



Neutral Citation Number [2022] EWHC 2919 (SCCO)

SCCO Ref: SC-2021-APP-001163

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Date: 17 November 2022

Before :

Costs Judge Brown

Between :

MNO
(a protected party, by his Litigation Friend KLM)

Claimant

- and -

HKC (1)

DGS (2)

Defendants

Roger Mallalieu KC
(instructed by and for Irwin Mitchell LLP)

Hearing dates: 29 September 2022
Further submissions were received on 4 November 2022

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.

.....
COSTS JUDGE BROWN

Costs Judge Brown :

1. I am required to assess the success fee payable by the Claimant, a protected party, to his solicitors, Irwin Mitchell LLP ('IM').
2. The Claimant was very severely injured in a road traffic accident that occurred on 17 June 2013. Pursuant to an order of Mr Justice Lavender on 17 June 2020 he recovered £5.25 million in an award of immediate damages together with an order for periodical payments from the Defendants (on a capitalised basis the value of the damages payable is said to be over £9 million). The Defendants were ordered to pay the Claimant's costs subject to detailed assessment on the standard basis.
3. The order also provided that unless the claimants' solicitors waive their entitlement to be paid by the claimant any shortfall in the cost recovered *inter partes* as they may otherwise be entitled to under the terms of the retainer, there was to be a detailed assessment of the solicitor/client costs incurred on behalf the claimant and of the amount which is reasonable for the claimant's solicitors to recover from the claimant pursuant to CPR 46.4.
4. IM did not waive their costs but have pursued a number of heads of claim. I have approved the recovery of the costs of ATE insurance premium against the Claimant. I was in the process of assessing a claim against the Claimant for the 'shortfall' of base costs not received the defendants for the work that they did on the claim (after transfer of the file from previous solicitors) when that particular claim was withdrawn. The success fee is the third head to be dealt with and is claimed pursuant to a conditional fee agreement dated 9 February 2015 entered into by IM and the Litigation Friend.
5. This being a detailed assessment of costs liability as between solicitor and client pursuant to CPR 46.4 it is an assessment on the indemnity basis and any doubt is to be exercised in favour of the solicitors.
6. I remind myself that in *Simmons v Castle* [2012] EWCA Civ 1288 ([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, such loss exposing the claimant to a liability to pay for the same from his damages.
7. Further, the amount sought by way of success fee is subject the statutory cap imposed under Section 58(4B)(c) of the *Courts and Legal Services Act 1990* and Article 5(1)(a) of the *Conditional Fee Agreements Order 2013*; it is clear that the sum claimed by way of success fee does not exceed this cap.

Relevant provisions

8. CPR 46.9 provides:

Basis of detailed assessment of solicitor and client costs

(1) This rule applies to every assessment of a solicitor's bill to a client except a bill which is to be paid out of the Community Legal Service Fund under the Legal Aid Act 1988⁴ or the Access to Justice Act 1999⁵ or by the Lord Chancellor under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

(2) ...

(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.

The claim

9. The success fee payable to IM is payable as a percentage of the recovered underlying time or profit costs. The recovered profit costs are calculated by IM at £467,077.20 net of VAT. A success fee uplift of 20% is claimed.

10. 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.”

11. Under the heading Stage 1 Success Fee three levels of risk are provided, High, Medium and Low. The case is said to have fallen within the third category, Low Risk, which prescribes a Stage 1 success fee of 20% if the case settled at any time prior to three months from the date of the trial (or the first date of the trial window). The prospects of success are said to set out in a table which appears in the risk assessment.

12. In the table the claim is said to fall within the category of Low Risk cases which are described (generically) as follows:

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

13. Under the heading Specific Case Information case the assessment reads:

“Liability evidence is strong- criminal convictions have been secured against the drivers of both of the vehicles involved and the identity of the insurers will be obtainable following transfer of the file.”

The prospects of success were described as over 75%.

14. Mr Mallalieu KC provided me with a fairly brief explanation of the accident and did not go in detail into all the facts known to the solicitors; that was because, as I understood him, I accepted on the facts and matters known to the solicitors when they entered into the CFA that there was no material or substantial risk in respect of liability affecting the success fee.

15. Some further setting out of the background in respect of what was a tragic accident is however, I think, appropriate. It occurred in the early hours of the morning. The Claimant was then aged 18 years old. He was a passenger in a Fiat motorcar being driven by the First Defendant, a friend, along the M25. They were returning from a festival. It seems that the Fiat collided with the rear offside corner of another vehicle, an HGV lorry. The collision between the Fiat and the lorry caused the Fiat to spin at speed, thereafter colliding with the central reservation and coming to rest sideways-on to the traffic. The First Defendant and the Claimant were, as I understand it, physically unharmed at this point. The Fiat was however then shunted a significant distance by the vehicle driven Second Defendant. As I understand from documents I have seen the Second Defendant conceded at interview that he did not see the Fiat; it appears to have been suggested that he made no obvious attempt to brake or avoid the stationary car. I also understand from some of the papers that I have seen that Second Defendant was found to be over the breath/alcohol limit at the time of the collision. In any event as I understand it he promptly pleaded guilty to an offence of careless driving in respect of this incident. The First Defendant subsequently and substantially before the instruction of IM pleaded guilty to an offence of careless driving (I am told that she did not initially plead guilty but there was evidence as I understand that she had fallen asleep while driving).

16. There was no real exploration of the extent of IM’s knowledge of such matter at the time of entering into the CFA. There had been no formal admission of liability and the convictions of the two defendants were not of course *per se* determinative of liability, but I understand from such material that I have seen that there was no real doubt that liability would be established (leaving only a dispute as to the respective shares of liability between the Defendants). The way it was put by Mr. Mallalieu is that one could ‘never say never’ but I understood from him, confirmed by what I saw in the papers, in substance that the only serious risk in the case was what was might be referred to as the ‘Part 36 risk’.

