Neutral Citation Number: **[2019] EWHC 1482 (QB)**

Appeal Ref: QB/2018/0290

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM THE SENIOR COURTS COSTS OFFICE, MASTER ROWLEY, COSTS JUDGE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/06/2019

Before:

MR JUSTICE JAY
MASTER HAWORTH, COSTS JUDGE (Sitting as an Assessor)

- -

Between:

XDE
(By her husband and Litigation Friend, XEF) **Appellant**

- and –

NORTH MIDDLESEX UNIVERSITY HOSPITAL TRUST **Respondent**

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- -

Benjamin Williams QC (instructed by **Bolton Burdon Kemp**) for the **Appellant**
Alexander Hutton QC (instructed by **Acumension Ltd**) for the **Respondent**

Hearing date: 24th May 2019

- -

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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MR JUSTICE JAY

MR JUSTICE JAY:

Introduction

1. This is the Claimant's appeal, brought with the permission of the court below, from the judgment of Master Rowley handed down on 12th September 2018 whereby he determined on a preliminary issue that the Claimant's success fees and ATE insurance premium be disallowed.

2. Throughout this judgment I will be referring to the parties to this appeal as the Claimant and the Defendant. I will also be referring to paragraphs in the Master's judgment using square brackets.

3. The claim in the underlying proceedings arose from a delay in the diagnosis of the Claimant's tuberculous meningitis with catastrophic consequences for her. The issue of liability, including causation, was concluded by agreement on 5th July 2016 on the basis of a 98%/2% apportionment. After the hearing before the Master, the issue of quantum was compromised in a very substantial sum. The Claimant's bill of costs in connection with liability aggregated £1,008,053.73, including a success fee for solicitors and counsel of £388,568.22 inclusive of VAT. The Claimant's ATE insurance premium was not claimed in the bill of costs but the Master's ruling on the preliminary issue was apt to cover it.

4. It was the recoverability, at least in principle, of these items which formed the subject matter of the relevant preliminary issue. I put it in these terms because one of the preliminary issues which was before the Master has not been appealed. I am concerned with the issue which had been formulated in the following terms:

> "Whether the discharge of the Claimant's legal aid certificate on 11th May 2012 was reasonable and therefore whether or not all additional liabilities [i.e. the success fee and the ATE premium] incurred following the subsequent entry into the CFA in October 2012 with [her solicitors] should be disallowed."

5. The appeal hearing was conducted by leading counsel truly steeped in this area of the law. Their expertise was borne out by the quality of their written and oral submissions. Mr Alexander Hutton QC for the Defendant wryly observed that there was a sense of *déjà vu* in this case because he and Mr Benjamin Williams QC for the Claimant had recently crossed swords in the Court of Appeal in a case where similar issues had arisen: the conjoined appeals of *Surrey v Barnet and Chase Farm Hospitals Trust and others* [2018] 1 WLR 5831 (*"Surrey"*). One of the key points for determination in this appeal is the extent to which the principles enunciated by Lewison LJ (giving the sole reasoned judgment for the Court of Appeal) apply to the instant case.

6. Identical observations about expertise and familiarity may be proffered in connection with the Master's detailed judgment. Mr Williams makes no criticism of the careful way in which the Master dealt with the facts. This will enable me to summarise the position rather than cover all the minutiae. I do not agree with Mr Williams'

characterisation of the Master's analysis and disposal of this case as "discursive", but in granting permission to appeal the latter recognised that his ruling raises points of principle worthy of further consideration.

Essential Factual Background

7. The Defendant's tort occurred in May 2001. Solicitors were instructed by the Litigation Friend in May 2002 to act on a privately funded basis. In February 2006 the Litigation Friend instructed Bolt Burdon Kemp ("BBK") on the same basis initially on the footing that the firm had a legal aid franchise and it was intended to apply for legal aid. In January 2007 the Legal Services Commission ("LSC") granted a public funding certificate for investigative work.

8. A substantive legal aid certificate was granted on 25th February 2009 with the following limitations:

> "Limited to all steps up to and including mutual exchange of statements and reports and Part 35 questioning of experts and thereafter obtaining external Counsel's Opinion or the opinion of an external solicitor with higher court advocacy rights.
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> …
>
> Limited to work as detailed in the case plan dated 19th January 2009 for all steps up to and including stage 2 at a total cost of £55,480."

9. Privilege was never waived in relation to the case plan but the parties have proceeded on the basis that it covered all stages in the litigation up to mutual exchange of expert evidence, and thereafter Part 35 questions and a conference with counsel and experts.

10. The total cost of £55,480 was exclusive of VAT. It was calculated at the LSC's prescribed hourly rates: £70 for a solicitor, £50 for junior counsel and £90 for senior counsel. These are well below private market rates – those could only be recoverable on an *inter partes* assessment in the event that the claim succeeded.

