Judgment Approved by the court for handing down.

Neutral Citation Number: [2020] EWCA Civ 543

Case No: A2/2019/1550

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
JAY J
MASTER ROWLEY, COSTS JUDGE
[2019] EWHC 1482 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/04/2020

Before:

LORD JUSTICE LEWISON
LORD JUSTICE FLOYD
and
LORD JUSTICE COULSON

- -

Between:

XDE	**Appellant**
(By her husband and Litigation Friend, XEF)	
- and -	
NORTH MIDDLESEX UNIVERSITY HOSPITAL NHS TRUST	**Respondent**

- -
- -

Benjamin Williams QC (instructed by **Bolt Burdon Kemp**) for the **Appellant/Claimant**
Alexander Hutton QC (instructed by **Acumension Ltd)** for the **Respondent/Defendant**

Hearing date: 19th March 2020

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Approved Judgment

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Judgment Approved by the court for handing down.

LORD JUSTICE COULSON :

1. INTRODUCTION

1. This is a second appeal following the decision by Master Rowley, Costs Judge, upheld by Jay J (sitting with Master Haworth), to disallow on assessment certain "additional liabilities", namely the success fees of solicitors and counsel and the ATE insurance premium. These additional liabilities are claimed at £1,078,972.72 (out of a total bill of £2.4 million odd). The appeal raises issues as to the reasonableness of the appellant's decision to change funding from legal aid (which would not have given rise to these liabilities) to a CFA (which has done) and, in particular, arguments as to the application of the decision of this court in *Surrey v Barnet and Chase Farm Hospitals NHS Trust* [2018] 1 WLR 5831 ("*Surrey*"). Like Jay J before me, I would wish to pay tribute at the outset to the excellence of the written and oral arguments of both leading counsel.

2. THE RELEVANT FACTS

2. The appellant's claim involved allegations of clinical negligence resulting from an alleged delay in recognising and treating her tuberculosis meningitis, which it was said caused catastrophic brain injury. She acted through her husband as her litigation friend. Subsequent to the events with which this appeal on costs is primarily concerned, issues of liability were agreed on the basis of a 98%/2% apportionment and quantum was later compromised in a very substantial sum.

3. The delay in treatment occurred in May 2001. A first firm of solicitors were instructed by the litigation friend in May 2002 and they acted for almost four years, first on a privately funded basis, and then on a Conditional Fee Agreement ("CFA"). In February 2006 the litigation friend instructed Bolt Burdon Kemp ("BBK"), initially on a privately-paying basis, then on the same CFA basis as the previous firm, but in the expectation that, since BBK had a legal aid franchise, he would apply for legal aid.

4. The Legal Services Commission ("LSC") granted a public funding certificate for investigative work in January 2007. They granted a substantial legal aid certificate on 25 February 2009, by which time breach (but not causation) had been admitted. This was limited to the end of stage two (the exchange of experts' reports, CPR Part 35 questions and a conference with counsel and experts), in the sum of £55,480. That was the sum which had been sought by BBK. The certificate was predicated on the basis that, as BBK had advised, there would be three liability experts.

5. The partner at BBK with conduct of this case was Ms Suzanne Trask. She provided a witness statement in the proceedings before Master Rowley and was not sought to be cross-examined by the respondent. From that statement it was apparent that, by June 2011, LSC had become generally concerned about BBK's internal monitoring of its work in progress on legally aided cases. LSC's principal concern was that it could not be readily ascertained from BBK's systems how many hours had been spent on individual cases and whether the relevant financial limits on the certificates were at risk of being exceeded. A system was put in place that alerted the relevant solicitor once 80% of the budget for any given case had been spent.

6. During 2011, and without any reference to the LSC, Ms Trask instructed two further experts, a consultant neurologist (on causation issues) and a medical microbiologist. Their reports were obtained in February and April 2011 respectively, and a conference with counsel and all five experts took place on the 31 October 2011.

7. On 13 December 2011 Ms Trask wrote to the LSC belatedly informing them of the reports from the two new experts and seeking an increase in the costs limit of the certificate of £10,000. Master Rowley inferred at [73] of his judgment that the £10,000 was intended to cover the extra work apparently needed for the case to be conducted to the end of stage 2.

8. On 17 January 2012, the LSC replied, referring to its recent Clinical Negligence Guidance and saying that, in accordance therewith, funding in a five expert case up to mutual exchange of reports would now be limited to £45,000. They stated that, in consequence, they could not agree to any further funding, but said that a formal request for funding should be made, including a report which fully addressed all of the points relevant to the stage for which funding was sought, accompanied by a particular form, CLSAPP8.

9. Two points should be noted about this reply. First, contrary to Mr Williams' oral submissions, I consider that it is wrong to say that the LSC were seeking to impose the new Guidance upon BBK in respect of this case; they were simply using it to demonstrate that, on the face of it, BBK's informal request for additional funding was too high and could not be accepted. Secondly, it is plain that the LSC were doing no more than rejecting that informal request: hence their invitation to make a proper application in the prescribed form. No such form was ever completed and there was no coherent reason for the omission.

10. Ms Trask did not reply to the LSC until her letter dated 8 May 2012, some 4 months later. She said that she inferred from their letter of 17 January that an increase beyond £55,490 (the sum in the existing legal aid certificate) would not be approved, recording that BBK's current costs were £57,000, and that BBK's costs at the point of issue would be £67,000. She also said that BBK would be unable to progress the case within the current costs limit of £55,490 and that in consequence:

> "[BBK] therefore suggest that the certificate is discharged as soon as possible so that we can enter into alternative funding arrangements… should, as we anticipate from the content of your previous letter, you be unable to agree to an increase to the cost limit to this figure, we request that the funding certificate is to be discharged, so that we can progress the matter to issue proceedings under an alternative funding arrangement".

11. Master Rowley spelt out a number of inferences to be drawn from these various figures at [74]. He observed that the £67,000 was well short of the total likely amount for the litigation to the end of stage 2 and that the additional £10,000 which BBK had sought in December 2011 would have been insufficient for that purpose. More importantly, as Master Rowley went on to find, Ms Trask was wrong to infer that the LSC would have refused a formal request for an increase; as we have seen, the LSC had invited such a request in the appropriate form, but this had not been provided. The inference which Master Rowley drew from that was that, by 8 May, Ms Trask had already made up her

mind to switch from legal aid to a CFA, so the making of the formal request no longer mattered to her.