17. The following is set out under the heading Stage 2 Success Fee: Trial Risks

If your claim does not settle and, after the issue of court proceedings, it progresses beyond a point in time which is 3 months before the date fixed for trial or the first date of the trial window then our assessment of the prospects of success and of the risks shall also incorporate the following additional risk factors:

- Your opponent will have been legally advised that they have good prospects of winning at trial.*
- You and your opponent will have exchanged all relevant evidence and if no settlement has been achieved it is assumed that your claim will be fought to trial.*

- *The outcome at trial when numerous unpredictable factors could arise will be very difficult to predict.*

If your claim settles in Stage 2 or is successful at trial the Success Fee is 100%.

18. The Claimant had previously instructed other solicitors and only modest interim payments had been made. But there was no doubt that the Claimant has suffered very serious brain injuries having spent a long time in a coma in hospital.

19. The CFA provides:

Part 36 Offers Made by Your Opponent

If your opponent makes a Part 36 offer in an attempt to settle your claim then, providing that you have complied with your responsibilities under Condition 2 of this agreement the following consequences will apply:

- *If you accept the Part 36 offer then you have won your claim and Condition 8 above will apply.*

- *If you reject the Part 36 offer in accordance with our advice, your claim continues and you recover damages which are more advantageous than the offer then the effect is that you have won your claim and Condition 8 above will apply.*

- *If you reject the Part 36 offer in accordance with our advice, continue to pursue your claim and your claim is finally decided in your favour (whether by judgment, court order, award, agreement or otherwise), but the amount of damages awarded to you is less than the Part 36 offer (or is determined by the court to be less advantageous to you than the Part 36 offer) and your opponent is not ordered to pay your legal costs from the date of expiry of the relevant period. If this happens then, although you will have won your claim under the terms of this agreement the consequences in relation to legal costs will be as follows:*

(1) You will be liable to pay our full legal charges for the work done before the expiry of the relevant period. You should be entitled to recover the majority of our basic charges, the disbursements and VAT from your opponent for that period.

(2) We will not charge you any basic charges or success fee after the expiry of the relevant period.

You will, however, remain liable to pay the disbursements incurred thereafter which we will normally recover from your insurers under your LitigATE policy (up to the limit of indemnity under the policy).

(3) You will probably be ordered by the court to pay your opponent's legal costs incurred after the expiry of the relevant period, but these would be limited to the amount of your damages. You will be covered under your LitigATE policy for your opponent's legal costs. (my underlining)

20. It is also relevant to note, as Mr. Mallalieu pointed out, where there are multiple defendants there may be a risk that the claim is successful against one defendant but not against

others and the claimant may not recover his own costs of pursuing the other defendant/s. Clause 9 of the CFA provides a waiver of IM's base cost and success fee in respect of the work done to pursue any claim against such a defendant¹. However, as I understand from his submission, not only was it anticipated that liability would be admitted by at least some of the defendants (that being sufficient to recover 100% of the damages) in any event the Claimant could, confidently, be expected to recover the costs of pursuing any other defendant on the basis that the involvement of the other defendants would have come about because that defendant had been blamed by the other unsuccessful defendant (see *Irvine v Commissioner of Police for the Metropolis* [2005] EWCA Civ 129 CA). Again, Mr. Mallalieu did not suggest that there was a significant risk in relation to this matter in this case and I did not understand that the solicitors considered this to be a case where the existence of multiple defendants exposed the claimant's solicitors to any significant increased risk in respect of the solicitor's own fees.

21. I accept that the real and substantial risk in this case lay in Clause 10 of the CFA and the difficulty that arises in assessing the risk that the solicitors will not be able to recover part of their fees as a result of the failure on the part of the Claimant to beat a Part 36 offer which he had rejected on their advice ('the Part 36 risk'). In that event, and barring any order in the Claimant's favour despite not having beaten a Part 36 offer, they would not be paid for their costs once the date of acceptance of the Part 36 offer had passed. As such, and I understand it not to be in dispute, the case falls in broad terms within a category of cases covered by the guidance found in *C v W* [2008] EWCA Civ 1459 and *NJL v PJJ* [2018] EWHC 3570 (QB).

General approach to the assessment of the reasonableness of success fees

22. It is plain that when success fees were recoverable from defendants in general personal injury litigation the reasonableness of the success fee was in general to be assessed by reference to the litigation risk. The justification for the fee was that good cases should pay for bad cases, that is to say successful cases should pay for the losing cases (*Callery v Gray* [2001] EWCA Civ 117²). I did not understand Mr. Mallalieu to argue that in principle a different approach is appropriate here, where the assessment is between a solicitor and a client (and not on an *inter partes* basis) albeit in other cases success fees as between solicitor and client can be justified by delays in payment and disbursement funding (see below).

23. The court is required to consider the reasonableness of the success fee without the benefit of hindsight; that is to say, it must not assess the success fee by reference to what actually happened (ie in this case settlement of the claim) but, in accordance with subrule 46.79 (4), having regard to all the relevant factors as they reasonably appeared to the solicitor when the conditional fee agreement was entered into. I acknowledge, as did Mr. Mallalieu, that sometime events afterwards can confirm or indicate the reasonableness or otherwise of an assertion of risk, and his submissions proceeded on this basis.

24. In an earlier claim, *BCX v DTA* [2021] EWHC B27 (Costs), also a claim for serious injuries arising out of a traffic accident, I rejected on a provisional basis a claim for success fees of 20% (see in particular [61] to [85]). The solicitors in that case, also IM, had entered into a two stage success fee in similar circumstances and the only substantial risk was Part 36 risk.

