Neutral Citation Number: [2018] EWHC 3570 (QB)

Case No: 3NE90061

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
On appeal from the Newcastle District Registry

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2018

Before :

MR JUSTICE MARTIN SPENCER
and MASTER LEONARD (Sitting as an Assessor)

- -

Between :

NJL	**Claimant/ Respondent**
- and -	
PTE	**Defendant/ Appellant**

- -
- -

Mr Andrew Nicol (instructed by **Irwin Mitchell Solicitors**) for the **Claimant/Respondent**
Mr Andrew Roy (instructed by **Plexus Law**) for the **Defendant/Appellant**

Hearing dates: 27 November 2018

- -

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.

.....

MR JUSTICE MARTIN SPENCER

MR JUSTICE MARTIN SPENCER:

Introduction and Background

1. By this appeal, the Defendant appeals against the order of District Judge Searl in the Newcastle upon Tyne District Registry of the High Court dated 23 May 2017 whereby she ordered that the success fee of the Claimant's solicitor and of counsel be assessed at 65%.

2. The order of District Judge Searl arises out of a claim for personal injuries made by the Claimant in respect of a road traffic accident which occurred on 14 May 2010. The Claimant was born on 29 September 1989 and was aged 20 at the date of the accident. The Claimant sustained severe injuries including a serious brain injury in consequence of which he lacks capacity and is a protected party.

3. Irwin Mitchell Solicitors were instructed on behalf of the Claimant and they entered into the first of two conditional fee agreements ("CFA1") on 19 July 2010. Following a change of litigation friend, a further CFA ("CFA 2") was entered into on 20 August 2012. Leading Counsel entered into a CFA on 8 October 2012 (CFA 3). It is agreed that the decision in this case should encompass both CFA2 and CFA3 which should provide for the same success fee. References hereafter are solely to CFA2.

4. The Defendant was convicted of dangerous driving arising out of the accident on 6 June 2011. Liability was formally admitted in December 2011. Thus, by the time CFA 2 was entered into, liability was no longer in dispute.

The Proceedings

5. Proceedings were issued on 27 March 2013 and initially the Defendant pleaded contributory negligence on the basis that the claimant had failed to wear a seat belt. However, the Claimant applied for this pleading to be struck out and this caused the Defendant to amend his defence so as to withdraw the allegation of contributory negligence, indicating that this had been pleaded in error. In reality, full liability was never at risk and this was known to the Claimant's solicitors at the time that the CFA 2 was entered into.

6. The parties proceeded towards quantification of the claim. Although it is not in the appeal bundle, it is understood that the schedule of loss served on behalf of the Claimant sought damages capitalized at about £4,000,000. The Defendant served a counter claim conceding damages in the sum of £791,222.67.

7. According to Miss Kate Nicklin, a solicitor employed by Irwin Mitchell and who provided a witness statement dated 9 March 2016, the impact of the Claimant's head injury on his life and on the assessment of damages was very much in dispute, with the Defendant relying upon the fact that the Claimant had been born prematurely (at 32 weeks' gestation), he had been subjected to violence and sexual abuse by his parents when a child, he had sustained four unrelated head injuries prior to the accident including one which had involved retrograde amnesia, there was a family history of epilepsy, the Claimant exhibited learning difficulties and behavioural problems at school and he was a drug user who had been in trouble with the police. Miss Nicklin also stated that there was a gulf between the medical experts instructed by the parties,

with the Defendant's experts suggesting in their reports that the brain injury, though indisputably severe, may have made little or no difference to the Claimant's life trajectory. Miss Nicklin said:

> "Such evidence served on behalf of the Defendant posed a significant litigation risk. Significant and real risks regarding quantum, causation and proportionality were of great concern throughout the Claimant's case and up to trial".

8. On 17 August 2015, the court gave directions, listing the quantum trial to start on 18 April 2016 with an estimate of five days. The schedule and counter-schedule with supporting evidence were served towards the end of 2015. A settlement meeting took place on 10 December 2015, but negotiations failed to achieve settlement at that stage. The Defendant was left with the Claimant's "final offer" which was confirmed in writing as follows:

> "Our CFA funding arrangement provides for a two-stage success fee and therefore if the case is not settled 3 months before trial the CFA success fee will increase to 100%; the trial date is 18 April 2016 so this increase in the success fee will take place on 17 January 2016. The ATE insurance premium is staged and will increase if the case is not settled within 45 days or less to trial. This increase will take effect on 3 March 2016."