12. That is borne out by the fact that, despite the clear terms of the letter to the LSC, Ms Trask had not (at the time she wrote it) had any communication with the litigation friend about funding. It was only on 8 May (the same day as the letter to the LSC) that she wrote to the litigation friend on this topic for the first time, noting that BBK had reached the current costs limit on the certificate and that the limit was unlikely to be increased at this stage. She said that BBK had informed the LSC of this and recommended that the certificate be discharged so that alternative funding arrangements might be made. She expressly advised the litigation friend that, under a 'no win no fee' agreement, the respondent "will be in broadly the same position, in that she will be protected from any deductions to her compensation as she lacks capacity…". Ms Trask went on to say that if the LSC sent the litigation friend a form in the event that he thought legal aid should continue, he need not complete it.

13. I should say here that Mr Williams' submissions dwelt on the importance of what he called 'party autonomy', namely the right of a claimant to choose the funding he or she considered appropriate. It is, however, an important feature of this case that, in reality, the appellant – through her litigation friend – made no choice at all. The decision to switch funding was made by BBK before – or no later than – 8 May 2012. Mr Williams accepted that "no choice was given".

14. On 11 May 2012, the LSC wrote to BBK enclosing a copy of the certificate showing that it had been cancelled "as the assisted person/client has requested/consented to the discharge". As Jay J found at [20] of his judgment, the LSC had clearly drawn the inference that BBK's letter of 8 May had been written on the basis of instructions from the respondent/litigation friend. That was an understandable but erroneous assumption.

15. BBK gave further advice to the litigation friend on 10 October 2012 to the effect that the reason for the change in funding was the legal aid limits, that anything that the respondent did not pay by way of costs would be "written off under a 100% scheme", and that in effect the arrangements being contemplated were in the nature of "CFA-lite", an arrangement whereby the appellant could never be exposed to a contractual liability to BBK in the event of a shortfall in any *inter partes* order.

3. THE JUDGMENTS IN THE LOWER COURTS

3.1 The Judgment of Master Rowley

16. The judgment of Master Rowley was dated 12 September 2018 and followed a three-day hearing in May 2018. Having dealt with the facts, Master Rowley then turned to the decision in *Surrey* and concluded at [41] that, in reliance on the principles set out there, "it is for the costs judge to consider all the circumstances which includes the reasons for the decision to change the method of funding and not simply the advice to do so."

17. Master Rowley set out the parties' respective submissions in relation to the change of funding at some length. He began his own analysis at [70]. He found that, although alarm bells should have been set off as soon as the total bill reached the 80% threshold, they did not start to ring until December 2011 when the budget figure had all but been

exceeded ([72]-[73]). He found that the further £10,000 sought in the BBK letter of 13 December was "plainly inadequate" [74], as was the information in the letter of 13 December [75]. He said that the letter of 8 May 2012 should have been provided in the form requested by the LSC [88].

18. Mr Rowley noted the "surprisingly candid terms" of Ms Trask's witness statement to the effect that no defended case could be run on legal aid [77]. He disagreed; a point made expressly at [87][1]. At [78] - [79] he found that, in both legally aided and CFA-lite cases, there was a tendency for solicitors to run them without seeking sufficiently frequent instructions from their clients on incurring costs. He found at [80] that by the time BBK wrote to the litigation friend on 8 May, given the terms of their letter to the LSC, *a fait accompli* had almost been achieved. There was no discussion as to the appropriateness of the change. At [81] he found that the case was run by BBK "with little or no regard to the certificate limits on the assumption that if it became defended, it would have to convert to a CFA in any event. What can only be described as a half-hearted attempt to increase the certificate limit for a further short period was made as prelude to inviting the LSC to discharge the certificate."

19. Master Rowley also found that, although in December 2011 it may have been too late to obtain the necessary funding to the end of stage 2, it was incumbent on the solicitors to ensure that they were keeping an eye on the costs incurred from the moment that the contract for a particular case was created [82]-[83]. He said that "there is absolutely nothing before the court to show how this case was ever expected to be brought home for the sum sought from the LSC." [83]. At [85] he said that the instruction of the two additional experts was not the reason that the limit had been exceeded, and that the appellant had failed to demonstrate the reasonableness of the change in funding. At [86] he concluded: "it cannot be a reasonable decision to change a funding simply because no obvious effort has been made to run the case within the original funding agreement".

20. In consequence, at [87], Master Rowley found that the additional liabilities, namely the success fee and the premium for the ATE policy, should not have been incurred because funding was available which did not require a change to take place. He went on to say:

> "88. For the receiving party to demonstrate that the decision to change was reasonable, I consider that, as a minimum, there would be a trail of calculations to show whether the case was being brought home within the sum agreed with LSC. If it were not, then evidence of formal applications for an increase had been made and any further information or similarly required by the LSC had been provided…
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> 89. Consequently, I do not consider that a reasonable choice was made to change funding from legal aid to a CFA and ATE arrangement. The litigation friend played no part in the decision and I would say that this lack of involvement is fundamental as a defect. But even the decision-making by BBK was flawed for the reasons that I have set out. Consequently the additional liabilities of success fees and an ATE premium are disallowed."

[1] During his oral submissions, Mr Williams suggested that Master Rowley was not entitled to reach that conclusion. This was a new argument, never previously foreshadowed. It cannot be right. It was precisely the sort of finding that an experienced costs judge was entitled to make, and there can be – and is – no appeal from it.

3.2 The Judgment of Jay J

21. The judgment of Jay J is at [2019] EWHC 1482 (QB). One of the principal issues before him (which had not been raised before Master Rowley) was Mr Williams' submission that the approach in *Surrey* was of no consequence because the facts were different. Mr Williams said that, since there could be no doubt that a CFA arrangement was inherently superior to legal aid, the actual reasons for the change did not matter. Accordingly, at [24] - [36] Jay J carefully analysed the decision in *Surrey*. Having dealt at length with the parties' submissions, in the discussion section, starting at [57], he rejected the appellant's argument that the approach in *Surrey* was of no application in the present case.

