Case No: JR 1707161

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 12/09/2018

Before:

MASTER ROWLEY

- -

Between:

XDE (by her husband and litigation friend XEF)	**Claimant**
- and -	
North Middlesex University Hospital NHS Trust	**Defendant**

- -
- -

Samuel Hayman of **Bolt Burdon Kemp LLP** for the **Claimant**
Eric Clegg of **Acumension** for the **Defendant**

Hearing dates: 22 to 24 May 2018

- -

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. This judgment concerns two preliminary issues brought by the defendant against the claimant's bill of costs namely:

    a) Whether it appears to the court that Bolt Burdon Kemp LLP ("BBK") have engaged in unreasonable or improper conduct either before or during the underlying proceedings, or in the assessment proceedings. If so, whether the court should disallow all or part of the costs incurred by BBK.

    b) Whether the discharge of the claimant's legal aid certificate on 11 May 2012 was reasonable and therefore whether or not all additional liabilities incurred following the subsequent entry into the CFA in October 2012 with BBK should be disallowed.

2. There were in fact five funding issues pursued by the defendant as preliminary issues at the hearing before me. The remaining three issues ((c) to (e)) were adjourned pending this reserved judgment. In respect of those issues, I indicated to the parties that I was putting the claimant to her election in accordance with paragraph 13.13 of the Practice Direction to Part 47 in respect of retainer documentation with her first solicitors, Simons Levine and Co. At the handing down of this judgment, I will give directions in respect of the hearing of those issues.

3. The essence of the defendant's argument regarding the two issues considered in this judgment concerns criticisms it makes of the claimant's second firm of solicitors, BBK. In the substantive proceedings, the defendant criticises the events surrounding the claimant's change from legal aid funding to a CFA and ATE insurance arrangement. In the detailed assessment proceedings, the defendant criticises the drafting of the bill as well as the approach taken by BBK to the disclosure of information and documents.

4. The second issue is entirely based on the change in funding and it was clear to all concerned that there is a considerable overlap between issues (a) and (b). Consequently, they were largely dealt with together as far as submissions were concerned and I propose to deal with them in the same way in this judgment. It seems to me to be sensible to deal with the issues concerning the change in funding first so that the criticisms raised by the defendant in the first issue as a whole can be considered in the light of my findings regarding the change in funding.

Background

5. The claimant's claim arose from a delay in diagnosis of tuberculous meningitis. The effect of that delay caused very serious injuries and the claimant has been a protected party throughout these proceedings. The issue of liability was concluded on 5 July 2016 when the court approved the defendant's acceptance of the claimant's Part 36 Offer to accept 2% of the liability and therefore the defendant would compensate the claimant for the effects of the other 98%. The quantification of the claimant's claim continues.

6. The bill before the court therefore relates only to the liability costs of the claimant which were ordered to be paid forthwith. The bill of costs totals £1,008,053.73. The

success fees of both solicitors and counsel amounts to £388,568.22 (including VAT). The claimant's ATE policy has not been claimed in these proceedings as it is intended to be claimed in the costs relating to quantum. Based on an application made for an interim payment as to costs in relation to the quantum proceedings, Mr Clegg, who appeared on behalf of the defendant, estimated that the additional liabilities of all of the success fees and ATE premium amounts to at least £1 million. He put that figure to me on several occasions and it was not specifically disputed by Mr Hayman who appeared on behalf of the claimant. Consequently, the sums in issue are significant since the defendant says that the additional liabilities should be disallowed as well as some or all of the base costs.

7. The claimant, through her husband acting as her litigation friend, first approached Simons Levine & Co in 2012 to act on her behalf. According to the bill of costs, these instructions were initially funded on a private paying basis before a CFA was entered into by the claimant and Simons Levine & Co. Thereafter, the decision was taken that the claimant might be eligible for legal aid funding and since Simons Levine & Co did not have a legal aid franchise, enquiries were made of BBK as to whether they could take on the case with the benefit of legal aid funding. This duly occurred in 2007.

8. There were some delays initially in full legal aid funding being granted owing to some erroneous information being considered by the Legal Services Commission ("LSC") but the investigative help commenced at the beginning of 2007 was changed to a full certificate on 25 February 2009.

9. The scope of the investigative help was set out in the certificate 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."

10. Upon the certificate being extended to full representation the investigative help limitation was removed and the following limitations were substituted:

> "Limitation
>
> Limited to all steps up to and including mutual exchange of statements and reports and Part 35 questioning of experts and thereafter obtaining external Counsel's Opinion or the opinion of an external solicitor with higher court advocacy rights.
>
> Limitation

> Limited to work as detailed in the case plan dated 19 January 2009 for all steps up to and including stage 2 at a total cost of £55,490.00."

The evidence

11. In the evidence reference has been made both to the Legal Aid Agency and its predecessor, the Legal Services Commission. For simplicity I have used "LSC" throughout and have placed it in square brackets in direct quotations.

12. The events which are said to be at the centre of the change of funding begin in December 2011 when Ms Suzanne Trask, the partner with conduct of this case, wrote to the LSC on 13 December 2011 in the following terms:

> "We enclose a copy of Counsel's updated advice in this matter, following a conference with all the liability experts. We are pleased to say that we are now looking to issue and serve court proceedings as soon as possible in this matter.
>
> We note that the current certificate is limited to all steps up to and including stage 2 of the case plan dated 19th January 2009, so already covers service and indeed several steps beyond this.
>
> Counsel previously advised that it was essential for the Claimant to have expert neurological evidence on causation. We enclose his earlier advice on this. We therefore instructed Dr Guy Sawle to provide a report, which was supportive. We enclose a copy of his report.
>
> Dr Guy Sawle recommended that we obtain evidence from an expert microbiologist to comment on breach of duty. We therefore instructed Dr Mike Rothburn, Medical Microbiologist, who has provided further evidence which is supportive of a breach of duty. We enclose a copy of his initial report.
>
> This brings the number of liability experts to 5 – Professor Neil Barnes General Physician, Professor Mike McKendrick Infection specialist, Dr Paul Butler Neuro-radiologist, Professor Mike Rothburn Medical Microbiologist, Dr Guy Sawle Neurologist. This is a complicated case where breach of duty arises in the physician and microbiological treatment, and the progress of the infection and neurological damage has to be considered.
>
> Stage 1 of the case plan dated 19th January 2009 envisaged that there would be three liability experts. We would therefore request an increase to the costs limit of the certificate of £10,000 for the extra work that needs to be conducted with these further two experts. We have not spent any further time preparing a formally updated case plan to reflect this in order to

> keep costs to a minimum, however please let us know if this is required."

13. On 17 January 2012 the LSC responded as follows:

> "I refer to your letter 13th December 2011. As you know clinical negligence cases are now managed in accordance with the Clinical Negligence Guidance (copy attached) rather than detailed case plans. You will see from the guidance that a 5 expert case up to mutual exchange would attract funds of £45,000 and of course your current costs limit is £55,490. I cannot therefore agree further funding. Any formal request for funding should be made by completing a report which fully addresses all of the points relevant to the stage you are seeking funding for accompanied by a CLSAPP8."

14. On 8 May 2012 Ms Trask replied:

> "We note the content of your letter dated 17th January 2012. This stated that as this case will now be considered in accordance with the clinical negligence staged process rather than the case plan previously approved, an increase to the costs limit beyond the existing limit of £55,490 could not be approved before the point of mutual exchange, as this limit is higher than that prescribed under the current guidance.
>
> With this in mind, we write to advise that we will be unable to progress the case to the point of mutual exchange within this cost limit, and therefore suggest that the certificate is discharged as soon as possible so that we can enter into alternative funding arrangements with the claimant, via her litigation friend.
>
> This is a complex case of a delay in diagnosing tuberculous meningitis in an adult who lacks capacity as a result of her injuries. There are five liability experts and there will be a greater number of quantum experts. Quantum is in excess of £1 million and is likely to be at least £5 million.
>
> Our current costs are £28,500 profit costs at LSC rates, plus £24,000 disbursements (plus VAT where appropriate) approximately £5,000 (plus VAT) counsel's fees (now Dr Peter Ellis, 7 Bedford Row).
>
> Particulars of claim have now been prepared, however we will need to ask the experts and litigation friend to consider the content of these before they can be finalised for issue and service of proceedings. We will also need to ensure the initial neurological report on condition and prognosis is ready for service. With this in mind, we estimate the costs to the point of issue (we will ask the court to serve proceedings) will be

> £32,000 profit costs at LSC rates, plus £29,000 disbursements (plus VAT where appropriate) and £6,000 (plus VAT) counsel's fees.
>
> This [sic] total costs to the point of issue at LSC rates are therefore likely to be £67,000 (plus VAT where appropriate). Should, as we anticipate from the content of your previous letter, you be unable to agree to an increase to the costs limit to this figure, we request that the funding certificate be discharged, so that we can progress the matter to issue proceedings under an alternative funding arrangement.
>
> We look forward to hearing from you."

