Assessing the consequences of funding changes for the award of solicitors' fees (Yesil v Doncaster & Bassetlaw Hospitals NHS Foundation Trust)

30/03/2016

Dispute Resolution analysis: A regional costs judge has ruled that no success fee or After the Event (ATE) insurance premium can be recovered by solicitors where a client is given insufficient advice about the consequences of changing from legal aid to 'no win, no fee' funding. David Bowden, freelance independent consultant, talks to Alex Bagnall, associate and costs advocate at Just Costs Solicitors about what lessons can be learned from Master Mehmet Edem Yesil v Doncaster & Bassetlaw Hospitals NHS Foundation Trust.

Practical implications

Yesil v Doncaster & Bassetlaw Hospitals NHS Foundation Trust [2016] Lexis Citation 26

This is yet another case in which the court highlights that the requirement for solicitors to discuss the option of an additional 10% uplift on general damages is a material factor when assessing the consequences of funding changes when determining the recovery of solicitors' costs. Where there is a failure to discuss this with the client it calls into question the adequacy of the funding advice given.

The court emphasised that where a number of funding options are available to the client and some are more financially beneficial to the solicitor there is a much greater need for there to be transparency about the issues discussed and it will be for the claimant to show that the decision to switch funding was a reasonable decision to take at the time.

What issues were in dispute at the costs hearing?

David Bowden (DB): The issue was whether the decision taken to change the funding of this case from legal aid to a 'no win, no fee' one on a conditional fee agreement (CFA) was the correct one. If the funding had not been changed, the claimant would have been entitled to an additional amount of general damages by way of compensation.

What is the relevance of the Court of Appeal decision in Simmons v Castle?

Simmons v Castle [2012] EWCA Civ 1288

DB: *Simmons* declared that general damages would be increased by 10%—the increase in general damages by 10% had been recommended by Lord Justice Jackson in his reports. The value of the *Simmons* uplift in this case would be £28,000.

What submissions did the parties make?

Paying party

DB: The paying party submitted that the decision to change from legal aid funding in March 2013 had caused costs of £106,204.34 to be unreasonably incurred.

The paying party submitted the receiving party had not been properly advised that he would be giving up his 10% *Simmons* uplift of £28,000 when he changed to CFA funding and that it was not reasonable for the receiving party to abandon his legal aid funding. It said the funding change was more to the benefit of the receiving party's solicitor than to the receiving party himself. The CFA provided for a success fee in a claim that was bound to succeed because of an admission of liability.

Receiving party

DB: In February 2013, the receiving party's solicitor sought to increase the legal aid funding (from £94,000 to £240,000) but the Legal Services Commission (LSC) rejected this proposal. The LSC letter dated 28 February 2013 questioned this increase on the basis that:

- it was 'beyond the parameters set out in the Clinical Negligence Funding Checklist'
- liability had already been settled and as it was inevitable that costs would be recoverable from the other side, there was no justification for the additional funding sought and a 'fully costed case plan detailing the steps and costs' was required

Rather than provide a costed case plan his solicitor (conscious of the impending Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012) changes) advised him to enter into a CFA instead and then applied to discharge the legal aid certificate—but no specific advice was given on the *Simmons* uplift. The receiving party submitted that the decision to change funding was reasonable given the LSC's stance and the additional liabilities of just over £106,000 were 'reasonably incurred'. The *Simmons* uplift of £28,000 in the context of an overall settlement of £7m appears inconsequential. If a CFA was taken out after 1 April 2013 then these additional liabilities would be payable by the claimant. Taking out a pre-LASPO 2012 CFA therefore had a net benefit to the claimant of £78,000.

The receiving party said that a costs judge had to apply a test of what was 'objectively reasonable' when looking at the decision made to change from legal aid to CFA funding. This was a 'now or never' decision to change funding because for CFAs entered into after 1 April 2013, success fees and ATE premiums (additional liabilities) could not be recovered from a paying party but had to be deducted from damages received. There was no guarantee that legal aid funding would continue.

What ruling did the judge make on the recovery of additional liabilities?

DB: The regional costs judge handed down a reserved judgment describing the 10% uplift on damages, the claimant would have received if he had remained on legal aid, as a 'significant piece of information'. He ruled:

'In my judgment it is inconceivable that a client would not consider the option of an additional 10% uplift on general damages a material factor. The omission to raise this factor, even if the claimant immediately rejected it, seriously calls into question the adequacy of the advice given. The solicitors would appear to have been not so much 'leaning' one way, as giving advice tailored to a decision they had already made. 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.'
Surrey v Barnet & Chase Farms Hospital NHS Trust [2015] Lexis Citation 142

The regional costs judge agreed with the decision on this point made by Master Rowley in *Surrey* . He said it was for a claimant on a standard basis assessment to show that the decision to switch funding at the time it was made was a 'reasonable decision to take'. He said the additional liabilities flowing from the switch of funding were 'unreasonably incurred and are irrecoverable from the defendants'. For more detail on this case, see News Analysis: When will changes to funding be considered unreasonable? (Surrey v Barnet & Chase Farm Hospitals NHS Trust).

How does this decision fit in with other recent developments in the costs area such as Ramos, Hyde and AH? Is there any common theme arising out of all these judgments?

Alex Bagnall: There are now a number of decisions regarding the reasonableness of decisions to switch from legal aid funding to a CFA. The claimant's solicitors in this matter seem to have found themselves in some difficulties by not disclosing a copy of the advice which was given to their client regarding the decision to switch.

Moreover, the claimant's solicitors' decision to switch funding was based on their erroneous calculations as to their incurred costs which led to a conclusion that the legal aid funding was likely to be exhausted in the near future. This compounded their difficulties.

The judgment makes it clear that these decisions will continue to turn on their own facts. Where evidence cannot be adduced that the decision to switch was reasonable, it is very likely that a claimant solicitor will fail to recover any additional liabilities.
Milton Keynes NHS Foundation Trust v Hyde [2016] EWHC 72 (QB)

DB: An appeal is being considered in this case. If it is issued, it may be that the receiving party asks for it to be transferred to the Court of Appeal under CPR 52.14. If permission is granted any appeal could be conjoined with *Hyde*. If a Respondent's Notice is issued, then the scope of the appeal could turn out to be broader than RCJ Besford thought would be the case. For a detailed analysis of the decision in *Hyde*, see News Analysis: Legal aid certificate—does it have to be expressly discharged? (Hyde v Milton Keynes Hospital NHS Foundation Trust)

Interviewed by David Bowden.

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