Case No: HQ13X05225

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COST OFFICE

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 28 January 2015

BEFORE:

MASTER LEONARD

BETWEEN:

AMH

Claimant/Respondent

- and -

THE SCOUT ASSOCIATION

Defendant/Appellant

MR A ROGERS (instructed by Bolt Burdon Kemp) appeared on behalf of the Claimant

MR B DUNNE (instructed by Berrymans Lace Mawer) appeared on behalf of the Defendant

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Judgment
(As Approved)

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101 Finsbury Pavement London EC2A 1ER
Tel No: 020 7421 6131 Fax No: 020 7421 6134
Web: www.merrillcorp.com/mls Email: mlstape@merrillcorp.com
(Official Shorthand Writers to the Court)

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1. THE MASTER: This case is, I believe, subject to an anonymity order. The Claimant was pursuing a claim for damages in relation to childhood sexual abuse and initially had the benefit of a public funding certificate dating from March 2012. The matter in issue is that the Claimant chose to arrange for the discharge of that certificate on 23 March 2013 and its replacement with a conditional fee agreement dated 26 March 2013, supported by an after the event insurance policy.

2. The question is whether, in the words of Master Gordon-Saker in the useful case to which I have been referred, LXM v Mid Essex Hospital Service NHS Trust [2010] EWHC 90185, a conditional fee agreement and attendant ATE policy was a reasonable choice for the Claimant at the time having regard to all the circumstances. That is an analysis of the issue with which I would respectfully agree. It follows that one must look at the circumstances of the particular case. Decisions in relation to choices of the kind made by the Claimant must, to some extent, be fact-specific.

3. What the Defendant says in this particular case is that the advice given to the Claimant in relation to funding choices, given in February 2013, was on the evidence inadequate and incomplete. It was not open to the Claimant to make a reasonable decision. He was unable to (and did not) make a reasonable decision without receiving full and adequate advice as to his funding choices. Beyond that, on purely objective grounds, the Defendant says that the funding choice made was demonstrably unreasonable.

4. The reasons are based on the evidence of attendance notes of 20 February 2013 produced by Mr Wheeler, the Claimant's conducting solicitor. Mr Wheeler appears to have given brief consideration on 20 February over (according to his attendance note) about 12 minutes, as to whether or not the client's best interests were best served by continuing with public funding or by arranging for its discharge and signing up to a conditional fee agreement before the new regime took effect on 1 April 2013.

5. Mr Wheeler concluded (on his own account) that the Legal Services Commission would not provide sufficient funding to take matters to trial; that they were very bureaucratic, which might cause delay to the case; and also that there was a possibility that the client would obtain employment and, therefore, would not remain eligible for legal aid. On the evidence produced by the client with his original claim, he had every intention of obtaining work following his return to the UK from Australia, so that was (I accept) a realistic possibility.

6. So one of the issues considered by the solicitor, according to his attendance note, was the danger at least of the Claimant having to make a contribution to legal aid and possibly of losing it altogether.

7. According to his note, Mr Wheeler reached the conclusion that it was unlikely that the 10 per cent increase in general damages which would take effect after 1 April would defray the cost (on no longer having the benefit of public funding) of irrecoverable success fees (even capped) and that it was in the best interest of the client to change to a funding agreement from 1 April.

8. Again according to his attendance notes, in an equally brief telephone conversation with his client, which is recorded at 12 minutes on the same day, he said:

> "I explained the issues about Legal Aid. I said that if he gets a job during the course of the case then he is likely to lose Legal Aid, but that doesn't mean to say he has to abandon the case. We often change funding in these cases, and my firm would be prepared to act on a no win, no fee basis. I explained what that meant. If he signs up to this before 1st April there will be no deductions from his damages, and we will guarantee 100 per cent of his compensation. We will get insurance to cover the cost of losing the claim and paying the other side's legal costs. I explained that that scheme will end on 1st April and a new scheme will come in, which is likely to mean some deductions from damages. I therefore suggested that we consent to the discharge of his Legal Aid now, because it's unlikely that Legal Aid will fund the case all the way to trial, and if he gets a job he will have to come off Legal Aid in any event. If we need to change funding the best option for him is to do so now, before 1st April."

9. The client is according to the attendance note happy with that, and

> "authorises me to consent on his behalf to the discharge of his Legal Aid certificate and new funding documents."

10. The point made by the Defendant about this approach is first that there is no evidence to support the conclusion that it might be difficult to obtain continuing funding from the Legal Services Commission all the way to trial and further that the prospect of a trial in this particular case was fairly low. Funding was likely to continue as far as was necessary in order to achieve a reasonable settlement. The Defendant reminds me that in fact the person responsible for this abuse had been convicted of crimes in December 2001 in relation to the Claimant and another linked claim; there had been admissions in two linked claims; and on 7 December 2012, the Defendant's solicitors had already stated that they were taking their client's instructions and that they would recommend that vicarious liability be admitted for such assaults as the Claimant may prove.. In summary, says the Defendant, the Claimant was at little risk of losing his claim and recovering no damages at all. Under those circumstances it was speculative and incorrect to conclude that there was any real danger of losing funding.

