Neutral Citation Number: [2020] EWHC 3269 (QB)

Case No: QA-2020-000045

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/12/2020

Before :

MR JUSTICE STEWART

(Sitting with Master Whalan as Assessor)

- -

Between :

AAJ OUDRASSEN CHOCKEN	**Claimant**
- and –	
OXFORD UNIVERSITY HOSPITALS NHS FOUNDATION TRUST	**Defendant**

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- -

Mr Kevin Latham(instructed by **Shoosmiths Solicitors**) for the **Claimant**
Mr Roger Mallalieu QC (instructed by **Acumension Ltd**) for the **Defendant**

Hearing dates: 26th November 2020

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Introduction :

1. This is an appeal from Master James. A detailed assessment of the claimant's costs took place on 16th-18th December 2019. She assessed the claimant's solicitor's success fee under the conditional fee agreement (CFA) at 50%. The claimant submits that the Master ought to have assessed the success fee at 80%.

2. Permission to appeal was granted by Mr Justice Morris by Order dated 29th May 2020. By Order dated 24th September 2020 I granted permission to the appellant to vary his grounds of appeal and I extended the time for the respondent to serve a respondent's notice.

3. A respondent's notice was sealed on 9th July 2020.

4. The Master's judgment on the point is relatively short, which is unsurprising given that it was one issue in the course of a detailed assessment. The material paragraphs are:

> "1. …I think that both sides have hit home with some of their points. For example, I do not think that it is the strongest point to say that the manufacturer of the equipment could have been a corporation that might have folded, only because there was surely an issue as to whether or not the hospital would have a duty to make sure that the equipment was maintained and that the defendant (*sic*) was monitored while he was on that equipment. However, having said that, having read out Mr Brearley's letter, he seems to be of the opinion that even monitoring the claimant while he was on the equipment would not necessarily have detected compartment syndrome. I do accept that repatriating the claimant to Mauritius would have made matters substantially more problematic and I think [therefore] risky.
>
> 2. Taking everything into consideration, my view is that the 50% risk assessment at the outset was about right. It was not too pessimistic. I think the defendant's suggestion of 25% really is little more than the Part 36 risk, and that would have to be for a much more straightforward case than this turned out to be. We are all aware, or certainly the costs people in the room are all aware, of the case of *Bensusan v Freedman*. In that case, 20% was allowed in a clinical negligence case on the basis that a dentist dropped an instrument down a client's throat during a dental procedure. I think it was the Senior Costs Judge who said, based on that, there is such a thing as a straightforward clinical negligence case. This case was clearly an order of magnitude more complicated than that example. There could have been other causes of the compartment syndrome, there could have been an issue as to whether the claimant did initially report agonising pain or only discomfort, as the records recorded and so on and so forth. I think that 50% at the outset was the correct rate.

3. I am troubled by the increase to 80% on issue of proceedings in a circumstance such as this whereby at the point proceedings were issued, the claimant had already known for some time, and certainly well over a year, that liability was not contested. There may have been the option to negotiate an extension of limitation, I know not. Mr Latham addresses me on the basis that that is a possibility. I do not know whether that was actually attempted and rejected or what the situation was.

4. Be that as it may, at the time that proceedings were issued, the claimant in effect already knew that liability was not going to be vigorously defended and that the battle royal in this case was going to be about quantum. To that extent Mr Corness's submissions hit home because, as he says, in a battle about the money, the fact is the win is already in the bag unless the claimant takes it all the way and fails to beat a Part 36. The settled law on that tends to suggest that the risk adherent to that is relatively low and also tends to suggest that adding the 50% to, say, 20% for the Part 36 risk would probably still be too much. I would not wish to give a decision that suggests that if this had gone to trial 100% would have been too much, because I do not think it would. At the point where the defendant would screw its courage to the sticking place and say, "we think we're going to win on our Part 36 offer," the costs inherent in a trial would effectively wipe out any benefit that the firm had from this and possibly a good chunk of the claimant's damages as well. However, it did not get to that stage and did not get near to that stage.

5….the defendant's point on the trigger of the 50% rising to 80% has hit home and therefore the success fee that I think is reasonable and proportionate to allow on the facts in this case is the stage 1 success fee of 50%, which I appreciate is more than the defendant was offering and less than the claimant was seeking.

(Mr Latham then sought clarification asking "is your finding that there ought not to have been an increase at all until trial?" The Master continued:)

6. On the facts in this case the difficulty that you face is this: on the indemnity principle you set your triggers where you set your triggers and you set a trigger on the issue of proceedings. On the facts of this case the issue of proceedings did not increase the risk at all.You already knew that you had a win for a year and a half. Based on the fact that the success fee is meant to reflect the risk of a win or not winning and not getting your costs, in my view 50% is where this one belongs throughout. I am not saying that 100% would have been unreasonable had it got to trial or even within 45 days of trial, but it did not.

