Neutral Citation Number: [2019] EWHC 1889 (QB)

Case No: A90MA326

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER APPEAL CENTRE SITTING IN LIVERPOOL
On appeal from Deputy District Judge Harris sitting as a Regional Costs Judge

Civil Justice Centre
35 Vernon Street,
Liverpool L2 2BX

Date: 16/07/2019

Before :

MR JUSTICE DINGEMANS

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Between :

AB (a protected party by his mother and litigation friend YZ)	**Claimant and Respondent**
- and -	
Mid Cheshire Hospitals NHS Foundation Trust	**Defendant and Appellant**

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- -

Roger Mallalieu (instructed by **Potter Rees Dolan**) for the **Claimant and Respondent**
Alexander Hutton QC (instructed by **Hill Dickinson LLP**) for the **Defendant and Appellant**

Hearing date: 8 July 2019

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JUDGMENT

Mr Justice Dingemans:

Introduction

1. This is an appeal against that part of the order dated 19 June 2018 of Deputy District Judge Harris sitting as the Regional Costs Judge ("the Regional Costs Judge") which declared that the additional liabilities (of a success fees claimed at 100 per cent and an insurance premium) were recoverable by AB, a protected party by his mother and litigation friend LZ who is the Claimant and Respondent to the appeal ("AB"), from Mid Cheshire Hospitals NHS Foundation Trust, who is the Defendant and appellant in the appeal ("the NHS Trust"). The amount of the additional liabilities, including whether the uplift should be allowed at 100 per cent, has been reserved to a further hearing before the Regional Costs Judge. The Regional Costs Judge gave permission to appeal.

Relevant statutory and legal provisions

2. The relevant provisions of the Civil Procedure Rules and Costs Practice Direction, applicable under the transitional provisions, are set out below. By CPR 44.4 "(1) … the court will not … allow costs which have been unreasonably incurred or are unreasonable in amount … (2) where the amount of costs is to be assessed on the standard basis the court will … (b) resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party …". Other provisions are set out in the judgment in *Ramos v Oxford University NHS Trust* SCCO Reference CL1503600 at paragraphs 69 to 73.

3. The costs judge is required to consider whether the costs have been "reasonably incurred". The proper approach to this question was set out in *Wraith v Sheffield Forgemasters Ltd* [1998] 1 WLR 132 which approved the dicta by Potter J. set out and reported at [1996] 1 WLR 617 at 624-625. The focus is primarily upon the reasonable interests of the claimant so one looks to see whether a reasonable choice or decision has been made by a reasonably minded claimant. In *Surrey v Barnet & Chase Farm Hospitals NHS Trust and others* [2018] EWCA Civ 451; [2018] 1 WLR 5831 at paragraph 32 Lewison LJ made it clear that the issue is "was the decision, which in this case was to switch from public funding to a CFA, a reasonable one". It is for the claimant to justify his change of funding method. This is not answered by a generic high level assessment of the pros and cons of each funding method. If a party has not received sound advice it may compromise the reasonableness of the choice to change funding. As was made clear in *Solutia UK Ltd v Griffiths* [2002] PIQR P16 at paragraph 16 "it is clear that the test must involve an objective element when determining the reasonableness or otherwise of instructing the particular legal advisers in question, none the less that must always be a question which is answered within the context of the particular circumstances of the particular litigants with which the court is concerned".

The question on an appeal

4. As this is an appeal from the decision of a Costs Judge, I will need to consider whether, as in any case involving an appeal against the exercise of discretion, the judge has approached the matter applying the correct principles, has taken into account all relevant considerations and has not taken into account irrelevant

considerations and reached a decision which is one which can properly be described as a decision which is within the ambit of reasonable decisions open to the judge on the facts of the case, see *Surrey v Barnet and Chase Farms Hospital NHS Trust* at paragraphs 27 and 28. In *Surrey v Barnet and Chase Farms Hospital NHS Trust* Lewison LJ said the decision of the costs judge might be more reasonably described as an evaluative judgment, perhaps even a finding of fact, rather than a discretionary judgment, but he did not decide the point and followed the appellate approach to the exercise of a discretion set out above.

