Case No: HQ11X01737
SCCO Reference: CL1405288

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building,
Royal Courts of Justice, Strand,
London, WC2A 2LL

Date: 11/01/2016

Before:

MASTER LEONARD

- -

Between:

Oliver Davis **(A child and protected party by Lisa Marie Davis, his Litigation Friend)**	**Claimant**
- and -	
Wiltshire Primary Care Trust	**Defendant**

- -
- -

Benjamin Williams QC (instructed by **Wolferstans**) for Oliver
Joshua Munro (instructed by **Acumension**) for the **Defendant**

Hearing dates: 21 August and 30 September 2015

- -

Judgment

Master Leonard:

1. This is the assessment of the costs awarded to Oliver Davis, the Claimant represented by his mother and Litigation Friend Mrs Lisa Marie Davis, under an order of 20 March 2013. The issue I must address is the Defendant's objection to Oliver's decision (through his mother and Litigation Friend) to arrange, in November 2009, for the discharge of a CLS funding certificate and to enter instead into a conditional fee agreement with his solicitors, backed by an ATE policy. The Defendant characterises that decision as unreasonable and seeks disallowance of the additional liabilities. Alternatively the Defendant takes issue with the retrospective effect of the success fee.

2. I have been reminded of the relevant pre-April 2013 rules, applicable to this case under transitional provisions.

3. CPR 44.4 provided (insofar as relevant):

> "(1) Where the court is to assess the amounts of costs …the court will not …allow costs which have been unreasonably incurred or are unreasonable in amount…

> (2) Where the amount of costs is to be assessed on the standard basis, the court will –
>
> (a) only allow costs which are proportionate to the matters in issue; and
>
> (b) resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party…."

4. CPR 44.5 provided (insofar as relevant):

> "…The court is to have regard to all the circumstances in deciding whether costs are –
>
> If it is assessing on the standard basis –
>
> Proportionately and reasonably incurred;
>
> Were proportionate and reasonable in amount…"

5. The then Costs Practice Direction provided at paragraph 11.7:

> "When the court is considering the factors to be taken into account in assessing an additional liability, it will have regard to the facts and circumstances as they reasonably appeared to the solicitor or counsel when the funding arrangement was entered into…"

6. And at paragraph 11.8:

> "In deciding whether a percentage increase is reasonable, relevant factors to be taken into account may include:
>
> (a) The risk that the circumstances in which the costs, fees or expenses would be payable might or might not occur;
>
> (b) The legal representative's liability for any disbursements;
>
> What other methods of financing the costs were available to the receiving party."

7. The success fee sought by Oliver's solicitors is 67% and by counsel 25%. The ATE premium for a FirstAssist "pursuit" policy claimed in the bill is (at 93% of opponent's costs plus IPT) £108,673.26. That has been agreed at (I understand) £93,938.51 following a correction to an error in calculation. The total additional liabilities claimed exceed £200,000 plus VAT generated, as the points of dispute put it, "only by virtue of the abandonment of public funding".

The CFA and the ATE Policy

8. The CFA between Oliver (represented by Mrs Davis) and Wolferstans is dated 26 November 2009. It covers Oliver's claim for clinical negligence "including any work done by us prior to the date on which the Conditional Fee Agreement was made."

9. These are the pertinent provisions of the CFA for the purposes of this decision. It incorporates the Law Society's standard conditions, including the solicitor's responsibility to act in the client's best interests. It applies to all work done on Oliver's claim including work done prior to the date of signing. The success fee, applicable to all charges, is set at 67% or 100% if the claim concludes within 3 months of trial. If Oliver wins he will be liable to pay basic charges, disbursements and success fee but only to the extent that they are agreed with the opponent or allowed by the court: "…there will be no deduction from your damages or a bill for you to pay if any of our own charges and expenses are unrecovered".

10. If Oliver loses he will not pay any Wolferstans' charges or disbursements save to the extent that they are recoverable under an insurance policy. (The same provision is made for any period over which Oliver fails to beat a Part 36 offer rejected on Wolferstans' advice). Losing is defined in this way: "The court has dismissed your claim or you have stopped it on our advice". If Oliver ends the agreement, he must pay Wolferstans' basic costs and disbursements, plus a success fee if he wins. Wolferstans can end the agreement if they believe that Oliver is unlikely to win, in which case Oliver will be liable to pay disbursements, or if he rejects their advice on settlement, in which case he must pay Wolferstans' basic costs and disbursements, plus a success fee if he wins. Oliver is entitled to a second opinion, for which he must pay.

11. The ATE policy is dated 15 January 2010. It is a FirstAssist Legal Protection "Pursuit" policy under which the premium is calculated at 93% of insured "Expenses" (expenses and disbursements "reasonably and properly incurred by the solicitor" but excluding the fees of counsel acting under a CFA) and opponent's costs. It is a direct contract with Oliver as the insured (it is not in issue that the ATE premium is not a "disbursement" under the terms of the CFA). Oliver pays the whole premium as long as the "outcome of the Legal Proceedings is a Success."

12. Success is defined in the Policy Schedule as: "The claim for damages is finally resolved in favour of the Insured whether by a court decision or where an offer is received which the Insured's solicitor advises should be accepted or any other offer accepted." The Part 36 risk is met by provisions for partial success.

13. Among the conditions on the policy schedule are that the premium is payable by the insured even if the opponent delays or defaults in payment of any judgment or settlement. The insurer has a lien over any monies received up to the value of the premium and the solicitor may not pay to the insured any money subject to that lien until the premium has been paid. The Policy will terminate if either the insured or the solicitor terminates the CFA of 26 November 2009. The policy may also be cancelled in certain circumstances, notably where the insured does not follow Wolferstans' advice on progressing the case, settlement or discontinuance or does not follow the insurer's recommendations with regard to settlement. In the event that the policy is terminated or cancelled, the insurer "is under no obligation to make any payment".

14. Among the "General Exclusions", at paragraph 7 the insurer excludes cover for opponent's costs "arising during a period when, for the purposes of the claim, a CLS public funding certificate was in force", at paragraph 9 "Expenses incurred outside the period of insurance", at paragraph 16 "Expenses that, in Our opinion, have been incurred unreasonably or unnecessarily" and at paragraph 17 "Adverse costs or expenses relating to the assessment proceedings or any other disputes regarding costs".

The Background: Mr Parford's account

15. Mr Simon Parford is the solicitor acting for Oliver on the instructions of Mrs Davis. Mr Parford is a partner in the firm of Wolferstans and head of its Clinical Negligence department. He has undertaken exclusively claimant clinical negligence work since 1991. The following account of events is Mr Parford's, supplemented by me by reference to the documentary record.

16. Oliver was born on 7 November 2005. He was in a poor condition at birth and required resuscitation, after which he was transferred to a neonatal unit where he required a period of intensive care with ventilation. Most regrettably he suffered from hypoxic ischaemic ncephalopathy and convulsions, sustained brain damage and developed severe quadriplegic cerebral palsy.

17. Oliver's case was that the Defendant's care of Mrs Davis and Oliver during the latter stages of her labour and at the time of his delivery was negligent, as a result of which Oliver suffered an avoidable period of hypoxic ischaemia which caused his brain damage.

18. A CLS Funding Certificate was granted to Oliver on 24 April 2006. This provided for an initial investigation to be undertaken in relation to liability and for all steps to be taken up to the end of the Pre-Action Protocol. Notice of the investigation of a potential claim was first given to the Defendant by letter of 22 May 2006 requesting disclosure of medical records. A number of reports were obtained from independent medical experts. Following a conference with leading counsel on 8 September 2009 a letter of claim dated 6 October 2009 was sent to Beachcroft LLP, solicitors for the Defendant.

19. The reports available in September 2009 included a report on condition and prognosis dated April 2009 from Dr Richard Miles, a consultant paediatrician. Dr Miles reported that Oliver's physical problems were so severe as to make it difficult to assess his cognitive abilities but that he was likely to have severe learning difficulties. Even receiving support (as he was) from physiotherapists, occupational and speech and language therapists he was going to make only limited progress. He would always be totally dependent and in need of 24 hour care. He would never be able to walk, talk or feed himself. The family currently had some specialist equipment but as Oliver grew older two carers and a hoist would be needed. His life expectancy would be reduced, but it would not be possible to say to what extent for 2 or 3 years.

20. On 7 October 2009, Wolferstans sought authority from the Legal Services Commission (the "LSC", since replaced by the Legal Aid Agency) to extend the scope of the funding certificate to enable proceedings to be issued and served and to

undertake an investigation of quantum. A request was also made for an increase in the financial limitation under the certificate to provide for the additional cost.

21. The LSC's response, dated 8 October 2009, indicated that it wished to have sight of the Defendant's protocol response before authorising further costs. In the event that liability was not admitted, the LSC would require Oliver to seek an order for a split trial ("to minimise the risk to the fund") and no authorisation would be provided to undertake quantum investigations.

22. Beachcroft LLP wrote in response to the letter of claim on 16 October 2009. Their letter gave 7 January 2010 as the date by which their protocol response would be required but qualified that by saying that the case on causation was not clearly made out: the letter of claim said an earlier delivery by forceps would have avoided injury but not the time by which that should have happened, nor the time by which the onset of acidosis had, on Oliver's case, occurred. Pending a statement of the latest time by which Oliver could have been delivered in order to avoid injury, Beachcroft stated that they would be unable to respond to the letter of claim.

23. Mr Parford's colleague Elizabeth Williams discussed matters with Mrs Davis on the telephone on 10 November 2009.

24. According to the file note, Ms Williams advised Mrs Davis that the Defendant had stated that "in their opinion the three month time limit for serving their letter of response did not commence until they received our further clarification on causation and therefore this put the date back for receiving the letter of response to the end of January". Mrs Davis responded to the effect that the Defendant "was simply trying to delay matters and she was disappointed as she wanted to progress things".

