Case No: JR 1703621

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 05/10/2018

Before:

MASTER ROWLEY

- -

Between:

EPX (a child proceeding by her Mother and Litigation Friend PPX)	**Claimant**
- and -	
Milton Keynes University Hospital NHS Foundation Trust	**Defendant**

- -
- -

Robert Marven QC (instructed by **Scrivenger Seabrook**) for the **Claimant**
Alexander Hutton QC (instructed by **Acumension**) for the **Defendant**

Hearing date: **8 June 2018**

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MASTER ROWLEY

Master Rowley:

1. The claimant in this case suffered severe brain damage at the age of 3 weeks as a result of the defendant's negligence during events which took place in May 2006. The claimant's mother and litigation friend instructed Scrivenger Seabrook solicitors ("Scrivengers") to bring a claim on the claimant's behalf. Those proceedings were ultimately successful, and a consent order dated 27 January 2016 provided substantial damages including periodical payments and costs.

2. The parties have agreed the claimant's costs in the sum of £262,000 net of additional liabilities. The success fee and ATE premium have been agreed in the sum of £152,440 subject to the matters which are the subject of this judgment. Those matters were raised by Mr Alexander Hutton QC on behalf of the defendant and responded to by Mr Robert Marven QC on behalf of the claimant. Having heard their submissions, I reserved judgment.

3. Scrivengers obtained a public funding certificate on 20 June 2006. The scope of that certificate was as follows:

> "Limited to obtaining medical/clinical notes and records (including, if necessary, an application for pre-action disclosure), obtaining one medical report per specialism, complying with all steps under the Clinical Disputes Pre-Litigation Protocol, considering the relevant evidence with external counsel or an external solicitor with higher court advocacy rights and expert(s), (if necessary), and thereafter obtaining external Counsel's Opinion or the opinion of an external solicitor with higher court advocacy rights, (again if necessary), to include settling proceedings if external counsel or an external solicitor with higher court advocacy rights, so advises."

4. The initial costs limitation for carrying out this work was £3,500 including disbursements and counsel's fees but excluding VAT. That limitation was increased to £7,500 in June 2008.

5. The certificate was amended on 26 March 2009. It provided for a further limitation to the scope of the certificate (without removing the original limitation) in the following terms:

> "Limited to work as detailed in the case plan dated 14/01/09. To include all work necessary to complete the investigation into liability and causation, conference with Counsel and comply with pre-action protocol for £20,000 ex VAT."

6. Scrivengers obtained supportive medical evidence and sent a letter of claim to the defendant in October 2008. A detailed letter of response was received in August 2009 denying breach of duty and causation. It was clear from that letter that the defendant had already obtained medical evidence to support its position.

7. As a result of that letter, Scrivengers arranged a conference with Counsel and the claimant's medical experts. The result was that the experts were asked to make some amendments to their evidence and a paediatric cardiologist was instructed in addition to the experts already instructed. Unfortunately, there were some delays before the medical experts were able to produce their further evidence and so it was not until April 2011 that Scrivengers were in a position to consider issuing court proceedings.

8. By a letter dated 8 April 2011, Scrivengers provided information to the Legal Services Commission ("LSC") about the case including details of the three liability experts that had been instructed as well as three further experts who dealt with quantum matters involving housing needs, nursing requirements and occupational therapy requirements. Under the heading "estimate of costs" Scrivengers said this:

> "To date £13,000 in respect of the experts reports
>
> £7,000 in respect of our fees exclusive of VAT
>
> £27,500 to conclude mutual exchange
>
> £55,000 to settlement
>
> £100,000 to trial"

9. Under the heading "Estimate of general and special damages" Scrivengers stated that quantum was quite complex and had not been considered in detail. Nevertheless, reference was made to the quantum reports obtained and enclosed with the letter. The letter also confirmed that liability had been denied in the protocol period but supportive expert evidence had been obtained and the chances of success were described as being 60 to 80%. The solicitors also said that once proceedings were issued there was a possibility of settlement prior to the service of the defence.

10. The LSC responded on 16 May 2011 expressing the view that the experts' reports did not appear to provide conclusive support for the claim. A copy of counsel's advice was therefore requested prior to considering further funding. This was said to be "particularly in view of the difficulties inherent in a claim for damages arising from meningitis infection."

11. The claimant's mother was informed of the views of the LSC and subsequently provided with a copy of counsel's advice which expressed the view that the prospects of success were 60% and which was sent to the LSC at the same time.