Settlement was in fact reached between the parties when the Defendant made a further offer to settle the case on 28 January 2016 (within the period of three months before the trial date) which was accepted by the Claimant on 29 January 2016. The settlement was for a lump sum payment of £1,150,000 (gross of interim payments and CRU recruitment) together with periodical payments of £34,000 per annum for life. Capitalised, the settlement was worth approximately £2m. This settlement was approved by HHJ Freedman on 4 March 2016.

The CFA

9. As stated, CFA2 was entered into on 20 August 2012 when liability had been admitted. This provided that a 25% success fee would be payable if the claim settled more than three months before trial and the success fee would rise to 100% thereafter. CFA3 for leading counsel also provided for a 25% success fee if the claims settled more than three months before trial, rising to 75% and then 100% at trial. CFA2 is described as a CFA "lite" meaning that any costs not recovered from the opponent were waived.

The Hearing before DJ Searl

10. The costs assessment came before District Judge Searl on 23 May 2017 when it was conceded on behalf of the Claimant that the 100% success fee where the case settled in the three-months period before trial could not be sustained or justified. In a skeleton argument, and in oral argument, counsel for the Claimant argued that a 67% success fee should be allowed equating to a 60% chance of recovering costs under the "ready reckoner". For the Defendant it was argued that the Claimant, having the burden of proof, was unable to justify a success fee above 20% and that the success fee should therefore be fixed at 12.5% pursuant to statute (see paragraph 14 below).

11. The "ready reckoner" is a table which assists in calculating the appropriate success fee to reflect a particular chance of success. For example, if all cases had a 50% chance of success, exactly half would be won and half would be lost. The success fee therefore needs to be 100% in those cases so that the winning cases pay for the losing cases. If, however, the chance of success in all cases were 75%, the solicitor would win 3 out of every 4 cases, and the success fee in the 3 cases that are won needs to pay for the costs of the one that is lost. The success fee for cases with a 75% chance of success is therefore ⅓: the one-third recovered 3 times in the 3 cases that are won covers the 100% of costs which are lost in the fourth case. Using the same principle, the Ready Reckoner gives the success fee for a range of success chances, but the success fee can also be easily calculated by taking the chance of success, and dividing 100% by the number of the winning cases to ascertain how much extra needs to be recovered in each of them to pay for the single lost case. Thus, with, for example, a 90% chance of success, 1 in 10 cases will be lost and 9 will be won. 100 / 9 = 11.11 which is therefore the required success fee in the 9 won cases to pay for the single lost case.

12. By her order, District Judge Searl rejected the claim for 67% success fee, but awarded a success fee of 65%. She was referred to the leading authority of *C v W* [2008] EWCA Civ 1459. It was submitted on behalf of the Claimant that *C v W* should be approached on the basis that:

> "It is not a template for all such matters, that there is scope for cases falling outside the usual and further that this is such a case."

She accepted the submissions stating:

> "I am satisfied that there is scope within the leading authority for matters beyond the usual range of claims conducted by experienced litigators to be considered attracting a success fee outside the fixed success fee regime of CPR 45. I am satisfied on the facts of the matter as I have detailed [that] this might be such a case. I come to that point further in my judgment, but on the first point, I am satisfied that on the basis of *C v W* there is scope for determining extraordinary and unusual or extremely complex matters beyond the fixed success fee of CPR45."

The District Judge's decision and reasons are to be found in paragraph 30 of her judgment where she stated:

> "I am not satisfied that either the 100% success fee originally claimed … is justified. I am satisfied that distinction can be drawn on the facts of this matter between it and the authority cited to me, to which I had regard in their entirety, such that 100% success fee cannot be justified. Concessions made by the Receiving Party that a 67% success fee should be allowed. I am not satisfied that is an appropriate success fee, having regard to the features of this case, both in respect of the weighing of liability against causation and the impact upon Part 36 offers. I am satisfied that the appropriate success fee to allow and I do allow is one of 65%."

The Defendant appeals against this order.

The law

13. Given the date at which these CFAs were entered into, they were pre-LASPO agreements, ie entered into before 1 April 2013 and therefore allowed for a success fee up to a maximum of 100%. The law and the rules have since changed as from 1 April 2013 for agreements entered into after that date.

