Neutral Citation Number: [2021] EWHC B27 (Costs)

Case No: SC-2021-APP-00145

**IN THE HIGH COURT OF JUSTICE**
**SENIOR COURTS COSTS OFFICE**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 December 2021

**Before** :

**Costs Judge Brown**

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**Between :**

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| **BCX (by his litigation friend KJP)** | **Claimant** |
| **- and -** | |
| **DTA (representative of the estate of CRS, deceased)** | **Defendant** |

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**Roger Mallalieu QC** instructed by and for **Irwin Mitchell LLP**

Hearing date: 19 October 2021
Draft sent out on 3 December 2021

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# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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**Costs Judge Brown :**

1. This is my provisional decision in an assessment of costs which was ordered by Judge McCloud on 20 November 2020. She made the order on the approval of a compromise of the Claimant's claim for damages for personal injury. The Claimant is a protected party and his claim for damages was agreed between the parties prior to what would have been the first CCMC.

2. This decision follows an oral hearing on 19 October 2021 at which it was proposed by counsel for solicitors, Mr Mallalieu QC, that I carry out a provisional assessment of the Claimant's solicitors claim for costs in the circumstances which are set out below.

3. By the order made at the approval hearing the Defendant was required to pay the Claimant's costs on the standard basis subject to detailed assessment. The order also provided the following:

> *Unless the Claimant's solicitors waive their entitlement to be paid by the Claimant such shortfall in the costs recovered inter parties as they may otherwise be entitled to under the terms of their retainer, there be a detailed assessment of the Solicitor/ Client costs incurred on behalf of the Claimant and of the amount which it is reasonable for the Claimant's solicitors to recover from the Claimant in all the circumstances such costs to be assessed on the basis provided for in CPR 46.4 and CPR 46.9.*

4. The sum payable by the Defendant on the *inter partes* order for costs, inclusive of interest and costs of detailed assessment, has been agreed, following mediation, in the sum of £330,000, The Claimant's solicitors Irwin Mitchell LLP ('IM') have not waived their entitlement to claim further costs against the Claimant and seek payment of a sum from the Claimant of £159,758.30 of the following:

(i) £94,977.38 (inclusive of VAT), representing what is says it a shortfall in profit costs from those recovered from the Defendant (the 'shortfall' claim);

(ii) payment of a success fee in the sum of £62,848.92 (inclusive of VAT); and,

(iii) payment of the costs of an ATE premium in the sum of £1,932.

5. It is these claims that I am concerned with as well as the approval of the compromise in respect of the Claimant's claim costs against the Defendant.

6. IM's application is, in effect, for a deduction from the damages received by the Claimant as there appears to be no other source of payment of the costs. The matters are clearly of importance to the Claimant and given the controversy that has arisen in this claim and other such claims as to the correct approach to the assessment. I have set out in this decision my own view as to the approach to claims such as this in rather more detail that might be usual for a decision which is provisional in nature.

7. CPR 46.4 provides so far as material:

***Costs where money is payable by or to a child or protected party***

*(1) This rule applies to any proceedings where a party is a child or protected party and –*

*(a) money is ordered or agreed to be paid to, or for the benefit of, that party; or*
*(b) money is ordered to be paid by that party or on that party's behalf.*
*('Child' and 'protected party' have the same meaning as in rule 21.1(2).)*

*(2) The general rule is that –*

*(a) the court must order a detailed assessment of the costs payable by, or out of money belonging to, any party who is a child or protected party; and*

*…*

*(3) The court need not order detailed assessment of costs in the circumstances set out in paragraph (5) or in Practice Direction 46.*

*(4) Where –*

*(a) a claimant is a child or protected party; and*
*(b) a detailed assessment has taken place under paragraph (2)(a),*
*the only amount payable by the child or protected party is the amount which the court certifies as payable.*

*(5) Where the costs payable comprise only the success fee claimed by the child's or protected party's legal representative under a conditional fee agreement or the balance of any payment under a damages based agreement, the court may direct that—*

*(a) the assessment procedure referred to in rule 46.10 and paragraph 6 of Practice Direction 46 shall not apply; and*
*(b) such costs be assessed summarily.*
*(This rule applies to a counterclaim by or on behalf of a child or protected party by virtue of rule 20.3.)*
*(my emphasis)*

8. Costs Practice Direction 46 provides at paragraph 2.1:

*The circumstances in which the court need not order the detailed assessment of costs under rule 46.4(2) are as follows –*

*(a) where there is no need to do so to protect the interests of the child or protected party or their estate;*
*(b) where another party has agreed to pay a specified sum in respect of the costs of the child or protected party and the legal representative acting for the child or protected party has waived the right to claim further costs;*
*(c) where the court has decided the costs payable to the child or protected party by way of summary assessment and the legal representative acting for the child or protected party has waived the right to claim further costs;*
*(d) where an insurer or other person is liable to discharge the costs which the child or protected party would otherwise be liable to pay to the legal representative and the court is satisfied that the insurer or other person is financially able to discharge those costs; and*
*(e) where the court has given a direction for summary assessment pursuant to rule 46.4(5).*

**9.** CPR 46.9 provides so far as material:

*(1) This rule applies to every assessment of a solicitor's bill to a client….. unless the solicitor and client have entered into a written agreement which expressly permits payment to the solicitor of an amount of costs greater than that which the client could have recovered from another party to the proceedings.*

*(3) Subject to paragraph (2), costs are to be assessed on the indemnity basis but are to be presumed –*

*(a) to have been reasonably incurred if they were incurred with the express or implied approval of the client;*

*(b) to be reasonable in amount if their amount was expressly or impliedly approved by the client;*

*(c) to have been unreasonably incurred if –*

*(i) they are of an unusual nature or amount; and*

*(ii) the solicitor did not tell the client that as a result the costs might not be recovered from the other party.*

*(4) Where the court is considering a percentage increase on the application of the client, the court will have regard to all the relevant factors as they reasonably appeared to the solicitor or counsel when the conditional fee agreement was entered into or varied.*

10. I note at this stage also the following provisions of CPR 21:

***21.10 Compromise etc. by or on behalf of a child or protected party***

*(1) Where a claim is made –*

*(a) by or on behalf of a child or protected party; or*

*(b) against a child or protected party,*

*no settlement, compromise or payment (including any voluntary interim payment) and no acceptance of money paid into court shall be valid, so far as it relates to the claim by, on behalf of or against the child or protected party, without the approval of the court.*

*(2) Where –*

*(a) before proceedings in which a claim is made by or on behalf of, or against, a child or protected party (whether alone or with any other person) are begun, an agreement is reached for a settlement or compromise or a payment (including any voluntary interim payment) which relates to the claim; and*

*(b) the sole purpose of proceedings is to obtain the approval of the court to a settlement or compromise or a payment (including any voluntary interim payment) which relates to the claim,*

*the claim must –*

*(i) be made using the procedure set out in Part 8 (alternative procedure for claims); and*

*(ii) include a request to the court for approval of the settlement or compromise or payment (including any voluntary interim payment).*

*(3) In proceedings to which Section II or Section III of Part 45 applies, the court will not make an order for detailed assessment of the costs payable to the child or protected party but will assess the costs in the manner set out in that Section.*

*(Rule 46.4 contains provisions about costs where money is payable to a child or protected party.)*

***21.11 Control of money recovered by or on behalf of a child or protected party***

*(1) Where in any proceedings –*

*(a) money is recovered by or on behalf of or for the benefit of a child or protected party; or*

*(b) money paid into court is accepted by or on behalf of a child or protected party,*

*the money will be dealt with in accordance with directions given by the court under this rule and not otherwise.*

*(2) Directions given under this rule may provide that the money shall be wholly or partly paid into court and invested or otherwise dealt with.*

*(3) Where money is recovered by or on behalf of a protected party or money paid into court is accepted by or on behalf of a protected party, before giving directions in accordance with this rule, the court will first consider whether the protected party is a protected beneficiary.*

***21.12 Expenses incurred by a litigation friend***

*(1) Subject to paragraph (1A), in proceedings to which rule 21.11 applies, a litigation friend who incurs costs or expenses on behalf of a child or protected party in any proceedings is entitled on application to recover the amount paid or payable out of any money recovered or paid into court to the extent that it –*

*(a) has been reasonably incurred; and*

*(b) is reasonable in amount.*

*(1A) Costs recoverable in respect of a child under this rule are limited to—*

*(a) costs which have been assessed by way of detailed assessment pursuant to rule 46.4(2);*

*(b) costs incurred by way of success fee under a conditional fee agreement or sum payable under a damages based agreement in a claim for damages for personal injury where the damages agreed or ordered to be paid do not exceed £25,000, where such costs have been assessed summarily pursuant to rule 46.4(5), or*

*(c) costs incurred where a detailed assessment of costs has been dispensed with under rule 46.4(3) in the circumstances set out in Practice Direction 46.*

*(2) Expenses may include all or part of –*

*(a) a premium in respect of a costs insurance policy (as defined by section 58C(5) of the Courts and Legal Services Act 1990); or*

*(b) interest on a loan taken out to pay a premium in respect of a costs insurance policy or other recoverable disbursement.*

*(3) No application may be made under this rule for costs or expenses that –*

*(a) are of a type that may be recoverable on an assessment of costs payable by or out of money belonging to a child or protected party; but*

*(b) are disallowed in whole or in part on such an assessment.*

*(Costs and expenses which are also "costs" as defined in rule 44.1(1) are subject to rule 46.4(2) and (3).)*

*(4) In deciding whether the costs or expenses were reasonably incurred and reasonable in amount, the court will have regard to all the circumstances of the case including the factors set out in rule 44.4(3) and 46.9.*

> *(5) When the court is considering the factors to be taken into account in assessing the reasonableness of the costs or expenses, it will have regard to the facts and circumstances as they reasonably appeared to the litigation friend or to the child's or protected party's legal representative when the cost or expense was incurred.*
> *(6) Subject to paragraph (7), where the claim is settled or compromised, or judgment is given, on terms that an amount not exceeding £5,000 is paid to the child or protected party, the total amount the litigation friend may recover under paragraph (1) must not exceed 25% of the sum so agreed or awarded, unless the court directs otherwise. Such total amount must not exceed 50% of the sum so agreed or awarded.*
> *(7) The amount which the litigation friend may recover under paragraph (1) in respect of costs must not (in proceedings at first instance) exceed 25% of the amount of the sum agreed or awarded in respect of—*
> *(a) general damages for pain, suffering and loss of amenity; and*
> *(b) damages for pecuniary loss other than future pecuniary loss,*
> *net of any sums recoverable by the Compensation Recovery Unit of the Department for Work and Pensions.*
> *(8) Except in a case to which Section II, III or IIIA of Part 45 applies, and a claim under rule 45.13 or 45.29J has not been made, no application may be made under this rule for a payment out of the money recovered by the child or protected party until the costs payable to the child or protected party have been assessed or agreed.*

11. It is clear from these provisions that the court when considering the claims made by the solicitors is required to have in mind the interest of the child and the protected party ('the protected party') and the purpose of r.21.10 is to impose an external check on the propriety of settlement, *Dunhill v Burgin* [2014] UKSC 18[1].