25. Ms Williams advised Mrs Davis that Wolferstans believed that it was in Oliver's best interests "to pursue his case as expeditiously as possible and to try and obtain quantum reports prior to service of the letter of response as this would enable us to apply for an interim payment if an admission was forthcoming". Mrs Williams responded to the effect that the family was in desperate need of assistance, in particular with suitable alternative accommodation and help with Oliver's care. She had been upset by the fact that the LSC "had put a stop to this until after the letter of response had been received".

26. Ms Williams then advised Mrs Davis it would be in Oliver's best interests for his CLS Funding Certificate to be discharged and thereafter for the claim to be pursued under a Conditional Fee Agreement. She compared and contrasted LSC funding with a "CFA lite" arrangement (under which Oliver's liability for Wolferstans' costs would be limited to whatever was recovered from the Defendant) supported by an ATE policy, probably with a self insured, deferred premium. Notably Ms Williams expressed the view that "under the public funding certificate Oliver had protection against the Defendant's costs though this was not absolute but that it was highly unlikely that if Oliver was to lose his case he would be forced to pay the Defendant's costs".

27. Mrs Parford, according to the note, "advised that in the circumstances she would be happier if we could expedite the investigation of Oliver's claim and she felt that the LSC was restricting this…the Defendant was merely stalling…and she believed that

Oliver would be better off funding the claim by way of a conditional fee agreement if this meant we were able to progress the matter at this stage".

28. Mr Parford wrote two letters to Mrs Davis on 10 November 2009. The first explained why he advised her to switch from LSC funding to a "CFA lite" arrangement. The second incorporated, in broader terms, a detailed review of the comparative advantages and disadvantages of Public Funding and Conditional Fee Agreements. The first letter incorporated this advice:

> I write further to your telephone conversation with Elizabeth Williams earlier today when you discussed your desire to progress the investigation of the value of Oliver's claim without delay and how this could be achieved…
>
> On the basis of Leading Counsel's opinion, but without knowing whether and on what basis the Defendant might seek to deny liability, I would currently put Oliver's prospects of success at 60%....
>
> The Defendant's Solicitors reverted to me requesting clarification of Oliver's case, in so far as it relates to causation of his Injuries and this clarification was sent to them on 30 October…
>
> The Defendant's Solicitors have written to me today suggesting that their time for serving the letter of response should run from the date upon which they received the clarification which I provided and that as such, the letter of response is not due to be served until 31 January 2010. I do not agree with their calculation of the date by which the letter of response should be served but, in reality, there is little point in arguing with them about this date since they will serve the letter of response when they are ready to do so…
>
> I advised you after the Conference With Leading Counsel that I would revert to the Legal Services Commission to request them to extend the scope and financial limitation currently Imposed upon Oliver's Certificate of Public Funding to enable me to immediately commence the investigation of the value of Oliver's claim, which would involve the instruction of several expert witnesses. I submitted an application but, as I have advised you, the application was turned down. I was informed that the Legal Services Commission would not authorise the incursion of any expenditure in relation to the valuation of Oliver's claim until they had had the opportunity of considering the terms of the letter of response.
>
> Unfortunately, this means that the time between now and receiving the Legal Services Commission's authorisation to proceed, following service of the letter of response will simply be wasted. It will lead to the delay in instructing the expert witnesses whose opinions are required and therefore result in a delay in obtaining their written opinion. This delay will inevitably delay the possibility of seeking a voluntary interim payment of damages, in the event that the letter of response contains a complete admission of liability or alternatively, in

making a formal application to the Court for an interim payment of damages if the Defendant refuses to agree to make a voluntary Interim payment.

I appreciate that your present circumstances are wholly unacceptable for you and your husband and Oliver. You urgently need to move to suitable alternative accommodation and you urgently require a substantial interim payment of damages to enable you to engage a Case Manager who will assist in the employment of carers to help you look after Oliver. This is increasingly important as both you and your husband have found that as Oliver becomes older and larger that he is more difficult to lift and carry than he used to be, as a result of which you have already or are likely to suffer back injuries yourselves. I also understand that you need an interim payment of damages to enable you to purchase certain items of equipment which you would like to have available for Oliver's use and that you would also like to purchase a suitable alternative vehicle In which Oliver could travel.

I understand from your discussion with Elizabeth Williams that there is a distinct possibility that your husband, Matthew, will be made redundant in the near future. If this were to happen, your financial position would become even more difficult and you would no longer be in a position to purchase any of the items which you need for Oliver on an ongoing basis which hitherto you have been funding yourselves.

I have advised you that, if the Defendant makes a full admission of liability in the letter of response, you would be entitled to request an immediate interim payment of damages for Oliver. However, until suitable expert opinion has been obtained, it will be impossible to cost Oliver’s needs and therefore, it will not be possible to evaluate how large an interim payment is required…

I am hopeful that, if I am able to instruct the appropriate expert witnesses in the near future…should it be necessary to make a formal application to the Court, by the time that it is possible to do so in March or April next year.

What is abundantly clear, however, is that, if it is not possible to instruct the expert witnesses until after I have received authority to do so from the Legal Services Commission following service of the letter of response, there will then be a significant delay before a request for a voluntary interim payment can be made, let alone a formal application to the Court.

Unfortunately, as a result of the Legal Services Commission's refusal to allow me to proceed as I have indicated above, I believe that it is no longer in Oliver's best interests to pursue his claim utilising the benefit of Public Funding. If you wish to continue to do so, then there will be an inevitable delay in investigating the value of Oliver's claim which will delay any request for or application to the Court for an interim payment of damages.

> I understand that Elizabeth Williams discussed the possibility of changing the basis of funding Oliver's claim to enable the investigation of the value of his claim to be undertaken without any delay. It was suggested that an application be made to the Legal Services Commission to discharge Oliver's Certificate of Public Funding so that a Conditional Fee Agreement can be signed in relation to the future funding of Oliver's claim. If this were to be done, I would be able to commence the investigation of the value of Oliver's claim immediately the Conditional Fee Agreement had been signed.
>
> I understand that you instructed Elizabeth Williams that you would like to do so as you wish to progress the investigation of the value of Oliver's claim without any delay whatsoever. Elizabeth Williams advised you that I would write to you today enclosing a form of authority, which I am doing and which I would be grateful if you could sign, date and return to me confirming that you would like me to apply for the immediate discharge of Oliver's Certificate of Public Funding.
>
> I would be grateful if you could telephone me upon receipt of this letter to have a brief discussion to confirm your instructions. I do not know whether you have access to email but if you do, I would also invite you to confirm your instructions to proceed, by email, in order to save time.
>
> I would also take this opportunity of advising you of the authorisation which the Legal Services Commission would be likely to provide upon receipt of the letter of response. If the letter of response contains a full admission of liability, authorisation is likely to be provided to commence Court proceedings and obtain Judgment in Oliver's favour against the Defendant and also to commence the investigation of the value of Oliver's claim. However, if the letter of response denies either breach of duty of care and/or causation of Injury, the Legal Services Commission… will require me to seek a direction from the Court that the liability issues be tried as a preliminary issue in advance of any valuation of Oliver's claim. No authorisation will be given to undertake the investigation of the value of Oliver's claim. I believe that this would also be detrimental to Oliver's claim. It would potentially cause some difficulties and would potentially delay settlement of Oliver's claim, at a later stage of the proceedings.
>
> I have written you a separate letter pealing with the potential advantages and disadvantages for Oliver of his claim being funded by the Legal Services Commission or alternatively under the provisions of a Conditional Fee Agreement. However, in summary, I would re-affirm that I believe that it would be in Oliver's best interests to discharge his Certificate of Public Funding and to enter into a Conditional Fee Agreement under the terms of which the investigation of his claim can be pursued expeditiously, without any delay…."

29. The second letter addressed in broader terms the advantages and disadvantages of public funding as against the "CFA lite" arrangement proposed by Wolferstans. It

referred again to delays attendant on LSC funding and the LSC's ability to determine the tactical approach. It included this advice:

> "The Legal Services Commission maintain an upper hourly rate which they are prepared to allow Solicitors to pay to expert witnesses. This means that to some extent, your solicitor can be constrained in instructing the most appropriate experts as many of the experts involved in cases such as Oliver's case, will charge a higher hourly rate than the Legal Services Commission will agree to pay. This may result in the need to instruct less experienced experts or possibly result in delays in obtaining expert opinions as the experts who are willing to act at Publicly Funded rates may be extremely busy.
>
> In addition, the Legal Services Commission will impose financial limitations in relation to the different stages of Oliver's case and it is quite likely that those financial limitations will not enable your Solicitor to undertake all the work which is considered necessary to investigate and litigate Oliver's Claim properly….
>
> Whilst I have indicated above that one of the benefits of a Certificate of Public Funding is that you will usually be protected against having to pay the Defendant's legal costs or any part of them if the claim is unsuccessful, you may be responsible for paying part of the Defendant's legal casts If any adverse costs orders have been made in favour of the Defendant during the course of the claim and Oliver's claim is ultimately successful…the Defendant would particularise the amount of their costs and would then seek to deduct those costs from Oliver's damages or the legal costs which the Defendant had to pay to Oliver…
>
> It is also possible that if Oliver's claim were successful that the Legal services Commission's statutory Charge might apply to certain elements of his legal costs or expenses. It is possible that if there were elements of his legal costs, for example, the costs incurred in unsuccessfully defending an application made by the Defendant, that those costs would ultimately be paid by Oliver from his damages.
>
> You will see that whilst there are certain benefits of Oliver funding his claim with the benefit of Public Funding, there are also certain potential disadvantages…"

30. This was contrasted with a CFA/ATE arrangement under which Wolferstans would charge only those costs recoverable from the Defendant and Oliver's damages would be "ring fenced" against adverse costs orders and Wolferstans and Mrs Davis would be able to move the case forward as they saw fit:

> "If we were acting for Oliver under the terms of a Conditional Fee Agreement, we would arrange for Andrew Spink QC and any other Barrister who might be involved in this case, to act under a Conditional Fee Agreement which they would enter Into with Wolferstans. This would similarly provide that in the event that

Oliver's claim was unsuccessful, they would not receive payment for their services but if the claim was successful, they would receive payment of both their base costs and a success fee.

