Neutral Citation Number [2023] EWHC 1000 (SCCO)
Case No: QB-2014-004896
SCCO Reference: SC-2021-BTP-000961

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London WC2A 2LL

Date: 21/04/2023

Before :

COSTS JUDGE LEONARD

- -

Between :

JXC (by his litigation friend CXJ)	**Claimant**
- and -	
NIS	**Defendant**

- -
- -

Erica Bedford instructed by Irwin Mitchell LLP for **the Claimant's Solicitors**

Hearing date: 12 August 2022

- -

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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COSTS JUDGE LEONARD

Costs Judge Leonard:

1. This judgment is concerned with the costs incurred by the Claimant in pursuing a High Court action for damages for personal injury. The Claimant is a protected party, defined in the Civil Procedure Rules ("CPR") at CPR 21.1(2)(d) as a party who lacks capacity to conduct the proceedings within the meaning of the Mental Capacity Act 2005. His solicitors, Irwin Mitchell ("IM") are instructed, on his behalf, by his litigation friend CXJ.

Orders and Rules

2. CPR 21.10 provides that where a claim is made on behalf of a protected party no settlement, compromise or payment in respect of that claim shall be valid without the approval of the court.

3. On 12 March 2021 the court approved a negotiated settlement of the Claimant's claim for damages. The court embodied the approved terms of settlement in an order which provided for the Claimant to receive from the Defendant a lump sum of £5,118,000 with annual periodical payments of £310,518. The order also provided for further damages to be claimed, should the Claimant develop post-traumatic epilepsy, and for the Defendant to pay the Claimant's costs on the standard basis.

4. Ms Bedford, counsel for Irwin Mitchell LLP ("IM"), the Claimant's solicitors, advises me that the damages settlement has a total capitalised value of over £14,000,000. This was by any measure a very substantial claim.

5. CPR 46.4(2)(a) provides that as a general rule, where money is ordered to be paid to a protected party, the court must also order a detailed assessment of the costs " payable by, or out of money belonging to, any party who is a… protected party…": in other words, the costs payable to the protected party's legal representatives by the protected party. The amount payable to those legal representatives by the protected party will, under CPR 46.4(4), be limited to the assessed sum. CPR 46.4(2)(b) provides that on assessing those costs the court must also assess the costs payable to the protected party by the "paying party", usually the defendant to the claim.

6. Exceptions to the general rule at CPR 46.4(2) include cases where the protected party's solicitors waive any claim to costs or disbursements not recovered from the paying party. Disbursements are expenses such as counsel's or experts' fees, and the term "costs", as defined at CPR 44.1, includes them.

7. The 12 March 2021 order provides, accordingly, for the costs payable by the Defendant to the Claimant to be assessed, and (at paragraph 13):

> "Unless the Claimant's solicitors waive their entitlement to be paid by the Claimant such shortfall in the costs recovered inter parties as they may be otherwise be entitled to under the terms of their retainer, there be a detailed assessment of the Solicitor/Client costs incurred on behalf of the Claimant and of the amount which it is reasonable for the Claimant's Solicitors to recover from the Claimant in all the circumstances such costs to be assessed on the basis provided for in CPR 46.4 and 46.9."

8. CPR 46.9 makes provision for the assessment of costs as between solicitor and client. It provides, at CPR 46.9(3) and (4), that:

> "(3)… costs are to be assessed on the indemnity basis but are to be presumed–
>
> (a) to have been reasonably incurred if they were incurred with the express or implied approval of the client;
>
> (b) to be reasonable in amount if their amount was expressly or impliedly approved by the client;
>
> (c) to have been unreasonably incurred if –
>
> (i) they are of an unusual nature or amount; and
> (ii) the solicitor did not tell the client that as a result the costs might not be recovered from the other party…
>
> (4) Where the court is considering a percentage increase on the application of the client, the court will have regard to all the relevant factors as they reasonably appeared to the solicitor or counsel when the conditional fee agreement was entered into or varied."

9. Paragraphs 6.1 and 6.2 of Practice Direction 46 add:

> "6.1 A client and solicitor may agree whatever terms they consider appropriate about the payment of the solicitor's charges. If however, the costs are of an unusual nature, either in amount or the type of costs incurred, those costs will be presumed to have been unreasonably incurred unless the solicitor satisfies the court that the client was informed that they were unusual and that they might not be allowed on an assessment of costs between the parties. That information must have been given to the client before the costs were incurred.
>
> 6.2 Costs as between a solicitor and client are assessed on the indemnity basis. The presumptions in rule 46.9(3) are rebuttable."

10. In the great majority of cases where costs are assessed between opposing parties in litigation, they are assessed on the standard basis. It takes something out of the ordinary to justify an order for costs to be assessed between opposing parties on the indemnity basis. In contrast, as the rules set out above make clear, costs as between solicitor and client are always assessed on the indemnity basis.

11. There are two important distinctions between costs assessed on the standard basis and costs assessed in the indemnity basis, which have some bearing upon the issues to be addressed in this judgment.

12. On either basis, costs will only be allowed on assessment if they have been reasonably incurred and are reasonable in amount. If however costs are assessed on the standard

basis, any doubt as to whether costs were reasonably incurred and are reasonable in amount will be resolved in favour of the paying party. If they are assessed on the indemnity basis, any such doubt will be resolved in favour of the receiving party.

13. That is the first distinction. The second distinction is that costs assessed on the standard basis are subject to an overall requirement of proportionality, so that even if reasonably incurred and reasonable in amount, they may still be disallowed insofar as they are disproportionate, by reference to criteria set out in the CPR.

14. Where (as in this case) the protected party's solicitors have negotiated a satisfactory settlement of the protected party's claim for costs, the requirements of CPR 21.10 and CPR 46.4(2)(b) are usually met (as they will be in this case) by an order assessing the protecting party's costs at the agreed figure. The court's attention, for assessment purposes, will be focused on any claim made by the protected party's solicitors for costs and disbursements above and beyond those recovered from the paying party, which will usually have to be deducted from the protected party's damages.

15. Where such a claim is made the court's role is to undertake an independent assessment of the costs claimed by the solicitor against the client and if appropriate to reduce them to a figure that, by reference to CPR 46.9, represents costs and expenses reasonably incurred and reasonable in amount. Acceptance by the litigation friend and by any court-appointed Deputy of the amount sought by the solicitors is, for the purposes of that exercise, relevant, but it is not decisive.

Deductions from the Claimant's Damages

16. The contract of retainer between IM and the Claimant is a Conditional Fee Agreement ("CFA") which provides for a success fee. Success fees in personal injury claims have, since April 2013, been irrecoverable under orders for costs, the loss of the right to recover having been counterbalanced by measures including an increase in awards of general damages.

17. Another common element of legal costs which has, since April 2013, been irrecoverable under an order for costs is the premium payable for an "After the Event" (ATE) insurance policy which, as in this case, may be taken out to indemnify the Claimant against any costs that he might have been required to pay to the Defendant, and any irrecoverable disbursements.

18. In this case, the ATE premium payable by the Claimant was £1,629.60 inclusive of Insurance Premium Tax. This seems to me self-evidently to be a reasonable premium, and it falls to be paid out of the Claimant's damages.

19. That leaves two matters to be addressed by this judgment. The first is the assessment of the success fee payable to IM by the Claimant. The other is the assessment of the "base costs" (costs and disbursements excluding the success fee) claimed by IM from the Claimant under the terms of the CFA, which is in excess of the sum recovered from the Defendant under the costs settlement.

20. Because the success fee is calculated as an element of base costs, I will deal with the base costs first.

21. Before going further I should first express my thanks to Ms Bedford for her thorough and detailed submissions on behalf of IM (including several that have helped me correct and clarify the first draft of this judgment) and second acknowledge IM's role in bringing a very substantial and complex claim to a favourable conclusion for the Claimant.

The Background

22. This was a tragic case. The Claimant, a 19 year old Marine Commando, sustained catastrophic head injuries when he fell a distance of approximately 20 feet during a training exercise.

23. IM were instructed under a CFA dated 30 August 2013. Liability for the accident was admitted by the Ministry of Defence on 12 February 2014 in response to a formal Letter of Claim, so the subsequent litigation was concerned only with the quantification of damages. Quantum investigations were complex, given the multifaceted disabilities and needs stemming from the Claimant's injuries. A substantial body of expert and witness evidence was obtained. It is not necessary to set out in any detail the history of the litigation, but evidently much work was done by IM between the signing of the CFA in 2013 and the settlement of the claim in March 2021.

24. Following settlement of the damages claim, the Claimant prepared and in April 2021 sent to the Defendant a bill of costs which included the costs of the Claimant's previous solicitors, Woolsey, Morris and Kennedy ("WMK"). According to a skeleton argument filed by Mr Ralph, who preceded Ms Bedford as counsel for IM (and for whose informative submissions I am also grateful) the bill totalled £1,300,448.44, which breaks down as follows:

WMK Costs, Disbursements, VAT	£15,796.28
IM fees (excluding Drawing Bill)	£774,809.00
VAT on IM's fees	£154,961.80
IM Bill Drafting Fees	£70,120.00
VAT on Bill Drafting Fees	£14,024
IM Disbursements	£149,297.05
VAT	£24,240.31
Counsels' Fees	£81,975.00

VAT	£15,225.00
Total	**£1,300,448.44**

25. Following service of that bill and subject to court approval, the parties agreed that the Defendant would pay £1,050,000 in settlement of costs. Once interest and detailed assessment costs are accounted for this, says IM, represents recovery of approximately 80% of total costs and disbursements.

