Neutral Citation Number: [2018] EWCA Civ 451

Case No: A2/2016/3419/3418/3417

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION
Mr Justice Foskett
QB/2015/0487:QB2016/0028:QB/2016/0113

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/03/2018

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE LEWISON
and
LADY JUSTICE KING

Between :

KAI SURREY **(A Child and Protected Party, by his Litigation Friend, AMY SURREY)**	**Respondent**
- and -	
BARNET AND CHASE FARM HOSPITALS NHS TRUST	**Appellant**

Between:

AH **(A Protected Party, by her Litigation Friend, XXX)**	**Respondent**
- and -	
LEWISHAM HEALTHCARE NHS TRUST	**Appellant**

Between:

MEHMET YESIL **(A Child and Protected Party, by his Litigation Friend, ALISAN YESIL)**	**Respondent**
- and -	
DONCASTER AND BASSETLAW HOSPITALS NHS FOUNDATION TRUST	**Appellant**

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MR BENJAMIN WILLIAMS QC & MR ROBERT MARVEN QC (instructed by **Irwin Mitchell LLP**) for the **Respondents**
MR ALEXANDER HUTTON QC (instructed by **Acumension Limited**) for the **Appellants**

Hearing dates : 7 and 8 March 2018

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Approved Judgment

Lord Justice Lewison:

1. Where a party to litigation is entitled to have his costs assessed, the court will not allow costs "which have been unreasonably incurred or are unreasonable in amount." Where the assessment takes place on the standard basis, any doubt is resolved in favour of the paying party: CPR Part 44.4 (1) and (2). In deciding whether costs have been proportionately and reasonably incurred the court must "have regard to all the circumstances of the case": CPR Part 44.5 (1).

2. The issue raised on these appeals from Foskett J (sitting with Senior Costs Judge Gordon-Saker as assessor) is the approach that the court should take in deciding whether costs are reasonable or unreasonable in a case where, after liability has been admitted, the funding of the claim changes (at the client's request) from funding by legal aid to funding under a conditional fee agreement (a "CFA") supplemented by a self-funding after the event insurance policy ("ATE insurance"). The judge's judgment is at [2016] EWHC 1598 (QB); [2018] 1 WLR 499. Since all these appeals are second appeals, our primary focus must be on the decisions at first instance.

3. Each of the three cases under consideration involves claims for clinical negligence resulting in very serious injury. In the *Surrey* case the claimant suffered very serious brain damage at birth. In the *AH* case the adult claimant also suffered devastating brain injury as a result of strokes, as well as becoming blind and paralysed. In the *Yesil* case the claimant was born with very serious mental and physical disabilities. The details of the individual cases do not bear on the legal issue, save to the extent that the quantum of damages recoverable in each case was likely to be very large if liability were established. Further factual details about each case can be found in the judge's judgment. However, the litigation history in each case is of relevance.

4. The litigation history in each of the three cases was as follows. In the *Surrey* case a legal aid certificate was granted on 9 January 2006. Liability was agreed in March 2013 and that agreement was subsequently approved by the court. By the end of February 2013 the claimant's solicitors had served a schedule of loss and experts reports. The defendant had made no Part 36 offer. On 15 March 2013 the legal aid certificate was discharged. On 21 March 2013 the claimant entered into a CFA with solicitors, Irwin Mitchell; and the claimant took out a 'LitigATE' policy of ATE insurance with Allianz Insurance plc on 22 March 2012. On 29 August 2013 there was a round table meeting at which quantum was agreed, in the lump sum of £2.4 million plus annual periodical payments for life starting at £74,400 and rising to £154,236. That agreement was approved by the court on 4 November 2013.

5. In the *AH* case a legal aid certificate was granted on 4 March 2010. A letter of claim was sent on 7 September 2011. The defendant's reply of 19 January 2011 contained a partial admission accepting that breach of duty led to the claimant being admitted to intensive care; but causation remained substantially in issue because it was not admitted that the breach of duty caused the strokes or the consequential brain damage. Thereafter, on 31 January 2013 proceedings were served. The defendant had made no Part 36 offer. On 27 February 2013 the claimant's solicitors, Irwin Mitchell, applied to discharge the legal aid certificate. On 18 March 2013 the defendant made a Part 36 offer of £285,000. On 27 March 2013 the claimant entered into a CFA with the solicitors and took out ATE insurance. On 13 December 2013 the defendant made an increased Part 36 offer of £325,000 plus CRU of £26,409. That offer was accepted on

26 September 2013 and the settlement was approved by the court on 13 December 2013.

6. In the *Yesil* case a legal aid certificate was granted on 19 April 2007. Breach of duty was admitted on 30 April 2010. A letter of claim was sent on 10 November 2010. Causation was admitted in April 2011. The defendant had made no Part 36 offer. Legal aid was subsequently discharged at the claimant's request, and his litigation friend entered into a CFA with Irwin Mitchell, and took out ATE insurance on 25 March 2013. In July 2013 the claimant served a schedule of loss claiming over £7 million. On 19 February 2014 the defendant accepted the claimant's Part 36 offer of £2.5 million together with staged periodical payments for life of £89,000 rising to £205,000 per annum.

7. Thus in each of the three cases, by the time the legal aid certificate was discharged the defendant was in principle the paying party, although in the *AH* case there was still an important issue about causation to be resolved. Costs would be recoverable from the defendant at ordinary commercial rates, rather than the lower rates that Legal Services Commission ("the LSC") would pay if the claim failed and Irwin Mitchell had to look to the LSC for remuneration. In each case the CFA provided that the success fee would be payable "if you Win your Claim". It stated that "you win your Claim … when your claim is finally decided in your favour, whether by a Court decision or by an agreement to pay you Damages". It also provided that if any costs were disallowed on an assessment, the client would not be liable to pay those costs. It was this that made the CFA what is known in the jargon as "a CFA-lite". In terms of the definition in the CFA a success fee was assured.