The Conditional Fee Agreement which we would offer Oliver would be on the basis that we would only seek to charge for those legal costs which we were ultimately able to recover from the Defendant. We would waive our unrecovered costs and any costs which we were technically entitled to claim from Oliver rather than the Defendant.

We would advise you to take out a policy of After the Event Insurance to indemnify Oliver in relation to the expenses which were being incurred on his behalf and also to indemnify him In relation to any costs which he may become liable to pay to the Defendant. We can arrange for such a policy to be taken out which would not only provide sufficient indemnity cover for Oliver but would also enable us to “ring fence" Oliver's damages so that if an adverse costs order were obtained during the course of the proceedings, those costs would not ultimately be deducted from Oliver's damages.

An After the Event Insurance Policy can be arranged without the need to pay a premium at the time that the policy is taken out. The policy premium is fully deferred until the end of the case and is also self-insured so that if the case is concluded unsuccessfully, the policy holder never has to pay the premium. In the event that Oliver's claim is concluded successfully, the policy can be claimed from the Defendant.

Oliver would remain responsible for the expenses which are incurred on his behalf during the investigation and/or litigation of his claim but only to the extent that they are indemnified under the terms of the After the Event Insurance Policy. These expenses would be incurred and funded by Wolferstans on Oliver's behalf during the course of the claim. If the claim were concluded successfully, these expenses can be claimed from the Defendant and in the event that the claim is concluded unsuccessfully they can be claimed from the After the Event Insurance Company. In both of these circumstances the payments received would be used to reimburse Wolferstans for the payments that had been made on Oliver's behalf.

The cost to Wolferstans of funding all of the expenses which are likely to be incurred during the course of Oliver's claim will be very substantial. Therefore, I would require your agreement to seeking to recover the disbursements incurred to any particular date from the Defendant as part of any application for an interim payment of damages. Upon receipt of such an interim payment, you would agree to reimburse Wolferstans in respect of the expenses which had been incurred to that date and to make a payment on account of recoverable future expenses. At the conclusion of the claim, when those expenses are paid by the Defendant, they will be reimbursed to Oliver.

> There are a number of advantages to utilising a Conditional Fee Agreement to fund Oliver's claim, not least the fact that it would enable us to progress the investigation and litigation of Oliver's claim as we think fit rather than being constrained by the need to revert to the Legal Services Commission periodically to seek their authorisation to proceed. In addition, under the terms of the Conditional Fee Agreement which I am proposing and with the security provided by a suitable After the Event Insurance Policy, Oliver will not be in any worse position and indeed he is likely to be in a better position in certain respects than if his claim were to continue to be funded with the benefit of Public Funding."

31. Upon receipt of these letters, Mrs Davis telephoned Mr Parford on 13 November 2009 and they had a further discussion, during the course of which, he says, he clarified several of the points which were dealt with in the letters and ensured that she understood all of the advice given in them. Mrs Davis confirmed that she chose to convert the funding in Oliver's case from Public Funding to a Conditional Fee Agreement.

32. Mr Parford's attendance note of the conversation includes the following passages:

> "Mrs Davis said that she is very keen to progress the investigation of the value of Oliver's claim as soon as possible. She confirmed that their financial position as well as the housing situation is very difficult and she would like to be able to seek an interim payment for damages at the earliest possible stage, if the Defendants make admissions in the letter of response.
>
> Mrs Davis asked whether she would be liable to pay Oliver's fees or the other side's fees if he continued to be publicly funded.
>
> I explained that in the event of a successful outcome there was a possibility that the Statutory Charge might apply to some element of Oliver's costs. If that were the case then those costs would be paid to Wolferstans by the Legal Services Commission who would require an equivalent amount to be deducted from Oliver's damages…
>
> I said that in the event of a successful conclusion Oliver would have no liability to pay the Defendant's costs save in respect of possible interlocutory adverse costs orders. If such orders existed then they would also be deducted from the damages.
>
> I said that if Oliver's claim was funded by a Conditional Fee Agreement it would be offered on the basis that we would seek to recover our costs from the other side and if there was shortfall we would not seek to claim that from Oliver's damages.
>
> In the event that Oliver's claim was unsuccessful he would be protected by a policy of indemnity insurance which we would arrange on his behalf which would provide cover for any adverse costs order and would also provide cover for any disbursements which had been

> incurred on Oliver's behalf during the conduct of the claim from the time that the Conditional Fee Agreement was signed, that is, the expenses which will relate to the medical experts' fees, court fees and so on and so forth….
>
> I explained that at the present time whilst Oliver was publicly funded any disbursements which were incurred were paid by Wolferstans and reimbursed by the Legal Services Commission. If the funding changed to a Conditional Fee Agreement the disbursements would be funded by Wolferstans but we were unable to seek immediate reimbursement from her. At the end of the case we would seek to recover them from the Defendant if the claim was successful or the indemnity insurance company if it was not…
>
> I said that in the event of a successful conclusion Oliver would have no liability to pay the Defendant's costs save in respect of possible interlocutory adverse costs orders, If such orders existed then they would also be deducted from the damages.
>
> I said that if Oliver's claim was funded by a Conditional Fee Agreement it would be offered on the basis that we would seek to recover our costs from the other side and if there was shortfall. We would not seek to claim that from Oliver's damages…
>
> She said that from what I had advised if the method of funding was changed that we would be able to progress matters more expeditiously than we would be able to do if public funding remained in place. I confirmed that that was so. She said that as she wanted to press on with matters as soon as possible providing that Oliver or indeed she and her husband were not financially disadvantaged by transferring the method of funding then she would very much want me to do so.
>
> I confirmed that Oliver would be in no worse a financial position if public funding were discharged and a Conditional Fee Agreement were signed and in certain respects he would be in a better position. It would certainly allow us to progress the investigation of the quantum aspect of the claim more quickly and in those circumstances if the Defendant did make a complete admission of liability in the letter of claim or did so in the Defence that we would be in a much better position to seek an interim payment of damages. I said that by changing the method of funding it was likely to save a period of approximately 3 months or possibly more.
>
> Mrs Davis said that she definitely wanted to change the method of funding, in the circumstances…"

33. Written authority was given, an application was made to the LSC and Oliver's CLS Funding Certificate was discharged on 16 November 2009. A Conditional Fee Agreement was signed on 26 November 2009 and an ATE insurance policy was put in place from 15 January 2010. The investigation of quantum was commenced immediately.

34. An application for an interim payment was made in November 2011 and an interim payment made in December 2011. The claim was ultimately settled on the basis of a lump sum payment and annual periodical payments, the capitalised value of which was approximately £6.05 million.

35. Mr Parford says that upon receipt of initial instructions, consideration is always given to the most suitable method of funding of the initial investigation of a client's claim. It is often, although be no means always, the case that it would be beneficial to have the benefit of Public Funding. However, it is necessary to continue to review whether or not such funding remains in the client's best interests throughout the conduct of a claim. This may be determined by a number of issues but in particular the approach taken by the Defendant and the willingness or otherwise of a Defendant to make early admissions of liability.

36. The LSC's letter of 8 October 2009 was he says a standard response which always causes difficulties for a Claimant who wishes to progress his or her claim without delay. Upon receipt of it he was concerned that simply awaiting receipt of the Defendant's letter of response could cause a significant delay because there was no guarantee when it would be received.

37. Whilst the Pre-Action Protocol provided for service of the letter of response within 3 months of receipt of the letter of claim, his experience was that in many cases a Defendant would seek an extension, often substantial, of the protocol period or would simply not serve the letter of response within the protocol period. In such cases, he says, substantial delays occur before any substantive response is received.

38. Beachcroft's letter of 16 October 2009, following the LSC's letter of 8 October, caused him further concern as he believed that it was an indication that there might well be delays in receipt of the Defendant's letter of response which would in turn exacerbate the delay in Oliver's ability to progress the claim at all. It reinforced his view that it would be in Oliver's best interests to change the method of funding the claim.

39. His reasoning is that if a Defendant does not provide a letter of response promptly and the LSC will not extend the scope of the certificate to commence Court proceedings until the letter of response has been received, a Claimant cannot take any proactive step to force the Defendant's position. He has acted for clients who have had to wait many months before a letter of response has been received. Until then LSC will not reconsider an application for an extension of the scope of a certificate.

40. Mr Parford took the view that if the CLS Funding Certificate was discharged and Mrs Davis entered into a Conditional Fee Agreement with an ATE insurance policy, it would enable the claim to be progressed without delay and for an investigation of quantum to be commenced immediately. It would inevitably take some time before the necessary quantum evidence was available to support an application for an interim payment of damages and the sooner that investigation was commenced, the more beneficial it was likely to be for Oliver.

41. Mr Parford repeats in his evidence his advice to Mrs Davies of the advantages of CFA as against LSC funding, in particular avoiding delay and tactical autonomy. He also argues that Public Funding provides no protection against a defendant's Part 36 offer.

If a defendant makes a successful Part 36 offer, its post-offer costs are likely to be deducted from the funded claimant's damages under the principle approved in *Lockley v National Blood Transfusion Service* [1992] 1 WLR 492 (CA). A claimant may enjoy far more protection with a CFA and ATE insurance, because the CFA may provide (as in this case) that post-offer costs are not payable to the solicitor and the ATE (as in this case) may cover Part 36 risk. That was the position in the present case, where post Public Funding Oliver was represented on a CFA lite with comprehensive ATE cover. Even where a claimant fully succeeds in his case, the statutory charge may lead to significant reductions from damages which are not suffered by a claimant who retains solicitors on a CFA lite.

42. Mr Parford argues that that it was open to the Defendant to make a complete admission of breach of duty of care and causation of injury at an early stage. The Defendant was put on notice as early as 22 May 2006, when an initial letter was written requesting disclosure of the medical records, that a claim was being investigated. In view of the very serious nature of the allegations being made and the potential value of the claim notified on 22 May one would have thought, he says, that the Defendant might have taken steps to have undertaken an investigation of liability well in advance of receiving the letter of claim. However, for whatever tactical or other reasons, the Defendant chose not to make any admissions prior to or upon receipt of the letter of claim. Although an admission of breach of duty of care was contained in the letter of response which was received on 20 January 2010, a complete admission of liability was not received until 21 July 2010.