> (Mr Latham pointed out that the Master had said that it did not increase the risk because the claimant already knew that it had the win for a year and a half. The Master replied "yes". Mr Latham then said that as he understood it, when the success fee triggers were set that was not known to those instructing him, to which the Master replied "I appreciate that". The Master continued:)
>
> 7. Bearing in mind that we are on the standard basis of course, but to that extent I have more in accord with what the defendant is saying than with what the claimant is saying. There are sometimes cases where one can agree an extension of limitation and so on and so forth. That submission is fighting against the submission that the claimant could have been deported in 2015. You either have to get on with it because he is going to leave the country or the defendant is at fault for not agreeing an extension and so on and so forth.
>
> 8. But the main point is this: for a case of this severity and of this value, even with the admission of liability, you were always likely to have to issue proceedings. It may perhaps have been more reasonable to set a trigger at the point at which proceedings become contested, perhaps by imposing a trigger of X-amount of weeks after issue or X-amount of weeks after service, or indeed upon receipt of a fully pleaded defence. In my view, the defendant's submission that you were in effect setting a trigger that was more or less guaranteed to take effect, is one that I think has hit home."

Background facts

5. The claimant suffered from a genetic disorder causing premature fusion of certain skull bones which prevent the skull from growing normally and affect the shape of the head and face. He underwent lengthy surgery at the defendant hospital on 21st February 2012. He awoke experiencing pain in his legs and feet. He was assured by nursing staff that this was likely to be an effect of his being laid still for a lengthy period before during and after surgery. He was advised to walk around the ward and keep moving, which he did. On 22nd February 2012 his pain continued and he was examined and referred for surgical investigation. On 23rd February 2012 he was taken to theatre and examined under general anaesthetic, whereupon compartment syndrome was diagnosed and fasciotomy was performed from knee to ankle. This surgery released the pressure in the claimant's legs and his pain subsided. He was nevertheless left with significant and permanent leg damage.

6. At first the claimant believed that the machine operated pressure cuffs applied to his legs during and post-surgery may not have operated correctly, following his transfer to the Intensive Treatment Unit after his surgery. Subsequently those machines were tested and found to be in good working order.

7. The claimant instructed solicitors and entered into a conditional fee agreement with them. This is dated 3rd December 2012. The CFA provided for the following staged success fee:

   Stage 1 – if the claim is concluded at any time before service of proceedings, 50% success fee

   Stage 2 – if the claim is concluded not less than 45 days before the date fixed for trial, 80% success fee

   Stage 3 – if the claim is concluded at any time thereafter, 100% success fee.

8. On 24th April 2013 a letter of claim was sent to the defendant. On 11th September 2013 a letter of response was received from the defendant, admitting breach of duty subject to causation. No offers to settle were made before issue of proceedings. Proceedings were issued on 13th February 2015. On 7th May 2015, prior to the service of proceedings, the defendant made a Part 36 offer to settle in the sum of £250,000. On 10th June 2015 proceedings were served, and on 29th July 2015 judgment was entered with damages to be assessed. The claim was allocated to the multitrack on 9th February 2016. The claimant underwent further surgery for bilateral fasciotomy on 21st September 2016. On 24th February 2017 directions were given to trial and costs budgets were approved.

9. The claimant instructed 11 experts and the defendant provided reports from 6 experts. Joint statements were prepared by experts of like discipline. The claimant served a schedule of loss totalling some £5,000,000. The defendant's counter schedule amounted to £1,200,000.

10. On 4th July 2018 there was a joint settlement meeting which was not successful. An increased schedule of loss totalling some £6,000,000 was then served. The claimant made a Part 36 offer on 11th July 2018. On 15th August 2018 the defendant made a second Part 36 offer providing for a lump sum of £1,900,000 and periodical payments of £15,675,00 per annum, increasing to £69,411.00 per annum.

11. On 1st November 2018, 70 days before the 12-day High Court trial was listed to commence, settlement was reached in the sum of £2,850,000 lump sum, plus periodical payments of £48,000.00 per annum rising to £85,000.00 per annum. On 12th November 2018 the final Consent Order and vacating of the trial listed for 14th January 2019 was effected.

12. The claimant served a bill of costs on 1st March 2019 in the sum of £1,065,217.70. Points of dispute were served on 3rd May 2019 and the claimant's reply on 5th June 2019.

13. In December 2019 the Master assessed the bill in the sum of £727,630.27 and the staged success fee was assessed at 50%, this being the decision which the claimant has appealed.

Grounds of appeal

14. There are five grounds of appeal as follows:

Ground 1 - The Master took into account factors which she ought not to have taken into account, or gave undue weight to those factors in reaching her decision. Specifically, when determining whether the claimant had acted reasonably in agreeing to the terms of the CFA, she took into account the fact that the defendant admitted liability in its letter of response and that the claimant therefore knew that liability was not contested when Court proceedings were issued. It is submitted that the Master was not entitled to assess the reasonableness of costs incurred with the benefit of hindsight

Ground 2 - The Master failed to take into account factors which she ought to have taken into account when determining the reasonable success fee payable. Alternatively, she gave inadequate weight to those factors. Specifically she failed to take into account the rationale for multi-stage success fees as explained in the case of *Callery v Gray* [2001] EWCA Civ 1117 at [108] that "it can properly be assumed that if, notwithstanding the compliance with the protocol, the other party is not prepared to settle, or not to settle upon reasonable terms, there is a serious defence". In the circumstances it is said that the Master erroneously concluded that the issue of proceedings was an inappropriate "trigger point" for the second stage success fee. The ground submits that the issue of proceedings is routinely used as a trigger point for second stage success fees across the personal injury sector.

