transferred its business to a limited company, Miller Gardner Ltd, under an agreement in similar terms. The point taken by Paragon is that on neither occasion was the CFA validly assigned to the new firm. There was therefore, they say, no effective retainer at the time when costs were incurred in the Supreme Court. The costs judges rejected this argument. I can deal with this point shortly, for in my view it has no merit and was rightly rejected.

5. It is common ground that the CFA was in principle assignable. Paragon's argument is based on the terms to the two successive transfer agreements made between the successive Miller Gardner entities.

6. The operative clause of the 2009 transfer agreement was Clause 2.1, which transferred ten categories of asset to the new firm "to the intent that the Buyer shall from the Transfer Date carry on the Business as a going concern." The only relevant category of assets for present purposes is "the Work in Progress". This is defined in Clause 1.1 as meaning "all partly completed goods or services allocated by the Seller or the Administrators to the Contracts." "Contracts" means "the contracts, instructions, orders and engagements placed with the Seller … by its clients insofar as they have not been fully performed by the Transfer Date." Paragon's argument is that "Work in Progress" includes only work already done at the transfer date. It does not, they say, cover further work on the same matter done thereafter. If this were correct, it would mean that the only right of the successor firm was to bill the clients for work done before the transfer date, leaving them with no solicitor to act for them other than the defunct shell of the old firm. This plainly cannot have been intended. The point about work in progress is that it is in progress, and Clause 2.1 expressly transfers the work in progress "to the intent that the Buyer shall from the Transfer Date carry on the Business as a going concern."

7. The relevant provisions of the 2012 transfer agreement are substantially the same, except that the words just quoted are absent. However, the intention that the practice should be carried on is equally plain.

8. It is right to add that even if the argument were sound, it would lead nowhere. Shortly after each transfer, on 30 July 2009 and 30 April 2012, the new firm wrote to Mrs Plevin informing her about the change, referring to the CFA and saying that they would "continue to represent you on the same terms and conditions as previously." Mrs Plevin plainly assented to that by continuing to instruct them.

Recoverability of the success fee

9. Section 27 of the Access to Justice Act 1999 amended the Courts and Legal Services Act 1990 by inserting new sections 58 and 58A. These authorised conditional fee agreements between litigants and their legal representatives, which might include provision for a success fee. Section 58A(6) provided that rules of court might provide for the success fee to be recoverable as costs. Section 29 provided that where ATE insurance was in place against the risk of incurring liability for costs, rules of court might provide for the premium to be recoverable as costs. Rules of court were subsequently made requiring both the success fee and the ATE premium to be included in the costs awarded to a party. At the relevant time the rules were contained in CPR Part 44. These arrangements were abrogated by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"). The Act amended the Courts and Legal Services Act 1990. Section 58A(6) of the Courts and Legal Services Act 1990 (as amended by section 44(4) of LASPO) now provided that a success fee may not be recoverable as costs. Section 58C(1) (as amended by section 46(1) of LASPO) made similar provision for ATE premiums, except that their recovery in clinical negligence actions might be authorised by regulations. These changes came into force on 1 April 2013, subject to transitional provisions. It is on the transitional provisions that the present issue turns.

10. The CFA originally agreed with Miller Gardner in 2008 covered all proceedings up to and including the trial, and all steps taken to seek leave to appeal from an adverse result at the trial. On 8 August 2013, the Court of Appeal having given leave to appeal from the dismissal of Mrs Plevin's case by the trial judge, she and Miller Gardner entered into a deed of variation extending the CFA to cover the conduct of the appeal. On 3 January 2014, the Court of Appeal having allowed the appeal and given leave to appeal to the Supreme Court, there was a further deed of variation extending the CFA to cover the appeal to the Supreme Court.

11. LASPO section 44(6) provides that the amendment of the 1990 Act to prevent the inclusion of a success fee in the assessed costs

> "does not prevent a costs order including provision in relation to a success fee payable by a person ("P") under a conditional fee agreement entered into before the day on which that subsection comes into force ("the commencement day") if
>
> > (a) the agreement was entered into specifically for the purposes of the provision to P of advocacy or litigation services in connection with the matter that is

> the subject of the proceedings in which the costs order is made, or
>
> (b) advocacy or litigation services were provided to P under the agreement in connection with that matter before the commencement day."