11. Although the case plan was not disclosed, the inference drawn by the Master was that it was predicated on three liability experts. It is clear from other evidence that those experts were Professor Barnes (a general physician), Professor McKendrick (an expert in infectious diseases) and Dr Butler (a neuroradiologist).

12. The partner at BBK with conduct of this case was Ms Suzanne Trask. She gave a witness statement in the preliminary issue proceedings and was not sought to be cross-examined by the Defendant. She informed the court that in June 2011, following an annual audit meeting with BBK's relationship manager at the LSC, the firm received a Contract Notice in relation to its internal monitoring of the work in progress it was incurring on legally aided cases at LSC hourly rates. On my understanding of her evidence, the LSC's concern was that there were deficiencies in BBK's systems such that it could not be readily ascertained at any given point in time how many hours had been spent on individual cases and whether the relevant financial limits on the certificates were at risk of being transcended – in fact, there is a

80% trigger for action. Ms Trask's evidence was that BBK revised its monitoring arrangements to create automated weekly reports to be circulated within the firm.

13. On 13th December 2011 Ms Trask wrote to the LSC advising it of the following:

(1) proceedings would be issued and served as soon as possible.

(2) in the light of Counsel's advice, BBK had obtained a report from Dr Guy Sawle, consultant neurologist, on causation.

(3) in the light of Dr Sawle's recommendation, BBK had also obtained a report from Dr Mike Rothburn, a medical microbiologist.

(4) "Stage 1 of the case plan … envisaged that there would be three liability experts. We would therefore request an increase to the costs limit of the certificate of £10,000 for the extra work that needs to be conducted with these further two experts. We have not spent any further time preparing a formally updated case plan to reflect this in order to keep costs to a minimum, however please let us know if this is required."

14. The chronology in relation to items (1) – (3) above is that Dr Sawle's report was obtained in February 2011, Dr Rothburn's in April 2011, and a conference with all five experts took place on 31st October 2011. The Defendant also points out that it is clear from the bill of costs that it was only on 12th December that BBK considered and noted appropriate subsequent steps in relation to LSC funding.

15. The inference that the Master drew [73] from the request for an additional £10,000 was that it was intended to cover the extra work apparently needed to be conducted to the end of the existing limitation: i.e. to the end of stage 2.

16. On 17th January 2012 the LSC replied pointing out that clinical negligence cases are now covered by its Clinical Negligence Guidance rather than detailed case plans. According to that guidance, a five expert case up to mutual exchange would be limited to £45,000 rather than the £55,490 specified in the limitation in this case. In the result:

> "I cannot therefore agree further funding. Any formal request for funding should be made by completing a report which fully addresses all of the points relevant to the stage you are seeking funding for accompanied by a CLSAPP8."

17. On 8th May 2012 Ms Trask replied making the following points:

(1) her interpretation of the LSC's letter dated 17th January 2012 was that an increase beyond £55,490 could not be approved as it was higher than that prescribed under current guidance.

(2) BBK's current costs are £57,000.

(3) BBK's costs to the point of issue will be £67,000.

(4) BBK will be unable to progress this case to the end of stage 2 within the current cost limit of £55,490.

(5) BBK "therefore suggest[s] that the certificate is discharged as soon as possible so that we can enter into alternative funding arrangements".

(6) (by way of conclusion) "[s]hould, as we anticipate from the content of your previous letter, you be unable to agree to an increase to the costs limit to this figure, we request that the funding certificate be discharged, so that we can progress the matter to issue proceedings under an alternative funding arrangement".

18. The inferences to be drawn from these figures are fairly obvious, but in spelling them out [74] the Master observed that the £67,000 figure was well short of the total likely amount for the litigation to the end of stage 2. Further, the additional £10,000 sought in December 2011 would be insufficient for that purpose.

19. On 8th May 2012 Ms Trask wrote to the Litigation Friend making the following points:

(1) given that (a) BBK has reached the current costs limit of the certificate, and (b) the strict limits of legal aid, "this [i.e. the cost limit] is unlikely to be increased at this stage".

(2) BBK has informed the LSC of the foregoing and recommended that the certificate be discharged so that alternative funding arrangements may be made.

(3) a "no win, no fee" agreement will allow BBK to fund the claim from this point. This "will not actually be as restrictive and avoid the delays that we have faced when previously dealing with the LSC".

(4) under such an arrangement the Claimant will be in broadly the same position "in that she will be protected from any deductions to her compensation as she lacks capacity …".

(5) if the LSC sends you a form inviting you to complete it in the event that you think that legal aid should continue, you need not to do so.

20. On 11th May 2012 the LSC wrote to BBK enclosing a copy of the certificate showing that it had been cancelled as at that date "as the assisted person/client has requested/consented to the discharge". The LSC had clearly drawn the inference that item (6) of BKK's letter dated 8th May had been written on the basis of instructions from the client.