12. Thus, where a legal representative limits his claim for costs to the costs recovered *inter partes* from a defendant a detailed assessment of the solicitor's claim against the claimant will not generally be required: plainly in that situation there is no prospect that the protected party's interests will be harmed as the protected party will not actually to have to pay anything from their damages or otherwise. Again, whilst an approval is required of the *inter partes* settlement of costs (ie by the defendant to the litigated claim) pursuant to CPR 21.10 it is difficult to see how any such settlement would not be approved if the legal representatives have waived any claim for costs or the interests of the protected party or child are otherwise unaffected by the terms of the settlement.

13. In other situations where a claim is to be maintained by the solicitors the effect upon the protected party can be substantial; such a claim has the potential, for instance, to reduce the ability of the Deputy to provide for any care that may be required or in a case of damages for loss of earnings any provision to children or other dependents of the claimant. The problem may be particularly acute where the protected party has been required to accept deductions from the full value of the claim on account of contributory negligence or because the prospect of success on the claim were uncertain. In the event of a significant claim by the solicitors against the protected party for 'shortfall' it is clear that the approval of

[1] The reasons for such approval being required is required in respect of a settlement of claim for damages include the protection of the interests of the protected party (including from any lack of skill on the part of their legal advisers) but also to ensure that defendant obtains a valid discharge in respect of the claim (see note in the White Book 2021 at 21.10.1). Clearly the latter also applies here in respect of the *inter partes* claim for costs.

any *inter partes* costs compromise might be a somewhat more significant exercise because of the possibility of there being an inadequate recovery against the defendant, and increased exposure of the protected party to a claim by his solicitors for costs.

14. It is appropriate to note in this context that in *Simmons v Castle* [2012] EWCA Civ 1288 (see [15]) awards of General Damages were uplifted to compensate for the loss of the recoverability of the ATE premiums and success fees from a defendant and the claimant's liability for the same.

15. Save in respect of claim for success fee by solicitors against a claimant who is a child and damages are agreed at over £25,000 where by r 21.12 (1A) (b)) there must be a detailed assessment, in any other case the success fee may be summarily assessed. Given that a success fee is ordinarily expressed by way of percentage of the solicitors own fees ('profit costs' or solicitors' 'time costs'), that might be said to require, in addition to consideration of the appropriate percentage uplift, some consideration of the reasonableness of the underlying time costs. Where a claim for a success fee is limited to a percentage based upon the profit costs which are understood to be recovered from the defendant to the claim, it is difficult to see why the starting point for the determination of the success fee should not be the amount of time costs recovered. In broad terms it may not be inappropriate to assume that a defendant would not have agreed to pay more by way of profit costs than was reasonable. In such circumstances, and subject to any conditions of the statutory cap (see CPR 21.12 (7) above ('the statutory cap') the level of the percentage the assessment of the success fee might ordinarily be relatively straightforward (regard being had to the facts and circumstances known to the solicitors when they entered into their funding arrangement).

16. In general pre-LASPO[2], and the ending of the recovery *inter partes* of success fee and ATE insurance premiums in many personal injury claims[3], claims for costs were not generally made against protected parties by their legal representatives over and above the sums recovered. Such claims were in general waived. It is only more recently, as I understand it, that 'shortfall' claims have been made in respect of base costs in addition to claims for the payment of success fees. Plainly 'shortfall' claims could in law have be made before LASPO but were not, as I understand, generally made where the claimant had the benefit of an *inter partes* costs orders; solicitors would, as I understand it, generally content themselves with the recovery of costs, including additional liabilities such as success fees and ATE premiums from a defendant. My own experience, for what it is worth, suggests whilst claims are now made sometimes for a some modest recovery against the claimant in respect of the 'shortfall' claim it has been recognised that not all the time recorded on solicitors' ledger might be recoverable against the protected party. More recently the costs claimed have been based substantially on all the time which has been recorded by the solicitors without any significant further deduction. That is, as I understand it, largely the case here; I understand that some costs relating to the recovery of costs from the Defendant, including some that might have been claimed for the mediation (as to costs), have not been claimed.

17. Some explanation is required as to how I come to be making a decision which is provisional in nature outside the ambit of CPR 47.15 (which governs claims costs in *inter partes* proceeds costs of us to £75,000) and under the provisions set out above, but I will

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[2] *Legal Aid, Sentencing and Punishment of Offenders Act 2012*

[3] Noting the existence of certain specified exceptions

first of all with background and the history of the underlying claim for damages in more detail.

**-the underlying claim for damages**

18. The Claimant suffered a serious head injury in an accident that occurred on 27 January 2017. The accident was a tragedy not just because of the serious nature of the injury suffered by the Claimant but the defendant to the claim for damages, who was a friend of the Claimant and the driver of the vehicle in which the Claimant was travelling, sadly died in the accident.

19. The Claimant was aged 55 as the time of the accident and instructed IM to bring a claim for damages. He did so pursuant to a CFA which, although dated 23 February 2017, it would appear may have been entered into some time later (the CFA was however retrospective in nature covering work before the date of entry). A letter of claim was sent on 28 February 2017.

20. The claim was issued on 7 January 2020 with a preliminary schedule of loss and was listed for a Costs and Case Management Hearing on 20 October 2020. It settled (subject to approval) on or about 15 October 2020 with a lump sum payment of £1.3 million plus reasonable costs.

21. Although not formally admitted prior to issue, liability was unlikely, as I understand it, ever to be in dispute. It appears the Defendant attempted a U-turn in the road and in so doing drove into the path of an HGV lorry. As I understand it the contemporaneous documentation confirmed that the Claimant was wearing a seat belt.

22. The brain injury suffered by the Claimant was towards the severe end of the moderate-severe bracket. I understand that imaging revealed extensive subdural haemorrhages and subarachnoid bleeds. He had an extensive period of Post Traumatic Amnesia. He also suffered orthopaedic injuries. He underwent inpatient treatment, during which he made various attempts to abscond from hospital and had to be made the subject of a deprivation of liberty order. He was eventually discharged in early March 2017 and then embarked on a community rehabilitation programme.

23. As far as I can tell the Defendant's insurer has been proactive and co-operative: substantial interim payments to facilitate case management and treatment were made.

24. The Claimant obtained expert evidence in the fields that might be expected following this type of injury. He appears to have made a good recovery from his orthopaedic injuries but continued to suffer from difficulties with his vision (which reduced ability to avoid obstacles on his lower right side). As I understand it the most serious effects of the accident related, as I understand it, to his brain injury. There were continuing problems with cognition, mood, headaches and fatigue. It seems than on first appearance the Claimant may present quite normally. However I understand that he has continued to present with a significant dysexecutive syndrome.

25. The Claimant was a foreman with a substantial history of working on major infrastructure projects. His gross earnings annual gross earnings were, at the time of the accident of the order of £72,000. There were issues arising at to his life expectancy - there

being a potential underlying heart condition, but it is not clear to me that this would have impacted on his ability to carry on working to retirement aged 65, albeit it might have his ability to work beyond. There were issues arising as to the extent of care he reasonably required (in particular whether he required a support worker), and indeed case management. The Claimant's case was that he lacked capacity albeit as I understand this was in issue; and this issue in turn went to the claim for deputyship costs.

26. Plainly the claim was of the utmost importance to the Claimant, his partner and other members of his family. The level of damages claimed (and recovered) was high albeit somewhat short of the highest level of damages in many cases proceeding in QB and there was no need for experts in accommodation or assistive technology and the like which are normally required in the very highest level of claim.

**-IM's claim for costs**

27. The matter originally came before me on an application for approval of a deduction from the damages sought in respect IM's claims. It was not clear to me that that I had any power to dispense with an assessment following the order made by Judge McCloud. It may well however be the case that the court does have a jurisdiction to dispense with a detailed assessment even after an order has been made in the terms set out above where there had been a material change of circumstances. In any event it was clear to me that it was not in the interests of the protected party to dispense with detailed assessment in this case even if I had the power to do so.

28. I should say that the hearing of the application and subsequently at the assessment reliance was placed on the agreement to the litigant friend to the deductions sought. I do not however accept the contention that simply because the litigation friend has agreed to the deductions in respect of IM's claim that this is an end of the matter. To my mind that is clear from the rules, in particular 46.4.

