# No success fee or ATE premium for firm in successful clinical negligence case

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**Dispute Resolution analysis: What are the consequences of changing from legal aid to 'no win, no fee' funding and what should solicitors be advising clients when considering such a move? David Bowden, freelance independent consultant, comments on the consequences of AH v Lewisham Hospital NHS Trust and talks to Alex Bagnall, associate and costs advocate at Just Costs Solicitors, about what lessons can be learned from this case.**

## Original news

*AH (a protected party proceeding by her litigation friend, XX) v Lewisham Hospital NHS Trust* [2016] EWHC B3 (Costs)

*A client accepted a significant amount of damages to settle a substantial clinical negligence claim. The solicitors acted on a 'no win, no fee' arrangement. In a tough and controversial ruling, the Senior Courts Costs Office has ruled that no success fee or ATE premium can be recovered by the solicitors. The judge ruled that the client was given insufficient advice about the consequences of changing from legal aid to 'no win, no fee' funding.*

## What were the facts in this case?

**David Bowden (DB):** The claimant suffered severe complications following day surgery at a hospital run by the defendant NHS Trust and now has to be cared for full time in a nursing home.

As the claimant lacks capacity a litigation friend was appointed on her behalf and solicitors appointed. A partial admission (valued at £25,000) was made in January 2011. Legal aid funding was applied for in March 2010 and a full representation certificate was issued in June 2011. There was no guarantee that funding would continue. Changes made by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012) meant that after 1 April 2013 a client entering into a conditional fee agreement (CFA) would not be able to claim a success fee or after the event (ATE) premiums from the losing side. The claimant on the advice of her solicitor changed the funding of her case from legal aid to a CFA on 26 March 2013. Under the CFA a success fee of 80% was claimed for solicitor's costs (if the case settled more than three months before trial) and 100% after that point. A block-rated ATE policy was taken out. This ATE provided cover of £500,000 costs if the case was unsuccessful and the premium was £18,881.78.

The claim was issued in January 2013 and on 18 March 2013 the defendant made a Part 36 offer of £285,000 which on 13 September 2013 was increased to £325,000 (plus any benefits that the Department for Work and Pensions' Compensation Recovery Unit would seek to claw back). That revised offer was promptly accepted. The defendant (as paying party) admitted it would have to pay the claimant's solicitor's base costs as receiving party.

## What issues were in dispute at the costs hearing?

**DB:** The paying party disputed it had any liability to pay additional liabilities. It said that the claimant had been given insufficient advice as to the risks of changing from legal aid to CFA funding. The costs judge had to decide whether the additional liabilities were:

- 'reasonably incurred or reasonable and proportionate in amount' (pre-April 2013 CPR 44.4)
- to judge this 'as they reasonably appeared to the solicitor...when the funding arrangement was entered into' (pre-April 2013 Costs Practice Direction para 11.7), and
- gauge the 'risk that the circumstances in which the costs, fees or expenses would be payable might or might not occur' (Costs Practice Direction, para 8)

In addition, it was disputed that the block-rated ATE policy cost was reasonable in amount.

Note: the level of base costs are disputed but were not dealt with in this judgment—the detailed assessment had not concluded.

## What submissions did the paying party make?

**DB:** The paying party drew the court's attention to the fact that the legal aid certificate was cancelled at the request of the receiving party's solicitor on 1 March 2013 nearly a month before the CFA was finalised. The fee earner from the paying party's solicitors was cross-examined at the hearing on her two witness statements. Those statements had assertions that:

- her client was vulnerable to the adverse effects of LASPO 2012
- there was no guarantee that the Legal Aid Agency would continue to provide financial support, and
- legal aid funding would not protect her client from failing to beat a Part 36 offer

However, in cross-examination she admitted that:

- she did not give the *Simmons v Castle* advice because she was not aware of the case at that time
- she was struggling to recollect what advice she gave to her client over the telephone, and
- the instruction from those above her in the firm was to review all legal aid cases, and this had not highlighted the 10% damages point either

In the light of this evidence, the paying party submitted the receiving party had not been properly advised that she would be giving up her 10% *Simmons* uplift of £17,500 when she changed to CFA funding. Developing this, they submitted that it was not reasonable for the receiving party to abandon legal aid funding. The paying party said its solicitor telephoned the other side on 4 February 2013 asking 'her to think without prejudice of where her claim is really valued at, in case we can in fact do a deal now'. The paying party said this case could have been settled before the LASPO 2012 changes took effect and that it was more to the benefit of the receiving party's solicitor than to the receiving party herself that the CFA was entered into which provided for a success fee in a claim that was bound to success because of an earlier partial admission.

