Case No: AGS1807059

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Royal Courts of Justice
London, WC2A 2LL

Date: 11th April 2019

Before :

MASTER GORDON-SAKER

- -

Between :

YZ (a protected party proceeding by way of her litigation friend AB)	**Claimant**
- and -	
GLOUCESTERSHIRE HOSPITALS NHS FOUNDATION TRUST	**Defendant**

- -
- -

Mr Robin Dunne (instructed by **Iacopi Palmer Solicitors LLP**) for the **Claimant**
Mr Eric Clegg (of **Acumension Ltd**) for the **Defendant**

Hearing date: 7th February 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.

.....

MASTER GORDON-SAKER

Master Gordon-Saker :

1. Pursuant to an order dated 6th December 2016 the Claimant is entitled to the costs of her claim in the Queen's Bench Division for damages for clinical negligence. On the detailed assessment of those costs the parties have been able to agree the amount of base costs and the only issue that I have been asked to decide is the reasonableness of the Claimant's decision to move from legal aid funding to a conditional fee agreement and after the event insurance. Subject to that, the amounts of the success fees have been agreed. It has also been agreed that the issue of the reasonableness of the after the event insurance premium should be deferred pending a decision of Master Nagalingam in other proceedings.

The background

2. In March 2007 the Claimant, who was born in 1958, suffered very heavy bleeding which was caused by fibroids. She collapsed on several occasions, requiring hospital treatment. On 23rd September 2008 the Claimant suffered a stroke which resulted in impaired mobility, the loss of use of her left arm, loss of field vision and cognitive impairment.

3. In August 2011 the Claimant's family instructed Iacopi Palmer, a firm of solicitors in Gloucester, to investigate a potential claim against the Defendant health authority. The argument was that the Claimant should have been referred to a gynaecologist in June 2008 and that would have led to a hysterectomy being performed in about August 2008.

4. The solicitors gave initial advice under the Legal Service Commission's Legal Help Scheme. An application for legal aid was made and on 20th October 2011 a claim form was issued in proceedings against the Defendant. No litigation friend had been appointed, as it would appear that it was not then thought that the Claimant lacked capacity.

5. A legal aid certificate for investigative help was issued on 7th November 2011 with a monthly contribution by the Claimant of £24.36.

6. Experts reports were obtained from Mr Fox, a consultant obstetrician and gynaecologist, and from Professor Brown, an expert in stroke medicine, and a conference was held with leading counsel and the experts on 24th July 2012. Time for service of the Defence was extended by agreement.

7. On 11th February 2013 a conditional fee agreement was entered into between the solicitors and the Claimant, by her litigation friend, the Claimant's stepmother. That agreement provided for a success fee of 100 per cent. On the same day an after the event insurance policy was obtained from ARAG plc for a premium of £50,000 plus insurance premium tax, which would be reduced to £38,000 plus insurance premium tax should the claim settle more than 60 days before trial. Thereafter conditional fee agreements were entered into with leading and junior counsel.

8. The Defendant served a defence denying liability and directions were given for a split trial. Disclosure took place and experts' reports on liability were exchanged. The Defendant requested an extension of time for serving witness statements but, before the extended deadline, admitted liability. Judgment for damages to be assessed was entered on 1st February 2014 and the Claimant's solicitors commenced detailed assessment proceedings in respect of the costs of liability. The total of the liability bill was £214,106. I understand that a figure was agreed in relation to everything apart from additional liabilities.

9. Work continued in relation to quantum. A joint settlement meeting took place on 13th September 2016, following which the Defendant made a part 36 offer which was accepted by the Claimant on 4th October 2016, subject to the approval of the court which was given on 1st December 2016. Under the terms of the order, the Defendant would pay damages of £820,000 and annual periodical payments of £23,000, together with the Claimant's costs.