12. Paragon's case is that in relation to the proceedings in the Court of Appeal and the Supreme Court the variations of August 2013 and January 2014 were new agreements entered into after 1 April 2013 for the provision of litigation services after that date. They were not therefore covered by the transitional provisions of section 44(6) of LASPO. This is in my judgment a bad point. The "matter that is the subject of the proceedings" means the underlying dispute. The two deeds of variation provided for litigation services in relation to the same underlying dispute as the original CFA, albeit at the appellate stages.

13. It follows that unless the effect of the deeds was to discharge the original CFA and replace it with new agreements made at the dates of the deeds, the success fee may properly be included in the costs order. Whether a variation amends the principal agreement or discharges and replaces it depends on the intention of the parties. To establish a discharge and replacement, "there should have been made manifest the intention in any event of a complete extinction of the first and formal contract, and not merely the desire of an alteration, however sweeping, in terms which are still subsisting": *Morris v Baron & Co* [1918] AC 1, 19 (Viscount Haldane). At the time when the two deeds of variation were executed, the CFA still subsisted (there were outstanding proceedings relating to the costs, for example). Both deeds are expressly agreed to be a variation of the CFA, leaving all of its terms unchanged except for the addition to the coverage of a further stage of the litigation and a change in the amount of the success fee. While the description given to the transactions by the parties would not necessarily be conclusive if the alleged variation substituted a different subject-matter, that cannot be said of either of the deeds of variation.

14. There was a faint suggestion that the deeds of variation were an "artificial device" designed to avoid the operation of section 44(4) of LASPO. There is nothing in this point. The deeds of variation were not a sham. An amendment of the existing CFA is a natural way of dealing with further proceedings in the same action. They therefore take effect according to their terms.

Recoverability of the ATE premium

15. I turn therefore to the corresponding issue about the ATE premium. Before the costs judges it was conceded that the ATE premium was recoverable as part of the costs. Because of the novelty and importance of the issue, we gave Paragon leave to resile from this concession on terms that they should pay the costs of the issue in any event, and directed an oral hearing limited to that issue.

16. The ATE policy was originally concluded on 29 October 2008. It covered legal expenses and liability for the other side's costs up to and including the "trial period", which meant the period fixed by the court for the trial. It was "topped up" for the appeal to the Court of Appeal and again for the appeal to the Supreme Court. The top-ups did not give rise to fresh contracts. They were true amendments to the policy which continued in effect subject to the same terms as amended. But on both occasions the amendment was made after LASPO came into force. By mistake, the wrong standard terms were incorporated into the policy, but the insurers have agreed to be bound by Clause 4 of the insuring clause in the form which ought to have been incorporated. This provided:

> "4. We will indemnify you against your liability, if any, to pay your insurance premium for your policy **if** you win and cannot recover the premium in full or in part."

We were told that this is a common, although not invariable provision in ATE policies issued to non-business litigants. Its effect is that if the premium is not included in the assessed costs awarded to the insured, the loss falls on the insurers and not on the insured. The significance of the point as far as the insured is concerned is that whichever of them is bound to meets the cost of the ATE premium, if it is not recoverable from the losing party ATE will not be a viable method of funding.

17. The difficulty arises out of the fact that the language of the transitional provisions relating to ATE premiums is different from that of the corresponding provisions relating to success fees. Section 46(3) provides:

> "The amendments made by this section do not apply in relation to a costs order made in favour of a party to proceedings who took out a costs insurance policy in relation to the proceedings before the day on which this section comes into force."

Whereas section 44(6) of LASPO refers in the context of success fees to an "agreement … in connection with the matter that is the subject of the proceedings", section 46(3) refers to an insurance policy "in relation to the proceedings". In other words, the requisite link is with the "proceedings" and not with the subject matter of the proceedings. Before 1 April 2013, there was an ATE policy in place, but it was not a policy in relation to the appeal to the Court of Appeal or the Supreme Court. Accordingly, the critical question is whether the two appeals constituted part of the same "proceedings" as the trial (as Mrs Plevin argues) or distinct "proceedings" (as Paragon argues). If the appeals constituted distinct proceedings, then there was no policy in place at the commencement date with the characteristic required by the Act, namely that it related to the appeals. That, in a nutshell, is Paragon's argument.