14. The relevant rules from the CPR as at the time the CFAs were entered into were as follows:

> "45.18 **Application for an alternative percentage increase where the fixed increase is 12.5%**
>
> (1) This rule applies where the percentage increase to be allowed –
>
> a. In relation to solicitors' fees under the provision of rule 45.16; or
>
> b. In relation to counsel fees under rule 45.17,
>
> is 12.5%.
>
> (2) A party may apply for a percentage increase greater or less than that amount if –
>
> a. The parties agree damages of an amount greater than £500,000 …
>
> (3) In paragraph (2), a reference to a lump sum of damages includes a reference to periodical payments of equivalent value.
>
> (4) If the court is satisfied that the circumstances set out in paragraph (2) apply it must –
>
> a. Assess the percentage increase; or
>
> b. Make an order for the percentage increase to be assessed.
>
> 45.19 **Assessment of the alternative percentage increase**
>
> 1) This rule applies where the percentage increase of fees is assessed under rule 45.18 (4).
>
> 2) If the percentage increase is assessed as greater than 20% or less than 7.5%, the percentage increase to be allowed shall be that assessed by the court.
>
> 3) If the percentage increase is assessed at no greater than 20% and no less than 7.5% -
>
> a. The percentage increase to be allowed shall be 12.5%; and

> b. The costs of the application and assessment shall be paid by the applicant."

***C v W* [2008] EWCA Civ 1459**

15. It is accepted by both parties that the leading authority for the assessment of the success fee pursuant to CPR 45.18(4) in circumstances such as the present, where liability had been admitted at the time that the CFA was entered into, is *C v W* [2008] EWCA Civ 1459. In that case, the Claimant had suffered serious personal injuries in a road traffic accident for which the Defendant's insurers admitted liability on 19 February 2001. On 18 May 2001 the Claimant entered into a conditional fee agreement with new solicitors including an uplift of 98% of which 15% represented the cost of funding, and a claim issued in July 2003 was settled for £680,000 plus base costs of £92,500 plus VAT. On detailed assessment, the District Judge allowed an uplift of 70%, which was reduced on appeal to 50%.

16. The Defendant appealed further, submitting that the appropriate uplift was 20%. Allowing the appeal, the Court of Appeal held that, as was accepted, a success fee had to reflect a reasonable and rational assessment of the risks facing the solicitors at the time when the agreement was entered into, hindsight not being available to the Costs Judge on assessment. In the absence of any evidence that the accident had been caused by anything other than the negligence of the defendant, it was difficult to see how the claimant could have failed to recover substantial damages. It followed that the chance of success was very high and the risk of losing was very low with a correspondingly low success fee that should not be increased because of the size of the claim itself. The Court of Appeal recognised that the real difficulty was the assessment of the risk that the solicitors might lose the right to recover part of their fees as a result of the claimant's failure to beat a Part 36 offer which, on the advice of the solicitors, was rejected. The chance that the solicitors would advise the claimant to reject an offer which they subsequently failed to beat at trial was difficult to assess but it was unlikely that highly experienced solicitors practising in the field would differ widely in their assessment of the bracket into which an award of damages would prevail. The court accordingly decided that the success fee allowed by the judge was too high and substituted a success fee of 20%.

17. The main judgment of the court was given by Moore-Bick LJ. At paragraph 12 he referred to the "ready reckoner" table used to calculate the basic success fee. He then went on to say:

> "17. The real difficulty in this case lay in clause 5 and in assessing the risk that the solicitors might lose the right to recover part of their fees as a result of Mrs C's failure to beat a Part 36 offer which she had rejected on their advice. Given that the CFA was entered into before proceedings had been commenced, that called for an analysis of several contingencies, each of which was difficult to assess individually, and which together made the task almost impossible. They included the chance that a Part 36 offer would be made, the chance that it would be made at an earlier or later stage in the proceedings, the chance that they would advise Mrs C to reject it, the chance that she would accept their advice and the chance that, having

rejected the offer, she would fail to beat it at trial. Some of these might be assessed with a degree of confidence: for example, one could confidently predict in the case of this kind that a Part 36 offer would be made at some stage. One might also predict, though perhaps not with quite the same degree of confidence, that Mrs C would reject such an offer if her solicitors advised her to do so. The timing of an offer was more difficult to predict, but was potentially of some importance because any fees earned by the solicitors after its rejection would be at risk; fees earned up to that point would be secured. The chance that Taylor Vinters would advise Mrs C to reject an offer which she subsequently failed to beat trial would be difficult to assess, but one would not expect highly experienced solicitors practising in this field to differ very widely in their assessment of the bracket in which an award would be likely to fall, provided they had access to the same information. … the task facing Taylor Vinters in May 2001 was to assess, as best as they could, the risk of losing part of their fees for reasons of that kind, and then expressing that as a percentage of the total fees likely to be earned to trial. Only by doing so could they calculate a success fee expressed by a percentage uplift on the whole of their profit costs. However, the explanation form shows that they did not attempt to grapple with that task and indeed I doubt whether they had the means of doing so in any reliable way.

