

Surrey v Barnet & Chase Farm Hospitals NHS Trust [2018] EWCA Civ 451

The Issue

Can a claimant who has instructed solicitors on legal aid, switch to a CFA and recover the success fee and ATE premium? In Surrey v Barnet & Chase Farm Hospitals NHS Trust [2018] EWCA Civ 451, - handed down today - the Court of Appeal said that if liability has been admitted, the answer is no.

Summary of the Case

The case involved 3 claimants each of whom suffered serious injury arising from clinical negligence. They were each eligible for and the claims were funded by legal aid. Liability was duly admitted. Shortly before the implementation of the LASPO reforms (which abolished recoverable success fees and massively reduced the scope for ATE cover in new cases) they all switched to CFAs. These provided that the solicitors (Irwin Mitchell) could only get paid the costs which were recovered and could not look to the client for any difference but would get a success fee (a “CFA-lite”).

At the eventual costs assessment (the claims having succeeded) the NHS objected to paying the success fee and ATE premium in circumstances where legal aid had been available and liability had been admitted. Different judges gave different decisions on the reasonableness of the switch.

The Court of Appeal said the question was whether the switch of funding gave rise to costs which were reasonably incurred, which depends on the reasons the litigant incurred the costs he did. If advice is received about why someone should switch, if that advice was not “sound” then this might taint the reasonableness of the decision. As between legal aid and funding by a CFA-Lite with ATE there was not much advantage or disadvantage to the client. But the latter was plainly more expensive for the paying party. The Court of Appeal held it was for the client to, nonetheless, justify that choice.

On the facts, the clients were not told the effect of a switch of funding meant they would be giving up the Simmons v Castle uplift of 10% of general damages. They were not given, according to the Court of Appeal, a fair appraisal of the options, which was especially important where Irwin Mitchell would, as a result of the switch, be entitled to a substantial success fee payable by the loser.

Accordingly, the Court of Appeal agreed with those who had decided the switch was not a reasonable one. The reasons for it were not sufficient to justify the extra cost to be incurred by the paying party. Thus, the claimants could only recover the base fees.

Comment

This is an important decision – the answer to this issue has divided a number of judges. Even now there is a long tail of cases which switched from legal aid to CFA. A lot of money still turns on it. In cases where switches have occurred after liability has been admitted, the paying party is now in a strong position. But the facts were important and undoubtedly receiving parties will be scrutinising these carefully to try and draw distinctions.

Imran Benson
Hailsham Chambers

Alexander Hutton QC of Hailsham Chambers acted for the successful defendant.