Ground 3 - The Master erred in that she misinterpreted and/or gave undue weight to the effect of the defendant's admission of liability. She concluded that the admission resulted in the claim not being "heavily contested". That conclusion was wrong. As is often the case, as here, the quantification of the complex claim was heavily contested. The level of expert evidence obtained by both parties, the significant distance between the parties' respective offers, and the late settlement demonstrated how heavily contested the claim remained after the admission of liability.

Ground 4 - If, which the claimant denies, the Master was right to conclude that the issue of Court proceedings was an unreasonable "trigger" point for the second stage success fee, and in any event, she erred in principle by limiting the claimant to the first stage success fee. The effect of an early trigger point is to lengthen the period during which the second stage success fee is payable. An appropriate assessment requires the Court to take into account that the earlier the trigger point may be, the more difficult it will be to justify a high level success fee – see *U v Liverpool City Council* [2005] 1WLR 2657. The 80% success fee was a fair reflection of the period covered by the second stage. A later "trigger" point would have resulted in a larger first and second stage success fee being payable.

Ground 5 - The only factor of risk which the Master did address directly (other than the defendant's admission and the reasonableness of the staging) was the fact that the claimant was a Mauritian national whose immigration status was uncertain, and which may have resulted in his removal from the jurisdiction before the claim was concluded. The Master rejected that as a relevant consideration in her judgment. It is submitted that she was wrong to do so.

Legal and procedural framework

15. The CFA in the present case was entered into on 3rd December 2012. Therefore the substantial amendments to CPR rule 44 which came into effect on 1st April 2013 do

not apply. This appeal falls for determination pursuant to the provisions of the pre-April 2013 versions of CPR 43 to 48 and the then Costs Practice Direction (CPD).

16. Key provisions of the CPD are at CPR 44 PD:

> "11.7 When the Court is considering the factors to be taken into account in assessing an additional liability, it will have regard to the facts and circumstances as they reasonably appeared to the solicitor or counsel when the funding arrangement was entered into and at the time of any variation of the arrangement
>
> 11.8 (1) In deciding whether a percentage increase is reasonable relevant factors to be taken into account may include:
>
> (a) the risk that the circumstances in which the costs, fees or expenses would be payable might or might not occur..."

17. A staged success fee sets the applicable success fee at particular points in the proceedings. Depending on the point at which the proceedings come to an end, the relevant success fee is applicable. A number of authorities fall for consideration.

18. In *Callery* the Court considered success fees in the context of high-volume low value road traffic claims. The Court referred to an example of staging a success fee at the end of the relevant protocol period, since many such claims settle within that period and there should be a response from insurers as to whether liability was disputed. The Court said:

> "84. We are in this case concerned with such a category of claims: claims for the consequences of a motor accident where, on the claimant's account of the accident, the solicitor reasonably concludes that the claim has every prospect of an early settlement as to both liability and quantum. At that stage the risk assessment that results in the determination of the uplift is likely to turn, not on peculiar features of the instant case - for there will be none – but on his experience that in a small minority of such cases, when the claim is pursued some unforeseen circumstance results in the ultimate failure or abandonment of the claim
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> …
>
> 104. …we have concluded that, where a CFA is agreed at the outset at such cases, 20% is the maximum uplift that can reasonably be agreed…
>
> …
>
> 107. A success fee can be agreed which assumes the case will not settle, at least until after the end of the protocol period, if at all, but which is subject to a rebate if it does in fact settle before

> the end of that period. Thus, by way of example, the uplift might be agreed at 100%, subject to a reduction to 5% should the claim settle before the end of the protocol period.
>
> 108. The logic behind a 2-stage success fee is that, in calculating the success fee, it can properly be assumed that if, not with- standing the compliance with the protocol, the other party is not prepared to settle, or not prepared to settle upon reasonable terms, there is a serious defence. By the end of the protocol period, both parties should have decided upon their positions. If they are prepared to settle, they should make an offer setting out their position clearly and providing the level of cost protection which they determine is appropriate. "

19. In *Atack v Lee* [2004] EWCA Civ 1712; [2005] 1WLR 2643 the Court of Appeal said this in relation to the matrix prepared by the claimant's solicitor in assessing the risk of litigation for entering into the CFA:

> "37. This case has the curious feature that the matrix prepared by Mr Cockx, which should have been useful in revealing his reasonable thought processes when assessing the risk of litigation, was of no value at all, so that the Deputy District Judge was right to consider the matter from the standpoint of a reasonably careful solicitor assessing the risk on the basis of what was known to the claimant's solicitor at the time."

20. The principle of not using hindsight was underlined in *U*. This was a tripping case where the following extracts are particularly relevant:

> "20. When a Court has to assess the reasonableness of a success fee it must have regard to the facts and the circumstances as they reasonably appeared at the time when the CFA was entered into: see paragraph 11.7 of the Costs Practice Direction and *Atack v Lee…* para 51. The principle that the use of hindsight is not permitted when costs are being assessed is an old one…
>
> 21. In October 2001 the claimant's solicitor would not have had access to the post-2001 evidence or other material cited in paras 12-16 above. When deciding upon a success fee he had two choices. He could have taken the view that this claim would probably settle without fuss at a reasonably early stage, but he wished to protect himself against the risk that the claim might go the full distance and might eventually fail. In those circumstances he could select the 2-stage success fee discussed by this Court in *Callery v Gray*…paras 106-112. In this situation he would be willing to restrict himself to a low success fee if the case settled within the Protocol period - or within such other period, perhaps until the service to the defence, as he might choose – and to have the benefit of a high success fee for the cases that did not settle early. As things