22. The heart of this part of the judgment is at [57] - [62] as follows:

> "57. Mr Williams' principal argument requires a close examination of paras 29-30 in particular of Lewison LJ's judgment in *Surrey*. Are those passages predicated on the *Simmons v Castle* uplift already having been factored into the balance sheet assessment? If that were the correct interpretation, it would follow that it is the inclusion of this factor which has enabled the Court of Appeal to conclude that there was not much to choose between the two methods of funding. By way of corollary, the absence of the *Simmons v Castle* uplift in the instant case would lead inevitably to the contrary conclusion that CFA-lites are significantly and objectively preferable to legal aid, and it is not incumbent on the receiving party to justify his choice.
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> 58. In my judgment, the difficulty with this submission is that its premise is incorrect. I cannot read paras 29-30 of Lewison LJ's judgment as already factoring in the *Simmons v Castle* uplift. The Costs Judges in *Surrey* had concluded at an "abstract", "generic high-level" or "macro" level of assessment that the pros and cons of legal aid versus CFA-lites were finely balanced. The references to a "level playing field" in this context cannot be read as factoring in a consideration which could not apply across the board. Lewison LJ's observation, which he was accepting for the sake of argument, that "there was not much to choose between funding by legal aid and funding by CFA", was a general statement which applies to all legal aid cases on the one hand and all CFAs on the other. Lewison LJ was not limiting this statement to CFAs which post-dated 1st April 2013 and therefore attracted the benefit of the uplift. On my reading of his judgment, the *Simmons v Castle* factor was taken into account at a later stage of the Court's decision-making as being decisive in two out of the three cases of which it was seized.
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> 59. Mr Williams told me that the only basis on which he would and could have made the submission recorded at the outset of para 30 of *Surrey* was that the *Simmons v Castle* uplift was being factored into the equation. It is true that at para 71 he is recorded as making a submission that CFA-lites were clearly preferable to legal aid in a quantum only case. However, I think that Mr Williams' submission recorded at para 30 was recognising, as it had to, that the Costs Judges had found in terms that this was more or less a level playing field. These were evaluative assessments which could not readily be shaken on appeal;

and at that point Mr Williams was not attempting to do so. Later on, Mr Williams advanced a more ambitious submission which Lewison LJ roundly rejected.

60. Mr Williams advanced the alternative submission that even if he was wrong on his principal argument as to the inclusion of the *Simmons v Castle* uplift in paras 29-30 of *Surrey*, an objective examination of the merits of CFA-lites over legal aid leads to the clear conclusion that the former is far preferable to the latter, in which circumstances the absence of subjective reasons in BBK's advice to the Litigation Friend is nothing to the point.

61. The difficulty with this submission is that the necessary factual underpinning is lacking. Mr Williams cannot be heard to submit that there is, in fact, a lot to choose between the two competing methods of funding in a situation where that was not the advice given by BBK to the Litigation Friend and it was not the case run before Master Rowley. A further difficulty with the submission, and I will be coming to this, is that the real or operative reason for the change in funding was that by May 2012 it had become clear that the money available through legal aid had run out.

62. Accordingly, it seems to me that there is no escape in the circumstances of this case from the application of the principle laid down in *Surrey* that the receiving party's *particular* reasons for the switching from legal aid to a CFA fall under scrutiny. The paragraphs in *Surrey* to which I have already referred (see para 54 above) strongly support this approach. I have in mind in particular the final sentence of para 30 and paras 70-71. I do not read *Sarwar v Alam* [2001] EWCA Civ 1401 as supporting the contrary proposition. On the facts of that case, the cost of the ATE premium was recoverable because the solicitor gave unsound advice in connection with a different insurance policy."

23. Further, Jay J went on to identify the factual difficulties in the way of the appellant's new submissions. He said:

"64. In any case, the real reason for the advice to switch to a CFA, which was given as late as 8th May 2012, was that the legal aid limit had been exceeded. By then there was no prospect of an extension to the certificate; indeed, BBK was effectively asking for the certificate to be discharged. It is not arguable that by this letter the solicitors were simultaneously or alternatively seeking an extension of the certificate in some indeterminate amount on the basis of the information they were putting forward. There was only one operative reason for the change in funding, and it followed in my view that the only real question was whether the solicitors were culpable or otherwise in relation to the state of affairs which had resulted. It is not surprising, in my view, that the argument before the Costs Judge was limited to that issue.

65. Examining BBK's advice to the Litigation Friend, such as it was, is deeply unhelpful to the Claimant. Aside from the absence of any reference to the points that Mr Williams now seeks to rely on, BBK stated in terms that under a CFA the Claimant "will be broadly in the same position". This was in the context of a case, cf. para 71 of *Surrey*, where causation remained in issue. Apart from the obvious difficulty that at the hearing before Master Rowley the Claimant did not

> seek to question or undermine that advice, I do not think that it was so plainly wrong that the Court may look behind it. To the extent that Mr Williams relied on paras 49 and 51 of *Surrey*, it seems to me that these do not avail him. In this regard, I would hold that there is a difference in principle between a factor such as the *Simmons v Castle* uplift, which was a certain and indisputable advantage, and the sort of factors prayed in aid by Mr Williams, about which there are differences of opinion. In short, I would reject any suggestion that these advantages are so overwhelming that the failure to mention them may be overcome."

24. Finally, at [66] - [72], Jay J dealt with Master Rowley's reasons for the conclusion that BBK had acted unreasonably, noting that they were appropriate evaluative assessments which could not be impeached on appeal. He therefore dismissed the appeal. Permission for a second appeal to this court was granted on 25 September 2019.

4. THE DECISION IN *SURREY*

25. On an assessment of costs, the court "will not … allow costs which have been unreasonably incurred or are unreasonable in amount": see CPR 44.3(1). In *Surrey,* as here, the court was concerned with whether additional items of cost (namely the success fee and the ATE insurance premium), which had arisen because of the change to CFA funding, had been reasonably incurred.

26. In *Surrey* there were three conjoined appeals. In all three cases, the claimants changed their funding from legal aid to a CFA shortly before the LASPO change in regime on 1 April 2013, which prohibited the recoverability of success fees and ATE insurance premiums from that date. The claimants were not told that, by entering into the CFAs before 1 April, they would lose the 10% increase in general damages (referred to in the documents as the *Simmons v Castle* uplift, named after the decision of this court at [2012] EWCA Civ 1039).

27. In two of the three cases (*Surrey* and *Yesil*) both liability and causation had been conceded by the defendant. In the case of *AH*, causation remained largely in issue. But in all three cases the defendant was in principle treated as the paying party [9] because costs would be (or were very likely to be) recoverable from the defendant.