21. The subsequent history was recorded by the Master. In short, it took some time for the CFA to be signed. Although this period in the chronology is largely irrelevant because the certificate had already been discharged, it appears that the Litigation Friend was advised on 10th October 2012 that the reason for the change in funding was the legal aid limits, that anything that the Defendant did not pay by way of costs would be "written off under 100% scheme", and that in effect the arrangements being contemplated were in the nature of "CFA-lite" inasmuch as the Claimant could never

be exposed to a contractual liability to BKK in the event of a shortfall in any *inter partes* order.

22. The Master referred at some length to the witness statement of Ms Trask which, as I have said, was not tested in cross-examination. Her reaction to the LSC's letter of 17th January 2012 was that it was "very unlikely" that the limit would be increased.

23. Without ignoring the remainder, I would highlight the following matters in Ms Trask's evidence:

> "In order to secure an increase, you had to show a good reason for this. If there wasn't a particular reason, they would decline the application and ask if you would like to discharge the certificate. In addition to this, a new system would come into place, and the [LSC] had already showed that they were reluctant to consider further funding that was out of step with the new process.
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> …
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> Whilst the request for an increase to the financial limit of the certificate was not on a legal aid form (called an APP8), the [LSC] were content to discharge the certificate on that basis. As a matter of general practice. The [LSC] would often consider requests in the format of a letter rather than a form. Here, all the information that would otherwise be contained in an APP8 had been provided between my letters sent in December 2011 and May 2012, to include evidence of merits and what was being sought. This is clearly a very high value claim and the financial increase being requested was limited.
>
> …
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> In my experience it is rare for the [LSC] to offer enough funding to be able to investigate a complex disputed clinical negligence claim to a successful conclusion. This would require it to support all necessary steps and expert evidence and for it to reach an advanced stage whereby it may settle, subject to the approval of the Court. Particularly given the course of this claim after the legal aid was discharged, I cannot imagine that the [LSC] would have supported sufficient funding. It would have needed to provide funds to present a robust response to the limitation defence out forward, which was withdrawn only days before the hearing on the issue, as well as to progress through liability directions in a case where liability was disputed in full, requiring significant expert and lay evidence. Again, an agreement was reached only days before the trial on the issue."

The Decision of the Court of Appeal in Surrey

24. The Master carried out a careful analysis of Lewison LJ's judgment in *Surrey*. I would summarise the position as follows.

25. The Court of Appeal in *Surrey* was seized of three cases in which the facts differed slightly. In all three cases the CFA-lites were concluded shortly before the change in the regime for such arrangements which came into effect on 1st April 2013 in respect of agreements concluded after that date. The change restricted the recoverability of success fees and ATE insurance premia: the precise details matter not for the purposes of this appeal. On the other hand, the general rule for all civil cases decided after 1st April 2013 was that general damages – typically for pain, suffering and loss of amenity - benefitted from a 10% uplift ("the *Simmons v Castle* uplift") which was introduced with a view to covering, at least in part, the irrecoverable ATE premium. The effect of s.44(6) of LASPO 2012 was that this uplift would not apply to cases where the relevant CFA was concluded before 1st April 2013. In other words, the *Simmons v Castle* uplift would apply to (a) post-April 2013 CFAs, and (b) legally aided cases regardless of the date of the certificate.

26. In all three cases the legal aid certificates were discharged. In two of these, this was clearly at the claimant's request. In two of the three cases, both liability and causation had been conceded by the defendant by the date of discharge; in the remaining case, causation remained in issue. In such circumstances, "the defendant was in principle the paying party" (para 7 of the judgment) and costs would be recoverable – subject to failing to beat any CPR Part 36 offer – at ordinary commercial rates.

27. The issue in the Court of Appeal was whether the Costs Judges had erred in concluding in all three cases that the decision to enter into a CFA, with its accompanying ATE insurance policy, gave rise to costs which was unreasonably incurred. This required an objective analysis of the reasonableness of the individual claimant's decision, on advice, to change the basis of funding, taking all relevant circumstances into account. The obligation to act reasonably did not preclude a claimant from choosing a more expensive option.

28. In this regard, it was essential to focus on the litigant's *particular* reasons for making the choice s/he did rather than the reason s/he might have had (para 16). Further, if the legal advice given was "unsound", that could well impact on the reasonableness of the client's choice.

29. It was reasonably clear on the facts of the three cases that "at an abstract level" there was little to choose from a claimant's perspective between legal aid funding on the one hand and CFA-lite plus ATE insurance on the other: see paras 29 and 30 of the judgment. An additional consideration was that solicitors were naturally aware in late March 2013 that the law was about to change, including the introduction of the *Simmons v Castle* uplift.