26. I will make an order approving that settlement figure, which is within the usual parameters of a costs settlement between parties.

The Budget

27. Part II of CPR 3 incorporates provision for the court, at an early stage of litigation, to make a costs management order setting a budget for each party's litigation costs. The budget will show incurred and future estimated costs for the litigation, divided into standard phases. On any subsequent detailed assessment of the costs payable by either party to the other, if (as will be the case in the great majority of cases) costs are being assessed on the standard basis, the court will not depart from the budgeted estimated costs for each phase unless there is good reason to do so (CPR 3.18).

28. Under CPR 3.15A, a budget may be revised (upwards or downwards) if significant developments in the litigation warrant that. The Claimant's budget in this case was first set on 27 January 2015. It was updated in July 2018 and again on 22 June 2020, but the court did not approve the Claimant's proposed budget figures in full. I understand from Mr Ralph's skeleton that total reductions made by the court to the budgets presented by the Claimant totalled £261,860.03. That excludes the success fee and VAT, which are not incorporated in budget figures.

29. The base costs claimed by IM from the Claimant significantly exceed the budgeted figures for several phases of the litigation. IM's bill, which is in electronic spreadsheet form, calculates the total overspend at £226,947.17 but IM argues that of this figure, £22,188 represents costs that could not have been anticipated and so included as contingencies within the budget. They arise from an application for an interim payment, an application to vacate a Case Management Conference, an application for a further Costs and Case Management Conference, two applications for the trial window to be extended and an application for an anonymity order. Excluding those costs the total overspend, excluding VAT, would be £204,759.17 (£245,711 inclusive of VAT).

30. I have seen no specific evidence in support of the assertion that none of the contingencies that make up £22,188 of the total budget excess figure could have been foreseen when the budget was first prepared, but I can see that that could reasonably have been the case at least for the great majority of those costs, and it would be disproportionate to enquire further into that. I will, accordingly, accept IM's calculation of the overspend.

The Base Costs Shortfall

31. The total difference between the base costs recovered from the Defendant and included in IM's bill of costs, net of preparing and checking the bill, is calculated by IM at £221,461.69 inclusive of VAT. IM seeks however to recover from the Claimant £212,974.69. I understand that the lower figure follows agreed reductions to counsel's fees. WMK do not seek any payment from the Claimant beyond what has been recovered from the Defendant.

The Base Costs Information provided to CXJ

32. The CFA of 30 August 2013 included this information on base costs:

> "These charges are for the work we need to do to prepare and progress your case. The reason why we may not recover all of these charges is because the courts will usually only order your opponent to pay costs for the majority of the work we need to do, but not all of those costs: the courts will expect you to meet those parts of the total costs which the courts consider to be 'solicitor and own client costs'.
>
> There is usually legal work to be carried out in any claim of this nature which the courts consider it is not reasonable for your opponent to have to pay for, for example, if we need to investigate one aspect of the claim which ultimately cannot be proved. The courts may also consider that some of the costs incurred for work which we consider necessary to secure the best outcome for you are not proportionate to the amount of compensation at stake.
>
> As a broad guide and this does depend on the outcomes of all the points previously highlighted, in most cases we are usually able to recover approximately 80% of all our basic charges (plus VAT) from opponents, which leaves a shortfall of around 20%."

33. Sarah Griggs, a partner at IM who steered the Claimant's case to its successful conclusion, has given a full and detailed account of the costs information provided to CXJ, backed by documents from IM's file.

34. The approach taken by IM from the outset was to advise CXJ that the shortfall between the full legal charges CXJ agreed to pay under the CFA and the recovered costs would be deducted from any damages received from the Claimant. There was at the outset no budget so it was necessary to explain the position to CXJ in terms which would apply whatever the reason for the shortfall.

35. The CFA, in its standard terms, explained that in the event of success the Claimant could expect to recover the majority of, but not all, costs and disbursements from the Defendant and that success fees and ATE premiums are by their nature irrecoverable. As IM's file shows, the same information was given to CXJ verbally and a careful explanation given of matters such as basic charges, success fees, disbursements, ATE premiums, VAT, interest on costs and the limits imposed upon cost recovery by considerations of reasonableness and proportionality.

36. During the course of the claim Ms Griggs advised CXJ in relation to estimated costs, success fees and the anticipated deduction from damages given the difference between the full costs payable to IM under the CFA and the amount likely to be recoverable from the Defendant. Ms Bedford has helpfully summarised the information provided as to base costs in tabular form:

Date	Details
9 January 2017	Costs to be incurred for pursuing the claim to include all steps over the next six months: £220,000 + VAT. IM expect to recover 80% of these costs in the event of a win, leaving an estimated contribution of £44,000 + VAT.
6 February 2018	Costs to be incurred for pursuing the claim to include all steps over the next six months: £350,000 + VAT. The majority of these costs will be recovered from the Defendant, leaving an estimated contribution of £105,000 + VAT
24 July 2018	Costs to be incurred for pursuing the claim to include all steps over the next six months: £600,000 + VAT. The majority of these costs will be recovered from the Defendant, leaving an estimated contribution of £180,000 + VAT.
2 April 2019	Costs to be incurred for pursuing the claim to include all steps over the next six months: £600,000 + VAT. The majority of these costs will be recovered from the Defendant, leaving an estimated contribution of £180,000 + VAT.
10 June 2020	Costs to be incurred up to the point of settlement at the JSM in Sept 2020: £675,000 + VAT. The majority of these costs will be recovered from the Defendant, leaving an estimated contribution of £202,500 + VAT. CXJ was also informed that the Court had now set a budget in respect of JXC's costs. *"This relates to the potential shortfall that you may have to pay at*

	the conclusion of…" (JXC's) "*… claim as outlined in the advice given above; it is one of the factors that determines how much of your costs your opponent has to pay. For further details please refer to the Information Guide attached and if you would like further information regarding the costs budget, please let us know. "*
28 January 2021	Costs to be incurred up to the point of settlement at the JSM in February 2021: £650,000 + VAT. The majority of these costs will be recovered from the Defendant, leaving an estimated contribution of £195,000 + VAT. The Budget information given on 10 June 2020 was repeated.

37. "JSM" is a joint settlement meeting between the parties.

38. The information guide attached to the estimates provided further information in relation to base costs:

> "Basic charges… are for the work we need to do to prepare and progress your case. The reason why we may not recover all of these charges is because the courts will usually only order your opponent to pay costs for the majority of the work we need to do, but not all of those costs: the courts will expect you to meet those parts of the total costs which the courts consider to be 'solicitor and own client costs'.
>
> There is usually legal work to be carried out in any claim of this nature which the courts consider it is not reasonable for your opponent to have to pay for, for example, if we need to investigate one aspect of the claim which ultimately cannot be proved. The courts may also consider that some of the costs incurred for work which we consider necessary to secure the best outcome for you are not proportionate to the amount of compensation at stake.
>
> As a broad guide and this does depend on the outcomes of all the points previously highlighted, in most cases we are usually able to recover approximately 80% of all our basic charges (plus VAT) from opponents, which leaves a shortfall of around 20%..."

39. The information guide attached to the estimates from 2 April 2019 onwards also provided further information in relation to cost budgets:

> The Court has a duty to consider setting limits on the legal costs which are payable by one party to another and it can achieve this by approving a "costs budget" for each party after proceedings have started. The Court will work through estimates of the remaining legal costs to be incurred and then decide what appropriate limits to set on each type of activity (called a "phase"). A party cannot expect to recover more legal costs from their opponent than the amount allowed for each phase unless there is good reason to depart from the cost budget – in practice this can be very difficult to justify. …
>
> The limits set by a cost budget are one factor that can influence the amount of any shortfall, and we will take into account any consequences arising from cost budgets in our continuing cost updates to you. It is possible to apply to the Court to vary (increase) the limits set in the budget but the circumstances in which this can be done are very restricted; nonetheless it is our practice to keep budgets under review as your case progresses.
>
> Should you wish to receive more information about the cost budget at this stage we would be happy to talk you through this in more detail."

40. Notably, the last estimate of 28 January 2021 is plainly wrong. The projected costs figure to the JSM of February 2021 (at which settlement was achieved) is £124,000 short of the figure subsequently presented to the Defendant and is actually lower than IM's previous estimate to a JSM in September 2020. This casts doubt upon the accuracy of all of the estimates, but Ms Bedford makes the point that the total shortfall now claimed is marginally below that of which CXJ was advised within the last estimate, once the figures are adjusted for VAT.

41. Apart from costs that were by their nature irrecoverable, such as the success fee, Ms Griggs did not separately distinguish between sums that might be irrecoverable for different reasons, so there was no specific discussion with CXJ about costs that might be irrecoverable as a result of exceeding the budgeted figure for any given phase or whether, for example, they might be recovered because of a good reason to depart from the budget. Ms Griggs would, she says, have been happy to discuss such matters with CXJ if CXJ had wished, but she considered that the important point was that she was aware of the likely amount of the shortfall and its makeup, however it might arise.

42. As far as Ms Griggs can recall, CXJ did not raise any further queries either as to the figures overall, their make up or any specific aspect of the limitations on costs recovery following the costs advice given from time to time. Ms Griggs says that had CXJ done so, Ms Griggs would happily have answered any queries she raised to the best of her ability and, if necessary, would have sought help from the firm's specialist costs team to ensure CXJ was provided with as much information as required.