¹ Assuming compliance with condition 2 of the CFA (which requires co-operation reasonable instructions on the part of the client).

² See too *Oliver v Whipps Cross* [2009] EWHC 1104 (QB)

I allowed 15% (provisionally). In the event and although a challenge to this had been intimated this was not pursued. I allowed, I think, 15% in two other claims brought by IM which gave rise to the same or similar issues, in one of those IM effectively conceded an uplift 15% on the facts of the case (without prejudice to their contention that 20% was the right amount), I recall correctly, at the hearing of the claim. This is therefore perhaps the fourth time in the last year or so that I have been asked to consider what is largely or substantially the same matter by IM.

25. In *BCX* it was contended that a success fee of 20% was usual and reasonable in the circumstances with which I am concerned. In coming to my conclusion to allow 15%, I had regard to the written advice of counsel on the application to approve the deductions and his reliance on the cases of *C v W* and *NJL* as to the proper approach to the assessment of risk. Indeed I addressed the cases in some detail. It is however necessary for me to do so again in the context of the arguments now pursued.

26. In *C v W* the Court broke down the elements that constitute the risk to Part 36 risks as follows:

- The chance that a Part 36 offer would be made,
- The chances that such an offer would be made at an earlier or later stage in the proceedings.
- The chance that the solicitors would advise the litigation friend to reject it.
- the chance that she would accept their advice and
- the chance that, having rejected the offer, she would fail to beat it at trial .

27. 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.”

28. 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 to 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%.

29. When considering the matter in *BCX* I thought it important to note that the determination of the uplift in *C v W* was of a single stage success fee, not, as here, the first stage of two-staged success fee. Indeed it is notable that in this case that the CFA requires the protected party to pay a 100% success fee if the claim goes at trial, indeed if it settles at a point up to three months before trial or the trial window. It seemed to me to be clear from guidance given in a number of cases (and my own experience) that in cases such as these a considerable amount of not just primary medical evidence but also non medical expert evidence (in respect of, for instance, care needs, accommodation, speech and language therapy) is required in order to ascertain the damages payable. It seemed to me that any settlement of the claim is likely to occur generally later, if not at an advanced stage, in the proceedings and/or the preparation of the evidence (I am told that this case settled just three months before the date of trial assessment of damages). This necessarily impacted on the costs at risk.

30. In *NJL* the claimant suffered catastrophic injuries including head injuries, also in a road traffic accident. it settled at a sum which capitalised at about £2 million. 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.”

31. 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% ($100 - (50\% \times 25\%)$). 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%. ...”

32. In [BCX](#) I considered that the underlying reasoning of the decision of Spencer J indicated that a success fee for a first stage success of no more than 15% was reasonable. It seemed to me that if no more than 20% were reasonable where the uplift was a single stage success fee, where the success fee is two staged such that it provides for a substantial uplift of the success fee to reflect the risks at trial (an assessment of damages) it followed that the uplift for the first stage should be substantially less than 20%. Indeed, in the case of a two staged success fee the more obvious starting point for considering the reasonableness of the success was, it seemed, the earlier provisions of CPR 45 by which the first stage was 12.5% leading to 100% payable to a claim which is determined or resolved at trial. These provisions reflected the agreement reached by a substantial number of interested parties under the auspices of the Civil Justice Council (CJC).

33. I should say that although not stated as a reason for the success fee uplift in this case, nevertheless, two further matters might be 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 delay, solicitors acting on a conditional fee agreement (CFA) do not generally get paid until success has been achieved by the terms of the CFA. This may happen relatively quickly if liability is admitted and interim payments as to costs are made (which is frequently the case); but otherwise there may be considerable delay. As to disbursement funding, ATE insurance

commonly provides insurance against a non-recovery of disbursements but solicitors dealing with claims such as this, I understand, may 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]) 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). As I indicated above Mr. Mallalieu made it clear that in this case he was not relying on these two factors (delay and disbursements funding) to justify the success fee.

The arguments in this case

34. Mr. Mallalieu pursued specific arguments on three points which he made against the backdrop of *BCX*. I should say that these arguments, although somewhat involved, were largely advanced orally, and went at least in part beyond the skeleton argument which had earlier been filed. I have of course endeavoured to ensure that I have dealt with the detail of all the arguments that have been advanced (but if I have not specifically dealt with the detail of everything argued I have nonetheless considered it). The arguments proceeded on the (correct) assumption that there was some familiarity generally with the relevant authorities.

35. The Litigation Friend was not at the hearing and was not represented (for understandable reasons) but both sides of the arguments were explored in the course of the hearing and indeed further written submissions were made by Mr. Mallalieu in the circumstances set out below.

Approval and the presumptions in CPR 46.9

36. Mr Mallalieu contended that the Litigation Friend had approved the success fee uplift by entering into the CFA, that this approval was informed and this in turn meant that the success fee uplift of 20% was presumed reasonable.

37. It is clear that in an assessment under the CPR 46.4 I am required, at the very least, to have regard to the presumptions in CPR subrule 46.9 (which I have set out above). Subrule 21.12 (4) provides that, as regards a claim by a litigation friend for costs against a protected party, 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.

38. Mr. Mallalieu accepted that approval for these purposes had to be informed: see *Macdougall v Boote Edgar Esterkin (a Firm)* [2001] 1 Costs L.R. and *Herbert v HH Law Ltd* [2019] EWCA Civ 527 [37] and [38]). In *McDougall* Holland J, in the context of an argument about hourly rates and the presumptions (in the RSC), said:

“To rely on the Applicants' approval the solicitor must satisfy me that it was secured following a full and fair exposition of the factors relevant to it so that the Applicants, lay persons as they are, can reasonably be bound by it.” (my underlining)

39. In *Herbert* Sir Terence Etherton MR said :

“Counsel were agreed before us that the Judge was correct to hold that “approval” in CPR 46.9(3)(a) and (b) means informed approval in the sense that the approval was given following a full and fair explanation to the client (although there was dispute

between them as to the reasoning and significance of the Macdougall case cited by the Judge). We agree.”