8. The judge described the essential legal background succinctly at [2] to [3]:

> "[2] The substantive litigation in each case had been proceeding for several years prior to 1 April 2013 and the claim of each claimant had been advanced with the benefit of legal aid. April 1, 2013 was the date from which it would no longer be possible for claimants proceeding under a conditional fee agreement ("CFA") to recover success fees and after the event ("ATE") premiums from the defendant if successful in the litigation. In the month or so prior to 1 April 2013 the solicitors acting for each claimant (Irwin Mitchell LLP), with the agreement of the litigation friend of each claimant, arranged for the legal aid certificates to be discharged in each case and for the funding for each claimant henceforth to be funded by a CFA. In fact, the CFA was what is known generally as a "CFA lite"—in other words, a CFA by virtue of which the client's liability to pay his lawyers' costs is limited to the amount of costs recoverable from the other party. Any shortfall is absorbed by the solicitors.
>
> [3] Each case was finalised in a way that was successful from each claimant's point of view resulting in a liability upon each defendant for costs. However, in due course, recovery of the success fee and the ATE premium in each case was challenged by the defendant (in reality, by the National Health Service

> Litigation Authority —"the NHSLA") and the costs judge upheld the challenge in each case, holding that the changed funding arrangements were not reasonable."

9. Changes to the funding regime were made by The Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"). One of the changes accompanying the changes to the litigation funding regime that was due to come into effect on 1 April 2013 was an increase of 10 per cent in the level of general damages. This was one of Sir Rupert Jackson's recommendations to which effect was given by this court in *Simmons v Castle* [2012] EWCA Civ 1039, [2013] 1 WLR 1239 by two judgments given in September and October 2012. In that case the court stated:

> "Accordingly, we take this opportunity to declare that, with effect from 1 April 2013, the proper level of general damages in all civil claims for (i) pain and suffering, (ii) loss of amenity, (iii) physical inconvenience and discomfort, (iv) social discredit, or (v) mental distress, will be 10% higher than previously, unless the claimant falls within section 44(6) of the 2012 Act."

10. The effect of section 44 (6) of LASPO, to which the court referred, was that the abolition of recoverable success fees under CFAs would not prevent the recovery of a success fee under a CFA entered into before 1 April 2013. The increase in general damages has been referred to as "the *Simmons v Castle* uplift". It follows that where a CFA was entered into before 1 April 2013, there was no possibility of recovering the *Simmons v Castle* uplift. In *Surrey* the *Simmons v Castle* uplift was worth between £16,695 and £20,970. In *AH* it was worth about £17,500; and in *Yesil* it was worth about £28,000.

11. It is of some significance to understand the reason for Sir Rupert's recommendation that the level of general damages be increased by 10 per cent. The recommendation itself was contained in para 5.1 of Chapter 10 of his Final Report, together with a recommendation that success fees be capped at 25 per cent of damages, excluding damages for future care or future losses. The purpose of the recommendations was, as Sir Rupert stated, "to assist personal injury claimants in meeting success fees out of damages." In para 5.4 he commented:

> "I am advised by Professor Paul Fenn (economist assessor) that such an increase in general damages will in the great majority of cases leave claimants no worse off. Indeed the great majority of claimants (whose claims settle early) will be better off."

12. This court accepted that rationale in its second judgment in *Simmons v Castle* at [27] and [31].

13. There is no objection on the part of the defendants to their liability to pay the claimants' solicitors' base fees. The objection is to the success fees, and the ATE insurance premiums payable as a result of the change from funding by legal aid to funding by CFA-lite. In the case of *Surrey*, the combined total claimed exceeded £100,000; in *AH* it exceeded £50,000, and in *Yesil* it exceeded £100,000. What marks these cases out from previous cases that the courts have considered is the combination

of two facts: (a) at the time of the switch to the CFAs the claimants already had legal aid; and (b) at the time of the switch the defendants were already, in principle, the paying party.

14. The question for us is whether, in each of the three cases, the decision to enter into a CFA, with its accompanying ATE insurance policy, gave rise to costs reasonably incurred. 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. For example, it may be reasonable to instruct solicitors in London rather than in the regions, even though the former charge more than the latter, and even where the latter would have been capable of doing a perfectly competent job. Whether the incurring of costs is or is not reasonable will depend on the facts that are relevant to the particular case under consideration.

15. The test applicable to the question whether costs have been reasonably incurred has been considered at least twice by this court. In *Wraith v Sheffield Forgemasters Ltd* [1998] 1 WLR 133 (heard together with *Truscott v Truscott*) the court approved the statement of principle made at first instance by Potter J:

> "In relation to the first question 'Were the costs reasonably incurred?' it is in principle open to the paying party, on a taxation of costs on the standard basis, to contend that the successful party's costs have not been 'reasonably incurred' to the extent that they had been augmented by employment of a solicitor who, by reason of his calibre, normal area of practice, status or location, amounts to an unsuitable or 'luxury' choice, made on grounds other than grounds which would be taken into account by an ordinary reasonable litigant concerned to obtain skilful, competent and efficient representation in the type of litigation concerned … However, in deciding whether such an objection is sustainable in practice, the focus is primarily upon the reasonable interests of the plaintiff in the litigation so that, in relation to broad categories of costs, such as those generated by the decision of a plaintiff to employ a particular status or type of solicitor or counsel, or one located in a particular area, one looks to see whether, having regard to the extent and importance of the litigation to a reasonably minded plaintiff, a reasonable choice or decision has been made."

