Changing funding before 1 April 2013

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The problem

- Additional liabilities not recoverable even in principle from 1 April 2013 unless there was a pre-commencement funding arrangement
- So late rush before 1 April 2013
- What's the test?
- Not just move from public funding to CFA, but also BTE to CFA and/or ATE

Recent case-law

- *Yesil v Doncaster & Bassetlaw Hospitals NHSFoundation Trust* (High Court, QBD, Hull, February 2016)
  - Cerebral palsy case
  - IM get legal aid certificate 19 April 2007
  - Admission of breach 30 April 2010 (formal letter of claim only November 2010)
  - Full admission inc causation April 2011

Yesil cont

- Issue 6 July 2011 and judgment 26 September 2011
- Quantum trial listed for November 2012 but moved to 8-day listing February 2014
- Transfer to CFA/ATE March 2013
- Schedule + evidence July 2013 - £7 million
- D's Csch + evidence November 2013
- JSM Jan 2014 and Feb 2014 D accepts C's P36 (lump sum + PPs)
- Costs claimed £350,000 inc SF £55,522 + ATE £50,681.
- SF agreed at 20% not 80%

Yesil cont

- Pre-1 April 2013 CPR
- Witness statement from fee-earner re change of funding but no file notes, client care letters or st from C
- IM funding review
- Costs at £92,000 v LSC limit of £94,000
- Seeks increase to £240,000
- LSC letter 28 Feb 2013 refers to IM making a number of applications for huge increases where liability settled: if you want more then fully costed case plan
- None sent
- Likely max would be £189,000 as against £240,000. Ps agreed if C asked for this likely to be approved.

Yesil cont

- Sol said had explained pros and cons, but did not mention 10% of GDs
- Most prominent factor = about to reach LSC limit
- D produced figures: C had used £66,703 not £92,000 and to conclusion a further £52,217, at LA rates, so £118,920, much less than £240,000 - C accepted. Not to trial of course.

Yesil cont

- Ps agree Q = reasonable decision or not
- Differ on approach
  - D says is it reasonable for the C in light of advice, apply *Surrey v Barnet and Chase Farm Hospitals NHS Trust* [2015] EWHC B16 (Costs) – whether, C, assisted by his solicitor, acted in a manner that was reasonable.
  - C says is it a reasonable choice as viewed by a notional reasonably minded plaintiff, taken from *Wraith v Sheffield Forgemasters*.

Yesil (cont)

- Difference: on C's reading consider only the decision, not the adequacy of the info on which the decision was based
- C relies also on *Sarwar v Alam*: don't consider reasonableness of decision by ref to adequacy of advice
- So is advice re *Simmons* relevant?

Yesil (cont)

- Considers
  - *Hughes v Newham LBC* (Master O'Hare 23 May 2005 but reg 4 case)
  - *LXM v Mid-Essex Hospital Services NHS Trust* [2010] EWHC 9185 (Master Gordon-Saker)
  - *Bradley v Windsor House Group Practice* (10 January 2011, DJ Bedford)
  - *AMH v Scout Association* (28 January 2015, Master Leonard)
  - *Hyde v Milton Keynes Hospital NHS Foundation Trust* [2015] EWHC B17 (Costs) (Master Rowley) – also failure to discharge the certificate
  - *Surrey v Barnet* – notion of informed consent to the change

Yesil (cont)

- The test as applied in *Yesil*:
  - Did C make a reasonable choice in all the circs, and the justification, including advice, weighs into the mix?
  - Choice does not have to be the best one.
  - Involves both subjective and objective assessment
  - If decision is manifestly reasonable, lack of advice does not make it unreasonable

Yesil (cont)

- Judge did not accept that public funding 'worse' than CFA – level playing field, but choice to use public funding already made and Q = is it still reasonable?
- Argument CFA + ATE costs D more irrelevant
- Evidence suggested that prior to general IM prompt fee-earner thought switch reasonably required

Yesil (cont)

- Fear of exceeding budget was the deciding factor but figures wrong and no reply to LSC
- Not a manifestly reasonable decision irrespective of advice, so look at advice
- Failure to raise 10% calls into question adequacy of advice
- Switch = unreasonable

State of play

- C considering whether to appeal *Yesil*.
- C is appealing *Surrey*,to be heard in June.
- But poss of joining the two, and a leapfrog to CA.

Other cases

- *Hyde v Milton Keynes Hospital NHS Foundation Trust* [2016] EWHC 72 (QB) on appeal from decision of Master Rowley 1 July 2015
  - Appeal only re concurrent CFA + public funding (D says)
  - Argument on appeal not that unreasonable but that CFA is unenforceable
  - C had public funding from 2008, judgment entered, CFA + ATE March 2013 with N251, case settles November 2013
  - Discussion with LSC begins late 2012
  - Ashton KCJ don't apply for or obtain discharge of certificate
  - D argues private retainer concurrently with public funding and so s10(1) and 22(2) AJA 1999, unenforceable
  - D accepts 2 exceptions to needing discharge: C acts in person or scope of work under certificate exhausted

Hyde cont

- Master Rowley:
  - Not ‘topping up’ which is impermissible. Sols were only clear in own minds only acting under CFA from point when they did so.
  - Sols not obliged to continue because scope not exhausted even if the costs are used up
  - In my judgment, where a party has exhausted the costs that can be claimed under a certificate so that it is ‘spent’, they can in principle establish a discharge by conduct in the same manner as certificates in which all of the work up to a limitation of scope has been carried out. The effect of that discharge is to end the services funded by the LSC and enable a private retainer to fund the remainder of the proceedings
  - Rejected argument unreasonable to switch, and no appeal against that findin

Hyde cont

- Soole J (D seeking permission from CA)
  - Formal discharge of the certificate is merely evidential and in case of transfer to e.g. new firm there can be no question of ‘topping up’ or other abuse by the solicitor on the certificate
  - Rejects argument only LSC can terminate public funding
  - Notice of the new funding arrangement, i.e. the private retainer, must be given to the other parties to the litigation and the client will continue to be treated as funded until that moment
  - Only the LSC can formally discharge the certificate but that is a matter of procedure – to adopt Ackner LJ's metaphor, a burial certificate. As a matter of substance and subject to notice being given to the other side, the funding had come to an end and Ashton and Mrs Hyde were entitled to enter a private retainer.
  - Overlap of one day is not enough to render entire CFA unenforceable

The horizon

- No cases yet re old style solicitor/counsel CFA on or after 1 April 2013 but sol/client counsel before

- No cases yet re CCFAs where there must be not just a pre-commencement funding arrangement but s44(6)(b) LASPO = advocacy or litigation services were provided to P under the agreement in connection with that matter before the commencement day, and see CPR 48.2(1)(i)(bb) – so both a 'person' and a 'matter' test. Complex where Part 20 claim or counterclaim on or after commencement day

- Cases re the clinical negligence premiums, see Master Leonard in *Nokes v Heart of England NHS Trust* [2015] EWHC B6 (Costs), where recoverable premium was £5,680 plus IPT for an indemnity of £10,000 and irrecoverable premium of 3% of damages for cover of £100,000