40. Mr. Mallalieu suggested that there was an unusual feature in *Macdougall* which led the court in that case to conclude that the hourly rates in that case were not approved, that feature being that the hourly rates increases which were applied retrospectively. I do not think that provides any basis for saying that the approach set out in *Macdougall* in determining whether any approval in CPR 46.9 (3) could be said informed was wrong or could be distinguished.

41. Further, the decision in *Belsner v Cam Legal Services* [2022] EWCA Civ 1387 (in which the Court of Appeal were primarily concerned with CPR 46.9 (2)) confirms, that informed consent was required under 46.9 (3). The Master of the Rolls, Vos LJ said:

The Court of Appeal approved a concession by counsel in Herbert v. HH Law Limited [2019] EWCA Civ 527 (Herbert) that the term "approval" in Part 46.9(3) meant approval following a full and fair explanation to the client: i.e. informed consent.

42. The Court not go on to say the approach in *Herbert* was wrong. Neither in *Herbert* nor in *Belsner* did the Court of Appeal disapprove of the formulation of Holland J.

43. I might add, albeit it does not alter my primary conclusion, that it appears that me that there is an inter relationship between the fullness and fairness of the explanation require and the issue as to whether it was reasonable for the client to be bound by it. On one reading Holland J made it clear that the explanation required has to be sufficiently full and fair that it was reasonable for the client to be bound by it. In any event it seems to me that for the court to be satisfied that approval was informed, in the ordinary case that would necessitate a full and fair explanation of factors relevant the amount of the success fee. If the client is taken to have approved it in the amount claimed the factors which go to explain how it is reached would need to be set out for the client be reasonably bound by it.

44. I might add that at hearing, which took place before the decision of the Court of Appeal in *Belsner*, I raised the issue as to whether the reason why consent needed to be informed was because the solicitors were considered when negotiating their retainers to be in a position that they could exercise undue influence. In *Clare v Joseph* [1907] 2 KB 369 Fletcher–Moulton LJ explained at p376 that this was the concern to which the precursors³ of the current provisions dealing with contentious business agreement (found in Part III of the Solicitors Act 1974, ss 56-66) were directed^{4 5}. In any event it was anticipated that the Court of Appeal might address the issue of informed consent when hearing the appeal in the *Beslner*, and Mr. Mallalieu reserved his position on the particular point. He did not however seek an adjournment of the case pending the decision. In the event however I permitted Mr Mallalieu an

³ In the Attorneys and Solicitors Act 1870

⁴ See too my own decision in *EVX v Smith* [2022] EWHC 1607 (SCCO) in which I sought to set out what I understood to be uncontroversial background to these provisions.

⁵ On this see too, the judgment of the Master of the Rolls, Esher LJ, in *re Stuart, ex parte Cathcart* [1893] 2 QB 201

opportunity to put in further submissions on behalf of IM if they so wished do so once the decision became available.

45. Mr. Mallalieu did make further submissions. He said that the decision in *Belsner* disposes of the argument that solicitors owe clients a fiduciary duty when negotiating the terms of their retainer; that is because when solicitors and a client are negotiating the terms of the solicitor's retainer, the client does not have any reasonable expectation that the solicitors will not be acting in the negotiation in their own interests [74]. It is also said that the decision in *Belsner* judgment disposes of any related argument that the solicitors may be acting in a position of undue influence when negotiating the terms of their retainer. He says that the first stage of the 'presumed undue influence test' set out in following passage in *Royal Bank of Scotland v Etridge* [2002] 2 AC 773 is not made out:

104. Presumed undue influence is different in that it necessarily involves some legally recognised relationship between the two parties. As a result of that relationship one party is treated as owing a special duty to deal fairly with the other. It is not necessary for present purposes to define the limits of the relationships which give rise to this duty. Typically they are fiduciary or closely analogous relationships.

46. The effect, Mr. Mallalieu says, of the decision in *Belsner* is that it strips away a possible layer of legal argument concerning whether the Litigation Friend's agreement to matter such as the success fee is, in some way, 'invalid' (by virtue of any presumption of undue influence).

47. Whilst I had raised the issue, and thus I understand why further submissions have been made, it does not matter why for these purposes consent has to be informed. There is no dispute, as I see it, that it is for the court to determine what is reasonable for the protected party to pay having regard of the presumptions that apply in CPR 46.9 (3), and as I have already noted the Court of Appeal have not removed the need for informed consent. Whilst it may be the case the reason for the presumptions applying (and that this is not a simply claim on a contract) lies not in any presumed undue influence, as now defined, but in more general concerns, it is nevertheless clear that I am required to determine the reasonableness of the costs claimed; it is also clear that the approval or agreement to the success fee is relevant only insofar as it is informed and even then it only gives rise to a presumption. Indeed as Mr. Mallalieu acknowledges solicitors do in any event have obligations to provide clients with costs information and to treat clients fairly (see *Belsner*, inter alia [80]).

48. Turning back to this case then I should say that it seems to me that the reason for setting a success fee at a certain level will be beyond the normal understanding of a lay person. Mr. Mallalieu did not submit otherwise but relied in particular upon a number of documents to show that approval was on an informed basis including the CFA and other documents such as attendance notes and letters written to the Litigation Friend. It is clear that the Litigation Friend was well aware that a success fee was payable, that the fee was not recoverable from Defendants (so that it would be paid out of damages) and that it was subject to the statutory cap. It would have been clear that the amount of the success fee was based on risk and calculable as a percentage of the solicitor's profit costs. And although the risk assessment did not expressly refer to the Part 36 risk I think for these purposes it can be assumed that from

a reading of the CFA the Litigation Friend would have been aware that there was some risk.

