30% success fee awarded instead of 75%

Mrs Carol Bright v Motor Insurers' Bureau

Appeal Ref: QB/2013/0458

High Court of Justice Queen's Bench Division

15 May 2014

[2014] EWHC 1557 (QB)

2014 WL 1220249

Before: The Honourable Mrs Justice Slade DBE Sitting with Master Campbell (as assessor)

Date: 15/05/2014

On Appeal from Master Rowley Costs Judge

Hearing date: 31 January 2014

Representation

Mr Roger Mallalieu (instructed by Irwin Mitchell LLP) for the Claimant/Appellant.

Mr Ben Williams (instructed by Weightmans LLP) for the Defendant/Respondent.

Approved Judgment

Mrs Justice Slade:

1 Mrs Bright ('the Claimant') appeals from the Order of Master Rowley made on 6 August 2013 following his judgment handed down on 3 June 2013 by which the success fee of the Claimant/Appellant's solicitors' was reduced from the 75% sought to 30%. Permission to appeal was given on 9 October 2013 by Mr Justice Dingemans. The Conditional Fee Agreement ('CFA') was entered into on 20 October 2010. *Inter partes* recoverability of success fees has been abolished for agreements entered into after 1 April 2013.

2 At the hearing of this appeal I sat with and have been greatly assisted by Master Campbell, Costs Judge. However the determination of this appeal is mine alone.

3 The Order and judgment which are the subject of this appeal were made in determining a preliminary issue raised in the detailed assessment of costs following the settlement of proceedings for personal injury arising out of a road traffic accident. The Claimant suffered serious injury when on 26 September 2010 the First Defendant's, Mr Abimbola's vehicle reversed into the Claimant who was standing behind it. The Claimant suffered a severed spinal cord at C3/4 leaving her tetraplegic.

4 Mr Abimbola's insurance company avoided its obligations under the policy of motor insurance and the Claimant claimed against the Second Defendant, the Motor Insurers' Bureau ('MIB').

5 The Claimant signed a CFA with Irwin Mitchell LLP on 11 October 2010. It was finalised on 20 October 2010 when she was in hospital.

6 The CFA provided for a two-stage success fee. A success fee of 50% was payable if the claim settled before three months before the trial date or the opening of the trial window and 100% if it was settled or was determined in favour of the Claimant thereafter.

7 A letter of claim was served on 9 November 2010. At this stage the police and the Crown Prosecution Service were reviewing the case to decide whether to charge Mr Abimbola.

8 The acknowledgment of the claim by the insurer on 8 December 2010 contained no admission of liability.

9 In January 2011 the Claimant was informed that Mr Abimbola would be charged with dangerous driving. He did not respond to bail and absconded.

10 On 1 March 2011 the insurer served its formal letter of response in which it stated that it had obtained a declaration which entitled it to avoid its policy with Mr Abimbola.

11 Proceedings were issued on 28 March 2011 against Mr Abimbola and the MIB.

12 On 5 April 2011 the MIB filed an acknowledgment of service stating that the "entire claim" would be defended.

13 On 27 May 2011 the MIB filed a defence denying liability for the claim and asserting, in the alternative, contributory negligence.

14 A preliminary trial on liability was listed for a trial window which was fixed for 1 May 2012 with a time estimate of two to three days.

15 On 23 March 2012 a joint settlement meeting took place. Agreement was not reached and liability and contributory negligence remained in issue.

16 On 26 April 2012, five days before a liability trial, a second joint settlement meeting took place. At this meeting the claim settled for a lump sum payment (gross of CRU and interim payments) of £1.6 million with periodic payments of £230,000 per annum, together with costs on the standard basis to be assessed if not agreed. The Order was approved on 15 June 2012.

17 On 3 October 2012 the Claimant served a Notice of Commencement together with a Bill of Costs. The Bill included a success fee of 75% on the solicitors' charges. By their Points of Dispute, MIB challenged that claim and offered 30%.

