Neutral Citation Number: [2019] EWHC 1508 (QB)

Case No: QB/2018/0314

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM THE SENIOR COURTS COSTS OFFICE
MASTER ROWLEY, COSTS JUDGE
APPEAL COURT REFERENCE
CLAIM NUMBER HQ14X00955

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/06/2019

Before:

MR JUSTICE STEWART
(with Master Gordon-Saker as Assessor)

- -

Between:

EPX (A CHILD PROCEEDING BY HER MOTHER & LITIGATION FRIEND PPX)	**Appellant/ Claimant**
- and -	
Milton Keynes University Hospital NHS Trust	**Repondent/ Defendant**

- -
- -

Robert Marven QC (instructed by **Scrivenger Seabrook Solicitors**) for the **Appellant**
Alexander Hutton QC (instructed by **Acumension Ltd**) for the **Respondent**

Hearing dates: 05 June 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE STEWART

Mr Justice Stewart:

Introduction

1. This is an appeal against an order made by Master Rowley on 28 October 2018. In that order he declared and ordered that the Claimant's additional liabilities are not recoverable from the Defendant. He refused permission to appeal. Permission was subsequently granted by Martin Spencer J on 18 February 2019.

2. The relevant documents before the Master were the bill of costs, the Points of Dispute/Reply and two witness statements. The first witness statement was from Vicki Seabrook dated 8 May 2018. Ms Seabrook is a director of Scrivenger Seabrook, the Claimant's solicitors. The second witness statement is from PPX, the Claimant's mother and Litigation Friend. That witness statement is dated 23 May 2018.

3. The parties agreed base costs in the sum of £262,000, this including base costs of assessment and interest. The quantum of the additional liabilities was also agreed in the sum of £152,440. This comprised a success fee of £125,116 and ATE £27,324. It is the refusal by the Master to award these latter sums which is the subject of the appeal.

The Underlying Claim

4. The Claimant was born prematurely in a hospital in Great Yarmouth on 28 July 2015. She was transferred to the neonatal intensive care unit as a result of her prematurity and low gestational weight. Her mother subsequently tested positive for Group B Streptococcus ("GBS"). The Claimant was given intravenous antibiotics because of her mother's GBS. She was transferred on 2 August 2005 to the Defendant's hospital. She was discharged home on 14 August 2005. She appeared to do well initially but there was deterioration on 19/20 August 2005. She was taken to the hospital accident and emergency department in the early hours of 21 August 2005. After investigations showing a normal full blood count, she was discharged home again that morning. In the afternoon of 21 August 2005 the result of the blood cultures, which after 13 hours incubation revealed GBS in the Claimant, were telephoned through to the ward. No action was taken and the Claimant was not recalled to hospital. She deteriorated at home on 21/22 August 2005 and was brought back to hospital on the morning of 22 August 2005. She was ill and getting worse. Despite intravenous antibiotics being commenced, she deteriorated further and was transferred to the Oxford Radcliffe hospital. There it was later confirmed that she suffered very extensive brain injury as a result of GBS meningitis.

5. The claim was eventually settled for £1.837 million and annual periodical payments for care and case management in the sum of £204,000 per annum from December 2016 until December 2023, increasing to £230,504 per annum from December 2024 onwards. Life expectancy was agreed by the parties to the age of 24 years.

Chronology of Events

6. On 20 June 2006 a full legal aid certificate was granted to Scrivenger Seabrook. This was limited to obtaining medical/clinical notes and records, obtaining one medical report per specialism, complying with all steps under the Clinical Dispute Pre Litigation Protocol, considering the relevant evidence of external counsel…and expert(s),…and

thereafter obtaining external counsel's opinion…to include settling proceedings if external counsel…so advises. There was a costs limitation of £3,500 excluding VAT.

7. On 9 June 2008 the Legal Services Commission increased the costs limitation to £7,500. More had been sought by the Claimant's solicitors. One of the reasons given for not increasing the sum beyond that was "We expect the investigative stage in cases involving two liability experts to be concluded for £7,500. This would include all steps up to and including complying with the Pre-Litigation Protocol."

8. On 13 August 2008, the Claimant having obtained medical records and instructed Professor Klein (microbiologist) and Dr Miles (paediatrician), the letter of claim was sent. It contained essentially two allegations:

    (i) Blood cultures should have been done on 10 August 2005 because of the high white cell count with high neutrophil elements on 10 August 2005. Blood cultures would have been positive and intravenous antibiotics should have been given for GBS. This would have avoided any meningitis (which probably developed on 19 August 2005) any brain damage.

    (ii) "It is further alleged that there was a failure to institute appropriate care following [EPX's] admission to Milton Keynes hospital on 21 August 2005 resulting in a further delay in the commencement of appropriate antibiotics."

9. On 26 March 2009 the legal aid certificate was amended. The terms remained the same save that the limitation was "limited to work as detailed in the case plan dated 14/01/2009. To include all the necessary to complete the investigation into liability and causation, hold conferences with counsel and comply with pre-action protocol for £20,000 ex VAT."

10. On 4 August 2009 the Defendant's solicitors responded to the letter of claim denying the allegations in relation to the Claimant's hospital stay up to 14 August 2005. This denial clearly had the benefit of expert opinion input. As for the second allegation in the letter of claim, it was noted that the Defendant, in a letter of 22 October 2008 had asked for further particulars. The Claimant's solicitors had refused to provide them in a letter dated 31 October 2008. The letter of 4 August 2009 said that the Defendant needed to know:

> "(a) the precise respects in which it is alleged that the management following admission 21 August 2005 was inadequate and
>
> (b) how, but for such identified failures, the outcome for [the Claimant] would have been different. As and when such a case is advanced, we will endeavour to respond to it, with such input from any relevant clinicians whose management may be criticised as may be indicated in the light of any particularised allegations."