18 … however, when it comes to the detailed assessment of costs the receiving party must normally be able to justify as reasonable any success fee he seeks to recover from the paying party. In my view the Cost Judge cannot refuse to award an success fee simply on the grounds that the difficulty of assessing the risks made it unreasonable to enter into a CFA at all; but if the receiving party cannot show that the success fee has been calculated in a way which reasonably reflects the risks that have been assumed, he will not be able to satisfy the Cost Judge that it is recoverable. Having said that, I should make it clear that there is nothing unreasonable in my view in entering into a simple CFA at a time when liability has been admitted provided that the parties make a proper assessment of the inevitably much reduced risk of failure. …

20. Although the judge recognised that this was a case in which a chance of failure in the conventional sense was minimal, he failed to keep a clear eye on the true nature of the risks which Taylor Vinters were undertaking and what constituted success and failure. That led him to treat the risk of failing to beat a Part 36 offer as if it represented a 20% risk of failing to recover any damages at all, as his reference to the relevant uplift, clearly drawn from the ready-reckoner table, shows. (It is not clear that he appreciated or took into account at all the fact that, depending on the stage at which an offer might be made, a significant

> proportion of the solicitor's profit costs and success fee might not be at risk for practical purposes.) He then compounded the error by adding a further 10% for the chances of litigation… to treat it as involving a 10% risk of the claim as a whole failing was wrong. At best it increased the risk attributable to the failure to beat a Part 36 offer to that extent. Similarly, the additional risk inherent in the size of the claim (which he assessed at 3%) should have been applied to the basic risk of failing to beat a Part 36 offer. So, instead of basing his calculation on an overall risk of losing about 23%, which would have led him to a success fee of 30%, he based himself on a risk of 33%, which led to a success fee of 50%. In those circumstances his decision must, in my view, be set aside …
>
> 23. As I have already said, the real difficulty in a case of this kind lies in assessing the risk of the solicitors failing to recover part of their fees as a result of the client's failure to beat a Part 36 offer at trial and in translating that into a risk of failure in the action so that the resulting success fee can properly be applied to their profit costs of the whole proceedings. That involves the analysis and assessment of a number of different risks which interact with each other and I doubt very much whether any solicitors are well placed to undertake it. The best they can hope to do, in my view, is to make a broad assessment based on their own experience. Providing the resulting success fee falls within a reasonable bracket, however, I should not expect the Cost Judge to reject it."

18. *C v W* has been applied in a number of subsequent cases. In *Gandy v King* [2010] EWHC 90177 (Costs), Master Haworth also considered a dispute over the success fee. The 17-year-old claimant sustained severe traumatic brain injuries in a road accident which rendered him a patient. In March 2001 the defendant admitted liability in response to a Letter of Claim. A new solicitor took over the case in March 2007 and entered into a CFA in July 2007. The trial was listed to commence on 3 November 2008 in relation to quantum only. A settlement meeting on 10 October 2008 was unsuccessful and full preparations for trial were made. However, settlement was achieved "at the door of the court" in the sum of £5,900,000 which was approved on 7 November 2008. The CFA provided for a two-stage success fee as follows:

> "The success fee is set at 100% of basic charges where the claim concludes at trial; or 52% where the claim concludes before the trial has commenced."

The 52% increase reflected a 65% prospect of success or a 35% risk of failure.

19. The solicitor in *Gandy's case* had added 5% to the success fee to compensate for this being a "high quantum" case. Following *C v W,* the Master said that this was wrong as, indeed, it was also wrong to add 5% for causation issues. He said:

> "I accept the *dicta* of Moore-Bick LJ in *C v W* that the appropriate way of dealing with factors such as a Part 36 offer,

> value and causation is by adjusting the chances of success. I've concluded that when allowing for the factors considered by the claimant's solicitors at the time the CFA was entered into, there was an 80 to 85% chance of success. In round figures using the ready reckoner approach this translates into a success fee of 20% which I am prepared to allow in this case."

20. In *Fortune v Roe* [2012] 2 costs LR 288, Sir Robert Nelson, sitting as a Judge of the High Court with assessors, considered an appeal by the claimant against the order of costs judge Master Campbell where he had held that the success fee claimed under a conditional fee agreement should be 20% rather than the 100% claimed by the Claimant. This arose from a road traffic accident in December 2001 where liability was admitted in March 2003, proceedings were served in January 2005, a defence was served in March 2005 admitting negligence but denying the claimant had sustained a head injury and judgment was entered for damages to be assessed in April 2005. The CFA was signed and entered into on 3 February 2006. This provided that the success fee would be 100% of the basic charges if the claim was won at any later time than three months before the date fixed for trial.