10. The Claimant's bill in respect of quantum costs is, in total, £631,054 which includes the additional liabilities from the liability bill. The total of the additional liabilities, the sum which is potentially in issue depending on the outcome of this judgment, is £292,298 plus value added tax.

The evidence as to the change in funding

11. The Defendant has pressed repeatedly for disclosure by the Claimant of the documents relevant to the decision to change funding, including correspondence with the Legal Services Commission. Those requests have been declined and the Claimant has elected instead to rely on two witness statements of Mrs Elizabeth Oaten, the fee earner who had conduct of the matter, dated 19th April 2018 and 5th February 2019, the latter being 2 days before the hearing.

12. In the first of those statements (the fourth in the proceedings) Mrs Oaten explained that by January 2013 the Claimant had exhausted the legal aid funding available for stage 2 of the proceedings (issue to exchange of experts' reports). Further the Legal Services Commission would pay experts' fees only at the rates prescribed by the regulations (then set out in schedule 6 of the Community Legal Service (Funding) Order 2007[1]).

13. In the second of those statements (the fifth in the proceedings) Mrs Oaten explained that her firm had audited all of its legal aid cases to ensure that it was not criticised "for failing to convert cases to a CFA before the 1/4/13 where there was a risk that LSC/LAA funding would not enable the case to be pursued to trial". In relation to this case she reported to her partners on 4th December 2012:

> The LSC won't authorise any quantum evidence and are being difficult re experts hourly rates. I would like to convert it to a

[1] Although there is power to allow higher rates: art 5(2)(e)(ii).

> CFA by end January well before the 1st April deadline and I have given Cl an estimate of future expert fees.

14. Although Mrs Oaten pointed out that of the 12 cases referred to in that email she had recommended a change to conditional fee agreements in only 3, in virtually all of them she had suggested that decision should be reviewed.

15. Mrs Oaten exhibited a number of emails passing between her and Mrs Parcell of the Legal Services Commission. Most of them relate to other cases in which Mrs Oaten was having problems in obtaining the payment of experts' fees. On 6th November 2012 Mrs Oaten asked for the fees of Professor Brown and Professor Kischka to be approved and paid as they had been rejected because no breakdowns had been provided. Mrs Parcell replied that the Commission required breakdowns.

16. In respect of attendances on the Claimant and the litigation friend Mrs Oaten exhibited 2 attendance notes and an email. At a meeting on 18th September 2012 the Claimant reported that she was still paying monthly contributions which were being continually reassessed. Mrs Oaten advised that she would consider moving to a conditional fee agreement "if the LSC restrict her choice of experts by giving only limited funding".

17. On 14th January 2013 Mrs Oaten emailed the litigation friend:

> Re funding of the claim as previously mentioned I am encountering considerable difficulties with the LSC re expert rates on this one and their refusal to authorise a preliminary care expert, we have also reached between us and the experts the limit of the LSC authority which is meant to take us through to stage 2 i.e. mutual exchange. The Trust defence is due 11 April 2013. We therefore have a lot more work to do before we can return to the LSC for stage 3 funding and the stroke expert needs to do more work on his report before it is in a format suitable for exchange. Andrew Post [leading counsel] is happy to advise on a CFA and so am I, if you are happy to convert away from public funding we need to make arrangements before April 2013 (when the rules change re recoverability of ATE insurance premiums and success fees from the Defendant) for the same to be converted – I don't see that we have much option given the constraints imposed by the LSC which are proving unworkable in practice. Perhaps once you have had a chance to mull this over we can chat the issues through on the telephone.

18. On 15th January 2013 Mrs Oaten had a telephone conversation with the litigation friend. The attendance note records that Mrs Oaten explained the forthcoming changes to the recoverability of additional liabilities and the difficulties caused by the Legal Services Commission's refusal to fund quantum investigations or pay more than prescribed hourly rates.