49. Mr. Mallalieu also relied upon passages from *Herbert v HH Law Ltd* [2019] EWCA Civ 527 in particular,

“It is important to bear in mind that the complaint of Ms Herbert on this issue is not that she should have been sent a more detailed invoice or further invoices but that she did not give her informed consent to the charging of the success fee and its amount. There is no merit in that complaint (subject to the risk point addressed below) because all the information relating to its imposition and calculation and to her exposure to HH’s fees generally, in the circumstances which occurred, was clearly set out in the documentation with which she was provided before agreeing HH’s retainer. The retainer letter said that any contribution by her towards HH’s costs under the CFA would be limited to 25% or less of her recovered damages. It told her who, within HH, would have the initial responsibility for dealing with her claim and the person having overall supervision for the claim. The CFA said that, if she won the claim, she would pay HH’s basic charges, their disbursements, the success fee and the ATE premium. It said that HH would use their best endeavours to recover maximum costs from the defendant and their insurers. It set out the way the success fee would be calculated, and specified that there would be a cap of 25% of the elements of damages described. The “What you Need to Know” document also stated that, if HH won her claim, she would be liable to pay HH’s basic charges, their disbursements, the ATE insurance premium and a success fee, and that her contribution towards her costs liability would be limited to up to 25% of the damages she obtained. That document also set out how the basic charges were calculated, and the hourly rate to be charged, and the imposition of VAT. Subject to the point on litigation risk and the success fee, the totality of that information provided a clear and comprehensive account of her exposure to the success fee and HH’s fees generally.

Mr. Mallalieu’s point was that that aside from the litigation risk all other matters were adequately explained in that case which supported his case that an adequate explanation was given in this case.

50. It seems to me clearly to be the case that the Litigation Friend gave informed consent to the payment of a success fee out of damages. I am not however satisfied that the other documents including and attendance notes to which he has referred me established informed consent as to the amount of the success fee.

51. Whether consent is informed consider is necessarily a fact specific issue. The adequacy of the explanations provided in *Herbert* should perhaps be seen in the context arguments which were advanced to the court (set out at [46] of the decision); moreover the Court was concerned in that case that there was no adequate explanation of the litigation risk (in circumstances where the success fee was set on generic basis as “standard” [53] and, perhaps, a firm specific risk). If litigation risks are to justify the success fee, as here, there would for the presumption to arise there would need to be some explanation as to how the Part 36 risk translated into a 20% success fee. The litigation friend can, I think, be assumed to be aware that a Part 36 risk would justify some success fee but I am not satisfied that there was any explanation as to how the percentage of 20% was reached. This is, perhaps, particularly significant in circumstances where a 100% success fee was to be payable if the matter were to settle within three months

of a trial window or was resolved at trial. In the absence of explanation on these matters, I do not think that in totality the explanation can be regarded as full or fair and thus, in my view, sufficient for the presumption of reasonableness to arise; nor do I think it is reasonable for the client to be bound by the terms of the CFA.

52. The solicitors can be presumed to be aware of the guidance in *C v W*, that that case involved a single staged success fee and, further, generally that in road traffic accident cases on an *inter partes* basis no more than 12.5% was allowed for a first stage success fee where the second stage is 100% (in accordance with the industry wide agreement and the provision to which I have referred). They would have known that this weighed heavily against a 20% success fee for the first stage success fee where a 100% would be claimed for second stage. They could also be presumed to be aware of the decision in *Fortune v Roe* [2012] 2 Costs LR 288 which also strongly suggests that the staging of the success fee was unreasonably favourable to the solicitors (as I think Mr. Mallalieu, at one point, seemed to suggest - see below). IM did not, as I understand it (and in the absence of any attendance note clearly demonstrating this), explain these matters. I think the necessary inference is that the Litigation Friend simply thought that 20% was in some way a standard success fee for low risk cases and that she simply trusted the solicitors to claim against the damages what was reasonable.

53. I am bound to add that it seems to me doubtful, as Mr. Mallalieu appeared to argue, that informed consent may be obtained whatever the quality of the advice and even if, as I understood him, the explanation was wrong or the risks overstated. It seems to me that there must be some proper explanation as to why the figure of 20% was reasonable if there is to be a presumption of reasonableness, and particularly if the approval or agreement is to be binding. On the case Mr. Mallalieu advanced it was difficult to see why the solicitors could not claim a higher success fee of, say, 50% or indeed 75% as a first stage success fee and the Litigation Friend would not be taken to have given informed consent. This is despite the fact on any measure a success fee at such a level would plainly be unreasonable and over compensate the solicitors.

54. It is, I think, true that very few people will be aware of the factors that are relevant in assessing success fees in cases such as these (even, I might add, lawyers specialising in personal injury); and any explanation might need to refer to some of the guidance to which I have referred and might be relatively complex. But that of itself does not mean that such an explanation would not be required. Moreover, and perhaps most importantly, it is to be borne in mind that not only would informed consent merely create a presumption of reasonableness, the failure to obtain informed consent does not mean that the uplift was not reasonable and cannot in principle be recovered; and thus the absence of any proper explanation does not mean it is not recoverable as against the client. It just means the presumption does not apply.