11. On 24 November 2009 there was a conference between the Claimant's legal advisors and relevant experts. No further particulars were provided in relation to the second allegation.[1]

12. On 8 April 2011 the Claimant's solicitors wrote to the LSC asking for an increase in the financial limitation from £20,000 to £27,500 and for confirmation to issue formal court proceedings. The letter listed that reports had been obtained from Dr Miles, Professor Klein and Dr Burch, a consultant cardiologist. These three experts addressed the issues of liability and causation. Three other experts were listed. They addressed quantum issues. They were a housing expert, a nursing expert and an occupational therapist. It was said that a split trial was not likely to be appropriate. That statement is followed by the sentence: "[The Claimant's] condition is unlikely to improve." Estimates of costs to date were £13,000 in respect of the experts reports and £7,000 in respect of legal fees. Future costs were estimated at £27,500 to conclude mutual exchange, £65,000 to settlement and £100,000 to trial. The letter said that liability had been denied in the protocol period and that the chances of success were 60-80%. In terms of likelihood of settlement, the letter continued: "the Defendants have denied liability in the letter of response. However, once proceedings are issued there is a possibility of settlement prior to the service of the defence."

13. On 16 May 2011 the LSC responded:

> "…It is my view that the Claimant experts' reports do not appear to provide conclusive support for this claim. I would request a copy of counsel's advice in this matter particularly in view of the difficulties inherent in a claim for damages arising from meningitis infection prior to considering further funding."

14. On 19 May 2011 the Claimant's solicitors wrote to the Litigation Friend. They told her that the LSC were not prepared to increase funding and had asked for counsel's advice. They said they were chasing Dr Burch and Professor Klein for further input so as to be able to put as strong a case as possible to counsel. However, they were concerned because previously they had waited months for any response from Professor Klein. Therefore, in the absence of response from Professor Klein by the end of May 2011 they were going to put papers to counsel in any event.

15. On 9 December 2011 counsel was instructed to advise. Counsel advised on 13 May 2012.

16. On 16 May 2012 the Claimant's solicitors wrote to the Litigation Friend. They told her that counsel felt that although the case was not without difficulty, he felt it was appropriate to proceed and gave the chances of success as not less than 60%. The intention was to send the advice to the LSC the following week.

[1] The second allegation was not particularised until the Particulars of Claim, dated 22 May 2013, were served. It was this allegation alone which the Defendant later admitted and upon which liability was conceded.

17. On 29 May 2012 counsel's advice was sent to the LSC in support of the April 2011 request for authorisation to increase the financial limitation, and for authority to issue formal court proceedings.

18. On 27 June 2012 the LSC replied. They were still concerned about the merits of the claim. The letter continued:

> "The existing scope and costs authorised under the certificate cover instruction of four experts, conference/s with counsel as well as all the work required under the pre-action protocol and it appears that you have instructed three experts. Therefore, there are more than sufficient costs to cover the outstanding work. Whilst I am prepared to allow scope to issue proceedings, I will consider future funding only on receipt of a copy of the defence. If the Defendants continue to deny liability I am not entirely persuaded that funding should continue."

The certificate was therefore extended so that limitation was "to the issue of proceedings". However, the sum covered by the certificate remained at £20,000 excluding VAT.

19. On 2 July 2012 there is an attendance note between the fee earner (Ms Hillson), the director Ms Seabrook and a salaried partner, Ms Newcombe. Miss Hillson recorded that she felt quite aggrieved by the LSC's response "on the basis that they had given the authorisation to issue proceedings but what they had said is that if the Defendants continue to defend the matter, she is not entirely persuaded that funding should continue. In addition, she has not given the additional funding and I need additional funding – I cannot go any further without it."

20. Ms Seabrook thought that counsel should be approached to see if he would take the matter on a CFA and that, if he was, "…as they are not giving us any further money, we should talk to the client about taking it on a CFA rather than continuing with the LSC funding."

21. On 4 July 2012 the Claimant's solicitors wrote to the Litigation Friend. They summarised the LSC's response and continued:

> "… although they have told me I am allowed to issue formal Court proceedings, I have no funding under which I can instruct Counsel to draft Particulars of Claim, nor to pay the issue fee.
>
> In addition to this, you will see that the LSC "remain concerned" about the merits of the claim and they say they will reassess whether LSC funding should continue upon receipt of the defence. They indicate that if the Defendants continue to deny liability, they are not entirely persuaded that the funding should continue.
>
> ….I think it is entirely possible that once the defence comes in defending the action as I anticipate, the LSC will cease to fund the claim.

> There are other methods of funding available to us at present. In particular, a conditional fee agreement (CFA). We, Scrivenger Seabrook, would be prepared to accept [the Claimant's] claim on a CFA basis. However we would also need counsel (the barrister) to act on a CFA basis to enable us to proceed with the matter further…
>
> I attach a copy of the leaflet setting out information regarding CFAs. I have also written to Mr John Holl-Allen to ask, should [the Claimant] lose LSC funding, if he would be willing to take the claim on a CFA.
>
> Once I have received counsel's response, I will contact you further so that we can discuss the options available in terms of proceeding with the matter…."