The Conditional Fee Agreement

18 The CFA incorporated the following material definition provisions of the Law Society Conditions as modified by Irwin Mitchell LLP 'for Use in Accident Cases':

> **"3. Explanation of words used:**
>
> ...
>
> *Basic Charges–*
>
> (b) Our charges for legal work we do on your Claim for damages.
>
> ...
>
> *Full Legal Charges–*
>
> (g) The total of our Basic Charges, Success Fee, your Disbursements (including Barristers' fees) after the event insurance premium, VAT and any interest on costs.
>
> ...
>
> *Success Fee–*
>
> (n) The additional percentage of Basic Charges that we are entitled to charge you if you win your Claim for damages.

Win–

(o) Your Claim for damages against your opponent or if your Claim is against two or more opponents against any of them, is finally decided in your favour, whether by a court decision or an agreement to pay your damages. This applies even if your Claim has not succeeded against one or more of your opponent(s). 'Finally' means that your opponent(s):

• is not allowed to appeal against the Court decision; or

• has not appealed in time; or

• has lost any appeal."

19 The CFA provided:

"Paying us

If you win your claim:

• You are primarily liable to pay our Full Legal Charges.

• You will normally be able to recover all of our Full Legal Charges from your opponent provided that these are reasonable. Please see Condition 4 of the attached Conditions.

...

• We will waive any part of our Full Legal Charges which we fail to recover from your opponent and will not make any further charge to you.

Part 36 Offers and payments:—

If your opponent makes a Part 36 offer or payment in an attempt to settle your Claim then providing that you have complied with your obligations under Condition 2 of the attached conditions the following will apply:—

...

• If you decide to reject the offer or payment and, on our advice, continue to pursue your Claim and you recover damages (whether by a Court decision or by way of an agreement with your opponent) which are either less than the offer or payment or less advantageous to you than the offer or payment then the net effect is that you have won your Claim against that opponent but the legal costs we will charge will be limited as described below:—

(i). You will be liable to pay our Full Legal Charges for the work done before the date on which the time for accepting the offer or payment expired which you should be entitled to recover from your opponent.

(ii). We will not charge you any Basic Charges or Success Fee from the date on which the time for accepting the offer or payment expired. You will, however, remain liable to pay your Disbursements which will normally be recovered from your insurers under your after the event insurance policy.

(iii). We will not make any charge to you over and above the legal costs which we are able to recover on your behalf from your opponent or your insurers."

By the inclusion of provision (iii), the CFA is known as a "CFA Lite":

"If you lose after taking Court proceedings:—

• You do not pay any legal costs in relation to your Claim to us.

• You will have a liability for Disbursements incurred after commencement of Court proceedings but these will normally be recovered from your insurers under your after the event insurance policy. In any event, we will waive payment of any disbursements (before or after commencement of proceedings) which are not recovered from your insurers.

..."

20 Schedule I of the CFA provides that:

"The Success Fee

The success fee is set at:

(a) 50% of the basic charges, assuming the case settles at any time prior to three months before the date fixed for the trial or the first date of the trial window (whichever is the earlier); or

(b) 100% if the case settles at any time thereafter; or

(c) such percentage as is fixed by the Rules of Court to be recoverable from your opponent.

The Risk Assessment:

The percentage success fee shown at (a) above reflects our assessment of the risks of your case, based purely on the information available to us at the time of entering into this agreement. This includes those specific issues which we regard as relevant and appropriate to take into account and which are set out in the table below.

The percentage success fee shown at (b) above reflects all of the risks in the table below which would be enhanced considerably should your case not settle prior to three months before trial. The enhanced risks at trial are due to the potential risk of failing to establish one or more fundamental elements of your case in respect of which the Judge prefers the opponent's evidence, and also the significant risk that you may fail to beat an offer or Payment into Court made by your opponent (see Condition 3(k) – Part 36 Offers or Payments of your Agreement)."

The risks assessed as high were lack of independent witnesses, contributory negligence, quantum, expert evidence and risk of a well placed Part 36 offer.

