LOSS of MENTAL CAPACITY

Guy Platt-Higgins

From: Elaine McGlinchey
Sent: 07 February 2014 09:24
To: Ann Allister
Cc: Paul Jones; Guy Platt-Higgins
Subject: Emailing: Blankley v Central Manchester and Manchester Children's University Hospitals NHS Trust [2014] EWHC 168 (QB) (05 February 2014).

Hi

This case may be of use in brain injury cases, or in fact any incapacity cases.

Elaine

England and Wales High Court (Queen's Bench Division) Decisions

Neutral Citation Number: [2014] EWHC 168 (QB)
Case No: QB/2013/0303

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
5th February 2014

Before:

MR JUSTICE PHILLIPS
Sitting with Assessors
MASTER CAMPBELL and GREG COX Esq

Between:

DIANN BLANKLEY
(By her Litigation Friend Andrew M. G. Cusworth) **Claimant/Appellant**

- and -

CENTRAL MANCHESTER AND MANCHESTER CHILDREN'S UNIVERSITY HOSPITALS NHS TRUST

Defendant/Respondent

Mr V Sachdeva (instructed by Linder Myers LLP) for the Claimant/Appellant
Mr M Smith (instructed by Clyde & Co LLP) for the Defendant/Respondent
Hearing dates: 5th and 6th November 2013

HTML VERSION OF JUDGMENT

Mr Justice Phillips :

1. These costs appeals raise the question of whether, where a party loses mental capacity in the course of proceedings, such loss of capacity has the automatic and immediate effect of terminating their solicitor's retainer.

2. The question is currently of particular importance for solicitors conducting personal injury claims pursuant to conditional fee agreements entered into before 1 April 2013, in respect of which success fees continue to recoverable from defendants (see s.44(6) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012). If such an agreement is found to have terminated by reason of the supervening incapacity of the claimant (such incapacity being by no means a rare occurrence in serious personal injury cases), it would not now be possible to replicate the effect of the original contractual arrangements between solicitor and client given that success fees are not generally recoverable in respect of agreement made on or after 1 April 2013 (see s.58(A)(6) of the Courts and Legal Services Act 1990). No matter how short the period of incapacity (theoretically, even a scintilla of time), nor how quickly a deputy was appointed by the Court of Protection in respect of the claimant, the original CFA would be lost and could not, in real terms, be replaced.

3. In a decision handed down in the Manchester District Registry on 8 August 2011, Regional Costs Judge Harris, sitting as a Deputy District Judge, held that, as a matter of law, supervening incapacity automatically frustrates and thereby terminates a contract of retainer. As a consequence, he struck out parts 4 to 7 of the claimant's Bill of Costs, those parts being in respect of costs charged and disbursements incurred by her solicitors, Linder Myers LLP ("Linder Myers") for services provided after 6 March 2007, by which date the claimant had lost mental capacity.

4. For the reasons set out below, I have reached the opposite conclusion, namely, that the intervening incapacity of a party does not frustrate or otherwise terminate a solicitor's retainer. Whilst such incapacity does have the effect of removing the authority of the solicitor to act on behalf of the party lacking capacity for the duration of that incapacity, such authority can be restored when a deputy is appointed and provides instructions to the solicitors in that capacity, or otherwise if and when the claimant regains capacity. There is no reason, as a matter of authority or legal principle, why an inability to instruct solicitors in the intervening period (which may be quite short) should be taken to have the effect of immediately ending a solicitor's retainer.

The background facts

5. On 6 August 1999 the claimant underwent a suction termination and laparoscopic sterilisation at St Mary's Hospital, Manchester (part of the defendant Trust) which resulted in cardio-respiratory arrest and anoxic brain damage.

6. In 2002 the claimant, then a patient acting through her father as her litigation friend, and with the benefit of legal aid, brought these proceedings claiming damages for the alleged negligence of the defendant in relation to the procedure. Linder Myers acted as the claimant's solicitors. The proceedings were complex and contested, but in February 2005 the parties agreed that judgment be entered for the claimant for damages to be assessed on the basis of 95% liability.

7. By May 2005 the claimant had regained mental capacity and an order was made that she carry on the proceedings without a litigation friend. On 7 July 2005 the legal aid certificate was discharged. The next day, 8 July 2005, the claimant entered into a conditional fee agreement with Linder Myers ("the CFA"). There is no dispute that the CFA was valid when executed and covered all work up to 26 February 2007.