22. On 6 July 2012 there is a further attendance note noting that counsel was prepared to enter into a CFA and confirming the details to Ms Seabrook. Ms Hillson then considered the documentation and continued:

> "This indicates that for investigative help, stage 1, a case that involves fee experts is allowed £10,000 to £15,000 and for four experts, £15,000 to £20,000.
>
> The next stage which is issue of proceedings to mutual exchange which is what we are asking to do, then a case involving three experts is allowed an additional £12,000 to £15,000 and a case involving four experts you get an additional £15,000 to £17,500.
>
> This gives a minimum for three experts of a total of £22,000 and a maximum for three experts of £30,000, a minimum of four experts of £30,000 and a maximum for four experts of £37,500.
>
> Checking the file and noting we currently have a financial limitation of £20,000 which is clearly below the minimum even for three experts and we have instructed four experts.
>
> On that basis, I am not sure what she is talking about in her letter about us having reached a reasonable amount. I need to go back and query that with her and, at the same time, confirm to her that we cannot issue proceedings or instruct counsel without that additional increase in funding and asking for the increase to be made to £27,000."

23. On 12 July 2012 the Claimant's solicitor wrote to the LSC stating that their file involved four experts and they had instructed four experts where the limits were between £15,000 and £20,000 for stage 1 (investigative help) and another £15,000-£17,500 for stage 2 (issue of proceedings to mutual exchange). They said that the current limitation on the certificate so far was £20,000 when it indicated in the proforma information that a

minimum of £30,000 would be appropriate in a four-expert case. Indeed, even in a three-expert case the total financial limitation in respect of both stages amounted to between £22,000 and £30,000. The letter continued:

> "We note from your letter that you are prepared to allow issue of formal court proceedings. Unfortunately, because we have reached financial limitation we will require an increase in the financial limitation to enable us to do so under the Legal Services Commission certificate.
>
> We would therefore be grateful if you would consider…an increase to the financial limitation upon the certificate to £27,000 to allow issue of formal court proceedings and to allow us to instruct counsel to draft Particulars of Claim…"

24. On 12 July 2012 the Claimant's solicitors wrote to the Litigation Friend. They confirmed that counsel would be prepared to take the case on CFA if the Claimant lost LSC funding. They said that they had written to the LSC asking for an increase. The letter concluded:

> "If they refuse to do so, then it may well lead to the certificate being discharged, in which case, we will proceed down the CFA route.
>
> If they agree to extend the financial limitation, then [the Claimant] will still continue to have LSC funding for the purposes of issue and service of the particulars of claim. Once the defence is received, we will have to go back to the LSC to see whether they will continue the funding in the light of any comments the Defendants make in their defence."

25. On 31 July 2012 the LSC responded pointing out:

- The existing limitation authorised under the certificate covered stage 1 (investigative help) involving four experts.
- The extension did not include instruction of quantum experts.
- Three liability experts had been instructed.
- Stage 2 funding had not been authorised but scope to issue had been authorised.

26. On 3 August 2012 there is an attendance note from the fee earner. She noted that in effect LSC were not prepared to extend the financial limitation and that quantum experts were outside the scope of the legal aid authorised. The file note continues:

> "Discussing the same with VS (although she has not seen the letter, I tell her the gist of it). She thinks we just CFA it. People are having all kinds of difficulties with the LSC and other people are just CFA-ing cases anyway so she thinks it is a case we should just CFA. Counsel has said he will take on a CFA as well.

> I explained that I do not want to drop the LSC as we are still authorised to issue even though we haven't got the money to do it. VS thinks we should let the client know what is going on and then email Elite[2] and see if it is a case they would be prepared to take on."

27. On 8 August 2012 the Claimant's solicitors wrote to the Litigation Friend. They enclosed the LSC letter and summarised its effect. They said the best way forward would be simply to discharge the LSC certificate and proceed on a CFA with ATE insurance. The next step was therefore to write to the ATE insurers. In the course of the letter it is stated that the LSC was saying that money should not have been spent on obtaining "condition and prognosis reports in respect of [the Claimant][3]. I have to say I disagree with this. We had to have an idea of the value of the claim and have [the Claimant] assessed during the course of the proceedings."

28. On 11 October 2012 the Litigation Friend was told that the ATE insurers were prepared to offer insurance. Arrangements needed to be made for the solicitor to come and see the Litigation Friend for the purposes of going through the consequences of dispensing with legal aid at this point and entering into a CFA agreement.

29. After some discussion/communication, there is a file note dated 28 November 2012 of a discussion between the fee earner and "MSF", of the Claimant's solicitors. This records:

> "The first point is that I cannot enter into this until I have discharged the LSC funding….really there is no other way forward. It is clear from the file that the LSC are not willing to increase the financial indemnity so we cannot proceed without asking the client for the money or, indeed, stumping the money up ourselves in terms of instructing counsel and, in particular, the court fee if it is payable.
>
> So we cannot take the matter any further without financial indemnity from the LSC being increased. It is also clear from the LSC correspondence that if the Defendants serve a defence defending the matter, then they will have serious consideration as to whether or not they could continue funding.
>
> It is quite clear to me, and I have said so to both the client and counsel, that the Defendants are very likely to file a defence in this case. On that basis, it seems to be quite likely that once a defence is filed, then the LSC will discharge the certificate in any event.
>
> Clearly, consideration needs to be given to the fact that if we take out the ATE insurance and have a CFA, the Defendants will be responsible for a success fee and for the ATE premium. However, it is also noted that if we issue proceedings with the

[2] Potential ATE insurers
[3] In fact it was quantum evidence from non-medical experts which the LSC had said was not covered

> benefit of insurance then the Defendants (unlike the LSC scenario) would be able to get a costs order against our client if she was unsuccessful. This therefore affords some protection to the Defendants from that point of view.
>
> In addition to this, if the client was to lose her LSC certificate post April 2013, then it is likely that a success fee will have to come out of her damages. Therefore, she will be put at a disadvantage.
>
> All in all, it is clear that there is no other alternative but to take out CFA and ATE, but we are unable to do so until we have discharged the LSC."