28. The issue was whether the costs judges had erred in these three cases in concluding that the decision to enter into a CFA gave rise to costs which were unreasonably incurred. Where a claimant was 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 were reasonable, even if one is more costly than the other. So what was required was an objective analysis of the reasonableness of the individual claimant's decision, on advice, to change the basis of funding, taking all relevant circumstances into account [14]. The court said that it was essential to focus on the litigant's reasons for making the choice s/ he did, rather than the reason s/ he might have had for that decision [16]-[19]. If the legal advice given in respect of that decision was "not sound" then that could impact on the reasonableness of the client's choice [23].

29. At [29] and [30], Lewison LJ (who gave the leading judgment, with which Longmore and King LJJ agreed) set out the general starting point:

> "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]:
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> > "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."
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> 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."

30. Following this general approach, Lewison LJ then examined the receiving party's reasons for changing funding in each of the three cases. Thus:

(a) In *Surrey,* although the solicitor had asserted that there was no guarantee that the LSC would increase the limitation on costs, there were no details of the costs that

had been incurred, what the authorised costs limit was, and what further costs needed to be incurred. The solicitor had also given misleading advice in suggesting that any shortfall might be "topped up" by him personally [34]-[36].

(b) In *AH*, the evidence was similar (even down to the suggestion of illegal "topping-up") although, as previously noted, that was the case where causation had not been accepted [37]-[38].

(c) In *Yesil* the solicitor stated that she took into account the risk of failing to beat any CPR Part 36 offer as well as the potential for a 10% uplift, but it was accepted that she had not mentioned any of that to her client. The calculation as to the costs incurred to date was seriously overstated, as was the estimate of likely future costs [39]-[46].

31. One thing which all three cases in *Surrey* had in common on their facts was that the claimant's litigation friend was not told that the change from legal aid to a CFA before 1 April 2013 would disentitle him or her to the *Simmons v Castle* uplift. In both *Surrey* and *AH*, the costs judges had found that it was impossible to say what the decision would have been had that information been provided, so the inevitable doubt that arose had to be resolved in favour of the paying party [47]. More widely, since liability had been admitted in all three cases and causation in two, the adverse risks to the claimants on costs were no more than possibilities, whereas the forgoing of the uplift was a certainty [53].

32. In conclusion, Lewison LJ said this:

> "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]:
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> > "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."
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> 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."

33. Having agreed with the decisions of the three costs judges, Lewison LJ briefly considered the reasons why Foskett J had disagreed with them, and concluded that he had erred in his approach. He therefore reinstated the decisions of the three costs judges disallowing the success fees and ATE insurance premiums.

5. THE ISSUES ON THIS APPEAL

34. In the present case, there were three grounds of appeal. The first was that the judge had been wrong to take as his premise the broad equivalence of CFA-lite funding and legal aid funding; secondly, that *Surrey* had been based on a comparison between the two funding systems which assumed the loss of the *Simmons v Castle* uplift and so was of no application to the present case; and thirdly that, because CFA-lite was "an objectively preferable method of funding", and so obviously superior to legal aid, the actual reasons for the change in funding were irrelevant.

35. As to the first and second grounds of appeal, arising out of the broad equivalence assumed at [29] and [30] of *Surrey* between legal aid, on the one hand, and CFA-lite, on the other, Mr Williams QC maintained that "the level playing field" can only have existed in *Surrey* because the court had factored into the equation the fact that the *Simmons v Castle* uplift would not be available to the three claimants once they had switched to CFA lite. He said that, in a case like this, where that issue did not arise (because *Simmons v Castle* had been decided after the change in funding in the present case), *Surrey* was of no application.

36. Mr Hutton disagreed, maintaining that, on a proper analysis of *Surrey,* the court used the expression "level playing field" to describe a general comparison between legal aid and CFA-lite, and that the point about the *Simmons v Castle* uplift was a specific issue, for consideration on the individual facts of each change in funding under review. He therefore maintained that *Surrey* set out the general approach to be taken in all cases involving a change of funding, including this one.

37. The third ground of appeal gives rise to an issue as to whether, on the evidence before the court, CFA-lite was so obviously superior to legal aid. By the time of the appeal hearing, it was front and centre in Mr Williams' submissions that CFA-lite was so obviously superior to legal aid that, to borrow an expression from contract law, "it went without saying". Mr Hutton disputed that, pointing to the fact that this alleged superiority had not been the actual reason for the change in funding; had not even been argued before Master Rowley; and was not in any event as clear-cut as the appellant made out.

38. One element of the debate about the third ground of appeal focussed on Mr Williams' related submission that the actual reasons for the change did not matter and that, since it was the appellant's case that CFA-lite was so obviously superior to legal aid, the fact that this superiority was not expressly highlighted by BBK at the time (either in their own internal documentation or in their correspondence with the litigation friend) did not mean that the appellant could not rely on it now to demonstrate the reasonableness of the decision to change. Mr Hutton again disagreed and submitted that the actual reasons for change (as opposed to a theoretical reason which played no part in the decision-making process) were the only relevant criteria. He relied on various passages in the judgment of Lewison LJ in *Surrey* to make that submission good.

39. I have found it convenient to deal with these grounds of appeal by reference to four sequential issues. Issue 1 addresses the broad equivalence between legal aid and CFA-lite referred to in *Surrey.* Issue 2 concerns the importance of the actual reasons for the change in funding. Issue 3 concerns the alleged superiority of CFA-lite over legal aid. And Issue 4 addresses Mr Williams' submission of principle that, if there is a good objective reason for the change in funding, even if it played no part in the decision-

making (and was therefore hypothetical), then that can always 'trump' the actual reasons for the change.

40. As is often the way in costs cases, each side sought to encapsulate their respective cases by reference to an underlying 'jury point.' So, on the appellant's side, it was argued that the entire debate was artificial because, if the appellant had signed up with BBK to a CFA-lite arrangement from the outset, there could be no argument that, at least in principle, the success fees and the ATE insurance premium were recoverable. The suggestion was that the appellant (or more properly the appellant's lawyers) should not be penalised merely because, for whatever reason, the type of funding was changed part way through the litigation.