Mr McGrath's Account

43. Mr Matthew McGrath of DAC Beachcroft (as the firm is now called) conducted the matter on behalf of the Defendant. Like Mr Parford he is a very experienced clinical negligence solicitor: he is head of his firm's clinical negligence department and client relationship partner to the NHSLA. He has undertaken Defendant clinical negligence work since 1994. He specialises in complex, high value brain injury claims, normally arising out of problems during delivery. He has had conduct of over two hundred obstetric claims and has supervised hundreds of others.

44. Mr McGrath gives this account. On about 7 October 2009 he received Wolferstans' letter of claim. On perusal it became clear to him that the Claimant's case on causation required slight clarification so in the letter dated 16 October 2009 Beachcroft sought clarification as to the precise time by which Wolferstans considered their client needed to have been born in order to have avoided all of his injuries.

45. The reason for seeking this clarification was that while there may well have been deficiencies in the midwifery/obstetric care provided to the Claimant, it is often the case that such breaches have little or limited bearing on causation. In other words, there can be occasions when despite inadequate care, the insult that caused the injury occurred prior to the accepted inadequate care.

46. On 8 January 2010 Mr McGrath wrote to Wolferstans indicating that he expected to receive instructions to serve a letter of response by 22 January. The reason for this was that he had needed to take some additional advice from the Defendant's experts following clarification of Oliver's case as requested.

47. As to Mr Parford's statement that he says that it is not uncommon for Claimants to wait many months before a letter of response is received, Mr McGrath says that this can occur as given the limited number of experts suitable to provide liability reports in this specialist field. However, as Mr Parford suggests, such was not the case here as the Claimant had first started investigating this claim in 2006 and the Defendant had obtained some preliminary expert evidence (albeit not responding to any specific allegations as none had been made) by the time the letter of claim was served.

48. On 15 January 2010 (just over one month after service of the letter of claim) Wolferstans wrote advising that the Legal Services Commission Certificate of Public Funding had been discharged on 16 November 2009. They further advised that the claim was now funded by a Conditional Fee Agreement dated 24 November 2009 and gave details of the agreement.

49. On the date of receipt Mr McGrath wrote to Wolferstans indicating that he could not understand why the matter did not qualify for continued Legal Services Commission funding. He also indicated that he was not convinced that the Legal Services Commission requirements for the future conduct of the case were such that it meant Oliver's best interests could not be maintained.

50. The Defendant's formal letter of response was served on 20 January 2010. An admission of breach of duty was made and it was accepted that the Claimant could and should have been delivered about 53 minutes before he was. On the basis of the expert evidence held by the Defendant at that time, it was indicated that it was accepted that the Claimant's damage arose from both chronic partial hypoxia and an acute profound asphyxia.

51. The Claimant's case had been that chronic partial hypoxia had commenced from approximately 0510 hours, but it was the Defendant's case that delivery did not need to occur until 0530 hours. As a consequence, in the letter of response, the Defendant stated that Oliver would not have been born totally unscathed at 0530 hours and he would have suffered from some mobility and cognitive difficulties in any event. However, the letter of response went on to say

> "Nonetheless, it is also accepted that the majority of Oliver's ongoing disabilities have occurred as a consequence of inadequate care on behalf of the PCT and on behalf of our client, we extend their apologies for the injury that has befallen Oliver as a consequence of this inadequate and substandard management".

52. The Defendant also made a Part 36 offer on liability to the effect that it would be responsible for 90% of the overall damages payable to the Claimant on a full liability basis.

53. On the same date, 20 January 2010, Wolferstans wrote to DAC Beachcroft indicating that the reason for the change in the Claimant's funding was that it was no longer considered to be in the Claimant's best interests to continue to receive public funding. The letter went on to state "In particular, the Legal Services Commission refused to

allow our client to take any steps to investigate and determine his current needs for the provision of care, therapy, equipment and accommodation".

54. On 2 February 2010, Beachcroft wrote to Wolferstans indicating that "We would respectfully suggest the Legal Services Commission should have no reason to refuse to allow your client to investigate his current need for the provision of care, therapy, equipment and accommodation in light of the admissions on both breach of duty and causation that have already been made by our clients in this matter".

55. On 7 July 2010 Wolferstans indicated, after Beachcroft had pressed for an answer, that the offer to settle the liability aspect of the claim was rejected. Following discussion with the Defendant's expert, a full admission of causation was made on 12 July 2010.

56. On 22 July 2010, Wolferstans wrote to the effect that they would seek an early substantial interim payment of damages. They said they would prepare an interim payment of damages application in the near future. They anticipated seeking an interim payment of £1 million.

57. In response to this request, Beachcroft indicated that if any significant interim payment request was made then evidence of the Claimant's anticipated life expectancy, together with details of expert evidence in support, would be needed. After this correspondence, despite Beachcroft pressing for an answer, they did not hear further substantially from Wolferstans until 4 April 2011. They indicated they were still acting on behalf of the Claimant and were issuing Court proceedings in the immediate future. They would be applying for an interim payment of £1 million.

58. Mr McGrath expresses surprise at the suggestions that publicly funded Claimants do not have access to good quantum experts and that their evidence cannot be obtained in a timely fashion. He make the following observations, all based on his experiences as a clinical negligence practitioner over 20 years.

59. It is exceedingly rare for a claimant such as Oliver to have his case funded by anything but public funding: over 95% of such cases have public funding provided to Claimants and this form of funding is maintained throughout the life of the claim. National law firms which have dealt with hundreds of birth injury claims over the years, including Irwin Mitchell and Leigh Day, invariably use public funding when pursuing claims for catastrophic injury arising out of birth.

60. Law firms acting on behalf of claimants like Oliver invariably request an interim payment within weeks of an admission of breach of duty and causation (whether in whole or in part). In this case, despite the suggestion that the Claimant would be seeking a substantial interim payment and the Defendant indicating that if a significant or substantial interim payment was sought that evidence in support would be required, there was no request for an interim payment to cover some of the Claimant's immediate needs. It is very common for interim payments of up to £100,000 to be agreed and paid by the NHSLA in such cases without the necessity for quantum expert evidence in support.

61. If substantial interim payments for items such as alternative accommodation or the establishment of 24 hour care regimes are sought, then expert evidence will be needed

to justify such sums but it is not uncommon to see substantial interim payment applications of about £1 million to be issued well within one year of an admission or the commencement of proceedings. In such cases, following admissions, the claimants' solicitors have obtained, using public funding, quantum expert evidence at least from specialist accommodation and care experts.

62. Mr McGrath had been given to understand that the Claimant had switched to a CFA and ATE, even before the time period for the Defendant to respond to the pre-action protocol had expired, because Wolferstans wanted to fund urgent quantum investigations. However it was not until 22 months after admissions of breach of duty and the majority of causation of injury, and 16 months after a full admission of causation of injury, that the Claimant issued a formal Application for an interim payment of damages. The gathering of quantum evidence in support seems to have been longer than the normal.

63. The Claimant instructed of Maggie Sargent, care expert; Julia Ho, occupational therapist; and Michael Valentine, accommodation expert amongst a body of experts. Those three experts are used extensively by Claimants' lawyers on publicly funded cerebral palsy claims of this kind. It has never been suggested to Mr McGrath that these (or any of the other usual and experienced array of quantum experts) have not been able to be instructed because of funding restrictions set by the Legal Services Commission. On the contrary it is very common indeed to see them instructed.

64. Even in significant value cases funded by CFAs it is usual practice, says Mr McGrath, for claimant lawyers initially to investigate liability issues only. If liability remains in dispute then it is usual practice for claimants to seek a preliminary trial on liability issues only.

65. Mr McGrath can recall only one case in which a claimant in a catastrophic injury birth claim failed to beat a Part 36 offer and had to pay some of his client's costs. The reality is he says that nearly all of these claims are settled by negotiation at Round Table/Joint Settlement meetings. As claims inflations runs at as much as 10% pa, even if there was an early Defendant Part 36 offer it would be unlikely to put a Claimant at real risk.

Mr Parford's Response

66. Mr Parford takes issue with the suggestion that CFA funding for catastrophic birth claims is very rare. He concedes that the majority are, at least initially, publicly funded but says he has had a number of cases (he does not say how many) funded by Conditional Fee Agreements supported by an ATE insurance policy, either from the outset or following a change in funding from Public Funding. The appropriate method of funding a client's claim is he says carefully considered by Wolferstans at the outset of a claim and reviewed on a continuing basis throughout the conduct of the claim and appropriate advice given to the client about the most appropriate method of funding and any potential change.

67. Mr Parford describes Mr McGrath's statement about his experience of effective Part 36 offers in catastrophic birth cases as "extraordinary", though he does not offer any comparison with his own experience. He does not contradict Mr McGrath's statement about the regular involvement of the three experts referred to in publicly funded cases,

though he says that the imposition by the LSC of upper hourly rates for experts was increasingly becoming a potential problem with running Legally Aided cases at that time and has become a very significant problem in subsequent years.

68. Mr Parford says that he has, and has had, a number of catastrophic injury cases (again he does not say how many) funded by Conditional Fee Agreements where liability has remained in issue and directions have been obtained for the case to proceed to a trial dealing with both liability and quantum. Whether liability should be tried as a preliminary issue depends on the case. The whole purpose of changing the method of funding in this case was to enable the case to proceed and for quantum to be investigated and determined at the same time as determination of the liability issues.

69. As for the timing of the application for an interim payment, Mr Parford explains that care, occupational therapy, speech and language, accommodation and physiotherapy experts were approached on 17 November 2009 and a life expectancy expert approached on 30 November 2009. By 27 July 2010 all had reported. The primary reason for the delayed application is that Mrs Davis wished to purchase a particular property, which necessitated a further report on adaptation. That, he says, could not have been anticipated in 2009.