5. One of the grounds of appeal in this case does engage a challenge to findings of fact made by the Regional Costs Judge. It is well-established that appellate courts have to be very cautious in overturning findings of fact made by a trial judge, see *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477. This is because trial judges have taken into account the whole "sea" of the evidence, rather than indulged on appeal in impermissible "island hopping" to parts of the evidence. It is also because duplication of effort on appeal is undesirable and will increase costs and delay, see *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] ETMR 26. Further appellate courts will only interfere with findings of fact if the trial judge was plainly wrong, *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 WLR 2600. This means making a finding of fact which had no basis in the evidence or showing a demonstrable misunderstanding of relevant evidence or a demonstrable failure to consider relevant evidence so that the decision cannot reasonably be explained or justified.

Factual background

6. On 16 July 2000 AB, who was then aged 31 and who worked as a forklift truck driver, had a road traffic accident while riding his motorcycle. AB was taken to the NHS Trust's hospital for treatment for fractures of his left ankle, both femoral shafts, and left forearm. AB underwent operations on 17 July and 19 July 2000. The final operation, during which an attempt was made to nail AB's right femur, was abandoned due to his unstable condition. AB suffered periods of hypotension during the surgical procedures and suffered catastrophic brain injuries. He now suffers from tetraplegia and has severe cognitive impairments. AB lost capacity to conduct litigation. Allegations of negligence were made in respect of the treatment and care provided by the NHS Trust.

7. Following the annulment of AB's marriage, his mother secured a lasting power of attorney in 2010. AB's mother instructed Potter Rees Dolan solicitors in November 2010 to investigate the claim against the NHS Trust. This was some 10 years after he had suffered catastrophic brain damage. The case was funded privately between 4 November 2010 and 29 December 2010 and a legal aid certificate was granted on 30 December 2010.

8. In 2010 and 2011 reports were obtained on breach of duty and causation from: Mr Summers, a consultant orthopaedic surgeon; Dr Matta, a consultant in intensive care and anaesthetics; and from Dr Loizou, a consultant neurologist.

9. The narrative on page 2 of the bill of costs shows that Mr Summers was critical of the decision to transfer AB to a general orthopaedic ward, contending that he should have

gone to a HDU where it was likely that early signs of respiratory distress would have been identified and action taken to prevent the brain injuries. However Mr Summers suggested that AB's brain injury may have been caused by fat embolism syndrome. This was "potentially problematic from a causation perspective". Dr Matta was critical of the anaesthetic management of the operation on 17 July 2000 and 19 July 2000 considering that these failures resulted in hypotension and hypoxia. Dr Loizou felt that the brain damage had probably been caused on 17 July 2000 as a result of poor oxygenation and poor circulation, which was preventable.

10. There was a conference between the experts and counsel on 12 November 2012. In paragraph 14 of the witness statement from Lesley Herbertson, a partner in the Claimant's solicitors, it was said that the "success of the case very much hung in the balance as evidenced by the conference with counsel … Dr Matta … and Dr Loizou … were at loggerheads and in complete disagreement as to the cause and timing of the claimant's brain injury". It seems clear that the reference to the conflict between Dr Matta and Dr Loizou was a mistake because the conflict was between Mr Summers and Dr Loizou. It appears that the prospects of success were assessed by Ms Dolan at 51 per cent. Ms Herbertson noted at paragraph 25 of her witness statement "in view of the fine balance between failure and success, the need for appropriate expert evidence was magnified".

11. A letter of claim was sent on 27 November 2012 alleging failures before, during and after the operations on 17 July 2000 and 19 July 2000. An extension of time for the service of the NHS Trust's letter of response was agreed.

12. Liability was denied in the letter of response on 29 July 2013. There was further correspondence and clarification of the allegations was sent on 13 June 2014. In the final event liability was admitted on 24 July 2014.

13. The parties then turned to address the quantum of the claim. A part 36 offer made by the Defendant was accepted, and the settlement was approved by King J. on 21 June 2017. The settlement consisted of a lump sum award of £3.8 million and annual periodical payments of £245,0000.