The Relevant Provisions of the Civil Procedure Rules ('CPR') and the Costs Practice Direction ('CPD')

21 At the relevant time, CPR 45 section III provided in CPR 45.16 for fixed success fees. CPR 45.18 allowed a party to apply for a success fee higher than the fixed success fee where the claim is one with a value on a full liability basis in excess of £500,000.

22 The CPD provides:

"11.5. In deciding whether the costs claimed are reasonable and (on a standard basis assessment) proportionate, the court will consider the amount of any additional liability separately from the base costs...

...

11.7. ...when the court is considering the factors to be taken into account in assessing an additional liability, it will have regard to the facts and circumstances as they reasonably appeared to the solicitor or counsel when the funding arrangement was entered into..."

The Judgment of Master Rowley

23 The Master held in paragraph 25 that the Defendant driver would have been hard pressed to escape a finding of liability against him. The risk assessed at the time of entering into the CFA was:

> "...really a question of the extent to which the claimant may have contributed to the accident circumstances."

Master Rowley held at paragraph 28:

> "Accordingly, I consider that the risks to be considered by the claimant's solicitor in this case revolved entirely around the risk of a Part 36 offer and the complications that might ensue from any finding of contributory negligence."

24 The Master compared the risks in this case with those in *C v W [2008] EWCA Civ 1459* . In both cases there was a risk of a "well-placed" Part 36 offer. The Master held at paragraph 29:

> "Where a percentage of the damages may be removed for contributory negligence, the parameters of a well-placed offer increase and the risk of rejecting an offer increase as well."

The Court of Appeal in C v W considered a 20% success fee appropriate. Since in this case unlike in C v W liability was not admitted, the Master awarded a higher success fee. As the Master was of the view that the risk of failing to establish negligence was not high given the circumstances of the accident, he considered the assessment by the solicitors of that risk was too pessimistic. The Master held that the Defendant's offer of 30% reflected the real risk taking into account all the relevant circumstances.

25 Master Rowley then considered whether the proximity of the settlement to trial justified a higher success fee than one that simply equated to the risk of the case.

26 The Master observed that not all cases should be taken as having a 50/50 chance of success when they get to court justifying a success fee of 100%. *Atack v Lee [2004] EWCA Civ 1712* was an example of a case which reached trial without a 100% success fee being allowed. Master Rowley *considered that the reference of the Court of Appeal in U v Liverpool City Council [2005] EWCA Civ 475* to:

> "...the claimant solicitor protecting himself in case the claim went 'the full distance and might eventually fail' by having a higher second stage."

"chimes" with the provisions of the fixed fee regime in CPR 45.16 which only allowed the higher success fee if the trial has started. The Master was of the view that the risk of the Claimant not succeeding in her claim was no more real on the eve of the hearing than it would be when the case was originally being risk assessed. The Master held at paragraph 44:

> "I do not see that the case is in fact any more risky if it only settles a week before the trial than if it settled a month or a year earlier. The process of quantification of a personal injury claim takes some time to crystallise and settlements regularly occur close to hearings. If the claimant has prepared for a forthcoming trial and the defendant then settles the case, the defendant will have to pay for those extra costs. It does not

> mean, in my view, that the case necessarily becomes riskier during the trial preparation period."

27 The Master did not consider the first stage success fee of 50% to be low justifying a high second stage success fee. The situation did not fall within the guidance in U v Liverpool that:

> "...costs judges should be more willing to approve what appears to be high success fees in cases which have gone a long distance towards trial if the maker of the CFA has agreed that a much lower success fee should be payable if the claim settles at an early stage."

In observing that a 50% success fee could not really be described as low, the Master referred to the "standard RTA percentage of 12.5%" in CPR 45.16 . The decision in U v Liverpool pre-dated CPR 45.16 . The Master commented that the Court of Appeal may have expressed themselves slightly differently if that rule had been in place at the time.

28 Master Rowley concluded at paragraph 47:

> "For these reasons I do not think that it would be reasonable to increase the percentage uplift from the 30% I have found to reflect the general risks simply because the case settled close to the trial on liability."