The Claimant's Submissions

70. Mr Williams for the Claimant argues that as a matter of law, Oliver had no obligation to fund his claim with recourse to public funding. In any event it was reasonable for him to switch to CFA/ATE funding. The terms provided him with greater protection than public funding. He needed to progress the claim and desired (through Mrs Davis) to do so independently of the restrictions imposed by the LSC.

71. In law a party who might either fund a service privately or with recourse to the taxpayer is absolutely entitled to decide on the former rather than the latter. In personal injury cases it has long established that a claimant is entitled to claim the cost of private medical treatment, even if treatment could have been obtained on the NHS. The principle has now been more broadly stated in *Peters v East Midlands Strategic Health Authority* [2010] QB 48 (CA). That case addressed the question of whether a wrongdoer (there too a negligent health authority) could require a claimant to throw his claim for future care on to council tax payers, via local authority care, in place of claiming the cost of private provision as damages. The court held that the claimant was entitled as of right to elect for private provision.

72. Mr Williams argues that there can be no principled reason for applying a different approach to questions of costs. Why should a claimant be required to have recourse to the limited resources of the LSC if she believes her interests better served by no less lawful CFA/ATE funding? The LSC's fund is intended to benefit claimants who cannot otherwise secure access to justice. Protecting wrongdoers from the full financial consequences of their actions is not part of its purpose.

73. A party is entitled to use CFA/ATE funding even if other forms of funding are available to him, if that is in his personal interest. In *Campbell v MGN* [2005] 1 WLR 3394 (HL) it was held that the claimant reasonably used a CFA to bring an appeal, even though she would have had little difficulty in funding the litigation herself (and indeed had previously so funded it). This decision, submits Mr Williams, throws

considerable doubt on the Court of Appeal's early decision in *Sarwar v Alam*, relied upon by the Defendant and considered below.

74. Subsequently, in *Sousa v Waltham Forest LBC* [2011] 1 WLR 2197 (CA), it was held that even international insurers conducting subrogated claims were entitled to enter CFAs and claim success fees where it was in their commercial interest to do so.

75. Defendants who say that a claimant should have resorted to public funding rather than incurring additional liabilities take as their predicate that publicly funded litigants are in a better position than CFA litigants. But that is very far from the case. A claimant with the right combination of CFA and ATE funding is in the best possible position, enjoying great advantages over other litigants, including the publicly funded.

76. The position is particularly stark in respect of quantum risks. Legal aid provides very little protection where a claimant recovers damages but fails to beat an offer to settle. If a legally aided claimant fails to better a defendant's Part 36 offer the defendant will recover costs from the date 21 days after the offer was made. As stated by Mr Parford those costs will be recouped from the claimant's damages via a *Lockley v National Blood Transfusion Service* set-off, against which section 11 of the Access to Justice Act 1999 provides no protection. The claimant's own publicly funded costs will from that point also be recouped from his damages by the LSC via the statutory charge.

77. In the present case, after the additional liabilities were incepted the position if Oliver failed to better a Part 36 offer was far more secure. The defendant's costs from the date the offer became effective were covered by the terms of the ATE policy, as were the claimant's own disbursements. Under the CFA, Wolferstans' costs ceased to be payable once the offer became effective. That fact that Oliver would in that situation have retained the whole of his damages, in contrast to the position with legal aid, was a benefit of great value.

78. This was not the only advantage of "CFA lite" funding to the claimant. He would see no deductions from his damages if he won his case outright. This would not usually be the case with legal aid, because of the statutory charge. Shortfalls on legal aid costs are often now substantial, as the LSC requires regular reporting by solicitors, and the drawing of case plans for cases of this kind. It is well established that the costs of this sort of work is not chargeable inter partes, but it remains payable by the LSC, and recoupable by it under the statutory charge.

79. Equally, a claimant with public funding may be at a significant disadvantage in respect of costs incurred at an interlocutory stage of the proceedings. Where a claimant loses an interlocutory hearing, the court will usually order that the defendant's costs be set off against any damages later awarded and the claimant's own unrecovered costs of that interlocutory stage of the proceedings will subsequently be recouped from damages via the statutory charge.

80. Even where a case is lost altogether, it does not follow that a claimant has the same protection with legal aid as with an ATE policy. Of course, that claimant will not have to pay his own costs. But he may have to pay the defendant's costs to the extent that that is reasonable under section 11 of the Access to Justice Act 1999. Where a legally aided claimant acquires assets over the life of a case (e.g. because of an inheritance), a costs order may well be enforced. By contrast, a claimant with a

suitable ATE policy is fully protected against an adverse costs order. Here, the claimant enjoys a contractual indemnity from First Assist, now Burford Capital, a market-leading ATE provider underwritten by a pre-eminent international insurance group.

81. When assessing costs, the only question for the court is whether (and this is common ground) the receiving party acted reasonably in his own interests. If the receiving party acted reasonably in his own interests, it is nothing to the point to say that the consequence is more expensive for the paying party. This principle was emphasised by the Supreme Court in *R (Edwards) v Environment Agency* (No 2) [2011] 1 WLR 79. In that case (where the defendant was the receiving party), the Supreme Court's costs officers decided, as part of the assessment of the reasonableness of the defendant's costs, that they should also take into account what is was reasonable to require the claimant to pay (this concern being stimulated by the perceived impact of the Aarhus Convention on the costs of certain environmental litigation).

82. The Supreme Court stated that this approach was misconceived. At paragraph 21: Lord Hope DP observed:

> "The test of reasonableness which [the costs officers] must apply is directed to their assessment of the costs incurred by the receiving party… It is not directed to the entirely different question whether the cost to the paying party would be prohibitively expensive…"

83. It was in any event reasonable for the Claimant to switch from public funding given the specific considerations stated by Mr Parford. It prevented delay. It enabled the claimant to conduct litigation autonomously, and without the need for approval from a third party which is notoriously concerned to protect its own budget.

84. For these reasons Mr Williams submits that the additional liabilities in this case were reasonably incurred. Further, he suggests that on any view this must be the position regarding the ATE premium. Even if the claimant had remained subject to legal aid it was reasonable for him to insure because of the costs risks set out above which the legal aid regime does not protect.

The Defendant's submissions

85. Mr Munro for the Defendant argues by reference to the rules I have set out that the burden of proof on this standard basis assessment lies with the Claimant, who must establish that the additional liabilities claimed were reasonably and proportionately incurred and (if so) reasonable and proportionate in amount.

86. In *Sarwar v Alam* [2002] 1 WLR 125, the question arose as to whether additional liabilities should be recoverable where, in the context of a personal injuries claim arising out of a road traffic accident, the claimant had signed up to a CFA with ATE rather than availing himself of potentially available BTE.

87. The Court of Appeal, referring to CPR 44.5(1), considered whether it was reasonable in all the circumstances for the claimant in a small personal injury claim, acting on his solicitor's advice, to incur the cost of an ATE premium without making further enquiries into the possible existence of BTE cover. The court concluded that the CPR

require the court to ensure that no costs are incurred which are not reasonable and proportionate; if in such cases a claimant possesses pre-existing BTE cover which appears to be satisfactory for a claim of that size, then in the ordinary course of things the claimant should be referred to the relevant BTE insurer; that the overriding principle is that the claimant, assisted by his/her solicitor, should act in a manner that is reasonable; that the question of the adequacy of a solicitor's enquiry and advice is not the same as the (higher) test applied when determining whether a solicitor has been professionally negligent; and that paragraphs 11.7 to 11.10 of the Costs Practice Direction point towards an inquiry into the availability of alternative, less expensive funding arrangements.

88. The relevant duties on a solicitor in that case were set out in the Solicitors' Costs Information and Client Care Code 1999. The relevant duties on the solicitor in this case are set out in the Solicitor's Code of Conduct 2007, which requires a solicitor to give very clear and complete information on litigation cost, potential exposure and funding options, including public funding and existing insurance.

89. Mr Munro has offered a very comprehensive review of relevant decisions on the reasonableness of electing for CFA/ATE funding as opposed to public funding. He has referred me to *Bowen v Bridgend County Borough Council* [2004] EWHC 9010 (Costs), *Traci Hughes v London Borough of Newham* (SCCO, 23rd May 2005), *Forde v Birmingham City Council* [2009] EWHC 12 (QB), *LXM v Mid Essex Hospital Services NHS Trust* [2010] EWHC 90185 (Costs), *Howarth v Britton Merlin* (case number 25 in the SCCO Case Summaries for 2005) in which, notably, the fact that a claimant had "at least notional" liability to pay any irrecoverable shortfall in an ATE premium was listed as a disadvantage compared to public finding); *Bradley v Windsor House Group Practice* (District Judge Bedford, Leeds District Registry, 10th January 2011); *AMH v The Scout Association* (SCCO, 28 January 2015); and *Kai Surrey v Barnet & Chase Farm Hospital NHS Trust* [2015] EWHC B17 (Costs).

90. Mr Munro argues that Wolferstans' advice to switch funding was given shortly after the liability consultation, at a time when Wolferstans could be reasonably confident that the claim would succeed and they could benefit from a success fee that was not available under LSC funding. It was only when it was clear that it was in Wolferstans' interests to enter into a CFA that that option was recommended.

91. Mr Munro submits that it is unreasonable for Wolferstans to recover a success fee in all the circumstances of this case. There were real and substantial detriments to Oliver pursuant to the CFA in the circumstances of this case, not advised to Mrs Davis. As in *Kai Surrey v Barnet & Chase Farm Hospital NHS Trust* the Claimant did not provide informed consent to the disadvantages of the CFA as compared to LSC funding.

92. First, the advice given to Mrs Davis in November 2009, to the effect that further expert evidence was needed to obtain an interim payment for immediate needs, was not justified. Mr McGrath's (effectively unchallenged) evidence is that in 95% of similar cases, there is public funding throughout the claim; reasonable requests for interim payments are usually made within weeks of an admission of liability; and it is very common for interim payments of up to £100,000 to be agreed within a few weeks, for the Claimant's immediate needs, without expert evidence on quantum. The April 2009 report from Dr Miles contained more than enough evidence to prove the requirement for an immediate substantial interim payment.