18. It is clear that for some purposes the trial and successive appeals do constitute distinct proceedings. In particular they are distinct proceedings for the purpose of awarding and assessing costs: see *Masson, Templier & Co v De Fries* [1910] 1 KB 535, 538-539 (Vaughan Williams LJ); *Wright v Bennett* [1948] 1 KB 601; *Goldstein v Conley* [2002] 1 WLR 281, at paras 79 (Clarke LJ), 107 (Sir Anthony Evans). The authorities were helpfully reviewed by Rix LJ in *Hawksford Trustees Jersey Ltd v Stella Global UK Ltd (No 2)* [2012] 1 WLR 3581. In that case, the Court of Appeal held that for the purpose of section 29 of the Access to Justice Act 1999, the costs incurred in respect of an ATE premium were recoverable only in the proceedings to which the policy related, ie as part of the costs of the trial if the policy related only to the trial, and not as part of the costs of the appeal. In *Gabriel v BPE Solicitors* [2015] AC 1663, para 16, this court applied the same principle when holding that a trustee in bankruptcy, by prosecuting an appeal to the Supreme Court, did not expose himself to liability for the costs of the distinct proceedings conducted by the bankrupt at trial or on appeal to the Court of Appeal.

19. However, "proceedings" is not a defined term in the legislation, nor is it a term of art under the general law. Its meaning must depend on its statutory context and on the underlying purpose of the provision in which it appears, so far as that can be discerned. The context in which the word appears in section 46(3) of LASPO is different and so, in my judgment, is the result.

20. 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 disposed of that claim one way or the other at whatever level of the judicial hierarchy. The word is synonymous with an action. In the cases cited above, relating to the awarding or assessment of costs, the ordinary meaning is displaced because a distinct order for costs must be made in respect of the trial and each subsequent appeal, and a separate assessment made of the costs specifically relating to each stage. They therefore fall to be treated for those purposes as separate proceedings. The present issue, however, turns on a different point. The question

posed by section 46(3) of LASPO is whether the fact of having had an ATE policy relating to the trial before the commencement date is enough to entitle the insured to continue to use the 1999 costs regime for subsequent stages of the proceedings under top-up amendments made after that date. The fact that costs are separately awarded and assessed in relation to each stage does not assist in answering that question.

21. The purpose of the transitional provisions of LASPO, in relation to both success fees and ATE premiums, is to preserve vested rights and expectations arising from the previous law. That purpose would be defeated by a rigid distinction between different stages of the same litigation. It may or may not be reasonable to expect an insured party who fails at trial to abandon the fight for want of funding. That will depend mainly on the merits of the appeal. But an insured claimant who succeeds at trial and becomes the respondent to an appeal is locked into the litigation. Unless he is prepared to forego the fruits of his judgment, which by definition represents his rights unless and until it is set aside, he has no option but to defend the appeal. The topping-up of his ATE policy to cover the appeal is in reality part of the cost of defending what he has won by virtue of being funded under the original policy. The effect, if the top-up premium is not recoverable, would be retrospectively to alter the balance of risks on the basis of which the litigation was begun.

22. The only substantial argument against this analysis arises out of the difference between the expression "the matter that is the subject of the proceedings" in section 44(6) of LASPO, and "the proceedings" in 46(3). In the ordinary course, there is a presumption that the same expression used in different provisions of a statute has the same meaning wherever it appears. There is also a presumption that differences in the language used to describe comparable concepts are intended to reflect differences in meaning. But the latter presumption is generally weaker than the former, because the use of the same expression is more likely to be deliberate. It will readily be displaced if there is another plausible explanation of the difference. Section 44(6) of LASPO is concerned with the terms on which a solicitor is employed to provide advocacy or litigation services. The subject of any solicitor's retainer is ordinarily referred to as a "matter". The word is, for example, persistently used throughout the Code of Conduct published by the Solicitors Regulation Authority. It is used in section 44(6) because the solicitor will commonly have been retained to provide a wider range of services in relation to a "matter" than just advocacy and litigation services. In those circumstances, the subsection had to be drafted so as to require the CFA to be limited to the provision of advocacy and litigation services. The word "matter" is also used, for a rather similar reason, in section 47, which repeals section 30 of the Access to Justice Act 1999 relating to the uplift chargeable by associations and other "bodies" who may have undertaken to meet a potential liability of members or other persons to pay the other side's costs in litigation. Section 47(2) is a saving for cases where before the commencement