30. Lewison LJ rejected the contention that the issue either fell to be resolved at a generic high-level assessment (para 29) or on the basis that if there were little or nothing to choose between the two funding methods, it would follow that the selection of either would lead to costs which were reasonably incurred (para 30). In short:

> "The court is required to take into account all the circumstances of the case. That means the particular case under consideration:

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

31. Further, although in all cases the client will be acting on legal advice, the issue is not the advice as such but the reasons why the receiving party made the choice that he or she did (para 32).

32. Lewison LJ examined the receiving party's reasons in each of the three cases under consideration viewed through the prism of the relevant solicitor's witness statement. In short:

(1) In *Surrey*, the solicitor asserted that there was no guarantee that the LSC would increase the limitation on costs, but on analysis there were no details of the costs that had been incurred, what the authorised costs limit was, and what further costs needed to be incurred. The solicitor also gave misleading advice to her client in suggesting that any shortfall might be "topped up" by him personally. The strongest arguments in support of the change in funding related to the shortfall, the risk of failing to beat a Part 36 offer, and the operation of the statutory charge (paras 34-36).

(2) In *AH*, the evidence was very similar, including the suggestion that any shortfall might be made up by the client (paras 37-38). On the facts of AH, breach of duty had been conceded but causation of catastrophic injury was not accepted.

(3) In *Yesil*, the solicitor stated that she took into account the risk of failing to beat any CPR Part 36 offer as well as the potential for a 10% uplift, although it was accepted that this was not mentioned to her client. Unfortunately for her, the solicitor's calculation as to the costs incurred to date was seriously overstated, as well as her estimate of likely future costs (paras 39-43)

33. A common thread in all three cases was that the claimant's litigation friend was not told that the change from legal aid to a CFA (before 1st April 2013) would disentitle him or her to the uplift. This was a critical factor in the cases of *Surrey* and *AH* because on their particular facts the adverse risks were no more than possibilities whereas the foregoing of the uplift was a certainty (para 53). Given that the Costs Judges held that it was impossible to say what the decision would have been had that information been given, the inevitable doubt had to be resolved in favour of the paying party (para 47).

34. In a case of mixed reasons, some good and some bad:

> "As we have seen the court often examines the reasons underlying a particular choice in the context of litigation; and a test of materiality is not inappropriate, as we have seen from *Solutia*. I consider also that if (as each costs judge found) the reasons given for the choice were a mix of good and bad reasons; and that some clear disadvantages to the client of making the switch had not been explained, the burden was on the receiving party to satisfy the costs judge that even if the bad reasons had not been put forward, and the disadvantages had been properly explained, the client would still have made the same choice." (para 51)

35. Moreover:

> "60. The bottom line is that in each of the three cases the advice given to the client had exaggerated (and in two cases misrepresented) the disadvantages of remaining with legal aid funding; and had omitted entirely any mention of the certain disadvantage of entering into a CFA. Moreover, one of the advantages of entering into the CFA was Irwin Mitchell's own prospective entitlement to a substantial success fee. In those circumstances I consider that DJ Besford was correct in saying at [81]:"
>
> "Where one of two or more options available to a client is more financially beneficial to the solicitor, the need for transparency becomes ever greater."
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> 61. This a reflection of the fundamental principle of equity that where a person stands in a fiduciary relationship to another, the fiduciary is not permitted to retain a profit derived from that fiduciary relationship without the *fully informed* consent of the other."

36. Finally:

> "Mr Williams developed an argument to the effect that in a quantum only case (such as these three cases) a litigant whose claim is funded by a CFA-lite and ATE insurance is in a commanding position. He is immune to costs risks, whereas his opponent may face a crushing burden of costs. That imbalance puts pressure on a defendant to settle a case early and, moreover, has the consequence that offers of settlement are higher. He referred in this connection to Sir Rupert Jackson's description of such litigants as "super-claimants". There are two problems with this argument. The first is that it formed no part of the decision-making process. In other words this was not one of the reasons for the switch. The second is that this argument was not run before the costs judges and was not the subject of a

> Respondent's Notice. In addition, of course, it is always open to a claimant to make a Part 36 offer, however his claim is funded, which exerts its own pressure on a defendant."

Other Jurisprudence

37. My attention was drawn to two cases decided at first instance.

38. In *Hyde v Milton Keynes Hospital NHS Foundation Trust* (unreported, 1st July 2015), coincidentally decided by Master Rowley, the court held that a legal aid certificate was exhausted and "spent" in circumstances where one firm of solicitors had taken over from another, the first firm of solicitors had not kept proper control of the costs, the second firm had done so and moreover had "tried very hard to extend the costs limitation under the certificate in order to continue to use it" (para 36). In these particular circumstances, it was held that the legal aid certificate was discharged by conduct, and – as a separate albeit connected matter – the decision to charge from public funding to a CFA and ATE was reasonable.