The Submissions of the Parties

29 Mr Mallalieu for the Claimant submitted that the Master failed to take into account three factors in his approach to the success fee. The success fee payable under a CFA is primarily to compensate the solicitor for the risk that he may not be paid his base costs in certain circumstances. These circumstances are material. First the claim may not be won, however "win" is defined. Second, in cases such as this in which the agreement with the claimant is a "CFA Lite", the costs payable to the Claimant's solicitor will be restricted to those she recovers from the Defendant. Third, if the Claimant fails to beat a Part 36 offer rejected on the advice of her solicitors they have no entitlement to charge their basic or success fees. Mr Mallalieu distinguished the type of CFA relevant to this appeal, the CFA Lite, from other CFAs. In a CFA Lite, base costs are at risk not just the success fee. This case was to be distinguished from Fortune v Roe [2011] EWHC 2953 . In Fortune v Roe liability had already been admitted and judgment entered for the assessment of damages before the CFA was entered into. Further, there was no issue of contributory negligence. The solicitors were therefore bound to receive their costs. In this case, base costs as well as the success fee were at risk if the Claimant did not win.

30 It is uncontroversial that the risk of not succeeding in the claim and consequential non-recovery of costs is to be assessed at the date of entering the CFA. Mr Mallalieu contended that in this case the MIB did not admit liability, unlike in C v W relied upon by the Master. Further there was a real risk of a finding of contributory negligence with a suggestion that the Claimant was standing behind the vehicle perhaps not paying attention as she was speaking on her mobile phone.

31 Further, it was submitted by Mr Mallalieu that the Master erred in his approach to the staging of the success fee. Neither C v W nor Atack v Lee relied upon by the Master were cases in which there was a staged success fee. The Master erred in relying on U v Liverpool and CPR 45.16 in holding that it was unreasonable to fix the second stage at three months before trial. *Callery v Gray [2001] 1 WLR 2112* in which a second stage after the end of the protocol period was discussed and U v Liverpool in which at paragraph 21 Brooke LJ observed that a solicitor may be willing to restrict himself to a low success fee if the case settled within the protocol period or within such other period as he might choose and to have the benefit of a high success fee for cases that did not settle early, show that there is no set point at which the second stage and higher success fee is triggered. Further, the Master appears to have relied upon CPR 45.16 in determining whether the timing and rate of the higher success fee was reasonable. In doing so

he erred. CPR 45.16 did not apply to the success fees in this case which was a high value claim. The success fees were at large both as to whether and when there was to be a higher second stage success fee and as to the amounts of the fees.

32 Mr Mallalieu contended that the Master erred in assessing the reasonableness of the second stage success fee by reference to the level of that for the first stage which he did not consider to be low. The level of the success fee at each stage of a two-stage success fee is to be assessed on the relevant circumstances. The level of both success fees can be challenged. They are to be judged independently although it has been observed that a high second stage success fee may be justified if the level of the first stage success was low.

33 Mr Mallalieu submitted that the Master erred in reducing the second stage success fee from 75% to 30%.

34 Mr Williams for the MIB contended that the Master did not err in the principles he applied nor come to a conclusion so far outside the ambit of reasonable disagreement as to be plainly wrong.

35 Mr Williams contended that unless the Master was wrong in his assessment of the risk of failing to establish primary liability his conclusion could not be challenged. Counsel pointed out that the Claimant's solicitors had been asked for the evidence on which they had assessed the risks of the litigation at the time they entered into the CFA. No documents apart from the scheduled table had been provided. There had been no explanation of how the first stage success fee of 50% was arrived at. In this case there was no question of the Defendant's ability to pay damages. No indication was given as to why liability would not be established. Master Rowley had invited the Claimant's solicitors to file their attendance notes before judgment was given. These were not provided.

36 Mr Williams contended that there could have been little risk in establishing liability for the accident. This was a case in which a driver reversed at speed into a stationary pedestrian. Mr Williams referred to the narrative of the Bill of Costs from which it can be seen that before entering into the CFA the solicitors had discussions with the police which included disclosable details of Mr Abimbola's arrest. They had the opportunity to take instructions before entering into the CFA. Even if the Claimant had been standing in Mr Abimbola's blind spot he should have reversed slowly whereas he reversed at speed.

