Case No: SC-2021-BTP-001095
QB 2018 001181

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice, Strand,
London, WC2A 2LL

Date: 5 January 2022

Before :

DEPUTY MASTER CAMPBELL

- -

Between :

Matthew Hankin **Claimant**

- and -

(1) Richard Barrington
(2) Ademola Adejuwon
(3) Saracens Rugby Club **Defendants**

- -
- -

Paul Hughes (instructed by **Irwin Mitchell**) for the **Claimant**
Mr Kirby (instructed by **Goodwin Malatesta Costs Services on behalf of the Medical & Dental Union of Scotland MDDUS**) for the **Defendants**

Hearing dates: 25 November 2021

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

DEPUTY MASTER CAMPBELL

Deputy Master Campbell, Costs Judge:

1. This reserved judgment addresses the following issue which is the only point that remains outstanding in the detailed assessment of the claimant's costs payable by two of the defendants (the first and second defendants mentioned above, the action having been discontinued against the third defendant, with no order for costs), all other costs issues having been agreed:-

   Point 31 - Item 3036 -Leading Counsel's brief fee

   > "… How is it reasonable for leading counsel to be paid a full brief fee in a case that was effectively settled two and a half weeks before a trial having undertaken no work under the same for a charge of £132,000? [£110,000 plus VAT] ... The following is accordingly offered as reasonable and proportionate: counsel's fee - £Nil".

2. I heard this matter on 25 November by Microsoft Teams when Mr Hughes represented the claimant and Mr Kirby appeared for the defendants. I reserved judgment because I received Mr Hughes's skeleton argument shortly before the hearing (no criticism of that: the parties had clearly been working hard behind the scenes to resolve all the issues in advance of the hearing) and I had not had time to give it the attention it deserved. In addition, the electronic bundle amounting to 1319 pages had been uploaded but had not reached me. Page references to the bundle appear as *[ ]* in this judgment.

The Facts – the Action

3. These can be stated shortly. The Claimant was a professional rugby player. During a pre-season tour in Budapest on 6 September 2015, the team became involved in a traditional off-the-pitch drinking game, during the course of which the Claimant suffered a severe head injury. The tap on the head he had received during the course of the game had been administered by the First Defendant.

4. On his return to England the following day, the Claimant displayed symptoms of concussion. The day after that, a Mr Nicholas Court, an employee of the Third Defendant had advised the Claimant that he needed to undergo an head injury assessment (Mr Court was subsequently named as a Defendant, but proceedings were discontinued against him). However, no SCAT test was completed and there was no follow up. Between 8th and 15th September, the Claimant had been placed on a Graduated Return to Play although he had complained of dizzy spells and vomiting after exercise. Following a medical review by the Second Defendant, the Claimant had been diagnosed with sinusitis and prescribed a nasal spray, a dose which was repeated on 2 October 2015 when he was told that he was fit to play rugby the following day.

5. During the match in question, the Claimant had suffered a further head injury, resulting in another concussion. Subsequently the Claimant was diagnosed with post traumatic vestibular order and persistent post traumatic vestibular migraine. With his rugby career at an end, the Claimant started proceedings seeking compensation pleaded at £3,155,842.76 against all three Defendants who denied liability. Directions were given for a trial on liability and quantum, to be heard over 13 Days starting on 15 March 2021. However, the case settled at a mediation on 24 February 2021, on terms that the First

and Second Defendants would pay agreed damages and the Claimant's costs, with there being no order for costs against the Third Defendant. Subsequently, the Claimant served his bill which sought £876,701.99 and the detailed assessment was assigned to me. However, as I have said, the parties have agreed terms so far as the entire bill has been concerned, save item 3036, Leading Counsel's fees.

The Facts - Chronology

6. The facts which are relevant to this judgment need to be expressed in more detail so far as dates involving the brief fee are concerned:-

14th October 2019 - Claimant's costs budget approved by Master Yoxall in the total sum of £739,991. Trial phase budgeted at £307,500 (profit costs and disbursements, £145,000 having been sought for leading counsel and £65,000 for Junior Counsel).