55. I would add that it seems to me in the context of considering a two stage success fee it might well be said that the terms of the CJC implemented agreement (by which a first stage of 12.5% uplift leads to 100% at trial) was more likely to be regarded as usual, and that a success fee of 20% for the first stage was unusual such that there was a presumption of unreasonableness in this case. That was, I think, how the matter was approached by District Judge Bellamy in *HH v Herbert*; an approach which, if not expressly endorsed, did not appear to be the subject of criticism in the appeal. It is, perhaps, to be noted that the 12.5% which would have been applied on the judge's approach was uplifted to 15% on account of the disbursements funding which the solicitors provided (but which is not relied on as justification

for the amount of the success fee here). Similarly, if on the guidance in *C v W* a success fee of over 20% was unreasonable as a single stage success fee (where part 36 is the only substantial risk) it might be said that it would follow that a success fee set at this level was unusual as the first of two stages and where the second stage was 100%. It is however not necessary for me to take either approach and apply such a presumption in this case, albeit that if it were necessary to do so, I see no particular difficulty with either of them.

56. It perhaps goes without saying that if, contrary to my findings above, the explanation provided here were a sufficient basis for a presumption of reasonableness to arise, I would not however be persuaded, in the circumstances set out above and for the reasons set out above, that the explanation provided was adequate to make it reasonable for the Litigation Friend to be bound by her approval or that I was therefore required to find that the success fee of 20% was, in the circumstances, reasonable. The Litigation Friend is essentially a volunteer who is not, as I understand it, expected to have the expertise of a lawyer or indeed to obtain legal advice when entering into a retainer (albeit if the explanation provided in this case were sufficient, then perhaps he or she should in order to protect the interests of the protected party).

Relevance of the staging

57. Mr. Mallalieu argued that it was irrelevant that the success fee was two-staged. His case was that if I ignored the fact that the success fee was two staged and asked myself simply whether a 20% success fee was reasonable, applying *C v W*, I should conclude that the 20% success fee was reasonable. All I was being asked to do, he said, was to determine what was the reasonableness of the figure claimed by his solicitors. To approach the assessment any other way would be to expose his client to a form of ‘double jeopardy’: that is because, as I understood the effect of this argument, the staging of the success fee was otherwise liable to be considered as unreasonable (in that it might be said to over-compensate his client).

58. Mr Mallalieu illustrated his argument by reference to the step to the second stage success fee of 100%, being three months prior to trial or the start of the trial window. This, he suggested, was liable to be found to be unreasonable following the decision in *Fortune v Roe* [2012] Costs LR 288. In that case Sir Robert Nelson sitting as a High Court Judge rejected an appeal from the order of a costs judge that the success fee claimed under a conditional fee agreement should be 20% rather than the 100% claimed by the claimant’s solicitors in a case which settled within three months of the trial (some 18 days). The CFA in that case was signed and entered into after liability was admitted (and indeed judgment had been entered in the claimant’s favour for damages to be assessed); it provided that the success fee would be 100% of the basic charges if the claim was won at any later time than three months before the date fixed for trial. The learned judge commented to the effect that in cases such as that where they were of a very serious nature, there would be a need for a substantial amount of evidence before it can reasonably be expected that any Part 36 offer would be made and this necessarily meant it would be late in the proceedings (he says “close to trial” at [51]).

59. It does not however follow in my mind that the second stage of a two stage success fee is irrelevant. When I suggested to Mr. Mallalieu that even accepting that the date on which the success fee became payable at 100% might be regarded as unreasonable it did not follow that having a higher second stage for trial or assessment would be regarded as unreasonable. It was not, as I recall, submitted that a 100% uplift at trial, could be regarded as unreasonable

nor did Mr. Mallalieu seek to encourage me in the belief that a 100% uplift at trial was unreasonable.

60. In fact, as I suggested in the exchange with Mr. Mallalieu at the hearing, it might be said that there was indeed a case for saying that an uplifted success of 100% at trial in a case where realistically the claimant was expected to recover very substantial damages for serious injuries was unreasonable. Such a second stage uplift might substantially overcompensate solicitors. That is because even if it were correct that the prospects of failure of a Part 36 offer (which solicitors had advised a client to reject) were not insignificant, the only sums at risk are the costs incurred after the period for acceptance has expired.

61. Nevertheless I do not accept that even if 100% were too high for a second staged success, a two staged success with some significant uplift at trial to compensate the solicitors for the risk that they were then taking was unreasonable. As is well known the setting of two staged success fees was encouraged by the Court of Appeal in *Callery v Gray & Others* [2001] EWCA Civ 1117, see [106- 112].

62. Further, and in any event, as was explained in *U v Liverpool City Council* [2005] EWCA Civ 475⁶, if solicitors have the benefit of increased uplift at trial it follows that the percentage deduction for the earlier stage must be adjusted downwards to reflect that fact. The staging of one stage of a two staged success fees is to be taken into account in deciding the reasonableness of the other stage of the success fee. Even accepting Mr. Mallalieu's broad point that solicitors should not be vulnerable to a double jeopardy, it is difficult to see how it can be said that a solicitor is acting unreasonably in entered into a CFA with two stages providing overall the staging of success fees are not unreasonable. It seems to me that it follows that in this case in deciding what is reasonable as a first stage success fee it is relevant to note that there is substantially increased success fee at the second stage. Thus, if solicitors, as here, enter into a CFA on terms which provide that if the matter proceeds to trial their success fee will be 100% or indeed any increased uplift reflecting the risk at trial (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 than would be payable if it were a single stage success fee.