30. On 4 December 2012 the Claimant's solicitors wrote to the Litigation Friend confirming the availability of ATE insurance, the premium being £27,600 plus tax. It was explained that if the case was successful the premium could be claimed from the Defendants and, if unsuccessful, then it would be paid by the insurers themselves. Insurance was to run in conjunction with the CFA. If the claim was successful then the lawyers would be paid their basic costs together with a success fee. These costs would be payable by the Defendants. If the claim was unsuccessful the lawyers would not be paid. The letter included the following:

> "…essentially, we are at an impasse with the LSC as they are refusing to increase the financial limitation on the case and, in addition, have indicated that if the Defendants file a defence defending the matter, they are unsure that funding will continue in any event. I am hopeful that the LSC will discharge the certificate so that we can enter into a CFA and insurance…"

31. On 12 December 2012 there is a file note of a discussion between the fee earner and the Litigation Friend. This records that an explanation was given in full about the CFA and insurance and how it all worked. The client said she understood and was happy with everything. The file note continues:

> "I explained to her that the LSC had put us in this position. We have no alternative, and I explained to her that effectively the LSC are saying that they are not providing any more financial limitation which means that ultimately either she or us are going to have to pay counsel to draft Particulars of Claim because she could not act under a CFA while she also had the legal aid, so really we were being pushed into this by the LSC because they were not agreeing to extend the limit…"

32. On 12 December 2012 the Claimant's solicitors wrote to the LSC inviting them to discharge the certificate to enable them to enter into a CFA. The letter stated:

> "We note that you are unable…to increase the financial indemnity until you have seen a copy of the defence. We, in turn, are unable to issue formal court proceedings without incurring counsel's fee for drafting the particulars of claim and, as you know, we have reached our current financial limitation.

> We note from previous correspondence that you are concerned regarding the merits of this claim and that if the Defendants, in any future defence, continued to deny liability, you are not persuaded that LSC funding should continue.
>
> It has become clear that it is only possible to proceed with this matter if our client agrees to pay counsel's fees or, indeed, we agree to. As such, we have been investigating alternative methods of funding…."

The Master's Decision

33. In his judgment Master Rowley went through the chronology in some detail (paragraphs 3-16). In paragraphs 19 and 20 he referred to the evidence, primarily that contained in the letters and attendance notes. He recorded that Mr Marven relied upon Ms Seabrook's unchallenged evidence but accepted that it was not particularly important regarding the exhibited documents. Mr Marven did rely upon paragraphs 20-21 of Ms Seabrook's evidence which were as follows:

> "The LSC's lack of enthusiasm for funding this case was always at the front of my mind and the progress of this case was the subject of regular discussion and review within the team.
> Our collective experience led us to believe that if the Defendant denied liability once proceedings were issued, the LSC would refuse to provide further funding. I fully anticipated that if a denial of liability was received, the legal aid certificate would then be discharged by the LSC."

34. The Master set out extracts from the Court of Appeal decision in Surrey v Barnet and Chase Hospitals NHS Trust and others[4], in particular from [14], [30], and [32]. The question to be determined was whether the decision to enter into the CFA gave rise to costs reasonably incurred, the burden of proof being on the receiving party to justify the choice, and that entailing examining the reasons why the choice was made. The Master considered the reasons for changing funding in paragraphs 26-52 of the judgment. It is his reasoning in these paragraphs which comes under scrutiny and criticism by the Claimant in this appeal. There are essentially four grounds as set out in Grounds of Appeal numbers 2-5.

Grounds of Appeal

The First and Second Ground

35. The first ground is that the Master was wrong to reject any reliance on the change of funding regime on 1 April 2013. It is said that whilst this was not the immediate reason for the transfer to CFA plus ATE, it was obviously important context to any issue of timings.

36. The second ground is that the Master was wrong to reject the Claimant's case that it was reasonable to change funding before receipt of the defence. In particular, the

[4] [2018] EWCA Civ 451

Master had no proper basis to reject the Claimant's solicitors' unchallenged evidence that the claim would become uninsurable once a defence denying liability was received.

37. The key paragraphs in the Master's judgment are [27]-[31] in respect of these two grounds. He referred to Ms Hillson's attendance note dated 20 November 2012 and said that she pondered the situation where the LSC certificate was withdrawn after April 2013, in which case the CFA success fee would have to come out of damages. He said he could not see any other reference to the change in funding regime in the contemporaneous documents. Ms Seabrook's evidence alluded to the uncertainty regarding post April 2013 insurance arrangements but there was nothing to indicate that this was a particular consideration in this case in terms of making a change prior to April 2013. He concluded: "It does not seem therefore that I should place any weight on the possibility that the LSC certificate might be withdrawn after April 2013."

38. In paragraph 29 the Master said all the references to the certificate being withdrawn if the Defendant denied liability seemed to consider detriment by the Claimant in such circumstances to be self-evident. There was no explanation as to why the solicitors considered this to be so concerning. It was clear that both solicitors and counsel would enter into a CFA; therefore there did not seem to be anything which suggested to the Master that the Claimant would be in difficulties in obtaining representation if the LSC certificate was withdrawn. In paragraph 30 he turned to ATE insurance. He said that in its infancy it was often said that a policy had to be incepted prior to any denial of liability of the Defendant if the ATE insurers were to provide coverage. The Master said that in his view that was no longer the case well before the relevant events here, and: "there is nothing in the correspondence with the ATE insurer to suggest that it made any difference to it as to whether or not the defence had been filed and served or not."