28th November 2019 - action listed for a 13 day Trial to commence on 15th March 2021.

18th December 2020 - Costs Management Conference: Claimant's Costs Budget increased by £36,990.00 increasing the total to £776,982.00.

6th January 2021- Claimant's Pre-Trial Checklist filed with the Court.

18 January 2021 - Mediation proposed by the Second Defendant.

18 January 2021 - Claimant's issue application for an order for the Defendants to agree the expert agendas to enable the joint meetings to take place and joint reports to be served later, listed to be heard on 2 February 2021.

26 January 2021- Mediation fixed for 24 February 2021.

28 January 2021 - Pre-Trial Conference.

1 February 2021 - Leading Counsel's brief fee reduced on revision of number of days of trial to £125,000 plus VAT [1300].

02 February 2021 - Claimant's application adjourned to be re-listed before the Judge in charge of the Lists.

12 February 2021 -Adjourned Application Hearing.

15 February 2021 - Pre Trial review: order for Experts reports , *inter alia,* for agreement on agenda and that having conducted a joint meeting, to produce a joint report of their conclusions by 5.00pm on 26 February 2021 to be served on all parties, trial bundles are to be lodged electronically at Court no later than 14 days before trial.

22 February 2021 - Claimant's brief on trial delivered to Mr Robert Weir QC.

24 February 2021 - Action settled at mediation: Experts stood down.

2 March 2021 - Consent Order approved by Master Eastman.

6 July 2021 - Claimant's bill served in the sum of £876,701.99.

23 July 2021 - Points of Dispute on the bill served.

The Submissions

For the Defendants

7. Mr Kirby advised me that on 18 January 2021, they had requested a proposal for mediation. According to the Claimant's bill, there had been a conference with his solicitors and counsel on 28 January 2021 at which he submitted "mediation must have been discussed". That day, too, Mr Weir QC, had confirmed that he would be available for the mediation. On 1st February, after the agreement to mediate had been reached, Mr Weir's brief fee had been agreed. Two days later, for the defendants, Plexus Law had written to all parties asking for costs schedules. On 12 February, there had been a pre-trial review at which the Judge had made further orders for the exchange of an agenda and expert's reports to be served, but not until 26 February. On 22 February, Mr Weir's brief had been delivered and his fee deemed "incurred".

8. At that point, however, no agreement had been reached about the trial bundle: that was not due to be lodged until 3 March and the expert evidence had still to be agreed. The mediation had then taken place on 24 February at which the settlement had been reached. The following day, Irwin Mitchell for the Claimant, had notified the court that the action had settled. The experts had been stood down and a consent order agreed. Only on 1 March did the Defendants hear mention for the first time that a brief fee had been incurred as from 22 February. Had the Defendants been made aware of that trigger point, they would have ensured that the mediation had taken place at an earlier date.

9. So far as the Defendants' own Counsel's brief fee had been concerned, an agreement had been reached to stage the fee which was £35,000, payable in three tranches – stage 1 £15,000 for the mediation; stage 2 on 1st March for £10,000; and stage 3 on 8 March, a further £10,000. Here, so far as Mr Weir's fee had been concerned, there had been no staging and a full fee had become payable, at least so far as the Claimant had been concerned, as of 22 February.

10. Drawing these threads together, Mr Kirby submitted that the starting point was whether a brief fee was recoverable as between solicitor and own client. Since Irwin Mitchell were conducting the case under a Conditional Fee Agreement, the Court needed to be satisfied that the Claimant had agreed to be, and was, under a contractual obligation to meet Mr Weir's fees. Absent such an obligation, by operation of the indemnity principle, there would be no costs for the Defendants to indemnify because the Claimant would not have had any liability to pay anything to his own solicitors.