12. The case handler at the LSC took the view that counsel's advice was sufficient to extend the certificate so as to enable proceedings to be issued. But, in her letter of 27 June 2012, she indicated that she remained concerned about the merits of the claim. She pointed to the fact that the existing costs authorisation covered four experts rather than the three (liability) experts actually instructed and therefore there ought to be more than sufficient room within the costs limitation to cover the costs of the outstanding work. On that basis, she was prepared to increase the scope of the certificate to issue proceedings but would only consider increasing the funding on

receipt of a copy of the defence. In closing she said that "if the defendants continue to deny liability I'm not entirely persuaded that funding should continue."

13. Having considered the situation, Ms Hillson, the solicitor dealing with this matter, wrote to the claimant's mother on 4 July 2012 as follows:

> "… I am very disappointed with this response to our application for further funding and authorisation to issue formal Court proceedings.
>
> In essence, the LSC have agreed to authorise issue and service of proceedings, but they have not increased the financial limitation on the certificate. Unfortunately, we are coming across this problem with the LSC on a regular basis.
>
> This means that although they have told me I am allowed to issue formal Court proceedings, I have no funding under which I can instruct Counsel to draft Particulars of Claim, nor to pay the issue fee.
>
> In addition to this, you will see that the LSC "remain concerned" about the merits of the claim and they say that they will re-assess whether LSC funding should continue upon receipt of the Defence. They indicate that if the Defendants continue to deny liability, they are not entirely persuaded that the funding should continue.
>
> I know from experience that the Defendants will put in a Defence in this case. This does not mean that they will defend the case to Trial, nor that they will be amenable to settlement, but what it does mean is that I think it is entirely possible that once the Defence comes in defending the action as I anticipate, the LSC will cease to fund the claim.
>
> There are other methods of funding available to us at present. In particular, a Conditional Fee Agreement (CFA). We, at Scrivenger Seabrook, would be prepared to accept [EPX]'s claim on a CFA basis. However, we would also need Counsel (the barrister) to act on a CFA basis to enable us to proceed with the matter further, as he would be required to draft the Particulars of Claim…"

14. Mr Holl-Allen of counsel promptly indicated that he was prepared to enter into a CFA with Scrivengers. Having considered the amounts allowed under the Clinical Negligence Funding Checklist, Ms Hillson then wrote to the LSC challenging the decision to keep the costs limitation at £20,000 whilst authorising the issue of court proceedings. I have not set out the detail of Ms Hillson's file note considering the figures or her letter to the LSC because it appears that some of her assumptions on the figures simply do not add up.

15. The LSC responded on 31 July 2012. The case handler pointed out that the limitation already provided covered stage one of the funding checklist for a case involving four experts. It did not however include instructing quantum experts and, given that the case handler must have known that this had not happened, made the rather waspish comment that she trusted that Scrivengers had "sought and received expressed (sic) authority from the Commission and if so can provide evidence of the same." If such authority had been obtained, then scope to cover the quantum evidence could be considered under a different stage of the checklist. The issuing of proceedings came within stage two of the checklist and once a successful application for funding had been made, then the costs of such work would be indemnified by the LSC.

16. Ms Hillson prepared a file note following her consideration of that letter. She describes the response as being "unpleasant" and sums up the LSC's position as "they say that basically, I should not have instructed quantum experts because it was outside the scope of the legal aid I had..." It then reiterates the point that the scope of work had been extended but the costs limitation had not. Having discussed it within Scrivengers, the proposal was to change funding to a CFA and ATE insurance. It is clear that Ms Hillson was reluctant to leave the legal aid regime. Nevertheless, she wrote to the claimant's mother explaining the circumstances and also wrote to Scrivengers' ATE provider to see whether the case would be covered. In October 2012, the insurer confirmed that it would be prepared to cover this case, albeit on a lower limit of indemnity than it would appear would usually be provided, in order to move matters along.