15. On the same day, 8 May 2012, Ms Trask wrote to the claimant's litigation friend as follows:

> "As you are aware, [XDE's] claim is currently funded by legal aid (now called public funding). As a requirement of having public funding, we have to stay within the costs limit of the certificate, and this limit is increased at certain points in the claim.
>
> As [XDE's] claim has required the expert evidence of five liability experts, we have reached the current costs limit of the certificate and given the strict limits of legal aid, this is unlikely to be increased at this stage. I have informed the Legal Services Commission (the organisation that administers the use of public funding) and recommended that as this is the case they discharge the certificate so that we can enter into an alternative funding arrangement with you.
>
> If they decide to discharge it, please be reassured that we will continue with the case under a "no-win, no-fee" agreement which will allow us to fund the claim from this point. In effect, this will actually not be as restrictive and avoid the delays that we have faced when previously dealing with the Legal Services Commission.
>
> Under a "no-win, no-fee" agreement, XDE will be in broadly the same position, in that she will be protected from any deductions to her compensation as she lacks legal capacity and the court will need to approve the terms of any settlement as an extra check on the amount that she receives. I will discuss this agreement with you in more detail once the position with legal aid has been finalised.
>
> It is likely that the Legal Services Commission will write to you directly to say that they have heard from us and will discharge the certificate within a certain period of time, and provide a form for you to fill in <u>if</u> you think that legal aid

> should continue. You do not need to fill this in, and please give me a call if you have any concerns about this.
>
> …"

16. On 11 May 2012 the LSC wrote to BBK enclosing a copy of the certificate showing that it had been cancelled as of that date *"as the assisted person/client has requested/consented to the discharge."*

17. BBK sent a conditional fee agreement together with explanatory documents and other documents relating to ATE insurance on 23 July 2012. The letter concluded by asking the litigation friend to contact the solicitors to arrange a meeting to discuss these documents. That request was chased by a letter dated 13 August 2012. The litigation friend was contacted by telephone on 10 September 2012 in the absence of any response. He indicated that he had just come back from abroad and had not had the chance to look through the documentation. An appointment was agreed for the 26 September 2012. That meeting was subsequently rearranged for 10 October 2012 and at which point the CFA was discussed at a meeting involving Ms Trask and her assistant and the litigation friend.

18. The attendance note for the meeting on 10 October 2012 was available at the hearing. Under the heading "CFA and Law Assist" it was noted:

> "Second thing – funding – ST we've moved on from legal aid – limits legal aid mean moved on to something else.
>
> Paid by def as already an admission – anything they don't pay – written off under 100% scheme."

19. The attendance note also recorded Ms Trask's assistant giving the litigation friend a fresh copy of the CFA "and confirmation", by which I assume it meant the other explanatory documents. The note describes the assistant talking through the CFA and the ATE insurance and then the litigation friend indicated that he would like to read through the documents again before signing. Those present agreed that a call would be made once he had done so. There is also an attendance note for the telephone call on 15 October 2012 when the litigation friend did indeed ring Ms Trask's assistant and the terms of the CFA were discussed.

20. One of the unexplained evidential features of this case is that, having explained the Law Assist ATE policy, seemingly in some detail, the litigation friend actually took out a policy with a different ATE insurer. However, nothing specifically turns on that fact. The terms and conditions of the second ATE insurer (Temple Legal Protection) were considered briefly in the hearing simply to confirm that the policy's cover was not retrospective. Accordingly, it did not provide cover for adverse costs or the client's disbursements prior to its inception in December 2012.

21. In addition to the documents disclosed by the claimant in respect of events between December 2011 and October 2012, the claimant relies upon a witness statement of Ms Trask. She joined BBK on 1 April 2008 and took over the conduct of this case shortly afterwards. Much of her evidence concerns the running of cases with the benefit of legal aid. I have set that evidence out a little later in this judgment. As far as the

specific events in relation to this case are concerned, she gives a chronology of events prior to the central period as follows:

- In May 2008 she advised the litigation friend that she needed to request further funding from the LSC.
- In July 2008 she told him that this had been granted to a financial limit of £22,500.
- In November 2008 she advised the litigation friend that he should be seeking a further increase.
- an updated case plan was submitted in December 2008.
- In January 2009 BBK were issued with an individual high cost case contract for this claim.
- In March 2009 the litigation friend was told that further funding had been agreed.
- In June 2009 BBK sought prior authority to instruct an expert whose fees were unusually high. That was refused and a different expert was instructed.

22. At paragraph 17 of her statement Ms Trask describes the contract in these terms:

> "The contract agreement put into place for the case plan, called the Individual High Cost Case Contract, was focused upon ensuring that once you have been granted funding, that you completed the work that you needed to in that stage of the case, i.e. ensuring that it should not be "under-worked". The [LSC] were also clear that any significant change to the assessment of the merits of the claim (i.e. prospects of success) should be reported to them. Beyond this, they would not generally become involved in the steps you are taking to progress the claim."

23. At paragraph 22 of her statement Ms Trask describes the need to seek approval for an increase to the financial limit of the certificate in December 2011. She outlines the contents of the letter of 13 December 2011 before saying:

> "Whilst the [LSC] did not have so much involvement in the day-to-day running of the case, there was a facility to apply for an increase to the overall financial limit for the stage where this was required, had the extra work not been reasonably foreseeable at the point of the application."

24. Ms Trask then describes the response of the LSC in respect of the change from the case plan system to the clinical negligence checklist arrangement. She outlines the LSC letter of 17 January 2012 and then says:

> "To be clear, the [LSC] were not saying that we had exceeded any limits, they were looking at the new system in saying how it compared and explaining that they now needed to take this into account."

25. Ms Trask then describes her reaction to the LSC's response:

> "The scope of the financial limit also went all the way through to exchange of expert evidence in the claim, and at that point we were preparing to issue court proceedings. So there was a lot of work left to do, to get to the point where expert evidence was exchanged.
>
> It was clear to me that it would be very unlikely indeed, in the face of the new guidance that was being followed by the [LSC], that further funding would be available before expert evidence was exchanged, and – in legal aid terms – the case reached the next stage. They were essentially applying the rationale of the new system retrospectively, which I found surprising, as this simply wouldn't fit with how the case had been considered in the past. Trying to do so would inevitably mean that the funding available in the case would come to an end, given the financial limit in place at the time and that the new system prescribed increases by different increments.
>
> …
>
> In light of the [LSC]'s previous letter, and that there were no substantive changes that were foreseeable, I knew that the limit on the certificate was very unlikely to be increased. In order to secure an increase, you had to show a good reason for this. If there wasn't a particular reason, they would decline the application and ask if you would like to discharge the certificate. In addition to this, a new system would come into place, and the [LSC] had already showed that they were reluctant to consider further funding that was out of step with the new process."

26. Ms Trask then describes her letters of 8 May to the client and to the LSC. Having received what she described as being a "very swift response" from the LSC with a copy of the discharged certificate she says that the phrase used to suggest that the discharge was with the consent of the client was one regularly used by the LSC in circumstances where the LSC could not increase the financial limit. She says that she took this as a very clear indication that there was no possibility that the legal aid limit could be increased to the level required.