> turned out, he would have benefited on the facts of this case if he had adopted this course: a high two-staged success fee would have been more readily defensible in a case which did not settle until proceedings were quite far advanced.
>
> 22. Alternatively, he could have selected, as he did in fact, a single-stage success fee, being a fee which he would seek to recover at the same level however quickly or slowly the claim was resolved. In those circumstances it would not be possible to justify so high a success fee." …

21. In *Matthews v Metal Improvements Co Inc* [2007] EWCA 215; [2007] C.P.Rep 27 the Court of Appeal reversed the lower Court's decision to allow the claimant costs up to the date of late acceptance of a Part 36 offer, on the basis that there were reasonable grounds for the claimant initially to reject the payment. At [33] the Court said that the Judge's approach had been based on a misunderstanding of a function of a Part 36 payment or offer. The paragraph finishes by saying that "the function of a part 36 payment is to place the claimant on that costs risk if, as a result of the contingencies of litigation, he fails to beat the payment."

22. In *C v W* [2008] EWCA Civ 1459; [2009] 1 Costs LR 123 the Court of Appeal considered assessment of the appropriate success fee entered into between the claimant and her solicitor at a time when the defendant had already admitted liability. The Court of Appeal upheld a success fee of 20% where, apart from general litigation risks, the only risk facing the recovery of costs was that of failing to beat a Part 36 offer. The Court said this:

> "15. To add a further 20% success fee to reflect the size of the claim was, in my view, also wrong. It is probably true in general that high value claims tend to be more complex and to involve a greater amount of work than claims of lower value, but that does not of itself increase the risk of losing. If more work is done the base fees are inevitably higher, but the application of a percentage success fee means that the amount recovered by the solicitor if the claim succeeds is correspondingly greater. It may be the case that the more complex the litigation, the larger the number of potential pitfalls, but the right way to allow for that is to adjust the chance of success and by that means the success fee. …in fact, however, the size of Mrs C's claim was likely to make little, if any, difference to the chance of her recovering a substantial award of damages…
>
> 17. The real difficulty lay in clause 5 and assessing the risk that the solicitors might lose the right to recover part of their fees as a result of Mrs C's failure to beat a Part 36 offer which she had rejected on their advice. Given that the CFA was entered into before proceedings had commenced, that called for an analysis of several contingencies, each of which was difficult to assess individually, and which together made the task almost impossible. They included the chance that a Part 36 offer would

be made, the chances that it would be made at an earlier or later stage in the proceedings, the chance that they would advise Mrs C to reject to it, the chance that she would accept their advice and the chance that, having rejected the offer, she would fail to beat it at trial. Some of these might be assessed with a degree of confidence: for example, one could confidently predict in the case of this kind that a Part 36 offer would be made at some stage. One might also predict, though perhaps not with quite the same degree of confidence, that Mrs C would reject such an offer if her solicitor's advised her to do so. The timing of an offer was more difficult to predict, but was potentially of some importance because only fees earned by the solicitors after its rejection would be at risk; fees earned up to that point would be secure. The chance that Taylor Vinters would advise Mrs C to reject an offer which she subsequently failed to beat at trial is difficult to assess, but one would not expect a highly experienced solicitor 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…the task facing Taylor Vinters in May 2001 was to assess, as best they could, the risk of losing part of their fees for reasons of that kind, and then expressing that as a percentage of the total fees likely to be earned at trial. Only by doing so could they calculate a success fee expressed as a percentage uplift on the whole of their profit costs

…

19. The Judge below identified the main complicating factors in the present case as being the allegation of contributory negligence and the risk that a Part 36 offer rejected on the advice of Taylor Vinters might not be beaten at trial. He was right to accept that it was a factor that had to be taken into account in assessing the success fee and he attributed a risk of 20%…

20. Although the Judge recognised that this was a case in which the chance of failure in the conventional sense was minimal, he failed to keep a clear eye on the true nature of the risks which Taylor Vinters were undertaking and what constituted success and failure. That led him to treat the risk of failing to beat a part 36 offer as if it represented a 20 % risk of failing to recover any damages at all…

23…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…I doubt very much whether any solicitors are well placed to undertake it. The best they can hope to do…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…"

23. *In Fortune v Roe* [2011] EWHC 2953 (QB); [2012] 2 Costs LR 288, the Court was concerned with a situation where the CFA was signed when liability was no longer in dispute. The CFA nevertheless provided for a success fee of 25% if the claimant won her claim prior to 3 months before the trial date/trial window or 100% if she won her case at any later date. The Master found that the high value and complexity of the case could only bear upon the risk of failing to beat a Part 36 offer, but even if that happened the costs up to date of the offer would have been recoverable and only those incurred after that date would have been payable to the defendant. He accepted the defendant's submission that the possibility of failing to beat the Part 36 offer in the circumstances carried a risk which could be assessed at a 20% success fee. The Master's decision was upheld on appeal. Sir Robert Nelson said this:

> "46. It is correct that the Courts have encouraged a two-stage success fee such as in *Callery* and *U* but that in itself does not assist the appellant. The question still remains as to what the level of risk was and what success was justified. The mere fact that a two-stage fee is in place does not mean that the second stage fee, closer to trial, can always be justified."