17. Having received this confirmation, Ms Hillson wrote to the claimant's mother setting out the situation and then had a long telephone conversation with her about funding issues. The attendance note from that call includes the following:

> "We then go on to discuss LSC position and the CFA. I explain to her in full the CFA and the insurance, exactly how it all works. Subsequently, she says she understands and she is happy with everything. I explained to her that the LSC have put us in this position. We have no alternative, and I explained to her that effectively the LSC are saying they are not providing any more financial limitation which means that ultimately, either she or us were going to have to pay Counsel to draft Particulars of Claim because he could not act under a CFA while we also had the Legal aid, so really we were being pushed into this by the LSC because they were not agreeing to extend the limit, and explaining to her that the time it had taken to set up whether we would take it on a CFA and whether Counsel would and making sure we had got the insurance and making sure that was all in place before we wrote the LSC to discharge the certificate.
>
> …
>
> We have had extreme difficulties with the experts, then we had difficulties with Counsel, now we are having difficulties with the LSC…"

18. On the same day as the telephone call, Ms Hillson wrote to the LSC stating that it had become clear that the it was only possible to proceed with this matter if either the claimant agreed to pay counsel's fees or Scrivengers agreed to do so. As such, Scrivengers had been investigating alternative methods of funding and had been able to arrange CFAs with themselves and counsel and ATE insurance if the certificate was discharged. The LSC discharged the certificate the following day.

Evidence

19. The chronology and quotations that I have set out in the foregoing paragraphs emanate from documents exhibited to the witness statement of Vicki Seabrook dated 8 May 2018. Whilst Ms Seabrook is mentioned in some of the attendance notes, the first hand evidence to be given would be by Ms Hillson and the comments made in Ms Seabrook's evidence are largely of a general nature. Consequently, it was not particularly surprising that Mr Hutton did not consider there was a need to cross-examine Ms Seabrook about her evidence. Similarly, although there was a brief witness statement from the claimant's mother, she was not required to attend court, let alone give evidence in accordance with the views expressed by Foskett J in the case of Surrey v Barnet and Chase Farm Hospitals NHS Trust and Others [2016] EWHC 1598 (QB). Mr Hutton summed up the claimant's mother's evidence as being that she would have done whatever Ms Hillson advised. Mr Hutton described Ms Seabrook's evidence as an introduction to the contemporaneous documents written by Ms Hillson. He said that the defendant accepted that Scrivengers did not take the view that all cases needed to change to a CFA from legal aid funding. It was the defendant's case here that Scrivengers had simply got it wrong that there was no money available to carry on the proceedings with the benefit of legal aid.

20. Mr Marven relied upon Ms Seabrook's unchallenged evidence, but he accepted that it was not particularly important regarding the documents which were exhibited. He did specifically rely upon paragraphs 20 and 21 of Ms Seabrook's evidence regarding the reasons for switching funding from legal aid to a CFA. Those paragraphs are as follows:

> "The LSC's lack of enthusiasm for funding this case was always at the front of my mind and the progress of this case was the subject of regular discussion and review within the team.
>
> Our collective experience led us to believe that if the defendant denied liability once proceedings were issued, the LSC would refuse to provide further funding. I fully anticipated that if a denial of liability was received, the legal aid certificate then be discharged by the LSC."

The law

21. The Court of Appeal's decision in Surrey v Barnet and Chase Farm Hospitals NHS Trust and Others [2018] EWCA Civ 451 gives guidance on the issue of a party changing from one form of funding to another. There have been a number of such cases considered recently.

22. At paragraph 14, the Court said:

> "The question for us is whether, in each of the three cases, the decision to enter into a CFA, with its accompanying ATE insurance policy, gave rise to costs reasonably incurred. Where the client is faced with a choice between two alternative courses of action which will involve incurring costs, it may well be the case that both courses of action are reasonable, even if one is more costly than another. For example, it may be reasonable to instruct solicitors in London rather than in the regions, even though the former charge more than the latter, and even where the latter would have been capable of doing a perfectly competent job. Whether the incurring of costs is or is not reasonable will depend on the facts that are relevant to the particular case under consideration.

23. In order to consider the facts, the court will often have to examine the reasons why the litigant incurred the costs he did. Having done so, the court will make an evaluative judgment, taking into account all the circumstances of the case.

24. At paragraph 30 the Court of Appeal said:

> "… The burden of proof, in the case of an assessment on the standard basis, lies on the receiving party. Accepting for the sake of argument that there is a "level playing field" and that there was not much to choose between funding by legal aid and funding by CFA, the fact is that in each of the three cases the claimant already had chosen legal aid. If there is not much to choose between the two methods of funding, and the claimant decides to switch to a funding method that is far more disadvantageous to a paying party, I consider that the paying party is at least entitled to ask the question: why did you switch? In those circumstances I consider it is up to the receiving party to justify his choice; and that entails examining the reasons why the choice was made"

25. Where (as here) the litigant has followed her solicitor's advice, the Court went on to say, at paragraph 32:

> "… In my judgment, the real issue is not the *advice* such, but the *reasons* why the receiving party made the choice that he did. If the reasons for that choice are contained in the advice, then the advice constitutes the reasons. In my judgment a costs judge is entitled to examine the *reasons* why a receiving party made the choice that he did; and in many cases that will entail looking at the advice that he received."