11. Further, there was no mention to the client of the advantages in the event that he did after 1 April lose funding or find that funding was inadequate. In respect of employment, the risk of his doing so was no different from any other funded case. There was no mention of capped success fees: qualified one way cost shifting that would apply to his claim for personal injury: and the 10 per cent increase in damages in the new regime. There was no mention of the fact that an ATE premium incurred after 1 April, if it was incurred, although irrecoverable was likely to be significantly lower because of the lower risk which was insured. So, in all the circumstances, it was not reasonable for the Claimant to incur additional liabilities of in the region of £14,500.

12. Having thought those points through and having taken into account the submissions of Mr Rogers, which I will not repeat for the purposes of this judgment, my conclusions are these. I do not think it is entirely fair to dismiss Mr Wheeler's concerns about the possibility that continued public funding might be difficult. Although I tend to agree with the submission that on the available evidence, the underlying merits of the case

were strong, in relation to proving and establishing abuse there were several potential issues about quantum and causation which could create difficulties. It seems likely that the Legal Services Commission at the relevant time would have wanted to undertake a very careful cost/benefit analysis and it might well have taken a conservative approach. It was a real consideration and I take the view that Mr Wheeler was obliged to consider it.

13. I have to agree, with respect, with Mr Dunne's submission to the effect that the advice given to the client was incomplete. It seems to me that he is right in saying that an appropriate practice would have been to write to the client setting out the pros and cons in full, or at least communicate them to the client in the most practicable way. That includes the matters he touched upon; the extra damages which were intended to counterbalance the loss of certain recoverable liabilities; the qualified one way cost shifting system; capped success fees; what all that would mean for the client. That advice was not given.

14. One does have the impression that the solicitor, having reached a conclusion, more or less nudged the client towards the conditional fee agreement arrangement. In saying that, I emphasise that I do not and I should not speculate as to what the thinking might have been behind that. Of course it has been pointed out to me that it is likely to be advantageous to a solicitor to have the client enter into such an arrangement but equally, it seems to me that at that particular time, with changes in the funding regimes coming and raising real issues which did bear consideration, a solicitor would be anxious to ensure that he did not expose himself to potential complaint from a client who had not been given the opportunity to consider the funding options and to take the best option from the client's point of view.

15. I am unable to accept that a choice must be unreasonable if it is not made on the best available information. I think one has to consider, as I said earlier, whether the choice was reasonable in all the circumstances. It is, as I suggested, possible to make the right choice for, here, not so much the wrong reasons as an incomplete set of reasons.

16. I bear in mind that the advice given focused on the prospect for the client of maintaining his claim for damages without any deduction in relation to unpaid costs. That was the advantage for the client of entering into what (and I think this is crucial) was a genuine CFA Lite arrangement in which the solicitor was according to his attendance note (and I had no reason to doubt its accuracy) guaranteeing to the client "if you enter into this arrangement you will not lose any of your damages to meet unpaid costs, whether your own or the other party's".

17. So the fact that this was a CFA Lite arrangement was crucial. The CFA Lite arrangement appears to have been a factor for Master Gordon-Saker in LXM v Mid Essex Hospitals Services. The conclusion he reached there was that continuing with public funding was likely to result, through the effect of the statutory charge, in a deduction from damages whereas the alternative arrangement entered into by the claimant in that particular case did not. That was a key factor in his reaching the conclusion that the choice in that particular case was reasonable.

18. One can contrast that with the case of Haworth v Britton Merlin in which it would appear that the client was faced with the usual deduction from any recovery of unpaid

costs. That was not, it would appear from the costs summary quoted by Master Gordon-Saker in LXM, the same fee arrangement.

19. The conclusion I reach is that this choice between public funding, potential deduction from damages and entering into an alternative arrangement is one the Claimant might well have had to make at some point. The change of regime from 1 April 2013, in effect, obliged the solicitor to put the point to the client while there was still time to make certain choices and, in particular, to reach an arrangement in which there would be no deduction from damages at the end of the day.

20. So, notwithstanding the fact that I do accept that the advice given was too brief and not as detailed and complete as it should have been, it does seem to me to have focused upon a genuine key issue in relation to the preservation of the client's damages. That was not inaccurate advice. The solicitor gave it in the knowledge that if he did not give that advice it was possible that the client might lose out financially at the end of the day.

21. In all those circumstances, the conclusion I have reached is that the choice to sign up to a CFA and accept the discharge of the public funding certificate in the circumstances of this particular case was reasonable. So, I would not disallow the success fee and ATE premium.