16. That case illustrates the sensitivity of the test to the facts of the case. In one of the two cases under appeal (*Truscott v Truscott*) it was held to have been reasonable for the claimant to have instructed London solicitors instead of local solicitors; while in the other (*Wraith v Sheffield Forgemasters Ltd*) it was held to have been unreasonable for the claimant to have instructed London solicitors rather than local solicitors. The way in which this test was applied in *Truscott* is particularly instructive. At first instance the judge had simply compared the charging rates of the London solicitors, ATC, with the charging rates of a local firm. This court held that was too narrow an approach. It examined the reasons (of which there were seven) why Mr Truscott had chosen the solicitors that he did. One of those reasons was entirely personal to him: namely his dissatisfaction with his previous (local) solicitors. Another, which has relevance to the

issues in our cases, was the fact that he had taken advice about whom to consult, and had been recommended to consult ATC. Thus the court examined the litigant's particular reasons for making the choice that he did. Equally important, the court excluded from consideration any particular experience that ATC had in relation to professional negligence:

> "… because that was not why Mr Truscott consulted them."

17. It is plain, in my judgment, that in examining whether costs were reasonably incurred the court is entitled to (and, in practical terms, will often have to) examine the reasons why the litigant incurred the costs that he did.

18. Potter J's statement of principle was again approved by this court in *Solutia UK Ltd v Griffiths* [2001] EWCA Civ 736, [2002] PIQR P16 in which, having referred to *Wraith*, Latham LJ said at [16]:

> "… whereas it is clear that the test must involve an objective element when determining the reasonableness or otherwise of instructing the particular legal advisers in question, nonetheless that must always be a question which is answered within the context of the particular circumstances of the particular litigants with whom the court is concerned."

19. That was another case in which the court took into account the particular reasons why the claimants had instructed London solicitors. As Latham LJ put it at [22]:

> "It seems to me that the costs judge was clearly wrong in failing to take account of those special features of the case which were material to the decision to instruct Leigh Day & Co…."

20. Thus the court took into account the factors that were material to the decision. The choice of "material" as the appropriate adjective also has a bearing on the issues we have to decide.

21. *Sarwar v Alam* [2001] EWCA Civ 1401, [2002] 1 WLR 125 concerned the reasonableness of entering into a CFA, together with ATE insurance, in a low value claim arising out of a road traffic accident. The claim was one by a passenger against the driver of the car in which he was travelling. The claimant had told his solicitor that he had no before the event insurance ("BTE insurance"). In fact the driver's own BTE insurance might have funded the claim, but the claimant's solicitor made no inquiries about that. The issue was whether the ATE insurance premium was recoverable by way of costs. At [50] the court said:

> "The overriding principle is that the claimant, assisted by his/her solicitor, should act in a manner that is reasonable. The availability of ATE cover at a modest premium will inevitably restrict the extent to which it will be reasonable for a solicitor's time to be used in investigating alternative sources of insurance."

22. At [51] the court recorded the submission that the quality of a solicitor's advice should be judged by the same standards as professional negligence. The court rejected that submission, stating:

> "We deprecate any attempt to equate the question of reasonableness that a costs judge has to decide with the question whether the claimant's solicitor has been in breach of duty to his/her client. If a solicitor gives advice which proves unsound, it will not necessarily follow that the advice was negligent. The advice will necessarily be based on information provided by the client. If the information is inadequate or inaccurate, the advice may prove to be unsound without any question of fault on the part of the solicitor."

23. In the result, the court held that the cost of the ATE insurance premium was recoverable because it was not incumbent on a passenger who wished to sue the driver to rely on the driver's own BTE insurance. What I draw from these two paragraphs is that a relevant factor in the reasonableness of the receiving party's choice to incur costs is the advice that he has received; and that if that advice is not "sound" (without necessarily being negligent) it may compromise the reasonableness of the choice. That fits in with the way in which the court took into account the advice that Mr Truscott had had before deciding to consult ATC.

24. In each of our three cases the costs judge posed the question that he had to answer. In *Surrey* Master Rowley said at [68]:

> "The test set out above from *Sarwar* requires me to consider whether the claimant, assisted by his solicitor, has acted in a manner that is reasonable. The relevant action is of course the decision to change funding arrangements and so the question is whether the claimant made a reasonable choice in doing so. As Master Gordon-Saker said in *LXM*, the choice does not have to be the best one, but merely a reasonable one."

25. In *AH* Deputy Master Campbell posed himself the question at [62]:

> "Was this claimant's choice objectively reasonable based on the advice she was given by Irwin Mitchell, taking all relevant circumstances into account?"

26. In *Yesil* DJ Besford said at [53]:

> "The general test remains, whether this claimant made a reasonable choice in all the circumstances to switch funding at the time that he/she did. When considering the claimant's actions, the justification, including legal advice proffered at the time also weighs into the mix. I further accept that the choice made does not have to be the best one, with the benefit of full and competent advice, but merely a reasonable choice. This necessarily involves an element of both subjective and objective assessment. If a decision is manifestly reasonable,

> then the lack of correct or inadequate advice does not render a reasonable decision, unreasonable. However as the cases show, when looking at 'all the circumstances' the choice is fact sensitive. In assessing 'all the circumstances' legal advice or its absence is a relevant circumstance"

27. I do not consider that any of the three costs judges mis-stated the legal test that they were required to apply. Nor did Foskett J suggest that they had. So this is not a case in which it can be said that the costs judges misdirected themselves in law. Foskett J was sitting as an appeal court from the three decisions of the costs judges. The test that he was required to apply was described in *Solutia* at [11]:

> "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."

28. It might, perhaps, be more accurate to describe the decision of the costs judge that a receiving party had not discharged the burden of proof as an evaluative judgment, rather than the exercise of a discretion; or even as a finding of fact. To describe the decision as an evaluative judgment rather than an exercise of discretion does not, I think, significantly alter the test which an appellate court must apply. But if the decision is described as a finding of fact the burden of persuading an appeal court to reverse a finding of fact is even higher: see for example *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600. However, I am content to proceed on the basis that the test is as stated in *Solutia*.