39. In my view, para 45 of Master Rowley's judgment in that case rather more avails the Defendant than the Claimant:

> "It is no doubt the case that claims are often successfully concluded in a way which renders the overspend as against the certificate relevant. But I do not think this means that a claimant and her solicitor who keep an eye on the costs being incurred and so are aware of the limitation problem should be obliged to continue to use the certificate come what may. Parties are encouraged to consider their legal spend prospectively and, where it is clear that the available public funding is going to be insufficient, a decision to change to another option must be a reasonable step to take."

The reasonableness of this step was predicated on solicitors keeping an eye on the costs being incurred and acting reasonably throughout – by, for example, applying to extend the costs limitation at the appropriate time.

40. In his unreported decision in *XX v ZZ* (27th June 2016), District Judge Spencer addressed a case where the solicitors were overspending, made no efforts to extend the legal aid, made no efforts to keep within the case plan, and had no discussion with their client's litigation friend before they had decided and recorded their decision to emplace a CFA. After the event, the litigation friend was told that the funding difficulties had been caused by the Legal Aid Board. At para 40 of her extempore judgment District Judge Spencer made clear that the solicitors had been under an obligation to give accurate and balanced advice to the client as to why this was a reasonable step to take.

The Decision Under Appeal

41. The reasoning of the Master proceeds along the following pathway:

(1) the court's inquisition must begin in 2009 and not 2011 because it is relevant that BBK entered into a High Costs Contract in respect of funds "that they had both sought and asked for the money for" (para 71).

(2) the instruction of the microbiologist was liable to increase the costs significantly (paras 72).

(3) in any case, with proper systems in place, which BBK claimed that it had installed after the LSC 2011 audit, alarm bells should have been set off as soon as the total bill approached the 80% threshold (para 72). In fact, they did not start to ring until December 2011 (para 73)

(4) BBK's letter of 13th December 2011 was seeking a further £10,000 until the end of stage 2, which claim was plainly inadequate on the figures made available in May 2012 (paras 73 and 74).

(5) in its letters of 13th December 2011 and 8th May 2012 BBK did not give the impression that it was expecting the LSC to grant the increase sought. Further, the information supplied in the first letter was inadequate (para 75), and in the second it should in any event have been provided in the form of a report and an accompanying CLSAPP8, as the LSC had requested (para 88).

(6) it was incorrect to assert, as Ms Trask had done, that no defended case could be run on legal aid (para 77).

(7) in legally aided and CFA-lite cases, there was a tendency for solicitors to run them without seeking sufficiently frequent instructions from their clients on incurring costs. It followed that the client would have every reason to agree to a CFA-lite if told that the legal aid fund had effectively run out and that it was the LSC that was causing the difficulty (paras 78 and 79).

(8) the information provided by BBK to the Litigation Friend was limited to that set out in the letter dated 8th May 2012 by which date, given the terms of BBK's letter to the LSC, a *fait accompli* had almost been achieved. The Litigation Friend was also advised not to complete any form he might receive from the LSC. This was without any discussion as to the appropriateness of the change (para 80).

(9) "[w]hat can only be described as a half-hearted attempt to increase the certificate limit for a further short period [i.e. by letter dated 13th December 2011] was made as a prelude to inviting the LSC to discharge the certificate. The LSC obliged and the client has entered into a CFA with a 100% success fee and associated ATE insurance as soon as the litigation friend was available to consider the documentation" (para 81)

(10) although in December 2011 it may be the case that it was too late to obtain the necessary funding to carry this case to the end of stage 2 (para 82), it was incumbent on the solicitors to ensure that the case was run within the contractual costs limits: there was no evidence before the court to show how this case was ever expected to be funded within those limits. Further, the instruction of two additional experts was not the reason for exceeding those limits. In short, "it cannot be a reasonable decision to change funding simply because no obvious

effort has been made to run the case within the original funding agreement (paras 83-86).

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

(12) finally, and as a separate matter, because virtually all of the foregoing reasoning bears on the reasonableness of BBK's thinking, the Litigation Friend's lack of involvement in the decision was "fundamental as a defect".

The Arguments on the Appeal

42. Although there are 10 grounds of appeal, in essence these boil down to three. The first series of grounds (1-6) contend that the Costs Judge was wrong to equate the instant case with *Surrey* where, on the facts, there was little to choose between legal aid and a CFA funding. The premise of *Surrey* was that the *Simmons v Castle* uplift was the decisive factor, but in the instant case the additional 10% could have no application. It followed either that *Surrey* could not apply at all to the present case, its essential premise being inapplicable, or that a CFA-lite was so obviously or inherently advantageous that its qualities was bound to be dispositive in any decision-making process. The second series of grounds (7-9) contend in the alternative that the Costs Judge should not have held that the switch was unreasonable: the Claimant had no choice because she had exhausted her legal aid budget. Finally (ground 10), the Costs Judge's conclusion that it was a "fundamental defect" in the Claimant's case that the Litigation Friend was not consulted amounted to a "laconic" finding which rested "on the fallacies impeached already", in particular the fact that the switch was involuntary.