27. At paragraph 31 of the statement Ms Trask deals with the format of the request for increase:

> "Whilst the request for an increase to the financial limit of the certificate was not on a legal aid form (called an APP8), the

> [LSC] were content to discharge the certificate on this basis. As a matter of general practice, the [LSC] would often consider requests in the format of a letter rather than a form. Here, all the information that would otherwise be contained in an APP8 had been provided between my letters sent in December 2011 and May 2012, to include evidence of merits and what was being sought. This is clearly a very high value claim and the financial increase being requested was limited."

28. In respect of using legal aid funding generally, Ms Trask says at paragraph 7:

> "Whilst public funding was and is very welcome particularly where it is available in those cases where prospects of success are unclear, its use requires careful consideration of compliance with the rules at each step, as any breaches are taken very seriously by the [LSC] and can impact on a firm's contract with them. Holding a contract with the [LSC] is the only way that a firm can offer legal aid in cases, which makes you able to act in claims where this is the best way of funding a claim. So it is of great importance that a good relationship with the [LSC] is preserved, and that the terms of its contract are complied with."

29. Ms Trask makes similar comments at paragraph 11 of her statement:

> "… You must remain within the scope limit (which covers the type of work you are allowed to carry out and the stage of the case) and financial limit of the legal aid certificate that has been issued. You are not allowed to choose to do more work than this, as a matter of compliance with the contract, regardless of the position in the case or its impact. To do so means that you are in breach of your contract with the [LSC], and that sanctions will apply…which ultimately could mean that the [LSC] could terminate your contract…"

30. Ms Trask returns to this point later in her witness statement when she describes an audit meeting in June 2011 in the following terms:

> "The approach of the [LSC] to a firm's operation under a franchise is rigid. This was brought to the forefront of my mind when in June 2011, following an annual audit meeting with our relationship manager at the [LSC], we received a Contract Notice in relation to our internal monitoring of the Work in Progress (WIP) we were incurring on legally aided cases at [LSC] hourly rates. Whilst this could be calculated from the number of hours we could see that we had spent at any time on a case, we didn't have this information immediately to hand so this was not felt to be sufficient. Of course, this was a concern at the time.
>
> We worked quickly to create automated weekly reports circulated to the firm on the levels of WIP at [LSC] rates on all

> legally aided cases at that time, and the percentage of the financial limit on the certificate that this represented. This satisfied the [LSC]'s requirements, and these reports continue to be circulated to this day. Where the time spent on a case reaches 80%, this is the trigger for action to be taken, as we will be unable to work on the case where there is a live certificate and it reaches its limit."

31. At paragraph 12, Ms Trask refers to the inability to charge the client or anyone else whilst a client is legally aided and then says therefore that:

> "The only way to progress the claim is to either obtain an agreement to additional funding from the [LSC] which increases the financial limit on the certificate, or to get it formally discharged which means that you are then able to enter into a different arrangement with the client."

32. Ms Trask concludes her evidence with some criticism of the time consuming and bureaucratic nature of funding cases by legal aid before discussing its adequacy in cases such as the present one. At paragraph 37 she says:

> "In my experience it is rare for the [LSC] to offer enough funding to be able to investigate a complex disputed clinical negligence claim to a successful conclusion. This would require it to support all necessary steps and expert evidence and for it to reach an advanced stage whereby it may settle, subject to the approval of the Court. Particularly given the course of this claim after the legal aid was discharged, I cannot imagine that the [LSC] would have supported sufficient funding. It would have needed to provide funds to present a robust response to the limitation defence put forward, which was withdrawn only days before the hearing on the issue, as well as to progress through liability directions in a case where liability was disputed in full, requiring significant expert and lay evidence. Again, an agreement was reached only days before the trial on the issue."

33. I have set out the contents of the various letters, attendance notes and the witness statement relied upon by the claimant to explain the matters challenged by the defendant. As I will describe in more detail below, the documents were produced in response to the defendant indicating that it had no offers to make in respect of additional liabilities until such documentation was forthcoming. The witness statement was served in response to the defendant's skeleton argument. As such the evidence disclosed by the claimant has largely been defensive in nature. It may be for that reason why obvious documents that might have been disclosed (but have not) were not before the court. For example, the case plan was not produced at the hearing and nor was it directly referred to in the witness statement of Ms Trask. The only information regarding the case plan comes from Ms Trask's letter to the LSC in December 2011 where it refers to the plan being based upon the need for three liability experts.

34. Having said this, from my reading of the numerous files lodged with the court for the detailed assessment, there is nothing further (other than the case plan) that is relevant in respect of letters or attendance notes concerning the change in funding. Given what I consider to be a relatively limited number of documents, I have set them out more comprehensively than might otherwise be the case.

The law

35. The Court of Appeal has recently considered the change of funding from legal aid to CFA in two separate cases – the conjoined cases of Surrey v Barnet and Chase Farm Hospitals NHS Trust; AH v Lewisham Healthcare NHS Trust; Yesil v Doncaster and Bassetlaw Hospitals NHS Foundation Trust [2018] EWCA Civ 451 and the separate case of Hyde v Milton Keynes NHS Foundation Trust [2017] EWCA Civ 399.

36. At paragraph 30 of Surrey, Lewison LJ, giving the lead judgment, considered whether costs judges should examine the reasons for a change in funding where there was little to choose between the two options. He said:

> "The court is required to take into account all the circumstances of the case. That means the particular case under consideration: not some generalised description of similar cases, as *Solutia [v Griffiths]* makes clear. Moreover, 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 that it is up to the receiving party to justify his choice; and that entails examining the reasons why the choice was made.

37. He continued at paragraph 32:

> "… In my judgment, the real issue is not the *advice* as 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 the costs judge is entitled to examine the *reasons* why the receiving party made the choice that he did; and in many cases that will entail looking at the advice that he received."

38. At paragraph 43, Lewison LJ considered the reasoning given by the first instance judge in the case of Yesil:

> "DJ Besford held that there were a number of flaws in Ms Rowland's approach. First, she had seriously overestimated the

> amount of costs incurred. Far from being £92,000, they were £66,703. They were therefore well inside the costs limit. Second, the figure of £240,000 was never justified. As DJ Besford held at [64) it was put forward "in a vacuum and without any justification." Third, Ms Rowland never responded to the LSC's request for a fully costed case plan. Fourth, Ms Rowland appears to have paid no attention at all to the LSC's valid point that as matters stood at the time, no Part 36 offer having been made, it was inevitable that the claimant would recover *inter partes* costs from the NHSLA. In her statement she said that the most prominent factor in advising a client to switch funding methods was that "we were about to reach the costs limit on the legal aid certificate, and the Legal Aid Agency had refused any application for further funding." If that was the advice she gave her client, it was seriously misleading. They were not about to reach the costs limit on the legal aid certificate. Nor had the Legal Aid Agency refused further funding. Indeed, DJ Besford held at [85] that the risk of exceeding the legal aid budget was "minimal". As he held at [63], the fear of exceeding the budget was the deciding feature to prompt the decision to switch funding. He further held at [69], in my judgment correctly (although the syntax has gone wrong):
>
> "any decision based upon the inevitability of switch based upon exceeding the budget would appear to be an erroneous assessment."
>
> He concluded at [83] that the primary reason for the switch was based upon erroneous information; and in those circumstances the decision to incur the costs associated with the CFA light had not been sufficiently justified."

39. Having discussed the first instance decisions regarding the potential for a 10% uplift on general damages following the Court of Appeal's decision in Simmons v Castle [2012] EWCA Civ 1288 Lewison LJ said at paragraph 60:

> "The bottom line is that in each of the three cases the advice given to the client had exaggerated (and in two cases misrepresented) the disadvantages of remaining with legal aid funding; and had omitted entirely any mention of the certain disadvantage of entering into a CFA. Moreover, one of the advantages of entering into the CFA was Irwin Mitchell's own prospective entitlement to a substantial success fee. In those circumstances I consider that DJ Besford was correct in saying at [81]:
>
> "Where one of two or more options available to the client is more financially beneficial to the solicitor, the need for transparency becomes ever greater."