43. Ms Griggs confirms that she did not specifically ask CXJ to approve the original or the updated Costs Budgets, as she did not understand that there was any requirement to do so. Nor did she give CXJ specific advice, for example on a phase by phase basis, on any sums incurred or to be incurred in excess of the approved sum per phase in the budget, or seek specific authorisation to specific sums being incurred in excess of each phase in the budget. She says however that in her final estimate before

settlement, she advised CXJ that the likely shortfall would be in the region of 20% (£234,000 inclusive of VAT), which she suggests accounted for any overspend to the costs budget. The shortfall in respect of which approval is now sought is less than that.

44. I should add that on 19 April 2021 Ms Sharn Khaira, a Costs Lawyer employed by IM, wrote to CXJ to notify her that a bill totalling £1,300,448.44 had been sent to the Defendant and advising her that the court would be likely to order the Defendant to pay between £850,000.00 and £950,000.00 toward that bill: between 65% and 73%. The sum actually negotiated with the Defendant comfortably exceeded that.

IM's Submissions on CPR 46.9(3)(a) and (b)

45. Ms Bedford points out that it is only following cost negotiations (or an assessment, if that takes place) that the final shortfall between costs incurred in cost recovered, and the components of that shortfall, crystallise.

46. In this case, as the costs settled following negotiations, there is no court determination of the exact costs which comprise the shortfall. There is in consequence no way to establish the constituent elements of the shortfall, and their amounts, with any reasonable degree of accuracy.

47. Given that the shortfall is less than the budget overspend, it is entirely possible (and IM argue probable) that the shortfall comprises elements of both costs which would fall to be disallowed under the Court's general discretion on a standard basis assessment as well as potential overspend disallowances under CPR 3.18. An element of overspend is likely to have been recovered in the settlement sum. However, there is no way to identify it. One is simply left with an unascertained, mixed basket of unrecovered costs which in totality make up the Shortfall.

48. Ms Bedford argues that this entirely accords with the pragmatic way in which IM have approached advising the client as to the potential shortfall and obtaining the client's consent to the shortfall.

49. It is understandable that the court would wish to focus upon the issue of budget overspend given its importance in cost assessments between opposing parties, but the overspend is an unascertainable amount within a basket of non-recovered costs which in totality comprise the shortfall.

50. To enable the Court to apply CPR 46.9(3) the court needs to know the amount in respect of which the Court is invited to make a determination. The exercise of that function is incompatible with unascertained amounts.

51. The shortfall is, in contrast, ascertained, defined and demonstrable. It is a sum, submits Ms Bedford, in respect of which there is informed consent so as to support the presumption of reasonableness in CPR 46.9(3)(a) and (b).

52. CXJ was commended by Leading Counsel in his settlement advice for her determination to understand the evidence and the litigation process and for fighting tirelessly on the Claimant's behalf to seek the best possible financial outcome for him. The excellent outcome, he observed, was in no small part due to her efforts and also

to those of her lawyers at IM. Those comments, submits Ms Bedford, reflect CXJ's level of sophistication and understanding, albeit without legal qualification.

53. In support of the proposition that the presumptions at CPR 46.9(3)(a) and (b) applies, Ms Bedford refers to a number of authorities. Two of them, when I heard Ms Bedford's submissions, were pending appeal, but I agree with her observation that the principles referred to are nonetheless helpful for present purposes, and the outcome of the appeals (determined after I heard her submissions) does not undermine the points that she was making.

54. In *MacDougall v Boote Edgar Esterkine* [2001] 1 Costs LR 118 Holland J considered whether there had been informed consent to the hourly rates charged by a solicitor. At paragraph 8 he said:

> "… To rely on the Applicant's approval the solicitor must satisfy me that it was secured following a 'full and fair explanation of the factors relevant to it so that the Applicants, lay persons as they are, can reasonably be bound by it."

55. One of the criticisms levelled at the solicitors in *MacDougall* (at paragraph 10 (e), page 126J of Holland J's judgment) was their failure to provide a "ball park" figure for the work already done, which would have allowed the clients to understand that in agreeing to those rates, they were taking on a very substantial retrospective financial liability.

56. The decision of Mr Justice Lavender in *Belsner v CAM Legal Services* [2020] EWHC 2755(QB) has been reversed on appeal, but as Ms Bedford originally submitted, his judgment remains helpful for present purposes not least due to its review of the law on informed consent.

57. *Belsner v Cam* concerned the assessment of the costs charged by solicitors in a personal injury claim governed by a fixed costs regime. One of the questions considered by Lavender J was whether the client had given her informed consent to an agreement that committed her to paying much more in fees than she could recover from her opponent under that regime.

58. At paragraph 34 of his judgment, Lavender J referred to paragraph 7-015 of *Snell on Equity* in respect of the practicalities of obtaining informed consent:

> ... "To provide the fiduciary with an effective defence to a claim for breach of fiduciary duty, the principal's consent to relaxation of the fiduciary's liability must be fully informed. The burden of establishing informed consent for conduct which would otherwise constitute a breach of fiduciary duty lies on the fiduciary. In order to show that the consent was fully informed there must be clear evidence that it was given after the fiduciary made "full and frank disclosure of all material facts". "The key is disclosure - 'sunlight bleaches'". The principal's consent will be "watched with infinite and the most guarded jealousy" by the court.

> The materiality of information to be disclosed is determined not by whether it would have been decisive (although, if it would have been decisive, then it clearly was material), but rather by whether it may have affected the principal's consent. Thus, it is no defence to a claim for breach of fiduciary duty for the fiduciary to argue that the principal would have acted in the same way even if the information had been disclosed. Further, consistent with equity's focus on substance rather than form, disclosure is treated in a functional, rather than a formalistic, way, so that the sufficiency of disclosure depends on the sophistication and intelligence of the person to whom disclosure is required to be made."

59. From paragraph 35 onward, Lavender J considered a number of authorities which considered whether the fiduciary must disclose not merely the fact that he is to receive a commission, but its amount. Ms Bedford submits that a theme that can be drawn from those authorities is that whether the amount needs to be disclosed or not is largely dependent upon the context and sophistication of the client. The greater the degree of sophistication, the greater their likely experience which thus pulls against the disclosure of the amount. Where lay individuals are involved, the amount ought to be disclosed.

60. Notably, Lavender J concluded at paragraph 86 of his judgment that it would not be unduly onerous to require the solicitors to inform their client of the limit on costs recoverable from the defendant. Ms Bedford draws my attention to the way (at paragraph 86 of his judgment) he explained that conclusion:

> "It would not involve explaining all of the detail and complexity of the provisions of the Civil Procedure Rules and the Protocol which I have set out. Nor would it have required identifying every possible outcome of the Claimant's claim. Rather, it involved taking the outcome which the Defendant had itself assumed for the purposes of its estimate of costs and stating what the recoverable costs might be in that case."

61. In *Herbert v HH Law Ltd* [2019] 1 WLR 4253 the Court of Appeal, applying the "full and fair explanation" principle, found that because a solicitor did not explain to a client that the solicitor invariably charge a success fee of 100%, regardless of litigation risk, the client had not given informed approval to a success fee that did not reflect the litigation risk. The court did not however accept that there was anything inaccurate or misleading in such information as she was given. Ms Bedford refers to paragraph 48 of the judgment of Sir Terence Etherton MR:

> "It is important to bear in mind that the complaint of Ms. Herbert on this issue is… that she did not give her informed consent to the charging of the success fee and its amount. There is no merit in that complaint (subject to the risk point addressed below) because all the information relating to its imposition and calculation and to her exposure to HHs fees generally, in the circumstances which occurred, was clearly set out in the documentation with which she was provided before agreeing HH's retainer. The retainer letter said that any contribution by her towards HH's costs under the CFA would be limited to 25% or less of her recovered damages… Subject to the point on litigation risk and the success fee, the totality of that information

> provided a clear and comprehensive account of her exposure to the success fee and HH's fees generally."

62. Ms Bedford submits that one can derive from these authorities the following principles. A key ingredient of informed consent in the case of this kind is that the litigation friend is informed of the likely amount of deductions from damages. That amount can properly be understood by reference to a percentage, and that information ought to be set out within the initial client care documents.

63. At the outset it is simply not possible, particularly in personal injury claims with a value exceeding £10,000,000 which in consequence fall outside the compulsory costs budgeting regime, to know whether a cost management order will be made; what level the budget will be set at; whether there will be any overspend; what amount such an overspend will extend to; or whether there will be any element of recovery of that overspend from the opponent.

64. The concept of informed consent engages with overarching categories of costs such as hourly rates, success fees and shortfall amounts. The information that is adequate, for the purposes of informed approval, does not need to descend into granular detail as to the intricacies of the CPR. It is sufficient to identify the potential shortfall by reference to a percentage limit, as was done here, not only initially but in all subsequent estimates provided to the client.

65. Solicitors are not under a burden to set out every possible outcome of any potential cost recovery or disallowance, as the case may be. To require the solicitors to descend to explain the intricacies of budgeting as a facet of cost recovery in amongst general disallowances on assessment, all against an uncertain factual background, would not assist a client or meet any proper test of informed consent.