29. I would doubt that many litigation friends, typically, of course, relatives of injured claimant, would be in a position to know whether the costs claimed by the solicitors are reasonable. It strikes me that there is a risk that the litigation friend may simply have been informed by the solicitors, or led to believe, that the costs they are claimed are payable without any reference to the need to determine whether they are reasonable or indeed that such costs are payable only if reasonable. Moreover, the solicitors are themselves in a position of trust. On this issue their interests are plainly not aligned with the protected party or the litigation friend and they are not in a position to give advice on the reasonableness of their own charges. Indeed, the litigation friend may not fully take into account the consequence of substantial deductions from damages; they may just be relieved that she or he does not have to pay for them themselves. Whilst I have every reason to be believe that the litigation friend in this case has acted conscientiously and assiduously in the interests of the protected party, I have not been give any sufficient basis for thinking that she is in a position to give informed consent to the deductions[4].

30. I should add that at the application for approval I was also provided with advice from counsel (not Mr. Mallalieu QC) in respect of the costs claimed by IM. I understand that

[4] Indeed I would note in passing that the litigation friend herself appears to raise concerns about the extent of the expenditure in July 2017

this would have been provided to the litigation friend. As I think is clear from the provisions under CPR 46.9 a detailed scrutiny is required of the costs claimed. It is not enough in my view for an advice from counsel simply to indicate that a claim for 'shortfall' costs looks reasonable or indeed that a success fee looks reasonable, at least without an adequate analysis of the nature of the claims and the objections that might reasonably and properly be raised to them. Nor is it enough simply to say that because assessment can be costly that therefore it is reasonable to agree to an amount that otherwise might be appear unreasonable. There is or might be no need for any attendance of the part of the litigation friend or the deputy at the assessment. Further, as was the practice of Costs Judge O'Hare, now retired, there might be a provisional assessment as a preliminary to any detailed assessment in person.

31. Further and in any event, even if any consent or approval were informed, by the terms of CPR 46.9 it would merely give rise to a presumption of reasonableness. I was however able to form my own preliminary view as to the reasonableness of the costs claimed and whether further scrutiny was appropriate. I have previously expressed considerable and detailed concerns about the costs claimed by IM which I set out in the recital in an order made on the initial application (and which it is not necessary for me to repeat here).

32. As the hearing Mr. Mallalieu argued that even if the consent of the litigation friend were not determinative I should give weight to it. I accept that this is so. It is clearly in the interests of the claimant that finality is achieved at an early stage. Indeed there may be problems if the Court were to be too fastidious about this process. Nevertheless it was unclear how, if I were to form a preliminary view that there were concerns which justified a more detailed scrutiny of the claim for costs, any such consent should operate in determining the reasonable amount payable, save insofar it might be relevant to the application of the presumptions in CPR 46.9.

33. I have had regard to the CPR 44.4 (3) factors. I have dealt with some of the relevant factors above. That this clam settled when it did is a credit to the Claimant's solicitors and indeed to the Defendant's insurers who I understand initiated the discussions. There are no obvious other issues of conduct arising as I see it. Complexity is to be assessed across spectrum. Albeit it is fair to say that a claim of this value is likely to have the potential to become complex it is not clear to me to me the claim was legally complex; there was some potential factual complexity in respect of the issues concerning capacity in particular and complexity in respect of the expert evidence (for which the experts took a substantial burden). It was also necessary for the solicitors to understand the nature of the expert evidence when dealing with issues such as capacity and the effect of underlying condition. This was plainly a case for specialist personal injury law firm.

34. In carrying out this assessment I have fully in mind the presumptions that apply on assessment of costs under r.46.9. I should exercise any doubt in favour of the solicitors and the rules that would apply in an assessment under the standard basis in respect of proportionality do not apply. As Mr. Mallalieu QC however accepted the matters set out in r.46.9 are merely presumptions. Plainly despite the different basis of assessment, the presumptions will not necessarily lead to any greater sum being payable than would be the case on standard basis assessment. This is plainly so since the very concerns which give rise to disallowances of costs *inter partes* can also give rise to deductions from claim under an assessment on the indemnity basis; such concerns include an excessive of amount time on activities, too much inter fee earner discussion, duplication of work (multiple fee earner

attendance on others when only one fee earner attendance is reasonable), inadequate delegation of work (ie senior fee earners doing work that could and should be done by lower grade fee earners) and work not properly charged. Moreover there may be no element of doubt in assessing the reasonableness of costs in respect of certain activities (or phases) with which the Court is familiar, so the basis of the assessment may make no difference to the allowance.

35. I am conscious that in some cases it will be clear that a claimant will have to pay sums by way of costs which are not recoverable *inter partes*. Thus, for instance, where there has been an interlocutory appeal or application in respect of which the claimant does not recover the cost but which steps were reasonably taken to protect the interest of the claimant. I am not aware that there were any such steps in this case, which settled without any court hearing save the approval hearing. I acknowledge also that if a client does demand a high level service which means that not all costs will not be recovered from the other side subject to the presumptions set out above in r46.9 the client may be required to pay the additional costs associated with such a level of service. Again, it is not clear to me that this is a matter that arises in this clam.

**A. The claim for a 'shortfall'**

36. After addressing me on general matters arising including the weight to be attached to the litigation friend's approval, Mr. Mallalieu invited me to proceed with the detailed assessment. It is appropriate for me to record briefly some matters that were addressed at the hearing.

-the reasonableness on an indemnity basis of associated travel time of two senior solicitors personal attendance on the claimant (some 14.4 hours) (items 3,4 ad 37,38).

37. I was not satisfied that it was reasonable for two fee earners to attend what was essentially introductory meeting on 22 February 2017, indeed I consider that this level of attendance is plainly unreasonable. It was not, as far as I can see, attendance specifically approved. One fee earner was enough. The meeting was of some importance. Some progressive work was done but not to my mind any that would have presented any difficulties for one fee earner, indeed quite possibly not one charging at the highest rates. The work done was of a highly preliminary nature. Such multiple fee earner attendances are of an unusual nature; indeed the associated costs (which are substantial) are, to my mind, unusual in amount for what was a preliminary meeting. I was not satisfied that a solicitor did tell the client that as a result the costs might not be recovered from the other party. I was however satisfied that it was reasonable for a partner or to attend and, I allowed as regards this particular attended the associated travel costs/charges (the solicitor travelled from Bristol office to Southampton where the claimant lived).

38. As regards my decision concerning for travel time and travel expenses at the hearing I expressed the view that it may be that such expenses and time would not be allowed going forward but that that was a matter for further determination.

-Charges for negotiating and dealing with funding arrangements at the meeting on 22 February 2017.

39. It seemed to me clear from the decision in *Motto v Trafigura* [2011] EWCA Civ 1150 (see inter alia 108 to 110) that discissions about the solicitors' charges, how much is owed by the Claimant to the solicitors and the nature of the charging arrangement is a matter which is collateral to the claim and in which the interests of the solicitors and the client diverge. The work done by the solicitors is not work on the claim but in respect of their own charges.

40. In *Motto* the court was concerned with arrangements before the CFA was entered and Mr. Mallalieu argued that the same did not apply if the claimant was at the material time a client. Although the CFA was retrospective in nature it seems to me to be clear that any work of this type is not chargeable work and any expenses associated with it are an overhead of the solicitors (as Lord Neuberger made clear in *Motto*). The work done by the solicitors is not work on the claim. The matter would be different if the parties had agreed in the CFA that any work that they did on their own charges were covered by the agreement but as far as I can see they did not and nor was there any explanation that such costs would not be recovered from the other side.

41. It was at about this point in the hearing of the assessment that Mr. Mallalieu raised a concern as to the process of the assessment, given that there were some 1773 items in the Bill. He proposed that I provisionally assess the Bill and, as I understood it, the rest of the claim on the papers. I agreed to this proposal. There were, as I accepted, difficulties dealing with what might be lengthy assessment without the benefit of Points of Dispute identifying each particular item of concern. A provisional assessment has the advantage in that it permits solicitors an opportunity to deal with any of the provisional disallowances at a subsequent hearing. Provisional assessment is, of course, a fairly normal procedure in costs (not just in dealing with *inter partes* costs claims but also in legal aid assessments).

42. The decisions and the reasons and findings that are set out below are, accordingly, provisional and to avoid any unnecessary complexity I will also provide that the disallowances I have set above should also be regarded as provisional. I have set out my approach in some detail with a view to be being transparent about my concerns.

43. I should perhaps add that prior to adjourning to enable me to carry out the provisional assessment I raised my concerns as to the level of costs which were claimed in various phases, including in particular under the phase Issue/Statement of Case and the preparation of the Schedule of Loss (as I had done previously in my earlier order), and as to what would occur if I took the view that the *inter partes* sum received was a generous compensation to the solicitors for their costs and that the reasonable costs produced by a process of assessment, albeit provisional, were less than the sums recovered from the Defendant. Mr. Mallalieu submitted that in that event something must have gone wrong in my assessment. As I have indicated above I accept that ordinarily and for the purposes of assessing a success fee a court might well take as a starting point the profit costs assumed to have been recovered from the defendants but I was not taken to any rule of law that would mean that costs for the amount properly due to the solicitors from a claimant must be assessed at at least that which the defendant to the claim has been agreed to pay. It was not said that the sums due were subject or could be the subject of any issue estoppel[5]. Whilst I can see that the outcome I raised as a possibility may be inconvenient but, as understand it, I am required to carry out

[5] As a matter of practice, in circumstances where there is to be a detailed assessment of the costs as between solicitors and client, a paying parties to an inter parte compromise as to costs might ask for an undertaking to repay any costs paid in excess of that which the claimant is required to pay.

my own analysis of the claim having regard to the provisions of CPR 46.9 and my determination of the reasonableness of the costs which IM claim from the protected party to

44. I do not think that I am required to carry out a line by line assessment of each individual item, particularly on a provisional assessment. There are, as I have indicated some 1773 items in the 'shortfall' claim and the task would take a very long time. Indeed it seemed to me that I could, on considering the papers, form a view as to the reasonableness of the costs having regard to the work normally required in respect of the various phases of the claim, an approach generally taken when costs budgeting. It is, of course, possible using the filtering function in Excel to see in an e-bill what work has been done in relation to particular phases (or indeed tasks) and by reference to the nature of the activity (considering documents/communications/attendances). This process is assisted by the matters set out in the table in paragraph 10 of Practice Direction 3E. I recognise that the assumptions paragraph 10 of Practice Direction 3E do not cover all work reasonably to be undertaken. But the process of looking at the costs claimed against these tables is at least a helpful starting point when considering the reasonableness of the costs claimed.