> 61. This is a reflection of the fundamental principle of equity that where a person stands in a fiduciary relationship to another, the fiduciary is not permitted to retain a profit derived from that fiduciary relationship without the *fully informed* consent of the other."

40. In two of the three cases in Surrey, the costs judge took the view that the absence of any advice regarding the Simmons uplift meant that the decision to change the method of funding could not be justified as being reasonable. There is no Simmons uplift issue here because, at the time of discharge of the legal aid certificate in May 2012, the Simmons decision had not yet been handed down. Consequently, the most relevant of the three cases is that of Yesil in which Lewison LJ found that the principal reason for DJ Besford also concluding that the decision to change funding was not reasonable related to the matters set out above at paragraph 43 of the Court of Appeal decision (set out at paragraph [37] above).

41. In relation to this case, therefore the guidance given by the case of Surrey is in general terms. It is for the costs judge to consider all the circumstances which includes the reasons for the decision to change the method of funding and not simply the advice to do so.

42. The case of Hyde v Milton Keynes NHS Hospital Trust [2017] EWCA Civ 399 also concerned a decision to change from legal aid to CFA funding. However, the central issue concerned the concept of whether a legal aid certificate could be "discharged by conduct" where the certificate was said to be spent but no notice of discharge had been filed and served. The reasonableness of the decision to change funding was not appealed from the original first instance decision.

43. In this case a notice of discharge was served upon the defendant and at first glance therefore the case is of little relevance to the facts present here. Mr Hayman referred to it in order to put forward submissions on a counterfactual basis i.e. if the LSC had not discharged the certificate whether by consent or otherwise. In those circumstances, it was Mr Hayman's submission that the certificate would have come to an end in any event because the certificate had been spent i.e. the costs payable under the certificate had all been used up and at that point the claimant would no longer be an assisted person and as such would be vulnerable to an order to pay the defendant's costs.

44. The assumption behind that submission was that BBK would do no further work under the certificate once the limit had been reached in order to make sure that it did not breach its contract with the LSC. The only alternative would be for BBK to incur costs knowing that it was breaching its contract with the LSC and that would not be a reasonable position for any client to require.

45. For reasons that I shall come on to, I do not think the circumstances in this case are in fact on all fours with the case of Hyde, superficially though they may appear to be. Consequently, I do not think that Court of Appeal's guidance in that case is of assistance here.

46. Mr Clegg also relied on the decision of DJ Spencer, who was a regional costs judge at the time, in the case of XX v ZZ given on 27 June 2016 in the Middlesbrough District

Registry. This was also a clinical negligence case where the claimant was legally aided before changing to a CFA. Mr Clegg firstly relied on paragraph 12 of the judgment where the district judge criticised the claimant for a lack of information. In order to give some context, I will start at paragraph 11:

> "11. The point of dispute is brisk, brief, to the point. It is absolutely crystal clear what is called for and, at the very least, one would have anticipated it would have led those who wish to maintain these items within the bill to have looked at the documentation and to have asked the questions that the court asked today.
>
> 12. Namely, and not limited…these are not all the questions we might ask but these are the questions I was asking today: the case plan, can I see it? It was not included in the documentation filed for me to prepare for this case. The solicitor's own budget or case plan – this was not filed. Any efforts made to apply to the Legal Services Commission for more funding early – none of this was provided. Any applications to change the court timetable so the timetable could match the opportunity to spend money that the claimants actually had from the LSC – this was not provided."

47. Having set out some correspondence between the solicitors and the claimant, the district judge came to the view that it was very clear that the solicitors had overspent the legal aid funding and decided to change funding before telling the client; and at the same time criticising the restrictions placed upon them by the legal aid fund. The district judge then considered the reasonableness of this approach in the following terms:

> "30. Well I could say several things about that letter but let me start with this. One has to take the client's instructions about funding. The client has to be informed and persuaded appropriately that this is a reasonable step to take and the client has to decide that it is a reasonable step; they have to have the pros and the cons. All I see in this letter is the pros of abandoning Legal Aid, I don't see any of the cons. There is no evidence that there was then a meeting with XX's mum to explain the cons, or indeed the pros, in any more detail. Therefore I am not satisfied that this lady was reasonably advised so she could make an informed choice. She was told "we need to do this, we need to do that, it's in the child's best interests, this is what we should do". There has to be discussion, there has to be advice, there has to be opportunity for questions to be asked and I have to say this letter would be capable of being criticised if mum was the smartest, most up-to-speed person in relation to her own approach, in the context that it is her own, disabled child whose future is at stake. If we park all of the emotional side of it, it is clear from the paperwork that mum was no more than of average educational ability and would not have any meaningful understanding from

> this letter as to what the pros and cons actually were. There were no reasonable enquiries about funding and no explanation or discussion with mum. Mum was likely to do what she was told. What she was told was that the Legal Aid Board are "letting us down". "Funding problem created by the Legal Aid Board", is what she was told, so she should go for something else and why wouldn't she go for the proposed CFA?
>
> 31. The letter is not entirely accurate. The "funding problem" was created by the solicitors spending more than they got from the Legal Aid Board. There is no evidence that they either tried to cut their cloth, or asked for more money or had an internal case plan to match their High Costs Case plan, or that they sought to adjust the court timetable to meet the money they had in their "back pocket". They simply stepped away from it and went for a CFA. Solicitors are entitled to do that in certain circumstances, there is no longer the rule that you must stick with Legal Aid if you've got it and you can't have anything else. It is perfectly open to a litigant to abandon Legal Aid if it is reasonable to do so and if it can be established, on a balance of probabilities, that it was a reasonable step to take.
>
> 32. I am not so satisfied. I am not satisfied, on a balance of probabilities, that it was a reasonable step to take. I am not satisfied that it was anything other than the solicitors driving this matter forward on their own agenda. Irrespective, I am also not satisfied the solicitors gave attention to the need to see if they couldn't run the case in accordance with the High Costs Contract that they themselves both sought and asked for the money for; not least because they were five figures over it around about a month after they got it. I cannot be satisfied that it was reasonable to incur these additional liabilities as envisaged by the CPR and therefore they will not be allowed."

The defendant's submissions on the change of funding

48. Whilst accepting that District Judge Spencer's decision in XX was of no more than persuasive value, it was, in Mr Clegg's submission, instructive because it demonstrated an in-depth examination of the costs that the claimant's solicitors were putting forward as being incurred under the legal aid contract. In the higher authority cases, there had been no similar discussion about whether the sums said to have been incurred were in fact reasonable in themselves when considering what steps it would be reasonable for the claimant and his or her solicitors to take.

49. Mr Clegg at various points referred to there being no evidence to support many of the claimant's propositions. For example, there was no evidence to support the figures set out in Ms Trask's letters to the LSC to show they had been properly incurred. The defendant did not accept that those costs were necessarily correct and he referred me to one example of why he said that was so.

50. At item 177 of the bill there is an entry for photocopying charges in respect of the cost of preparing copies of documents for counsel and various experts who convened at a conference in December 2012. The cost of that photocopying was £5405 plus vat. At this point in the chronology of correspondence with the LSC, Ms Trask had asked for an extension of the contract of £10,000 ostensibly to deal with the cost of the additional expert evidence. Half of that sum, on the face of it, was then being spent simply on photocopying documents. That did not appear to be considered an expense in the sum claimed from the LSC or it simply showed that the figures being put to the LSC were produced with little care or regard.

51. Mr Clegg spent some time criticising the approach of BBK in seeking to increase the level of funding. The December letter refers to the fact that a formally updated case plan had not been prepared "in order to keep costs to a minimum". It was telling, in his submission, that the letter then suggested that the LSC let BBK know if a formal application was required. Mr Clegg was clear that this phraseology indicated that BBK were well aware that a formal application was required but chose not to make one. When making the application, BBK should have done so formally and not informally by letter and without any updated case plan or APP8.

52. When the LSC responded by indicating that a formal request for funding needed to be prepared comprising a report fully addressing all of the relevant points together with a CLSAPP8, that is what BBK should have done. By simply replying in a further letter, BBK were paving the way for the certificate to be discharged. Mr Clegg went through the APP8 form and laid great emphasis on the need for the certification at the end of the form to be completed. That was not something that could be replicated by correspondence.