11. Next Mr Kirby took issue with the Point of Reply served to the Points of Dispute on the bill that "Brief fees become payable 21 days before trial". No authority had been advanced to support that proposition and in Mr Kirby's submission, there was none. There was no standard industry term to that effect and to fix a mediation after the Claimant had incurred such a large fee plainly would not have been in his interests.

12. As to comments in the Replies that Mr Weir had been booked for the trial on 25 November 2019, thereby reserving a period of 13 trial days and 16 preparation days,

meaning that he had turned away other lucrative work in order to devote his time to the Claimant's case, the Defendants had noted that neither Junior Counsel nor the experts had claimed any "lost opportunity" fees in the bill. The Defendants had not seen Mr Weir's diary, but it was reasonable to suppose, as a busy silk, that he would have been able to take on other work in the days freed up by the settlement.

13. Lastly, there was the quantum of the fee. The Defendants' primary contention was that the fee should be nil. However, if the court were to be against the Defendants on the principle of recovery, it was their case that a fee of £110,000 was wholly unreasonable. Brief fees were usually calculated on the basis of one day's preparation for every Court day and the first day's attendance. Taking account of Counsel's charging rate of £550 per hour, that would equate to a thirteen day brief fee of approximately £77,000. In Mr Kirby's submission, 9 preparation days would have been reasonable, plus the first day of trial, meaning that a brief fee of £55,000 would have been appropriate. To set against that, there would have been the £15,000 fee for the mediation, to which no objection was taken, plus that fact that according to the claimant, Mr Weir had undertaken 6 conferences and two short hearings in the days released by the settlement. That addressed the "lost opportunity" point.

14. Taking these matters together, the brief fee should be reduced from £55,000 to reflect the early settlement, by £15,000 for the mediation and then further abated to take into account the work that Mr Weir was actually able to undertake after the action had settled, for which Mr Kirby posited a figure of £11,000.

For the Claimant

15. Mr Hughes at the outset, made the sensible concession that although the case had been budgeted by Master Yoxall, he could not resist an argument, in so far as the Defendants wished to make it, that there was "good reason" under CPR 3.18(b) to depart from that budget due to the fact that there had been no trial.

16. Mr Hughes then took issue with the point about whether the Claimant was liable for the brief fee in the sense advanced by Mr Kirby, namely was this the correct contractual agreement for him to have entered into? That point that was akin to an argument that had been advanced, dealt with and dismissed by the Court of Appeal in *Garbutt v Edwards* [2006] 1 Costs LR 143. It did not raise a genuine issue and could not be advanced now.

17. As to what was a reasonable brief fee for the case in point, Mr Hughes explained that the original fee had been reduced to £125,000 to reflect the shortening of the trial length by two days *[1300]*. Mr Weir had charged £15,000 for the mediation, so the figure claimed in the bill was £110,000 *[1304]*. As to how that sum had been reached, whilst Mr Weir was pre-eminent counsel, his hourly rates were not. They were commensurate for a case pleaded at over £2m. The Defendants had contested liability, causation and quantum. The case, involving as it did, a professional rugby player, had had public importance. Mr Weir's diary had been blocked out as to 22 days for a period of sixteen months. At £5,000 a day for 22 days, the brief fee would have been £110,000 and had he undertaken the trial, there would have been 12 refreshers on top. For these reasons, the figure claimed in the bill was one that had been reasonably calculated.

18. That said, Mr Hughes accepted that there would be an abatement. The 'lost opportunity' argument would be mitigated to the extent that Mr Weir had been able to undertake other work, albeit that there had been no fall-back hearings. The case had not been removed from his diary until 1 March 2021. What Mr Weir had been able to do was not a matter of speculation but of fact. Knowing that he was now available, Irwin Mitchell had obtained his advice about other matters in two consultations, there had been four other consultations and two short hearings *[1315].* In these circumstances, any abatement of the brief fee should be relatively low, in the region of 20-25% meaning that the fee should be not less than £75,000 and up to £80,000.