93. In a normal publicly funded case with solicitors acting with usual speed, the Claimant should have received an interim payment for immediate needs in early 2010, without expert evidence on quantum. The main stated reason for the CFA would have been met by LSC funding.

94. In fact, no such request was made by Wolferstans for the Claimant's immediate needs. Beachcroft was chasing for details of any interim payment application in 2010, but did not receive a substantive response.

95. Wolferstans say that the main reason for the switch in funding was to avoid delay. However the case was characterised by delay before and after the switch to a CFA/ATE arrangement. On the basis of the information in their bill of costs Wolferstans had proceeded very slowly between the granting of a funding certificate in April 2006 and their consultation with counsel in September 2009, three and a half years later. That cannot have been in Oliver's best interests, particularly if he required an interim payment urgently.

96. After the CFA was signed there was yet more delay, much more than is normally the case under public funding. There was a delay of 22 months between the admission of liability in the letter of response of 20 January 2010 and Wolferstans' application for an interim payment in November 2011. After signing the CFA, Oliver was left in a situation of (according to Wolferstans' evidence) *"desperate"* need of financial support for some 2 years before any application was made.

97. Mrs Davis was not told, and therefore was apparently unaware, that the remarkable delays before the CFA were unusual, nor that the CFA gave the Claimant no express terms requiring prompt action by Wolferstans in respect of an interim payment or otherwise and fewer rights to do anything about Wolferstans' delays than would be the case under public funding.

98. If Oliver terminated the CFA before proceedings ended he had to pay all Wolferstans' costs and disbursements. Wolferstans could exercise a lien over all the papers until he or Mrs Davis paid Wolferstans costs. ATE cover would, in accordance with the policy terms, vanish with no obligation on the insurer to provide any cover for the costs and disbursements of either party. Oliver therefore could not afford to terminate the CFA should Wolferstans continue to delay. He would be tied to Wolferstans.

99. In contrast, under LSC funding, if for any reason Wolferstans acted more slowly than might normally be expected by an LSC funded firm, and Mrs Davis was desperate for an interim payment she could go to another LSC funded firm and instruct them to request an interim payment for immediate needs immediately. According to Mr McGrath's evidence, this would be processed promptly and within weeks.

100. The stated aim of avoiding delay was better met by the public funding that Wolferstans had considered the best option for three and a half years, than by the CFA. On the contrary the CFA undermined that aim. At the very least, for the CFA to be more reasonable than public funding it should have incorporated a right of the Claimant to terminate with no charges if Wolferstans' progress was slow in respect of an interim payment or otherwise.

101. Any implied term in the CFA, by way of an expansion of the implied term regular to solicitors' retainers to act with reasonable skill and care, to the effect that Wolferstans would act without unreasonable delay would have been of little immediate assistance. Under the CFA's termination provisions, short of a repudiatory breach of the CFA by Wolferstans, breach of such an implied term to avoid delay would only entitle the Claimant to damages.

102. Mr Munro submits that there were other serious disadvantages for Oliver in the CFA of 26 November 2009. At the time there was no CFA with any Counsel in place. The Claimant was unable to afford to fund Counsel herself. The CFA terms restricted the Claimant to the services of Counsel who might in the future be willing to act on a CFA. That was worse than the position under LSC funding, where the Claimant was practically guaranteed to be represented by Leading Counsel. Appropriate Leading Counsel, Andrew Spink QC, was already retained via LSC funding and had conducted the liability Consultation on 8 October 2009.

103. Wolferstans, in their second letter of 10 November 2009 indicated that they would arrange for Andrew Spink QC and any other barrister who might be involved in this case, to act under a Conditional Fee Agreement, which they would enter into with Wolferstans. Mr Munro argues that this is a positive promise to ensure the continuing instruction of Mr Spink, who did not act further in the case. I cannot accept that it stands to be read in that way but in any event, at the time of the CFA, when there still was potential for a full liability trial, Oliver was left with access only to such Counsel as might take the case on a CFA.

104. The CFA also gave Wolferstans substantial rights to terminate the CFA, in which case Oliver (in reality, Mrs Davis) would have to pay unaffordable disbursements. The "second opinion" option was of little use to a Claimant who could not afford to utilise it.

105. At the time of signing the CFA in November 2009 the prospects of success had been assessed at 60%. There was a distinct possibility that the Defendant's letter of response would deny liability, supported by expert evidence with an unforeseen and good reason for the denial. Oliver would then be in difficulty. Wolferstans could decide to terminate the CFA, leaving their client with personal liability for disbursements incurred since 16 November 2009 (they has started writing to quantum experts on 17 November 2009). Under LSC funding the Claimant could obtain further expert evidence and Andrew Spink QC's opinion with no personal liability.

106. Alternatively, if the Claimant were to disagree with Wolferstans' opinion as to settlement, Wolferstans could terminate the CFA and charge the Claimant all their costs and disbursements. Under LSC funding, the Claimant would be able to challenge Wolferstans' opinion as to settlement.

107. As to the ATE policy, it took effect from 15 January 2010, leaving Oliver with personal potential liability for adverse costs between 16 November 2009 and 14 January 2010 if the claim was lost.

108. Further, there was as at 26 November 2009 the possibility that a sufficiently strong letter of response would be received before either the ATE policy or a CFA with counsel was in place, leaving Oliver unable to secure either.

109. Under the terms of the ATE Policy, there was also a relinquishing of a great deal of control from the Claimant to the ATE insurer. Cover would be cancelled, with the insurer avoiding all liability to make any payment, should Oliver refuse to accept the insurer's recommendations with regard to settlement or terminate the CFA. There is no provision for a second opinion.

110. The policy documents restrict all disbursements that may be indemnified by the ATE provider to those that are, in the opinion of the ATE provider, reasonable and necessary. There is no evidence that Wolferstans had even asked the ATE provider at the time of the CFA in November 2009 whether the ATE provider would indemnify the cost of quantum reports before resolution of the liability issue. The policy was not incepted until 15 January 2010, over three months after the letter of claim was served and after the time which Mr Parford says was required for the letter of response.

111. The ATE cover, says Mr Munro, is not as comprehensive as Mr Parford's November 2010 advice indicated. Under the terms of the ATE policy the Claimant pays the whole premium as long as the outcome of the legal proceedings is a success, broadly defined by reference to any recovery. However it was also no means certain that there would be a 100% costs order if the claim was won. The definitions of "partial success" and of an "unsuccessful" claim do not extend to a claim that succeeds but in which a split costs order is made.

112. This was a relatively complex clinical negligence claim. Although it was a strong claim, there was a risk that the Claimant might win on some issues and lose on others. Some but not all of the allegations of breach of duty might be proven. Even if breach of duty was proven, not all of the alleged breaches of duty might be proven to be causative. There was a lot of scope for a split costs order, in which case Oliver would have no cover for the adverse costs.

113. Oliver has no cover for adverse costs or Counsel's fees in detailed assessment proceedings. Given in particular the high success fee, high premium, and the unusual decision to switch funding after more than three years of LSC funding there was always a substantial risk of this dispute going to detailed assessment and the Claimant being the subject of adverse costs orders. The court did make a costs order against the Claimant on 1 May 2015 which is now a personal liability of the Claimant for which there is no cover. That would not have been incurred under LSC funding.

114. With regard to the ATE premium itself Mr Munro's primary submission is that it should be assessed at nil, because the CFA was unreasonable and it follows that the associated ATE policy was unreasonable.

115. Alternatively there was a substantial risk, of which Mrs Davis was not advised, of Oliver ending up paying a large part it from his damages. The liability to pay the entire premium is personal to Oliver, not Wolferstans. The premium was always likely to be substantial given the methodology of calculation by reference to the Defendant's costs.

116. Oliver has to pay the entire premium even if there were a percentage costs order reducing the amount of costs recoverable between the parties, or indeed if the premium were reduced on assessment. Advice on these risks was, again, never given to Mrs Davis.

Submissions in Response

117. I will touch upon some of Mr William's key submissions in response to Mr Munro. First, he refers me to *Jones v Wrexham Borough Council* [2007] EWCA Civ 1356, in which the Court of Appeal rejected a strict construction of a CFA in isolation in favour of reading it together with a "Rule 15" client care letter explaining it, and on that basis found it to be a "CFA lite". Mr Williams points to the unequivocal statements, in the second letter of 10 October 2013, to the effect that Wolferstans would claim their costs and disbursements from Oliver only to the extent that they are either recovered from the Defendant or covered by the ATE policy. This case is, he says, on all fours with *Jones v Wrexham Borough Council*. Whether or not the ATE policy was terminated by either party, Oliver would never have been required by Wolferstans to pay uninsured disbursements. They had agreed that they would not do so.

118. Further, they were under an express obligation to act in their client's best interests. They could only terminate the CFA for good reason, as the LSC would only withdraw funding for good reason. Whilst the cost of obtaining a second opinion on the merits of the claim or of an offer could be problematic, it should not be assumed to be impossible and the likelihood of that need arising was small.

119. The same applies to Counsel's fees; in the event that Counsel declined to act on a CFA, either the ATE policy or Wolferstans would have paid them.

120. Mr Williams also cautions me against judging the reasonableness of a choice made in November 2009 against subsequent events: he includes in this not only the post- CFA delay in applying for an interim payment but the specific terms of the ATE policy.

121. As regards the costs of assessment, Mr Williams argues that as a matter of Law, Wolferstans must bear the cost of adverse costs orders in these assessment proceedings. They are acting in their own interests, not Oliver's, and as such are in exactly the position of a subrogated insurer (Phillips MR in *Callery v Gray No 2* [2001] EWCA Civ 1246).

Mr Parford's Third Statement

122. On 30 September 2015 I gave permission for the Claimant to rely on a further statement from Mr Parford, on the basis that some of the points raised in Mr Munro's submissions had not been included in the points of dispute.

123. Mr Parford asserts that everyone familiar with the ATE market in clinical negligence cases is aware both that shortfalls on premiums are very unusual, and that where they do occur they are, for sound commercial reasons, absorbed by the insurers rather than deducted from damages.