14. By the conclusion of the proceedings 12 experts were instructed on behalf of the Claimant. In addition to Mr Summers, Dr Matta, and Dr Loizou, these were: Professor Moran, an orthopaedic surgeon, who was a substitute for Mr Summers after the CFA had been made. His hourly rate was £220 per hour; Dr Kent, a neurological rehabilitation expert; Dr McKinlay, a neuropsychologist; Ms Sargent, an expert in nursing care; Ms Ho, an expert in OT; Ms Filson, a physiotherapist; Mr Nocker, an expert in accommodation; Mr Humberstone, a speech and language therapist; and Mr Clayton, an expert in assistive technology.

The 2011 Order

15. The evidence shows that the Community Legal Service (Funding)(Amendment Number 2) Order 2011 ("the 2011 Order") came into force on 3 October 2011. It set out a schedule of fixed hourly rates allowed by the Legal Aid Agency in respect of experts' fees in and outside London.

16. The rates varied from £54.40 per hour for an occupational therapist to £115.20 for an orthopaedic surgeon up to £200 per hour for a neurologist in a clinical negligence cerebral palsy case. Other neurologists had rates of £122.40 per hour out of London and £72 per hour in London.

17. Although the 2011 Order did not apply to AB's case, because legal aid had been granted in December 2010 which pre-dated the 2011 Order, the evidence from Ms Herbertson was that the 2011 Order "had an impact on this case as well as other cases within this office". Ms Herbertson noted that from October 2011 "we started to experience difficulties in instructing our preferred experts in cases". Ms Herbertson exhibited correspondence from other cases, details of which had been redacted, to which the 2011 Order also did not apply showing that the Legal Services Commission referred to the rates under the 2011 Order to justify restricting the hourly rates paid to experts. There was also evidence showing that a request for funding a neurosurgeon at £345 per hour in another case was refused and the Legal Services Commission reported that they had not authorised payment of more than £200 per hour for an expert since 2006.

Expert fees for Dr Loizou, Mr Summers and Dr Matta

18. In the bundle there is evidence showing that on 26 September 2012 the Legal Services Commission did not approve Dr Matta's fees at that time because a CLS APP8A form had been used, which related to the 2011 Order, and because there was an attempt to obtain retrospective authority for something which was a request for prior authority. The Legal Services Commission reported that Dr Loizou's fees could not be approved beyond £200 per hour.

19. The Claimant's solicitors wrote by letter dated 27 September 2012 to Dr Loizou seeking his agreement to be paid at £200 which was "below the rate within your terms and conditions". The Claimant's solicitors noted "we are having real difficulties in persuading the LSC to agree to us incurring anything above the expert guideline hourly rate". Reference was made to forthcoming funding changes and the impact of the current recession on public funds. It is apparent from the invoices that Dr Loizou agreed to an hourly rate of £200 per hour.

20. It appears that on 28 October 2011 Mr Summers charged £1,000 plus VAT for his report and £250 plus VAT for a teleconference, but no hourly rate was given. Dr Matta charged 6 hours at £200 per hour on 6 August 2012. It appears that Dr Matta's fees were paid at £200 per hour, although his fees for the teleconference were undercharged because of a mathematical error. The documents show that fee notes from Dr Matta and Dr Loizou were paid on 20 December 2012. It is apparent that Dr Matta and Dr Loizou's fees in this case continued to be charged in 2013 and 2014 at £200 per hour.

The enactment of LASPO

21. The Legal Aid, Sentencing & Punishment of Offenders Act 2012 ("LASPO") was enacted and came into force with effect from 1 April 2013. Among other matters, LASPO made changes to the recoverability of success fees and insurance premiums in return for the introduction of restrictions on the right of a successful defendant to recover its costs by way of Qualified One Way Costs Shifting. However that

protection would not exist if a defendant made a successful Part 36 offer, and the cost of insurance against that risk would not be recoverable. The changes made to the conditional fee agreement ("CFA") funding regime by LASPO were summarised in *Simmons v Castle* [2012] EWCA Civ 1288; [2013] 1 WLR 1239 at paragraphs 7 to 10. The second decision in *Simmons v Castle* amended the guidance given in the first decision in *Simmons v Castle* [2012] EWCA Civ 1039 about the cases for which the 10 per cent uplift would be payable. The reasons for the 10 per cent uplift were explained in *Simmons v Castle*.