Law

19. Where a case settles after the brief has been delivered, it is no longer the case that counsel is entitled to a full fee. There will need to be a re-negotiation between counsel's clerk and instructing solicitors. Useful binding guidance can be found in the judgment of Jack J in *Miller v Hales* [2007] EWHC 1717 (QB) at [7].

> "The old, the very old, rule was that when a brief was delivered the full fee was payable whatever happened thereafter. Many years ago it became common for agreement to be reached between solicitor and counsel's clerk in large cases as to the dates at which proportion of the brief fee would become payable in advance of the trial. There are two elements to be reflected there: the work counsel will put in on the brief as the trial approaches – which I would regard as the main element, and the fact that counsel has been booked for the trial and so will have a gap in his diary if the case settles, which may be difficult to fill at short notice. I would not expect today that, where no particular terms had been agreed, counsel would require to be paid his full brief fee where the brief had been delivered well in advance of the trial and the case settled soon after delivery. In short it is today appropriate to take a realistic and practical approach rather than to apply rigidly the old rule that a brief fee becomes payable on delivery of the brief".

20. In terms of what level of reduction would be reasonable, Mr Hughes's skeleton has helpfully alerted me to the following cases:-

   i) *Simpsons Motor Sales (London) Ltd v Hendon Corporation (No. 2)* [1964] Costs LR (Core) 29 - Penncuick J:-

> "Mr Harman contended that the proper measure for counsel's fees is such a fee as counsel competent in the field concerned would be content to take upon the brief. Mr Bell, for the corporation, contended that the proper measure is such a fee as counsel appropriate to the brief would be content to take upon the brief. As used by counsel in argument these expressions come, I think, more or less to the same thing. In other words, one must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particular high fee sometimes demanded by counsel of pre-

> eminent reputation. Then one must estimate what fee this hypothetical character would be content to take on the brief ... The taxing master, employing his knowledge and experience, determines what he considers the right figure. The judge in his turn must, I think, consider whether upon his own knowledge and experience the figure adopted by the taxing master falls above the upper or below the lower limit of the range within which in his view the proper figure would come. If, and only if, it does fall above or below those limits, he should substitute his own figure".

ii) *Bowcott v Wilding* [2003] EWHC 9042 (Costs). Brief delivered on 10 April 2003 in a clinical negligence case pleaded at £1m and case listed to begin before Leveson J on 7 May 2003. It settled on day three when the Claimant accepted a Part 36 offer made on 19 April, from which point, the judge ordered the Claimant to pay the Defendant's costs. The issue for Hallett J was how much of the brief fee (if any) was payable by the Defendants for costs due to the Claimant up to the date if the offer. She allowed half the full brief fee being the commitment element as she had described it.

iii) *Lewis v the Royal Hospital Shrewsbury Hospital* 20 May 2005 (unreported) - Mitting J.

21. In *Lewis,* the following extract is taken from the SCCO Case Note made by the Costs Judge assessor in the days before judgments on appeals from decisions of the Masters were regularly transcribed – see No 15 of 2005:-

> "Proceedings were brought in October 2002 and liability was settled by a Court Order dated 15 March 2004 ...
>
> The case concerned a difficult clinical negligence action where a split trial had been ordered. … The costs related to the issue of liability which was settled at 85% for the Claimant, after briefs had been delivered and about three weeks before trial.
>
> Leading Counsel had apparently originally sought a brief fee at £15,000. In view of the settlement it had been reduced to £10,000. There was no evidence before the Deputy Costs Judge as to whether or not Leading Counsel had been able to refill the dates set aside for the trial. The Deputy Costs Judge erroneously assumed he would have been able to take on other work. He allowed a brief fee at £3,500. The brief fee for a full trial or an aborted trial covered the commitment for that trial plus preparation and any negotiations before the trial. It was pure speculation by the Deputy Costs Judge that counsel had other work he was able to do. It was irrelevant whether or not counsel could take on other work. The Deputy Costs Judge had erred in principle and the Appeal Court was entitled to substitute its own view. The hearing was to determine liability only for which a fee of £12,500 would be reasonable and within the expected bracket. The action had settled early. While acknowledging that

> Leading Counsel was fully committed there was evidence of little preparation up to the time of settlement. In these circumstances a fee of one half of the full fee was appropriate".