21. The court in *Fortune's* case was provided with two attendance notes prepared by the claimant's solicitor who had made the CFA risk assessment. In the first it was noted that liability had been conceded and judgment entered by the court with no allegations of contributory negligence and the attendance note stated:

> "There are therefore no risks in relation to whether or not our client will succeed in recovering damages on the grounds of liability."

Complex arguments arising as to the injuries and their causation were noted as were potential problems with loss of earnings and care management. No Part 36 offers had been made and the fee earner concluded:

> "In summary, the major risks relate to quantifying this case in the face of the Part 36 payment in or Part 36 offer for periodical payments. At the moment assessing the long-term outcome for our client in terms of her needs for care, accommodation and her earning capacity is not straightforward. On the basis of this, we assess the prospects of success when measured against an unknown Part 36 risk at - and therefore the success fee at -."

In the second attendance note it was concluded that:

> "The probabilities that a Part 36 payment will be made at some stage, potentially putting a significant risk on the recovery of costs beyond that point. Given the multi-faceted nature of this case, the assessment of those risks will be more difficult."

This case bore many similarities to the present case.

22. In his judgment, Sir Robert Nelson said:

> "36. When the Claimant and her solicitors, Irwin Mitchell, entered into this CFA, liability had already been admitted and judgment entered for the assessment of damages. One of the main risks of litigation, namely losing the action completely, had therefore gone. Furthermore, the admission and judgment on liability ensured that Irwin Mitchell would receive their costs incurred up to that time. Indeed it would have been possible for them to have rendered the claimant a bill for their costs and take a payment on account, although they would still have been obliged under their retainer to continue acting for the claimant in order to achieve a proper conclusion of her proceedings.
>
> 37. As judgment had been entered there were no assessable risks on the issue of liability, and as there were no allegations of contributory negligence it was inevitable that the claimant would receive substantial damages given the very serious nature of her injuries. The case involved complex quantum issues but these are common in serious multiple injury cases. There is no material to suggest that the claimant was likely to lose a specific quantum issue that would result in a separate costs order. The head injury issue was likely to be resolved as part of the general issues on quantum rather than as a stand-alone issue. The risk of the basic charges not being recovered would therefore only arise if a Part 36 offer was made, rejected, and on Irwin Mitchell's advice the claimant pursued her claim and then failed to beat the Part 36 payment. It is probably in substantial personal injury cases of this kind that a Part 36 offer will only be made at a period close to trial when the expert evidence on the quantum issues has been resolved or at least as close to being resolved. Up until that time, i.e. close to trial, the fees earned up to that point would in Lord Justice Moore-Bick's phrase used in *C v W*, 'be secure'."

It seems to me that those words could be applied, almost without alteration, to the present case. Sir Robert Nelson then went on to consider what a reasonable success fee would have been at the time that the CFA was signed in February 2006 by reference to the risk at that time. He said:

> "48. … what was the risk in February 2006 when the CFA was signed and what would a reasonable success fee be in such circumstances? There may have been potential problems with the claimant's evidence or the expert evidence, or the extent of the claimant's head injury, but none of these issues were likely to have any effect on costs save in so far as they affected whether the claimant beats the Part 36 offer. In the absence of such an offer, those issues would not have prevented the claimant from obtaining a 'win'. Issues such as a dispute about the causation of a head injury in a complex personal injury case are not without difficulty, but they are very rarely determined as a specific issue that can lead to a separate and distinct cost award.

> 49. It was indeed probable that a Part 36 offer would be served when the CFA was signed. **It was also probable, given the size and complexity of this claim, that such an offer would probably be made late in the proceedings.** By that time a substantial part of the claimant's solicitor's charges would have been incurred, and this is not altered by the fact that the last few weeks before trial are always particularly expensive. Where a Part 36 offer is likely to be made as here, within the last two or three months before trial, the costs likely to be incurred before that date would have been secure and recoverable by the claimant's solicitors. Even after the Part 36 offer is served, the risk should not be described as substantial. As Lord Justice Moore-Bick said in the case of *C v W* (para. 130): 'One would not expect highly experienced solicitors practising in this field to differ very widely in their assessment of the bracket in which an award would be likely to fall, provided they had access to the same information. …
>
> 52. Where, as here, the risk was not great and a substantial proportion of the costs were already secured for the claimant's solicitors a success fee of 100% is unjustified …
>
> 53. I am grateful to the assistance I've had from my assessors. With the helpful guidance of Lord Justice Moore-Bick and the knowledge and experience of my assessors, I've come to the clear conclusion that a reasonable success fee, whether single or second-stage, in the circumstances which pertained in February 2006 when the CFA was entered into, was 20%. I am satisfied that Master Campbell was wholly correct in this conclusion and that accordingly the appeal must be dismissed." [emphasis added]

