IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Neutral Citation Number: [2023] EWHC 2843 (KB)

Case No: QB-2022-001783

The Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday, 18th July 2023

Before:
MASTER BROWN

B E T W E E N:

REID

and

(1) WYE VALLEY NHS TRUST
(2) THE ROBERT JONES & AGNES HUNT ORTHOPAEDIC HOSPITAL NHS FOUNDATION TRUST

MR T TAYLOR, Costs Lawyer, appeared on behalf of the Claimant
MR C WILLIAMS-KNIBB,. Solicitor, appeared on behalf of the Defendants

JUDGMENT
(Approved)

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MASTER BROWN:

1. At the end of a costs management hearing the defendant contended that I should make no order as to the costs in respect of the hearing. Both parties indicated to me, and I understood it to be the case, that costs in case, was the usual order in respect of the costs of and incidental to a costs budgeting hearing.

2. The effect of an order for costs in the case is of course that if the claimant succeeds she will recover the costs. If the defendant succeeds in the claims, subject to costs protection, then the defendant recovers the costs.

3. In general, cost budgeting has in the past been carried out at the same time as case management and it is, of course, entirely usual to make a costs in case order at case management hearing. However, it is increasingly the practice, encouraged perhaps by the recent Civil Justice Council paper, not to costs budget at the same time as setting the case management directions. Views differ on this practice but as per the paper, one size does not necessarily fit all.

4. One advantage, and some would say the particular advantage, of this practice of separating cost budgeting in case management, is that when dealing with costs budgeting the parties have the advantage of knowing what directions had been made and hence there is a far greater scope to agree the costs budgets or at least more effectively to discuss and negotiate disputed phases in a way that reflects the directions. A very considerable amount of Court time is taken out dealing with costs budgets. Indeed, the budgeting process has its cost to the parties as well as on Court resources generally. The short point however is that there is good reason why the court might expect the parties to take reasonable steps to agree the costs, and that carrying out the budgeting after giving directions may facilitate this.

5. The Defendants' contention was that this case, having been case managed, the directions having been made by Master Stevens, an order was made for costs management, that order anticipated that parties would seek to negotiate those costs. The Defendants say no reasonable endeavours were made by the Claimant to do that and it is for this reason that no order for costs should be made.

6. I adjourned the issue at the end of the costs budgeting hearing. There were a number of reasons for this. I had not seen the relevant, what I anticipated might be 'without prejudice save as to costs', documentation. But the cost management hearing itself had been listed at 3.30 pm and finished, to the best of my recollection, after about 5 pm. It was one of three costs budgeting hearings I had had on the day, and I thought that further thought would was required on this point.

7. I have since heard argument, looked at the relevant documents and reserved this decision albeit that I am giving this decision orally.

8. The sum involved on this point is, I think, likely to be small. The costs management costs are subject to caps. If I am to reduce the costs of the hearing by a percentage then it will apply, I anticipate (and subject to any further comment) post application of the cap, otherwise any reduction might not make any difference.

9. Turning then to this facts of this case, the Claimant alleges there was negligent delay by the Defendant in the diagnosis of cauda equina syndrome; and that once diagnosed, substandard surgery was performed and the reversion surgery was delayed. There is perhaps more to it, but that is essentially the case. It said that as a result the Claimant, who is now 38, has have suffered from ongoing neuropathic lower limb pain, restricted movement, symptoms of pain, weakness, some sensory issues together with bladder, bowel and a sexual dysfunction. It is alleged that the ongoing symptoms mean that the Claimant is no longer able to work in the same role as she did prior to the relevant events. She was previously employed as a health care assistant but it is said that that she could not continue to do so because of the demanding nature of the work and appears to have transferred to an administrative role.

10. The claim is said to have a value in excess of £1million. I think at some stage in the course of at a cost budgeting hearing it was actually put at substantially more than that, but I have cost budgeted on the assumption that there is a reasonable and realistic claim for over £1million, which seemed to me on the face of the evidence that I have got may be realistic. The case has been case managed as I say by Master Stevens.

11. I have had regard to the the factors set out in 44.4(3) - what used to be referred to as the 'seven pillars of wisdom'. Liability is not accepted. It will plainly be a matter of some dispute, so will causation, that it is to say the determination in effect of whether if there were negligence what the effect of it was. These are complex issues. It is also a case of high importance to the Claimant. The sums involved are substantial. There is no doubt to my mind this case requires a considerable amount of skill, effort and specialised knowledge of a clinical negligence firm and counsel.

12. Making full allowances for all these matters, I nevertheless reduced the claimant's budget substantially. There had very substantial sums claims particularly in relation to Statements of Case, Experts to some extent and Trial Preparation and Trial. It is not necessary for me to set out all those reductions in detail but the reductions were substantial. I had a particular concern about the claims made for solicitors' fees in the budget, as I commented in the course of the hearing.

13. Turning then to the provisions to which I must have regard, albeit these are perhaps too well-known for me to set them all out, I have reminded myself of the principles set out of CPR 44.2.