53. Mr Clegg then submitted that the LSC had responded promptly to BBK's December letter. It was then BBK who delayed by not replying until May with the second letter on the subject. The LSC then responded promptly three days later with the discharged certificate. There was nothing in the facts of this case to suggest that the LSC delayed matters in any way.

54. Mr Clegg also criticised BBK's May letter as essentially asking for the certificate to be discharged. By doing so, the assisted party lost any opportunity to challenge the discharge because it had been discharged by consent.

55. Ms Trask had written to the litigation friend on the same date that she had written to the LSC. This was a clear demonstration, in Mr Clegg's submission, that the litigation friend was simply being told what was happening and not having his advice and instructions sought as should have been the case. There was no evidence provided by Ms Trask on any discussion with the litigation friend about the pros and cons of changing from legal aid to a CFA prior to the discharge of the certificate.

56. Mr Clegg pointed to the need for the litigation friend to delay signing the CFA and ATE insurance proposal following the meeting in October 2012. This was, he suggested, demonstrative of the litigation friend having very little idea of what was going on in relation to the funding arrangements.

57. The documents that BBK disclosed showed that they were not at all concerned about discharging the legal aid in favour of a CFA. Indeed, the whole use of legal aid in this

case had fallen short of what was required. BBK should have sought to increase the limit on the certificate once the evidence of Dr Sawle, who had produced a condition and prognosis report which also assisted on liability and who recommended a report from a microbiologist, was to hand. If the request had been made as soon as those reports had been produced, they would have been considered under the old regime and there would have been no difficulty in increasing the figures. Instead BBK had continued to run the case without involving the LSC and had been quite content to incur fees and to have a conference so that they were "ready to go" in commencing proceedings.

58. This lack of concern for the mechanics of the LSC funding contrasted with the contract note produced by BBK and the suggestion that they took the admonitions of the LSC very seriously. There was no mention of this case on the contract notice that had been provided and the claimant had not served the Audit Outcome Report. The court therefore had no evidence to suggest that the contract note was of any relevance whatsoever. But even if this case had been referred to in the audit report, there was nothing before the court to suggest that the maker or makers of the ultimate decision to change funding had borne the contents of that report in mind.

The claimant's submissions on the change of funding

59. Mr Hayman began by providing me with a copy of the audit report from June 2011. It had not been disclosed to the defendant as it contained confidential matters. It was to be noted from that report that it could not have been clearer to BBK of the importance of not breaching the limits for individual cases. This specific case was not in breach of those limits as of June 2011. The requirements of the audit report had to be put in place within 21 days and therefore BBK were compliant with the LSC's requirements by the end of June 2011. Mr Hayman referred to the passages in Ms Trask's evidence regarding the weekly reports produced on the time recorded at legal aid rates and the trigger for action of 80% of the certificate's value. Mr Hayman told me that every fee earner in BBK was well aware of the position from June 2011.

60. Given the situation that the claimant and BBK found themselves in as of December 2011 then discharge of the certificate was inevitable. Under the franchise BBK were not entitled to breach the certificate limits and it would clearly not be reasonable for the litigation friend to expect them to breach that contract. The only other options were to transfer the case to another firm with a legal aid franchise (but that would not assist because it would not increase the funding under the certificate for the stage reached) or to discharge this certificate.

61. In any event, Mr Hayman submitted that the case of Hyde set out above was authority for the proposition that the certificate had been spent in any event by the sums payable under it having been exhausted. That was not the position at December, but it was more or less by May 2012.

62. Mr Hayman took me to an anonymised letter in the claimant's bundle regarding a different case where funding had been granted based on a letter rather than a formal application. The purpose of his submission was to demonstrate that a formal CLSAPP8 was not always used and indeed it was BBK's view that the relationship manager preferred correspondence. The correspondence in this case in any event set out all the information that could have been expected on the APP8 for the sections

that were relevant to this case. The LSC were happy to discharge the certificate based upon the letter in May without any formal application for discharge being made.

63. Mr Hayman disputed the submissions made by Mr Clegg that prior authority should have been sought for the two experts' reports. Mr Hayman said that prior authority was only sought where the cost was unusually high or was unusual in nature. It was not used for retrospective approval of costs incurred but for unusual aspects only.

64. Mr Hayman informed me that Dr Sawle was mentioned in the case plan as the condition and prognosis expert. As I have set out above, as things turned out his report was also considered to be helpful on liability and he recommended that BBK obtained a microbiologist's report in addition. According to Mr Hayman, the following of leads within a stage was standard practice since the LSC were keen for the cases to be suitably worked up and not "underworked". The LSC would allow the solicitors to get on and prepare the case without a great deal of intervention. To illustrate this, Mr Hayman referred to the audit report which was only concerned with whether or not the cases were kept above or below the financial limits rather than the details of the individual cases and the evidence needed to prove them.

65. Mr Hayman provided the High Cost Case contract between BBK and the LSC for this case. I understood these to be standard terms which apply to any case run by BBK. They did not contain any case specific information other than the case name itself.

66. Mr Hayman disagreed that there was no evidence regarding the costs that have been claimed by BBK in their correspondence with the LSC. The letter itself was evidence and there were also attendance notes within the files lodged with the court to show Ms Trask considering the figures involved. On the contrary to the defendant's position, Mr Hayman submitted that there was no evidence that the figures set out in the letters were not reliable.

67. In any event, Mr Hayman submitted that there was no requirement to show that the costs contained in the figures put to the LSC whether by breakdown or otherwise, were reasonable and necessary. The figures were just needed to show that they had been incurred. Unless, as per the Yesil case, there was something completely wrong with the calculation, such as where inter partes rates were used rather than legal aid rates. Absent that, the solicitors were only expected to put in the costs that they had incurred without specific vetting.

68. In his submissions, Mr Clegg suggested that something had changed between December and May in terms of the monies requested from the LSC and by inference that the figures had not been calculated with any great regard. Mr Hayman said that there had indeed been a difference, but that was simply that the change in the funding regime had occurred and the figures in May had to be put on a different footing from the previous request in December. There was nothing untoward in this.

69. Mr Hayman said that there had clearly been information given to the litigation friend regarding the withdrawal of funding. It had been set out at length in the letter to him dated 8 May 2012. The client was best served by changing to a CFA at that point since the solicitors had reached the limit of the funding certificate and had been informed that there would be no increase. In reality, the only approach was to change

and no reasonable client would have instructed the firm to do otherwise since that would mean the solicitors having to breach its contract with the LSC.

Discussion and decision on the change of funding

70. Mr Clegg said that this case comes down to what happened regarding the two additional liability reports. He said that it "stopped and started" with this. I have to say that I do not agree and I think that that approach is in fact the one that BBK was seeking to impress upon me. But it cannot be right in my view, to start in the middle of the funding arrangement without considering what had gone before.

71. In my view, the relevant events in this case start at the beginning of 2009 when the investigative help funding was converted to a full representation certificate. With the benefit of a costs plan, the LSC agreed to fund this case on behalf of the claimant. As DJ Spencer said in her decision in XX, the assisted party's solicitors had funds under a High Costs Contract "that they had both sought and asked for the money for."

72. According to the narrative given to me by the claimant, matters began to change in 2011 when additional expert evidence was obtained. It is difficult to know the extent of that change to the contract because, as in XX, no case plan has been put before the court. Mr Clegg commented about its absence on many occasions but Mr Hayman did not at any point suggest that it was going to be produced. My understanding is that Dr Sawle's report was included in the case plan as the condition and prognosis expert in addition to the three liability experts. If that is so, then the cost of his report should not have produced any increase to the costs under the contract simply because it included matters relating to liability. I appreciate that once he was invited to the conference with other liability experts, he would start to incur costs that would be put against liability rather than quantum. But as at early 2011, the cost of his report does not seem to me to require any increase to the costs previously budgeted. That then leaves the evidence of the microbiologist which clearly would not have been contemplated directly. Nevertheless, if it was a significant increase, then it ought to have set off the alarm bells which would be triggered on a weekly basis based on the steps put into place by BBK following the audit report. If, as per Mr Hayman's assertion, everyone in BBK was alive to the issue of potentially exceeding the costs limit, then it must have been the case that once the figures were approaching 80% or higher of the costs limit in the contract, then steps would need to be taken.