Reasons for changing funding

26. I have set out above paragraphs 20 and 21 of Ms Seabrook's witness statement which Mr Marven said describe the two reasons for the change in funding; namely (1) the

LSC's refusal to provide any more funding to pursue the claim and (2) the concern about LSC funding being withdrawn if the defence was filed and served. According to Mr Marven, a fair reading of those two paragraphs demonstrated that it was the second reason rather than the first that was the major concern.

27. It is undoubtedly true that Scrivengers expected a denial of liability to be forthcoming given the letter of response that had been received. Ms Hillson's attendance note upon the defendant's solicitor shows that, when he rang to say that an admission of liability was going to be put forward, clearly came as a surprise. Ms Hillson explained to the claimant's mother that entering a defence did not necessarily mean that it would be the final word of the defendant, but it must have been the likely option given the letter of response. Indeed, the defendant's solicitor's telephone call seems to suggest that he had fully expected to defend the case until further information was put forward by the claimant as to one part of her case.

28. In Ms Hillson's attendance note dated 20 November 2012, having received a letter from the ATE insurers, she pondered the situation where the LSC certificate was withdrawn after April 2013 and in which case the CFA success fee would have to come out of the damages. I cannot see any other reference to the change in funding regime in the contemporaneous documents. Ms Seabrook's evidence alludes to the uncertainty regarding post April 2013 insurance arrangements but there is nothing to indicate that this was a particular consideration in this case in terms of making a change prior to April 2013. It does not seem to me therefore that I should place any weight on the possibility that the LSC certificate might be withdrawn after April 2013.

29. All of the other references to the certificate being withdrawn – if the defendant denied liability – seem to consider the detriment to be suffered by the claimant in such circumstances to be self-evident. There is certainly no explanation of why Scrivengers considered this to be so concerning. It seems to be clear that Scrivengers would offer the claimant a CFA in such circumstances. Indeed, this option is mentioned to the claimant's mother as soon as there is any difficulty with the LSC. Counsel also confirmed his willingness to enter into a CFA by return and there does not seem to be anything to me to suggest that the claimant would be in difficulties in obtaining representation if the LSC certificate was withdrawn.

30. In the infancy of ATE insurance, it was often said that the policy had to be incepted prior to any denial of liability by the defendant if the ATE insurer was to provide coverage. However, that, in my view, was no longer the case well before the relevant events here and there is nothing in the correspondence with the ATE insurer to suggest that it made any difference to it as to whether or not the defence had been filed and served or not.

31. Consequently, whilst I accept that reference is made to the possibility of the LSC certificate being withdrawn, it does not seem to me that there has been any explanation given to the claimant's mother as to why that would justify a change in funding in anticipation of such an event occurring. Given that a CFA would have been entered into if the certificate was withdrawn, there was no reason, in my view, why this would justify asking the LSC to discharge that certificate before the terms of the defence were known. If anything, the reverse is true. The claimant's mother could

have been reassured by an indication that if the defence denied liability and the certificate was indeed withdrawn, then a CFA would be offered to her in any event.

32. In fact, in my judgment, the solicitors' overwhelming reason for the change in funding is the refusal of the LSC to increase the costs which could be spent under the certificate.

33. This is not a case where there is a dispute about the reasonableness of the costs incurred by the solicitors. It was accepted by Mr Hutton that Scrivengers had reasonably incurred £7,000 by way of profit costs in addition to incurring £13,000 upon experts' reports. The defendant's argument is simply that money has been spent on experts' reports which was not covered by the scope of the certificate and which should not have been obtained at that point. Having done so, however, Scrivengers found themselves apparently being unable to spend the further money necessary to issue proceedings under the certificate.

34. There are several comments made both to the claimant's mother and to the LSC in the documents that the LSC's approach meant that either the claimant's mother as litigation friend or Scrivengers would have to fund counsel's fees for the particulars of claim and the issue fee. Mr Hutton pointed out that the client could not possibly be asked to fund such matters because to do so would amount to "topping up" which is entirely forbidden. Mr Marven was vehement on the part of his client as to the unattractiveness of any accusation of topping up. In my view, Mr Hutton was careful to avoid specifically indicating that the defendant was accusing Scrivengers of such behaviour. I do not think that there was anything wrong with the defendant's submissions. Essentially they were brought about by the contemporaneous documents produced by Ms Hillson. At first blush, the comments can certainly be read as suggesting that the client might have to meet the costs of the particulars of claim, for example. But, in my view, the comments made are entirely intended to show Ms Hillson's belief in the inappropriateness of the LSC's position. I do not think for a moment she was suggesting that the claimant's mother should meet any of the costs any more than she thought that Scrivengers should do so.