Later the Judge said [48] the central issue in the appeal was what was the risk when the CFA was signed and what would be a reasonable fee in such circumstances.

24. In *Bright v Motor Insurers Bureau* [2014] EWHC 1557 (QB); [2014] 4 Costs LR 643 the claimant suffered serious injury in a road traffic accident. The Master reduced the staged success fee from 75% to 30%. The Court held that that decision had been correct. The fact that the defendant would have been hard pressed to contest liability was amply supported by what was known at the time of entering the CFA. The Court said this, after reviewing the authorities:

> "49. A two stage success fee may be used by a solicitor "to protect himself against the risk that the claim might go the full distance" (*U v Liverpool* para 21). As Master Campbell held in *Matthew Peacock v MGM Ltd* [2010] EWHC 90174 (Costs) para 25 (ii), it is open to the claimant to choose the date of staging. The claimant must be in a position to justify the percentage uplift for success fees. If, therefore, he elects an early trigger for a higher second stage success fee, he must be in a position to justify the higher risk of non-recovery of his fees at an earlier stage than if the second stage were only reached at or shortly before trial
>
> 50. In my judgment, if and insofar as the Master relied on the trigger point for the second stage of a stage success fee in CPR 45.16 in determining that the success fee claimed was unreasonably high in this case, he would have erred in doing so. CPR 45.16 is not relevant to the determination of the reasonableness of success fees which do not fall within its scope. The trigger point of the second stage of a success fee is

> not the principal basis for determining its reasonableness. What is material is whether the success fee is set at such a level which is reasonable in light of the risk of non-recovery of costs anticipated at the date of entering into the CFA."

25. From the authorities the following can be said:

i) When the Court assesses the reasonableness of the success fee it must have regard to the facts and circumstances as they reasonably appeared at the time the CFA was entered into and not with any hindsight. *U* [20]

ii) The solicitor's assessment of the risk of the litigation should be useful in revealing the thought processes of the risks. It is a matter for the Court to consider the matter from the standpoint of a reasonably careful solicitor, assessing the risk on what was known at the time of entering the CFA. *Atack* [37]

iii) The logic in a two-stage success fee is based on whether the other party is not prepared to settle, or not prepared to settle on reasonable terms, such that there is a serious defence. There is no set point for the triggering of a stage in a staged success fee. *Callery* [108]; *U* [21]

iv) The value/complexity of the litigation does not increase the risk of losing, though there may be a higher number of pitfalls in such cases. It is difficult to assess the risk of beating a part 36 offer, but the Courts have upheld 20%-25% success fees in such circumstances. *C* [15]-[23]; *Fortune.*

v) A staged fee agreement does not always justify a higher success fee closer to trial. The question is what was the level of risk justifying the success fee at the time the CFA was signed. *Fortune* [46] and [48].

vi) It is open to the claimant to choose the date of staging. He must be able to justify the percentage uplift. If he elects an early trigger for a higher second stage success fee, he must be in a position to justify the higher risk of non-recovery of fees at an earlier stage than if the second stage were only reached at or shortly before trial. It is not therefore the trigger point which is the principal basis for determining reasonableness, but whether the success fee is set at such a level which is reasonable in the light of non-recovery of costs anticipated at the date of agreeing the CFA. *Bright* [49]-[50]

The Risk Assessment

26. Six pages of risk assessment were before the Master. The latter three pages are headed "Statement of Reasons (success fee)." It is divided into sections. The first section is headed "General risks". These are risks of clinical negligence litigation generally. However they have been bracketed and ticked as a whole.

27. There is then a section headed "Risks specific to your claim". A number of risks have been ticked in relation to "Breach of duty". None of the risks are ticked in relation to "Causation". There are then sections headed "Witness evidence of fact", "Expert evidence", "Documentary evidence", and "Additional factors". The Additional factors run from (a) to (mm). These are in proforma style save that there is a hand written entry at (nn).

28. I do not propose to go through all of the matters which are ticked. That is because the first three pages of the document handed to the Master contain more useful case specific information. Nevertheless:

i) A number of the ticked factors seem unusual and potentially not relevant to CFA assessment of risk. An example is: "crown indemnity does not apply to one or more defendant." Another is: "the defence may challenge the CFA in relation to whether other funding was available or should have been used." In relation to the last item, that would not prevent recovery of base costs. Further a ticked risk factor is that the defendants will rely on contemporaneous clinical records, as is the fact that there is no independent witness evidence to support the claimant's account of key events. It is not clear what relevance either of these had in the circumstances obtaining in the claimant's case.

ii) The handwritten addition at (nn) reads:

> "You have a resident's permit to live here until 2015 when you should become eligible to become a citizen of the UK but in the interim you have no rights to claim benefits and have a risk that you could be asked to leave the country."

29. Little is to be gained from looking in detail at the final three pages of the document. Although superficially, by reason of not ticking a number of potential items, it appears that thought has gone into the document, the examples that I have given suggest that a number of boxes may have been inaccurately ticked.