37 Mr Williams submitted that Master Rowley correctly directed himself that there was little risk that there would not be a finding that Mr Abimbola was liable for the accident and that the main risk was the extent to which the Claimant may have contributed to the circumstances. It was impossible to say that the Master erred in reaching this judgment.

38 As for the percentage uplift success fee, Mr Williams pointed out that the 30% allowed by the Master was greater than the 20% allowed in C v W . The increase takes into account the fact that liability was not admitted in this case. However, Mr Williams disavowed the proposition in Callery v Gray at paragraph 104 that where a CFA is agreed at the outset of a road traffic accident case, in the absence of any special feature which raises apprehension that the claim may not prove to be sound, 20% is the maximum uplift that can reasonably be agreed.

39 Mr Williams contended that it would have been unlikely that there would have been an issue based costs Order in this case. Contributory fault would be factored in to a Part 36 offer.

40 Mr Williams pointed out that Mr Mallalieu agreed with the comments he made in paragraph 16 of his skeleton argument on the solicitors' exposure in the event of a Part 36 offer. These included the following: the solicitors were only at risk of not recovering their costs if they advised their client to reject a Part 36 offer which was not beaten; if they advised her to accept but she unreasonably rejected the offer, the solicitors could terminate the CFA. They would then be entitled to recover their charges. The solicitors' exposure to the risk of not being paid is only in respect of costs incurred after the Part 36 offer becomes effective. Even this exposure does not extend to disbursements and the Claimant would have no costs protection if she behaved unreasonably. Mr Williams submitted that with these conditions, the risk to the solicitors of not being paid if a Part 36 offer were made and rejected was minimised.

41 The fact that there was a two-stage success fee in this case does not affect the assessment of level of risk and the related reasonableness of the success fee. Mr Williams referred to Fortune v Roe , a case in which there was a two-stage success fee. Sir Robert Nelson observed

that C v W could not be distinguished in any meaningful way on the basis that it was a case of a single success fee.

42 Whilst a discounted success fee at stage one can be taken into account in deciding whether the level of the second stage success fee is reasonable, where, as in this case, the first stage level is unreasonably high, it cannot be used as a platform to justify a high second stage fee.

43 Mr Williams contended that in this case the first stage should have attracted a success fee with an uplift of 5–10%. The Master did not disregard the staging of the success fee. 50% provided for in the CFA was far too high. Accordingly, the Master was right to consider whether the percentage of 75% asked for by the Claimant at the second stage was justified on a stand alone basis. Even if there had been a category error in paying insufficient regard to the fact that the CFA provided for a two-stage success fee it made no difference as the first stage was too high and it was right to assess the reasonableness of the second stage success fee on its own merits.

44 Mr Williams contended that the decision of the Master to reduce the success fee claimed was within the broad ambit of reasonable decision making and he had not made an error of principle. This court should not interfere with the judgment that the uplift for the success fee in this case should be 30%.

Discussion and Conclusion

45 I cannot improve upon the explanation for and the regulatory basis of success fees at the material time set out by Sir Robert Nelson in Fortune v Roe . I gratefully adopt his explanation of the regime which was as follows:

> "10. A success fee is based upon the premise that there is a risk that the claimant's solicitors will not recover all or part of their costs. The success fee compensates them for undertaking that risk. The level of risk determines the amount of the success fee, save in cases where such fees are fixed by the court.
>
> 11. Section 58 of the Court and Legal Services Act 1990 , as amended, defines a conditional fee agreement as one which provides for fees and expenses or any part of them to be payable only in specified circumstances. The Conditional Fee Agreements Regulations 2000 provide that if the percentage increase is disallowed on the grounds that the level at which the increase was set was unreasonable in view of the facts which were or should have been known to the legal representative at the time it was set, that amount ceases to be payable under the agreement unless the court is satisfied that it should continue to be so payable.
>
> 12. The CPR r. 44.4 states that, where the court is assessing the amount of costs either by summary or by detailed assessment, it will not, either on a standard basis or on an indemnity basis, allow costs which have been unreasonably incurred or are unreasonable in amount. The CPR Pt 44 Costs Practice Direction provides in relation to success fees as follows:

'11.7. ...When the court is considering the factors to be taken into account in assessing additional liability, it will have regard to the facts and circumstances as they reasonably appear to the solicitor or counsel when the funding arrangement was entered into and at the time of any variation of the arrangement.