23. *Thornley v Ministry of Defence* [2011] 3 costs LR 335 was another case where Irwin Mitchell entered into a CFA at a stage when liability was not in dispute and where the CFA provided for a 100% success fee if the claim settled within three months of trial. The District Judge had decided that the success fee was too high and assessed it at 33.3% stating as follows:

> 1) Liability was admitted, causation was admitted, there was means to pay and no contributory negligence.
>
> 2) There was a whole range of opinion as to the extent of the injury and the disability the claimant would face as he grew up and this plainly affected issues on quantum.
>
> 3) The complex issues on quantum gave rise to a risk in relation to Part 36 offers. However, on the facts of this case he did not accept that this was a high risk. This was not a case which could settle early because there would have been insufficient information available early on for Irwin Mitchell to be able to advise the claimant's litigation friend to accept an early offer.

In fact, the medical evidence had made it clear that it would not be possible to settle the case until the claimant was aged 10 or 11 because of the uncertain prognosis before then and thus there was no realistic possibility of an effective Part 36 offer before then.

24. Judge Behrens, sitting with assessors, concluded that the District Judge's assessment was too generous to the claimant. He said:

> "47. I have discussed this point at length with my assessors. We are all of the opinion that there is considerable force in Mr Brown's arguments. This was a case where the risk to Irwin Mitchell was very limited indeed. Although there are other minor risks the principal risk is the risk involved in a Part 36 offer. For the reasons given by [the District Judge] and enlarged on by Mr Brown this was very low.
>
> 48. It is true, as Mr Foy QC pointed out, that this is a complex case and to some extent the complexity can add to the risks involved in considering a Part 36 offer. However, as Mr Brown pointed out in his reply, it is important not to confuse complexity with risk. The complexity of the case may justify a higher hourly rate. It does not necessarily justify a higher success fee.
>
> 49. We are all agreed that a success fee of 33.3% is very substantially in excess of the risk taken by Irwin Mitchell. …
>
> 50. … In my view the success fee should be close to the 12.5% now provided in the rules. To my mind that figure more properly reflects the facts that there is an admission of liability and causation, that the Claimant was an infant patient and that there could be no early settlement thus reducing the risk of an early Part 36 offer.
>
> 51. I would, however, acknowledge that the wide range of possible outcomes did increase the risk somewhat with the result that I would assess the success fee at 15%."

The submissions on behalf of the Defendant/Paying Party

25. Mr Roy, on behalf of the Defendant, submitted that the criticisms of the assessments in each of the cases of *C v W*, *Gandy v King*, *Fortune v Roe*, and *Thornley v Ministry of Defence* were equally applicable in the present case. In relation to *C v W*, he identified the court's criticisms of the claimant's solicitors' failure properly to analyse the relevant risks as applying equally here. He was critical of the approach of the District Judge, who, he submitted, simply announced a figure without attempting to calculate the relevant risks. He submitted that, just as in *Gandy's* case, there was little Part 36 risk here at the time the CFA was entered into. Again, drawing comfort from *Fortune v Roe*, he submitted that a Part 36 offer was always likely to be made late in the proceedings at a time when the vast majority of the costs had already been "safely" incurred. Finally, in relation to *Thornley*, he equated the position of the claimant there (an infant) with the position of the claimant here, a Protected Party. He submitted that the need for approval of any settlement reduced the likely costs potency of an early Part

36 offer because, if the claim could not properly be valued, then a settlement would not be approved by the court and therefore such an early Part 36 would not sound in costs.