## What submissions did the receiving party make?

**DB:** The receiving party said that the test to be applied was what was 'objectively reasonable' and not a test of materiality. When looking at the decision made to change from legal aid to CFA funding. The receiving party said this test was met and that while the advice about the 10% *Simmons* uplift was 'less than complete' it did not render the decision to change funding unreasonable.

To illustrate the force of this (and the corresponding absurdity of the paying party's position) the receiving party invited the costs judge to consider two different claimants each with identical claims. One claimant explains the *Simmons* point while the other does not. Both have their legal aid certificates discharged and signed pre 1 April 2013 CFAs with recoverable success fees and ATE premiums. In those circumstances, it would be a nonsense were the defendant to be obliged to pay only the additional liabilities for the claimant who had had the *Simmons* advice, but nothing for the claimant who had not. In both cases, where the choice has been objectively reasonable, the quality of the advice should make no difference where, at the end of the day, each client has made an identical choice.

## What ruling did the judge make on the success fee?

**DB:** The costs judge accepted the paying party's submission on the basis it was proper for the receiving party's solicitors to give their client advice about the pending LASPO 2012 changes. However, he asked whether the receiving party's choice was 'objectively reasonable based upon the advice she was given'. Ruling that the advice was not just incomplete but that 'a very significant component was missing', he noted that the court did 'not know what the client would have said had the *Simmons* advice been given'. He notes there were two options for the claimant:

- giving up £17,500 to know that with a risk-free CFA she is certain to keep all the damages, or
- settlement discussions have opened, an offer has been made, £17,500 is a lot to give up and it is better to stick with the protection of legal aid

The costs judge ruled that the *Simmons* point 'might have tipped the balance of the choice one way or the other' and 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 fee and ATE premium therefore fail.'

The costs judge goes on to state what he considers the success fee should be in 'case I am mistaken about the principal issue'. In the light of the partial admissions and offers, at the time the CFA was taken out in March 2013 he judges that the risk of losing was not as high as the claimed 80% success fee justified. He says the success fee is 'excessive' and concluded:

> 'Taking all the factors I have mentioned into account and doing the best I can, I consider that the prospect of success when the CFAs were signed was in the region of 75% to 80% which would give a success fee of between 25% and 33.3%, in addition to which an amount should be added in respect of the Part 36 risk. Overall, I consider a success fee of 40% for the solicitors would be reasonable, and given Mr Marven's concession, 30% for counsel.'

## What ruling did the judge make on the ATE premium?

**DB:** As this was also an additional liability, the costs judge ruled that this was not recoverable for the same reason that the success fee was not. The costs judge did go on to consider what should be the appropriate premium and noted that the onus is on the paying party to adduce evidence as to the unreasonableness of the premium. He noted that the receiving party had legal aid protection for three years and that the ATE premium should be reduced to reflect that. He also said the limit of cover of £500,000 was too high.

On this basis the costs judge said even if the ATE premium was recoverable only £15,000 (and not the full £18,881.78) should be allowed.

## What can dispute resolution practitioners learn from this ruling?

**DB:** This is a deeply unsatisfactory case in many ways. The example given by the receiving party about the two identical claimants who received different advice shows the absurdity of this ruling.

These sorts of challenges are going to recur and to defend the decision to change funding arrangements there will need to be evidence as to what was done, when and why. Rather unusually for costs proceedings, the fee earner was called to be cross-examined.