## Provisional findings on base costs

### a) Solicitors' hourly rates

45. I do not think that hourly rate of £365 for a Grade A fee earner based in National 1 (Bristol or Southampton) taking responsibility for a claim of this nature in the period 2017-2020 is unreasonable. Such an hourly rate seems to be appropriate however if the role of this lead solicitor is essentially supervisory and one that involves taking substantial responsibility for some of the more important decisions made in the litigation. Whether the costs claimed in respect of the work done by the relevant fee earner is reasonable may depend upon the work done and whether it suitable for a fee earner at such an hourly rate.

46. However, I am concerned that the hourly rates claimed for the Grade B fee earners (£300 to £325 per hour), the Grade C earners (£245- £260) and the Grade D fee earners (£145) are unusual, and that they appear unreasonably high. Even if it were appropriate to take the new Guideline Hourly trades (for 2021) as a starting point in considering the rates claimed, the Grades B and C rates are about 50% above them. The B rate claimed here is more typical of an Grade A rate instructed on a substantial personal injury claim out of London and yet such the fee earners in this case were being supervised; similar such points can be made in respect of the Grade C rate. If I were to take the old A/B approach as a cross check they would reflect an uplift of substantially over 100%, which under the traditional approach would reflect a very high degree of responsibility. Discounting the matter further to allow for the fact that rates would have increased since the work was actually done confirms my view that these rates are unreasonable. I think that more usual and reasonable rates for the Grade B, C and D fee earner would be nearer to £260 per hour, £210 and £135 for this kind of work- carried out under supervision.

47. It appears to me that counsel's advice in my papers does not go as far as to say that the rate of £400 per hour, the rate claimed for the Grade A in the latter stages of the claim, is a usual rate for a Grade A fee earner in a claim. I do however accept that in general terms a solicitor who takes a high degree of responsibility in respect of important decisions, and in circumstances where the day to day to handling of the claim is delegated to junior fee earners at significantly lower rates may reasonably justify such a rate. But that is not, it seems to me, this case.

48. As is understandable I have not been addressed on the consequences of the CFA being regarded as a contentious business agreement under section 59 of the Solicitors Act 1974. CFAs are generally regarded as such: see *Hollins v Russell [2003] EWCA Civ 718, [2003] 1 WLR 2487,* at paragraph *93*; also see *Acupay System LLC v Stephenson Harwood LLP* [2021] 6 WLUK 36. It is however not in any event clear that the litigation friend has made any informed decision to opt out of the protection provided under this section 61 of this Act- with the consequence that all its terms would be subject to the court being satisfied they were reasonable.

49. The litigation friend appears to have been on notice that not all her costs may be recovered from the defendant (see para. 8 of the CFA) even if the claim were successful. However I have not found in the Core Bundle (where I would expect to see it) any clear explanation that these hourly rates may not be recoverable *inter partes* (cf r46.9 (3) (c) (i)

and (ii) and yet the difficulty in establishing that the rates that have been agreed with the client are reasonable is relied upon as one of the reasons why the *inter partes* costs compromised should be approved[6]. I am also unclear whether any approval which would be required for the presumption under r46.9*(3)(a)* or *(b)* to apply is given with informed consent (*HH v Herbert* [2019] EWCA Civ 527 at [37]): that it is to say that she would be in a position to know whether the rates were reasonable.

50. I should emphasise that notwithstanding my concerns that the hourly rates claimed are substantially too high and lower hourly rates should be allowed my provisional allowances do not necessarily turn on any reduction of the hourly rates. The higher the hourly rate the more efficient a legal representative can be expected to deal with the case. To my mind the hourly rates claimed for the fee earners at all levels convey a high level of expertise, experience and specialism dealing with claims such as these. Thus, the Grade C (PQE 0-4 years) fee rate, which might be regarded as close to a rate ordinarily commensurate with or close to a Grade A rate outside London, and the degree of efficiency expected is high. Further, in this case work that has been actually done by a higher grade fee earner, for instance in respect of task such preparing indexes for bundles or other work in respect of bundles, could or should be delegated to Grade D fee earners with consequent reductions for the overall allowances.

51. I note that notwithstanding the relatively short life of this claim as a litigated claim there was some not insignificant reliance on counsel at various stages. I do not say this as a criticism- it is plainly not unreasonable for counsel to be instructed - merely that that necessarily has some effect on the responsibility assumed by solicitors.

### b) Counsel's hourly rate

52. Counsel's fees are, of course, ordinarily assessed in the round without reference to an hourly rate. However there was a challenge to his rate, of £325 per hour, by the Defendant. To my mind this rate is reasonable given the nature of the case and the degree of responsibility taken. Although this rate is somewhat higher than I would consider normal for junior counsel, the rate of counsel is also dependent on the extent of the responsibility borne. Whilst to my mind this case was within the competence of specialist junior counsel, I consider the degree of responsibility taken by Counsel was substantial and it seems to me that his experience and experience was clearly in evidence and demonstrated on the papers that I have seen.

### c) Travel time

53. The Claimant lives in Southampton. Although I was satisfied that the attendance of senior fee earner from the Bristol office at the initial meeting (given that the claimant was initially in hospital, as I understand it in or close to Bristol) IM had an office in Southampton; it appears to me, on a provisional basis, to be unreasonable for there to have been a very large amount of time to be claimed for travelling when solicitors of suitable expertise and experience were (as I understand to be case) to be found in the Southampton office. This is notwithstanding any recommendation from Headway in respect of the principal fee earner. It seems to me most unlikely that any such recommendation by a charity apprised of all the relevant facts would be made if it were thought or suspected that it would

lead to the Claimant paying for the associated and wholly unnecessary travel costs out of his damages.

54. It appears to be readily acknowledged that such time would not have been recoverable *inter partes*, a matter as I understand also relied upon to justify approval of the compromise, but I have not been able to locate any clear explanation to the litigation friend of this, at least in the Core Bundle to this effect (this might be my failing). Indeed I don't recall Mr. Mallalieu putting the case in this way.

**d) Incoming routine correspondence**

55. I am struck by the amount of time claimed in respect of routine correspondence. In general, there is no difficulty charging fees on the basis of units of 1/10th of an hour in respect of outgoing correspondence. But no allowance is ordinarily made separately in an *inter partes* assessment for incoming correspondence as the time taken to consider incoming routine correspondence is generally taken to be subsumed within the allowance for outgoing routine letters. 6 minutes would, afterall, be a long time to spend writing and sending most routine emails. Any terms of retainer which provide for a full unit to be charged for the consideration of incoming correspondence strike me as unreasonable and unfair (cf the Consumer Protection Act 2015) whether or not it is a usual term (see the judgment of Costs Judge Rowley in *Breyer Group v Prospect*para. 32-42). I have been unable to locate any attendance note giving any advice to the litigation friend about this term in the Core Bundle or otherwise.

56. There will inevitably have been a significant amount of correspondence of this sort in pursuing this claim. I am concerned however that some of the emails relate to payments or refer to payments made for care and/or are essentially administrative in nature, internal or just acknowledgment of the receipt of emails and not recoverable. Filtering the e-bill however suggests the equivalent of 65 hours is claimed for routine correspondence alone, which not only forms a substantial part of the claim, it is greater than I have would expected given the stage at which the claim reached, equating as it does 650 units.

57. Without any real detail as to whether this claim includes the consideration of incoming correspondence, and given my other concerns above, I think that some not insignificant deduction should be made on a provisional basis. No doubt if the matter required further consideration an appropriate bundle could be prepared.

**e) Funding**

58. I had some concern that the provisional ruling above (see para. 39 and 40 above) might affect other claims made in the Bill given the number of letters relating to funding which I have seen (and confirmed on subsequent checking). I do note that email letters appear to have been sent out to the litigation friend attaching the letters relating to funding (see, I think, letterof 25 July 2018) There appears to be nothing in the e-bill phase entitled 'funding' (phase code '12'), so at this provisional stage I make no further disallowance, on the understanding that no charge has been made for such letters.

**f) Allowances per phase**

59. The amount claimed against the Claimant per phase is as follows:

| Phase Name | Counsel's Base Fees | Other Disbursements | Base Profit Costs | Total Base Costs | Total VAT | Total Costs |
|---|---|---|---|---|---|---|
| Initial and Pre-Action Protocol Work | | 1,497.92 | 19,545.50 | 21,043.42 | 3,927.10 | 24,970.52 |
| Issue / Statements of Case | 3,087.50 | 10,669.85 | 82,779.50 | 96,536.85 | 17,193.32 | 113,730.17 |
| Case Management Conference | | | 4,263.00 | 4,263.00 | 852.60 | 5,115.60 |
| Disclosure | | 412.70 | 39,560.00 | 39,972.70 | 7,930.54 | 47,903.24 |
| Witness statements | | 188.10 | 19,971.00 | 20,159.10 | 4,031.82 | 24,190.92 |
| Expert reports | 3,737.50 | 54,922.88 | 63,971.00 | 122,631.38 | 20,839.83 | 143,471.21 |
| ADR / Settlement | 12,100.00 | 267.60 | 27,570.00 | 39,937.60 | 7,936.52 | 47,874.12 |
| Budgeting incl. costs estimates | | | 4,210.50 | 4,210.50 | 842.10 | 5,052.60 |
| Costs Assessment | | | 12,450.00 | 12,450.00 | 2,490.00 | 14,940.00 |
| | **18,925.00** | **67,959.05** | **274,320.50** | **361,204.55** | **66,043.83** | **427,248.38** |

60. My provisional findings on these claims are as follows:

### i) Initial and Pre-Action Protocol Work (phase code[7] 'P1')

**Solicitor's time costs**

Some 60 hours of work is claimed.