29. In each of our three cases, the costs judges considered the pros and cons of funding by legal aid as opposed to funding by a CFA-lite plus ATE insurance. At an abstract level there was something to be said for each method. In *AH* Deputy Master Campbell held at [49] that there was "no advantage or combination of advantages which makes one choice more compelling and irresistible than any other…" In *Yesil* DJ Besford held at [75] that "the decision is finely balanced if one approaches the issue from a level playing field." In *Surrey*, I think that Master Rowley reached the same conclusion, although he did not summarise his conclusion quite so pithily. Between [79] and [93] Foskett J also conducted a balance sheet assessment, at a generic level, of the pros and cons of each funding method. I agree with Mr Hutton QC that a generic high-level assessment of the pros and cons of the two methods of funding does not answer the question whether costs were reasonably incurred in the particular case under consideration. While the judge was, understandably, trying to give general guidance, I do not consider that the question whether a change in funding method was reasonable is a question to be answered at the macro level. As Lord Scott put it in his dissenting speech in *Callery v Gray* [2002] UKHL 28, [2002] 1 WLR 2000 at [114]:

> "The correct approach for costs assessment purposes to the question whether an item of expenditure by the receiving party has been reasonably incurred is to look at the circumstances of

> the particular case. The question whether the paying party should be required to meet a particular item of expenditure is a case specific question."

30. Mr Williams QC argued that since there was nothing much to choose between funding by legal aid and funding by CFA-lite plus ATE insurance, it followed that either choice was a reasonable choice. It therefore followed that the costs incurred in entering into the CFA-lite and the ATE policy were reasonably incurred; and that the costs judges were not entitled, let alone required, to examine the reasons for the switch. I do not agree. The court is required to take into account all the circumstances of the case. That means the particular case under consideration: not some generalised description of similar cases, as *Solutia* makes clear. Moreover, the burden of proof, in the case of an assessment on the standard basis, lies on the receiving party. Accepting for the sake of argument that there is a "level playing field" and that there was not much to choose between funding by legal aid and funding by CFA, the fact is that in each of the three cases the claimant already had chosen legal aid. If there is not much to choose between the two methods of funding, and the claimant decides to switch to a funding method that is far more disadvantageous to a paying party, I consider that the paying party is at least entitled to ask the question: why did you switch? In those circumstances I consider that it is up to the receiving party to justify his choice; and that entails examining the reasons why the choice was made.

31. In our cases the judge held at [73] (the emphasis is his):

> "It seems to me that what *Sarwar's* case decided, as a matter of principle, albeit in the context of the issues that arose in that case, was that the advice received by the receiving party on an issue as to the funding of the litigation *may* be relevant to the question of the reasonableness of the decision concerning funding, but the advice itself is *not* to be judged by reference to the standards of negligence."

32. I agree with this, as far as it goes, at least in a case in which the litigant has followed his solicitor's advice. However, in my judgment, 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 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.

33. So what were the reasons that prompted each of the claimants to switch from funding by legal aid to entry into a CFA-lite? The NHSLA applied for disclosure of contemporaneous materials evidencing the advice that had been given to the clients in each case, in accordance with the procedure laid down in PD 47 para 13.13. This gives the receiving party an election whether to disclose the material (which is likely to be privileged) or to decline to disclose and "instead rely on other evidence". In the present case Irwin Mitchell chose to rely on other evidence. It seems to me that in those circumstances we must take that evidence as proxy for the reasons given to the client for the change.

34. In *Surrey*, the relevant solicitor was Ms Stanford-Tuck. She made a witness statement in which she explained why she had advised the switch from legal aid to a CFA-lite. That switch was made at a time when judgment for damages to be assessed had already been entered against the defendant; and no Part 36 offer had been made. Her main point was that there was no guarantee that the LSC would increase the reserve to a sufficient level to fund the assessment of damages hearing. However, she gave no details of what costs had been incurred, what the authorised costs limit was, what further costs needed to be incurred, and how the LSC had reacted to requests for an increase in the costs limit. In short, her discussion was at a very high level of generality. She also made the extraordinary point that:

> "There was a risk to the client that there may not be sufficient funding to cover the cost of our work in the future and my client could be exposed to make up the shortfall of any costs not recovered from the Defendant."

35. If that was the advice that she gave her client, it was also seriously misleading. It amounts to saying that a legally aided client must make up the shortfall in his own solicitors' costs if they are not recovered from the other side. But that amounts to "topping up" which is unlawful: Access to Justice Act 1999 s 10 (1) and s 22 (2); LASPO s 23; s 28 (2). On one reading of her evidence the amount of that shortfall might have been as much as £150,000. If the client was advised of a very substantial potential liability that was in fact unlawful, then he has been misled into making a decision based on deeply flawed advice to the effect that he was exposed to a substantial financial risk which was in fact non-existent. Although this was one of the reasons that Master Rowley gave for his decision, Foskett J did not refer to it. Having stated the main reasons for the switch, Ms Stanford-Tuck also said that there were "other general considerations" to be taken into account. Among these was the point that legal aid does not protect a client's damages from the effect of failing to beat a Part 36 offer, or adverse interlocutory costs orders. However, although these risks were mentioned, she gave no consideration to the likelihood of any of those risks eventuating, on the facts of the particular case.

36. Master Rowley was not impressed with Ms Stanford-Tuck's reasoning. He found at [74] that the solicitors had no concern that they would not recover their fees to date, even though they had ignored the costs limitation imposed by the LSC. At [75] he dismissed the argument based on the alleged bureaucratic approach of the LSC. At [82] he held that the risk of legal aid being withdrawn was fanciful; and the costs limitation was not problematic. He considered at [76] that the strongest reasons for the change in funding were the shortfall issues. There were two potential points about shortfall. One was the risk of failing to beat a Part 36 offer. The other (which he described as modest) was the operation of the LSC's statutory charge.