35. The costs of the three quantum experts reports comes to a total of £5,494.50 plus VAT. Counsel's fees for drafting the particulars of claim were £2,375 plus VAT. No court fee is claimed in the bill and the assumption would therefore be that the claimant was exempted from paying it. It is, however, recorded on the claim form at £1,670.

36. As Mr Hutton pointed out, a comparison between the costs of the quantum reports when compared with the costs of commencing the claim is rough and ready if only the disbursements are looked at. Nevertheless, I think that it can be fairly said that the amount of work involved in instructing and considering the quantum reports, even on a relatively broad basis, would not be insubstantial. The cost of instructing counsel to draft the particulars of claim and for the solicitors to prepare the claim form et cetera would not, in my view, usually come to a higher sum. Accordingly, I think there is force in Mr Hutton's illustration that if Scrivengers had not obtained quantum reports, there would have been room in the sums allowed by the LSC for the instruction of counsel and the commencement of proceedings within the certificate already provided (even if the claimant was not exempt from paying the court fee in any event).

37. The crucial question seems to me to be whether or not it was a reasonable approach for the solicitors to obtain quantum reports prior to the commencement of proceedings. Ms Seabrook says in her witness statement at paragraph 26:

> "In relation to the obtaining of quantum evidence, in high value claims such as this, I have always told my team that gathering some early quantum evidence is absolutely necessary to enable us to respond on behalf of the clients to any early Part 36 offers made by defendants."

38. Mr Marven, in support of this evidence, pointed to the fact that the quantum reports were openly disclosed to the LSC right from the off. There was no mention made by the LSC originally of this being problematic. Mr Marven said that the £20,000 funding could be used by the solicitors as they saw fit unless a formal step such as the issuing of proceedings needed to be authorised. It was entirely proper that the claimant's solicitors would want to know what quantum was worth at an early stage in case the defendant made an early Part 36 Offer. Mr Hutton had suggested that experienced, specialist solicitors such as Scrivengers could place a broad valuation on the claim without the need to obtain any evidence. Mr Marven disagreed with this suggestion and said that it could not possibly be the case that Scrivengers could know all of the quantum aspects such as the claimant's life expectancy or the need to have two carers on a 24-hour basis in this particular case, as was revealed by the nursing evidence.

39. There are two separate reasons in my judgment why the claimant's approach to obtaining quantum evidence at this early stage was not reasonable. The first concerns the alleged need to be aware of the likely value of the case.

40. The case of SG v Hewitt [2012] EWCA Civ 1053 involved the defendant making a speculative, early Part 36 Offer which proved to be a generous assessment when the claimant's evidence was crystallised. That offer was accepted considerably after it had been made and the claimant was required to pay the defendant's costs over the intervening period. The Court of Appeal overturned the High Court judge on the particular facts of the case, but it was clear from the judgment that claimants as a whole might be in some difficulties from a well-judged early Part 36 Offer.

41. The decision in SG was handed down in August 2012 which was in the middle of the relevant events in this case. In my view, the effect of the defendant making a speculative offer was not generally considered to be a particular concern prior to SG. Consequently, I consider that Ms Seabrook's instructions to members of her firm regarding quantum evidence would have been unusual at the time and may be tinged with an element of hindsight. But even if it has always been Ms Seabrook's practice, it does not appear to take into account the costs protection afforded to a legally aided claimant. The prospect of the claimant paying costs to the defendant if a generous offer was made early and not accepted would essentially be nil. At worst, the claimant's costs might only be recoverable at legal aid rates from the LSC.

42. Moreover, if an offer was made that could not be discounted, then the LSC would presumably extend the certificate to fund quantum investigations at that point.

43. The decision to seek some defensive / quantificatory evidence does not seem to enable a full exploration of the likely quantum of the case in any event. As such the instruction of the three quantum experts leaves the claimant's solicitor in no man's land as to the value of the case. I accept that Scrivengers are a specialist clinical negligence firm of long-standing and that instruction of the particular experts in this case would assist the claimant's solicitors in valuing the case to some extent. But the approach is neither fish nor fowl in my view.