73. Seemingly the alarm bells did not go off until December 2011 at around the time of the conference with the liability experts. The scope limitation in the certificate was, as it had been since 2009, to take steps up to and including exchange of statements and reports. Having decided that the financial limit on the certificate would need to be increased, it is incomprehensible to me why a further sum would be sought that only went partway through that period. Therefore, BBK's letter of 13 December 2011 can only be read as requiring £10,000 for the extra work needed to be conducted to the end of the existing limitation.

74. The letter of 8 May 2012 to the LSC makes reference to the extent of the certificate but only in the context of saying that the case could not be pursued to that point under the existing limit. Proceedings had still not been commenced and the costs of approximately £57,500 had exceeded the limit of £55,490 on the certificate. A further £9,500 (to reach £67,000) was required simply to the point of issue which again

makes no sense as an estimate given that that does not take the case anywhere near the exchange of statements and evidence.

75. It does not seem to me that the tenor of either of BBK's letters demonstrates any expectation that the LSC will accede to the increases requested Indeed, the first letter is so short of information that it seems that Ms Trask felt compelled to offer to provide further information if requested.

76. In order to demonstrate that communications with the LSC could be by correspondence rather than APP8's, BBK put in anonymised letters from another case. The case had been transferred from another firm and who had been working within a budget of £94,000 plus vat to complete stage 5 (quantum investigations). The solicitor at BBK did not consider this sum to be adequate and so sought an increase to the sum of £184,00 plus vat, i.e. almost twice the previously agreed figure. The LSC agreed an increase to £117,000 but on the basis that it also included stage 6 (quantum trial). BBK's second letter adopts a similar approach in terms of the increase requested. A further £200,000 is requested so that the total sum would be £317,000 plus vat. The LSC are requested, if they are not prepared to confirm the increase, to discharge the certificate immediately. Whilst figures are put forward to show that BBK have used up the increased limit, there is no breakdown whatsoever of the £200,000 estimated future costs. It is not surprising that the LSC discharged the certificate three weeks later.

77. The approach of BBK is summed up in surprisingly candid terms by Ms Trask at paragraph 37 of her witness statement where she says that in her experience no defended case can be run on legal aid. Mr Hayman sought to bolster that argument by reference to some of the evidence referred to in the Surrey cases but it did not seem to me that they really addressed this situation. He also referred to the solicitors in Hyde being unable to run their case within the limits of the legal aid certificate. But I think that in fact Hyde runs counter to BBK's proposition. The increase sought by the final firm of solicitors in Hyde was no more than the sums they said had been frittered away by previous solicitors. It was not that the case could not be run as a whole within the certificate limits but simply that those limits had not been used effectively by predecessor solicitors.

78. In some of the bills that come before this court the client is sent a copy of every letter that is forwarded to the opposing solicitors. In others, specific sums are agreed for each stage of the proceedings and sums have to be written off if those figures are exceeded. Such cases are a far cry from many personal injury and clinical negligence cases where the client's claim is funded either by legal aid or by a CFA. The client's practical interest in the level of costs incurred is peripheral where those costs are unlikely to be claimed from him or her at the end of the case. Such "topping up" is expressly forbidden in relation to legal aid. Where, as here, a so-called "CFA Lite" is used the same point applies.

79. Consequently, it seems to me that solicitors of such clients can become used to running the cases without either feeling the need to check with the client for instructions on incurring costs or to provide the sort of advice that a private paying client would expect to receive. As DJ Spencer said in XX, why would the client not agree to a CFA (particularly a CFA lite) if told that the legal aid fund had effectively run out and it was the LSC that was causing the difficulty?

80. The facts of this case differ from XX in number of ways. It would appear in that case that the client was simply given erroneous information at certain points albeit that the judge complained about the lack of evidence put before her to establish exactly what information was given to the client. In this case I have set out what appears to be the entirety of the information put before the client and it is scant to say the least. In my view, the defendant was right to emphasise the fact that the only letter to the litigation friend was dated the same date as the letter to the LSC which, in not very subtle terms, invited the LSC to discharge the certificate. A fait accompli had almost been achieved by the time of the sending of the letter. In order to make sure that the discharge occurred, BBK needed to make sure that the client did not complete the form querying the discharge of the certificate. Therefore, without any discussion as to the appropriateness of the change, at least as evidenced before this court, the client was told not to fill in the form that he might receive from the LSC.

81. As far as I am concerned, the evidence produced as to the running of this case by BBK is entirely clear. The litigation friend was introduced by Simons Levine & Co as a client for whom legal aid could be obtained. But having obtained it, the case was run with little or no regard to the certificate limits on the assumption that if it became defended, it would have to convert to a CFA in any event. What can only be described as a half-hearted attempt to increase the certificate limit for a further short period was made as a prelude to inviting the LSC to discharge the certificate. The LSC obliged and the client has entered into a CFA with a 100% success fee and associated ATE insurance as soon as the litigation friend was available to consider the documentation.

82. By the time that the request in December 2011 was made for additional funding, it may be the case that it was too late to obtain the sort of additional funding that would have been sufficient to take the case through to the exchange of evidence. I do not accept the defendant's argument that a breach of the costs limit did not necessarily mean that the certificate would have to be discharged. To carry on thereafter would be to do so in the knowledge that the costs could not be recovered from the LSC. That is an approach which could be argued in cases where liability had been admitted and quantification was well underway. It is unrealistic in my view to expect solicitors to take that approach where liability was still in dispute, particularly after the outcome of the audit report and the inevitable breach of the terms of the contract with the LSC.

83. But the other side of this coin is that the solicitors need to show that they are keeping an eye on the costs incurred from the moment that the contract for a particular case was created. There is absolutely nothing before the court to show how this case was ever expected to be brought home for the sum sought from the LSC. The oft mentioned dicta of HHJ Alton in Stevens v Watts as approved in Lownds v The Home Office [2002] EWCA Civ 365 of planning a case to be run for a reasonable and proportionate amount of costs springs to mind. BBK had to do this when producing the original case plan and, in my view, it was incumbent upon them to ensure that as the case was run, the costs were managed within that contract.

84. This is hardly a novel approach to litigation. It is the essence of the prospective budgeting brought into all multitrack cases from April 2013. It would be surprising, to put it mildly, if a solicitor was to say to his or her client that the costs allowed under a CMO were unlikely to be increased, subject to any significant development, but that it was widely known that CMO figures were never going to be sufficient. The client would be forgiven for expecting rather more adherence to that approved budget.

85. Consequently, in my view the case does not stop and start in December 2011 but starts when the contract was entered into in February 2009 and a close eye needed to be kept on the costs thereafter. There is no evidence before me that this was done, notwithstanding the LSC audit in the early part of 2011. As Surrey makes clear, it is for the receiving party to demonstrate the reasonableness of the change in funding. In my view she has failed to do this.

86. The additional liability expert or experts in my view does not explain in any way the extent of the costs incurred by BBK when compared with the amount originally agreed with the LSC. If that original sum had been considered to be inadequate throughout, I would have expected there to be evidence on the file making it clear to the litigation friend that there would be a problem further ahead if the case was defended. But there is no such evidence as far as I am aware. It cannot be a reasonable decision to change funding simply because no obvious effort has been made to run the case within the original funding agreement.

87. The extent of the additional liabilities claimed in this case mean that whichever side loses the argument, it would appear that a disproportionate sum has been lost / has been paid as a result. But the level of the success fee has not been determined and nor the reasonable premium for the ATE policy. Whether those additional liabilities would actually amount to £1 million or not is a matter of conjecture at this point. In any event the size of the additional liabilities cannot bear any relevance to the question of whether they should have been incurred in the first place. In my judgment they should not have been because funding was available which did not require a change to take place. Whilst it may be Ms Trask's experience that defended cases cannot be run on legal aid, it is the experience of this court that legally aided bills in substantial matters of clinical negligence are assessed on a regular basis.