It does seem that *Simmons* has unintentionally back-fired here. There was no consideration at all in the first *Simmons* judgment of what should or could happen in cases such as this where there had been a perfectly legitimate change of funding arrangement. The second *Simmons* judgment considers the position of a claimant who entered into a CFA before 1 April 2013, disinstructs their solicitors and then reinstructs other solicitors on a post April 2013 CFA. The Court of Appeal brusquely says 'the answer…is obvious' but clearly this answer has been far from obvious to costs judges. In my view, the costs judge gave far too much weight to *Simmons*. His attention should have focused instead on the fact that settlement of the case was far from clear, that the case had been live for three years and the claimant had a 'now or never' choice to change to CFA funding before the LASPO 2012 changes took effect.

This judgment also refers to another judgment of Master Rowley in *Hyde v Milton Keynes Hospital NHS Foundation Trust* [2015] EWHC B17 (Costs). Here too a client switched from legal aid to CFA funding before the LASPO 2012 changes took effect. However, Master Rowley came to the exact opposite conclusion and ruled that with the limitation running the claimant was entitled to transfer to a CFA arrangement with ATE from 25 March 2013.
Changing funding arrangements—briefing clients is keyLegal aid certificate—does it have to be expressly discharged? (Hyde v Milton Keynes Hospital NHS Foundation Trust)

**Alex Bagnall (AB):** There is a degree of uncertainty surrounding the question of whether it was reasonable for a claimant to switch from legal aid to CFA funding in the run-up to the Jackson reforms. Whilst the *Hyde* case resulted in a finding in favour of the claimant, the decisions in both *AH* and *Ramos v Oxford University NHS Trust* [2016] EWHC B4 (Costs) went in the defendants' favour.

These decisions very much turn on their own facts. A claimant can act reasonably even if the advice given is imperfect. If the advice is mostly wrong but a claimant chooses to follow the elements which are correct, the claimant can make a

reasonable choice. But where the advice is 'utterly wrong' it is impossible for a claimant to follow that advice and make a reasonable decision.

A decision to use CFA/ATE funding where legal aid was available must be judged as to whether it was a reasonable decision or not. If it was, the additional liabilities occasioned by that choice will be recoverable (subject to the usual tests of reasonableness and proportionality). If it was not, such additional liabilities will not be recovered.

## How does this decision fit in with other recent developments in the costs area?

**AB:** There is an apparent conflict between the various cases in which funding was switched from legal aid to CFA which is, on its face, not easy to reconcile. However, the underlying facts in each case—particularly in relation to the advice given to a claimant—tend to assist with that reconciliation.

In *AH* the solicitor failed to advise a claimant that, by switching to a CFA, she would lose out on a £17,500 *Simmons* uplift. The solicitor accepted that this was a material and important factor which a claimant should have been advised about.

By contrast, in *Hyde* it was apparent that the monies available under the legal aid certificate were about to be exhausted and no further sums would be available. That claimant was fully advised of the effect of transferring to a CFA.

It is likely that these decisions will prove to be a battleground for some time to come. The sums at stake for the NHS Litigation Authority are significant, and their instruction of leading counsel in *Hyde* and *AH* demonstrates the importance which is being placed on this point.

**DB:** With the various conflicting decisions from the SCCO and the gaps that are now apparent from *Simmons* itself, it is now abundantly clear that this needs a ruling from a higher court to sort the mess out. Fortunately an application A2/2016/0542 was lodged on 17 February 2016 with the Court of Appeal for permission to appeal *Hyde*. Hopefully permission will be granted and this will proceed to a hearing. No doubt these words in the first *Simmons v Castle* judgment will be ringing in the Court of Appeal's ears too:

> 'We have not been addressed by counsel on the issue of increasing the level of general damages. It does not seem to us to be appropriate, let alone necessary, for us to be so addressed.'

A query remains as to what ATE insurers will do. Will they write these ATE premiums off accepting that there is a litigation risk that not all ATE premiums will in the end be recovered? Or will they try to recoup their loss from the solicitor's firms themselves? If so, will professional indemnity insurance premiums for solicitor's firms rise?

*Interviewed by David Bowden.*

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