19. In the course of the hearing some further documents were disclosed by the Claimant. In his letter to Mrs Oaten dated 23rd July 2012 Professor Brown explained that his report was only a preliminary report on the medical records because of the £1,000 fee limit that had been imposed. He would be happy to provide a final report for a further fee. On 30th July 2012 Mrs Oaten asked him for a breakdown of his fee "at no greater than an hourly rate of £153 per hour outside of London and £90 per hour inside London for the purposes of the Legal Services Commission". On 1st August 2012 Professor Brown replied:

> I regret that I do not do reports on this basis. You received a copy of my Terms and Conditions, as below, for providing reports before instructing me, which provide details of my hourly rate. In your instruction letter of 2nd February 2012, you only told me that the LSC had imposed a £1,000 maximum for my report, which I observed.

20. On 10th December 2012 Professor Brown estimated that his fee to finalise his report would be £1,200 plus value added tax. On 20th December 2012 Mrs Oaten wrote to him that she would make an application to the Legal Services Commission for authority to incur that fee.

21. In paragraph 15 of her fifth witness statement Mrs Oaten explained that the Claimant was dependent on state benefits and was struggling to pay her monthly contributions under the legal aid certificate which had increased in June 2012 to £29.66.

22. In paragraph 18 she explained that at the time that the decision was made to transfer from legal aid funding, over £19,000 had been incurred although the costs limitation on the certificate was only £15,000 and a considerable amount of work needed to be done before the next funding stage could be reached. Further, in the absence of a breakdown, they had not been able to obtain payment of Professor Brown's fee, nor the fee of Professor Kischka, a consultant neurologist, who had charged in excess of the prescribed hourly rate.

23. As to the *Simmons v Castle* uplift on general damages, Mrs Oaten stated, at paragraph 28:

> The only potential benefit of continuing on LSC/LAA funding was the 10% uplift on general damages which would only equate to circa £17,500 but the availability of the 10% was not confirmed until 2016 in the case of Summers v Bundy (Court of Appeal). If the case could not be proved the Claimant would receive 10% of nothing. My main focus was getting the Claimant's case home on breach and causation the latter being very problematic and this would impact significantly the value of the claim.

24. It is not apparently in issue that there is no record of any advice given to the Claimant or the litigation friend that in entering into a conditional fee agreement on or before 31st March 2013 the Claimant would forego the 10 per

cent uplift in general damages. The Claimant's case is that Mrs Oaten is not able to say for certain either way whether that advice was given.

Surrey v Barnet & Chase Farm Hospitals NHS Trust

25. In *Surrey*[2] the Court of Appeal explained that:

> … in examining whether costs were reasonably incurred the court is entitled to (and, in practical terms, will often have to) examine the reasons why the litigant incurred the costs that he did.[3]

26. Where a solicitor has omitted to explain to the client that he or she will lose the *Simmons v Castle* uplift as a result of moving to a conditional fee agreement, the receiving party bears the burden of showing that the decision would have been the same. Any doubt has to be resolved in favour of the paying party.[4]

27. I was referred also to three first instance decisions: *Ramos v Oxford University NHS Trust* [2016] EWHC B4 (Costs), *EPX v MK University Hospitals NHS Trust* (SCCO, 21 September 2018), and *XX v ZZ* (Middlesbrough District Registry, 27 June 2016). While I have read them, it seems to me that they do turn on their own specific facts. For that same reason I had earlier refused the Claimant's application to adjourn the hearing of this case pending judgment in an appeal from another first instance decision: *XDE v North Middlesex University Hospitals NHS Trust.*

The parties' submissions

28. On behalf of the Defendant, Mr Clegg complained of the lack of disclosure of the relevant legal aid documents by the Claimant, the piecemeal and inconsistent way in which the Claimant's case on this point had been advanced and the late service of Mrs Oaten's fifth statement. He pointed to the lack of any proper record of the advice that was given to the litigation friend as to the advantages and disadvantages of legal aid funding as opposed to a conditional fee agreement and the apparent lack of advice as to the certainty of losing the *Simmons v Castle* uplift.