44. As such, I conclude that the instruction of the quantum experts was unreasonably early. The need for defensive evidence in a legally aided case is not made out and the instruction of only some quantum experts leaves the claimant in no man's land. But if I am wrong about these matters, I do not think that there is any room for doubt in respect of my second reason.

45. During submissions, Mr Hutton queried rhetorically why his clients had agreed to meet the costs of the three quantum experts given that they were outside the scope of the legal aid certificate and as such would not have been paid by the LSC if Scrivengers had sought to make a claim against the LSC for those fees. By operation of the indemnity principle, the fees would then not be payable by the defendant.

46. It is precisely for this reason that it seems to me to be impossible to say that the instruction of the quantum experts was reasonable in this case. The claimant's mother could not be asked to pay privately for the costs of the quantum experts any more than she could have been liable for the fees of counsel settling the particulars of claim. The LSC were not responsible for the costs of the quantum experts because they do not fit within the phrase "all work necessary to complete the investigation into liability and causation" set out in the certificate. Whilst that phrase was only included in the March 2009 amendment to the certificate, it seems to me to be incontrovertible that the "one medical report per specialism" in the original limitation would similarly relate to experts concerned with breach of duty and causation and not with quantum. In any event, none of the quantum experts can properly be described as providing a medical report.

47. Consequently, when considering the amount of costs incurred under the certificate, in my judgment, Scrivengers should have extracted the quantum report fees from the £13,000 for experts' reports overall since the quantum reports were simply not covered by the certificate. Having failed to do this, the representations of Scrivengers to the LSC were all fundamentally flawed by erroneous calculations in a manner similarly to those in the case of Yesil which formed part of the cases heard by the Court of Appeal in Surrey.

48. In my judgment there was in fact no need to seek an increase in the certificate because there was still room within it for the instruction of counsel and the payment of the issue fee if required. Contrary to Ms Hillson's comments about Scrivengers footing the bill for such additional work, it seems to me that the correct analysis is that they were already footing the bill for the quantum reports which had been obtained outside the scope of the LSC certificate.

49. In the circumstances, I conclude that the need to change the funding mechanism simply did not exist. Proceedings could have been commenced and depending upon the terms of the defence either (as it turned out) the investigations could move on to

quantum or the LSC could consider whether or not to fund the case further should liability have been disputed. Furthermore, on this analysis, the question of the certificate being discharged after April 2013 does not arise because all of the work to prepare the proceedings and require the defendant to enter a defence would have been carried out long before April 2013 since there was no need to seek an extension to the costs limitation in the certificate.

50. In my judgment, therefore, neither of the reasons put forward by Scrivengers justifies the change in funding and as such, in accordance with the guidance provided by Surrey, I find that the claimant's choice to incur additional costs as a result of the change in funding was not reasonable and therefore disallow the additional liabilities that have been incurred as a result.

51. Given this conclusion, it is not been necessary for me to consider whether or not the admitted absence of any advice regarding the Simmons v Castle [2012] EWCA Civ 1039 10% uplift on general damages would have made otherwise reasonable advice unreasonable. It is not obvious why there is a difference in this case from the case of Surrey itself given that the sums are similar in extent and there is no reference whatsoever to the certain additional monies payable if legal aid was retained.

52. Nor has it been necessary for me to consider the attractiveness of the CFA and ATE arrangement when compared with the legal aid funding. Mr Marven's skeleton argument suggests that there were obvious advantages to the claimant but it is not apparent to me what they would be. The CFA and the ATE insurance all impose a liability upon the claimant. Ms Seabrook instructed Mr Marven to inform me that she has never sought costs from any of her clients and would not have done so in this case. That does not seem to me to answer the question of whether counsel or the ATE insurer would have been similarly beneficent. It is certainly not clear that the claimant was obtaining a more advantageous arrangement in the absence of there being a CFA Lite as had occurred in the Surrey and conjoined cases. In any event, as Mr Hutton said, the fact that there were CFA Lites in those cases did not prevent the Court of Appeal from concluding that the change in funding arrangement was unreasonable in any event.

Next steps

53. I have set a date on the front of this judgment for the handing down of it. I am not expecting the parties to be in attendance. If the parties are unable to reach agreement on consequential matters, then I will list a separate hearing upon notification of a proposed time estimate from the parties. Time will be extended for any application for permission to appeal this decision until that hearing. Alternatively, if the parties wish to seek permission to appeal in writing I will deal with it in that manner.