39. In summarising his judgment on the potential consequences of the LSC funding being withdrawn if a defence was filed and served, the Master said at paragraph 31:

> "Consequently, whilst I accept that reference is made to the possibility of the LSC certificate being withdrawn, it does not seem to me that there has been any explanation given to the Claimant's mother as to why that would justify a change in funding in anticipation of such an event occurring. Given that a CFA would have been entered into if the certificate was withdrawn, there was no reason, in my view, why this would justify asking the LSC to discharge that certificate before the terms of the defence were known. If anything, the reverse is true. The Claimant's mother could have been reassured by an indication that if the defence denied liability and the certificate was indeed withdrawn, then a CFA would be offered to her in any event."

40. As to the change in funding regime (the first ground) the ground of appeal states: "whilst this was not the immediate reason for the transfer to CFA plus ATE, it was the obviously important context to any issue of timing." The appellant says that the fact that it was not referred to elsewhere than in the 28 November 2012 attendance note was because it was never suggested to be the immediate reason for the change. However it is a non-sequitur to say that because this was not referred to elsewhere, it should be disregarded.

41. I reject this ground of appeal for the following reasons:

    (i) The only reference in the contemporaneous documentation was, as the Master said, in the 28 November 2012 attendance note. There it suggested that if the client was to lose her LSC certificate post April 2013: "Then it is likely any success fee will have to come out of the damages."

    (ii) Ms Seabrook's statement at paragraph 34 said that at this time they were aware of changes to the recoverability of additional liabilities which would come into effect on 1 April 2013. As a firm they did not adopt any policy of moving all of their legal aided clients onto CFA.

    (iii) Although the letter to the Litigation Friend dated 4 December 2012 was based on the premise that the additional liabilities would be recoverable from the Defendant, there was no evidence that there had been any communication with the Litigation Friend as to the pros and cons of the possibility of a success fee coming out of the Claimant's damages in a post April 2013 CFA.

    (iv) In those circumstances it seems to me that on the evidence the Master was entitled to find as he did. To put it in the words of the Surrey case at paragraph 71: "It formed no part of the decision making process. In other words, this was not one of the reasons for the switch."

42. As regards the availability of ATE insurance if the Defence had denied liability, the Claimant says it was not open to the Master to reach the conclusion he did. Reference is made to Ms Seabrook's statement where at paragraph 38 she said:

> "Our view in this case remained that if legal aid was discharged by the LSC, the case would have become uninsurable because the ATE insurer would not be prepared to issue an ATE policy where the Defendant denied liability and the LSC had discharged the legal certificate because of the poor chances of success. Without insurance, the Litigation Friend could not have continued."

43. In the preceding paragraphs in that witness statement Ms Seabrook makes some points about the availability of ATE insurance post April 2013. These were not raised before me and Counsel agreed that they were not relevant to para 38 or to the appeal.

44. I reject this ground of appeal for the following reasons:

    (i) Paragraph 38 does not sufficiently evidence that the possibility of a lack of ATE insurance after April 2013 was ever actually taken into account in this particular case. Nor is there anything in the contemporaneous documents to support this.

    (ii) In particular there is no evidence or any contemporary documentation to suggest that this matter was discussed as a potential risk with the Litigation Friend.

(iii) The Master was therefore entitled to make the finding he did at [31], namely that there was no explanation given to the Claimant's mother that the possibility of the LSC funding being withdrawn would justify a change in funding. Further, as will be demonstrated below, the Master at [32] found that the overwhelming reason for changing funding was an entirely separate one. This he was entitled to do for the reasons I give later in this judgment.

The Third Ground: *the Master was wrong to reject the Claimant's case that the reason, or alternatively a principal reason, that the change in funding was the concern that LSC funding might be withdrawn if the defence was filed and served.*

45. The Master recorded at [26] that counsel submitted that it was the concern about LSC funding being withdrawn that led to the change to a CFA. Counsel based this on paragraphs 20 and 21 of Ms Seabrook's witness statement. At [32] the Master said "In fact…the solicitors' overwhelming reason for the change in funding is the refusal of the LSC to increase the costs which could be spent under the certificate." It is said that the Master was not entitled to reach this conclusion, it being contrary to the untraversed evidence.

46. The reason why this ground of appeal must fail is that the evidence was not untraversed. The Master was entitled to look at the contemporaneous documentation. Although Ms Seabrook was consulted from time to time, she was not the primary fee earner on the case. There is an abundance of contemporaneous documentation to support the Master's findings. For example:

(i) In the attendance note 2 July 2012, although reference is made to the possibility of funding stopping after a defence, the fee earner recorded "In addition, she has not given me additional funding and I need additional funding – I cannot go any further without it." At that point the question of the CFA was raised between the solicitors.

(ii) In the letter to the client of 4 July 2012 the fee earner wrote "I have no funding under which I can instruct counsel to draft particulars of claim, nor to pay the issue fee."

(iii) In the letter of 12 July 2012 to the client the fee earner wrote "that she had specifically requested an increase to the financial limitation in order to allow them to issue court proceedings. If they refuse to do so then it may well lead to the certificate being discharged in which case they would proceed down the CFA route." This suggests that, whatever any concern may have been as regards the withdrawal of funding after a defence denying liability, had funding been extended further so as to cover the issue of proceedings then those proceedings would have been issued without recourse to a CFA at that stage.

(iv) In the attendance note of 3 August 2012 the fee earner did not want to drop LSC funding. It is clear from that note that she would have issued had she had more funds from the LSC at that point.