22. So far as the actual calculation of the brief fee is concerned, in *Loveday v Renton* [1991] Costs LR (Core) 204, Hobhouse J said this

> "In assessing a brief fee it is always relevant to take into account what work that fee, together with the refreshers, has to cover. The brief fee covers all the work done by way of preparation for representation at the trial and attendance on the first day of the trial … In the present case I consider that the brief fee should be assessed and allowed having regard to the full history of the trial as now known. It thus should take into account the need for counsel to have meetings with each other and with experts out of court hours and to prepare final submissions. But it should also take account of the fact that all heavy trials include such a need to a greater or lesser extent. The preparation by counsel of his examinations-in-chief and cross-examinations and of his final submissions are an ordinary part of his conduct of a trial on behalf of his client. It is all part of the work which he accepts an obligation to perform by accepting the brief and for which he is remunerated by the brief fee and the agreed refreshers".

23. Jackson J agreed with the judgment of Hobhouse J post the implementation of the Civil Procedure Rules in *Hornsby and Others v Clark Kenneth Leventhal (a Firm) and Others* [2000] 2 Costs LR 295.

24. Assessing the brief fee is not a case of working out the hours spent by Counsel and multiplying them by an hourly rate - see judgment of Lambert J in *Essex Fire and Rescue Service v* [2019] Costs LR 709:-

> "The Master acknowledged that brief fees are not calculated by reference to hourly rates and that the proper measure of counsel's fees is to estimate what fee a hypothetical but not pre-eminent counsel, capable of conducting the case effectively, would be content to take on the brief".

25. Thus, the calculation is more nuanced and takes into account the factors mentioned by Hobhouse J such whether the trial is "heavy" and a booking fee. It follows that in the context of the issue before me, it is worth emphasising what Jack J said in *Miller*, that the brief fee will also have contained an element to reflect the reserving of Mr Weir and a recognition that by clearing his diary, Counsel in all likelihood will have turned away other lucrative work in order to devote his time to the case in hand.

Decision

26. Given Mr Hughes's sensible concession that the fact that the trial did not take place but Counsel's brief fee has been claimed, is a good reason under CPR 3.18(b) to depart from Master Yoxall's last approved budget, that aspect of the Defendants' case does not require a decision. It follows that the starting point is to decide what, (if any) would

be a reasonable sum to allow for Mr Weir's brief fee, with the parameters being £132,000 for the Claimant and £nil b for the defendants. I need to add in this context that Master Yoxall did not allocate the £307,500 for the trial phase as between profit costs for Irwin Mitchell and counsels' fees. It follows that I am not constrained to allow the figure had he made a specific allocation between the two but can exercise my own discretion in this respect.

27. In my judgment, having regard to the authorities I have mentioned and the facts of this case, a brief fee of £125,000 plus VAT is unsupportable.

28. I accept that this was a difficult and complex case on liability, causation and quantum, but it is not strikingly more so in these contexts than other tragic and life changing cases which come before the courts involving personal injury and clinical negligence. The reduction in the trial length, the fact that Mr Weir had not come into the case late, (had that been the case, he would have needed to work up his brief from a standing start), but on the contrary, had already undertaken 17.5 hours work on the matter by 26 January 2021 with a further 3 hours in conference with four experts on that date *[1319]*, and that he has received the unchallenged fee of £15,000 for attending the mediation, are all matters which militate against the reasonableness of the fee claimed.