41. The respondent's point was to the effect that the entire dispute had only arisen because the appellant's solicitors had been found by Master Rowley to have acted unreasonably in failing to keep within the restrictions of the legal aid certificate and had been forced to change the type of funding as a result. He said that it would be wrong to reward BBK for the unreasonable conduct which necessitated the change, by allowing them to recover the additional liabilities which came with CFA-lite.

42. It is not, I think, appropriate to give a final view about the merits or otherwise of these arguments. They cannot be decisive of the issues on appeal. Moreover, they both have some superficial attraction, largely because costs disputes regularly throw up such intractable illogicalities. But I should say that I am sympathetic to Mr Hutton's underlying submission. To paraphrase Lewison LJ in *Surrey*, the paying party, namely the respondent in this case, is entitled to ask: 'why did you switch?' Here the answer to that question is BBK's unreasonable conduct: without it, the change in funding would never have been made and there would never have been a success fee to argue about. If there is an argument that BBK can recover that success fee and ATE premium, it would suggest that, somewhere along the line, there is a flaw in the reasoning.

43. By contrast, the problem with Mr Williams' jury point is that it begs the obvious question. If a CFA-lite arrangement was so obviously superior to legal aid, and if such an arrangement had been in place at the outset this debate could not have arisen, then one has to ask why a CFA-lite arrangement was not in place from the outset or, even more pertinently, why the appellant changed to legal aid from the original CFA which was in place, only to change back again some years later. I checked Ms Trask's witness statement before the appeal hearing, but no answer appeared to be provided to that fundamental question. Mr Williams conceded that during argument. I volunteer the obvious reason for that in paragraph 86 below, but it does not assist BBK on this appeal.

6. ISSUE 1: THE BROAD EQUIVALENCE IDENTIFIED IN *SURREY*

44. I have set out [29] and [30] of the judgment of Lewison LJ in *Surrey*. Both Master Rowley and Jay J found that the approach and guidance set out there, to the effect that there was a broad equivalence between legal aid and CFA-lite, was of general application in assessing the reasonableness of the costs consequences of a change from one funding regime to another. In my view, both Master Rowley and Jay J were right to reach that conclusion.

45. It is clear that those paragraphs in *Surrey* were intended to be of general application. Nowhere is it said that the general approach and guidance in *Surrey* was predicated on

the basis that it applied only to cases where the *Simmons v Castle* uplift point arose. Neither can that be inferred from the language used. On the contrary, Jay J found at [58] that "the references to a 'level playing field' in this context cannot be read as factoring in a consideration which could not apply across the board…Lewison LJ was not limiting this statement to CFAs which post-dated 1 April 2013 and therefore attracted the benefit of the uplift". I agree.

46. This level playing field is, of course, merely the starting point. That is not to say that the *Simmons v Castle* uplift was not a relevant factor to be taken into account when the circumstances of the change in funding in each individual case were looked at. Indeed, the uplift was found to be a relevant factor in two of the *Surrey* cases.

47. But in the third case, *Yesil,* although the *Simmons v Castle* uplift was present, it formed no part of the district judge's reasons for disallowing the success fee and the ATE premium: see [47] of Lewison LJ's judgment in *Surrey.* In that case the success fee and the ATE premium had been disallowed because the solicitors had erroneously advised the client that they had exceeded the LSC costs limitation, and so had no choice but to discharge legal aid: see [44] and [46]. As a result, the disallowance of the success fee and the ATE insurance premium in *Yesil* was not based on the *Simmons v Castle* factor.

48. In my view, that analysis fatally undermines the appellant's argument that the approach in the three *Surrey* cases applied only to circumstances where the *Simmons v Castle* factor was present. It manifestly did not.

49. Accordingly, I consider that Mr Hutton was right to submit that the approach in *Surrey* was not limited to cases where the *Simmons v Castle* uplift applied. It was setting out an approach which started with the general equivalence of legal aid and CFA-lite (which was what was meant by the expression "level playing field"), before then going on to look at the individual circumstances. *Surrey* therefore is of general application in cases where the reasonableness of a decision to change funding is in issue, and of particular application where the change was from legal aid to a CFA.

7. ISSUE 2: THE REASONS FOR THE CHANGE

50. The judgment in *Surrey* was predicated on the basis that the decision to change funding is a decision of the client, albeit advised by his or her solicitor. The court must look at the reasons that the client had for deciding to change funding, to see if they were reasonable in the particular circumstances of the case. That obviously involves the examination of the advice given by the solicitors because in most cases it will be that advice which informs the decision.

51. There is nothing new or controversial about that. It is consistent with the approach in *Wraith v Sheffield Forge Masters*; *Truscott v Truscott* [1998] 1 WLR 132; and *Solutia v Griffiths* [2002] PIQR P16. The relevant passages from those cases were all cited in *Surrey* and it is unnecessary to set them out again. It is sufficient to note that in *Truscott*, the reasonableness of the change to a firm called ATC was not judged by reference to ATC's particular experience of professional negligence cases, "because that was not why Mr Truscott consulted them"; whilst in *Solutia*, a claim for personal injury due to pollution by a chemical works, the deputy high court judge's decision to overturn the costs judge's refusal to allow the higher costs of Leigh Day was upheld, because the costs judge had failed "to take account of those special features of the case which were

material to the decision to instruct Leigh Day". Those features included Leigh Day's expertise in cases of that kind and their particular knowledge of other cases involving the same chemical works, which had all been part of the claimants' decision to instruct them in place of the previous firm.

52. Mr Williams sought to rely on *Sarwar v Allam* [2002] 1 WLR 125, although that case was concerned with a very different issue, namely the reasonableness of a passenger recovering his ATE insurance premium after successfully suing the driver of the car in which he was travelling at the time of the accident. This court said that the premium was recoverable and rejected the argument that the passenger should instead have relied on the driver's existing insurance (which had not been a possibility considered by the solicitors at the time). Mr Williams argued that this case provided some support for the proposition that matters not referred to at the time could still be taken into account when assessing the reasonableness of a particular item of cost. I disagree with that. *Sarwar* was a very different kind of case, and the conclusion was that something which had not been considered at the time (the availability of the driver's own insurance) was not a reason why the ATE premium should be disallowed as unreasonable.

53. In my view, the authorities confirm the principle that what matters when considering reasonableness are the actual reasons for the incurring of the costs in question, and that where this involves a change in funding or a change in the firm instructed, the court generally puts out of account matters which were not part of the decision-making process.