The decision to change from legal aid to a pre-LASPO CFA

22. Page 3 of the bill of costs records that on advice about the advantages and disadvantages of proceeding by way of Conditional Fee Agreement ("CFA") rather than legal aid, AB's mother and litigation friend decided to discharge the legal aid certificate and enter into a pre-LASPO CFA. It was noted that AB's mother was not advised that this meant that she would not get the benefit of the 10 per cent uplift on damages following the decision in *Simmons v Castle*.

23. A CFA was made on 19 February 2013. The CFA has not been disclosed, but some details about the CFA are set out in the Bill of Costs. The CFA provided that in the event that a Part 36 offer was made which was rejected but which AB did not beat at trial, then no success fee would be payable. This shows that the CFA was not what has been termed a pre-LASPO "CFA lite" in which the solicitors agree to restrict their recovery in costs to what has been recovered from the other side. This means that there was a possibility that AB would be liable for solicitors' costs at over £345 per hour plus a success fee.

24. In the Bill of Costs at page 10 under the reasons for the solicitors' success fee it was noted that this was a "very difficult case on breach of duty and causation as evidenced by the expert views of Dr Summers, Dr Matta and Dr Loizou in the conference with counsel and experts". After the decision to change funding arrangements had been challenged by the NHS Trust in the Points of Dispute, Replies to the Defendant's Points of Dispute were served. This noted that there were three experts and that a letter of claim had been submitted. It was then said "… it was obvious that the Claimant would need a good deal of further expert evidence, in a climate where the LSC were seriously limiting the field of available experts through the imposition of unattractive hourly rates". It was said that the Legal Services Commission had made it clear that solicitors were not permitted to make good the shortfall between the rate paid by the LSC and the expert's actual hourly rate and that with LASPO "the Claimant would be in a far worse position if, at a later date, refusal by the LSC/LAA to fund expert reports at a reasonable hourly rate or at all, had a material impact on the progression of a claim".

No *Simmons v Castle* advice

25. As the Bill of Costs makes clear no advice was given to AB's litigation friend about the loss of the 10 per cent uplift available following the decisions in *Simmons v Castle*. The estimated value of the uplift in this case was £18,000. Ms Herbertson said in paragraph 21 of her statement that the failure to advise on this was not necessarily important or of reduced importance "given the central reasoning for

changing funding was primarily motivated by the need to ensure we were able to instruct appropriate medical experts necessary to prove and succeed in the claim …".

The issue between the parties on the bill of costs

26. A bill of costs was served on 19 September 2017. It amounted to £1,003,810.76. Success fees comprised £323,477.84 plus VAT making a total of £388,173.40. The ATE premium was £29,256. In the points of dispute the NHS Trust noted that AB had the benefit of legal aid funding and that the change of funding to CFA was unreasonable. AB contended that the change was reasonable because numerous experts would be required in circumstances where the Legal Services Commission was limiting the field of available witnesses through the imposition of unattractive hourly rates. Other concerns about the possible impact of the statutory charge and loss of protection were identified.

Proceedings before the Regional Costs Judge

27. There were late witness statements from Ms Herbertson and YZ, AB's mother and litigation friend, which were adduced at the hearing before the Regional Costs Judge. The Regional Costs Judge was critical of the lateness of the evidence, but in the event it was agreed that the statements should be admitted. There was no cross examination of the witnesses.

28. Ms Herbertson noted that Ms Dolan of the Claimant's solicitors had conduct of the matter, but she was unwell at the time of the hearing before the Regional Costs Judge and was not able to give evidence. Ms Herbertson stated in paragraph 19 of her statement that the Claimant's solicitors had chosen to engage with the legal aid system until it had become untenable.

29. It might be noted there was some discussion about the attendance note recording the advice given to YZ about the reasons for the change of funding. It had not been exhibited to the witness statements but it was produced during the hearing after there was some discussion about its absence. In the event no reliance was placed on the attendance note at the hearing, and although it was in the bundle before me I have not taken account of its contents because it was not adduced in evidence before the Regional Costs Judge and no application has been made to adduce it as evidence before me on appeal.

30. YZ said that she had been contacted by Ms Dolan to give evidence in the costs proceedings. It was apparent that YZ had no real recollection of events and was entirely dependent for that recollection on what she was told. She was asked what about have been the effect of advice about the *Simmons v Castle* uplift and said "looking at the choice now which, put simply, was between giving AB the best chance of success or reducing the chance of success but with a potential chance of increasing his claim by £18,000, I believe that I would have chosen the former …".

