Unreasonable discharge of the claimant's legal aid certificate pre-April 2018 results in additional liabilities being disallowed (XDE v North Middlesex University Hospital Trust)

18/06/2019

Dispute Resolution analysis: On appeal from a decision of Master Rowley to disallow the recovery of the claimant's additional liabilities, the claimant unsuccessfully sought to distinguish the issues in this case from those in Surrey v Barnet and Chase Farm Hospitals Trust and others. The appeal was dismissed on all grounds as the matter was not distinguishable from Surrey. Accordingly, the additional liabilities were not recoverable inter partes. Written by Lucy Baldwin, senior costs lawyer at Paragon Costs Solutions.

XDE (by her husband and litigation friend) v North Middlesex University Hospital Trust [2019] EWHC 1482 (QB)

What are the practical implications of this case?

This decision reiterates the importance of the reasoning provided in *Surrey v Barnet and Chase Farm Hospitals Trust and others* [2016] EWHC 1598 (QB) as to the changing of funding arrangements from legal aid to CFA and confirms that the *Simmons v Castle* [2012] EWCA Civ 1039, [2013] 1 All ER 334 uplift was not a significant factor in the court's findings in *Surrey*. The claimant's primary grounds of appeal, which were unsuccessful, were that the *Simmons v Castle* uplift was not a factor in this case and therefore either *Surrey* did not relate to this claim or, in the absence of the uplift, the CFA lite was clearly the most advantageous funding arrangement for the claimant. In any event, it was submitted that the claimant had exceeded the legal aid budget and that there was therefore no choice but to switch funding.

There are a limited number of claims remaining where the issues addressed here will be applicable. However, in those where it becomes relevant, it is imperative that the specific reasons why a switch in funding arrangement are discussed with the client, and a record kept of such discussions. It is not sufficient to suggest that there are obvious reasons why a new arrangement may be beneficial.

What was the background?

The underlying claim was one for clinical negligence which arose from a delay in the diagnosis of tuberculous meningitis.

The claimant had initially been the beneficiary of legal aid funding. The substantive legal aid certificate of 25 February 2009 specified the limitations.

On 13 December 2011, the claimant's solicitor wrote to the Legal Services Commission (LSC) advising that proceedings were shortly to be issued—a causation report and a report from a microbiologist had been obtained—and that stage one of the case plan had identified three liability experts but that as additional experts had been required, a further £10,000 would be required to reflect the additional work. At this stage the claimant's solicitor had not incurred the costs of preparing a formally updated case plan but advised that they would prepare one if necessary.

The LSC's response directed the claimant's representative to its new Clinical Negligence Guidance, under which a reduced limitation would in fact have been awarded in the first place. Accordingly, at this point, further funding was refused and the claimant's solicitor was invited to complete a formal request for an increase, to include an application for amendment or prior authority (CLSAPP8). In response to this, the claimant's solicitors wrote to the claimant advising that the legal aid limit had been reached and they had accordingly requested that the certificate be discharged. The claimant was therefore advised to enter into a CFA and to allow the certificate to be discharged—which they did.

Liability was later agreed on a 98%/2% basis in the claimant's favour and quantum was later settled for a substantial sum. The bill of costs which followed totalled £1,008,053.73 of which £388,568.22 related to the success fee of

solicitors and counsel. The after the event insurance premium had not been claimed in the bill of costs—however the judgment was also relevant to the recoverability of this premium.

Master Rowley had found that the decision to switch from legal aid funding to a conditional fee agreement (CFA) was unreasonable.

In the first instance, Master Rowley found, inter alia, that 'no obvious effort' had been made to conduct the claim within the initial certificate allowance, and that no more than a half-hearted effort had been made to increase the limit. Accordingly the additional liabilities were disallowed.

The claimant appealed on eleven grounds, which could be split into three sections. The first (grounds 1–6) being that the current case could, and should, be distinguished from that which was the subject of the decision in *Surrey*. In that case the availability of the 10% *Simmons* uplift was a significant factor, the CFA having been concluded before 1 April 2013, but this was so in this case. In *Surrey,* the reasons for changing funding arrangements were hopeless and thus the additional liabilities were not allowed.

By contrast, in this case, the claimant's solicitors did not give false, misleading, or self serving, advice as causation was still in issue. Mr Williams QC submitted that the essential premise in *Surrey* was absent and therefore there was no requirement for the change of funding to be justified.

Further, the multiple benefits of a CFA lite, should have been considered, not simply the issues which were expressly addressed with the claimant.

The second set of grounds (7–9) related to Master Rowley's finding that it may have been 'too late' to obtain an extension of funding and that, by extension, the reason for concluding that it was unreasonable to switch was because the claimant's solicitors had not kept within budget. In any event the funding had been exhausted by early 2012 and thus the case ceased to be funded, even though the certificate had not been discharged.

The final ground was that Master Rowley's finding that the lack of involvement by the litigation friend in the decision was a fundamental defect, was unreasonable.

Mr Hutton QC, for the defendant, submitted that *Surrey* was very clear that the party's particular reasons for switching funding arrangement should be taken into account, not the general or hypothetical reasons. He also noted that in one of the cases which was determined alongside Surrey, the *Simmons* uplift was not a factor.

In relation to grounds 7–9, it was for the claimant to prove that the fact that they had exceeded the costs under the certificate was not a deciding factor in the changing of funding arrangement.

What did the court decide?

The court considered the reasoning and principles decided in *Surrey*, in particular whether the *Simmons* uplift, had been factored in to the assessment to such a degree that were it not a factor, the change of funding arrangement would have been reasonable. On consideration of the judgment, Master Haworth found that the uplift was not considered as a factor until a later stage of the judgment and thus it was not accepted that the absence of the uplift rendered the change reasonable.

Master Haworth also found that there was no escape from the requirement in *Surrey* to consider the particular reasons for the switch. Nor did he consider that the decision in *Sarwar v Alam* [2001] EWCA Civ 1401 supported the alternative view.

In this case, it was the fact that the limit had been exceeded which was found to be the real reason for the switch. As to the submission the benefits of a CFA lite were so overwhelming that they did not need to be addressed with the claimant—this was also not found to be a sufficient argument and was dismissed.

Ground 10 fell away in light of the findings as to grounds 1–9.

Accordingly the appeal failed on each ground.

Case details

- Court: High Court, Queen's Bench Division, on appeal from the senior courts costs office
- Judge: Jay J and Master Haworth (sitting as an assessor)
- Date of judgment: 12/06/2019

Lucy Baldwin is a senior costs lawyer at Paragon Costs Solutions, and a member of LexisPSL's Case Analysis Expert Panel. Suitable candidates are welcome to apply to become members of the panel. Please contact caseanalysis@lexisnexis.co.uk.

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