54. I also note that in *Surrey* the appellants endeavoured to argue that the actual reasons for the change might be irrelevant. That was rejected by this court: see [30], where Lewison LJ said that what mattered was not "some generalised description of similar cases," but "the particular case under consideration".

55. Furthermore, it seems to me that this is important as a matter of practical costs assessment. The court cannot properly evaluate the reasonableness of the choice without having regard to what the client was told and why, what the background circumstances were, and whether any advice given was erroneous or self-serving. Moreover, it would be impractical to expect, at least as a matter of routine, that the costs judge or the district judge dealing with a costs assessment to embark on a significant counterfactual exercise in which the merits or otherwise of entirely hypothetical reasons for the change, thought up after the event and so not considered at the time, could be relied on to justify the reasonableness of the change that was actually made.

56. I acknowledge that some caution is always necessary when considering whether an earlier decision of this court has been of subsequent practical assistance. But the authorities identified by Mr Hutton in paragraph 49 of his skeleton argument do seem to me to provide support for his contention that the approach in *Surrey* (as set out above) has been applied clearly and effectively in subsequent cases. Thus, by way of example:

    (a) In *EPX v Milton Keynes NHS Foundation Trust* [2019] EWHC 1508 (QB) Stewart J applied *Surrey* and upheld the decision of the costs judge that the decision to change funding from legal aid to a CFA was unreasonable on the facts.

    (b) In *AB v Mid Cheshire Hospitals* [2019] EWHC 1889 (QB), Dingemans J (as he then was) applied *Surrey* and held that the decision to change from legal aid was

reasonable on the facts. He stressed at paragraph 44 that "the decision of the Regional Costs Judge was not a generic decision which would apply to every catastrophic brain injury case where there is a need for experts but a reasonable decision made in the light of a serious dispute between experts on causation…" It is also to be noted that, in *AB*, the judge said at [41] that there was evidence that the LSC had sought to retrofit a subsequent legal aid funding structure (and therefore rates) to a case to which it did not apply. It is not clear how important that was to the judge's overall reasoning but in any event, that was not the case here, for the reasons I have explained.

(c) In *YZ v Gloucestershire Hospitals NHS Foundation Trust* [2019] 4 WLUK 550, Senior Costs Judge Gordon-Saker applied *Surrey*, looked at the particular facts of the case surrounding the change in funding and concluded that "the potential liability of the Claimant under the statutory charge would be no different from the potential liability under a CFA". He found on the facts that the change of funding had not been shown to be reasonable.

57. Accordingly, I consider that the importance of the actual reasons for change was emphasised in the cases decided before *Surrey* and restated by Lewison LJ in his judgment in that case. This has led to an approach which has been followed without difficulty in subsequent cases. I therefore accept Mr Hutton's submission on the second issue.

58. The practical common sense of that approach can be tied back to the facts of the present case. The actual reasons for the change were found to be BBK's unreasonable failure to limit their spending within the parameters imposed by the LSC. This was part of a wider monitoring issue at the firm. When they sought further funds, they did so in a way that Master Rowley described as "half-hearted". They decided, without obtaining the instructions of the litigation friend, that they would move to a CFA-lite. Master Rowley found that, in all of this, they had behaved unreasonably. That finding of fact is not appealed.

59. In addition, there is no evidence here that, had the appellant's litigation friend been advised about the features of CFA-lite in advance of any change, he would have chosen to discharge legal aid, which had been running for five years without any apparent problem, and switch to this new system. Nobody can say what the litigation friend might have done, other than perhaps to ask: "If CFA-lite is so marvellous, why have I been funded by way of legal aid for five years?" On that basis, therefore, the appellant has not discharged the necessary burden of proof: she has not shown on the facts that the change to CFA-lite was reasonable.

60. To put this case at its simplest, Master Rowley found that BBK had gone over the LSC budget and that Ms Trask knew that she would not get an increase in that budget because she could not show a good reason for the increase. As a result, she changed funding. It therefore follows that that change in funding was unreasonable.

61. In one sense, that is the end of the appeal. Master Rowley adopted the right legal test and reached a conclusion on the evidence (as to the unreasonableness of the decision to change funding and the actual reasons for it) which was plainly open to him. However, in deference to Mr Williams' submissions about the obvious superiority of CFA-lite, I go on to consider the two issues arising out of that argument, which was not raised before Master Rowley.

8. ISSUE 3: THE ALLEGED SUPERIORITY OF CFA-LITE

62. Mr Williams maintained that CFA-lite was obviously superior to legal aid and that, because of that obvious superiority, it was unnecessary for the appellant to do any more to justify the change in funding. I have considered that submission carefully but, in my view, it fails at every level.

63. The first point to make is that it is a position which is contrary to the views of the three costs judges in *Surrey*. Each of them said that there was little to choose between the two funding regimes. So they would all have had to have been wrong if the appellant was right and CFA-lite was obviously superior.

64. Secondly, of course, the alleged superiority of CFA-lite was never articulated as being the reason for the change in funding made here. It played no part in the decision-making process. On the contrary, BBK must have regarded legal aid as the proper funding method because they advised the appellant's litigation friend to switch *away* from a CFA to legal aid in 2007, and were then happy to take legal aid funds for the maintenance of this case for the best part of 5 years, down towards the end of stage 2. At no point during that 5 year period did they suggest that CFA funding, which they had moved away from, was obviously a much superior system to the one to which they had changed.

65. Thirdly, when the time came to consider a change of funding, the alleged superiority of CFA-lite was not the reason put forward for the change. Both in their dealings with the LSC, and belatedly with the appellant's litigation friend, BBK never articulated such an opinion. If BBK had thought that, then they would have said so, because it provided them with an easy way out of the difficulties they had got themselves into over the legal aid budget limit. I do not accept that in some way the alleged superiority of CFA-lite somehow "went without saying" so it did not need to be articulated either to the LSC or to the appellant or her litigation friend.

66. Fourthly, that conclusion is only confirmed by the fact that the alleged superiority of CFA-lite, whatever the actual reasons for the change, was not an argument that was advanced before Master Rowley either. It appeared to arise for the first time in the Grounds of Appeal from the decision of the Master. It was rejected in short order by Jay J. I refer in particular to [61] and [64], set out at paragraphs 22 and 23 above.