8. On about 9 February 2007 further assessments of the claimant by psychiatrists determined that she no longer had mental capacity to conduct her own affairs and could not provide instructions in relation to her ongoing claim. On 26 February 2007 an application was made to the Court of Protection for the appointment of Mr Cusworth, a trusts partner in Linder Myers, as the claimant's receiver. On 16 April 2007 the Court of Protection duly made such an order, expressly providing that the receiver had authority to conduct these proceedings on the claimant's behalf.

9. On 1 October 2007, on the coming into force of s.66 of the Mental Capacity Act 2005, and by virtue of the transitional provisions in schedule 5 to that Act, receivers automatically became Court of Protection deputies. It was subsequently confirmed that Mr Cusworth, as such deputy, was entitled to act as a litigation friend of the claimant as of right.

10. On 16 July 2007 Mr Slater, a litigation solicitor at Linder Myers, sent a copy of the CFA to Mr Heapy, Mr Cusworth's assistant. On 4 September 2007 Mr Slater wrote to Mr Cusworth stating "*as you know we are proceeding with this case on a conditional fee basis.*" and providing an update on fees and rates. Mr Slater sent a similar client care letter to Mr Cusworth every six months thereafter, each stating that Linder Myers were proceeding on a conditional fee basis. At the end of his letter dated 26 February 2009 Mr Slater added a manuscript note asking Mr Cusworth "*Do you feel that a new [CFA] is needed now that you have taken over conduct or do you just assume any contractual relationship that [the claimant] was already in?*"

11. It appears that a draft of a new conditional fee agreement was prepared by Linder Myers in March 2009, bearing the date 4 July 2007 ("the draft 2009 CFA"). However, neither Linder Myers nor Mr Cusworth has been able to locate an executed version of that agreement. In a witness statement dated 27 July 2011 Mr Cusworth stated that he could not recall signing the draft 2009 CFA, but could think of no reason why he would not have done so. Mr Slater, however, in a witness statement dated 28 July 2011, stated that "*I specifically recall there being a copy of the CFA which had been signed by Mr Cusworth and me*" and that "*When I left the firm [in December 2009] the signed CFA was still on the file*".

12. The quantum proceedings eventually resulted in a settlement of the claim in the amount of £2.6 million plus costs, the settlement being approved by the court on 5 March 2010. Linder Myers submitted a Bill of Costs on behalf of the claimant in the total sum of £387,724.42, including disbursements, subsequently amended to £372,724.42.

The costs proceedings

13. Parts 4 to 7 of the claimant's Bill of Costs related to the period after 6 March 2007, when the claimant was acting through Mr Cusworth as her receiver/deputy and litigation friend, claiming payment on the basis of the CFA, including a 25% success fee. The sums claimed in parts 4 to 7 totalled approximately £185,000.

14. In Points of Dispute, the defendant contended that no costs were recoverable in relation to work done and disbursements incurred as claimed in parts 4 to 7, asserting that, as a result of the claimant's mental incapacity, the CFA had automatically terminated prior to 6 March 2007, leaving Linder Myers without any retainer.

15. That contention came before Judge Harris on 9 May 2011 as a preliminary issue. In a judgment dated 11 July 2011, but formally handed down 8 August 2011 ("the First Judgment"), the Judge took as his starting point the Court of Appeal decision in *Yonge v Toynbee* [1909] 1 KB 215, a case in which solicitors had conducted the defence of proceedings against their client whilst unaware that he had lost mental capacity shortly before the action commenced. The Judge set out the headnote to that decision, which reads as follows:

> "*Where an authority given to an agent has, without his knowledge, been determined by the death or lunacy of the principal, and, subsequently, the agent has, in the belief that he was acting in pursuance thereof, made a contract or transacted some business, with another person, representing that, in so doing, he was acting on behalf of the principal, the agent is liable, as having impliedly warranted the existence of the authority which he assumed to exercise, to that other person, in respect of damage occasioned to him by reason of the non-existence of that authority.*"

16. The Judge went on to conclude that:

> "*Yonge v Toynbee is clear authority that the loss of capacity in itself terminates the contractual arrangements, and therefore it is necessary for the Claimants to show that the process that they entered into is one that would show the retainer was maintained.* "

17. The Judge found support for that view in the decision of the Senior Costs Judge in *Findley v Barrington Jones* [2009] EWHC 90130 (costs), in which the Senior Costs Judge held that the effect of *Yonge v Toynbee* was that where a claimant lost capacity so that he was no longer able to give instructions, the contract of retainer was at that point frustrated.