43. In developing these grounds, Mr Williams accepted that it was incumbent on him to demonstrate on appeal some vitiating error of principle, or that the Costs Judge took into account irrelevant considerations or ignored those which were relevant, or reached an evaluative conclusion that was plainly incorrect. He submitted that the Costs Judge should have relied on Ms Trask's unchallenged evidence which was to the effect that in January 2012 she believed that it was "very unlikely indeed" that the LSC would expand the Claimant's funding, and that as a matter of practice the former often considers requests to do so by letter rather than under form CLSAPP8.

44. Mr Williams submitted that the Claimant was not under an obligation to fund a case by legal aid if other suitable methods are available. *Surrey* is authority for the proposition that scrutiny of the reasons for the change may be required, and on the facts of the cases before the Court of Appeal these reasons were hopeless.

45. In contrast with those cases, Mr Williams submitted that: (i) there is no issue with *Simmons v Castle*, (ii) BBK did not give false or misleading advice, and (iii) there could be no suggestion that BBK was giving self-serving advice (cf. *Surrey*) because causation was still in dispute.

46. Mr Williams submitted that in *Surrey* "an inquisition into the change of funding was countenanced" because the change of funding greatly increased the costs without any obvious benefit to the claimants, and with one obvious detriment – the loss of the uplift. The logic of the position was therefore as follows:

> "If CFA funding was treated as on a par with legal aid funding in *Surrey*, despite the certainty of the loss of the … uplift ..., then in the present case, where it is common ground that this feature is absent, it cannot have been correct to take *Surrey* starting point of broad equivalence."

47. Thus, submitted Mr Williams, the essential premise of *Surrey* was absent, and the inquisition into the reasons for the change in funding was not required. The absence of the *Simmons v Castle* factor meant that the playing field was by no means level, and the inherent superiority of CFAs, in particular CFA-lites, over legal aid did not require further justification.

48. In any event, submitted Mr Williams, if reasons for the change were nonetheless required CFA funding has potentially significant advantages over legal aid funding in a number of respects: security and autonomy of funding; greater costs protection; no statutory charge on damages; the benefits of ATE insurance in covering any shortfall of recovery as well as any costs liability flowing, for example, from interim costs orders or failing to beat CPR Part 36 offers; the enhanced negotiating position with which CFA claimants are invested; and the ability to fund the litigation without the constraints of the "rule book".

49. On this last aspect, Mr Williams contended that legally aided parties were under no obligation to ensure that costs were managed within the confines or "straitjacket" of the contract and the case plan, and/or be "beholden to the LSC". In oral argument Mr Williams interpolated the adverb "needlessly".

50. Mr Williams did not accept that *Surrey* was authority for the proposition that was only the receiving party's express reasons which fell to be taken into account. Any inquisition should cover both objective and subjective factors. Given that there were no downsides to the switch and a number of obvious upsides, it could not be said that the Litigation Friend, who was only specifically advised on the matters which went to autonomy, might have reached a different decision had he been more fully advised on the correct basis.

51. As for his second series of grounds (7-9), Mr Williams relied on the finding of the Costs Judge that in December 2011 "it may be the case that it was too late" to obtain an extension of funding. Thus, the Costs Judge's real reason for concluding that it was unreasonable to switch was that BKK should have kept within budget. As to this: (i) there was no obligation to do that, and (ii) the Costs Judge failed to identify work which BBK had performed unreasonably or at extravagant cost during the currency of the certificate. By early 2012 the Claimant had exhausted his funding. It followed

from *Hyde* that the case ceased to be funded even if the certificate had not been discharged.

52. Mr Williams submitted that one of Costs Judge's three reasons for concluding that the switch was unreasonable was his view that BBK should have made a properly constituted application for an extension. As to this: (i) that conclusion cannot be reconciled with the Costs Judge's acceptance that by December 2011 an increase in funding was unlikely, (ii) Ms Trask's unchallenged view was that an increase was indeed highly unlikely, and (iii) on 8th May 2012 she gave detailed costs information to the LSC.

53. In his submissions in defence of the Costs Judge's judgment, which for present purposes I believe I can take quite shortly, Mr Hutton submitted that the Claimant could not rely on factors which did not constitute the real reason for the change in funding. The real reason for the switch was that the costs threshold had been attained or transcended, and so the essential point was not whether the Claimant *might* have had good reasons for entering into a CFA – this was hypothetical – but whether the state of affairs which existed in May 2012 could be justified.

54. Mr Hutton submitted that a close examination of the decision in *Surrey* demonstrates that the court must examine the receiving party's particular reasons for switching funding, not the reasons that he or she might have had. My attention was drawn to paras 16, 17, 29-30, 32 and 70-71 of *Surrey* in particular. Furthermore, by 8th May 2012 the Claimant was being presented for the first time with a *fait accompli*: apart from being advised that legal aid funding was too restrictive, there was no possibility of saving the certificate, particularly in circumstances where BBK was in effect asking the LSC to discharge it.