29. Doing the best he could on what had been disclosed, Mr Clegg argued that the litigation friend's decision to enter into a conditional fee agreement was based on advice that funding of only £15,000 had been authorised to mutual exchange, that the solicitors had already incurred over £19,000 and that the litigation friend therefore had no option other than to switch funding. That appeared now not to be correct.

---

[2] [2018] EWCA Civ 451
[3] para 17
[4] para 68

30. On behalf of the Claimant, Mr Dunne submitted that the decision to move to a conditional fee agreement was reasonable given that legal aid funding had been exhausted and, given the Defendant's denial of liability, that there remained a considerable amount of work to do. There was no practical way of getting Professor Brown's report finalised if legal aid funding continued. He would not provide a breakdown of his fees and the Legal Services Commission would not pay him until he did. Further the contributions which the Claimant was required to pay under the legal aid certificate were becoming a concern to her. Despite the lack of any record of advice as to the loss of the *Simmons v Castle* uplift, the court should infer that, on the balance of probabilities, appropriate advice had been given.

31. Mr Dunne went further and argued that even if no advice was given about *Simmons v Castle*, that would have made no difference to the decision because this was a case where leading counsel had put the prospects of success at only 55 per cent, so there was only a barely better than 50:50 chance of recovering the uplift.

Has the Claimant discharged the burden in establishing that this was a reasonable decision?

32. It is clear that in answering that question the court must consider the context of the particular circumstances of the particular litigants concerned[5] and, in this case, that entails examining the reasons why the litigation friend made the choice that she did. Where those reasons are contained in the advice that was given, that also entails looking at the advice.[6]

33. At paragraphs 27 and 29 of her fifth statement Mrs Oaten set out the disadvantages of legal aid funding and the advantages of moving to a conditional fee agreement.

34. At paragraph 28 she identified the only advantage of legal aid funding as that the Claimant would not lose the 10 per cent uplift on general damages, which uplift she estimated to be worth about £17,500. She went on to say that the availability of that uplift was not confirmed until the Court of Appeal's decision in *Summers v Bundy* in 2016.

35. In *Summers* the issue was whether a legally aided party was entitled to a *Simmons v Castle* uplift. The judge at first instance decided that he had a discretion and refused it. In granting permission to appeal Jackson LJ concluded that the appeal was bound to succeed and directed that the appellant need not attend the appeal hearing (the respondent not having taken any part in the proceedings at any stage).

36. It is perhaps surprising that Mrs Oaten has raised this. The decision in this case to move to a conditional fee agreement was made in February 2013. The first instance decision in *Summers* was made in July 2015 and the appeal was

[5] *Surrey* para 18.
[6] *Surrey* para 32.

heard in February 2016. If there was any uncertainty generated by the first instance decision, that could not have been a relevant reason at the time of the decision to change funding. Further, if there were uncertainty about this, one would expect to see a detailed record of the advice given to the client.

37. The Claimant's difficulty is that, in the absence of a detailed record of the advice given, much of what is now said on her behalf appears to be post-rationalisation.

38. The advantages and disadvantages identified by Mrs Oaten are:

    i) The risk that legal aid funding might be withdrawn if the prospects of success were not improved.

    ii) The difficulty in finding supportive experts at the prescribed legal aid rates.

    iii) The Claimant's liability under the statutory charge for costs not recovered from the Defendant.

    iv) The Claimant's difficulty in making the monthly contributions under her legal aid certificate.

39. There is simply no evidence that there was a specific risk in this case that legal aid funding would be withdrawn. Leading counsel's risk assessment dated 11th January 2013 for the purposes of his conditional fee agreement, which has been disclosed, put the prospects of success at 55 per cent.