47. Further important documents which entirely justify the Master's conclusion are:

(i) The letter to the client dated 8 August 2012 where the whole basis of the explanation is the inability to cover the costs of issuing court proceedings.

(ii) The attendance note of 28 November 2012 and the attendance note of a conversation with the client on 12 December 2012 which again are really based upon the same premise.

48. Another point that can be made, although the Master himself did not make this, is that had proceedings been issued in the summer of 2012 a defence could have been obtained well before April 2013. If funding from the LSC had then dried up, there could well have been time to enter into a CFA and obtain ATE insurance under the old regime.

49. Therefore the appeal based on the third ground is rejected.

The New Point

50. During the hearing, Mr Marven raised a new point. It was that the Surrey cases concerned the position where two courses of action were reasonable. It was in those circumstances that the Court held that the real issue is the reasons why the receiving party made the choice he did. If the reasons are contained in the advice, then the advice constitutes the reasons[5]. Mr Marven's submission was that where there was in reality only one reasonable decision, i.e. only one reasonable choice available to the receiving party, then whether costs had been reasonably incurred because of the switch from LSC to CFA funding did not depend on the advice given to the client or the reasons why the client made the choice. The sole question was whether there was, objectively speaking, only one reasonable decision.

51. In the context of the present case, the submission was that, even if the Master was correct in finding that the possibility of the LSC withdrawing funding was not a reason for the switch to CFA, nevertheless it was the only reasonable decision. This was because of Ms Seabrook's evidence in para 38 of her witness statement. She said the case would have become uninsurable because the ATE insurer would not be prepared to issue an ATE policy where the Defence denied liability and the LSC had discharged the legal aid certificate because of the poor chances of success.

52. This point was not addressed in Surrey. Nor was the case argued in this way before the Master. Unsurprisingly it forms no part of his judgment. There was no Ground of Appeal to this court based on it.

53. The court must consider the fact that this point was not raised until in oral submissions before me. At first, neither the Court, nor Mr Hutton wished to take a purely procedural point. However, as the matter developed, so did the procedural concerns. First, the Defendant had taken a decision not to cross-examine Ms Seabrook before the Master. She was available for cross-examination. That decision would have been made on the arguments reasonably expected to be, and in fact, presented. There was at no stage any suggestion that, even if the actual reasons for the decision to switch funding did not include the possibility that the LSC funding would be withdrawn, nevertheless the decision was objectively justified. Had that been an argument before the Master, the Defendant may have asked to cross-examine Ms Seabrook. Mr Marven said that was

[5] See in particular Surrey at [14] and [32]

not realistic, but (a) I do not understand why not and (b) Mr Hutton stated that, though he could not say he would have asked to cross-examine, nor could he say he would not have done. I accept this. Secondly, the Master, though he did make a finding in para 30, may well have approached that finding and his reasons for it somewhat differently had it been potentially critical to his decision, rather than being seemingly non-critical based as it was on a reading of Surrey which was not sought to be distinguished before him.

54. The principles of allowing new points on appeal are set out in the 2019 White Book at 52.17.3. So, for example, in Crane v Sky In-Home Ltd[6] Arden LJ (As she then was) reviewed the authorities and said at [21]: "the court has to be satisfied that SHS will not be at risk of prejudice if the new point is allowed because it might have adduced other evidence at trial, or otherwise conduct the case differently".

55. In those circumstances it cannot be right to allow the new point to be raised on appeal.

56. I shall in any event make some comments about the factual position, while carefully eschewing the argument that Surrey could be distinguished.

57. It merits repetition that the factual argument is premised on the fact that no ATE insurer would insure if the LSC had withdrawn funding after service of the Defence. This, it is said, objectively was the key reason why there was no real choice but to switch funding before service of Defence. Ms Seabrook's recollection in her evidence in para 38 is said to be impregnable, she not having been cross-examined. My comments on this are:

- If this risk of losing funding was so key that it meant that the only reasonable choice available to the client was to switch funding rather than issue proceedings, it is extremely odd that (a) the client was never told this and (b) it is never referred to in any of the contemporaneous documentation

- The matter goes even further than this. After the first response from the LSC on 27 June 2012, Ms Hillson spoke to two partners, including Ms Seabrook, on 2 July 2012. Not only is the potential unavailability of ATE funding not mentioned, after the meeting Ms Hillson wrote to the LSC on 12 July 2012 repeating the request for extra funding to allow the issue of proceedings. At no stage was the LSC asked to re-consider the possibility of not continuing to fund after service of the Defence. So these very experienced clinical negligence solicitors, whose recollection is now that ATE insurance would not have been available if LSC funding was withdrawn after Defence, continued to press the LSC for money to issue proceedings and serve the Particulars of Claim.

- It is also of note that in the meeting of 2 July 2012, Ms Seabrook is recorded as saying: "If he (Counsel) is willing to take it on a CFA then, as they are not giving us any further money, we should talk to the client about taking it on a CFA.." *(My underlining)*

- It is of course theoretically possible that at the time none of the 3 solicitors involved spotted this problem, now said to be such that it, without more, yielded only one reasonable choice, namely to switch funding before a defence could

[6] [2008] EWCA Civ 978

be served. However, that sits very ill with all the contemporaneous evidence and the experience of the solicitors.

- In any event the ATE insurers in this case required reasonable prospects of success in order to insure the claim (see causes 10.6 and 12.1 of the ATE agreement). There is nothing in the papers to suggest that a defence denying liability would have materially altered the prospects of success in circumstances where liability had been denied on one basis and further particulars (which had not been forthcoming) requested on the second potential basis of the claim. Indeed, when considering whether to fund, the ATE Insurers[7] themselves went through the papers and offered insurance on the basis that they thought: "there are cogent arguments on breach/causation supported by the expert evidence"[8]

- The above demonstrates: (a) (At least some of) the hurdles which would have had to be surmounted by Ms Seabrook in cross-examination on para 38 of her statement, (b) If the matter fell to be decided on paper, the probabilities are strongly in favour of Ms Seabrook's recollection being in error.