55. In addressing the *Simmons v Castle* uplift, Mr Hutton pointed out that in the case of *Yesil* that was not the determinative factor. *Surrey* was, therefore, of general application. Paras 29-30 of that case were not limited to a situation where the uplift was applicable, still less did the level playing field predicate that it was applicable.

56. As for grounds 7-9, Mr Hutton submitted that the burden was on the receiving party to prove that the exceedance of the limit in the case plan was not culpable: this was part and parcel of the obligation to prove that he had acted reasonably. For these purposes, any defaults of the solicitor fell to the attributed to the client by operation of standard agency principles. In the present case, there was no explanation for the overspend, no timeous application(s) for additional funds, a half-hearted, inadequate and unparticularised application in December 2011, a failure to respond to the LSC's letter of 17th January, and an entirely fatalistic approach underpinning the final letter on 8th May.

Discussion

57. Mr Williams' principal argument requires a close examination of paras 29-30 in particular of Lewison LJ's judgment in *Surrey*. Are those passages predicated on the *Simmons v Castle* uplift already having been factored into the balance sheet assessment? If that were the correct interpretation, it would follow that it is the inclusion of this factor which has enabled the Court of Appeal to conclude that there was not much to choose between the two methods of funding. By way of corollary,

the absence of the *Simmons v Castle* uplift in the instant case would lead inevitably to the contrary conclusion that CFA-lites are significantly and objectively preferable to legal aid, and it is not incumbent on the receiving party to justify his choice.

58. In my judgment, the difficulty with this submission is that its premise is incorrect. I cannot read paras 29-30 of Lewison LJ's judgment as already factoring in the *Simmons v Castle* uplift. The Costs Judges in *Surrey* had concluded at an "abstract", "generic high-level" or "macro" level of assessment that the pros and cons of legal aid versus CFA-lites were finely balanced. The references to a "level playing field" in this context cannot be read as factoring in a consideration which could not apply across the board. Lewison LJ's observation, which he was accepting for the sake of argument, that "there was not much to choose between funding by legal aid and funding by CFA", was a general statement which applies to all legal aid cases on the one hand and all CFAs on the other. Lewison LJ was not limiting this statement to CFAs which post-dated 1st April 2013 and therefore attracted the benefit of the uplift. On my reading of his judgment, the *Simmons v Castle* factor was taken into account at a later stage of the Court's decision-making as being decisive in two out of the three cases of which it was seized.

59. Mr Williams told me that the only basis on which he would and could have made the submission recorded at the outset of para 30 of *Surrey* was that the *Simmons v Castle* uplift was being factored into the equation. It is true that at para 71 he is recorded as making a submission that CFA-lites were clearly preferable to legal aid in a quantum only case. However, I think that Mr Williams' submission recorded at para 30 was recognising, as it had to, that the Costs Judges had found in terms that this was more or less a level playing field. These were evaluative assessments which could not readily be shaken on appeal; and at that point Mr Williams was not attempting to do so. Later on, Mr Williams advanced a more ambitious submission which Lewison LJ roundly rejected.

60. Mr Williams advanced the alternative submission that even if he was wrong on his principal argument as to the inclusion of the *Simmons v Castle* uplift in paras 29-30 of *Surrey*, an objective examination of the merits of CFA-lites over legal aid leads to the clear conclusion that the former is far preferable to the latter, in which circumstances the absence of subjective reasons in BBK's advice to the Litigation Friend is nothing to the point.

61. The difficulty with this submission is that the necessary factual underpinning is lacking. Mr Williams cannot be heard to submit that there is, in fact, a lot to choose between the two competing methods of funding in a situation where that was not the advice given by BBK to the Litigation Friend and it was not the case run before Master Rowley. A further difficulty with the submission, and I will be coming to this, is that the real or operative reason for the change in funding was that by May 2012 it had become clear that the money available through legal aid had run out.

62. Accordingly, it seems to me that there is no escape in the circumstances of this case from the application of the principle laid down in *Surrey* that the receiving party's *particular* reasons for the switching from legal aid to a CFA fall under scrutiny. The paragraphs in *Surrey* to which I have already referred (see para 54 above) strongly support this approach. I have in mind in particular the final sentence of para 30 and paras 70-71. I do not read *Sarwar v Alam* [2001] EWCA Civ 1401 as supporting the

contrary proposition. On the facts of that case, the cost of the ATE premium was recoverable because the solicitor gave unsound advice in connection with a different insurance policy.

63. It is arguable that the position would be different if the evidential case Mr Williams has sought to run on this appeal through submission had been the case set out in BBK's advice to the Litigation Friend either in May 2012 or, far preferably, at some earlier point in the chronology when the need to switch was not inevitable. This hypothetical factual structure might need to be considered on another occasion, but it does not arise for determination in this appeal.