37. In *AH* the relevant solicitor was Ms Cumberland. She made two witness statements. In her first witness statement she drew attention to the fact that although breach of duty had been admitted, causation had not; and that the bulk of the claimed damages was dependent on a favourable finding on causation. She said that there was no guarantee that the LSC would increase the scope of the costs limit; and that the LSC might have taken a different view on the merits of the claim. She also said that she had been involved in cases where the legal aid certificate had been discharged. She, too, said:

> "There was a risk to the Claimant that there might not be sufficient funding to cover the costs of the legal work necessary in the future and the Claimant could have been expected to make up the necessary shortfall of any costs not recovered from the Defendant."

38. Just as in the case of Ms Stanford-Tuck, this amounted to a suggestion of illegal "topping up". And as in *Surrey*, it appears that the client was being advised of a substantial financial risk that was in reality non-existent. This, too, was seriously misleading advice. Her second witness statement did not correct it. This is not a feature upon which Deputy Master Campbell commented. Mr Williams tried to explain away the references by both Ms Stanford-Tuck and Ms Cumberland to "topping up" as no more than muddled expression; but I do not think that there is any getting away from the impression that that advice must have made on the client in each case. However, like Ms Stanford-Tuck, Ms Cumberland also said that there were "other general considerations" to be taken into account. In words which were almost identical to those in Ms Stanford-Tuck's witness statement, she referred to the risk that if the defendant made a Part 36 offer, which the claimant failed to beat, the claimant would be liable to pay the defendants costs incurred thereafter, and that those costs could be set off against any costs otherwise recoverable by the claimant, or even against the damages themselves. But as in the case of Ms Stanford-Tuck there was no evaluation of the risks themselves.

39. In *Yesil* the reasons for the change were set out in a witness statement made by Ms Rowland, the solicitor handling the case. That witness statement was made after Master Rowley's decision in *Surrey*, so Ms Rowland eschewed those reasons which he had held to be bad reasons: in particular the suggestion about "topping up". She said that she had calculated costs incurred so far at legal aid rates as £92,000 as against a costs limit of £94,000. Her perception, therefore, was that the costs were close to the limit. She asked the LSC for an increase in the limit to £240,000 to cover the full costs of the action. The LSC replied that it was "inevitable that you will be recovering your costs inter partes from the other side." However, the LSC did not refuse outright. Instead it said that if costs could not be contained within typical limits it would require a "fully costed costs plan". That would have given a likely maximum of £189,000.

40. Ms Rowland also mentioned the possibility of a Part 36 offer. What she said was:

> "The Defendants could have made a Part 36 offer at any time, and in a case with six experts and four single joint experts, the unrecovered costs could have been very substantial."

41. She also said:

> "When advising my client, I also took into account the 10 per cent increase in general damages which would apply to a post LASPO CFA. In this case, however, this factor was significantly outweighed by the benefits of a pre LASPO CFA as set out above."

42. Despite that statement, it was accepted that Ms Rowland did not mention the *Simmons v Castle* uplift to her client.

43. DJ Besford held that there were a number of flaws in Ms Rowland's approach. First, she had seriously overestimated the amount of costs incurred. Far from being £92,000, they were £66,703. They were therefore well inside the costs limit. Second, the figure of £240,000 was never justified. As DJ Besford held at [64] it was put forward "in a vacuum and without any justification." Third, Ms Rowland never responded to the LSC's request for a fully costed costs plan. Fourth, Ms Rowland appears to have paid no attention at all to the LSC's valid point that as matters stood at the time, no Part 36 offer having been made, it was inevitable that the claimant would recover *inter partes* costs from the NHSLA. In her statement she said that the most prominent factor in advising her client to switch funding methods was that "we were about to reach the cost limit on the legal aid certificate, and the Legal Aid Agency had refused any application for further funding." If that was the advice she gave her client, it was seriously misleading. They were not about to reach the costs limit on the legal aid certificate. Nor had the Legal Aid Agency refused further funding. Indeed, DJ Besford held at [85] that the risk of exceeding the legal aid budget was "minimal". As he held at [63], the fear of exceeding the budget was the deciding feature to prompt the decision to switch funding. He further held at [69], in my judgment correctly (although the syntax has gone wrong):

> "Any decision based upon the inevitability of switch based upon exceeding the budget would appear to be an erroneous assessment."

44. He concluded at [83] that the primary reason for the switch was based upon erroneous information; and in those circumstances the decision to incur the costs associated with the CFA-lite had not been sufficiently justified. In particular he said:

> "On a standard basis, without cogent evidence that the decision to switch from one type of funding to another was a reasonable decision, then a doubt is raised which should be exercised in favour of the paying party."

45. This conclusion preceded his conclusion on the *Simmons v Castle* uplift.

46. Having referred to the decision of Master Rowley in *Surrey*, he concluded at [87]:

> "… I find myself entirely in agreement with Master Rowley in Surrey's case. It is for the claimant on a standard basis to show that the decision to switch funding, at the time it was made was a reasonable decision to take. The limited evidence before the court to explain the decision *was based on an erroneous premises that the cost limit was shortly to be reached*. Further, the solicitors have produced no evidence either by way of file notes, copy letters or even a witness statement from the client as to the advice tendered. In my judgment, the decision to switch was not self-evident or transparent." (Emphasis added)

47. What was common to all three cases was that the claimant's litigation friend was not informed by the solicitors (apparently through oversight) that one consequence of the change from legal aid funding to CFA-lite funding was that the claimant would lose the benefit of the 10 per cent uplift in damages mandated by *Simmons v Castle*. As I have said, although DJ Besford mentioned this point in *Yesil*, it does not seem to me that it formed any part of his real reasons for disallowing the success fee and the ATE premium. By contrast in both *Surrey* and *AH*, this point was a critical factor. Each of the costs judges in those two cases held that it was impossible to say what decision would have been made if that information had been given. There was therefore a doubt about whether the decision was reasonable, which had to be resolved in favour of the paying party. The success fees and ATE premiums were therefore disallowed.