The judgment of the Regional Costs Judge

31. After the day's hearing on 18 June 2018, the Regional Costs Judge gave an ex tempore judgment on 19 June 2018 which was transcribed and sent to the parties attached to an order dated 19 November 2018. The Regional Costs Judge noted that

the essential issue was whether the recovery of the additional liabilities was unreasonable on the basis that there were alternative methods of funding the claim which should have been utilised. The Regional Costs Judge noted that the paying party submitted that there was a method of funding in place and, despite this, AB elected to discharge the legal aid certificate and enter into a CFA, incurring substantial additional liabilities.

32. The Regional Costs Judge set out the background to the matter and identified that the issue was whether the decision to switch from public funding to a CFA was a reasonable one. The Regional Costs Judge referred to the two late witness statements, and accepted that there were extremely unfortunate circumstances surrounding the matter. AB's solicitors were experts and specialists in high value serious injury personal injury and clinical negligence actions and he noted the absence through illness of Ms Dolan, who the Regional Costs Judge said was "one of the most experienced clinical negligence practitioners in the north west of England". The Regional Costs judge noted that Ms Herbertson had set out between paragraphs 4 and 13 the explanation for the change of funding. He noted that she was reporting problems with experts from October 2011 because experts would only agree to prepare reports at normal hourly rate which were often well in excess of rates set out in the Legal Aid Board's expert fees and rates schedule. The Regional Costs Judge noted that "she contends that such refusals were becoming more commonplace as time went on, and it was predicted that their hands were going to be tied more frequently in the future and that their discretion in instructing experts of choice would generally be fettered negatively". The Regional Costs Judge noted that the difficulty in which the Claimants found themselves were not assisted by the fact that Dr Matta and Dr Loizou ultimately continued to provide reports in the case without variance on the rates that they were being allowed and claiming under legal aid.

33. The Regional Costs Judge noted that it was for the Claimants to prove their case. He said "ultimately, each case is fact-specific, and the claimant's solicitors have not helped themselves due to the paucity of the evidence that they have produced … This was very complex case, competently conducted by very experienced solicitors."

34. In paragraphs 16 and 17 of the judgment the Regional Costs Judge noted that the reason given was that the Claimant's solicitors "decided they needed the freedom of a CFA and to be free of the shackles of the LSC, in order to properly conduct the litigation. I am just about persuaded that the evidence produced to me by way of witness statements, correspondence, skeleton argument, submission and extracts from the LSC evidence list meets the required criteria … In all the circumstances I am satisfied that it was reasonable to enter the CFA and abandon Legal Aid, and this has been shown. Each case is fact specific.".

35. The Regional Costs Judge addressed the *Simmons v Castle* point referring to Ms Herbertson's witness statement and saying that he had "seen the witness statement of the litigation friend which sets out her understanding of that position" before concluding in paragraph 18 that the decision to change was not negated by this point.

Grounds of appeal and the issues on appeal

36. The grounds of appeal are contained in the Defendant/Appellant's grounds of appeal document. There are four grounds of appeal, some of which are more succinctly set out than others. In essence the grounds were: (a) the Regional Costs Judge was wrong to find that AB had satisfied the burden of proof of showing that the additional liabilities were reasonably incurred, said to be the essence of the appeal; (b) the Regional Costs Judge was wrong to find that "the reason ultimately given to elect for a CFA was … the Claimant's solicitors decided they needed the freedom of a CFA and to be free of the shackles of the LSC in order to properly conduct the litigation"; (c) the Regional Costs Judge ought to have found that the paucity of evidence meant that AB must fail in showing that there was no doubt as to the reasonableness of the change and he had satisfied the burden of proof; and (d) the Regional Costs Judge was wrong to find that the absence of *Simmons v Castle* advice did not negate the decision to charge.

37. Mr Hutton QC submitted that his first ground was an all encompassing ground, and that there was overlap between the grounds of appeal. Mr Mallalieu complained of the difficulty in identifying the points in each ground of appeal. I am very grateful to Mr Hutton and Mr Mallalieu for their helpful written and oral submissions, and by the end of the hearing it was apparent that the real issues between the parties were: (1) whether the Regional Costs Judge had been entitled to find that the additional liabilities were reasonably incurred; and if so: (2) whether the judge had been entitled to find that the failure to provide *Simmons v Castle* advice did not lead to a different result; and (3) whether advising about AB's exposure to increased unrecovered solicitors' costs would have led to a different result.