(1). In deciding whether a percentage increase is reasonable relevant factors to be taken into account may include: (a) the risk that the circumstances in which the costs, fees or expenses would be payable might or might not occur; ...'

> 13. A two-stage success fee, as was used here, has been encouraged in principle provided that it reflects the risk: *Callery v Gray [2002] R.T.R. 10* and *U v Liverpool City Council (Practice Note) [2005] 1 W.L.R. 2657* . Settlement in the protocol period will justify a lower fee whereas settlement closer to trial may justify a higher fee, even up to

> 100 percent depending on the circumstances. Whether a percentage as high as 100 percent can be justified depends on whether it is appropriate in a particular case: *Atack v Lee [2006] R.T.R. 11* ."

46 CPR 45.16 provided for fixed percentage success fee increases. Under CPR 45.16 the percentage increase allowed in solicitors' fees was 100% where the claim concluded at trial or 12.5% where the claim concluded before a trial was commenced. In this high value case both parties agreed that the fixed percentages did not apply. The parties were free to decide the percentages agreed in the CFA.

47 There was also a broad measure of agreement as to the principles to be applied in determining the reasonableness of the level of the success fee. Provided the success fee in a CFA falls within a reasonable bracket the court would not expect a Costs Judge to reject it (C v W paragraph 23). The appellate court will not interfere with the decision of the Costs Judge unless he has made a material error of principle or has come to a conclusion which is so far outside the ambit of reasonable disagreement as to be plainly wrong. The reasonableness of the success fee is to be determined by reference to the facts and circumstances as they reasonably appeared to the solicitor at the time when the CFA was entered into. The use of hindsight is not permitted (U v Liverpool paragraph 20; CPD 11.7).

48 As was explained in C vW by Moore-Bick LJ at paragraph 8:

> "...the purpose of a success fee under a CFA is to compensate solicitors for the risk of failing to recover any fee at all."

Insofar as the success fee is payable by the opposing party, it is subject to assessment under CPR Part 44 . Paragraph 11.8(1) of the CPD provides that in deciding whether a success fee is reasonable, one of the principal factors to be taken into account is the risk that the circumstances in which the costs, fees or expenses would be payable might or might not occur.

49 A two-stage success fee may be used by a solicitor "to protect himself against the risk that the claim might go the full distance..." (U v Liverpool paragraph 21). As Master Campbell held in Matthew Peacock v MGN Ltd [2010] EWHC 9 0174 paragraph 25(ii), it is open to the Claimant to choose the date of staging. The Claimant must be in a position to justify the percentage uplift for success fees. If, therefore, he elects an early trigger for a higher second stage success fee, he must be in a position to justify the higher risk of non-recovery of his fees at an earlier stage than if the second stage were only reached at or shortly before trial.

50 In my judgment, if and insofar as the Master relied on the trigger point for the second stage of a staged success fee in CPR 45.16 in determining that the success fee claimed was unreasonably high in this case, he would have erred in doing so. CPR 45.16 is not relevant to the determination of the reasonableness of success fees which do not fall within its scope. The trigger point of the second stage of a success fee is not the principal basis for determining its reasonableness. What is material is whether the success fee is set at such a level which is reasonable in light of the risk of non-recovery of costs anticipated at the date of entering into the CFA.