40. Clearly there was a difficulty in funding the experts. There was no difficulty with Mr Fox, the Consultant Obstetrician and Gynaecologist, who was willing to charge at the prescribed rate of £135 and provide breakdowns of the time spent. Even after the move to a conditional fee agreement, he continued to charge at similar rates (£130-£140).

41. The difficulties lay with Professor Brown and Professor Kischka. The prescribed rates for neurologists under the 2007 Funding Order were £90 in London and £153 outside London. Professor Brown is based in London and, from the fee notes served with the liability bill, was charging £300 per hour. Professor Kischka was based in Oxford and, from the fee note served with the quantum bill, was charging £200 per hour.

42. No evidence has been produced of any application to the Legal Services Commission under article 5(2)(e)(ii) of the 2007 Funding Order to allow increased rates on the basis of the seniority of the expert required (see paragraph 2 of section 2 of schedule 6 of the 2007 Funding Order).

43. Instead Mrs Oaten's approach seems to have been simply to press the Legal Services Commission to approve the experts' fees despite the fact that they appeared to be charging in excess of the prescribed rates. It is difficult to understand why, before instructing these experts, Mrs Oaten did not seek prior authority under article 5(2)(e)(ii) for the rates that they were seeking. It is also

difficult to see why, having not done that, Mrs Oaten did not provide the explanation suggested by Mrs Parcell in her email dated 14th January 2013:

> … obviously the more evidence you can provide e.g quotes and an explanation as to why this expert needs to be instructed then the more luck you may have.

44. The result is that I cannot be satisfied that the difficulty in obtaining authority from the Legal Services Commission for the payment of these two experts is not something that could have been resolved had Mrs Oaten approached it in a different way.

45. Prescribed rates for experts were introduced by the Community Legal Service (Funding) (Amendment No.2) Order 2011, which amended the 2007 Funding Order. Article 13 of the Amendment Order provided that it did not apply where the application for the certificate was signed before 3rd October 2011 and the application was received by the Commission before the expiry of 7 days after that date. The chronology of the legal aid applications in this case emerged only during the course of the hearing and the parties did not address this point in detail.

46. I have proceeded therefore on the footing (as apparently did the Claimant's solicitors) that prescribed rates did apply in this case. If they did not apply, my conclusion that I cannot be satisfied that the difficulty in obtaining authority to pay the experts could not have been resolved would stand but I would get there by a more direct route. There would have been no need for an application under article 5(2)(e)(ii) of the 2007 Funding Order to allow increased rates.

47. As to funding generally the evidence was somewhat confusing. During the course of the hearing the legal aid certificate was handed up to me and I explained the limitations on it. On the face of the certificate, there was an initial costs limitation of £7,500 which was increased on 5th July 2012 to £15,000.

48. However in order to understand the legal aid position properly I have had to read through the Claimant's solicitors' files and to look at documents which are privileged and which have not been disclosed. Having done that I am not satisfied that there was a difficulty in pursuing the claim with legal aid funding. The limit of £15,000 was intended to cover the conclusion of stage 1 and the service of proceedings. The Claimant's solicitors made an application for stage 2 funding on 22nd October 2012 (as referred to in Mr Dunne's skeleton argument). The Commission would not authorise the instruction of a care expert, as normally quantum reports would not be authorised until an admission of liability or offer of settlement had been made. However there is nothing to suggest that the request for stage 2 funding was chased up.

49. I cannot therefore accept Mrs Oaten's assertion in her fourth witness statement that stage 2 funding had been exhausted. Rather it seems to me that stage 1 funding had been exhausted and that stage 2 funding had been requested but not approved at the time that the decision was made to move to a conditional

fee agreement. It seems to me that the fact that a care expert could not be instructed at this stage was not a disadvantage to the Claimant. There was no realistic prospect at this time that the Defendant would make a part 36 offer on quantum which would have costs consequences.