18. Judge Harris concluded at paragraph 15 as follows:

"It is impossible not to be sympathetic to the position in which the Claimant's Solicitors find themselves. The starting point is the contractual position relating to the capacity of the Claimant and the position that arises on her losing capacity. There seems to me to be no doubt that Yonge v Toynbee remains good law, and that the relationship between a Solicitor and their client under a CFA agreement or indeed a private funding agreement, is contractual, and that Yonge v Toynbee is good authority and that the loss of capacity terminates that contractual arrangement."

19. The Judge further held that the receiver/deputy had not entered into any new contract with Linder Myers on behalf of the claimant and had not adopted the CFA. He therefore reached what he accepted was the "desperately unfair" conclusion that the claimant's solicitors should be deprived of their costs and disbursements as set out in parts 4 to 7 of the Bill of Costs.

20. The claimant did not apply for permission to appeal (apparently accepting, through Counsel then appearing, that the First Judgment was correct on the material before the Judge) but instead made an application for re-consideration of the matter on the basis of fresh evidence and legal argument. In addition to re-arguing the issues of (i) whether the CFA had been frustrated and (ii) whether, if so, it had been by adopted the receiver/deputy, the claimant also argued (iii) that Mr Cusworth, as deputy, had power to carry on the CFA by reason of s.18(1)(f) of the Mental Health Act 2005; (iv) that Linder Myers' fees were otherwise recoverable from her as a reasonable price for "necessary services" and (v) that the claimant, through Mr Cusworth, had in any event entered a new but retrospective CFA by executing the draft 2009 CFA in March 2009.

21. In a judgment handed down on 12 April 2012 ("the Second Judgment") Judge Harris held that none of the new matters raised by the claimant satisfied him that he should amend the First Judgment. The Judge held that the only fresh documentation relied upon, the draft 2009 CFA, did not take the matter further as there was "not a shred of correspondence dealing with the inception of this Conditional Fee Agreement in March 2009". The other matters, he found, were no more than an attempt to re-argue the points he had previously decided.

22. The Judge did, however, give the claimant permission to appeal against the Second Judgment on the basis of each of the five arguments advanced before him on the application for re-consideration, stating that they raised issues of considerable importance, but emphasised that he was not giving permission to appeal the First Judgment.

23. On 12 October 2012 Bean J granted the claimant permission to appeal the First Judgment out of time on the basis of the same five arguments as raised in the appeal against the Second Judgment, but also in respect of a new sixth argument that the defendant was estopped by convention from disputing the claimant's liability to Linder Myers. Notwithstanding the considerable delay and previous counsel's concession that the First Judgment was correct, Bean J was satisfied that the argument was essentially one of law and one which was recognised to be of considerable importance.

24. The appeal against the First Judgment and the appeal against the Second Judgment were argued together before me, the grounds of appeal and the evidence in each appeal being identical.

<u>The issues in the appeals</u>

25. Mr Sachdeva, who appeared for the claimant (but in reality for Linder Myers, the party with the economic interest in the success of the appeals) advanced five of the arguments in respect of which permission to appeal had been granted, namely:

i) that supervening lack of capacity on the part of the claimant did not frustrate or otherwise terminate the CFA:

ii) that, if the CFA was frustrated, it was adopted by the receiver/deputy following his appointment;

iii) alternatively, that the claimant was liable for Linder Myers' reasonable fees because the services were necessary within the meaning of section 7 of the Mental Capacity Act 2005 which came into force on 1 October 2007 and, prior to that, within the common law concept of "necessaries";

iv) in further alternative, that the defendant was estopped by convention from denying that Linder Myers had authority to act for the claimant;

v) that in any event, Linder Myers and the deputy (on behalf of the claimant) entered a new agreement in March 2009 by executing the draft 2009 CFA, which agreement covered work done since March 2007 retrospectively.

26. Mr Sachdeva did not pursue any separate argument based upon a deputy's powers to carry on a contract under s.18 of the Mental Capacity Act 2005, acknowledging that a deputy could not "carry on" a contract if (contrary to the claimant's primary contention) it had been frustrated.