88. For the receiving party to demonstrate that the decision to change was reasonable, I consider that, as a minimum, there would be a trail of calculations to show whether the case was being brought home within the sum agreed with the LSC. If it were not, then evidence of formal applications for an increase had been made and any further information or similar required by the LSC had been provided. It may not have mattered whether the application was made formally or not but it was not a reasonable approach in my view to respond by letter when the LSC had specifically stated that a report with an accompanying CLSAPP8 was required. My reading of the letter of 17 January 2012 is that it is simply informing BBK that the regime has changed and that as such an increase could not be agreed merely based on the letter that had been provided. A clear proposal was requested and it was simply ignored to all intents and purposes.

89. Consequently, I do not consider that a reasonable choice was made to change funding from legal aid to a CFA and ATE arrangement. The litigation friend played no part in the decision and I would say this lack of involvement is fundamental as a defect. But even the decision-making by BBK was flawed for the reasons that I have set out. Consequently, the additional liabilities of success fees and an ATE premium are disallowed.

CPR 44.11

90. CPR 44.11 provides as follows:

> 44.11
>
> (1) The court may make an order under this rule where –
>
> (a) a party or that party's legal representative, in connection with a summary or detailed assessment, fails to comply with a rule, practice direction or court order; or
>
> (b) it appears to the court that the conduct of a party or that party's legal representative, before or during the proceedings or in the assessment proceedings, was unreasonable or improper.
>
> (2) Where paragraph (1) applies, the court may –
>
> (a) disallow all or part of the costs which are being assessed; or
>
> (b) order the party at fault or that party's legal representative to pay costs which that party or legal representative has caused any other party to incur.
>
> (3) Where –
>
> (a) the court makes an order under paragraph (2) against a legally represented party; and
>
> (b) the party is not present when the order is made,
>
> the party's legal representative must notify that party in writing of the order no later than 7 days after the legal representative receives notice of the order.

91. In the case of Ridehalgh v Horsfield [1994] 3 All ER 848, the meaning of the words "improper" and "unreasonable" was considered in the context of orders for wasted costs. The case of Lahey v Pirelli Tyres Plc [2007] EWCA Civ 91 confirmed that the same definitions should be used in hearings under what is now CPR 44.11 as under the wasted costs jurisdiction. Ridehalgh defined the conduct as follows:

> ""Improper" means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code.
>
> "Unreasonable" also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass

> the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable."

92. The defendant says that BBK, as opposed to the claimant, her litigation friend or the first firm of solicitors, have engaged in improper or unreasonable conduct such that CPR 44.11(1)(b) is engaged and as a result I should disallow all or part of the costs being assessed in accordance with 44.11(2)(a).

93. At paragraph 131 of Mr Clegg's skeleton argument, he helpfully sets out twelve particulars of why he says that BBK's conduct, both during the liability proceedings and the detailed assessment proceedings, was unreasonable and/or improper for the purposes of CPR 44.11. Those twelve particulars can be broken down into four categories which I will take in turn:

a) events surrounding the change in legal aid funding

b) the drafting and certifying of the bill of costs

c) the drafting of replies to the points of dispute

d) conduct in respect of the detailed assessment proceedings

<u>a) events surrounding the change in legal aid funding</u>

94. The defendant criticises BBK for obtaining liability reports and undertaking work outside the scope of legal aid, the consequences of which exposed the claimant to significant financial and litigation risks: the failure to remedy the situation regardless of whether or not the LSC would increase the financial limit of the legal aid certificate: the discharge of the claimant's legal aid certificate without any or any informed consent or any or any meaningful advice being provided to the litigation friend; misrepresenting to the litigation friend the requirements under legal aid in support of its decision unilaterally to discharge the legal aid certificate; and exposure of the claimant to all future litigation risks until such time as the litigation friend had the opportunity to consider an alternative funding arrangement.

95. Most of these issues relate to the length of time between the notice of discharge in May 2012 and the signing of the CFA in October 2012. They are the sort of arguments that the client might take on a solicitor and client assessment. On the facts of this case it does not seem to me to be relevant as to how quickly the client decided to enter into the CFA once the certificate has been discharged. The correspondence and attendance notes to me clearly showed BBK taking an appropriate amount of care and effort to explain clearly to the litigation friend how the CFA and ATE insurance worked. Quite a large proportion of the time involved occurred whilst the litigation

friend was abroad and so could not have the meeting to run through the CFA in any event. I do not think the fact that the litigation friend asked to read through the documentation raises any inference that he did not understand the funding arrangements being discussed with him.

96. It is often said that the paying party can step into the shoes of the receiving party client in order to take points regarding matters such as the indemnity principle on a detailed assessment hearing. It seems to me to be a further leap however for the paying party to pray in aid such matters so as to demonstrate improper or unreasonable conduct against the defendant. If BBK's actions caused their client some difficulties with regards to the LSC and the protection its funding brings, that cannot be sufficient to say that such conduct should mean that the claimant's costs should be disallowed in part or at all as against the defendant.

97. In any event, I do not see that the acts which are complained of come anywhere near to satisfying the test of improper or unreasonable conduct as laid down in Ridehalgh. In particular, the categorisation of conduct that is "unreasonable" for the purposes of the wasted costs order is said to be a narrow one. Whilst I have found the failure to give advice to the litigation friend et cetera to mean that it was unreasonable to change funding arrangements, that is not the sort of conduct, as I understand it, which is intended to come within CPR 44.11. In my view none of the six particulars set out by the defendant in the skeleton argument (and paraphrased at paragraph [95] above) in respect of events surrounding the change in funding begin to lead to a finding of improper or unreasonable conduct.

b) the drafting and certifying of the bill of costs

98. There are two parts of the bill which draw criticism. In the narrative, parts 1.3 and 2.5 of the bill are described as follows:

> "Part 1.3 – work undertaken by Simons Levine and Co under CFA from 30/01/2014 up to 16/12/2014; and preparation of the Bill of Costs by Bolt Burdon Kemp under private retainer agreement, with the VAT charged at 20%
>
> Part 2.5 - work undertaken by Bolt Burdon Kemp under Legal Aid from 4/01/2011 up to 24/10/2012, with VAT charged a 20%."

99. Simons Levine and Co handed over the case to BBK towards the end of 2006 in order for the claimant to have the benefit of legal aid funding. It is therefore surprising that work in 2014 was claimed to be payable to Simons Levine & Co by the claimant, not least since BBK remained instructed at the time. Ostensibly, the claimant sought costs on behalf of two firms at the same time. It was not surprising therefore that the points of dispute queried this at general point 4 when suggesting that there appeared to be CFAs with both firms of solicitors and a further private retainer with BBK existing in 2014.

100. The replies clarify the position slightly by explaining that the fee for preparing the bill of costs was agreed between BBK and Simons Levine and Co rather than with the claimant. But otherwise no explanation was forthcoming. That lack of explanation remained even though, as discussed below, the entirety of Part 1.3 was conceded prior to the detailed assessment hearing. At the hearing, Mr Hayman explained that Mr

Simons had rendered a fee note to the claimant for work done in relation to limitation issues. The fee note was based on a private retainer rather than the CFA and as such the bill was in error. In any event, it was far from clear on what basis Mr Simons was entitled to render any invoice to the claimant and the inference from the abandonment of Part 1.3 was clearly there to be drawn that the claimant's legal team had had second thoughts about the entitlement to claim such costs which, it appeared to those present at the hearing, had probably not been paid to date.

101. In relation to part 2.5 of the bill, the legal aid certificate was in fact discharged on 8 May 2012. Consequently Part 2.5 ought to end on or about that date and part 2.6 relating to work done under the CFA ought to run immediately thereafter since the wording of the CFA is retrospective.

102. Mr Clegg was firm in his submissions that this misdescription of the ending of the legal aid period was an attempt by the claimant to obfuscate the hiatus between the two forms of funding which would otherwise have waived "red flags", to use Mr Clegg's phrase, to the defendant on funding issues. The seventh particular of unreasonable or improper conduct refers to the miscertification or misrepresentation of the bill of costs insofar as the date of the public funding certificate was concerned. It is said that the effect of this was to provide BBK with a clear advantage in pursuit of very substantial additional liabilities.