38. In relation to the first issue the NHS Trust noted that it was common ground that there was a paucity of evidence and submitted that such evidence as had been adduced was all generic and high level which was not sufficient to prove that the decision to change was reasonable in the light of the judgment in *Surrey v Barnet and Chase Farm Hospitals NHS Trust*, and there was no need to change funding to instruct new experts. In relation to the second and third issues the NHS Trust noted the failure to provide *Simmons v Castle* advice or to identify the additional exposure of the Claimant to costs of £345 per hour with a 100 per cent success fee which meant that the decision was unreasonable.

39. In relation to the first issue AB accepted that it was common ground that there was a paucity of evidence, but submitted that the evidence showed that there was a critical dispute between the experts already instructed in this clinical dispute catastrophic brain injury case meaning that the evidence about problems with instructing experts on legal aid was particularly relevant to the decision in this case, which was reasonable and necessary. It was said that there were no grounds for interfering with the judgment of the very experienced Regional Costs Judge. As to the second and third issues AB submitted that this was a case which, at the time of the decision to enter into the CFA the prospects of success were very uncertain and that the requirement to have the freedom with the experts was always going to outweigh both the loss of the *Simmons v Castle* £18,000 which was not secure given that there might be no recovery, and the additional potential liability for solicitors' costs and success fees. It was said that YZ had given unchallenged evidence that the *Simmons v Castle*

point would have made no difference which had been accepted by the Regional Costs Judge and there was no basis for interfering with that finding of fact.

Regional Costs Judge entitled to find that additional liabilities were reasonably incurred (issue 1)

40. The evidence showed that AB's case was a claim for medical negligence which was said to have caused catastrophic brain injury. Most importantly the evidence showed that having instructed and retained three experts on legal aid rates, by obtaining the agreement of one expert to charge an hourly rate lower than his standard rates, there arose a serious dispute between the experts about the causation of the catastrophic brain injury. If the brain injury was caused by fat embolism syndrome, as suggested by Mr Summers but not accepted by Dr Loizou or Dr Matta, it would not be possible to relate any breach of duty to the causation of the catastrophic brain injury. This meant that, in practical terms, it was going to be necessary to instruct at least another orthopaedic surgeon to deal with causation if AB's case was to have any chance of success. As a result of this dispute about causation the prospects of success were assessed at 51 per cent.

41. There was also evidence showing that at this time although the 2011 Order did not apply to this case, it was being used by Legal Services Commission to restrict hourly rates paid to experts in other cases.

42. It is right to record that the evidence showed that, by the time of change of funding, the Claimants' solicitors had not taken steps to identify a substitute expert for Mr Summers, and had not begun the process of obtaining authorisation for the fees for that substitute expert, who turned out to be Professor Moran. Although Professor Moran's fees in 2014 were charged at £220 per hour, there is no evidence of his hourly rate in 2013 or whether he would have been prepared to reduce his hourly rate to £200, which the evidence shows was the highest rate that the Legal Services Commission had paid for an expert since 2006. I also accept that given the dispute between Mr Summers on the one hand, and Dr Matta and Dr Loizou on the other hand, if the Legal Services Commission had refused to fund a further expert the Claimant's solicitors could have appealed the refusal, and if the appeal had not been upheld, they could have sought judicial review of the decision not to provide further funding. However this would have added to the complications in a case where it was apparent that a further expert was required if AB's claim, which it is now common ground was a good one, were to succeed.

43. I also accept that the reasoning of the Regional Costs Judge was very summarily expressed in his judgment when talking about the freedom of a CFA and the need to be free of the shackles of the Legal Services Commission. However I can discern no failure to take into account relevant considerations or the taking into account of irrelevant considerations. Further in my judgment the decision of the Regional Costs Judge was within the ambit of reasonable decisions open to the judge on the facts of the case. This is because the Regional Costs Judge rightly noted that each case was fact specific and he did refer to the witness statements, correspondence and extracts from the Legal Services Commission correspondence. In this case the decision to have "the freedom of the CFA" and to be "free of the shackles of the Legal Services Commission" was reasonable because of the need to instruct another expert in

substitution for the expert already instructed as a result of the dispute between the experts on the issue of causation.