29. To that I would add the point on pre-eminence. Mr Weir can command an hourly rate of £550 per hour and in that context, I consider his rate falls fairly and squarely into the pre-eminence category envisaged by Pennycuick J since it is higher than that allowed for these types of catastrophic injury cases which come before the Costs Judges. By way of example, in *Essex Fire and Rescue Service*, the Master had reduced leading counsel's hourly rate from £500 to £400, a decision with which Lambert J did not interfere on appeal (see judgment [41-42]). In that case, the brief fee had been claimed at £50,000 for a 15 day trial in 2013 in a Group Action involving negligence and breach of statutory duty which the judge described as *"... not, by any stretch, a typical "run of the mill" personal injury action"*. Albeit 8 years later, even taking account of inflation, Mr Weir's fee at more than double that amount, gives the appearance of being one that is unreasonably high for the Defendants to meet.

30. All these factors militate against a brief fee for a leader of £110,000 plus VAT as being one that can be justified between the parties. In so far as an hourly rate has been used, it is too high and reflects a sum for pre-eminence. It is also out of kilter with a case with similarities in which Lambert J allowed £45,000 for work undertaken 8 years ago. Doing the best I can, based upon the materials before the court, the submissions and the authorities to which I have referred, I consider a brief fee of £75,000 would have been reasonable for the hypothetical leader envisaged in the judgment in *Simpsons Motor Sales* undertaking a high value trial in 2021 such as this.

31. The next point is to decide the level of abatement to take account of the fact that the trial did not take place. Mr Hughes has accepted that a reduction as a matter of principle is justified, but submits that this should be relatively low. He argues that preparation for a mediation is very different from getting a case ready for trial and that if the starting point is £110,000, the degree of abatement should be about 20-25 percent, meaning the brief fee should be £75,000 to £80,000.

32. In my judgment, Mr Hughes has been realistic in making a concession, but the starting point is too high. If that is £75,000 and £15,000 is allowed for the mediation (Mr Kirby

argued that that should be set off against the brief fee, but I consider that it is a free standing instruction separate from the brief fee itself and outside the scope of the work envisaged by Hobhouse J in *Loveday*), I am satisfied that a much greater reduction is required. First, it is not advanced that Mr Weir was working up his brief before the date of the mediation: if the brief was delivered on 22 February and the mediation took place two days later, it is unlikely that Mr Weir would have spent much time at all on trial preparation as he would have been getting ready for the mediation, a different type of preparation , as Mr Hughes has submitted.

33. The case then settled at the mediation, without the trial bundles having been agreed, and with the experts then being stood down. Correct it is that Master Eastman did not approve the consent order until 2 March, so things could not be taken for granted, but the reality of the situation is that an agreement had been reached on the damages payable, leaving merely one or two loose ends to be tied up about costs. To all intents and purposes, the action was at an end and it was not suggested to me that Mr Weir was involved in work during that last week of February preparing for trial which can reasonably be laid at the door of the defendants. The point made on his behalf *[1316]* is simply that the case could not be removed from his diary until 1 March 2021, which is different. The inference I draw from that is that Mr Weir was not hard at work in preparing the case during the days beforehand. That is important because it was a point which Mitting J found persuasive in *Lewis,* holding that with evidence of little preparation, just 50% of the brief fee was allowable.

34. Against that, there is the point that Mr Weir had booked out time from his busy diary to accommodate the case, and as a matter of principle, Counsel is entitled to be paid for the loss of the chance to appear at the trial and for the fact that he turned away other remunerative work in order to take the case. That is correct so far as it goes, but the time scale between the date of delivery of the brief and the expected trial date was about three weeks, and as Mr Hughes has conceded, there must be an abatement. In *Bowcott,* Hallett J attributed 50% of the brief fee to what she described as the commitment element, whereas in *Miller,* Jack J allocated one third of the fee to the fact that the fact that Counsel had been booked for the trial and would have a gap in his diary if the case settled, which might be difficult to fill at short notice. As I have said, Mitting J allowed 50% of the brief fee where the action had settled three weeks before the trial. Taking these facts into account, I consider that an abatement of 50% of the brief fee would be appropriate here, meaning the allowance, subject to what I say below, should be £37,500, plus VAT.