There was an inquest and some necessary consideration of the documents produced in the inquest – but it is not clear to me that liability was ever going to be issue. There was also some detailed consideration to the Initial Needs Assessment (the 'INA'). However:

(1) There were, as indicated above, multiple fee earner attendance and inter fee discussion in this phase. As I have indicated above, to my mind, the hourly rates claimed imply a high degree of expertise and responsibility. This of itself renders the extensive times claimed unreasonable. Much of the work done which was preliminary in nature plainly could reasonably, in any event, have been dealt with by only one fee earner.
(2) Although work was delegated it was delegated to a Grade B (in particular in respect of the INA), but the hourly rates claimed by a Grade C suggest a degree of expertise that I

[7] In the e-bill

consider to be reasonable to carry out much of this work relating to the INA (with modest levels of supervision).
(3) Generally, times spent in Case Planning and Case Management (Activity Code 'A8') and documents ('A10') are, to my mind, excessive.
(4) I also consider much of the times spent dealing with the case manager to be unreasonable. The solicitors' expertise list in the recoverability of the costs of care in the claim but not otherwise as to the appropriateness of any particular care or rehabilitation: these were matters falling within the expertise of the care manager engaged in this case. The costs of case management are generally recoverable as damages in the claim under the Rehabilitation Code.
(5) I have already set out my provisional findings concerning travel time but would add that some 20 hours are claimed in this phase most of which appears attributable to the distance between the solicitors' office and the Claimant's home.

**Invoice of the case manager re the INA**

It is not clear to me that the cost of the case manager generally (who was, of course, not an appointed expert in the claim) could, in principle, be claimed as costs rather than as damages in the litigation. The manager is not providing a litigation service and generally acts outside of the litigation process. The manager would have provided substantial input into the INA, but if this were done under the Rehabilitation Code I would assume that the work done by the Case Manager would be paid for by the compensator (see the Code). I am not in any event satisfied of the reasonableness of this expense (or indeed of the level of the expense).

I remind myself that this assessment is on the indemnity basis. The sums I am provisionally disallowing are to my mind obviously unreasonable on the information I have considered and I have no doubt of that. My provisional allowance for all costs in this phase is £15,000 (inclusive of VAT).

**ii) Issue/ Statement of Case (phase code 'P2')**

**Disbursements**

The court fees. On the basis that the Claimant was not entitled to a fee remission (which I have assumed to be the case) these were plainly unavoidable. Had the Claimant been entitled to a remission it would be difficult to see the reasonableness of such an expense. On a provisional basis I proceed on the basis that the Claimant was so entitled.

I consider Counsel's fees for a relatively straightforward Particulars of Claim are reasonable. They contain a detailed recitation of the injuries. Fees in respect Counsel's conference appears reasonable. Counsel's fees dealing with updating of the schedule are claimed in the ADR phase (item 1590).

**Solicitors' time costs**

Excluding VAT and the court fee (£10,000) the claim for such costs is some £86,000: some 290 hours of work have been claimed. As I have set out above, indicated to Mr Mallalieu in the course of argument that I had considerable concerns about this claim.

The schedule that was produced for the JSM was substantial in length (c. 60 pages). But much of the work associated with updating the schedule and considering the counter

schedule is claimed in the ADR phase. A preliminary schedule was served when the claim was issued which dealt with losses to date but much of the future loss was 'TBQ': whilst the losses were substantial the presentation of them is not, to my mind, a particularly complex or necessarily time-consuming matter. There was some work associated more specifically with the issue of proceedings but from a procedural perspective, save that the sums involved were substantial, in other respects this was a relatively straightforward claim.

There was some work following on from the letter of claim in respect of liability. Liability was not admitted straightaway, albeit that the reason for this appears not to have been that there was the potential for any argument in respect of either primary or contributory negligence (the documentation produced as the inquest confirming that the claimant was wearing a seat belt in the accident) but rather because there appear to have been two policies of insurance in respect of the vehicle the Defendant was driving. This would have given rise, I anticipate, to some discussions between the insurers as to how for the claim was to be apportioned or allocated between them. Some work was reasonable in considering and checking the Particulars prepared by counsel but work in respect of liability ought to have been modest: as I understand the position an admission of liability is likely to have been anticipated from the outset.

There was, to my mind, a substantial amount of unreasonable time associated with case management issues, internal discussions and generally a considerable claim for multiple fee earner involvement in certain activities. Solicitors needed to keep abreast of developments relating to the claimant's care, treatment and rehabilitation and, to my mind, were reasonably involved in the appointment of care managers. I accept that in certain cases attendance at MDT meetings can be reasonable: where, for instance, the claimant is to be or is being treated outside the NHS it may be important to ensure that there is clarity about interim payments and the funding of the care. However the level of involvement in this case was unreasonable notwithstanding the importance of the claim to the claimant and the importance of obtaining an interim payment in a suitable amount. I have not located in the papers any explanation to the Claimant that such costs may not be recoverable from the defendant (again I would expect to see this in the Core Bundle). Moreover, I have difficulty seeing what solicitors would have been able to contribute to the MDT meetings in this. Nor, it seems to me, did the solicitors need to be at the meeting in order to find out what had happened: the notes of the meetings would be provided to them. If there were any issues or concerns about the recoverability of the costs associated with particular recommendations of treatment the case manager could, of course, communicate with solicitors and vice versan=, by email, about this.

As to the preparation of the provisional schedule it seems to me that something has gone seriously wrong. I have real concerns about the time spent by multiple fee earners, including a Grade A fee earner, in respect of what appears to have been, albeit a claim for a substantial amount, a not overly complex document. The relevant calculations should not have taken a great deal of time. Ordinarily (junior) counsel will have an extensive role in preparing a schedule and I find it difficult to see why counsel was not instructed to perform such a role in this case. Of course, there is nothing inherently wrong with the solicitors themselves preparing the schedules themselves but if they are going to do so they can be expected to bring the same degree of experience and efficiently as can reasonably be expected of counsel. I would expect counsel to have been able to prepare the essential structure of the schedule with any narratives that were reasonably necessary within about a about a day; and that it would take a further day to update it with regard to the future loss (he had familiarity with the expert evidence that supported many of the future loss claims

from his involvement with the experts). The fact that solicitors had to seek counsel's advice on the schedule on the points that they did gives me concern; this might suggest a lack of experience in dealing with such matters.

I appreciate that obtaining the information and evidence necessary to advance a clam such as this is a substantial task. But the potential heads of loss should have been, and it seems to be probably were, clear at an early stage of instruction. There is nothing to suggest that either the case manager or the litigation friend would not co-operate and assist. And in such circumstances it is difficult to see why so much time was taken. The schedules of expenses (presumably in Excel form) could, it seems to me, be updated on a regular basis; whilst this might involve a fee earner work in some checking, this could be done on receipt of the relevant notes or invoice provided by the case manager or litigation friend; indeed it might be provided by the case manager or litigation friend in a form which could be 'cut and pasted' into a working copy of the schedule. The case manager might moreover be assumed to be keeping a record of payments made.

I would expect the amount of time preparing the schedule to measured in days, not weeks (of course not all of the 290 hours related of the schedule of loss but it is notable that 290 hours might reasonably be taken to equate to about nearly 8 weeks uninterrupted and continuous work [at 37.5 hours per week])

By way of example, I have identified the following entries - amounting to close to 40 hours work dealing - it seems to me largely (albeit not exclusively)_with the narratives to the schedule in this phase alone (by using the search term 'narrative'):

| | | | |
|---|---|---|---|
| 11/04/2019 | Preparing detailed narratives (13+ page document) for each head of loss in the updated Schedule of Loss. Time includes reviewing supporting witness and expert evidence | P-B[8] | 3.80 |
| 01/08/2019 | Considering the full set of expert evidence and further preparing narratives for the schedule of loss (continued 02/08/19) | P-C | 8.40 |
| 14/08/2019 | Updating narratives for the Schedule of Loss including evidence from Dr Cockerell's medical report. Cross-referencing information with the remaining medical reports | SS-C | 2.20 |
| 27/08/2019 | Continued preparation of narratives for the Schedule of Loss. Including evidence from the updated reports of Dr Murphy and Mr Moyes | SS-C | 2.80 |
| 18/09/2019 | Updating narratives for the Schedule of Loss in light of Dr Cockerell's updated report | P-C | 1.20 |
| 22/10/2019 | Considering the updated Schedule of Loss and reviewing against instructions. Identifying updates required to the formatting and text for the narratives. Delegating additional work | AS-C | 1.90 |
| 24/10/2019 | Carrying out updates to narratives and supporting material in the Schedule of Loss | QA-C | 3.60 |
| 24/10/2019 | Updating instructions for the Schedule of Loss with narratives, medical experts and Deputy costs | AS-C | 1.20 |
| 09/03/2020 | Preparing instructions for the Schedule of Loss and narratives to be included | TS-C | 1.20 |

[8] Fee earner

| | | | |
|---|---|---|---|
| 28/07/2020 | Preparing a highly detailed introduction to the Schedule of Loss, past losses and future losses, including all calculations, reviews of witness statements and narratives for each head of loss | P-C | 9.00 |
| 02/09/2020 | Preparing further amendments and additions to the Schedule of Loss prior to submission to Counsel and the Claimant. Significant changes made to the claim for future care (contingencies for relationship breakdown) and consideration of appropriate narratives | P-C | 4.00 |
| 12/12/2019 | Email regarding narratives for the Schedule of Loss | AS-C | 0.20 |
| | | | **39.50** |

I would note that in addition there is further time claimed in other phases for considering the medical evidence; and further work on the schedule as I have pointed out above in the ADR phase.