63. In short I do not think that the solicitors can have it both ways. If 20% were reasonable for what was essentially a Part 36 risk on a single stage success fee, then the uplift for the first

⁶ Brooke LJ said as follows:

21. *In October 2001 the claimant's solicitor would not have had access to the post-2001 evidence or other material cited in paragraphs 12–16 above. When deciding upon a success fee he had two choices. He could have taken the view that this claim would probably settle without fuss at a reasonably early stage, but he wished to protect himself against the risk that the claim might go the full distance and might eventually fail. In those circumstances he could select the two-stage success fee discussed by this court in *Callery v Gray* [2001] EWCA 1117 at [106]–[112], [2001] 1 WLR 2112. In this situation he would be willing to restrict himself to a low success fee if the case settled within the protocol period — or within such other period, perhaps until the service of the defence, as he might choose — and to have the benefit of a high success fee for the cases that did not settle early. As things turned out, he would have benefited on the facts of this case if he had adopted this course: a high two-stage success fee would have been more readily defensible in a case which did not settle until proceedings were quite far advanced.*

22. *Alternatively, he could have selected, as he did in fact, a single-stage success fee, being a fee which he would seek to recover at the same level however quickly or slowly the claim was resolved. In those circumstances it would not be possible to justify so high a success fee.*

stage must be substantially below this: if it were otherwise the solicitors are liable to be substantially over-compensated for the risk. Accordingly, I also reject this argument.

Within a reasonable range of what is reasonable

64. Mr Mallalieu's further and more general point was that the success fee claimed fell within a reasonable range such that it could not to be said be unreasonable.

65. I am not satisfied that there were unusual risks in this case outside those cases broadly covered by the guidance in *C v W* and *NJL*, or, at least that any such risk was apparent to the solicitor at the time when the CFA was entered into. This was expected to be a high value claim and with that greater complexity may be expected. I accept that this will affect the level the risk (see in particular *C v W* [20] where the risk factor was taken to be at about 3%) but it does not appear that this factor justifies a different approach to the risks identified and analysed in *NJL* by Spencer J where he was also considering the Part 36 risks in the context of a high value claim.

66. I accept that 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. It would have been clear that there was likely to be an issue about the claim for loss of earnings and an issue as to how the losses would be projected forward- noting in particular the Claimant's age and that he was not established in any career. An issue about accommodation costs could be anticipated; as to whether, perhaps, the Claimant would require in residential care as indeed occurred. It could also reasonably be anticipated that there would be issues about life expectancy (albeit to some extent this mitigated by availability a periodical payments order). I understand that in the event there were issues about epilepsy risks and whether they were, as I understood it to be put by Mr. Mallalieu, time limited (albeit the impact on quantum on this issue was not developed in any great detail). There would also generally be expected to be issues arising as the extent of the care the Claimant required as occurred in this case. But none of these potential issues (as they would be seen at the date of entry into the CFA) would make the case, to my mind, unusual when considering the risks in the context of the guidance given.

67. As I have noted the Claimant had previously instructed other solicitors and some evidence had been obtained by them. As Mr. Mallalieu put it this had the potential to truncate the period in which his solicitors were acting risk-free (ie before any realistic offers could be made). I accept that this might in some cases impact the success fee. However I am not satisfied that much of any substance had been done to progress the claim that would diminish substantially the extent of IM's costs at risk (the claim had not been issued). The matter was not addressed in detail. However when looking figures have been advanced by the previous solicitors costs and setting those against the IM's but also considering the work IM needed to do, the point seems to me at best marginal. There was criticism was, I think, made that little substantial progressive work had been done so by previous solicitors such that the earlier instruction would have had, at most, a marginal effect in decreasing the proportion of work that might be said have been anticipated before realistic settlement negotiation could be anticipated.

68. It was not, I think, suggested that Spencer J in *NJL* was wrong in his broad assessment of when a claim such as this claim was as a whole likely to be settled (or indeed the other guidance to which I have referred). By the time a Joint Settlement Meeting takes place in

general substantial schedules and counter schedules, sometimes in without prejudice form, have been prepared. In any event, as in *NJL*, the Claimant's injuries were very serious; he was a protected party and overall settlement is likely only to be possible once a very substantial amount of work had been done by solicitors (with, in general, reports having been obtained by non-medical experts including care experts) and most probably a significant proportion of the work the solicitors might be expected to do (in contrast perhaps to counsel). I accept that it cannot be assumed that settlement negotiations will necessarily always take place at a late stage in the case; but even if discussion takes place at an early stage the amount of the solicitor's costs that will be incurred before any offer is made would be a large proportion of the eventual costs.

69. It was open to the Defendants to make Part 36 offers at an earlier stage than the final offers that were made in this case (the case settled, as I say above, as I understand it just over three months before trial). Mr. Malallieu rightly pointed me to the risks that the defendant insurers may make offers in respect of a discrete element of the claim at an early stage; which is apparently what happened here in respect to accommodation claim (by, as I understand it, a lump sum offer). He readily acknowledged that what actually happened in this case is not in itself directly material given the requirement that I should approach the issue without hindsight but it was indicative of what might happen. However I did not understand it to be said that there was no general expectation that cases such as this tend to be settled at a later stage when the evidence is at an advanced stage.

70. I remind myself of what was said by Spencer J in *NJL* at [34] :

The second risk factor which a solicitor needs to take into account is the risk of the fees incurred after the Part 36 offer is made not being recovered because the Part 36 offer is rejected and then, at trial, the Claimant recovering less than the Part 36 offer and being ordered to pay the costs from 21 days after the making of the Part 36 offer (or at least failing to recover those costs). In this regard, the risk may be increased by any complexities or uncertainties which increase the chance of the solicitor "getting it wrong" and advising his client to reject a Part 36 offer which ought in retrospect to have been accepted. The experience of the solicitor will be relevant as will his/her knowledge and expertise in the particular field, together with his/her knowledge of the opponent. I would expect an experienced solicitor to be able to gauge whether a Part 36 offer puts his client seriously at risk, understanding that there may be quite a wide risk area within which a Part 36 offer may fall, and therefore give himself quite a wide margin for error. The experienced solicitor will, in most cases, back himself to get it right.