66. That would place too high a burden on the solicitor, would go beyond that which is required by the relevant authorities, and would not meet the requirement of being able to inform the client of the likely amount of a shortfall. Absent that key ingredient, informed consent would not be possible in respect of budget overspend until the conclusion of the cost claim, which is entirely unsatisfactory, not least from a client perspective.

67. In contrast, explaining to the client that cost recovery is expected at 70-80% leaving the Shortall element limited to 20-30%, is to give information of which the solicitor can be sure and to provide the litigation friend with the critical information needed to make an informed decision at the relevant time.

IM's Submissions on CPR 46.9(3)(c)

68. In *ST v ZY* [2022] EWHC (Costs) the Senior Costs Judge addressed a similar claim by IM for base costs payable from a protected party's damages. He found that costs incurred by IM in excess of budget were, in the circumstances of that case, irrecoverable by IM.

69. As in this case, ST's litigation friend was, from time to time, given costs estimates along with a projected shortfall, the last one of which was very close to the figure which IM sought to recover from the client's damages. The Senior Costs Judge's

conclusion was however that the costs incurred in excess of budget were so far in excess that they must be unusual in amount.

70. It followed that, to avoid the presumption applied by CPR r.46.9(3)(c) that those costs had been unreasonably incurred, it was incumbent upon IM to tell the litigation friend before they were incurred that as a result of their being unusual in amount, they might not be recovered from the paying party. No such advice had been given: telling the client that some costs might not be recovered from the paying party was not sufficient. As a result, the costs incurred in excess of budget were presumed to have been unreasonably incurred and could not be recovered by IM from the client's damages.

71. At paragraph 47 of his judgment the Senior Costs Judge rejected a submission to the effect that "unusual" should be read as being between solicitor and client:

> "… that seems to me to ignore the purpose of the rule. To avoid the presumption the solicitor is required to explain to the client that the costs may not be recovered because they were unusual. "Unusual" must therefore be read in the context of a between the parties assessment."

72. At paragraphs 55 and 56 of his judgment he added:

> "55. I should add that I think it very surprising that a solicitor would not tell their client that the budget had been exceeded and that the costs in excess of the budget would not be recoverable. At that point the client is moving from pursuing a claim in which reasonable and proportionate costs will be recoverable to a claim where no further costs will be recoverable in respect of some or all of the phases.
>
> 56. Instead IM appear to have been happy simply to ignore the budget and incur costs which they would or should have known would not be recovered from the Defendant."

73. Costs Judge Brown, in *EVX v Smith* [2022] EWHC 1607 (SCCO), another IM case, agreed with the Senior Costs Judge as to the meaning of "unusual" and applied the same principles in relation to the hourly rates claimed as against the client (a child, and accordingly subject to the same provisions of CPR 21 and CPR 46 as a protected party) under IM's contract of retainer.

74. The judgment of Lavender J in *SGI Legal v LLP v Karatysz* [2021] EWHC 1608 (QB) has, like *Belsner v Cam,* gone to appeal but Ms Bedford draws my attention to some observations he made regarding costs unusually incurred and are unusual in amount (and upon which, given that it was not a feature of the appeal, the Court of Appeal did not comment). At paragraphs 102 and 103 of his judgment he said:

> "Although it is not necessary for the determination of this appeal, I should state that I do not accept the Claimant's submission that any costs in excess of the fixed costs allowed inter partes were unusual for the purposes of CPR 46.9(3)(c)(i) on an assessment of costs between solicitor and client on the indemnity basis. It is not necessary for me to decide this point, because the district judge did not base his decision on it, but it may be worth stating that

> in my judgment the question of what is usual or unusual as between solicitor and client is a very different question from the question of what is recoverable inter partes.
>
> The question whether a solicitor's costs should be limited to those recoverable inter partes is dealt with by subsection 74(3) of the Solicitors Act 1974 and CPR 46.9(2). Assuming that a solicitor's costs are not so limited by virtue of those provisions, it is not the purpose of CPR 46.9(3)(c) to reintroduce the same limit by a different route."

75. Ms Bedford submits that the conclusions of the Senior Costs Judge in *ST v ZY* are inconsistent with this authority, which does not seem to have been drawn to his attention.

76. Ms Bedford submits that the budget overspend, on a solicitor/client basis is neither unusual in nature nor unusual in amount so as to trigger the presumption in CPR 46.9(3)(c).

77. The budget is concerned with standard basis costs subject to an overriding requirement of proportionality. That is entirely different from the indemnity basis assessment to be undertaken as between solicitor and client under CPR 46.9.

78. The existence of an overspend alone is accordingly an overly restrictive measure of whether the overspend costs are unusual in amount. It necessarily imports proportionality into an assessment on the indemnity basis, and is accordingly impermissible.

79. Further, if "unusual" were to be measured by reference to an assessment between opposing parties, then a client would not enjoy the protection of CPR 46.9(3)(c) in relation to costs which are wholly in the realm of solicitor client work, for example where solicitor wishes to charge for extraordinary amount of time discussing funding, which an established authority is not recoverable against an opposing party.

80. Ms Bedford suggests that on the Senior Costs Judge's analysis, such costs would fall outside the "unusual" test in CPR 46.9(3)(c) and so restrict the protection awarded to a client. The wider interpretation of CPR 46.9(3)(c) as adopted by Lavender J in *SGI Legal v LLP v Karatysz* is therefore the correct approach. That approach would lead to the conclusion that costs are not "unusual in amount" solely by reference to an unknown element of overspend being included in the shortfall between costs payable to the solicitors and cost recoverable from an opponent.

81. A shortfall of 20% of the overall costs claimed, in fact, falls towards the lower end of client contributions toward costs, which are usually between 20-30%. A shortfall at that level cannot properly be said to be "unusual in amount".

82. That aside, Ms Bedford submits that the authorities referred to in relation to informed consent make it clear that the duty on the Solicitor is to set out the position in a practical and pragmatic way, so as to facilitate a clear understanding. To avoid the presumption of unreasonableness imposed by CPR 46.9(3)(c) a client simply needs to be told that as a result of being unusual in nature or amount the costs might not be recoverable from the other side. That information needs to be delivered in a practical

and pragmatic way which does not require the intricacies of the CPR to be set out to the client.

83. As Lavender J put it at paragraph 108 of his judgment in *SGI Legal v LLP v Karatysz*:

> "Mr Marven submitted that informed consent is irrelevant to CPR 46.9(c)(ii). In my judgment, that is right. The issue under CPR 46.9(c)(ii) is whether or not the solicitor told his client what is there set out. That issue concerns what the solicitor said, not whether the client agreed with or approved what the solicitor told him. That issue is materially different from the issue under CPR 46.9(2) or 46.9(3)(a) & (b), which is whether the client agreed or approved something proposed by the solicitor. The focus there is on what the client did, which is why it is relevant to consider whether the client gave informed consent to what was proposed."

84. Ms Bedford submits that IM have satisfied the test at CPR 46.9(3)(c). The advice given to the Litigation Friend from 10 June 2020 onwards clearly sets out that any overspend in budget will prove difficult to recover from the Defendant and that any non-recovered overspend will be incorporated into the Shortfall.

Conclusions on the Adequacy of the Costs Information Provided by IM

85. I would start with the observation that IM's characterisation of their shortfall estimates as incorporating or providing for an element of costs incurred in excess of budget, seems to me to be a construction imposed upon those estimates after the event.

86. It is evident from the wording of the costs and shortfall advice provided to CXJ from time to time that it was provided according to a set formula. In the first estimate the shortfall was put at 20% of reported accrued costs. In every subsequent assessment it was put at 30%. That is standard advice for non-budgeted cases, in which a shortfall of between 20% and 30% may be expected on a standard basis assessment.

87. The final estimate given before settlement (10 June 2020) did not, as Ms Griggs says, anticipate an ultimate shortfall of 20%: it anticipated a shortfall of 30% of an understated figure for accrued costs. This estimate seems to me in itself to demonstrate that IM gave no thought to budget overspend when estimating costs and shortfalls. It projects a shortfall, net of VAT, of £202,500 notwithstanding a budget overspend, net of VAT of £204,759.17, most of which must have been incurred by that point.

88. It follows that the estimate could only be said to incorporate an allowance for budget overspend if it is assumed that costs would otherwise be recovered at 100%, which is (a) unsustainable and (b) clearly not intended.

89. I do not mean to suggest that Ms Griggs' statement is in any way intended to misrepresent the position. I am sure that it is not, but the similarity between the shortfall projected by IM on 10 June 2020 and the shortfall which IM now wants the Claimant to pay seems in reality largely to be coincidental. It cannot retrospectively justify the provision to CXJ of inadequate information on costs and I am quite

satisfied that the cost information provided to CXJ from time to time was inadequate, for these reasons.

90. The authorities referred to by Ms Bedford do not, in my view, support the proposition that a solicitor is obliged only to provide a client with general information about a likely shortfall in costs which might fail the standard basis tests of reasonableness and proportionality, without explaining anything about, for example, a substantial budget overspend and its likely consequences.

91. I am also quite unable to accept the proposition (if that is intended) that costs in excess of budget cannot be addressed until the litigation has concluded. A costs budget sets a figure for recoverable costs. Costs incurred in excess of budget are likely to come straight out of the client's pocket, with no prospect of recovery. It follows of necessity that it is incumbent upon a solicitor to monitor accruing budgeted costs (as IM said they would) and before budgeted figures are exceeded, to advise the client of the implications of doing so and of such options as applying for budget revision or avoiding the overspend.