58. Given that the point was never raised before the Master, and his primary concern - based on Surrey - was what the client's reason actually was, his statement in the first part of paragraph 30 was not central to his decision making. Had the matter been fully canvassed, and/or if there had been cross-examination, it is not known whether the Master would have said what he did, or said it in that way.

The Fourth Ground: The Master was wrong to conclude that it was unreasonable of the Claimant's solicitors to obtain quantum reports.

59. In the context of the entirely justified finding that the solicitors' overwhelming reason for the change in funding was to increase costs to be spent under certificate, the Master considered the basis of the LSC's rejection of further funds whilst approving the certificate to include the issue of proceedings.

60. The Defendants submitted that the money spent on experts' reports relating to quantum was not covered by the scope of the certificate and should not have been obtained at that point. It is for this reason that the Claimant's solicitors found themselves unable to spend further money necessary to issue proceedings under the certificate.

61. As a matter of arithmetic, the cost of three quantum experts' reports was £5,494.50. Counsel's fees for drafting the particulars of claim were £2,375. No Court fee was claimed in the bill. Therefore it was assumed that the Claimant was exempt from paying it. On the claim form it was recorded as £1,670. The Master found that there was force in the suggestion that there would have been room in the sums allowed by the LSC for the instruction of counsel and the commencement of proceedings within the certificate already provided. This was not contentious in the appeal.

62. In his judgment at paragraph 37-49 the Master found the following:

[7] In an e mail dated 24 October 2012
[8] cf the last 3 lines of the Master's judgment at [30]

(i) The crucial question was whether or not it was a reasonable for the solicitors to obtain quantum reports prior to the issue of proceedings. He referred to paragraphs 26 of Ms Seabrook's witness statement which said: "…I have always told my team that gathering some early quantum evidence is absolutely necessary to enable us to respond on behalf of the clients to any early Part 36 offers made by defendants."

(ii) There are two separate reasons given by the Master why the Claimant's approach to obtaining quantum evidence at this early stage was not reasonable. These were:

(a) The alleged need to be aware of the likely value of the case. In this regard the Master referred to the case of SG v Hewitt[9].

(b) Secondly, the LSC were not responsible for the costs of the quantum experts because they did not fit within the phrase: "all work necessary to complete the investigation into liability and causation" set out in the certificate. Whilst that phrase was only included in the March 2009 amendment to the certificate it seemed to the Master incontrovertible that the "one medical report per specialism" in the original limitation would similarly relate to experts concerned with breach of duty and causation, and not with quantum. In any event, none of the quantum experts were providing a medical report.

63. I shall begin with an analysis of the second reason given by the Master. The two reasons are independent. I have set out the wording of the LSC certificates in some detail. The 20 June 2006 certificate provided for "obtaining one medical report per specialism." The letter of 9 June 2008 increased the cost limitation because the LSC expected the investigative stage "in cases involving two liability experts to be concluded for £7,500." The 26 March 2009 extension allowed for "all work necessary to complete the investigation into liability and causation…" In my judgment the Master's finding was absolutely correct. The appropriate question is what the certificate authorised. The certificate and extensions did not authorise the use of legal aid funds to instruct quantum experts.

64. The Claimant refers to the LSC's clinical negligence funding checklist. In investigative help stage 1[10] it states: "Includes attendance on clients, medical records, client statement(s), instructing experts…" It is said that there is no restriction on the type of experts. Nevertheless: (a) the certificate itself must be the basis of the authorised funding, (b) for authorisation of sums the LSC document requires an answer to the question "Is a split trial likely to be appropriate?" It continues: "in a case where numerous quantum experts are required the assumption will be that funding is provided on the basis of a split trial unless liability/causation is conceded or a realistic offer assessment has been made." This fits in with the earlier statement in the checklist that there are proposed stages which lead to a trial on liability (and settlement) and then quantum investigations and a quantum trial.

[9] [2012 EWCA Civ 1053
[10] It is the same format in Issue of Proceedings – Mutual exchange Stage 2.

65. The letter to the LSC dated 8 April 2011 did say that a split trial was not likely to be appropriate and gave the reason that the Claimant's condition was unlikely to improve. I say by way of footnote that seems not to be a good reason for failing to have a split trial. There are other particularly valid reasons why a liability/causation trial should be held before the enormous expense of assessing quantum is incurred. The letter of 8 April 2011 follows the format of the matters to be addressed for authorisation as required by the LSC's documents. It is to be noted that, prior to the question about the split trial, the requirement is to "(b) List all medical reports obtained…" Under this heading, the letter lists three non-medical experts.

66. The net result quite simply is that three medical experts had been instructed, along with three non-medical experts. These latter were not authorised by LSC funding at any stage. Therefore, the Master found (paragraph 47) "the representations of Scrivengers to the LSC were all fundamentally flawed by erroneous calculations." As the Master said this was similar to the case of Yesil which was one of the Surrey cases.[11]

67. As Mr Hutton QC submitted, if it was the solicitors' practice to instruct quantum experts in the early stages without seeking authority from the LSC to do so, then they did this at their own risk. Thus, the costs of such steps outside the costs limitation could not be counted as costs counting towards the costs limitation in the certificate.