71. As I have recorded above the learned judge went on to say that he would be surprised if the solicitor with conduct of that case would have had found himself in a position where the claimant has rejected advice on an offer and then fails to beat that offer at trial on many occasions. He anticipated that the solicitors would have the advice of Leading Counsel to rely upon in relation to consideration of any Part 36 offer. He says in terms that he would be very surprised if the solicitor 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*" (my emphasis). It is perhaps also to be borne in mind that when costs budgeting there will normally be allowance for substantial involvement of counsel (often leading counsel) in the preparation of expert evidence (in addition to solicitor's input) and in evaluating the risks in the claim prior to a JSM. In any event the analysis of the judge in *NJL* indicating a single stage success fee uplift at

14.29%, was based on the assumption that 50% was a reasonable assessment of the risk. He went on to say that even on this basis, a 20% success fee would be regarded as generous.

72.It does not appear (as I suggested *BCX*) that Spencer J was addressed on the question as to whether the increase in the success fee under the provisions of then r45.9 (should the matter have gone to trial) to 100% (ie the second stage) would impact on reasonableness of the success fee payable in the circumstances that arose in that case ie settlement before trial. 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 an amount that was sufficient to make any difference (as per the default provisions of 45.19). It is however notable that the judge, who is highly experienced in dealing with claims such as this, was plainly concerned that in any event a success fee of 20% appeared generous; he did not in the event need to consider whether it was too generous because of the manner in which the default provisions worked. However it does seem to me, for reasons which I have set out above, that the prospect that the success fee would increase at trial is a matter I should take into account.

73.I accept, of course, that there is a danger in being too precise about this and there must be a reasonable leeway and or margin of appreciation allowing for a number of different eventualities, even the possibility of early settlement and early offers. I am conscious too of Mr. Mallalieu's point about the truncated time period, and that it may be that other such points could be made. But to my mind set against the CJC agreement (which covered a basket of cases including, importantly cases where liability was in dispute) and the analysis of Spencer J, it seems to me that a success fee 15% for the first stage of two stage success in a high value claim where the only substantial risk is a Part 36 risk could reasonably be said to be generous to the solicitor. In any event to my mind it makes suitable allowance for sorts of variations and risks that Mr. Mallalieu described.

74.Standing back and looking at this another way, if the matter were to proceed to trial the solicitors would be compensated by a success fee of 100% (or at least one that compensated for them the risks inherent in matter going to full trial on the basis of a Part 36). It might then be asked, what further risk does a 20% uplift up to three months pre-trial cover? Presumably it is the possibility that a Part 36 offer is made which solicitors initially 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 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 rare occurrences. Again looking at the matter this way 15% success for their first stage appears reasonable if not ungenerous.

75.Mr. Mallalieu, I should say, also sought to rely on the following passage in para. 42 of the judgment in *NJL*,:

"[h]aving 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."

76. In the result the judge substituted a success fee of 65% with one of 20%. But it did not matter whether the judge was accessing the reasonable success fee at 10%, 14.29% or 20% because of the application of the default provisions. These provisions meant that so long as the reasonable success fee was not greater than 20% the success fee payable was 12.5%. The judge went out of his way to make clear that he had reservations about whether it could be said 20% was reasonable; but it did not matter for the purposes of determining the appeal. It seems to me that I cannot disregard his reasoning and his analysis of the risks which seem to me integral to his decision to allow the appeal in that case. I do not think anything has changed since the decision in *NJL* by way of practice to make cases of this sort more risky. Indeed I would, if anything, suppose that the introduction of costs budgeting may mean more cases settle.

77. Nor am I persuaded that I should, over the analysis of Spencer J, take the decision of Sir Robert Nelson as indicating that a higher success fee than is indicated by *NJL* would be reasonable. In *Fortune* Sir Robert Nelson held that an uplift of 20% was a reasonable success fee “whether single or second-stage” [53] (my underlining). That case settled within three months of trial so as this passage suggests it could be said that this was considered reasonable as the second of a multi-staged success fee (alternatively a single stage success fee). Moreover, there was no cross appeal in that case from the decision of Costs Judge and it was not argued that the uplift was too high and it did not therefore matter that a lower success fee might have been reasonable. To my mind this does not assist Mr. Mallalieu particularly when set against the decision of HH Judge Behrens sitting as a High Court Judge in *Thornley v Ministry of Defence* [2011] 3 Costs LR 335 in which he allowed 15% on broadly similar facts as these, taking 12.5% as his starting point.

78. There was a further matter which I should add, as it seemed to provide some additional support for my decision (albeit is not integral to my reasons). The ATE insurance in this case (as it typically does) included cover against the adverse costs including those in respect of a Part 36 risk and provided a fund to cover the non recovery of the Claimant’s own disbursements (generally not counsel’s fees). It may well be correct that it was not a bespoke policy but block rated by reference to a broad category of the cases. Mr. Mallalieu did not know and suggested, in effect, nothing could be inferred from the ATE arrangements in this case given that we know little of the categories of cases that may be covered. It is however perhaps notable that the policy provides an indemnity of £100,000 and yet the premium was some £1,123.26 (including IPT). It seems to me that the costs of disbursements at trial and indeed the Defendants’ counsels’ fees at trial, which might be payable under an adverse costs order, might have been expected to be substantial. And yet the level of the premium would appear to suggest that insurer’s experience of having to meet claims against the policy was slight, confirming perhaps the view expressed by Spencer J as to the likelihood that a Part 36 offer would not be beaten in circumstances where solicitors had advised its rejection.

79. In any event in all the circumstances, I am not persuaded that the approach that I took in *BCX* on similar facts is wrong. In my judgment 20% is too high and I am not persuaded I should allow a success fee of greater than 15% on the facts of this case.