92. None of that happened here. No attempt seems to have been made at any point to obtain CXJ's authority for, or even keep her advised of, anything to do with the budget set for this case. She was given no opportunity to authorise the three budgets IM submitted to the court for approval, or to authorise (or decline to authorise) any element of spending outside the limits set by those budgets.

93. Such information as was provided on budgets and their effect was standard information, provided years after the event and never applied to the facts of the case. Notably CXJ was told on 10 June 2020 that the court had "now" set a budget, whereas in fact a budget had been set almost 5 ½ years earlier and was shortly to be revised for the second time. This appears to have been simply an update to the standard wording in IM's costs estimates, but in the circumstances the very limited information on budgeting which CXJ was given on 10 June 2020 was misleading.

94. In summary, CXJ was never advised of the limits imposed by the court in its costs management orders upon recoverable expenditure in this case; or of the fact that the budget approved by the court was significantly lower than that proposed by IM; or of the likelihood that the budget overspend of £245,711 inclusive of VAT, would be irrecoverable from the Defendant in any event; or of fact that the overspend was likely to add substantially to (as Ms Bedford correctly describes it) the standard anticipated shortfall of between 20% and 30%.

Conclusions on the Appropriate Application of CPR 46.9

95. Turning the appropriate application of CPR 46.9, my first observation would be that I have to decide, by reference to the criteria in that rule, whether the costs charged by IM to the Claimant were reasonably incurred and are reasonable in amount.

96. As I have said, where costs have been settled between parties at a satisfactory level the court's focus on a solicitor/client assessment under CPR 46.4(2) is upon any excess claimed by the solicitor over the costs recovered from the opponent. In fact, because the general requirement for a solicitor/client assessment at CPR 46.4(2) is displaced where the solicitor waives any claim to costs beyond those recovered from

the opponent, I take the view that the court's duty extends only to ensuring that anything claimed in excess of what is recovered from the opponent has been reasonably incurred and is reasonable in amount. Costs recovered from an opponent under such a settlement should, accordingly, be taken to have been reasonably incurred and to be reasonable in amount.

97. It is important however to bear in mind that the solicitor/client assessment under CPR 46.4(2) is not an assessment only of the shortfall between the total costs sought by the solicitor from the client and the sum recovered from the opponent. The costs recovered from the opponent belong to the protected party, so all of the costs claimed from the paying party by their legal representatives will be "costs payable by, or out of money belonging to" the protected party and will fall to be assessed under CPR46.4(2)(a). All such costs are subject to the tests of having been reasonably incurred and reasonable in amount, and any component of those costs, whether it be success fees, hourly rates or budget overspend, may be disallowed if it fails those tests.

98. For that reason, whether IM ultimately achieved a cost recovery that broadly equated with its projected shortfalls does not seem to me to have any real bearing upon the question of whether any particular part of their costs was unreasonably incurred or unreasonable in amount. That applies to the budget overspend as it does to any other part of their costs.

99. Ms Bedford's ingenious submissions concerning the impossibility of identifying the component elements of the cost recovered, and proposing that unidentifiable elements of budget overspend must be taken to be included within the costs figure ultimately recovered, seem to me to be too abstract and hypothetical to be of any real assistance.

100. The appropriate approach to the overspend seems to me to be rather simpler than Ms Bedford's submissions suggest.

101. For the reasons I have given, I have concluded that whilst the court's duty is limited to ascertaining that the costs shortfall claimed by IM from the Claimant has been reasonably incurred and is reasonable in amount, in doing so the court must consider the totality of the costs claimed by IM from the Claimant. To the extent that the budget overspend was neither reasonably incurred nor reasonable in amount, it must be deducted from the base costs shortfall recoverable by IM from the Claimant. The budget overspend (£245,711 including VAT) exceeds the base costs shortfall which IM seeks to deduct from the Claimant's damages (£212,974.69 including VAT). It follows that if the entire overspend was either unreasonably incurred or unreasonable in amount, IM cannot recover from the Claimant any part of the base costs shortfall.

102. This takes me to the presumptions at CPR 46.9(3)(a) and (b). It seems to me that the authorities referred to by Ms Bedford are of no assistance to IM: quite the contrary. I cannot see how a client who was told nothing whatsoever about the limits on recoverable costs imposed by two costs management orders could properly be said, either expressly or impliedly, to have given informed consent to expenditure in excess of the budgeted figures.

103. Given that IM is not in a position to rely upon the presumptions at CPR 46.9(3)(a) and (b) my conclusion is that the budget overspend was unreasonably incurred and

unreasonable in amount, precisely because IM, having themselves given no thought to the effect of the costs management orders, gave CXJ no opportunity to consider whether it was appropriate to incur expenditure in excess of budget that was in consequence likely to be irrecoverable.

104. As for CPR 46.9(3)(c), for the reasons I have given, my view is that the budget overspend should be regarded as unreasonably incurred before one considers the presumption created by CPR 46.9(3)(c).

105. I would however respectfully agree with the conclusions of the Senior Costs Judge in *ST v ZY* as to the nature of the CPR 46.9(3)(c) criteria and the way in which they are to be applied when it comes to expenditure over budget.

106. The observations of Lavender J at paragraphs 102 and 103 of his judgment in *SGI Legal v LLP v Karatysz* were, expressly, obiter. In any event, they are not in my view in any way inconsistent with the conclusions reached by the Senior Costs Judge. Lavender J was I believe making the point that it could not be right to characterise a solicitor's costs as "unusual" to the extent that they exceed the recoverable costs under the fixed costs regime applicable to claims under the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents. That is a view with which I would respectfully agree.

107. Lavender J's underlying point was, I believe, that costs are not unusual in themselves simply because they are irrecoverable from an opponent. It remains the case that whether costs are "unusual" in nature or amount for the purposes of CPR 46.9(3)(c) has to be judged by reference to whether they may, in consequence, be irrecoverable from an opponent. So much seems to me to be evident from the combined wording of the rule itself and paragraph 6.1 of the accompanying Practice Direction.

108. Ms Bedford is entirely correct to point out that on this interpretation of CPR 46.9(3)(c), the presumption that costs of an unusual nature or amount have been unreasonably incurred cannot arise if those costs are already, by their nature, irrecoverable against an opponent. Such costs cannot be said to be irrecoverable "as a result" of their unusual character, because they are already irrecoverable. That follows, unavoidably, from the way in which CPR 46.9(3)(c) and the Practice Direction are worded, but it does not in itself have any bearing on the correct interpretation of the rule.

109. In *ST v ZY* the Senior Costs Judge found that the costs incurred by IM in excess of budget were unusual in amount, in particular because of the remarkable extent by which costs for three specific budget phases had been exceeded. Although the excess costs, on a phase by phase basis, are not in this case so wildly in excess of budget as in *ST v ZY*, at almost a quarter of a million pounds inclusive of VAT the total figure speaks for itself. As in *ST v* ZY, the correct conclusion is that whilst the overall budget overspend was not unusual in nature, it was unusual in amount. The presumption of unreasonableness does apply, and I have seen nothing to rebut it.

110. For all those reasons, I conclude that the budget overspend was in its entirety, as between IM and the Claimant, unreasonably incurred and unreasonable in amount.

111. I appreciate that IM has, notwithstanding the budget overspend, achieved on the Claimant's behalf a satisfactory recovery of costs from the Defendant, but that cannot offer a pretext for recovering from the Claimant additional costs that have been unreasonably incurred or are unreasonable in amount. The budget overspend must be deducted from the base costs shortfall which IM seeks to recover from the Claimant. It exceeds the shortfall, and in consequence IM may not recover the entire base costs shortfall from the Claimant.

The Success Fee

112. The CFA of 30 August 2013 provides, in standard fashion, that IM will be paid their "basic charges" and a success fee, calculated as a percentage of those basic charges, in the event of a "win". Otherwise, IM will go unpaid.

113. "Win" is defined in this way:

> "In the context of your claim this means you become finally entitled (whether by judgment, court order, award, agreement or otherwise) to be paid damages by your opponent…
>
> the words "finally entitled" means that your opponent against whom you are successful is not allowed to appeal, has not appealed in time, or has lost an appeal."

114. The CFA also contains the following provisions in respect of formal settlement offers by the Defendant under CPR 36:

> "If you reject the Part 36 offer in accordance with our advice, continue to pursue your claim and your claim is finally decided in your favour (whether by judgment, court order, award, agreement or otherwise), but the amount of damages awarded to you is less than the Part 36 offer (or is determined by the court to be less advantageous to you than the Part 36 offer) and your opponent is not ordered to pay your legal costs from the date of expiry of the relevant period. If this happens then, although you will have won your claim under the terms of this agreement the consequences in relation to legal costs will be as follows:
>
> (1) You will be liable to pay our full legal charges for the work done before the expiry of the relevant period. You should be entitled to recover the majority of our basic charges, the disbursements and VAT from your opponent for that period.
>
> (2) We will not charge you any basic charges or success fee after the expiry of the relevant period…"

115. The CFA sets a two-stage success fee. It is set at 67% in the event of a win more than 3 months before the date fixed for the commencement of a trial, and at 100% for a win after that point.

116. As I have mentioned, CPR 46.9(4) provides that when assessing the success fee, I must have regard to all the relevant factors as they reasonably appeared to the solicitor or counsel when the conditional fee agreement was entered into or varied.