48. In reaching their conclusions each of those costs judges relied on an analogy drawn with the law relating to the giving of informed consent to medical treatment, as explained by the Supreme Court in *Montgomery v Lanarkshire Health Board* [2015] UKSC 11, [2015] AC 1430. In that case Mrs Montgomery, a diabetic, was not told of the risks involved in giving birth vaginally as opposed by means of caesarean section. She proceeded to give birth vaginally, but the birth went wrong and her baby was starved of oxygen, as a result of which he was born with severe disabilities. That damage would have been avoided if Mrs Montgomery had had a caesarean section. The question for the Supreme Court was whether the failure to inform Mrs Montgomery of the risks of giving birth vaginally amounted to a breach of the medical practitioner's duty of care. In other words, at bottom, the question was who should bear the risk of things going wrong: the patient who did not know the risks; or the doctor who did, but who did not tell the patient? As the judge correctly said, the nub of the decision is at [87]:

> "An adult person of sound mind is entitled to decide which, if any, of the available forms of treatment to undergo, and her consent must be obtained before treatment interfering with her bodily integrity is undertaken. The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it."

49. In the *Surrey* case Master Rowley held that a solicitor must set out the various options fully and properly as part of explaining why her advice is to follow a particular course. If a material piece of advice is not given, the advice is insufficient to found a reasonable decision. The test of materiality is the same as in the *Montgomery* case. Since the solicitor gave no advice about the *Simmons v Castle* uplift on general damages; and it was impossible to say what decision would have been made with fuller advice, the success fees were not shown to have been reasonably incurred and were irrecoverable. In *AH* Deputy Master Campbell concluded that the decision to switch funding method was not reasonable because it was based on incomplete advice in which a "significant component was missing". That component was the failure to

inform the client that by switching from legal aid to a CFA-lite the *Simmons v Castle* uplift on general damages would be forfeit. That was something which could have tipped the balance of choice one way or the other if the client had known about it. He concluded that:

> "… the claimant's decision, based as it was upon advice that was flawed in a material way, was not objectively reasonable and the claims for success fees and ATE premium therefore fail."

50. In *Yesil* DJ Bedford also referred to the test in *Montgomery*; but as I have said I do not consider that his decision was based on the failure to mention the *Simmons v Castle* uplift.

51. I find it hard to see how the decision in *Montgomery* bears directly on this case. The issue in *Montgomery* was quite different: it concerned the scope of the duty of a medical practitioner towards a patient. The quality of the patient's decision to undergo treatment was not the point. In the present case the question is whether the costs in question were reasonably incurred. Accordingly, I agree with the judge at [96] that the focus on *Montgomery* was "a distraction". However, although I agree with the judge that *Montgomery* was a distraction, I do not think that the rather unhelpful analogy undermines the correctness of each of the costs judges looking at the particular reasons why each litigation friend made the choice that he or she did. As we have seen the court often examines the reasons underlying a particular choice in the context of litigation; and a test of materiality is not inappropriate, as we have seen from *Solutia*. I consider also that if (as each costs judge found) the reasons given for the choice were a mix of good and bad reasons; and that some clear disadvantages to the client of making the switch had not been explained, the burden was on the receiving party to satisfy the costs judge that even if the bad reasons had not been put forward, and the disadvantages had been properly explained, the client would still have made the same choice.

52. In *Surrey* Master Rowley decided at [86] that:

> "*On the facts of this case*, the failure to give advice regarding the post LASPO landscape and in particular the Simmons damages, in my view rendered the advice to be insufficient on which to found any proper or reasonable conclusion." (Emphasis added)

53. The relevant facts are those that I have already summarised. Some of the risks on which the solicitors relied were on the face of it unlawful. Others were dismissed as fanciful or not problematic. The only one that remained was the risk of shortfall by reason of a failure to beat a Part 36 offer. But that was no more than a risk, that had to be evaluated. By contrast the forfeiting of the *Simmons v Castle* uplift was a certainty. If it is said to be reasonable to forgo a certainty on account of a risk, it is incumbent on the person upon whom the burden of justification rests to demonstrate that the risks have been properly evaluated on the facts of the particular case. In my judgment Master Rowley was entitled to conclude that to engage with the potential risks at such a high level of generality, without reference to the specific risks involved in this particular case, coupled with a failure to balance those risks against the certainty that

the *Simmons v Castle* uplift would be forfeit, was not good enough. I suggested in the course of argument that what has been called the "Part 36 risk" is in fact three risks. But on reflection, and in the light of Mr Hutton's reply, I think that there are in fact four cumulative risks:

i) The risk that the defendant makes a Part 36 offer at some stage before the case has settled;

ii) The risk that, on the advice of his solicitors, the claimant rejects that offer;

iii) The risk that, having rejected the offer, the case goes to trial; and

iv) The risk that at trial the claimant fails to beat the offer.

54. Master Rowley concluded at [88]:

> "There is no evidence before me to indicate whether the claimant or his Litigation Friend would have considered the abandoning of up to £20,000, which was more or less guaranteed, in return for peace of mind regarding future funding. They may have decided that the system that had apparently worked for 7 years was unlikely to break down in the final stages and they would rather have the money and risk the funding issues. They may have taken the view that QOCS protected them sufficiently not to incur an ATE premium. The possibilities for speculation are endless."