67. Of course, in any particular case, the overriding objective at CPR r.1.1 may require an appeal court to consider matters which were not argued below. Moreover, Mr Hutton properly concedes that, since this is a point of law, there was no prejudice to the respondent in the point being taken before Jay J and on this second appeal. But the fact that this issue was not raised until the first appeal is perhaps an important pointer to the weight - or lack of it – which it should be given.

68. Fifthly, I note that this argument, as to the alleged superiority of CFA-lite, was unsuccessfully raised by Mr Williams in *Surrey*. Lewison LJ noted at [71]:

> "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."

69. In my view, Mr Hutton is therefore right to maintain that the submission that CFA-lite was so obviously superior to legal aid (which, as I have said, underpins Mr Williams' appeal in this case), is a re-run of an argument which was rejected in *Surrey*. Moreover, the same two reasons which led Lewison LJ to conclude that there were problems with this argument - namely that it formed no part of the decision-making process and had not been run before the costs judges - apply equally to the present case.

70. For all these reasons, therefore, it does not seem to me that the argument as to the superiority of a CFA-lite gives the appellant a way round her difficulties on the facts. But since the point has been argued by leading counsel, it is I think appropriate to express a view as to whether, if this argument had been part of the decision-making process, or if it had been run before Master Rowley, it has any merit. In my view, for the reasons set out below, it does not.

71. As I have already noted at paragraph 55 above, it does not seem to me to be an efficient use of limited civil justice resources, to expect district judges and costs judges to become involved in detailed comparisons between different forms of funding and to consider purely hypothetical matters which formed no part of the actual reason for the change. That would only serve to give costs disputes of this kind an even worse reputation for complexity than they already have.

72. The specific reasons why I do not accept that a CFA-lite was obviously superior to legal aid can be summarised by reference to the five alleged advantages of CFA-lite relied on by Mr Williams, and a number of additional matters.

73. First, Mr Williams noted that legal aid involved a deduction from any damages because of the statutory charge, whilst CFA-lite did not. That is not entirely accurate. CPR 46.4 provides that there must be an assessment of any costs claimed against a protected party such as the appellant in the present case, and the Practice Direction gives examples of where this will not be necessary, including where the protected party has waived their right to claim further costs other than those recovered between the parties. Furthermore, as I have already said, *YZ v Gloucestershire*, which also involved protected parties, suggests that it is most unlikely in practice that any shortfall would be charged to the client under legal aid. Mr Williams accepted that unrecovered costs which might otherwise be deductible under the statutory charge are usually waived in cases involving children or protected parties.

74. Secondly, Mr Williams said that by reference to Section 11(1) of the Access to Justice Act 1999, which applied to this case, legal aid only provided limited protection against adverse costs orders. But that is a purely theoretical state of affairs, described by one of the costs judges in *Surrey* as "fanciful or not problematic". I agree with Mr Hutton that

the chances of a costs order being enforced against a severely brain-damaged woman with supportive expert evidence is properly regarded as fanciful.

75. Thirdly, Mr Williams submitted that legal aid provided little protection against the adverse consequences of failing to beat Part 36 offers to settle, because any post-offer costs awarded to a defendant would be deductible from the claimant's damages. This ended up being Mr Williams' principal point in support of the obvious superiority of a CFA. But I do not accept his analysis.

76. I note that the issue was addressed in *Surrey* at [53]. Lewison LJ found that:

> "[It involved] four cumulative risks: (i) the risk that the defendant makes a Part 36 offer at some stage before the case is 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; (iv) the risk that at trial the claimant fails to beat the offer".

These four cumulative risks were not considered or evaluated in the present case. More widely, we were told that, on the current statistics, fewer than 1% of clinical negligence claims ended in trials, so it follows that the chances of all four risks eventuating in any given case are nugatory.

77. I acknowledge that offers were made in the present case, but they concerned liability percentages, not quantum, so they were not going to have a detrimental effect on the appellant's costs (because at trial, liability was either going to be 100% or not established at all). The offers were not accepted, and the appellant went on to achieve a better result (98%/2%) than was reflected in those offers. So it is quite impossible to say that, on the facts of this case, a potential liability to costs deductions was of any relevance at all.

78. I accept Mr Williams' general submission that (even though there were no quantum offers here) a claimant in a large clinical negligence case like this has to be very careful of a well-judged Part 36 offer, because of the costs risks if it is not accepted. But a claimant funded through a CFA is, in reality, in much the same position as a claimant funded by legal aid when faced with a well-judged offer: if that claimant is advised to take the offer but refuses to do so, in all probability the funding (however provided) will cease. A legally aided claimant will find the funding withdrawn; a claimant with ATE insurance will have to look at the small print, but may find himself/herself paid out to the limit of the insurance and left to continue themselves, or (as Mr Williams said was more likely) may find that their cover was terminated or withdrawn. The only practical difference that may arise is when the claimant is advised to reject the offer and then fails to beat it at trial: then a legally aided claimant may be at risk of deductions whilst a claimant with a CFA would not be. But for the reasons I have given, this will arise so rarely that it cannot be a general reason to suggest that one system of funding is so obviously superior to the other.

79. Fourthly, a similar point is made by Mr Williams about the costs of interlocutory disputes. In my view that is an entirely unrealistic factor, given that it was not a reason in the present case put forward for the change of funding and there was no evaluation of how, on the facts of this case, it could have had any relevance, particularly given the size of the claim.

80. Fifthly, Mr Williams pointed out that a claimant who only makes a partial recovery of costs in their legal aid case will also see substantial deductions from damages because the unrecovered costs will be deducted and repaid to the legal aid agency. Again, I consider that to be theoretical, certainly in the present case, given that this was a multi-million pound claim which was either going to succeed or fail. It was not a case in which a partial costs order was going to be made.

81. Furthermore, contrary to Mr Williams' submissions, I consider that there was a positive advantage of legal aid which was particularly apposite in the present case. As Jay J found at [71] of his judgment, there was a measure of budgetary control imposed as a result of the legal aid arrangement which was a benefit to the appellant. BBK had accepted a contract with the LSC and had been provided with a costs budget in the sum which they themselves had requested. If they had wanted more, they could have sought it, in accordance with the LSC rules to which they had agreed. Master Rowley considered that the outcome of the present dispute might have been different if BBK had run the case properly and reasonably in accordance with the LSC's rules.