27. I shall deal first with the question of whether the CFA was automatically terminated by the mental incapacity of the claimant. As my conclusion is that it did not so terminate, the remaining arguments do not strictly arise for decision, but I shall nevertheless address each of them briefly for the sake of completeness and in case I am wrong on the first issue.

(i) Does supervening incapacity terminate a solicitor's retainer?

28. It appears to be established (and is not disputed by the claimant in these appeals) that the supervening mental incapacity of a principal has the effect of terminating the actual authority of his agent. That was the conclusion of Brett LJ. in *Drew v. Nunn* (1879) 4 QBD 661 at 666 (although Bramwell LJ expressed the view at p. 669 that only insanity amounting to dementia would suffice to annul the authority of an agent) and was the basis on which the Court of Appeal proceeded in *Yonge v Toynbee* (above). The agent may have continuing ostensible authority to bind the principal (as in *Drew v. Nunn*) or might otherwise be liable for breach of warranty of authority (as in *Yonge v Toynbee*), but it appears settled that an agent's actual authority terminates automatically and immediately upon the mental incapacity of his principal.

29. However, where an agent's authority arises from a contract (such as a solicitor's authority under the contract of retainer between the solicitor and his client), a further question arises as to whether the termination of the principal's authority by reason of supervening mental incapacity also has the effect of terminating the underlying contract. Contrary to Judge Harris' finding, the Court of Appeal in *Yonge v. Toynbee* considered only the question of the consequences of a solicitor's lack of authority and did not consider, let alone decide, whether the underlying contract of retainer terminated on the client's mental incapacity. In *Drew v. Nunn* there was no contract at all between principal and agent (who were husband and wife).

30. For the defendant, Mr Smith accepted that, whilst a client's loss of mental capacity has the legal effect of terminating the existing authority of his solicitor, such loss of capacity does not, in itself, have the legal effect of terminating the underlying contract of retainer. That concession was entirely realistic. The normal rule (often referred to as the rule in *Imperial Loan Co. v Stone* [1892] 1QB 599) is that contracts entered into by a mentally incapacitated person are not void but only voidable, and only then if that person can show he was, at the time of contracting, incapable of knowing what he was doing, and that the other party was aware of the incapacity: see *Bowstead & Reynolds on Agency* 19th edition, paragraph 2-009. As a contract is not void even if one party lacked mental capacity when it was made, it cannot be the case that subsequent mental incapacity would in itself automatically terminate the contract as a matter of operation of law.

31. Mr Smith's contention was that, although a client's mental incapacity does not terminate a solicitor's retainer as a matter of law, the practical effect of the termination of the solicitor's authority is that the contract of retainer can no longer be performed: the client cannot perform his obligation under the contract to give instructions and the solicitor cannot take any steps as he lacks authority. Mr Smith argued that, as the contract of retainer cannot be performed due to an event outside the control of either party, the contract is frustrated and therefore automatically and immediately discharged. This, he pointed out, was the conclusion of the Senior Costs Judge in *Findley v Barrington Jones* (above) at paragraph 122: "*I find, therefore, that as from* [the date the Claimant lost mental capacity] *the Claimant was no longer able to give instructions, and the contract was at that point frustrated.*"

32. In relation to the retainer in the present case, Mr Smith pointed to clause 2 of the CFA under the heading "*Your responsibilities*", which provided that the claimant must *"[g]ive us instructions that allow us to do our work properly*" and "*[c]o-operate with us*". He contended that such provisions were at the heart of the contract, so that any interruption to the claimant's ability to perform those obligations, however short, frustrated the CFA.

33. Mr Smith further submitted that the possibility that the authority of the solicitors might in due course be restored was no answer to his argument that their retainer was immediately frustrated when that authority was terminated. He referred to the dictum of Lord Sumner in *Bank Line Ltd. v. Arthur Capel & Co.* [1919] AC 435 at 454 (referred to by Viscount Simonds in *Davis Contractors Ltd. Fareham Urban District Council* [1956] AC 696 at 715) that *"Rights ought not to be left in suspense or to hang on the chances of subsequent*

events". Mr Smith further relied on clause 7(c) of the CFA, which provided that the agreement would automatically terminate on the death of the claimant: this, he argued, demonstrated that the parties did not intend the contract to be suspended whilst steps were taken to provide an alternative route for instructions to be given on behalf of the claimant or her estate.