55. In *AH* Deputy Master Campbell held at [63] that the advice was more than merely incomplete because a "significant component" was missing. The client should have been told that by entering into the CFA she would immediately forfeit the right to a 10 per cent uplift on general damages, estimated at about £17,500. Deputy Master Campbell was careful to say that if the client had been given that advice it would not *necessarily* have changed the decision. As he put it at [64]:

> "As Mr Hutton points out, we do not know what the client would have said had the *Simmons* advice been given. It could have been "It is worth giving up £17,500 to have the certainty that under a CFA, I will be litigating in a risk-free costs environment in which I will keep all the damages". On the other hand, it could also have been "A settlement discussion has been opened over the telephone, an offer has now been made, we are very close, and £17,500 is a lot of money to give up. As it is, I have the protection of the legal aid certificate. Thank you for giving me this advice but let's play it safe and stick with what we have got as it looks as though we may be able to agree terms before long"."

56. At [67] he said that it was a factor that might have tipped the balance. He thus held:

> "It follows that the claimant's decision, based as it was upon advice that was flawed in a material way, was not objectively

> reasonable and the claims for the success fees and ATE premium therefore fail."

57. It was, of course, not necessary for Deputy Master Campbell to have gone that far. It would have been sufficient for him to have said that there was a doubt about whether the costs had been reasonably incurred; and that the doubt had to be resolved in favour of the paying party. This is what DJ Besford had said in *Yesil* at [83].

58. In relation to the Part 36 risk I consider that in *Yesil* DJ Besford carried out the correct exercise, noting the difference between a risk and a certainty. As he put it at [86]:

> "Whilst [there] may possibly be risks that the claimant may have to pay something out of his damages, the available evidence from Irwin Mitchell is not sufficiently real to justify the loss of substantial additional benefits. The reality may well have been that the additional damages received may have more than met any deduction. The risk of exceeding the Legal Aid budget was minimal and there is a lack of particularity of the 'other circumstances' referred to in the witness statement."

59. I consider that DJ Besford was also correct in saying at [85]:

> "… any shortfall for solicitor/client work would need to be weighed against the additional 10% which was introduced with the intention to offset any such prejudice."

60. The bottom line is that in each of the three cases the advice given to the client had exaggerated (and in two cases misrepresented) the disadvantages of remaining with legal aid funding; and had omitted entirely any mention of the certain disadvantage of entering into a CFA. Moreover, one of the advantages of entering into the CFA was Irwin Mitchell's own prospective entitlement to a substantial success fee. In those circumstances I consider that DJ Besford was correct in saying at [81]:

> "Where one of two or more options available to a client is more financially beneficial to the solicitor, the need for transparency becomes ever greater."

61. This a reflection of the fundamental principle of equity that where a person stands in a fiduciary relationship to another, the fiduciary is not permitted to retain a profit derived from that fiduciary relationship without the *fully informed* consent of the other.

62. Why did the judge disagree with the costs judges? At [95] he said:

> "For reasons which will emerge more fully below, I do consider, with respect, that each Costs Judge placed too much weight on the suggested analogy with the informed consent issue in the context of medical treatment…. Mr Williams is, in my view, right to say that, in the first place, it over-complicates the issue which, putting it shortly, is simply whether the

> additional liabilities were reasonably or unreasonably incurred."

63. This criticism of the costs judges is restricted to the *weight* that they gave to the analogy. Even if that were a fair criticism (and I do not think that it is), it does not amount to saying either that the costs judges took into account an irrelevant consideration; nor that their decisions on the facts were outside the ambit of reasonable decisions open on the facts of the three cases. In questions involving the exercise of a discretion, questions of weight are questions for the primary decision maker: not for an appeal court. Although Mr Williams said that a decision-maker may overweight or underweight a particular factor to such an extent as to make his decision vulnerable to attack on appeal, that will only be the case if the decision falls outside the band of reasonable decisions open to the decision-maker on the facts. The judge did not make that finding. In short, I do not consider that the judge applied the right test to his appellate role. On that ground alone, I do not consider that he was entitled to interfere with the evaluative judgment of the three costs judges.

64. In addition, there are also other parts of his judgment with which I disagree. First, in reversing DJ Besford's decision in *Yesil* the judge appears to have thought that the driver for the decision was Ms Rowland's failure to inform the client that by entering into a CFA-lite the claimant would lose the benefit of the *Simmons v Castle* uplift. It is true that DJ Besford mentioned that in the course of his discussion, but it is plain that that was not the main reason for his decision.

65. At [55] Foskett J said:

> "There has been debate before me about other aspects of what each Costs Judge said about the case he was considering, but I do not think it can be doubted that what I will call the "*Simmons v Castle* point" was the determinative factor (or the tipping point) in each case that led to the conclusion that recovery of the success fee and the ATE insurance premium was not reasonable"

66. As I have said, I do not consider that that was the case in *Yesil*. DJ Besford's principal reason for deciding as he did was that the choice was made on the "erroneous premise" that the costs limit was shortly to be reached: see [87] which I have quoted above. In my opinion the judge mischaracterised DJ Besford's reasons for his conclusion. Because he mischaracterised those conclusions, he gave no reasons for disagreeing with them. In my judgment DJ Besford's conclusions were fully justified on the evidence that he had; and I consider that the judge was wrong to reverse him.