30. The first three pages of the document contain these extracts:

> "6. Brief Facts:
>
> On 20th February 2012 Mr Chocken was admitted for a ten hour operation for surgery on his face to reconstruct it. Following the operation he was transferred to ITU. The following morning he awoke with extreme pain in his legs. He has been advised that he has suffered from compartment syndrome probably due to the pressure cuffs malfunctioning whilst he was in ITU. He now has foot drop in both legs and some nerve damage and muscle damage.
>
> …
>
> 8. Breach of Duty…
>
> It appears that the cuffs may have malfunctioned due to a sticky valve when transferred to ITU and reconnected. However, from the information that the client has obtained from the hospital it appears that there is no record that the ITU staff monitored or checked that they were working during the night and therefore there is a breach of duty by the staff to properly monitor him and secondly potential product liability claim in relation to the pressure cuff. We will therefore need evidence from an ITU nurse and we will need the information from the hospital with regard to their review of the pressure cuff and then potentially

> an expert to advise on product liability if it appears that they are defective.
>
> 9. Causation…
>
> Causation does appear straightforward in that he has suffered from compartment syndrome and the only cause appears due to the pressure cuffs that remained on him during the operation and until the following morning. There was nothing wrong with his legs prior to admission.
>
> 10. Value (estimate):
>
> (a) General Damages
>
> This probably falls within the very serious severe leg injuries and therefore in the region of £40,000-£50,000 as a minimum for general damages
>
> (b) Special Damages
>
> There will be a loss of earnings claim although it will depend on whether or not he makes any further recovery and it could take two years for nerve injury to recover and to know whether or not he will make a full recovery. We will therefore have a two year loss of earnings claim and he will need adaptations to his house and some help and support somewhere in the region of £100,000.
>
> …
>
> 12. Identity of defendant(s):
>
> Oxford Radcliffe Hospitals NHS Trust
>
> …
>
> DECISION NOTE:
>
> …
>
> From limited information (no records complaint or expert evidence) appear to be good grounds to investigate. Due to limited information and evidence there are significant risks on liability."

Ground 1 – hindsight

31. The claimant submits that the Master in her judgment at [3], [4], [6] and [8] demonstrated clearly that she took into account the fact that the defendant

subsequently admitted breach of duty. It is correct that, if the Master did use hindsight, that is an error which would require the decision on the success fee to be set aside and this Court to exercise its discretion afresh.

32. There is no doubt that in the passages relied upon, the Master could have used better phrasing. Nevertheless her words need to be seen in context. A number of points should be made:

i) At [2] the Master, early in her judgment, gave her decision that "the 50% risk assessment at the outset was about right" (my underlining). This followed [1] in which the Master said that she was not going to go through all the elements of the parties' submissions. Two factors to which she referred were that the defendant may not have been liable to the claimant because even if the claimant had been monitored whilst on the equipment it would not necessarily have detected compartment syndrome. Further, the Master accepted that repatriating the claimant to Mauritius would have made matters substantially more problematic and therefore more risky. The first of these points was clearly looking at the risks as they appeared to the claimant's solicitor at the outset. The second also was a factor mentioned in the risk assessment. In the development of her reasoning at [2], the Master again clearly looked at the risks at the outset, expressly considering the potential Part 36 risk, in other words again applying the correct test.

ii) At [4], when referring to the "battle royal" being about quantum, the Master made reference to the defendant's solicitor's submissions. In those submissions he made it clear that the Court should look at the risk as they were at the time the CFA was agreed. His argument was that the liability risk was small. What he said specifically was:

> "…so clearly there is some degree of liability in this case and a clear degree that something has gone wrong. I know we have hindsight – and it is not with the benefit of hindsight you are judging what the risks are at the time you enter into a CFA – but this was a case where liability was admitted at a very early stage."

Later when discussing the risk assessment at the time of entering into the CFA he said:

> "Clearly something had gone wrong in this case. Therefore I say that, first of all, putting an assessment of the risks on this case as high as they did was not borne out by what actually happened in the treatment and what actually happened with the benefit of hindsight, in the actual case."

iii) The Master's response to this argument was:

> "…although it is absolutely correct that the risk assessment is set by what was in the solicitor's mind at the time – what she reasonably contemplated at the time that she did the risk assessment, or whoever did the risk assessment; … - it is appropriate to look at how things panned out to certain extent by way of a cross reference to how reasonable that assessment was at the time."

She then continued in a similar vein.

iv) After what she said in the judgment at [6] Mr Latham pointed out that the success fee triggers were set at a time when liability was not determined. The Master responded "I appreciate that".

33. When one considers what the Master said in the above context, it is inconceivable that she made an error of principle such as is alleged by the claimant. From [3] onwards the Master was dealing with the trigger for the increased percentage. She had already determined what the position was at the outset. This is made clear by what she said at [8] where she considered the position at the time of entering the CFA. Any earlier references to what had in fact happened are to be construed as the Master doing what she said in submissions she would do, namely using it by way of a cross reference to how reasonable the assessment was at the outset, and no more. I therefore find that ground 1 is not made out.

Grounds 2 and 3 – the staging point

34. Apart from the overlap of these grounds with ground 1, with which I have already dealt, the complaint is that the Master erred in deciding that the issue of Court proceedings did not on the facts of the case increase the risk of losing. Although it is not material to the Masters' reasoning, stage 2 applied from the service, not the issue, of proceedings.