34. There was no dispute between the parties as to the test for frustration. The classical statement of the modern law is that of Lord Radcliffe in *Davis Contractors Ltd. V Fareham Urban District Council* [1956] A.C.696 at 729:

> *".. frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do".*

35. Lord Reid observed in the same case (at page 721):

> *"... there is no need to consider what the parties thought or how they or reasonable men in their shoes would have dealt with the new situation if they had foreseen it. The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end."*

36. In *J. Lauriitzen AS v. Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep 1 Bingham LJ set out the following five propositions which are "established by the highest authority and not open to question":

> i) The doctrine of frustration was evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises. The object of the doctrine was to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances;
>
> ii) Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended;
>
> iii) Frustration brings the contract to an end forthwith, without more and automatically;
>
> iv) The essence of frustration is that it should not be due to the act or election of the party seeking to rely on it. A frustrating event must be some outside event or extraneous change of situation;
>
> v) A frustrating event must take place without blame or fault on the side of the party seeking to rely on it.

37. Applying the established test and the above principles it is clear, in my judgment, that termination of a solicitor's authority by reason of mental incapacity does not, in itself and in the usual case, frustrate the underlying contract of retainer. It is even clearer, in my view, that a retainer such as the CFA in this case, entered into with a person known to have fluctuating capacity, is not frustrated by the loss of such capacity.

38. First, whilst the giving of instructions and the consequent authority of a solicitor to act on behalf of a client according to those instructions is certainly central to the contract in question, the manner and capacity in which those instructions is given is not. The supervening inability of a party to give instructions personally, with the likelihood (if not the certainty) that a deputy will be appointed, does not change the nature of the contract of retainer, radically or even significantly. The position would seem no different to a company providing instructions to its solicitors through its board of directors. If the entire board resigned, there might be no individual capable of giving instructions until a new director was appointed, but that would not in itself change the nature of the contract of retainer so as to frustrate it.

39. Second, the obligation to provide such instructions is express in the CFA and would in any event be implied, from which it follows that an inability to provide such instructions cannot be said to be a matter not dealt with by the contract. The supervening incapacity of a client may cause a delay in performance of the obligation, but such a delay and its consequences (including whether the contract was repudiated) would be a matter for the application and enforcement of the terms of the contract.

40. Third, even if any delay cause by supervening incapacity was not within the scope of the contractual terms, it is clear that mere delay does not frustrate a contract. It would only amount to a frustrating event if the delay is "*abnormal, in its cause, its effect or its expected duration, so that it falls outside what the parties could reasonably contemplate at the time of contracting*": see *Chitty on Contracts 31st ed.* para 23-035. Given that a claimant may regain capacity or otherwise have a deputy in place in short order, the delay arising from supervening incapacity would not seem to be of sufficient expected duration to regard the retainer as having been frustrated.

41. Fourth, in cases such as the present, the possibility that the client will at some point lose mental capacity is plainly a matter which was within the reasonable contemplation of the parties. The fact that the CFA here contained an express provision that the retainer would terminate on the death of the claimant, far from supporting the case that supervening incapacity was a frustrating event, indicates that the parties did not regard incapacity of the claimant as something which should bring the contract to an end. They could equally have provided that the retainer would terminate on incapacity, but did not do so.

42. Fifth, far from being unjust to hold the parties to their literal bargain, it would plainly give rise to an unjust and unreasonable result to treat a retainer as terminated by reason of what may be a fleeting period of incapacity. To do so would be contrary to the principle that the doctrine of frustration should be confined within narrow limits and cannot be lightly invoked: it would result in the frequent termination of retainers (on the basis of arguments advanced by a non-party to the contract, such as the defendant) where neither party wished that to be the outcome and neither saw any difficulty in continuing to perform their obligations.

43. Sixth, it is established that supervening incapacity of an employee does not necessarily frustrate a contract of employment, despite the personal nature of that contract: see *Chitty on Contracts 31st ed.* para 23-038. In deciding whether the employment is frustrated by such incapacity, the court will consider the nature and likely duration of the incapacity, the prospects of recovery and whether performance of the contractual duties would be either impossible or radically different. A client's role in a contract of retainer is far less personal than a contract of employment and can readily be assumed by a deputy, further indicating that incapacity does not in itself frustrate such a contract.