51 Further, if and insofar as the Master relied on the "standard RTA percentage of 12.5%" in CPR 45.16 in determining that a 50% success fee for the first stage could not be described as low in this case, he would have erred. As Sir Robert Nelson observed in Fortune v Roe at paragraph 14:

> "Where, however, as here, the new rules under CPR 45.16 do not apply, it is not permissible simply to adopt the new CPR fixed rates in assessing the reasonableness of a success fee. The reason for this is that the new CPR approach, which was informed by an industry-wide agreement, does not take into account the individual effects of a particular case (Atack v Lee)."

Each case is to be determined in accordance with the risk of non-recovery of costs assessed at the point of entering into the CFA. With respect, the observation by the Master that the Court of Appeal in U v Liverpool may well have expressed themselves slightly differently if CPR 45.16 had been in place is not of assistance. The observations in U v Liverpool uninfluenced by CPR 45.16

are apposite as the provisions of the Rule are not applicable to the case under consideration.

52 The Master gave detailed consideration of the Claimant's solicitors' assessment of the risks of the litigation which formed the basis of the 50% first stage success fee. At paragraph 24 he held:

> "The main risks identified by the claimant's solicitors were (a) liability (b) recoverability and (c) Part 36 /quantum/contributory negligence."

In my judgment the conclusion of the Master that the MIB would be hard pressed to contest liability was amply supported by what was known at the time of entering the CFA. The accident was caused by a driver reversing at speed into a pedestrian. The citation by Mr Williams from *Eagle v Chambers [2004] RTR 9* (CA) is relevant. Hale LJ observed at paragraph 16:

> "It is rare indeed for a pedestrian to be found more responsible than a driver unless the pedestrian has suddenly moved into the path of an oncoming vehicle..."

53 The conclusion of the Master that in light of the involvement of the MIB the prospect of a win but no recovery of costs was negligible cannot be said to have been impermissible. Counsel referred to but did not develop argument on the effect of the CFA being a "CFA Lite" on success fees. It was not suggested that any particular increase was built into the success fee to take into account the contractual arrangements for non-recovery of any costs or disbursements from the Claimant in certain circumstances. The risk to the solicitor of non-recovery of those costs and disbursements would not be attributable to the prospects of success in the litigation but from the agreed effects of such risks. In another case there might be questions of whether the losing party to the litigation should bear any increase in a success fee attributable to such agreements with the successful party and their solicitor. However they do not arise in this case.

54 In my judgment the Master correctly concluded at paragraph 28 that:

> "...the risks to be considered by the claimant's solicitor in this case revolved entirely around the risk of a Part 36 offer and the complications that might ensure from any finding of contributory negligence."

The Master had before him the Bill of Costs which included details of the allegations of contributory negligence raised in the amended defence of the MIB. These included that the vehicle's hazard lights were flashing and the allegation that the Claimant had a lack of awareness of the approach of the vehicle because of her pre-occupation with her mobile phone.

55 The Master took into account the increased risk of a "well-placed" Part 36 offer with the additional difficulty in assessing the adjustment for contributory negligence. Further, the fact that liability was not admitted was also taken into account by the Master as adding to the risk justification for the success fee. He had regard to the decision in C v W in which the Court of Appeal substituted a success fee of 20% for the risk of failure to beat a rejected Part 36 offer where there was an issue of contributory negligence.

56 The decision on a reasonable success fee was reached independently of the decision of the Master as to staging. Since the material issue is whether the requested success fee of 75% was reasonable whether it was staged or not, the observations made earlier in this judgment about the approach of the Master to the issue of staging do not affect the outcome of the appeal.

57 In my judgment Master Rowley did not err in his approach to assessing a reasonable success fee. Nor was the conclusion he reached that the success fee in this case should be assessed at 30% outside the parameters of a decision of a Master properly directing himself on the relevant circumstances.

58 The appeal is dismissed.

59 Insofar as any matters remain to be decided, the detailed assessment of costs is remitted to Master Rowley, or, if not practicable, to another Costs Judge. For the avoidance of doubt the Costs Judge is to have full discretion as regards the costs of the detailed assessment. The Claimant is to pay the MIB their costs of the appeal to be assessed by the Costs Judge to whom the matter is remitted if not agreed.