50. As to the statutory charge the Claimant would of course be liable for costs charged by her solicitors and not recovered from the opponent. In practice, in my experience, solicitors acting for children and protected parties generally waive their entitlement to costs which would otherwise fall to be deducted from their damages. In paragraph 29(e) of her fifth witness statement Mrs Oaten explained that, as a matter of policy, her firm did not recover from their clients costs due under pre-April 2013 conditional fee agreements which were not recovered from the opponent. It seems to me that the potential liability of the Claimant under the statutory charge would be no different from the potential liability under a conditional fee agreement. The statutory charge is unlikely to have been a particular disadvantage to this claimant.

51. In moving to a conditional fee agreement the Claimant would avoid the need to make monthly contributions. These had increased to £29.66 per month (£355.92 pa).

52. There is however no real evidence that this was a factor of significant importance to the Claimant. In the attendance note dated 18th September 2012, it is recorded that the Claimant commented that she was still making contributions and that the Commission was continually reassessing the amount she paid. In the attendance note dated 15th January 2013 it is recorded that Mrs Oaten told the litigation friend that the Claimant would not have to pay further contributions once legal aid was withdrawn.

53. It seems to me that the disadvantages of moving from legal aid to a conditional fee agreement were the loss of opportunity of recovering the *Simmons v Castle* uplift put, on the Claimant's case, as a 55 per cent chance of recovering £17,500, the loss of costs protection, and the contractual liabilities which the litigation friend assumed under the conditional fee agreement.

54. Although they are not irrelevant, I would not place too much emphasis on the last two. Provided that adequate after the event insurance was purchased, the loss of costs protection under s.26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, would not be a significant factor. The conditional fee agreement has not been disclosed. However, as is implicit from sub-paragraph 29(e) of Mrs Oaten's fifth witness statement, it was not a CFA-lite and the Claimant, through her litigation friend, would be liable for all of her solicitors' charges (including a liability for basic charges if a part 36 offer was not beaten), whether or not they were recovered from the Defendant. Again, given Mrs Oaten's evidence that in practice her firm did not seek to recover shortfalls from their clients, I would not treat this as a particularly significant factor. Whether counsel would have taken a different view in relation to any shortfall on his fees is unknown.

55. However all of these factors, varying as they do in degrees of significance, should have been explained carefully to the litigation friend. I would expect to

see a detailed note of the advice that was given. I would also expect to see that advice repeated in a letter, so that the litigation friend would have an opportunity to consider it properly. Changing from legal aid to a conditional fee agreement was a significant step which would create a new relationship between the litigation friend and the solicitors and create contractual obligations on the part of the litigation friend, whatever the risk that those obligations would be enforced in practice.

56. Based on the evidence that has been produced I cannot conclude that the litigation friend was advised properly as to the change in funding. The meeting on 18th September 2012 was nearly 5 months before the conditional fee agreement was entered into. The change in funding was then only a possibility. An explanation of "the advantages and disadvantages of a CFA", even if comprehensive, is unlikely to be recalled 5 months later. The telephone conversation with the litigation friend on 15th January 2013 was recorded as 30 minutes long. I have difficulty in accepting that detailed advice could have been given on everything that would have been required in that time. The result of that conversation was that the litigation friend was persuaded that "we do not have any [other] option". But, it seems to me, that was not correct.

57. The telling point is that there is no record at all of the litigation friend being advised that the Claimant would lose the chance of recovering the 10 per cent uplift in general damages or of any advantages that may outweigh that disadvantage. I cannot be satisfied that had the litigation friend been advised properly, not only as to the *Simmons v Castle* uplift but also as to the true legal aid position, that her decision to relinquish legal aid and to enter into a conditional fee agreement and purchase an after the event insurance policy would have been the same.

58. On the evidence that has been produced I cannot be satisfied that the litigation friend's decision to change from legal aid funding to a conditional fee agreement and thereby to incur the additional liabilities now claimed was a reasonable one or was to the advantage of the Claimant.