I do understand that in order to make sense of a schedule of loss it can be necessary for some explanation to be provided of the losses claimed. But both the initial preliminary schedule and the subsequent without prejudice schedule, were effectively interim in nature. The nature of the future losses would await finalisation of the expert evidence. Narratives of great length were not reasonably progressive of the claim. They would inevitable change, at least to some extent, as the case progressed and more evidence became available. For the purposes of the JSM it can be assumed that both sides are familiar with the expert evidence and I consider that very much less time should have been devoted to the consideration of the narratives, a matter which in any event it seems to could have been done by counsel at a fraction of the cost.

I consider also, by way of further example, the Grade A work at over 87 hours highly unreasonable. This would equate to about two and half weeks of continuous and uninterrupted work on normal measures. If, as I understand to be the case, counsel was involved in checking the schedule, it cannot see how it is reasonable for senior fee earners should also involved for such extensive periods.

The preparation of appendices of travel expenses, the costs of case management and the like are plainly suitable for delegation a Grade D fee earner and, in checking the appendices, delegation to Grade C fee earners. Calculation of tax, the gratuitous care discount and loss of pensions are matters which counsel deal with on an everyday basis (and if there is any complexity the PIBA handbooks can assist).

I have not been able to find many attendance notes which explain why so much time was required. The work required some supervision,oversight and checking but the task was not in this case particularly complex.

I remind myself that this this assessment is on the indemnity basis. Looking at this matter provisionally, I am nevertheless in no doubt that the times claimed in this phase are unreasonably high and that the task could and should have been done at far less expense. It seems to me clear that the amount of time in this case was unreasonable in amount.

To my mind the costs claimed in relation to this work require substantial reduction. I provisionally allow £55,000 (inclusive of VAT and the court fee of £10,000).

### iii) Case Management Conference (phase code 'P3')

13. 2 hours of work is claimed in this phase. The case settled shortly before the CCMC. Although the sums involved are relatively small it is be noted that the costs in respect of costs budgeting are claimed separately (see below). Also the parties had progressed the expert evidence substantially by the time the CCMC was due and it is difficult to see that a preliminary consideration of the directions would have taken a large amount of time.

I make the following provisional findings:

(1) The time spent in case management discissions and planning for the CCMC is somewhat too high.
(2) 5.4 hours spent by the Grade B is too high, given the work that I would reasonably expected to have been undertaken at this stage.
(3) There also appear to be too much involvement of the Grade A fee earner (much of this should be well within the competence of a grade B fee earner particularly at the rates claimed) and more work, for instance preparing a Case Summary, should have been delegated.
(4) Similarly time is claimed for a Grade B preparing a bundle (at £325 per hour) when this should be have been undertaken by a Grade D .

I provisionally allow £3,750 inclusive of VAT.

### iv) Disclosure (phase code 'P4')

Just over 151 hours of work are claimed in this phase. The matter had not reached the stage where a formal list of documents was required but a working copy was, as I understand it, prepared.

The fee earner dealing with day to day matters (a Grade B) would need to consider with care the case manager's assessments. Plainly it was reasonable to be kept up to date with these. But this phase also appears to include extensive fee earner attendance at MDT meetings. It is to be noted that these attendances appear to be, in part, by more than one fee earner at the same time with substantial additional costs for travel time (as to which seeee my comments above). It is not usual for legal representative to attend the consultation of treating doctors in personal injury claims and generally I am not satisfied that it is reasonable here.

There are substantial number of different fee earner considering the different records (including the GP records); such records would need to considered but it is difficult to see, even on the indemnity basis, why very detailed consideration of these records progressed the case, given not least the fact that the relevant experts would consider them closely, as would counsel in due course. The documents from the coroner dealing with liability were considered in detail by two fee earners (I note nearly 4.5 hours spent by different fee earner in this phase, see items 583 and 584) notwithstanding the matters I have set out above. The times claimed for these activities and generally perusing/reading documents and becoming familiar with these documents compares unfavourably with the times understood to have been spent by counsel (who would have also need to consider the underlying documentation carefully). They appear to me to be excessive. This is particularly so when it is borne in mind

that effectively the only issue arising was one of quantum where the times claimed in other phases such a dealing with the experts, and preparing the witness statements would also have involved detailed consideration of the underlying documentation.

To my mind the involvement of different fee earners different elements of the task at different times, and at times such work duplicating the work done by others, is likely to have substantially contribute to the excessive nature of the costs. The following entries from items 625 to 630 are perhaps illustrative:

| | | | |
|---|---|---|---|
| 25/04/2018 | Perusing and considering a SALT assessment. Noting difficulties with social communication, word finding, comprehension and other issues. Considering recommendations for SALT input and training | SS-B | 0.70 |
| 08/05/2018 | Considering the SALT assessment report and recommendations | P-B | 0.50 |
| 11/05/2018 | Considering a therapy update report from the treating vocational OT | P-B | 0.70 |
| 14/05/2018 | Considering the psychology treating update report | P-B | 0.40 |
| 14/05/2018 | Perusing and considering a treating psychology report. Noting progress made after 14 sessions, further sessions to be undertaken and plans for the same | SS-B | 0.30 |
| 14/05/2018 | Perusing and considering an OT report. Noting benefits to the Claimant's functional capacity and understanding of his limitations. Noting goals, daily routines and reliance on others | SS-B | 0.40 |

In short, it is difficult to see that a more systematic approach to considering documents would not have led to less time by fee earners. There was, I might add – at least as I understand it- no obvious time pressure.

I recognise that there was likely to have been substantial amount of documentation. This required management by junior fee earners or administrative staff; no doubt a core bundle could be created online which could be added to as and when further documents became available. The uploading of such documentation is it seems to me administrative work and the addition to and alteration of indexes are to my mind clearly Grade D work.

I have similarly concerns as to the times claimed in respect of general Case Management in this phase (about 5 hours in addition to routine items, file reviews and items delegating work). These matters should be relatively everyday or routine for a personal injury firm.

Again, I consider the involvement of the Grade A (nearly 13.5 hours, excluding routine items) excessive.

I have not been shown for, for good reason, all the underlying records. I can see that they were sought and obtained from many different sources- as is usual in such claims, However it strikes me that the level of documentation involved in this case, whilst substantial, is not - it seems to me -likely to be as substantial as in many personal injury claims and yet the overall claim for dealing with such a phase is substantially higher than I would expect to see. It is noticeable that the time taken by counsel to obtain close familiarly with all the

documents appears to have been significantly less than that of solicitors (the same observation would also apply in respect of medical experts).

Again reminding myself that this assessment is on an indemnity basis I provisionally allow £27,000 in total for this phase, including disbursements and VAT.

### v) Witness statements (phase code 'P5')

The witness statements taken were detailed and this would have taken substantial amount of time; they were, understandably, lengthy. However,

(1) Much of the attendance and drafting at least at the initial stages could and should have been done by a Grade C fee earner;

(2) A substantial amount of time was claimed travelling which calls for discount;

(3) It is difficult to to see why meetings with the claimant and the litigation friend could not have been co-ordinated, with consequent savings of time;

(4) Time spent on dealing with what is described as the witness statement of the expert dealing with deputyship costs appears unreasonable given what would have been expected of such an expert.

I provisionally allow £12,000 including disbursements and VAT.

### vi) Experts (phase code 'P6')

**Disbursements**

I provisionally allow the fees for experts' report albeit I have some doubts about the fees of Dr Cockerell and Dr. Holloway (at c. £6,000 each) which strike me as high. But on the basis there fees included considerable travel times and the instruction of these particular experts was reasonably called for I would allow them provisionally.

I would also allow Counsel's fee (the fees for various conferences with different experts total just over £3,700 excluding VAT); some substantial input was reasonable, albeit the time spent by counsel to my mind impacts on the reasonableness of the time spent by the solicitors with the same issues. Indeed the time spent by counsel in familiarising himself with and understanding issues arising in respect of the expert evidence, to my mind sheds some light (unfavourably) on the reasonableness of the time spent by solicitors doing the same.

**Solicitor's time costs**

Some 221 hours are claimed. Again I have very considerable concerns about the time spent here. It is notable that the costs of the solicitors exceed, by a significant margin, those of the experts who provided the reports. There were some 4/5 reports served by the Defendant, and, as I understand it, the reports of some 8 experts were served by the Claimant. No joint statements were prepared, no directions having been given in the case.

I recognise the difficulties associated with a claim such as this where the deficits suffered by an injured claimant may not be obvious. Nevertheless it seems to me that the costs are too high even reminding myself that I am carrying out this assessment on the indemnity basis and I must exercise any doubt in the solicitor's favour.

The drafting of letters instructions in this case would be relatively straightforward a matter for those working in teams and given ability to *cut and paste* much of the background material into such letters- similarly, letters of approach.

There are the same issues arising here as arise in other phases: multiple fee earner involvement, lack of delegation, and excessive time considering documents. The time spent by both a Grade A and Grade B fee earner both considering the initial report of Dr. Cockerell is perhaps illustrative.

I do not consider it reasonable for there to have been multiple fee earner involvement in a detailed and extensive review of the evidence or extensive and general case management discussions (see, for instance, 1238 and 1239). It strikes me, for instance, that a specialist fee earner dealing with a brain injury such as this would have fully in mind the need for neuropsychology input at the outset following the report of Dr. Cockerell, and it is difficult to see why extensive discussion would have been required about these matters.

I do not consider that there was an extensive role for a grade A fee earner in the obtaining of this evidence (cf the consideration of the evidence) and yet some 60 hours are claimed of such time in this phase (note there are some 105 hours claimed by the Grade B fee earner in this phase). There is, I should add, addition substantial time spent in the ADR phase considering the effect of the expert evidence on the claim.