82. In my view, this was a clear benefit of the legal aid regime. It is ironic that, just as civil legal aid has ceased to be available for much of the work it used to fund, the sort of control of costs that used to be exercised by the LSC has now been introduced in a much wider range of civil cases, through the mechanism of cost-budgeting. These days, the civil courts require all solicitors to keep a tight control on the costs which they are incurring, in part so as to protect their own clients from overspend. It might fairly be said that, when on legal aid, the appellant already had that advantage, without what some see as the additional paraphernalia that goes with costs budgeting. It was an advantage which was dissipated in the present case but that was not the appellant's fault (the fault lay with BBK). It remained an advantage to her which did not arise out of the CFA- lite arrangements.

83. Accordingly, I do not accept Mr Williams' submission that the change in funding was an obvious benefit because, as he put it, "it freed the appellant from the LSC's financial control." Control of the costs being incurred was in everyone's interests, including those of the appellant.

84. During the hearing, there was some debate about whether it was appropriate in any comparison exercise to recognise that, at least as a matter of theory, under the CFA-lite regime, the appellant was liable to reimburse BBK for the sums (in excess of £1 million) now in issue: that is why they are identified as "additional liabilities". Mr Hutton said that this was something which should be taken into account when legal aid is compared with CFA-lite because, although he accepted that the sums would never be paid by the appellant, what mattered was whether the costs – including these items of cost - had been reasonably incurred. He acknowledged that there was a conceptual difficulty inherent in the application of the indemnity principle in this sort of situation. Mr Williams said simply that the liability should be ignored because it could never arise.

85. In my view, this liability cannot be a deciding or even significant factor in any comparison exercise, because it is not a liability that will fall to be paid in practice. But there is some force in Mr Hutton's submission that, if the court is considering whether the costs were reasonably incurred, these liabilities should not be left entirely out of account. On that basis, it is therefore a downside of CFA-lite. At the very least, it is

another reason why the comparison exercise should be considered as producing a broadly level playing field, as identified in *Surrey*.

86. Finally, it seems to me that, in any comparison exercise, what might be said to be the elephant in the room needs to be addressed, namely the reason why the funding in this case took the course that it did, and then changed when it did. In my view, BBK had a very good reason for changing from a CFA to legal aid in 2007. Moving to legal aid, at the outset of a potentially complex case meant that, win or lose, BBK would be paid. That was a beneficial arrangement when a large but potentially difficult clinical negligence case was getting underway. 5 years, an admission of breach and many experts later, it would have become clearer that the claim was more likely to be successful. That may have seemed a good time for BBK to lose the restraints of legal aid and change to an arrangement that gave them a success fee as well. It is not therefore unfair to say that changing to CFA-lite at that point potentially allowed them to have their cake and eat it too.

87. For all those reasons, I agree with Mr Hutton that, even taking the points raised by Mr Williams at face value, as far as the appellant herself was concerned, it was far from obvious that CFA-lite was a superior funding system compared to legal aid. On any view, it was not so much better that, contrary to the authorities I have cited, the appellant did not need to explain the reasons for changing funding and to justify that decision as reasonable.

88. In one sense, the proof of the pudding is in the eating. BBK advised the appellant at the time that she "will be broadly in the same position" under a CFA as she was under legal aid. I agree with that advice; so she was. A CFA meant that BBK were potentially in a better position, but they did not advise the appellant of that, and it is in any event immaterial for present purposes. For these reasons, I reject the underlying premise of Mr Williams' submissions, that CFA-lite was, in fact, obviously superior to legal aid.

9. ISSUE 4: CAN A HYPOTHETICAL REASON EVER TRUMP THE ACTUAL REASONS FOR A CHANGE IN FUNDING?

89. It follows from my analysis of Issue 3 that Issue 4 does not arise for decision: having undertaken the comparison exercise, I have concluded that CFA-lite was not so obviously superior to legal aid that it should lead to a reversal of the analysis set out under Issues 1 and 2. In those circumstances, it is unnecessary to give any sort of definitive answer to the question as to whether a hypothetical trump card could ever displace the actual reasons for the change in funding. However, having heard argument about it, I would wish to add this.

90. Whilst it seems to me that it would be wrong in principle to rule out entirely a factor that played no part in the decision-making process, it seems to me that an argument based upon such a factor faces two very high hurdles. The first is the weight of the authorities noted above, which stress again and again the importance of the actual reasons for the change in funding. The second is the unlikelihood of such a situation arising in practice; the more obvious the reason for a change in funding, the more likely it is that such a reason will have occurred to the claimant's solicitors at the time. If the so-called 'obvious 'reason did not occur to them or feature in their advice, that may well be because it was not so obvious, after all.

91. Perhaps the highest that the objective element can be put is to be found in the words of Latham LJ in *Solutia*, where he 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, none the less 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."

10. CONCLUSIONS

92. For the reasons set out above, I would dismiss this second appeal. The decision in *Surrey* appears to have worked well in practice. It stresses that, in general terms, there is little to choose between legal aid funding, on the one hand, and a CFA-lite arrangement on the other. In disputes about the recoverability from the paying party of additional liabilities where the funding has changed from the former to the latter, what matters is the reasonableness of the decision to change funding. That inevitably highlights the actual reasons for the change. On the particular facts of the present case, Master Rowley found that the reasons for the change were unreasonable and disallowed the success fee and the ATE premium. Jay J agreed with that, and so do I.

LORD JUSTICE FLOYD

93. I agree with both judgments.

LORD JUSTICE LEWISON

94. I, too, would dismiss the appeal for the reasons given by Coulson LJ. But since much of the debate concerned my judgment in *Surrey*, I would like to add a few words of my own. First, there are obvious dangers in the author of a judgment having to interpret it; not least because of the temptation (with hindsight) of an interpretation which reflects what the author would have liked to have said rather than what he did say. Second, I am glad that Coulson LJ interprets the judgment in *Surrey* as he does, because that is the way I interpret it myself. Third, the comparison between a CFA-lite and legal aid referred to in *Surrey* at [29] was an evaluation carried out by experienced costs judges at an "abstract" or "generic" level. It was not an evaluation based on the facts of any particular case or, indeed, type of case. Fourth, I agree with Coulson LJ not only that the costs judges were entitled to come to that conclusion, but that their conclusion was right. Fifth, although the submissions on both sides ignored what Coulson LJ has called "the elephant in the room", he is right to reveal it. It is a feature of cases like these which, if ignored, is likely to result in vastly increased financial liabilities falling on the NHS.