103. Mr Clegg said that anything which weakened the defendant's position in terms of challenging the additional liabilities inevitably strengthened BBK's position. Whilst that might be so, it was not at all clear to me why it was said that BBK's position was strengthened by misdescribing parts 2.5 and 2.6. Mr Hayman was clear that, if anything, the effect of any alleged misdescription was detrimental to BBK. If the line had been drawn properly in May 2012 rather than October 2012, then costs could have been claimed in part 2.6 and a success fee claimed upon them. As it was, costs between May and October 2012 were claimed as if the legal aid certificate was in force and therefore no success fee applied.

104. It seems to me that Mr Clegg's argument is founded on the basis that Part 2.5 should state an end date of 8 May 2012 and Part 2.6 should state a commencement date in October 2012 thereby leaving a gap of 5 months as some sort of beacon to spotlight the delay in changing arrangements. But if the bill had been drawn in that fashion, it would not have accorded with the reality of the litigation friend entering into a retrospective CFA with BBK so that the transition would appear seamless if the bill had been drawn correctly. The only difference would be that the line would be drawn in May rather than October.

105. Whilst it cannot be the case that every error by a party can be assumed to be benign if it is unhelpful to that party, there has to be something to impute a malign intention. It may have been self-evident to Mr Clegg that the misdrafting of the bill demonstrated that intention but I have to say that it was not evident to me.

c) the drafting of replies the points of dispute

106. I have mentioned above that the reply in respect of Part 1.3 of the bill was only enlightening in part. Nevertheless, it was an improvement on some of the other replies which were simply wrong. For example, the defendant challenged the level of

the solicitors' success fees at general point 7. There, the point of dispute states that a *"two staged success fee of 50%, rising to 100% after the issuing of proceedings is not appropriate in this case."* The reply categorically states that *"the success fee charged by Bolt Burdon Kemp is not staged. It was agreed at 100% throughout. The defendant's submissions fall away as irrelevant therefore."* Unfortunately, it was the defendant's categorisation of the success fee that was entirely accurate and not the claimant's.

107. Similarly, the error in drafting the bill in respect of the date of discharge of legal aid was carried through into the replies. At general point 4 the point of dispute refers to funding by the LSC from the 23/01/07 to 24/10/12 on two occasions. Although some correction of the defendant's misunderstanding is contained in that reply (for example regarding the BBK private retainer with Simons Levine and Co) there is no clarification of the date on which the legal aid certificate was discharged. In response to the question of why public funding was "abandoned" in favour of the CFA the reply states as follows:

> "The Claimant wrote to the Legal Services Commission on 13 December 2011 informing the LSC that the number of liability experts had increased from 3 to 5 and requesting an increase to the costs limit of the certificate of £10,000.
>
> The LSC responded by letter dated 17 January 2012 refusing the increase in funding. The claimant subsequently wrote to the LSC on 9 May 2012 stating the intention to seek alternative funding arrangements.
>
> The Claimant was advised by Bolt Burdon Kemp of the LSC's refusal and switching to a CFA. The advice letters to the Claimant dated 8 May 2012 and 23 July 2012 will be provided for inspection at the detailed assessment hearing."

108. In the particulars of improper or unreasonable conduct in the defendant's skeleton argument, criticism is made of the replies as being a misleading portrayal of the claimant's funding position with BBK: of replying in such a way as to allow the defendant to continue to be misled in relation to the date the legal aid certificate was discharged: and of misrepresenting that the success fee was not staged, thereby gaining an advantage in pursuit of the level of the success fee.

109. Mr Hayman's response to these various matters was twofold. In respect of the success fee, he apologised on behalf of BBK for the error that was made and said that as soon as it had been spotted by his colleague, the defendant was notified of the correct position. When it came to the defendant being misled as to, for example, the date of discharge of the legal aid certificate, Mr Hayman pointed to the fact that the information was on the defendant's own file. The notice of discharge was served at the time upon the defendant. If there was any confusion in the defendant's mind therefore as to the date of the certificate by the reply, it could easily be ascertained simply by looking in the defendant's own file. The defendant was, Mr Hayman's submission, seeking to make rather more of the alleged confusion that was actually the case.

110. It seems to me that Mr Hayman must be right in relation to the date of the notice of discharge. The whole purpose of a notice being sent to the opponent is to alert them to the fact that the assisted party is no longer covered by the protection afforded by legal aid. If the defendant then chooses to ignore its contents, then that is a matter for it, but it cannot lead to any credible suggestion of reliance upon other statements by the claimant which are contradictory. With the date of 8 May 2012 in mind, the reply regarding the change in funding can be seen in its proper light rather than, as portrayed by Mr Clegg, that the advice to and instructions from the litigation friend all occurred before the switch took place.

111. It is regrettable that the replies appear to have been drafted with scant regard for information that was available. As Mr Clegg pointed out, little of this bill has been considered so far and yet a number of errors have come to light. But it seems to me, at least at this stage, that such matters fall to be dealt with in relation to the costs of the detailed assessment. I do not think, again at least at this stage, that these matters reach the threshold of unreasonable conduct let alone improper conduct.

d) conduct in respect of the detailed assessment proceedings

112. To some extent, the drafting of the bill and the replies can be described as conduct in the detailed assessment proceedings. However, this particular subsection relates specifically to work done in the last month before the hearing. Prior to that period the detailed assessment proceedings had taken an unremarkable course. The order for costs was made in July 2016 and the bill of costs was served a year later with points of dispute served in August 2017 and replies in October 2017. The significant development that occurred was the handing down of the Surrey decision by the Court of Appeal in March 2018.

113. Following that handing down, and presumably as part of preparation for the forthcoming detailed assessment hearing, BBK's costs department reviewed this case. This led to a flurry of communications between Mr Hayman and his colleague Mr Jenkinson at BBK and Mr Clegg and his colleague Mr Regnauld at Acumension. These communications included Mr Jenkinson ringing Mr Regnauld to confirm that there was an error in the replies regarding the staging of the success fee.

114. Most of the communications related to whether the defendant was going to take the Surrey point regarding the change of funding and the merits of so doing. They included the extent of disclosure of documents to support the reasonableness of that decision. Both Messrs Clegg and Regnauld indicated that they had not been provided with the sort of documentation that would be expected to demonstrate this issue and that no offers in relation to additional liabilities were going to be forthcoming in its absence. Mr Hayman referred to the question of privilege of the documents which, as Acumension pointed out was the client's privilege rather than BBK's. The client then provided BBK with a waiver of the general maintenance of privilege if by disclosing documents it was advisable to do so. The documents which I have set out in some detail above were released to the defendant.

115. I was taken through those documents by Mr Clegg in the same detail as the letters and attendance notes in respect of the change of funding itself. I have not set them out in the same detail however because I do not think that they come close to demonstrating unreasonable conduct as suggested by Mr Clegg. This is litigation between a firm of

solicitors and its clients who regularly come up against the professionals representing NHS Trusts. The discussions are professional but hard-nosed as is often the case where repeated contact over a number of cases occurs. There is nothing out of the ordinary in the communications in my view and the most that Mr Clegg could say about the communications was that it was all done late in the day.

116. Mr Hayman's explanation for the timing of the disclosure was that, until Foskett J's decision in Surrey was overturned, his authoritative judgment disapproved of the sort of trawl that has occurred here and BBK could not be criticised for taking the approach that was set out by the High Court. Once the Court of Appeal's decision was handed down, BBK reviewed its position and contacted the defendant's representatives. Privilege could not be waived without the client's instructions. Once those instructions had been taken, documents were disclosed to the defendant. None of these actions ought to be criticised. Having considered the communications and the timing as described by Mr Hayman, I accept entirely his description of these events.

117. It follows from the paragraphs I have set out in relation to CPR 44.11 that I do not consider that any of the claimant's conduct reaches the threshold of improper or unreasonable conduct so as to require the court to consider a sanction to be imposed.