14. The Court has a discretion as to costs. The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. That is modified in the case at case management or in ordinary costs management where there is no clear winner so that costs in case the general rule. However, in deciding what order to make about costs I can have regard to all the circumstances including the conduct of the party whether a party has succeeded on part of its costs even though that party has not been wholly successful and any admissible and any admissible offer to which CPR 36 does not apply. Conduct for these purposes includes:

> " *a) conduct during the proceedings and particularly the extent to which parties followed the Practice Direction .... or any pre-action protocol;*
> *b) Whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;*

c) The manner in which a party has pursued or defended its case; and
d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated the claim."

The last of these being I think a reference not to deliberate exaggeration but a consideration as whether looked at objectively the claim has been exaggerated.

15. The provisions 44.2(6) give a discretion as to the sort of order that I can make applying these principle. It is not necessary to set them out.

16. Lord Woolf, the former Master of Rolls, in his very well-known judgment, in *AEI Rediffusion Music Ltd v Phonographic Performance Ltd*[1999] 1 WLR 1507, made clear (in particular at pages 1522 to 1523) that the then new procedural rules, of the CPR, were intended to impose a higher discipline on parties in the conduct of ordinary litigation than had been the case. It was in these circumstances that the principle of costs following the event was described was the starting point from which a Court could more readily depart. Hence, the provisions of CPR 44.2, 4 and 5 the substance I have already referred to.

17. There seems to me no good reason why there should be the same expectations in respect of claims for costs and, moreover, why such a discipline should not be encouraged by costs orders which incentivize such discipline. Further, there seems no reason why consideration should not be given to making some other order than costs in the case in the circumstances of a costs budgeting hearing to reflect the relevant factors set out in CPR 44 and to apply these considerations as they would in determining the substantive claim

18. As I have indicated, the contention of the Defendant, as it was initially framed, was the Claimant was not properly engaged in trying to resolve the costs budget by negotiation. Documentation was produced to me which was, to my mind, clearly 'without prejudice'. Mr Williams-Knibb sought to develop an argument that somehow he intended the offers that he had made to the Court to be 'without prejudice save as to costs' offers. Whatever his intention I must read the documentation as it stands, and as it reads, not as he intended it to read. However, there was no objection to this documentation being produced, as far as I understand it. Indeed, Mr Taylor, costs lawyer for the claimant, made submissions by reference to it. It seemed to me that whatever the initial nature of the documentation passing between the parties, any privilege had been waived.

19. My particular concern however in going through this costs budgeting process was that there were elements of the budget that seemed to be put unrealistically high, as it was pursued and maintained at the hearing; that there were elements that would put at a level which was unrealistically high and essentially outside the bracket of realistic contention. I raised with the parties either at the end of the costs budgeting hearing or in the subsequent argument. That t is a concern that stuck with me.

20. It is not necessary, I think, for me to analyse the budget in detail in this judgment on costs because I have already given my judgment on the budgeting. But in this case the claimant's solicitors are in Manchester. The hourly rate claimed in the budget for the grade A fee earner, which they say is agreed with their client,-and I have no reason to go behind that, is £425 per hour. That is substantially above the guideline hourly rate, a factor itself does not worry me or concern me for these purposes. You might expect a lead fee earner on a case such as this to have their hourly rate uplifted from the guideline hourly rate because of the

responsibility taken -indeed whether £425 per hour might be recovered on detailed assessment is a different matter. I am not asked to set the hourly rate. I think the concern that I expressed was how much of the work in the budget was work that would be carried by the grade A at £425 an hour. Although there was some delegation of the work to be carried out, I formed the view that you would expect there to be a substantially greater degree of delegation that was allowed for.

21. As I say it is not necessary for me to give a great exposition on this. I was concerned, as I say, that some of these claims in the budget were just was not realistic.

22. By way of example, if you look at the Statements of Case, 47 hours work is claimed for grade A. There is no grade D involvement at all in the schedules and counter-schedules when you might expect a grade D go be involved to many of the claims for expenses or the like. As to the times claimed in respect of schedule of loss, there is already a really fairly detailed schedule of loss. There is a significant amount of work to be done. But I took the view that the claim for £23,000-odd with counsel at a further £3,400 was unrealistic; the solicitor was going to do the schedule and counsel, despite a charge of £3,400, just going to be checking it. This level of costs was clearly substantially too high in circumstances where you would expect the experts' reports to provide details of the associated claims going forward. I should add that even making full allowance for the fact that this was an important and serious claim nevertheless the schedule was not in the same league of many of the schedules that we see in very high value personal injury work.

23. In the Experts' phase ,226 hours is claimed at £425 an hour, £96,000, and grade D- just two hours, I was very concerned about these figures. Solicitors' fees considering the reports were higher than the experts' fees for their involvement which includes preparing the report -at less than or about £89,000. These fees are on top of the incurred solicitors' fees in circumstances where a substantial number of the reports, not all of those necessary, but a substantial number of reports had been obtained, and the case is already reasonably well formulated.