124. Similarly, FirstAssist have never sought to enforce their right to exercise a lien over monies received from an opponent. In every case that Wolferstans have had where a FirstAssist premium has become payable upon the successful conclusion of the claim, the insurer has been content to wait, with no retention from damages, until either an agreement has been reached in relation to settlement of the Claimant's claim for costs or alternatively, the outcome of the Detailed Assessment Hearing.

125. Mr Parford says that Wolferstans had a delegated authority scheme with FirstAssist to provide After the Event Insurance for clinical negligence clients. By November 2009 he knew that the method of calculation of FirstAssist's "pursuit" premiums had been successfully tested in the SCCO. He had also been advised by FirstAssist Legal Protection that they had reached an agreement with the National Health Service Litigation Authority (NHSLA) that the calculation of their premiums would not be contested.

126. Mr Parford says that the NHSLA has only ever once sought to challenge the amount of any premium in relation to a FirstAssist Policy issued to one of Wolferstans' clients upon the successful conclusion of a clinical negligence claim. The case in question had successfully concluded in 2013. The challenge was dismissed at the detailed assessment hearing and the premium was ordered to be paid in full. He is advised by a colleague who had conduct of the case that FirstAssist intimated that, in the event that the challenge was successful, they would not seek to enforce payment of the shortfall.

127. Although he accepts that the January 2010 ATE policy provides that the Claimant is personally liable to account to FirstAssist in respect of any shortfall in the premium recovered, Mr Parford says that the reality was that no such shortfall would ever occur. Even if it did, in the extraordinarily unlikely event that the level of premium was challenged successfully, his understanding was that FirstAssist would write off the shortfall.

128. The same would apply in any case where a claimant did not recover 100 per cent of his costs because of an issues-based costs order. In any event, he says, such orders are unusual in personal injury litigation, and in this particular case there were no circumstances that he could envisage which would have led to such an order being made.

129. In a clinical negligence case such as this the real risks were either losing or failing to better a Part 36 offer, against which the FirstAssist policy gave the Claimant at least equal protection to public funding against losing, and considerably better protection than public funding against Part 36 risk.

130. In entering into a "CFA lite" with the Claimant's Litigation Friend and arranging ATE Insurance with FirstAssist Legal Protection, Mr Parford says that he was seeking to ensure that the Claimant was not in a worse position than he would have been had public funding continued. He specifically assured Mrs Davis of that. In the event that there was not a full ATE premium recovery, it would have been borne by Wolferstans. However this he says was a theoretical risk to which did not detain him for an instant, given his knowledge of the commercial reality of the ATE market.

CONCLUSIONS

Principles

131. From the authorities and decisions referred to by Mr Williams and Mr Munro I have derived these principles. A decision to choose a CFA/ATE arrangement rather than public funding (where available) must have been a reasonable decision. If it was, then the additional cost attendant on that choice will (insofar as reasonable in amount) be

recoverable from the paying party. If not, then CPR 44(4) will preclude recovery of the additional costs unreasonably incurred.

132. Mr Munro and Mr Williams agreed before me that the receiving party may act reasonably in his own best interests whether or not that increases the burden on the paying party. Applying that test, whether or not a given decision was reasonable will turn on the facts of the particular case. A comparison of the advantages and disadvantages attendant on each funding method, for the person making the choice, is likely to be necessary because consideration of those advantages and disadvantages may inform a reasonable choice. Inadequate advice on those advantages and disadvantages may lead to an unreasonable choice being made. It does not follow that if inadequate advice was given, the choice must have been unreasonable. The question will be whether the choice was reasonable in all the circumstances prevailing at the time it was made.

Delay

133. I should say that I have been invited by Mr Munro to review a case plan on Wolferstans' files, which were filed with the court before the hearing, but I take the view that it is right for me to determine this issue only on the basis of the evidence served and seen by both parties.

134. I have insufficient evidence before me to reach any conclusion about alleged delay before September 2009, and so Mr Munro's submissions based on the suggestion that Mrs Davis was being derived of a chance to address past and possible future delays fall away.

Retrospective Success Fee

135. I do not believe that there is much substance in the point about the retrospective success fee. Although the wording of the CFA does not make it clear, I do not believe that Wolferstans were ever in a position to, or ever had any intention of claiming a retrospective success fee except for the short period between the discharge of the certificate and the signing of the CFA. That is not unreasonable.

The Claimed Tactical Advantages of the CFA and ATE Policy

136. I accept that Wolferstans thought that they could protect Oliver's best interests by putting the CFA/ATE arrangement in place. I have concluded however that Wolferstans' enthusiasm for the arrangement was such as to render their advice on the issue one-sided and to overlook some potential disadvantages to Oliver. I will explain my reasons for that conclusion.

137. The main ground upon which the Defendant takes issue with the switch from public funding to the ATE/CFA arrangement is its timing. The CFA was entered into after three and a half years of public funding, after the letter of claim had been written but before the Defendant had had a chance to respond formally within the protocol period. The ATE policy followed almost two months later, but still before the Defendant's response was received.

138. On Mr Parford's evidence his advice to the client in November 2009 was prompted first by the LSC's refusal to fund work on quantum until the issue of liability had been resolved and second by the Defendant's indication that a response could not be prepared until the case against it had been clarified, in particular to identify the latest time at which it was said Oliver could have been delivered safely and without harm. He says that he saw this as an indication that a prompt response would not be forthcoming at a time when the client needed an interim payment and the LSC would do nothing to assist in working toward that until liability had been established. He also says that entering into a CFA allows for the issue of proceedings against a Defendant which is dragging its feet in responding, whereas the LSC will not authorise that.

139. I find myself unable to accept these justifications. The Defendant's request for clarification seems to me to have been an entirely reasonable request for information that should have been incorporated in the letter of claim. The request was made promptly, and it was reasonable to suggest that the protocol period should be extended from the point when that information, which was at the heart of the Claimant's case, was given. None of this gave any good reason to suppose that the Defendant would delay in providing its formal response in a case where, as Mr Parford acknowledges, it could have been expected to have made its own investigations. In fact the Defendant had made its own investigations, and it did not delay.

140. Mr Parford emphasises that the decision whether to use public funding or a CFA/ATE arrangement for a given client is determined in particular by the willingness or otherwise of a defendant to make early admissions of liability, but in this case he did not first give the Defendant a chance to do that within the protocol period. His suggestion that the Defendant could have admitted liability before the letter of claim was received has (with respect) no substance: it is not incumbent on any defendant to formulate a case against itself or make admissions before it knows what a claimant's case is. It is not the Defendant's fault that it took three years for that to happen.

141. I am not persuaded that Oliver's need for an interim payment justified the change to a CFA/ATE arrangement. There is no evidence from Mrs Davis herself in relation to Oliver and the family's financial needs and such evidence as there is not adequate to justify the conclusion that it was necessary, in November 2009, to instruct quantum experts immediately if those needs were to be met. It is also difficult to reconcile the stated urgency, and the strategy said to have been adopted to meet it, with the very slow progress made subsequently. Certainly it does not seem that a change of accommodation was a pressing need. If it had been, Mrs Davis would not have allowed matters to be put back for so long in the hope of purchasing a particular house.

142. Of more significance is that full advice on the possibilities of meeting any immediate financial and practical needs does not seem to have been given. Mr Parford does not offer any effective challenge to Mr McGrath's evidence to the effect that once liability had been admitted a request for a substantial interim payment to meet immediate needs could and would have been entertained within weeks of the admission of liability without the need for further expert evidence. On the evidence offered by Wolferstans this might well have been a solution to many if not all immediate needs and it was not mentioned to Mrs Davis.

143. I am not aware of any obstacle to receiving a substantial interim payment without delay after the admission of liability (and I agree that Dr Miles' report would have established the need for that) followed by a further, more substantial payment when expert evidence was complete. Mrs Davis was advised on the basis that expert evidence would be needed before any interim payment could be needed, which was not the case. Oliver's needs and potential short-term solutions were not adequately explored.

144. Mr Parford also justifies pressing on with expert evidence on quantum in order to minimise delay overall. However the evidence of Mr McGrath (which I prefer, as it tends to be more precise and forthright than Mr Parford's) is that the great majority of catastrophic clinical negligence cases are publicly funded and that once liability is established perfectly adequate progress can be and is made with public funding, both in relation to interim payment and final resolution.

145. Once the arguments about delay fall away (and to my mind they do) the question becomes whether there is merit, in a given case, in incurring costs on quantum evidence before it is known whether liability will be established. At the time Mr Parford put the chances of doing so at 60%, leaving a 40% chance that the cost of obtaining expert quantum evidence would be wasted.

146. Mr Parford says that in an unspecified number (but on the evidence, a minority) of clinical negligence cases, liability and quantum must be addressed together. What Mr Parford does not say is that this was, in November 2009, seen as one of those cases. Presumably that would not have been known until the letter of response was received, so the point does not assist him in justifying the instruction of quantum experts before then. If however Mr Parford did believe that quantum evidence would be needed in any event, the LSC could have been told that. I have seen nothing to suggest that if it were demonstrated that quantum evidence would be needed in any event, the LSC could not have been persuaded to fund it without delay. As it was the LSC simply objected to a potential waste of costs.

The November 2009 Advice

147. The reasoning which I have been unable to accept was incorporated into the advice given to Mrs Davis in November 2009. The attendance note of Ms Williams' telephone conversation with Mrs Davis on 10 November 2009 indicates that Mrs Davis had formed the impression that the Defendant was deliberately dragging its feet and that the LSC was going to acquiesce in that, so delaying the prospect of an interim payment to meet Oliver and his family's immediate needs. None of that was a fair reflection of the position, but Wolferstans did not correct her misapprehensions. Wolferstans rather advised Mrs Davis that her concerns could be addressed by changing to CFA/ATE funding.