117. The level of success fee in a solicitor's CFA should reflect the risk to the solicitor of going wholly or partly unpaid (*C v W* [2008] EWCA Civ 1459). Ms Griggs has given evidence on the risk assessment underlying IM's calculation of the success fee.

118. Ms Griggs first met CXJ (and his family) on 5 August 2013. CXJ had approached IM's Court of Protection team in respect of a statutory will. Ms Griggs was invited to that meeting to advise if necessary in relation to any personal injury claim. During the meeting, Ms Griggs learned that CXJ, on behalf of the Claimant, had already instructed WMK. CXJ said that there had been some communication between WMK and the Ministry of Defence but there had been no admission of liability. She was not hopeful about the case. (Ms Griggs did not see any record of the work undertaken by WMK until after the CFA had been signed).

119. The family provided Ms Griggs with a letter from the Ministry of Defence (no longer, I understand, available) confirming that he would receive an Armed Forces Compensation Scheme ("AFCS") award. The letter stated that the Claimant's injury had been accepted as caused by his service. CXJ told Ms Griggs that someone at the Ministry of Defence had suggested that if a claim were pursued, there would be a finding of 20% contributory negligence. The family understood however that this person had no legal background.

120. AFCS awards, says Ms Griggs, are only made in cases where there is an accident in the course of active service. There is no need to prove fault to secure such a payment, and receipt of such a payment does not imply that an admission of liability will be forthcoming.

121. Ms Griggs was also told that the Health and Safety Executive had investigated the Claimant's accident and produced a detailed accident report. Ms Griggs was provided with a copy of the report, but she says that it was not considered in detail until 19 September 2013, by a trainee solicitor under her supervision, when preparing the Letter of Claim.

122. I have been unable to find a copy of the Health and Safety Executive report in the papers supplied by IM for the purposes of this judgment, but I have seen an attendance note for 7 August 2013 in which Ms Griggs reviewed a Royal Navy Board of Enquiry report. The report confirmed that it had been decided, in view of the Claimant's accident, to install safety netting and to request a study into the height and reach of personnel using the course (the Claimant having possibly been at a disadvantage because of his height). It indicated that the Claimant had been using an incorrect technique when the accident happened.

123. Ms Griggs says that while none of the available information included a formal admission, it did indicate a strong claim on liability. This observation is consistent with the notes Ms Griggs made at the time.

124. Ms Griggs took the view that the Claimant had sustained his injuries because a safety net had not been installed on the assault course, and that had the assault course been

properly risk-assessed then such an injury would have been foreseeable. The Claimant's accident was in her view an avoidable accident. Ms Griggs did however anticipate arguments in relation to contributory negligence on the basis that the Claimant should have been more careful, as an experienced cadet, and in the light of what she had been advised in her meeting with the family on 5 August.

125. The risk assessment form completed by Ms Griggs required her to categorise specified risks as high, medium or low. She categorised the risks relating to liability as low.

126. Bearing in mind that the Claimant, due to his injuries, could not himself provide witness evidence to meet any allegation of contributory negligence, Ms Griggs categorised contributory negligence and causation as medium risk. Ms Griggs says that with hindsight, she now considers her views on liability perhaps to have been optimistic, as no formal admission had been made at the time and significant risks could have emerged once the Letter of Claim was served.

127. Ms Griggs also give consideration to quantum risk. At the time the CFA was signed, the Claimant was an in-patient in a rehabilitation centre. She did not herself attend the rehabilitation centre until 12 September 2013, after the CFA had been signed. What she knew of the Claimant's condition was what she had been told by CXJ, and she applied to that information her own experience of catastrophic injury cases.

128. The Claimant was at the mid-stage of rehabilitation at the time that Ms Griggs was instructed. Ms Griggs was informed that he was making gradual gains but that he was still significantly impaired. His likely progress or deterioration was unknown.

129. Ms Griggs advises that in her experience, there are significant risks in catastrophic injury cases where rehabilitation is not at an advanced stage, as the injured person's condition has not stabilised. It was, when the CFA was signed, not known whether the claimant would make a significant recovery or deteriorate further after additional treatment.

130. Due to the nature and severity of the Claimant's injuries and his age at the time of the accident, Ms Griggs identified his claim as having a significantly high value and considered that quantum would be a significant issue with the Defendant. In her experience, says Ms Griggs, significantly high value claims tend to be defended in relation to quantum and to give rise to significant differences in relation to valuation between the parties in respect of the different heads of loss advanced on behalf of a claimant.

131. Ms Griggs identified a high risk in relation to the availability of witness evidence, bearing in mind in particular the likely substantial claim which would be advanced for future loss of earnings and what the Claimant would have gone on to achieve but for the accident.

132. Ms Griggs considered that there was a high risk in relation to expert evidence for the same reasons. Quantum success would very much turn on the strength of the Claimant's experts and evidence of losses. She had not as yet obtained any expert evidence or disclosure evidence in relation to losses and was mindful that a number of experts would be needed to deal with all areas of quantum. Similarly she perceived a

high risk if an early Part 36 offer was made, particularly if a monetary offer was made before quantum was investigated.

133. Risks in relation to quantum, expert evidence, lay witness evidence and Part 36 offers were all, accordingly, categorised as high.

134. Her CFA risk assessment, says Ms Griggs, was borne out by subsequent events. As is typically the case with complex catastrophic brain injury claims, the Claimant suffered fluctuations with his health. As a result, one trial date was vacated with the consent of the Defendant.

135. There were, in addition, trials of different care homes. During the course of the Claimant's claim five different case managers were appointed. When the Claimant's health stabilised, and it was deemed in his best interests to trial independent living, a full multi-disciplinary team was recruited by the case manager including support workers, a team leader, a neuropsychologist, and occupational therapist, two speech and language therapists, two physiotherapists (one land based and one aquatic) and a Music therapist, a neurology expert to assess the severity of the brain injury, a care expert to assess care needs and an accommodation and assistive technology expert. The Defendant obtained its own experts in the same disciplines. The Claimant's case was that he needed 24/7 care.

136. Ms Griggs completed the risk assessment on 8 August 2013. Once she had completed the risk assessment, she concluded that there was a 40% risk, which according to the standard "ready reckoner" for calculating success fees justifies a success fee was of 67%.

The Success Fee: Authorities and Submissions

137. Ms Bedford points out that the Conditional Fee Agreements Order 2013 limits the success fee payable to IM by the Claimant to a maximum of 25% of the damages awarded for pain, suffering and loss of amenity and past pecuniary loss. IM has voluntarily excluded general damages from the 25% calculation. It has instead calculated the success fee at 25% of the figure for past losses incorporated in the advice given by leading counsel for the damages approval hearing. That produces a success fee of £431,748, which according to IM amounts to 46.7% of base costs.

138. When considering the success fee in this case I considered, and discussed with Ms Bedford, *C v W* [2008] EWCA Civ 1459 and *NJL v PTE* [2018] EWHC 3570 (QB).

139. Both those cases concerned CFAs entered into after a defendant had admitted liability. In *C v W* the claimant had suffered a serious brain injury when a car being driven by her brother crashed after he lost control of the vehicle. As in this case, the claimant's solicitors had accepted the risk of going entirely unpaid following a Part 36 offer which they advised against accepting at which was not subsequently beaten. The only material difference was that they would go unpaid for the period following notification of the offer rather than, as in this case, from the expiry of the period set for acceptance.

140. The court accepted that it was not in itself inappropriate to enter into a CFA with a claimant after liability had been admitted by the relevant defendant. The question

addressed by the court was the proper formulation of a success fee in such circumstances.

141. Moore-Bick LJ found that the risk of losing entirely justified success fee of no more than 5%. He did not think it right to add a further success fee to reflect the fact that the claim was likely to be substantial, observing at paragraph 15 of his judgment that

> "… the size of Mrs C's claim was likely to make a little, if any, difference to the chance of her recovering a substantial award of damages."

142. At paragraphs 23 and 24 of his judgment he said:

143. "23. As I have already said, the real difficulty in a case of this kind lies in assessing the risk of the solicitors' failing to recover part of their fees as a result of the client's failure to beat a Part 36 offer at trial and in translating that into a risk of failure in the action so that the resulting success fee can properly be applied to their profit costs of the whole proceedings. That involves the analysis and assessment of a number of different risks which interact with each other and I doubt very much whether any solicitors are well placed to undertake it. The best they can hope to do, in my view, is to make a broad assessment based on their own experience. Provided the resulting success fee falls within a reasonable bracket, however, I should not expect the costs judge to reject it.

24. The judge took as his starting point the uplift of 20% which Taylor Vinters had used in their explanatory document to allow for the issue of contributory negligence. As he pointed out, that was not in fact an assessment of risk; as the ready-reckoner table shows, a success fee of 20% reflects a 17% risk of losing altogether. For the reasons I have given, I am not satisfied that that is a fair reflection of the risk Taylor Vinters had assumed. There is no doubt that they had assumed a risk of some kind, but in the circumstances I am not persuaded that it was equivalent to more than a 15% risk of failure overall. I would not myself add much for the general risks of litigation since they must be taken to have been subsumed in the basic assessment, but in any event to increase the risk by a factor of 10% would add little. Again, I would not add anything significant for the size of the claim, nor, for the reasons I have already given, would I make any allowance for the risk that Mrs. C might decide not to pursue the claim. However, taking all these factors into account I should be prepared to accept that a reasonable assessment of the risk in overall terms would be 17%. That would lead to a success fee of 20% which I think is fair in the circumstances of this case. I would therefore allow the appeal and substitute for the judge's order an order that the success fee in this case be assessed at 20%."