64. In any case, the real reason for the advice to switch to a CFA, which was given as late as 8th May 2012, was that the legal aid limit had been exceeded. By then there was no prospect of an extension to the certificate; indeed, BBK was effectively asking for the certificate to be discharged. It is not arguable that by this letter the solicitors were simultaneously or alternatively seeking an extension of the certificate in some indeterminate amount on the basis of the information they were putting forward. There was only one operative reason for the change in funding, and it followed in my view that the only real question was whether the solicitors were culpable or otherwise in relation to the state of affairs which had resulted. It is not surprising, in my view, that the argument before the Costs Judge was limited to that issue.

65. Examining BBK's advice to the Litigation Friend, such as it was, is deeply unhelpful to the Claimant. Aside from the absence of any reference to the points that Mr Williams now seeks to rely on, BBK stated in terms that under a CFA the Claimant "will be broadly in the same position". This was in the context of a case, cf. para 71 of *Surrey*, where causation remained in issue. Apart from the obvious difficulty that at the hearing before Master Rowley the Claimant did not seek to question or undermine that advice, I do not think that it was so plainly wrong that the Court may look behind it. To the extent that Mr Williams relied on paras 49 and 51 of *Surrey*, it seems to me that these do not avail him. In this regard, I would hold that there is a difference in principle between a factor such as the *Simmons v Castle* uplift, which was a certain and indisputable advantage, and the sort of factors prayed in aid by Mr Williams, about which there are differences of opinion. In short, I would reject any suggestion that these advantages are so overwhelming that the failure to mention them may be overcome.

66. Turning to the second limb of Mr Williams' appeal (grounds 7-9), a brief rehearsal of the facts is required. BBK did not inform the LSC at the material time that two additional experts were being instructed, or that all five experts were attending the conference with counsel in October 2011. Difficulties in BBK's systems had been identified by the LSC in 2011, and Ms Trask's evidence was that these had been addressed. In December 2011 an application was made for an additional £10,000 on the basis, as found by the Costs Judge, that it was sufficient to cover the funding of the litigation to the end of stage 2. However, inadequate particulars were supplied in support of this application, and – as will soon be demonstrated – it was plainly insufficient to cover the whole of the relevant period.

67. Such figures as existed were only provided by BBK to the LSC in May 2012, by which time it was far too late. As at 8th May £57,500 had been spent. It was estimated that £67,000 would be spent by the date of issue. BBK did not provide any estimate of

the costs to the end of stage 2, but the Costs Judge must have carried out a back-of-the envelope calculation, and in answer to my question Mr Williams agreed that a figure in the region of £90,000 was about right. It followed that (i) a significant overspend would have occurred even without the two additional experts, and (ii) BBK had probably exceeded the costs limit in March or April.

68. I do not read the LSC's letter of 17th January 2012 as coming close to ruling out a properly constituted application for additional costs. Given the terms of its letter, such an application had to be on the appropriate form, but nothing was forthcoming either then or for a further 3½ months. Form CLSAPP8 required details of the costs incurred to date and future estimated costs, including an updated case plan. Nothing approaching this was forthcoming, and the information supplied in December 2011 had been exiguous.

69. The Costs Judge gave two reasons for his conclusion that BBK had acted unreasonably.

70. His first reason was that the solicitors should have attempted to keep this case within budget, should have provided calculations to demonstrate their adherence to the budget or otherwise, and in the event that the case plan was not being followed should have made timeous and properly constituted applications for additional funding. Such application should have explained why the costs limits were not being adhered to. The Costs Judge also drew the inference that no "obvious effort" had been made to keep within the original funding agreement. In my judgment, these were appropriate evaluative assessments to make. They cannot be impeached on appeal.

71. I cannot accept Mr Williams' submission that BBK were not beholden to the LSC and its rulebook. By accepting a contract on this express basis, BBK clearly was – although I would prefer terminology such as "bound by" rather than beholden.

72. The Costs Judge's second reason was that BBK acted unreasonably in failing to make a properly constituted application in December 2011. I have already pointed out that BBK's application was improperly constituted and inadequately formulated. However, the real issue here is whether it was already too late for a correctly constituted application to succeed. I have noted Ms Trask's fatalism, but the Costs Judge found only that "it may the case that it was too late to obtain the sort of additional funding" to take the litigation to the end of stage 2. Given that the additional funding required was substantial, it is arguable that the Costs Judge understated the difficulty, but the decision was his to make and in my view it was not obviously wrong. I am driven to accept Mr Hutton's submission that on the basis of this finding the Claimant failed to discharge the burden of proof: the onus was on him to show that the lateness of the application made no difference.

73. In the light of my earlier conclusions, ground 10 does not arise for separate consideration.

Disposal

74. This appeal must be dismissed.