35. What of mitigation of loss? In *Lewis* Mitting J found that the Master had erred in speculating what Counsel might have earned after the case had settled and that that was an irrelevance. Here, however, evidence has been advanced that Mr Weir undertook six consultations and two short hearings, so there is no need for any speculation. Mr Kirby submitted that these earnings should be taken into account which he put at £11,000. Mr Hughes did not advance his own figures but did not challenge those put by Mr Kirby. I agree that credit must be given for those sums. Mr Weir took steps to mitigate his loss and did so. I consider that that factor must be taken into account when assessing what it is reasonable for the defendants to pay, just as the Claimant himself would be entitled to ask: "if Counsel took other work, why should I pay the full brief fee?" Looking at matters in the round, I would attribute £10,000 to mitigation.

36. In the result, I allow item 3036 at £27,500 plus VAT.

37. In conclusion, I need to address three further points made by Mr Kirby. First, in his submissions, he was critical of the Claimant for not having warned the defendants about the delivery of Mr Weir's brief. Had the Defendants known that it was to be 22 February, they would have arranged for the mediation to have taken place earlier.

38. I have two observations on that. First, that is to apply a hindsight test. I agree that it would have been sensible for the mediation to have taken place before briefs were delivered, but that is to adopt a "being-wise-after-the-event" test which is not permissible - see *Francis & Francis v Dickerson* (1955) 3 AER 836 . Second, this was complex, high value litigation with experienced firms on both sides. The trial had long since been fixed for 15 March 2021. It would have been open to the defendants to ask "*When are you delivering your brief?".* If, as was the case, the right question was not asked, I do not follow how it can be the fault of the Claimant if the Defendants remained in ignorance of the answer until it was mentioned on 1 March, after the case had settled. According to Mr Kirby's skeleton argument, Plexus Law had asked on 4 February 2021 for all parties to have details of their costs available at the mediation, but if it is right that it was only on 1 March that the amount of the brief fee came to the Second Defendant's attention, it would appear that the point was not followed up, as well as having been flagged up, earlier as it could have been. That is not the Claimant's fault.

39. Next there is the staging of the brief fee. Mr Kirby submitted that a staged fee would have been appropriate, as was the case for his Counsel. However, I agree with Mr Hughes that there is no obligation on solicitors to agree staged fees and the fact that it was not done here does not render Mr Weir's fee irrecoverable.

40. Finally, there is the question of the Claimant's approval of Mr Weir's fees. I agree with Mr Hughes that *Garbutt* is relevant by analogy. That case concerned estimates, Arden LJ having identified the following issue for decision:-

> "… can a paying party claim that his liability to the receiving party under an order for the payment of costs is discharged, or that it should be reduced, if the solicitor for the receiving party has failed to give to his client an estimate of costs in accordance with the Solicitors Costs Information and Client Care Code ("the Code") as required by the Solicitors' Practice Rules?"

41. The Court of Appeal considered first in this context, the importance of the solicitor's certificate on the bill (see paragraph [7]) and concluded that:-

42. As a matter of policy, therefore, the courts start from the position that the certificate of accuracy has been properly given. There must be good reason to justify going behind the certificate.

43. Here, I am not persuaded that speculation about what the claimant may or may not have been told and agreed is sufficient to go behind the certificate. Indeed, the starting point is that where a client instructs a solicitor *"it is normal that solicitors acting for a client expect to be paid, this is the default position*." See judgment of Roth J in *Robinson v EMW Law LLP* [2018] 4 Costs LO 477. I have no reason to doubt that proposition so far as the claimant here is concerned. For these reasons, the point fails.

Disposal

44. The brief fee is allowed at £27,500 plus VAT. The Defendants are to pay the costs of the detailed assessment under CPR 47.20 in relation to this point, subject to the court being invited to make a different order should there have been an offer which the Claimant has failed to beat. There is no need for the parties to attend when this judgment is handed down, but they are at liberty to restore this matter by letter for a further hearing about the costs giving rise to this judgment and permission to appeal if required.