date the body in question has given such an undertaking in respect of costs "relating to the matter which is the subject of the proceedings." The undertaking and the relationship between the body and the beneficiary of the undertaking may be wider than just the conduct of the litigation. By comparison, section 46(3) relates to costs insurance policies which by their nature are concerned with specific litigation. I do not regard the difference of language as being any more significant than that. In particular, Counsel was unable to suggest any rational reason why the legislature should have wished to limit the transitional provisions in section 46(3) to a particular stage in the litigation, while extending the transitional provisions in sections 44(6) and 47(2) to arrangements relating to the underlying "matter". Neither can I.

23. In my opinion, if there has been ATE cover in respect of liability for the costs of the trial, the insured is entitled after the commencement date to take out further ATE cover for appeals and to include them in his assessable costs under the 1999 costs regime.

Conclusion

24. For these reasons, I would confirm the assessment of the costs judges.

LORD HODGE: (dissenting)

25. I agree with Lord Sumption on the question of the assignments of the CFAs. But I regret that I find myself in disagreement on the interpretation of the transitional provisions in sections 44(6) and 46(3) of LASPO.

26. The interpretation of the word "proceedings" formed a significant part of the legal debate before this court. I agree that there is no good policy reason for Parliament to have introduced differing transitional protection for CFAs on the one hand and cost insurance policies on the other. Where I differ is that I interpret the transitional provisions as protecting only the pre-existing contractual rights of the party to the proceedings and her expectation to recover the success fee, for which she and her lawyers had contracted before the commencement day, from the losing party. I do not construe the provisions as protecting any wider expectation of how the litigation may be funded thereafter. Thus the subsequent amendments of the CFA to cover the appellate proceedings and the top ups of the costs insurance policy did not, in my view, fall within the transitional provisions. I set out my reasons below.

27. When Parliament enacted LASPO it removed the right of a successful party to recover from the unsuccessful party by way of a costs order both a success fee payable under a conditional fee agreement (section 44) and also (subject to an

exception with which this appeal is not concerned) all or part of the premium of the successful party's costs insurance policy (section 46).

28. But in each case Parliament included a transitional provision to protect the party who had already entered into such funding arrangements before those sections came into force on 1 April 2013.

29. In relation to CFAs section 44(4) of LASPO amended section 58 of the Courts and Legal Services Act 1990 ("the 1990 Act") to prohibit the costs order from providing for the recovery of a success fee. Section 44(6) of LASPO provided:

> "The amendment made by subsection (4) does not prevent a costs order including provision in relation to a success fee payable by a person ("P") under a conditional fee agreement entered into before the day on which that subsection comes into force ("the commencement day") if -
>
> > (a) the agreement was entered into specifically for the purposes of the provision to P of advocacy or litigation services in connection with the matter that is the subject of the proceedings in which the costs order is made, or
> >
> > (b) advocacy or litigation services were provided to P under the agreement in connection with that matter before the commencement day." (emphasis added)

30. It is clear that this provision requires there to be a CFA in existence before the commencement day and that the success fee was payable by P under that CFA, whether it related specifically to the matter (subsection (6)(a)) or was sufficiently wide as to cover that matter (subsection (6)(b)). A success fee payable under a CFA entered into after 1 April 2013 is not recoverable. It seems to me that this transitional provision was designed to preserve both the pre-existing contractual rights of the parties to the CFA and their expectation that there would be an entitlement to recover the success fee arising under that contract from the unsuccessful party through a costs order. Thus, if the pre-existing CFA covered a dispute through several levels of the court hierarchy, costs orders could allow the recovery of the success fee at each level so covered. If not, the costs orders would not.