44. I acknowledge that the decision of the Senior Costs Judge in *Findley v Barrington Jones* (above) is highly persuasive authority in the opposite direction. However, that decision was based on what I consider to be a misreading of *Yonge v Toynbee*. Further, the Senior Costs Judge did not consider the principles governing the frustration of contracts as set out above, nor their application to the effect of supervening incapacity on a solicitor's retainer.

(ii) Did the receiver/deputy "adopt" the CFA?

45. If, contrary to my conclusion above, the CFA was frustrated prior to the appointment of Mr Cusworth as the claimant's receiver, the question arises as to the basis on which Linder Myers were acting in these proceedings following Mr Cusworth's appointment.

46. There is no doubt that Mr Cusworth had full power and authority to take steps to conduct the proceedings on behalf of the claimant, including instructing solicitors in that regard. It also cannot be in dispute that Mr Cusworth either gave instructions to Linder Myers in relation to the proceedings or, at the very least, from time to time approved and ratified the steps that had been taken. In those circumstances it cannot sensibly be disputed that Linder Myers' conduct of the proceedings was authorised by the claimant's duly empowered representative in relation to their conduct of the proceedings.

47. Indeed, in such circumstances the burden passes to the defendant to prove that the claimant was not liable for her solicitors' fees. In *Meretz Investments NV v. ACP Ltd* [2008] 1 Costs LR 42, Warren J. explained the position as follows (paragraph 21):

> *"Authority shows that, once it is established that a firm of solicitors is acting for a receiving party, a presumption arises that the client is liable to pay the solicitor. The onus is on the paying party to rebut the presumption … The presumption thus arises (subject to rebuttal) where the solicitor is on the record for the client in the litigation … in order to rebut the presumption, it has to be shown that there are no circumstances in which the solicitor would be able to look to the client for payment".*

48. In the present case it is common ground that Linder Myers were on the record for the claimant and, in my judgment, no reason has been shown why they were not entitled to look to the claimant for payment in so acting.

49. The further question which arises is whether, on the hypothesis that the CFA had been frustrated, Linder Myers were not only entitled to be paid reasonable fees for their services, but were entitled to be paid on the basis of the terms of the CFA on grounds that the receiver/deputy had in some way "adopted" that agreement.

50. However, if the CFA had been terminated by frustration, it would have ceased to exist altogether and could not be continued, adopted or ratified by the receiver/deputy. It would be necessary to show that the receiver/deputy had entered into a new conditional fee agreement with Linder Myers, even if that new agreement was on the same terms as the CFA. As from 1 November 2005 it ceased to be necessary for a conditional fee agreement to be signed, although it continued to be a requirement that it should be in writing.

51. Mr Sachdeva relied upon the approach of the Senior Costs Judge in *Findley v Barrington Jones* (supra). Having found that the conditional fee agreement in that case had been frustrated by the supervening mental incapacity of the claimant, the Senior Costs Judge held that the claimant's litigation friend, in continuing to instruct the solicitors on the basis that there was a conditional fee agreement in place, implicitly retained the solicitors on the terms of the frustrated agreement (which was sufficient written agreement for the purposes of the Conditional Fee Agreement Regulations)

52. The difficulty I see with that approach is that, both in *Findley v Barrington Jones* and in this case, the parties were proceeding on the assumption that there was a conditional fee agreement in place (rightly, in my judgment). In those circumstances, and even if their assumption was mistaken, it is impossible to find an intention on the part of either party, whether implied or "obvious but unexpressed", to enter a new contract.

53. Had it been necessary to decide the point, I would have found that the receiver/deputy did not implicitly enter a new conditional fee agreement with Linder Myers.

(iii) Was Linder Myers entitled to be paid for supplying "necessary" services?

54. Section 7 of the Mental Capacity Act 2005, which came into force on 1 October 2007, provides as follows:

(1) If necessary goods or services are supplied to a person who lacks capacity to contract for the supply, he must pay a reasonable price for them.

(2) 'Necessary' means suitable to a person's condition in life and to his actual requirements at the time when the goods or services are supplied."

55. Mr Smith accepted that Linder Myers' services in pursing the claimant's entitlement to damages in these proceedings fell within the definition of necessary services in s.7(2): the recovery of such damages was clearly of central importance in the context of the claimant's condition and her present and future requirements. It was also not disputed that, to the extent that relevant services were provided prior to 1 October 2007, they would have constituted "necessaries" under the pre-existing common law.