35. The first point made is that the Master's approach ignored the logic of staged success fees as explained in *Callery* at [108] and in *U* at [21]. Reference is also made by the claimant to paragraphs 5.1 and 6.1 of the Pre-Action Protocol for the Resolution of Clinical Disputes. In paragraph 5.1 of the Protocol it is said that litigation should be a last resort. At paragraph 6.1.1 it states that where a dispute has not been resolved after the parties have followed the procedure set out in the Protocol, the parties should review their positions before the claimant issues Court proceedings.

36. The claimant also refers to the following paragraphs of the Protocol:

> "3.27. If the parties reach agreement on liability, or wish to explore the possibility of resolution with no admissions as to liability, but time is needed to resolve the value of the claim, they should aim to agree a reasonable period.
>
> …
>
> 5.2. Some of the options for resolving disputes without commencing proceedings are –
>
> (a) discussion and negotiation (which may or may not include making Part 36 Offers or providing an explanation and or apology)…"

37. The claimant submits that when the CFA was entered into the claimant's solicitor had no knowledge as to how the defendant might react to the claim, whether or not they would admit or deny a breach of duty, whether the defendant would comply with the

Protocol, and/or make a Part 36 offer if liability was admitted. It is said that, following *Callery*, it is entirely proper to assume that if, notwithstanding compliance with the Protocol, the defendant is not prepared to settle or not prepared to settle on reasonable terms, there is a serious defence.

38. The claimant says that, as pointed out during submissions in the lower Court, it is usual for NHS Resolution to offer a limitation amnesty to allow parties to obtain medical evidence in order to negotiate settlement of a claim. Therefore the Judge's conclusion, at [8], that the trigger of proceedings being "more or less guaranteed to take effect" was wrong.

39. Finally, the claimant submits that there can be no doubt that service of proceedings was a reasonable trigger for the claimant's solicitor to set in December 2012, at the point of agreement of the CFA, given what was said in *Callery* and *U*, particularly since the expiry of the limitation period was more than 26 months away at the time.

40. Having rejected the submission that the Master was guilty of the legal error of using hindsight, save as a cross check – which is permissible -, the question is whether she fell into error in not permitting an increased success fee triggered by the service of proceedings.

41. I will begin by considering the claimant's reliance upon the two authorities.

42. The context of the statement at [108] of *Callery* was bulk issue low value road traffic claims. At [102] the Court of Appeal said this:

> "It should be recognised that any general guidance that we provide is given in the context of the type of claims which are the subject of this appeal, that is to say, modest and straightforward claims for compensation for personal injuries arising from road traffic accidents…"

Low value RTA claims overwhelming settle. One has to be cautious about relying too heavily in a clinical negligence case on what would or would not be regarded as a "serious defence" in a small RTA claim.

43. Nor is this present case within the matrix of *U* at [21], which refers to a low success fee if a case settles within the Protocol period or perhaps until service of defence (as the claimant's solicitor might choose), and a high success fee for cases that do not settle early. 50% is not a low success fee. It is the equivalent on the "ready reckoner" of there being approximately one third prospect of total failure of the claim.

44. As the Master said at [2], at the outset 25% would be little more than the Part 36 risk. She therefore doubled that risk to 50% because of the liability issues. She also took into account in that doubling of the risk (at [1]) the potential repatriation of the claimant to Mauritius. Having expressly taken into account these three risks for the 50% success fee at the time of entering into the CFA agreement, the question to be asked is whether there is any justification in the complaint that the Master erred in deciding that the issue of Court proceedings (or service of Court proceedings) did not on the facts of the case increase the risk of losing? In this regard I make the following points:

i) This was a somewhat unusual clinical negligence case in that, as the claimant's solicitor recognised at the outset, causation was not likely to be in issue.

ii) The case was not one which involved the reliability of the claimant as a witness in circumstances where his evidence might be in dispute with clinical professionals.

iii) In the claimant's risk assessment document at [8] the author said "…therefore there is a breach of duty by the staff to properly monitor him and secondly potential product liability claim in relation to the pressure cuff.." At this point in the document it appears that the author not only thought that causation was "straightforward" but that breach of duty was also. I accept that this has to be seen alongside the "Decision Note" which said: "due to limited information and evidence there are significant risks on liability." Nevertheless the tenor of the assessment, justifiably so, is that this was a lower than average risk clinical negligence case.

iv) Although in some cases of substantial size the defendants would offer a limitation amnesty to allow parties to obtain medical evidence in order to negotiate settlement, many cases – whether the liability is or is not in dispute – lead to the issue and service of proceedings. In addition, the claimant's solicitor has the option whether or not to ask for/accept a limitation amnesty. The Master pointed out [7] the prospect of the claimant's solicitors agreeing to a limitation amnesty (if offered) was rendered less likely by the requirement to get on with the case lest the claimant be deported in 2015. On the terms of this CFA, absent a total settlement of the claim by the defendant prior to issue of proceedings, it was entirely a matter for the claimant's solicitor whether she issued/served, and thereby obtain an extra 30% success fee. That was in circumstances where it came to pass, as is often the case, a fully pleaded schedule of loss was not served until well after service of proceedings; also, as is not infrequently the case, the claimant's prognosis was guarded and unknown until sometime after he underwent further surgery in September 2016.

v) The important point, whatever actually happened, is that with foresight from the date of the agreement there was no increased risk on a second stage, since the material risks of (a) a Part 36 payment at some stage, (b) liability being an issue and (c) the claimant being required to repatriate to Mauritius had already been catered for in the initial 50% success fee.