68. On this basis alone, the Master's decision is correct.

69. I turn briefly to the Master's other reason why the Claimants obtaining quantum evidence at the early stage was not reasonable. He noted from the SG case, that it was clear from the judgment that Claimants as a whole might be in some difficulties from a well-judged early Part 36 offer. Nevertheless, the court emphasised the exception to the general rule on Part 36 offers, namely, the general rule will be followed unless the court "considers it unjust to do so".

70. There are statements in the Master's judgment at [41] and [42] which cause concern on this point. For example:

    (i) He says that if it had been Ms Seabrook's practice to obtain early quantum reports, then that does not appear to take into account the costs protection afforded to a legally aided claimant. However, subject to the exception in Part 36, a successfully legally aided claimant: (a) would have a statutory charge in respect of his or her own costs after an effective offer from the Defendant, and (b) would be vulnerable to settlement of the Defendant's post offer costs against the damages recovered.

    (ii) Further, the Master said that if an offer was made that could not be discounted then the LSC would presumably extend the certificate to fund quantum investigations at that point. Even if correct[12], it would not, subject to the Part 36 exception, protect the claimant against an adverse costs order.

71. This court would have some difficulty in upholding the Master's first basis. He himself appeared to accept that he may possibly have fallen into error. He said [44] "…if I am

[11] See Surrey at [39]-[44] and [66].
[12] He may have had in mind the LCS Settlement Stage 3.

wrong about these matters, I do not think that there is any room for doubt in respect of my second reason." I agree. That is a sufficient answer to this ground of appeal.

72. I would add by way of some additional comments that experienced personal injury solicitors will have some "ball park figure" understanding of value of a claim once medical evidence, including evidence as to condition and prognosis has been obtained. To suggest otherwise flies in the face of the knowledge acquired over time by such practitioners.[13] In summary it may not be unreasonable to obtain early quantum reports; however it is not unreasonable not to obtain them. Such reports are commonly not obtained until after a liability/causation trial. This reflects the way LSC funding is outlined in the Checklist. Of course there is always a risk that a defendant may make a speculative Part 36 offer before any quantum reports have been obtained. However, such an offer is usually made where liability looks very problematical for the Claimant and the Defendant makes a low offer which the court is asked to approve because of the very substantial danger of total failure. It would be rare indeed for either (a) a defendant to make a very substantial offer of a 7-figure lump sum plus periodical payments without any quantum reports and/or (b) a court being asked to (or approving) an offer in a case which was strong on liability and which did not have the benefit of some quantum evidence. If such offers became a real problem in large-scale personal injury litigation, such that Claimants were being put at serious cost risk when they could not obtain quantum reports because of LSC certificates, then one would have expected it to have surfaced and that either the SG exception would be utilised perhaps more than it is, or there would be other steps taken to counteract the problem.

Conclusion

73. The Master correctly directed himself as to the principles of law set out in the Surrey case. These included:

(i) "Where the client is faced with a choice between two alternative courses of action which will involve incurring costs, it may well be the case that both courses of action are reasonable, even if one is more costly than another...Whether the incurring of costs is or is not reasonable will depend on the facts that are relevant to the particular case under consideration." (Paragraph 14)

(ii) The burden of proof lies on the receiving party. "The paying party is at least entitled to ask the question: why did you switch? In those circumstances I consider it is up to the receiving party to justify his choice; and that entails examining the reasons why the choice was made" (Paragraph 30).

(iii) Where (as here) the litigant followed the solicitor's advice then (paragraph 32) "…the real issue is not the *advice* as such, but the *reasons* why the receiving party made the choice that he did. If the reasons for that choice are

[13] In paragraph 38 of the judgment the Master mentioned such a suggestion by Mr Hutton QC. Mr Marven disagreed with the suggestion on the basis that solicitors could not possibly know all of the quantum aspects such as the Claimant's life expectancy or the need to have two carers on a 24 hour basis in this case. The Claimant's life expectancy is a medical matter. As to carers this is part medical and part nursing. Nevertheless, experienced personal injury solicitors would have a pretty good idea as to whether two 24-hour carers could be justified, even in the absence of the nursing evidence. See also LSC Checklist Stages1 and 2 which say that a broad estimate of quantum is acceptable if quantum is complex or the prognosis is unclear.

> contained in the advice, then the advice constitutes the reasons. In my judgment a costs judge is entitled to examine the *reasons* why a receiving party made the choice that he did; and in many cases that will entail looking at the advice that he received."

74. The Master found in paragraph 50 that neither of the reasons put forward by the Claimant's solicitors justified the change in funding. He therefore disallowed the additional liabilities.

75. As the Court of Appeal made clear in Surrey (paragraph 27) the test that I am required to apply is that described in the Solutia case[14] namely,

> "Essentially the test requires the appellate court to consider whether or not, in a case involving 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 has 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."

76. In Surrey at paragraph 28 the Court said that rather than being a discretion, the decision in the Surrey case (as in the present case) is rather "an evaluative judgment" adding, however, "to describe the decision as an evaluative judgment, rather than an exercise of discretion does not, I think, significantly alter the test in which an appellate court must apply. But if the decision is to is described as a finding of fact the burden of persuading an appeal court to reverse a finding of fact is even higher…however, I am content to proceed on the basis that the test is as stated in the Solutia case."

77. Following that authority and for reasons given, the appeal must be dismissed.

Other Matters

78. I do not deal with the two matters referred to in paragraphs 51-52 of the Master's judgment since the Master said it was not necessary for him to consider them, though he did make some comments. Nor are they the subject of a Respondent's Notice. In any event, the Respondent accepted that I do not need to deal with them if the appeal was dismissed, as it has been.

[14] [2002] P.I.Q.R. P16 at paragraph 11