144. Notably, at paragraph 25 of his judgment Moore-Bick LJ suggested that a CFA could meet the Part 36 risk through a provision conferring upon solicitors the right to review the success fee once an offer had been made.

145. *NJL v PTE* also focused on Part 36 risk. In addition to *C v W*, Martin Spencer J reviewed *Gandy v King* [2010] EWHC 90177 (Costs), *Fortune v Roe* [2012] 2 costs LR 288 and *Thornley v Ministry of Defence* [2011] 3 costs LR 335.

146. Notably, the last two of those cases concerned IM CFAs. In *Fortune* the claimant suffered serious injuries in a road traffic accident. Negligence had been admitted and there were no allegations of contributory negligence but causation in relation to head injury was denied. Complex arguments arising as to the injuries and their causation were not just anticipated, but, it seems, already identified, along with potential problems with loss of earnings and care management.

147. Sir Robert Nelson, hearing an appeal from Costs Judge Campbell, observed that complex quantum issues but these are common in serious multiple injury cases. At paragraph 49 of his judgment he said:

> "49. It was indeed probable that a Part 36 offer would be served when the CFA was signed. It was also probable, given the size and complexity of this claim, that such an offer would probably be made late in the proceedings. By that time a substantial part of the claimant's solicitor's charges would have been incurred, and this is not altered by the fact that the last few weeks before trial are always particularly expensive. Where a Part 36 offer is likely to be made as here, within the last two or three months before trial, the costs likely to be incurred before that date would have been secure and recoverable by the claimant's solicitors. Even after the Part 36 offer is served, the risk should not be described as substantial. As Lord Justice Moore-Bick said in the case of *C v W* (para. 130): 'One would not expect highly experienced solicitors practising in this field to differ very widely in their assessment of the bracket in which an award would be likely to fall, provided they had access to the same information…"

148. Sir Robert Nelson found that an appropriate success fee was 20%.

149. In *Thornley*, liability had been admitted and there was no contributory negligence issue. The claimant was just under 7 years old when the CFA was signed, and there was a wide range of opinion as to the extent of the injury and the disability the claimant would face as he grew up. It would not be possible to settle the case until the claimant was aged 10 or 11 because of the uncertain prognosis before then. There was, accordingly, no realistic possibility of an effective Part 36 offer before then.

150. HHJ Behrens found that an appropriate success fee, under those circumstances, was 15%.

151. Having reviewed those cases, Martin Spencer J, at paragraphs 32 to 36 of his judgment in *NJL v PTE*, gave the following guidance on calculating a success fee by reference to part 36 risk:

> "32… There are, it seems to me, essentially two fundamental risks to be brought into the equation: the risk arising from the timing of a Part 36 offer and the risk of rejecting that offer and failing to better it at trial.

33. First, so far as the risk arising from the timing of a Part 36 offer is concerned: given that it is only the costs incurred from 21 days after the making of a Part 36 offer that are at risk, the costs incurred up to 21 days after the making of a Part 36 offer are secure and will be recovered in so far as they were reasonably incurred. The risk in respect of those costs is 0%. The reason why this is relevant is that although it is only the costs after the Part 36 offer is made which are at risk, the success fee attaches to all the costs including those not at risk because they were incurred prior to the making of the Part 36 offer. Thus, supposing a solicitor estimates his overall costs at in the region of £400,000 and knows from experience that a Part 36 offer is likely to be made at a late stage in the litigation when, say, £300,000 has been incurred and there is still £100,000 of costs to be incurred which will be the ones at risk. The proportion of the costs which are at risk is on that calculation 25%. The success fee needs to reflect the risk of losing that 25%. If, on the other hand, it is reasonably anticipated that a Part 36 offer will be made at an earlier stage when, say, £200,000 of costs has been incurred, then it is £200,000 which are likely to be at risk. The success fee needs to reflect the risk to the solicitors of failing to recover £200,000 rather than £100,000 as in the first example, a 50% costs risk rather than 25%. Thus, the timing of any anticipated Part 36 offer is an important factor.

34. The second risk factor which a solicitor needs to take into account is the risk of the fees incurred after the Part 36 offer is made not being recovered because the Part 36 offer is rejected and then, at trial, the Claimant recovering less than the Part 36 offer and being ordered to pay the costs from 21 days after the making of the Part 36 offer (or at least failing to recover those costs). In this regard, the risk may be increased by any complexities or uncertainties which increase the chance of the solicitor "getting it wrong" and advising his client to reject a Part 36 offer which ought in retrospect to have been accepted. The experience of the solicitor will be relevant as will his/her knowledge and expertise in the particular field, together with his/her knowledge of the opponent. I would expect an experienced solicitor to be able to gauge whether a Part 36 offer puts his client seriously at risk, understanding that there may be quite a wide risk area within which a Part 36 offer may fall, and therefore give himself quite a wide margin for error. The experienced solicitor will, in most cases, back himself to get it right.

35. Armed with an assessment of these two governing risk factors, the solicitor is then in a position to take an informed view as to the appropriate success fee. Take, for example, the case where the solicitor considers that the timing of a Part 36 offer will be when £300,000 of costs have been incurred and £100,000 remain to be incurred. 25% of his costs are likely to be at risk. Supposing he considers that the chance of him getting it wrong and advising his client to reject a Part 36 which should be accepted is 20%, then his risk is 20% of 25%, namely 5%. The prospects of success are accordingly 95% and that would justify a percentage increase of 5% according to the ready reckoner. If the solicitor considers the case so difficult to call that the chance of him getting it wrong is 50%, then his risk

> is 50% of 25%, namely 12.5% and the prospects of success are therefore 87.5% which would justify a percentage increase of 14.29%.
>
> 36. Suppose, instead, the solicitor anticipates a Part 36 offer at a stage when the costs at risk will be 50%. And suppose the case is so difficult to call that he gives himself no better chance than 50% of giving the correct advice in response to a Part 36 offer. The risk in such a case is 50% of 50% or 25% so that the prospects of success are 75%. Using the ready reckoner, the percentage increase for all the costs would therefore be 33% so as accurately to reflect the risk to the solicitor in such a case. If, on the other hand, he assesses the risk of him getting it wrong as only 20%, then the risk is 10% and there is a 90% chance of success: this would justify a success fee of 11%."

152. Applying that approach to the facts of *NJL v PTE*, and agreeing with the observations of Sir Robert Nelson as to the likely timing of a Part 36 offer in a very substantial and complex personal injury claim, Martin Spencer J concluded (at paragraph 40 of his judgment) that IM should not, even on a conservative estimate, have anticipated more than 25% of their costs being at risk. As for the risk of non-acceptance, he said at paragraph 41:

> "The second main element relates to the chance of a Part 36 offer being made, being rejected on the solicitor's advice and then the Claimant failing to better that offer at trial. I do not know, of course, Mr Davis' "track record" in that regard but I would be surprised if a solicitor of his experience had found himself in that position on many occasions. Furthermore, at the time that the CFA was entered into, he could have anticipated that he would have the advice of Leading Counsel to rely upon in relation to consideration of any Part 36 offer. With the combined forces of his own experience and that of Leading Counsel, I would be very surprised if he would have anticipated the risk of a Part 36 offer being rejected and then not bettered at trial as being as high as 50% or anything like it. However, even if the risk is taken as 50%, if it is only 25% of the costs which are at risk, then the overall chance of success is 87.5% (100 – (50% x 25%)). Using the ready reckoner this would justify a percentage increase of 14.29%: on this basis, even a 20% success fee would be regarded as generous."

153. All of those cases can be distinguished from the present case in that liability had been admitted. What they do offer, for present purposes, is clear guidance on three points. The first is that it is not appropriate to make any substantial allowance within a success fee for the fact that a claim is likely to be substantial in amount. The second, which overlaps to some extent with the first, is that early Part 36 offers are unlikely in complex, high-value catastrophic injury cases of this kind, and the Part 36 risk should be assessed accordingly. The third is that *NJL v PTE* offers a clear, methodical guide to assessing a success fee by reference to that risk.

154. Ms Bedford submits that IM's "qualitative risk assessment" in addressing various risk factors and assessing them as low, medium or high risk, accurately considered all the available relevant evidence, correctly categorised the risks, gave each appropriate

weight and balanced them appropriately. That produced a 67% success fee, which broadly equates to a 60% prospect of success.

155. The Risk Assessment could be open to criticism on the basis that IM appears to have attached linear weight to each category of risk, where the court might conclude that certain categories ought to have weighed heavier in the balance than others. That might be a fair criticism if the real term percentage uplift was 67%, but the true amount of the claimed success fee is 46.7% which, by reference to the "ready reckoner", equates to a risk factor of 30-33%.

156. Whilst Ms Griggs considered that liability would be established, it remained in dispute at the time the risk assessment was undertaken and there was no certainty that it would be admitted. The liability risk was also furthered by the fact that the client was unable to provide any evidence himself.