67. In the other two cases, it is fair to say that the failure to explain that the *Simmons v Castle* uplift was the tipping point. At [105] the judge said:

> "… a Costs Judge is perfectly entitled, possibly using his or her experience of other cases or their experience from days in practice, to ask and, in most cases, answer the question of whether the omission to refer to the 10% uplift would have made any difference to a reasonable claimant or his litigation friend in the circumstances prevailing in that case without

> receiving evidence on the issue. However, this question should be seen from the perspective of asking whether a reasonable claimant or reasonable litigation friend, in the circumstances prevailing in the case, would see the possibility of obtaining X +10% of X rather than X in the context of the overall global settlement as a matter that would prevent the change to a CFA. In *Surrey*, taking £19,000 as the value of the 10% uplift and the capitalised value of the settlement as £7,165,255, the question is whether a reasonable claimant or litigation friend in that situation would hold out for obtaining an increase of 0.026% of that sum rather than to have the uncertainty of the possible effect of the statutory charge, the possible effect of Part 36 offer and possible delays that might be overcome by being answerable to an insurer rather than the LSC. Whilst it would be possible to try to quantify those matters, the reality is that a solicitor would almost certainly put them forward in a broad way and invite the claimant or the litigation friend to approach the issue accordingly." (Original emphasis)

68. There are, in my judgment, at least two flaws in this approach. First, the approach that the judge adopted posed the question whether the omission to refer to the *Simmons v Castle* uplift "would" have made any difference. This differs from the approach of both Master Rowley at [88] and Deputy Master Campbell at [64]. Both those judges said that they did not know whether the omission *would* have changed the decision; but that it *could* have. The judge's approach casts on the paying party the burden of showing that the decision would have been different. By contrast, the costs judges' approach casts on the receiving party the burden of showing that the decision would have been the same. Since not only does the burden of proof rest on the receiving party, but also any doubt is to be resolved in favour of the paying party, I consider that the costs judges' approach was right, and the judge's was wrong. Second, I also consider that the comparison that the judge posed between the overall damages claim and the *Simmons v Castle* uplift was not the right comparison. The right comparison was one between the amount of *costs* for which the individual claimant might have been liable on the facts of the particular case, balanced against the amount of the *Simons v Castle* uplift, as DJ Besford correctly held. If costs for which a claimant would be potentially liable (either because of a failure to beat a Part 36 offer or because of the operation of the statutory charge) would have been absorbed by the *Simmons v Castle* uplift, then if the risk eventuates the client is no worse off. If it does not, then the client is obviously better off. But since the one is a risk and the other is a certainty, the comparison cannot fairly be made without assessing the seriousness of the risk on the facts of the particular case. The judge did not perform that exercise, even in a "broad way". As far as the other two cases were concerned, he said at [106]:

> "When looked at in that way, I do not believe that any reasonable claimant or litigation friend would hold out for such a marginal improvement on the overall settlement. In *Yesil* the percentage increase would be just under 0.4% (taking £24,000 as the 10% uplift). In *AH* it would be somewhat higher at 5%. However, that case was, as I have said, extremely tragic and I cannot believe that the claimant's litigation friend would have

> wanted anything other than a quick and simple resolution and would not have seen an additional £17,500 as worth pursuing."

69. In these two paragraphs he said, in effect, that even if the *Simmons v Castle* uplift had been mentioned as part of the advice given to the client, the decision to change from legal aid funding to funding by CFA *would* have been the same. Whether that is so is, of course, a question of fact. The judge did not consider, at this point, the limitations of an appellate court's power to reverse findings of fact. That was a material omission.

70. Moreover, I consider that there is considerable force in Mr Hutton's point that it was not a case of the claimants "holding out" for the *Simmons v Castle* uplift. That would have been theirs by right if they had stayed on legal aid. Nor does the judge explain why their entitlement to that uplift would have (or could have) delayed any settlement on the facts of the particular cases. A further flaw in this strand in the judge's reasoning was that a possible delay in achieving settlement was not a reason that any of the claimants advanced as justifying the switch in funding methods. Consistently with the approach of this court in *Truscott*, the judge should not have taken it into account.

71. Mr Williams developed an argument to the effect that in a quantum only case (such as these three cases) a litigant whose claim is funded by a CFA-lite and ATE insurance is in a commanding position. He is immune to costs risks, whereas his opponent may face a crushing burden of costs. That imbalance puts pressure on a defendant to settle a case early and, moreover, has the consequence that offers of settlement are higher. He referred in this connection to Sir Rupert Jackson's description of such litigants as "super-claimants". There are two problems with this argument. The first is that it formed no part of the decision-making process. In other words this was not one of the reasons for the switch. The second is that this argument was not run before the costs judges and was not the subject of a Respondent's Notice. In addition, of course, it is always open to a claimant to make a Part 36 offer, however his claim is funded, which exerts its own pressure on a defendant.

72. Mr Williams also submitted that, if we formed the view that the decision to switch from legal aid funding to funding by CFA-lite plus ATE insurance was unreasonable, it would be open to us to disallow the success fee but allow the ATE insurance premium. This, too, was not an argument put to the costs judges, so we do not have the benefit of their views. Nor was it the subject of a Respondent's Notice (or even foreshadowed in Mr Williams' skeleton argument). However, it seems to me that the ATE insurance is part of the whole package associated with the change in funding regime. If the claimants had remained on legal aid they would not have bought the ATE insurance. I do not consider that it would be right to separate out the components of what is in practice an indivisible package.

73. For these reasons I would allow the appeals.

74. By way of postscript I should record that Mr Hutton did not challenge the proposition that whether costs have been reasonably incurred is to be judged solely from the point of view of the receiving party, even in a case in which it is known that the other side will pay the ultimate bill and the client has no real interest in controlling costs. It is also difficult to see how the indemnity principle applies to a case like this where

under the terms of a CFA-lite plus self-funding ATE insurance the client will never be liable to pay anything. As Mr Williams engagingly put it, the indemnity principle in a case like this is "a bit of a nonsense". But these are the constraints within which we have been invited to determine these appeals.

Lady Justice King:

75. I agree.

Lord Justice Longmore:

76. I also agree.