26. In relation to the reasoning of District Judge Searl, Mr Roy submitted that this was flawed on three levels: first the causation complexities did not increase the risk of the claim failing entirely, nor did they increase the Part 36 risks. Secondly, he submitted that, in any event, there was no proper basis for saying that this claim was more complex in any material way than any other catastrophic case, such cases being by their nature inherently complex. He reminded me of the *dictum* of HHJ Behrens in *Thornley* that "It is important not to confuse complexity with risk". Thirdly, he submitted that the District Judge's eschewal of any quantitative analysis vitiated her assessment on three levels. First, she misdirected herself away from any proper scrutiny of the Claimant's risk assessments. Secondly, this rendered her own assessment unsupportable, having no arithmetical or other proper basis. Finally, he submitted that, had the District Judge properly undertaken the requisite quantitative risk analysis, she would have appreciated that the appropriate success fee was below 21%.

The submissions on behalf of the Claimant/Receiving Party

27. For the Claimant, Mr Nicol submitted that neither the approach of the District Judge nor her conclusion could be faulted and that it would be wrong for this court to substitute its own approach or its own conclusions. He submitted that, on proper analysis, the District Judge can be taken to have considered all the relevant factors: she was asked to pay specific regard to the factual background as it appeared to the Claimant's advisers at the time CFA 2 was entered into, she was invited to conclude that the fact that more than one CFA was entered into differentiated the case from *C v W* and she accepted that this was an exceptional case where the medical evidence of the parties was at odds and where the consequences of acceptance of one or other of the parties' contentions as to the medical evidence had a potentially massive impact on the value of the claim. He submitted that the complexities of this case had made it quite different to the usual, albeit catastrophic, personal injury action submitting:

> "The increase on the risk profile of the claim resulting from the fact that as of August 2012 the dynamic of the litigation had shifted when the full impact of the Claimant's learning difficulties and historic drug problems came to light."

He submitted that these matters formed a significant obstacle to a mutual view of the merits of the case being taken between the parties and, thus, a differing view as to its settlement value and, inevitably, an increased Part 36 risk.

28. Responding to the Appellant's complaint that the Judge "simply plucked a figure from the air", Mr Nicol argued that the District Judge had approached this aspect of her task with care having already had regard to, commented on and indeed criticised the risk assessments of the Claimant's solicitors.

29. Mr Nicol referred to paragraph 23 of District Judge Searl's judgment where she said:

> "In dealing with assessment of risk in relation to CFAs, the experience of the litigator is called into play. I am satisfied that the practical experience of those conducting the litigation is such

> that one can properly assess, on either a numeric basis or a three-categorisation basis, the percentage risk and therefore the prospects of success and the associated success fee. It is a matter of 'feel' for which those experienced in conduct of litigation (as was the case in this matter) are more than equipped to possess."

He relied on this as a finding which makes it clear that Irwin Mitchell, in his submission,

> "clearly grappled with the task that was faced in assessing all the relevant factors which impacted on the question of the recovery of fees. This was a broad assessment based on their (Irwin Mitchell's) own experience and the resultant success fee fell within a reasonable bracket."

This submission was difficult to understand and even more difficult to accept, however, when there was no attempt at the hearing before the District Judge to justify the 100% success fee for the period within three months of trial, the Claimant's advocate before District Judge Searl (not Mr Nicol) abandoning Irwin Mitchell's assessment and contending for a 67% success fee instead.

30. In his oral submissions, Mr Nicol further argued that, in assessing the success fee, the court would be entitled to take into account the fact that, if the case went substantially the way of the Defendant, there might well be "proportionality" arguments upon the assessment of the solicitor's fees and that an additional 15% on the success fee could, he argued, be justified in order to take into account this risk for the solicitor. In my judgment, this was an argument easily rejected. The solicitor would be entitled to recover the costs which were reasonably incurred and, on any assessment, the costs judge would take into account that, although in the event the damages awarded may have been closer to the Defendant's figure than the Claimant's figure, the solicitor could not know this in advance and could reasonably justify expenditure on costs which sought to promote and recover a significantly higher figure. Thus, there is a quite separate mechanism available to the solicitor in relation to the base costs and any risk in that regard cannot possibly justify assessing a higher success fee.

31. In essence, it was Mr Nicol's contention that all the other cases previously considered, including *C v W*, are distinguishable from the present because none of them had the same risk profile as in the present case. He submitted that the cognitive impairment of the Claimant which was apparent by the time the CFA was entered into was a factor running through each and every head of loss, materially affecting the Claimant's ability to recover damages. He submitted that there were too many factors and uncertainties as at 2012 which operated to affect the Claimant's ability to recover and a substantial uplift was justifiable by reference to the risk to the solicitor in establishing causation between the relevant accident and the heads of loss for which claim was made.