148. The letters of 10 November 2009 reinforced this incorrect perception of delay by the Defendant, tolerated by the LSC. They did not explain the obvious logic behind the LSC's reluctance to incur potentially irrecoverable cost on expert quantum evidence. They gave the impression that progress toward an interim payment depended entirely upon obtaining expert evidence as soon as possible, which was not the case. The possibility of obtaining an interim payment for immediate needs without such evidence seems to have been overlooked.

149. The second letter of 10 November incorporated a statement to the effect that financial limitations imposed by the LSC would be "quite likely" to prevent Wolferstans from properly managing Oliver's claim. Even if I did not accept Mr McGrath's evidence to the effect that the great majority of cases of this kind are managed perfectly well on public funding (and I do) I would have difficulty in accepting that statement.

150. Nor am I convinced by Mr Parford's evidence defending the advice in those letters that LSC restrictions on fees would hamper the choice of appropriate experts. He has not contradicted Mr McGrath's evidence that at least three of the quantum experts he instructed regularly act in publicly funded cases. I cannot accept a suggestion by Mr Williams that one must distinguish between liability and quantum experts for those purposes. I have no evidence to support that. Given that in 2009 the great majority of catastrophic clinical negligence claims were publicly funded, the problem cannot have been as severe as Mr Parford suggested to Mrs Davis, to the extent that it existed at all.

The ATE Premium

151. The decision to enter into a CFA and to take out ATE cover was in this case one effectively indivisible decision. For that reason the CFA and the ATE arrangement stand or fall together. I cannot accept Mr Williams' submission that the ATE premium can justified in any event because of the Part 36 risk. It was just one of the factors to be considered. I accept Mr McGrath's evidence that the Part 36 risk (again, not challenged to any real effect) was in this case a relatively small risk comparable to the possibility of, for example, a split or percentage costs order.

152. It does seem to me that the CFA was rushed through without giving thought to first setting up ATE insurance and arranging a CFA with counsel. Mr Parford seems to have been entirely confident that he could arrange both, and in due course he did, but the position might have changed had a strong letter of response denying liability been received before either or both were in place. I do not know the terms of the delegated authority scheme referred to by Mr Parford but a strong letter of response would hardly be something an insurer would ignore. I have already accepted that Wolferstans had agreed to, and could, bear all unpaid disbursements but I do not believe that they were anticipating, in a contested case, bearing all the fees of counsel unwilling to act under a CFA and I have no idea whether they would have been able to do so, at least without Mr Parford's partners being persuaded that they had no choice.

153. More significantly, it seems to me that Mr Parford overlooked a danger to Oliver attendant on a challenge to the ATE premium.

154. It was accepted before me that Oliver's liability (though his Litigation Friend) to pay the ATE premium is a personal liability owed directly to the insurer. It is not a disbursement subject to any "ring-fencing" arrangement by virtue of the CFA or the November 2009 letters. Mr Parford has instead given evidence to the effect that he had good reason to believe that no challenge would be made to the ATE premium; that in the unlikely event that a successful challenge was made, the insurer would, for sound commercial reasons, accept the reduction itself rather than demand payment of the irrecoverable part from Oliver; and that Wolferstans would cover it if necessary.

155. Mr Parford's evidence does not in my view meet the point. His evidence in relation to an agreement by the NHSLA not to challenge the calculation of a "Pursuit" premium is entirely lacking in specifics and inadequate to establish its existence. It also sits oddly with his example of an NHSLA challenge to such a premium after 2013.

156. Even if any such agreement had been made it would not have precluded any challenge whatsoever to an ATE premium. That is because the calculation of the premium may not be the issue. I have myself on assessment reduced at least one ATE premium where the calculation was not challenged but one of the factors incorporated into the calculation (the assessment of the prospects of success) was. The agreement referred to by Mr Parford would not in any event have justified the assurance he takes from it.

157. Evidently Mr Parford assumed, in 2009, that the ATE insurer would bear any premium shortfall in any event. I can understand the basis for that assumption based on his personal experience of the way in which ATE insurers operate and the obvious potential difficulties for insurers attendant upon seeking to recover from the assured any part of a premium that had been judged to be unreasonable.

158. The fact is however that ATE insurers do, for equally obvious reasons, reserve the contractual right to seek payment of the full amount of an ATE premium and there is no guarantee that they will not exercise that right. If an ATE premium is challenged (as in this case) on some ground other than that it is unreasonable in amount, an insurer might take the view that it has no good reason to waive its rights.

159. It is notable that despite an indication that evidence from the insurer would be obtained, I have seen nothing from the insurer in this case to confirm that it would be willing to waive any part of its contractual rights.

160. More was at stake than a challenge to the amount of the ATE premium. As Mr Munro says, there was at least the possibility of a percentage costs order under which only part of it would be recoverable. Further, Wolferstans, in recommending a change at this particular point, seem to have overlooked the likelihood that the Defendant would (as, predictably, it did) object to the change and would (as, predictably, it has) object, on assessment, to the ATE premium in its entirety.

161. I do not suggest that the mere possibility of a future challenge to an ATE premium can render it unreasonable to switch from public funding to a CFA/ATE arrangement. It is just one of the risks (as in *Howarth v Britton Merlin*) to be taken into account. Nor does the Defendant seek to rely upon its own challenge to the ATE premium to argue that the premium must, being open to challenge, have been unreasonably incurred. That would be an entirely circular argument.

162. The point is that this particular case the timing of the change was such as to make a challenge to the entire ATE premium more likely than not and that there were in the circumstances sound reasons to anticipate that such a challenge would succeed. In *LXM v Mid Essex Hospital Services NHS Trust* any potential challenge to any part of the premium was (in effect) addressed by including the ATE premium in the "ring-fencing" arrangement. Here, it was not.

163. In summary, in following the advice given by Wolferstans in November 2010 Oliver (through Mrs Davis) undertook a personal liability to pay a substantial ATE premium

in circumstances where it might well be wholly or partly irrecoverable, leaving him with a very substantial potential reduction to his damages.

164. I do not doubt Mr Parford's sincerity when he says now that Wolferstans would bear the shortfall should the ATE premium be successfully challenged, but that does not assist him. First, no such assurance was given at the time. The issue was not addressed. Mr Parford's advice to the effect that Oliver's damages would be completely ring-fenced was not a guarantee or an indemnity in relation to the ATE premium. It was no more than advice which overlooked a risk to which Oliver would be exposed.

165. Second, I am unable to accept that Wolferstans would, as a matter of course, fully indemnify their client against an ATE liability of in the region of £100,000. That is the sort of issue that may be referred to insurers. Mr Parford does not suggest that he discussed and agreed anything to that effect with his partners at the time. Nor would he have done, given that the possibility that they might have to so did not occur to him. As far as I can see he is speaking only for himself.

166. For those reasons I have concluded that Mr Parford was wrong to advise his client on the basis of an assumption that the ATE premium would be immune from challenge or that Oliver would not have to bear any shortfall. Mrs Davis should have been told that there was a risk that the ATE premium might be challenged, and what the consequences of that would be for Oliver.

167. The argument that the CFA/ATE arrangement was in all the circumstances advantageous to Oliver seems to me to be fatally undermined by this omission. The key advantage of the arrangement, obviously of great importance to Mrs Davis, was that Oliver's damages would be "ring-fenced". They were not.

168. The Part 36 risk was (I have accepted) relatively small. The likely amount of any adverse costs orders that might have reduced Oliver's damages under the statutory charge was limited. The ATE risk seems to me to have been more substantial than either.

Other Weaknesses in the "Ring Fencing" Arrangement

169. There were other breaches in the "ring-fencing", which I believe Mr Parford overlooked. I should say that I attach much less weight to them, and on their own they would probably not be decisive, but they do form part of the overall picture, they have been raised by the Defendant and I should address them.

170. I agree with Mr Williams that on the authority of *Jones v Wrexham Borough Council* I should read the CFA not in isolation but together with Mr Parford's letters of 10 November 2009. On that basis his 10 November 2009 letters can add to the express terms of the CFA of 26 November 2009. To my mind however they do not displace them without making some express provision to that effect.

171. I am not persuaded by Mr Williams' argument that the "bespoke terms" of the 10 November letters displace the "standard" Law Society terms incorporated in the CFA. The CFA terms are what they are. The letters of 10 November 2009 explain what will happen if the relationship between solicitor and client continues to the end of the

claim, successful or unsuccessful. They do not address what will happen if the relationship is terminated by either party, or Mrs Davis does not accept Wolferstans' advice. The CFA does.

172. Nor does it seem to me that the ATE policy's terms are, as Mr Williams argues, ex post facto. Wolferstans cannot on the one hand rely on its key terms (for example to indemnify Oliver against the Part 36 risk) and on the other hand say that other terms are ex post facto and irrelevant. It was up to Mr Parford to make good on his promise to obtain ATE insurance. This policy must be taken to be the best he could get, so he must bear responsibility for its weaknesses as well as accepting credit for its strengths.

173. Between them the CFA and the ATE policy do provide for certain circumstances in which Oliver would be left with a personal liability for costs and disbursements. I am sure that that was never Mr Parford's intention but that was the contractual position. I take the view that, in November 2009, the risk of such circumstances arising can properly be described as minimal or even speculative, but it would have been appropriate to advise in respect of it.

174. The point also has some bearing on the autonomy claimed as an advantage of a CFA/ATE arrangement. To my mind Mrs Davis was not, by switching from public funding to the CFA/ATE arrangement, really gaining autonomy: she was passing a degree of control from the LSC to Oliver's solicitors and ATE insurers.

175. Because of the conclusions I have reached I am also unable to accept Mr Williams' argument in relation to the costs of assessment. Wolferstans are not simply representing their own interests in these detailed assessment proceedings: they are defending an ATE premium which falls outside their "ring-fencing" arrangement. I have made an order for costs against the Claimant, not Wolferstans. I appreciate that they may well choose to indemnify him, but that was not part of the arrangement entered into in 2009. Again, the "ring-fencing" was not complete.

176. For the reasons I have given, I have concluded that the decision made in November 2009 to switch from public finding to a CFA, backed by ATE insurance, was not a reasonable decision, nor to Oliver's advantage. The success fee and ATE premium must be disallowed.