45. As Mr Mallalieu QC put it for the defendant,

> "the defendant was exposed to a 50% success fee no matter what it did in response to the claim. That might (or might not) be reasonable if this was a single stage success fee. However, this was only the lowest potential exposure for the defendant, no matter what it did. There was, therefore nothing the defendant could do – no additional breach of duty or of liability subject to quantum or even of settlement of the whole case which could avoid exposure to a success fee of at least 50%."

46. This CFA was of a wholly different order from the ones suggested in *Callery* and *U*. In *Callery* the proposal was of a success fee of 100%, subject to a reduction to 5% should the claim settle before the end of the Protocol period. In *U* it was of restricting a claimant to a low success fee if the case settled within the Protocol period and a high success fee for cases that did not settle early. The 50% success fee in the present agreement continued to increase in circumstances where the risks were all factored in

from the beginning and could, if anything, only decrease e.g. (as happened) by an admission of breach of duty prior to issue of proceedings.

47. This case fell to be considered on its own facts, as the Master made clear throughout her short judgment. Following the principle I have elicited at [25](vi) above, it is up to the solicitor to choose how and when (if at all) to stage a success fee. However, the level of the success fee and any staging must be justified. The Master accepted a 50% success fee as reasonable from the outset, given all the risks (liability, Part 36 and risk of deportation in 2015), but did not accept in the circumstances of the case and the initial level of success fee that any increase was justified at the point chosen for stage 2. She considered that 50% was reasonable up to a point close to trial. This was a decision she was entitled to make. In addition she was concerned that in this case from the outset proceedings were likely, even if liability was conceded, such that the trigger could not be justified as reasonable. The central, though not only, risk of a CFA is total failure of the claim such that no costs will be recoverable.

48. Therefore ground 2 fails. The Master did not fail to take into account factors which she ought to have taken into account: nor did she give inadequate weight to any factors.

49. As to ground 3, the Master did not use the phrase "heavily contested". She fully accepted that this was a case of severity and substantial value [8]. The point she made was that the claimant was always likely, given those facts, to have to issue proceedings. She may later in [8] have put it somewhat too high by saying that proceedings were "more or less guaranteed", but her point was well made. What she was saying was that, having built in the risks of liability being challenged etc, if that risk had actually come to fruition and the trigger had been set by a contested liability issue, that may have been a different matter. This case fell fairly and squarely within what this Court said in *Fortune* [46] and *Bright* [49].

Ground 4 – level of success fee

50. This ground is in the alternative. The claimant submits that even if the Master was right to conclude that the service of proceedings was an unreasonable trigger point, she was wrong to conclude that the second stage success fee ought to be limited to the same level as the first stage success fee.

51. It flows from what I have previously set out that this ground cannot succeed. The Master found that, having regard to all the relevant risks, a 50% success fee was reasonable. She also found that an increased success fee at the stage of service of proceedings was not reasonable. She judged that a 50% success fee was reasonable up to and including the point at which the case settled. This she was perfectly entitled to do.

52. The claimant focuses upon what the Master says at [8]. There she postulated some potential triggers of a second stage success fee. However none of these triggers obtained. They were based on proceedings becoming fully contested on liability in circumstances where it seemed less likely at the outset. If there had been such a trigger, it would never have materialised in this case.

53. Earlier at [4] and [6] the Master said that, if the case had gone to trial, she was not saying that 100% would have been too much because she did not think it would. She justified this on the basis that at that stage the defendant would very probably have made a Part 36 offer and was sticking by it, such that the risks would have increased. I am not required to determine whether the Master would have been correct in awarding 100% in those circumstances since it does not arise. An important statement by her at [6] was "Based on the fact that the success fee is meant to reflect the risk of a win or not winning and not getting your costs, in my view 50% is where this one belongs throughout…" That was a decision to which she was entitled to come.

Ground 5 – assessment

54. This was the ground added by way of amendment to the Appellant's Notice.

55. It was said that the Master rejected as a relevant consideration the fact that the claimant was a Mauritian national whose immigration status was uncertain and which may have resulted in his removal from the jurisdiction before the claim was concluded.

56. In fact, as the claimant accepted at the hearing the ground was based on a mis-reading of the judgment. At [1] the Master said: "I do accept that repatriating the claimant to Mauritius would have made matters substantially more problematic and I think [therefore] more risky." (See also [7]). Mr Latham did not therefore pursue this ground.

The Respondent's Notice

57. The Respondent's Notice first seeks to uphold the Master's decision on the basis that the success fee was unreasonable for the reasons she gave. Secondly, it says that in the alternative it was unreasonable because the staging of the success fee failed to make any adequate allowances for the prospect of an admission of a breach of duty and causation, as opposed to the settlement of the entire case. In the further alternative, it is said that the staging of the success fee failed reasonably to take adequate account of the prospect of an admission of a breach of duty and causation, the effect of which would substantially minimise the risk of non-recovery of base costs to which the solicitor was exposed under the CFA.

58. In the light of my findings above, there is no need to deal with the arguments in the Respondent's Notice.

Conclusion

59. For those reasons the appeal is dismissed.