56. In my judgment, if the claimant had herself instructed Linder Myers directly in order to obtain their necessary services, Linder Myers would (in the absence of a valid CFA) have been entitled to recover reasonable fees for those services. Mr Smith contended that, once a deputy had been appointed for the claimant, s.7 could not be relied upon because the claimant no longer lacked capacity to contract: she could do so through her deputy. I do not agree. S. 7 is designed to protect persons who provide necessary good and services directly to persons lacking capacity, including day to day matters which a deputy may well not be able to deal with on a patient's behalf. Mr Smith's interpretation of the provision would deprive it of any effect and cannot, in my judgment, be correct.

57. However, in the present case Linder Myers were not instructed directly by the claimant after March 2007, but by or through Mr Cusworth, acting as her duly appointed and empowered receiver/deputy. In those circumstances, even in the absence of a valid CFA, the question of "capacity" simply does not arise and s.7 of the Mental Capacity Act can have no application.

(iv) Estoppel by convention

58. Mr Sachdeva contended that the defendant, having dealt with these proceedings throughout on the basis that Linder Myers were acting with the claimant's authority, including in relation to the court approval the settlement, cannot now deny that those solicitors had authority to act on behalf of the claimant (and were consequently entitled to be paid for their services).

59. As explained in relation to issue (ii) above, there cannot be any doubt that Linder Myers were acting in these proceedings with the authority of the claimant (through her receiver/deputy, Mr Cusworth), whether or not the CFA remained in force. It follows that there is no need for the claimant to rely on any form of estoppel to establish such authority.

60. However, had Linder Myers been acting without authority, I can see no basis on which the defendant would have been estopped from so contending in the context of costs proceedings. Solicitors acting in proceedings represent and warrant that they have the authority of the party they purport to represent. In the ordinary course, the opposing party does not in any sense agree that such authority in fact exists, nor share a common assumption as to its existence. The opposing party does not need to (and would be ill advised to) communicate any such agreement or assumption, precisely because it may later emerge that authority was absent or defective. The fact that the opposing party deals with solicitors without questioning their authority does not amount to such communication, and implies at most that the opposing party is relying upon the solicitors' warranty. Such reliance cannot give rise to any form of estoppel if and when facts emerge that demonstrate that such reliance was misplaced.

(v) Was there a new conditional fee agreement in March 2009?

61. Judge Harris, in the Second Judgment, observed that there was no documentary evidence of the entry of a new conditional fee agreement in 2009, other than the draft 2009 CFA which had been found only in electronic form on Linder Myers' computer system. Given that the entry of such an agreement would have raised issues, including the potential for a conflict of interest on the part of Mr Cusworth, the Judge found it extremely hard to understand why there was no reference in any attendance note or correspondence to the entry of a new agreement, if such an agreement had indeed been made. In those circumstances, and bearing in mind the late introduction of the point, the Judge did not consider that the claimant had discharged the burden of proving on the balance of probabilities that a new conditional fee agreement had been made.

62. Mr Sachdeva contended that the Judge's finding in this regard was not open to him given the unequivocal evidence of Mr Slater, a solicitor, that the draft 2009 CFA was executed by himself and Mr Cusworth, particularly as that evidence had not been tested by cross-examination.

63. If it had been necessary to decide this issue I would have upheld Judge Harris' decision on this aspect. The Judge was well aware of Mr Slater's statement (see paragraph 3 of the Second Judgment), but the complete absence of any documentation within the files of Linder Myers evidencing the execution of the draft 2009 CFA (not least the alleged executed version itself), together with the belated introduction of the argument, fully justified the Judge's scepticism as to whether the agreement had in fact been entered and his finding that, on the balance of probabilities, it had not. The Judge did not find, and did not need to find, that Mr Slater was not telling the truth. The Judge's finding merely implies that, on balance, Mr Slater's recollection was mistaken.

Conclusion

64. In view of the above findings, the claimant's appeal against the First Judgment is allowed, with the consequence that the defendant's application to strike out parts 4 to 7 of the claimant's Bill of Costs is dismissed.

65. As a result, no question of reconsideration of the First Judgment arises and accordingly there will be no order on the appeal against the Second Judgment.