Discussion

32. As was accepted by both parties, the leading authority is *C v W* [2008] EWCA Civ 1459 (see paragraph 15 above). In my judgment a number of points arise from this decision. First, a 100% success fee can never be justified in a case where liability has been admitted and there has been no Part 36 offer of settlement. The challenge is to assess the risk that some of the costs incurred will be unrecoverable. There are, it seems to me,

essentially two fundamental risks to be brought into the equation: the risk arising from the timing of a Part 36 offer and the risk of rejecting that offer and failing to better it at trial.

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

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

35. Armed with an assessment of these two governing risk factors, the solicitor is then in a position to take an informed view as to the appropriate success fee. Take, for example, the case where the solicitor considers that the timing of a Part 36 offer will be when £300,000 of costs have been incurred and £100,000 remain to be incurred. 25% of his costs are likely to be at risk. Supposing he considers that the chance of him getting it wrong and advising his client to reject a Part 36 which should be accepted is 20%, then his risk is 20% of 25%, namely 5%. The prospects of success are accordingly 95% and that would justify a percentage increase of 5% according to the ready reckoner. If the solicitor considers the case so difficult to call that the chance of him getting it wrong is 50%, then his risk is 50% of 25%, namely 12.5% and the prospects of success are therefore 87.5% which would justify a percentage increase of 14.29%.

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

37. It seems to me that if a solicitor could show that he had at least attempted to make a judgment of those matters and had devised his success fee accordingly, a District Judge would be slow to say that the solicitor had got it wrong and that the success fee should not be allowed. The court would give the solicitor some considerable leeway given that the assessment of these risks is by no means a precise exercise and a solicitor would not be blamed for taking a relatively conservative approach, given what is at stake.

38. In my judgment, essentially for the reasons relied on by Mr Roy for the Defendant, the decision of the District Judge was plainly wrong and must be overturned. At paragraph 30 of her judgment, she makes no attempt to analyse the risks which should reasonably have been taken into account by the Claimant Receiving Party when the success fee was agreed in August 2012. In particular, she does not state what percentage of the solicitor's base costs should have been regarded as at risk, nor does she consider in terms the percentage chance of success in relation to "beating" any Part 36 offer of settlement. I have considered with my Assessor whether, despite these omissions, it can be said that this sort of percentage is "standard" or "usual" in this sort of case where a CFA was entered into after liability had been admitted and where the claimant could expect to recover 100% of the damages assessed. I am assured that it is not and, since the decision in *C v W*, if there is a "standard" or "usual" success fee at all, it is 20%. No reasons have been articulated by the District Judge as to why she should have rejected 20% in favour of a success fee as high as 65% and, in my judgment, that assessment cannot stand.

39. In considering the appropriate success fee, I start from the point of view, in my judgment, and contrary to the submissions of Mr Nicol, there was nothing about this case which took it out of the category of standard, high-value personal injury cases where there are issues in relation to causation of the injuries. It is true that this Claimant had sustained four previous head-injuries, but, from my experience, there are very often difficult questions of causation in terms of the effect of a head injury in relation to many of heads of claim, where medical evidence for each side is likely to diverge. This is something which any experienced personal injury solicitor such as the Claimant's solicitor, Mr Davis, would have been well used to dealing with and taking a view about.

40. Firstly, so far as the "timing" risk is concerned, in my judgment, as at August 2012, the Claimant's solicitors could have anticipated the Defendant making a Part 36 offer relatively late in the proceedings. In *Fortune v Roe*, Sir Robert Nelson, a very experienced judge in personal injury actions, stated at paragraph 49:

> "It was also probable, given the size and complexity of this claim, that such an offer would probably be made late in the proceedings."

This is also my experience of dealing with many such cases when I was still at the Bar. In fact, the timing of the Part 36 offer in this case mirrored exactly the timing which I would have expected an experienced solicitor to have anticipated in a case of this nature when the CFA was entered into. It seems to me that even on a conservative estimate the solicitor should not have anticipated more than 25% of his costs being at risk.

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

42. In any event, the Claimant, in my judgment, clearly fails to achieve a success fee of 21% or more so as to avoid the statutory reduction to 12.5%. Having discussed the risks and the proper approach of a reasonable cost judge and a reasonable solicitor with my Assessor, I conclude that a reasonable success fee might, at a pinch, have been assessed at 20% but certainly no higher and probably lower. In any event the success fee which I would substitute in this case for the 65% reached by the District Judge should be one of 20% which then reduces to 12.5% by reason of the provisions of CPR 45.19. The same shall apply to CFA3.

43. For the above reasons, this appeal is allowed, and the success fee for both CFA2 and CFA3 shall be 12.5%.