44. In these circumstances the decision of the Regional Costs Judge was not a generic decision which would apply to every catastrophic brain injury case where there is a need for experts, but a reasonable decision made in the light of a serious dispute between experts on causation. The answer to the question which Mr Hutton rightly raised, namely what had changed between December 2010 when legal aid had been granted and February 2013 when the decision was made to change funding, was that a serious dispute had arisen between the three experts on the issue of causation, which issue was critical to the success of the claim. In circumstances where experts had already been instructed and hourly rates had already been an issue for one of them (although he had reduced his rate) and given the problems with other experts being caused by the approach of the Legal Services Commission to hourly rates, a new funding arrangement was reasonably considered necessary to be made.

Regional Costs Judge entitled to find that the failure to provide *Simmons v Castle* advice did not make the decision to change funding unreasonable (issue 2)

45. A failure to give sound advice may affect the reasonableness of the decision to change funding arrangements. In this case the *Simmons v Castle* uplift was not in any sense secure. This was because the prospects of success were assessed at 51 per cent, and unless the issue of causation was resolved there would not be any recovery by AB, let alone a 10 per cent uplift on his general damages. In these circumstances the Regional Costs Judge was entitled to find that the reasonableness of the decision to change funding was not affected by the failure to advise on this point.

46. It is also apparent that the Regional Costs Judge had accepted as a fact the evidence of YZ that advice on this point would not have made any difference to her decision. There is no basis for interfering with this specific finding of fact because it was based on unchallenged evidence for the Regional Costs Judge. This is another reason for not finding that the failure to advice on the *Simmons v Castle* point made no difference.

The failure to advise on the potential additional liabilities for a higher hourly rate and success fee did not make the decision to change funding unreasonable (issue 3)

47. It is apparent from the transcript that this point was raised at the hearing before the Regional Costs Judge, but it was not very strongly pressed. It is apparent that it must have been implicitly rejected by the Regional Costs Judge. In my judgment the Regional Costs Judge was right to reject that the failure to advise on the potential additional liabilities for hourly rate and success fee did not undermine the reasonableness of the change. That is very much for the reasons given in relation to the *Simmons v Castle* point. This is because there was in this case a very real risk that there would be no recovery because of the issue on causation, meaning that the requirement to have the freedom of a CFA to attempt to ensure that there was some recovery for AB became the decisive feature.

Costs of this appeal

48. It was common ground that the costs of the appeal should follow the event, and I was addressed by both parties on the respective schedules which each side had put in at the hearing.

49. I therefore award AB the costs of the appeal. I have the schedule before me but I agree with Mr Hutton's point that the claim for solicitors' costs at £17,665 are excessive given that they were simply responding to a one day costs appeal, even allowing for the higher hourly rate when compared to the Defendant's solicitors. Having regard to the work required I reduce those costs to £10,000. I will allow the other costs as claimed in the sum of £9,280, and VAT where applicable.

50. I will not summarily assess the success fee. This is because it is claimed at 100 per cent and the amount of the success fee is a matter for the Regional Costs Judge. I accept that a success fee is assessed at the time at which a CFA is made, and at the material time the prospects of success were only 51 per cent. However it is apparent that it was contemplated that there would be a split trial on liability and quantum as appears from page 10 of the Bill of Costs under "solicitors success fee". If liability was achieved after a split trial there would not be a continuing justification for an uplift of 100 per cent because recovery of costs would be guaranteed in this case regardless of whether there was a successful Part 36 offer from the Defendant, and if liability was not achieved there would be no continuing costs. In these circumstances the justification for a continuing 100 per cent success fee after the hearing on liability was concluded is not immediately apparent, and it is apparent that an issue about whether the success fee should have been staged will arise. I will therefore refer the issue of the success fee on the base costs to the Regional Costs Judge who will be assessing the quantum of the additional liabilities, including the success fee, in any event.

Conclusion

51. For the detailed reasons set out above I dismiss the appeal and award AB the costs of the appeal. I have summarily assessed the base costs of the appeal, but I have referred the issue of the success fee on those costs to the Regional Costs Judge.