157. The element of liability risk distinguishes this case from *C v W*. It would appear that the Defendant had already started investigations into this claim and so was considerably ahead of IM in that respect. It was entirely possible, Ms Bedford contends, that the Defendant was in a strong position to make an early Part 36 offer before the Claimant had fully investigated quantum. There was also a concern at the outset that the Defendant would raise contributory negligence as a live issue, an additional factor applicable to the Part 36 risk;

158. Calculating a success fee, says Ms Bedford, is an art, rather than an exact science. Weighing matters in the balance, she submits that a reasonable bracket of reasonable percentage uplifts would extend between 60-70%, Which would justify a success fee of between 67 and 43%. This supports the "true" success fee of 46.7%.

159. Ms Bedford distinguishes *NJL v PTE* on a number of grounds. Liability was admitted, and notably the CFAs under consideration superseded a previous CFA, signed when liability had not been admitted. Ms Bedford says that a success fee for that CFA was allowed at 65% and remained unopposed on the appeal to Martin Spencer J. Thus, the direct analogy to this case is a success fee of 65%, higher than that sought in this case by IM.

160. In this case, whilst there was a strong indication that liability would be admitted, it had not. The possibility that liability would be disputed was a relevant risk factor.

161. In *NJL v PTE* an early Part 36 offer was unrealistic. The likely timing of a Part 36 offer was assessed as following exchange of expert quantum evidence. At the time the offer was made, the experienced solicitor and Leading Counsel would have been in a position to immediately evaluate the potency of the Part 36 offer.

162. In this case, says Ms Bedford, the position is different. IM's risk assessment makes direct reference to the high risk of an early Part 36 offer on quantum. That is because the Defendant was already in possession of a large amount of information, which related to both liability and quantum.

163. The Defendant must have undertaken some quantum analysis in order to arrive at the conclusion (as it did) that the Claimant qualified for the maximum Armed AFCS award of £570,000. A capacity assessment had already been undertaken (based upon a

medical report of a clinical psychologist), so the Defendant was aware that the extent of the brain injury suffered had rendered the Claimant without capacity and that he would not work again. The Defendant was already funding a speech and language therapist and a physiotherapist and had received music therapy.

164. In contrast, the Claimant's family was unaware of the exact extent of the services being funded by the Defendant. The Defendant already had an appreciable amount of information on quantum that the Claimant did not have at the time the CFA was entered into. That information could have been utilized to make a very early Part 36 offer to the Claimant, prior to the Claimant being in possession of his own quantum evidence.

165. This created a substantial Part 36 risk which operated over the vast majority of the costs to be incurred. The risk attendant on that Part 36 offer would not be able to properly evaluated by the Claimant's legal team at the time it was made. Realistically, had such an offer been made it could not have been properly evaluated for many months whilst medical evidence was gathered. This, says Ms Bedford, supports the conclusion in the Risk Assessment that there was a real risk of an early Part 36 offer.

166. *NJL v PTE* is, accordingly, to be distinguished from this case. If however one applies Martin Spencer J's criteria, Ms Bedford suggests that if, conservatively, 90% of IM's costs would be at risk on an early Part 36 offer and the likelihood of giving the correct advice on such an offer within the 21 day period for acceptance, given the lack of any quantum information, is at best 50%, the risk profile would be 50% of 90%: a 45% chance of success. That would justify a success fee of 100%, which is not sought here.

Conclusions on the Success Fee

167. The first point I need to make is that in calculating the base costs upon which the success fee will be based, it must be right to deduct the budget overspend which I have found is not payable to IM by the Claimant.

168. Turning to the evidence offered in support of the claimed success fee, I do not think that Ms Bedford is quite right to say that IM undertook its CFA risk assessment after considering all the available evidence. A notable omission, according to Ms Griggs' statement, was the Health and Safety Executive report, which appears to have been available but which she says was not considered in detail until after the CFA was signed.

169. I have considered why Ms Griggs might not have felt the need to review such a significant document before undertaking her risk assessment, and the only reason I have been able to identify is that she was so confident about liability that she did not consider it necessary. This would be consistent with the notes she met at the time, as well as her own recollection of her confidence in the strength of the liability case, and an internal record of a conversation with a colleague in which she described the Claimant's case as "straightforward on liability".

170. I can understand why Ms Griggs would have taken that view, and I tend to agree. Whilst there had been no formal admission of liability, the addition of safety netting

to the training course after the Claimant's accident had happened spoke for itself. It was that, above all else, that appears to have led Ms Griggs to conclude that the accident had been avoidable, and in my view she must have been right.

171. Another point upon which I must disagree with Ms Bedford is that it does not seem to me, on Ms Griggs' evidence or on the risk assessment that she completed the time, that in August 2013 she foresaw a high risk of an early part 36 offer. The wording of the risk assessment was "At risk if early Part 36 offer is made particularly if monetary offer is made before quantum has been investigated". In other words, the risk assessment acknowledged that an early Part 36 offer would create a substantial risk, not that there was a substantial risk of such an offer. Ms Griggs says much the same in her evidence.

172. I accept that an early Part 36 offer would indeed have created substantial risk, especially if quantum had not yet been fully investigated, but it is not right to conflate the risk that would be created by a possible early Part 36 offer with the risk of an early part 36 offer actually being made.

173. Nor am I persuaded by Ms Bedford's suggestion that the Defendant was, in August 2013, in any better position than the Claimant's advisers to judge with any real accuracy the potential value of his claim. The services referred to as funded by the Defendant at the time seem to have been provided by the care centre in which the Claimant had been treated. The fact that the Claimant lacked capacity following a major traumatic brain injury cannot have come as a surprise to anyone, but it did not take matters much further in relation to the quantification of the claim. His AFCS award would have been set by tariff. Obviously the level of the award recognised a very serious degree of injury, but it would not have offered any insight into the likely value of a personal injury claim.

174. In fact the thrust of Ms Griggs' evidence, in particular as to the uncertainty regarding the Claimant's eventual improvement or deterioration, seems to me to support the conclusion that this case was very much in line with *NJL v PTE* and other such cases in which it could reasonably have been anticipated, in August 2013, that a Part 36 offer was much more likely to be made late in the proceedings than early.

175. A further consideration is that this was not a single stage success fee, but a two-stage success fee, so that such risk as was presented by a Part 36 offer must have been addressed to a substantial extent by the increase of the success fee to 100% in the event of settlement within three months of trial.

176. There is, I think, some force in the approach taken by Costs Judge Brown in *BCX v DTA* [2021] EWHC B27 (Costs) and other cases in which he found that it is not appropriate to calculate the first stage of a two-stage success fee as if it were a single stage success fee. A high second-stage fee, as in this case, must be balanced by a lower first-stage success fee if arrangement as a whole is not to overcompensate the solicitor for the risk of non-payment.

177. In summary, it seems to me that whilst this was not, in August 2013, a case where liability had yet been admitted, it was a case in which the liability prospects, even pre-admission, were very strong. I do not mean to equate the case with, for example, a road traffic accident case in which the injured claimant had been a passenger in a

dangerously driven vehicle: the particular circumstances of this case were less straightforward, and would have justified a more cautious approach. Mr Griggs was, nonetheless, right to be confident about liability.

178. There was some additional risk posed by the possibility of a Part 36 offer, possibly based on an allegation of contributory negligence, but nothing which would be beyond the capacity of an experienced solicitor like Ms Griggs to judge. Those additional risks were in any case effectively offset by the high second-stage success fee.

179. In coming to my conclusions I bear in mind that this is a solicitor/client assessment and any doubts I may have about the appropriate level of success fee should be resolved in favour of the solicitor. I also bear in mind that, in accordance with *C v W*, one does not accumulate risks in a linear fashion but takes matters like the part 36 risk into account by applying them to the overall chances of success.

180. Applying those principles, my conclusion is that a reasonable first-stage success fee, taking into account the risks as reasonably perceived in August 2013, would have been 33%, to reflect a risk of in the region of 25%.

181. I agree with Ms Bedford's calculation, for success fee purposes, of base costs minus budget overspend at £684,059.20 inclusive of VAT. That would entitle IM to a success fee of £225,759.53 inclusive of VAT.

Summary of Conclusions

182. The ATE Premium of £1,629.60 falls to be deducted from the Claimant's damages.

183. Having told CXJ nothing about the three costs management orders made in this case or (except at a late stage and in entirely hypothetical, generalised terms) of their effect on recoverable costs, and having denied her any opportunity to make an informed decision about incurring a budget overspend of £204,759.17 (£245,711 inclusive of VAT), IM is not in a position to rely, in relation to the budget overspend, upon the presumptions created by CPR 46.9 (3)(a) and (b).

184. It seems to me that for the same reasons, it is right to conclude that the budget overspend was unreasonably incurred.

185. As a separate point, applying the same approach as the Senior Costs Judge in *ST v ZY*, it is also I believe right to conclude that the budget overspend, applying CPR 46.9(3)(c)(i), whilst not unusual in nature, is unusual in amount. As IM did not warn CXJ that the overspend would, in consequence, be irrecoverable, the presumption at CPR 46.9(3)(c) applies and the overspend must be presumed to be unreasonably incurred.

186. The court's duty is to ensure that any costs payable by the Claimant to his legal representatives in excess of the amount recovered from the Defendant have been reasonably incurred and are reasonable in amount. Because the budget overspend exceeds the amount of the base costs shortfall which IM seeks to deduct from the Claimant's damages, it follows that no part of the shortfall may be deducted by IM from the Claimant's damages.

187. A reasonable first-stage success fee, taking into account the risks as reasonably perceived in August 2013, would have been 33%. That would entitle IM to a success fee of £225,759.53 inclusive of VAT.