31. Two sections further on in LASPO, section 46(1) introduced into the 1990 Act the new section 58C prohibiting the recovery by a costs order of the premium of a costs insurance policy. Section 46(3) provided:

> "The amendments made by this section do not apply in relation to a costs order made in favour of a party to proceedings who took out a costs insurance policy in relation to the proceedings before the day on which this section comes into force." (emphasis added)

32. It is clear that this provision required there to be a costs insurance policy in place before the commencement day. Again, the subsection protects the contractual rights of the parties and their expectation of an entitlement to recover the policy premium through a costs order. But Parliament chose to use different words to define the scope of the protection given to the expectations associated with the relevant contract. In this subsection it is not a policy covering the matter which is the subject of the proceedings but a policy "in relation to the proceedings" that is exempted from the new regime. Does that difference matter or are both transitional provisions seeking to achieve the same result?

33. I can detect no good reason why the two transitional provisions should have a different effect and Counsel suggested none. For the following three reasons I have come to the view that each is designed to protect the expectations of a party arising out of her contractual arrangements for the funding assistance as they existed before the commencement day.

34. First, the protection which section 44(6) gives to the recovery of success fees applies only in so far as the pre-existing CFA covers the appeal proceedings and not otherwise. Thus a claimant whose CFA covered only the proceedings at first instance could not rely on the transitional provision if she or he had to enter into a new CFA for an appeal, for example if she or he had to instruct different legal representatives. To my mind the transitional protection cannot depend on whether the contract for a success fee at later stages of the action is achieved by varying or assigning the original CFA on the one hand or entering into a new CFA on the other. If Parliament had wanted to allow the litigant to say "I've started so I'll finish", it would not have made the transitional protection depend upon the success fee being payable under the pre-existing contract.

35. Secondly, the protection for the costs insurance policy premium in section 46(3) covers the party who has timeously taken out "a costs insurance policy in relation to the proceedings". This wording focuses on the scope of the pre-existing costs insurance policy. It is common ground that the word "proceedings" can bear a

broad or a narrow interpretation, covering either the proceedings at one level of the court hierarchy (as in *Masson Templier & Co v De Fries* [1910] 1 KB 535, *Wright v Bennett* [1948] 1 KB 601, *Hawksford Trustees Jersey Ltd v Stella Global UK Ltd (No 2)* [2012] 1 WLR 3581 and *Gabriel v BPE Solicitors* [2015] UKSC 39) or the proceedings in the case at all levels of the hierarchy. In applying the subsection the question to be asked is: "what are the proceedings in relation to which the party has obtained a costs insurance policy?"

36. Thirdly, in my view the public policy expressed in each of the transitional sub-sections can be reconciled if the words "the proceedings" in section 46(3) are construed as referring to such proceedings as were covered by the pre-commencement day insurance policy. In other words, the question posed in the previous paragraph is answered by reading the pre-existing insurance policy. Again the transitional protection does not depend on whether, as in Mrs Plevin's case, the policy was varied to cover the further stages of the litigation or a new costs insurance policy was entered into to cover those stages. Each transitional provision protects the pre-existing contractual rights and the pre-existing expectations, arising from those rights, as to recovery from the losing party.

37. This interpretation would not cause concern if the claimant had lost at first instance and had herself or himself to initiate an appeal. The claimant who had lost and wished to appeal would be in a position similar to anyone else who had not put in place funding arrangements for a litigation before the commencement date and had to assert a claim under the post-LASPO costs regime. But it is undoubted that an individual claimant, who wins at first instance and must thereafter defend the judgment in her or his favour when the defendant appeals, would be in an unenviable position on this approach. Having commenced litigation with the security of a CFA and a costs insurance policy, the claimant could find herself or himself having to defend the judgment without the benefit of the costs insurance policy:

> "They have tied me to a stake; I cannot fly. But, bear-like, I must fight the course." (Macbeth Act 5, 7, 1-2)

I therefore acknowledge the force of the view that transitional provisions which covered the whole of the litigation would be sensible. My difficulty is in seeing that intention in the words which Parliament has used.

38. I would have allowed the appeal on this ground.