My concerns about the costs that have been claimed in earlier phases apply here. The time spent delegating and in general case management seem to me to be generally excessive for the work done, accepting that there was a large amount of evidence obtained.

There was also an excessive amount of time dealing with bundles (some 32 hours) some of it at higher grades (including the partner, see item 1096). Such work, largely, is suitable for a Grade D fee earner or is otherwise administrative in nature.

On an indemnity basis, I provisionally allow £120,000 inclusive of VAT in total for this phase.

### vii) ADR/settlement (phase code 'P13')

**Counsel's fees and other disbursements**

Counsel's fees include work in conference, advising on the schedule, attendance and advising at the JSM and advice and attendance at the approval hearing. At first blush a fee £6,500 preparing and attending the JSM looks somewhat high given counsel's prior involvement in this case and familiarity with the issues. My understanding that a fee of about £5,000 is more usual for junior counsel for a one day JSM (allowing for one day's preparation): I am not however sure the JSM lasted a full day or that counsel would charge, assuming a APIL/PIBA CFA, on the basis of a brief fee for the JSM as opposed to an hourly rate. That said, I think this conference and JSM would have taken some time to prepare notwithstanding counsel's relatively close involvement with this case (in particular as regards the expert evidence). I note too that some discount has already been offered by counsel in respect of this fees, and I do not think any further discount is appropriate.

I allow these fees, as discounted, and the other disbursements such as the fee for the approval hearing.

**Solicitor's time costs**

Again I think the time claimed at some 90 hours of work, is too high. I recognise the very considerable importance of the JSM to the Claimant. But essentially for the reasons which have justified reductions in other phases there should, in my provisional view, be a substantial reduction of the costs claimed in this phase. In particular I note:

(1) The extensive work on the schedule which I have allowed for above and note the extensive case management discussions concerning the *without prejudice* schedule and *without prejudice* counter schedule (see the extensive discussion of 2/6/20 just ahead of the conference with counsel);
(2) Multiple fee earner attendances (3 at the JSM);
(3) Time spent in the preparation of bundles in respect of the approval hearing;
(4) I note some 98 routine letters/calls;
(5) In circumstances where the JSM appears to have lasted some 3.7 hours, Grade A involvement of some 25 hours overall appears excessive.

I would add that looked at broadly the fees relating to the a JSM appear substantially higher that I would normally expect; I would expect the the overall costs of a JSM for a case such as this might reasonably be in the region of £14-15,000 (plus VAT) . There are in addition times claimed for the attendance at the approval hearing, as well as work done on the other aspects of the case including as I have said, on the schedule of loss and on the request for interim payment.

I allow in total for this phase and on a provisional basis, the sum of £31,000 including VAT.

**viii) Costs Budgeting (phase code 'P13')**

I consider that the appropriate amount to allow provisionally for this phase is £3,600 inclusive of VAT.

The costs claimed in this phase again, to my mind, call for reduction. My reading suggests there were no complex or difficult costs issues arising; much of the budget would have consisted of past costs given the work already done. My further reasons for the amount of my provisional reductions are as follows:

(1) I think that much of the time of the trainee was not substantially progressive.
(2) The partner's time in this task looks too high (2. 7 hours). Much of the work in this phase could and should have been done at lower hourly rates.
(3) I consider the hourly rate /grade of fee earner for much of this work is excessive. There appears to be no reason why some of this work could have been done by a cost draftsman at Grade D rate with modest involvement of a Grade C. This is particularly so at the rates claimed.

**ix) Costs of assessment (phase code 'P15')**

I consider that the hourly rate claimed at £158 and the time spent by the costs draftsman excessive.

This is particularly so given the time spent very recently on costs budgeting. I am not satisfied that it was reasonable for a partner to spend extensive time checking the bill effectively in respect their own charges, particularly given the recent time spent in dealing with costs budgeting in respect of which the cost budget would have included a statement of incurred costs.

Solicitors can reasonably be expected to use electronic ledgers which readily transpose information into an electronic bills and the fee earners dealing with the claim can reasonably be expected to have provided substantial and sufficient information on their entries in their ledger to make this process relatively straightforward.

I allow, provisionally, £7,500 inclusive of VAT.

## Total allowance of base costs

I calculate that the allowances above amount to £274,859. I have allowed counsel fees of £18,828 (plus VAT) in full: total, £22,710 . I have moderated the disbursements only slightly to £66,340.25 plus VAT of £7,550.55, totalling £73,089.80. That leaves the solicitor's fees which I provisionally assess in a sum which I calculate to be £179,059.2 including VAT.

Given the burden of work falling to a significant extent on the Claimant (and the fact that the Defendant obtained less evidence), and given the different hourly rates application, it is not necessarily or usually illuminating to make any comparison with the Defendant's costs and I am not satisfied it is in this case.

Overall my assessment of the reasonable sum the Claimant is required to pay his solicitors is is less that the Defendant had agreed to pay. However it is in accordance with my own instinctive and necessarily highly preliminary view that the *inter partes* compromise looked generous and should be approved. The consequence of this finding is that, provisionally, I am not currently satisfied, that any payment should be made by the protected party in respect of IM's claim for a 'shortfall'.

## B. Success fee

61. No success fee is claimed by counsel. The success fee payable to IM is, of course, payable as a percentage of the underlying time costs. To my mind the CFA should be read as providing that the fee payable is function of the reasonable assessed time costs, not those costs which are claimed but which are found to be unreasonable. The uplift for the fee claimed is put at 20%.

62. In their risk assessment the solicitors state:

> *"The success fees applicable to your claim are determined by our assessment of the prospects of success balanced against the risks of your claim. This assessment is based purely on the information available to us at the time of entering into this agreement.*

*This includes the ordinary risks of litigation together with those specific issues which we regard as relevant and appropriate to take into account in relation to your claim."*

63. The success fee in the CFA is two staged: it rises from 20% to 100% of the base costs three months before trial. The risk assessment in the papers provided to me, which appears to be substantially generic in nature, provides three levels of risk, High, Medium and Low. The case is said to have fallen within the third category, Low Risk, which prescribes, as far as I can see, a success fee of 20%. The following is said about cases which call into this category:

*"Low Risk*

*Evidence on liability is strong. Identity of defendant and insurer are known or obtainable. Likelihood of early admission of liability but possible issues on causation/ quantum."*

64. Like Counsel instructed to provide an advice on IM's claim, I have not found a bespoke risk assessment.

65. I find it difficult to see that the Claimant could have failed to recover significant damages given the serious nature of his injuries and the circumstances of the accident as they would reasonably be known to the solicitors- - albeit there may reasonably have been an anticipation of significant improvement and recovery. I am not satisfied that there was any real doubt as to how the accident occurred as at the time when the CFA was entered into: the risks in respect of primary liability, and I might add- contributory negligence, were essentially theoretical in nature.

69. The real difficulty in this case appears to lie in clause 10 of the CFA and in assessing the risk that the solicitors might lose the right to recover part of their fees as a result of the Claimant's failure to beat a Part 36 offer which he had rejected on their advice ('the Part 36 riks').

70. Two decisions were relied upon in the written advice of counsel on the approval application for the proposition that a success fee of 20% was usual and reasonable in these circumstances: *C v W* [2008] EWCA Civ 1459 an *NJL v PJL* [2018] EWHC 3570 (QB).

71. In *C v W* [2008] EWCA Civ 1459 the Court broke down the elements that constituted the Part 36 risk' as follows: firstly - the chance that a Part 36 offer would be made, secondly- the chances that such an offer would be made at an earlier or later stage in the proceedings, thirdly- the chance that the solicitors would advise the litigation friend to reject it, fourthly - the chance that she would accept their advice and fiftly- the chance that, having rejected the offer, she would fail to beat it at trial .In considering these matters, Moore-Bick LJ said:

*"Some of these might be assessed with a degree of confidence: for example, one could confidently predict in a case of this kind that a Part 36 offer would be made at some stage. One might also predict, though perhaps not with quite the same degree of confidence, that Mrs. C would reject such an offer if her solicitors advised her to do so. The timing of an offer was more difficult to predict, but was potentially of some importance because only fees earned by the solicitors after its rejection would be at risk; fees earned up to that point would be secure. The chance that Taylor Vinters would advise Mrs. C to reject an offer which she subsequently failed to beat at trial is difficult to assess, but one would not expect highly experienced solicitors practising in this field to differ very widely in their assessment of the bracket in which an award would be likely to fall, provided they had access to the same information. That would include access to any evidence of contributory negligence which, if established, would*

> *reduce the amount of the award. The task facing Taylor Vinters in May 2001 was to assess, as best they could, the risk of losing part of their fees for reasons of that kind, and then expressing that as a percentage of the total fees likely to be earned to trial. Only by doing so could they calculate a success fee expressed as a percentage uplift on the whole of their profit costs. However, the explanation form shows that they did not attempt to grapple with that task and indeed I doubt whether they had the means of doing so in any reliable way."*

72. The claimant's claim for damages in *C v W* arose out of road traffic accident; she was a passenger in motorcar driven by the defendant to the and suffered a head injury. There were risks identified in respect of contributory negligence: the defendant in that case asserted that the claimant had failed to wear a seat belt and had allowed herself to be driven by a person who was unfit to drive through drink. There were also risks going to the level of the claim: evidence emerged which tended to suggest that some of the damage the claimant's brain might have been caused by excessive consumption of alcohol and therefore pre-dated the accident; also the Claimant had developed of breast cancer with its consequent implications for her life expectancy and thus the amount required for her future care. The court considered success fee of 20% was reasonable. This was based on assessment of the risk in overall terms of 17%. There are, I would agree, some parallels between that case and this. However the determination of the uplift in that case is of a single stage success fee, not as here the first stage of two-staged success fee.