24. Similar points can be made as to the Preparation for Trial phase and, perhaps more particularly, the Trial phase in particular with a grade A only attending trial, a 10-day trial, at 119 hours. Notable are the costs of attendance at trial for a solicitor at over £50,000 for the ten day trial, plus the disbursements for solicitor's attendance, which were claimed at £5,500. I was concerned also about the experts' fees attendances but the solicitors' fees for a ten-day trial, notwithstanding the importance of the matter and anticipated length of trial seemed to be substantially outside the range that I would expect to see.

25. It followed that I was persuaded to make a considerable reduction in the costs budget. To my mind it is also appropriate that I should have regard to these matters, including the substantial nature of the deductions, in making my costs order, in particular some other order than 'costs in case'..

26. Mr Taylor, Costs Lawyer, made a good point, however, when he said that to impose too high a costs deduction, or too stringent a costs consequence, to reflect large budgeting reductions and the extent there was a failure to put in a realistic offer, would discourage defendants, or could discourage defendants, from making realistic offers. I thought that was a sensible and considered submission, and that it would be very regrettable if there really

were to be, at the end of a costs budgeting hearing, much in the way of argument about the costs budgeting costs because overall the costs involved are likely to be very small. And, taking too strict a line in relation to this matter, would encourage defendants to sit back and not to make realistic offers.

27. I should also say though Mr Taylor intimated in his written submissions that was the case here – and the Defendants did not make realistic offers. I do not think it was. I think the offers made by the Defendants, at least at the costs budgeting hearing, were not unrealistic. I may have made somewhat increased allowances above them in some phases, but I do not think there was a case of these Defendants being unrealistic.

28. I should remind myself what was said by Coulson J, as he was then, in the case of *Findcharm Ltd v Churchill Group Ltd* [2017] EWHC 1108 (TCC). Mr Williams-Knibb. Solicitor having referring me to this case. The judge was concerned about defendants putting in an unrealistically low costs budget, and he considered that what was, as it were, a 'low-ball' tactic was something in which he should pass comment; indeed that the case should be reported on BAILII. In this case the concerns are of course that claiming party's budget was unrealistically high. Nevertheless I think however that comments that the learned judge made give me confidence that it is appropriate in some way to reflect concerns about unrealistic budgets in the costs order that I am asked to make.

29. Mr Taylor also said that allowances as between Masters vary quite a lot. This is the sort of submission that is made all the time before the Masters; that other Masters allow more or less than is proposed. I recognise that the nature of costs budgeting and estimating costs means that there is necessarily a broad range of what might be awarded. I think, as I say, that some of these claims were just too high and I would be surprised if any other judge took another view in relation to that. I must, of course, be wary and careful before coming to the view that something is unrealistically high. However it would be concerning if the claimants or their solicitors, thought that they advance budgets which were made without any real constraint or consideration as to whether the claim was reasonable. I am concerned that that was what was going on here. In any event, whatever the claimant's legal representative actually thought about their claim, I formed the view that it is appropriate that there should be some discount of the costs to reflect my concern that these claims were unrealistically high and out with the reasonable band.

30. As to the second point, and whether I should look at the offers and counter-offers and matters such as that. In the end, having looked through the relevant material, I was not persuaded this would adds much or anything to my concerns. Indeed whilst it appears appropriate to bear in mind that the Defendants seem to have generally done better overall on their offers I have to look at matter by phase and on one phase the Claimant has actually done better than their own offer. It does also seem also that the offers that the defendants have relied on were made at a late stage. They were not all made in their Precedent R. Moreover, inevitably it seemed to me some of this negotiation was going on over a long period and there would be costs in carrying out the negotiation which might reasonably be said to be costs in case. Overall, I formed a view that points that Mr Williams-Knibb made in relation to the failure to make realistic offers and as to a lack of proper negotiation did not really add anything to my concerns or add anything that would affect the nature of the decision that I have decide to make..

31. As I have made clear I have in approaching this task been wary about considering whether some of the claims for costs made were unrealistic in all the circumstances including the background which I have set out. As I say, I think they were, and I think some costs deduction should be made. However, I do not think that no order as to costs is the right order. I think inevitably there will be a substantial amount of negotiation. I think also the position in relation to the negotiation and matters was somewhat more mixed than the Defendants would have it. I think overall the right deduction from costs is a 25%, so that the costs are costs in the case, save that should the claimant recover their costs there is a 25% reduction of those costs. That seemed to me to meet the broad justice of the matter bearing in mind also that these claims were really pursued to the end.

32. It may be that sort of percentage deduction encourages to take reasonable steps to negotiate their costs budget and to achieve settlement- or at least I might hope so. In any event that is the view that I have taken as to the appropriate deduction applying the relevant factors

End of Judgment

Transcript from a recording by Ubiqus (Acolad UK Ltd)
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This transcript has been approved by the judge.