73. In *NJL v PJL* [2018] EWHC 3570 (QB) the claimant suffered catastrophic injuries including head injuries also in road tariff accident. The claim settled at a sum which capitalised at about £2m. It appears that full liability was never at risk and this was known to the Claimant's solicitors at the time when they entered into the relevant CFA. As to the quantum risk Spencer J noted as follows:

> "*According to Miss Kate Nicklin, a solicitor employed by Irwin Mitchell and who provided a witness statement dated 9 March 2016, the impact of the Claimant's head injury on his life and on the assessment of damages was very much in dispute, with the Defendant relying upon the fact that the Claimant had been born prematurely (at 32 weeks' gestation), he had been subjected to violence and sexual abuse by his parents when a child, he had sustained four unrelated head injuries prior to the accident including one which had involved retrograde amnesia, there was a family history of epilepsy, the Claimant exhibited learning difficulties and behavioural problems at school and he was a drug user who had been in trouble with the police. Miss Nicklin also stated that there was a gulf between the medical experts instructed by the parties, with the Defendant's experts suggesting in their reports that the brain injury, though indisputably severe, may have made little or no difference to the Claimant's life trajectory."*

74. As to, specifically, the Part 36 risk, Spencer J said as follows:

> *40. Firstly, so far as the "timing" risk is concerned, in my judgment, as at August 2012, the Claimant's solicitors could have anticipated the Defendant making a Part 36 offer relatively late in the proceedings. In Fortune v Roe, Sir Robert Nelson, a very experienced judge in personal injury actions, stated at paragraph 49:*
>
> *"It was also probable, given the size and complexity of this claim, that such an offer would probably be made late in the proceedings."*

> *This is also my experience of dealing with many such cases when I was still at the Bar. In fact, the timing of the Part 36 offer in this case mirrored exactly the timing which I would have expected an experienced solicitor to have anticipated in a case of this nature when the CFA was entered into. It seems to me that even on a conservative estimate the solicitor should not have anticipated more than 25% of his costs being at risk.*
>
> *41. The second main element relates to the chance of a Part 36 offer being made, being rejected on the solicitor's advice and then the Claimant failing to better that offer at trial. I do not know, of course, Mr Davis' "track record" in that regard but I would be surprised if a solicitor of his experience had found himself in that position on many occasions. Furthermore, at the time that the CFA was entered into, he could have anticipated that he would have the advice of Leading Counsel to rely upon in relation to consideration of any Part 36 offer. With the combined forces of his own experience and that of Leading Counsel, I would be very surprised if he would have anticipated the risk of a Part 36 offer being rejected and then not bettered at trial as being as high as 50% or anything like it. However, even if the risk is taken as 50%, if it is only 25% of the costs which are at risk, then the overall chance of success is 87.5% (100 – (50% x 25%)). Using the ready reckoner this would justify a percentage increase of 14.29%: on this basis, even a 20% success fee would be regarded as generous*
>
> *42. In any event, the Claimant, in my judgment, clearly fails to achieve a success fee of 21% or more so as to avoid the statutory reduction to 12.5%. Having discussed the risks and the proper approach of a reasonable cost judge and a reasonable solicitor with my Assessor, I conclude that a reasonable success fee might, at a pinch, have been assessed at 20% but certainly no higher and probably lower. In any event the success fee which I would substitute in this case for the 65% reached by the District Judge should be one of 20% which then reduces to 12.5% by reason of the provisions of CPR 45.19 . The same shall apply to CFA3."*

75. It does not appear that Spencer J was addressed on the question as to whether the increase in success fee under the provisions of r45.9 should the matter have gone to trial would impact on the success fee payable in the circumstances that arose in thar case. It was not, as I understand it, an issue that the judge needed to address in the circumstances set out above as he was not persuaded to depart from the success fee of 12.5% by more than 20% (as per the the default provisions of 45.19). It is however notable that the Judge, who is and was highly experienced in dealing with claims such as this, was concerned that in any event a success fee of 20% appeared generous; and he did not in the event need to consider whether it was too generous because of the manner in which the default provisions worked.

76. In the event I am not persuaded that these two decisions do support the case that a claim for a 20% success is usual or reasonable in the context of two staged success fee where the second stage rises to 100%, particularly one that does so three months before trial.

77. It seems to me to be clearly reasonable for the solicitors to enter into a two staged success fee. But if solicitors are going to do so on terms which provide that if the matter proceeds to trial their success fee will be 100% (even in a case where liability is not likely to be in issue) then that must be balanced by a lower success fee at an earlier stage. If 20% were reasonable for what was essentially a part 36 risk on single stage success fee, then the uplift

for the first stage must be below this: if it were otherwise the solicitors would be substantially over-compensated for the risk that they are taken.

78. Put another way, if the matter were to proceed to trial, or the matter settled within three months of trial, the solicitors would have been compensated by a success fee of 100% on their time costs up to the last day for acceptance of the Part 36 offer. It might then be asked, what further risk does the 20% uplift up to three months pre-trial cover? Presumably it is the possibility that a Part 36 offer is made which solicitors advise should not be accepted but in respect of which a decision is thereafter made to accept and, further, that the Claimant does not recover his costs from the Defendant from the date of expiry of the offer. Whilst this is no doubt a real risk it is difficult to see following *C v W* that it could justify the success fee claimed: this and other such possible eventualities would appear to be pretty rare occurrences.

79. In this case no real risk was identified in respect of contributory negligence at the outset. However the CFA was entered into an early stage and it would not have been possible to predict with any degree of confidence the precise risks that might emerge in respect of quantum and causation - albeit it could be assumed there would be some significant issues. Hindsight has to be ignored in the determination of a success fee. I accept that it was reasonable to anticipate issues arising in respect of quantum of the sort that arose.

80. To my mind, there was a clear risk that a Part 36 offer would be made which the solicitors might advise the Claimant to reject and the Claimant would not better at trial. As the chronology in this case indicates it cannot always be assumed that settlement negotiations will take place at a late stage; but even if discussion takes place at an early stage the amount of solicitor's costs that will be incurred before any offer is made would be a substantial proportion of the eventual costs (as the claim for costs in this case illustrate). Moreover in line with observations of Spencer J I would assess the risk that experienced solicitors and counsel, in effect in combination, advise the Claimant to reject a Part 36 offer which the claimant then fails to beat as modest. As Spencer J observed it is difficult to see that the prospects of this occurring at trial as high as 50% or indeed anything like this level of risk (and yet it was this figure which the learned Judge took for illustration purposes in considering the overall risk in *NJP*).

81. Under the former fixed two-staged success fee regime in RTA cases in rule 45.19 at it then was a success fee of 12.5% would be payable in an *inter partes* recovery if the claim settled pre-trial. This figure was reached, as I understand it, after extensive negotiation involving relevant affected parties under the auspices of the Civil Justice Council, the CJC. That, as starting point, seems to me to be a better benchmark for the reasonable success fee in respect of a two stage success fee rising to 100% as here. Provisionally then my view is that 20% is too high bearing in mind the risks which were identified and having regard to the fact that this was a two stage success fee with no substantial liability risk.

82. However although not stated as a reason for the success fee uplift in this case, nevertheless, two further matters are customarily relied on as justifying a success fee claimed by a solicitor against a client: firstly, the delay in payment of the solicitors' own fees and, secondly, the arrangements made for the payment of disbursements such as expert reports. As to the former point solicitors do not generally get paid until success has been achieved on a CFA. This may happen relatively quickly if liability is admitted and interim payments as to costs are made; but otherwise there may be considerable delay. As to the latter point, ATE insurance commonly provides insurance against a non-recovery of disbursements but solicitors dealing with claims such as this, I understand, will generally bear the initial costs.

That said these matters are also compensated by the application of judgment rate interest to costs following on from any costs order at the end of the substantive claim, *Simcoe v Jacuzzi UK Group plc v [2012] WLR (D) 35* (see generally [39] to [48])[9] and the extent to which these points can affect the level of uplift is perhaps modest (it was commonly about 2% in many pre-LASPO CFA's, as I recall).

83. I understand that the litigation friend knew that the success fee was not recoverable from the Defendant. There is however no real basis however for thinking that litigation friend would have been able to consider the reasonableness of the success fee, and thus that any approval, by her entry into the CFA, was informed. Moreover if the CFA were to be regarded as a CBA it would in any event be for me to consider the reasonableness of the success fee in any event.

84. In deciding what a reasonable success fee is, I think I should bear the additional funding matters (referred to in [82] above) in mind. I have not however been provided with any bespoke risk assessment (and I am not sure that there was anything about this case which took it out of the category of standard, high-value personal injury cases). Nor has the success fee in this case been justified on the basis of these funding matters and nor indeed have I currently been given any real basis for understanding why as much as 7.5% would be justified for such matters. In these circumstances I will provisionally allow 15 %.

85. As I understand the statutory cap would not reduce the success fee claimed. So the success fee I provisionally allow is the application of this percentage to the solicitors' time costs I have allowed above.

## C. The ATE policy premium

86. Although the decision in *Herbert v HH Law* [2019] EWCA Civ 527 (at [71]) is to the effect that this premium is not a disbursement, in my view the consideration by the Court of the reasonableness of the premium, being (as I understand it) an expense of the litigation friend, is mandated by CPR 21.12. Further, it seems to me to be clearly sensible that this is dealt with by the SCCO in an assessment rather than by application in another court.

87. The policy in this case provided insurance in respect of the non -recovery of disbursements and other side costs following a Part 36 offer. Notwithstanding QUOCS protection I am satisfied that the figure of £1,932.00 being the amount premium (inclusive of IPT), is not a premium that can be said to be unusual in amount and, to my mind, it was reasonably incurred.

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[9] See also perhaps my own decision in *Nosworthy v Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust* [2020] 4 WLUK 387