[2023] EWHC 1392 (KB)

QB-2020-003956

IN THE HIGH COURT OF JUSTICE

KING'S BENCH DIVISION

BETWEEN

Thomas Hadley (A Protected Party By His Litigation Friend Laura McCarry)

Claimant

v

Mateusz Przybylo

Defendant

JUDGMENT

For the Claimant: Chris Barnes KC and Mark Brighton, costs lawyer, instructed by Gamlins Solicitors LLP

For the Defendant: Andrew Davis KC, instructed by Keoghs LLP

**Keywords: Costs budgeting – court ordered Alternative Dispute Resolution – ADR - Costs lawyers – Rehabilitation – personal injury – case manager – MDT – recoverability – costs – Issue and statements of case – progressive – litigation – Judgement of Solomon**

**Plain language summary (Flesch score over 50). This summary does not form part of judgment but must be included in any reproduction of the judgment.**

This judgment is about whether some legal charges can be included in a court budget for a claim. A budget is a document which gives the expected cost of a court case right through to its end. The charges are money which the lawyers want to spend on going to meetings with Case Managers and deputies. The reason they want to spend the money is to keep the Schedule of Damages updated. The charges were included in the Issues and Statements of Case phase of the budget. A phase of a budget is a part of it which relates to a set of steps or actions in the case which the lawyers plan to take. The judge decided the charges are not claimable. The reason is that they do not progress the court case.

**MASTER MCCLOUD:**

1. On rare occasions, like the transit of Venus or a triple Jovian eclipse but far less predictably, costs budgeting ceases to be a cause of judicial *ennui*, and raises instead something of interest legally. This case determines one such specific issue in relation to the principles of costs budgeting under the Civil Procedure Rules. In particular that issue is whether the inclusion of solicitor attendance time in a budget, for attending case management meetings with medical and other professionals in the course of management of the Claimant's rehabilitation needs, and for meetings with financial and court of protection deputies said to be part of inputting into a Schedule of Loss are in principle costs which may be included in a budget and whether, if so, it is appropriate to include those in the 'Issues and Statements of Case' phase of the budget on Form H. The costs in the Claimant's original budget were very substantial, and in that context I also touch on the question of the benefits of a judge ordering that parties must engage in ADR using appropriately qualified professionals in relation, specifically, to the costs budgets.

**Mandatory ADR and Costs Budgeting**

2. Before I proceed I will note that in this case, where there is a large budget in a complex and very serious personal injury claim, I took the step of ordering the parties to engage in ADR to seek to resolve issues in the budget before I would budget any outstanding phases. The Claimant's budget exceeded £1m and my view is

that a simple obligation to discuss and seek to agree is an insufficient encouragement to parties to focus their minds on really working to resolve issues, where one often sees that (once the time and trouble of attending a costs management hearing has been incurred) the presence of costs professionals at court and immediately before so often narrows issues which could have been narrowed sooner. I therefore directed that:

*"The parties shall engage in ADR in respect of the parties' costs (insofar as they are not already agreed), the professionals engaged in the ADR being appropriately experienced/qualified costs professionals, such ADR to be completed by 5pm on 3 March 2023".*

3. By the time the matter returned to me some time later, the parties had indeed engaged in ADR using qualified costs lawyers and all but one matter had been agreed on the budget, which I think speaks for itself in terms of saving time and money. It also enabled an important point of principle to be identified, and the rest of this judgment deals with that one outstanding issue.

**The issue of the inclusion of time costs for fee earner attendance at case management meetings of medical and other professionals, and meetings with or attendance on Court of Protection deputies**

4. The Claimant argues that it is frequently, in its representatives' experience, the case that such charges are allowed to be included in budgets in that section and that such is the practice of other Masters. They contend that attendance by a fee earner at these case management meetings etc are reasonably necessary to progress the litigation because they assist in maintaining the Schedule of Loss as the claim goes along. It is (in my words) something of a 'live feed' from the Claimant's care and treatment at medical-professional level and the deputies, to the lawyers. What is claimed in the budget is about 1 hour each week with the Case Manager and 1 hour each week with each of the two Deputies, totalling 3 hours a week in the Issues and Statements of Case phase, as part of work on drafting and updating the Schedule of Loss on an ongoing basis.

5. The Defendant argues quite the contrary. His representatives argue that as a matter of principle such attendance charges ought to be ruled as inadmissible in a budget. They are not progressive of litigation any more than, say, having lawyers attend every medical treatment appointment would be. They are not properly included. In addition, whether or not in principle ever allowable in a budget, they do not fall within the guidance as to the categories of matter to be included in the Issues and Statements of Case phase in any event. Furthermore, their experience in contrast with that of the Claimants is that such charges are often rejected for inclusion in budgets.

6. There is no relevant authority which the parties could find to assist me and absent that it falls to me to make a decision so that any aggrieved party can seek a ruling, if they wish, on appeal, as to the correct approach. Hence whilst this is a brief decision it is in writing and not *ex tempore*. Assuming both sides are correct and hence that the practice is variable among colleagues, this is necessarily something of a 'Judgment of Solomon' (I do not intend thereby to self-identify as Solomon, lest I be thought to dip into areas of social controversy currently causing anxiety in some corners of the media).

**Decision**

7. The matters, according to Precedent H Guidance, Practice Direction 3D, to be included in the Issues and Statements of Case phase are (taking this summary from the Defendant's submissions):

   *"work relating to the preparation of the Claim Form, the Particulars of Claim, the issue and service of proceedings, consideration of the Defendant's statements of case, preparation of the Schedule of Loss, and conferences with counsel on the statements of case, and any amendments to the statements of case".*

   These are the sorts of things one would intuitively expect, ie those relating to issue of the claim and to statements of case.

8. Already <u>incurred</u> time costs on Issues and Statements of Case in the original budget totalled some 544.3 hours (£163,185). After ADR the total claimed by way of <u>future</u>

costs in the budget before me (as time costs) is 258 hours (£68,400). That breaks down to 48 hours on the schedule, counsel and so on (£12,900). The rest is expense of attending on the deputies for health and welfare and finance, and the case manager. Some 60% is for the case manager and 20% each for attendance on, effectively meetings with, deputies. All this was framed as being part of the maintenance of the Schedule of Loss.

9. It is not a part of this decision one way or another whether some legal charges relating to case management/rehabilitation in a medical sense can be properly claimable in some parts of budgets, such as, say, time incurred liaising over a witness statement from the case or care manager. They are often sought in budgets as is for example time in relation to disclosure of case management-related documents (the Defendant for example included about £400 of past costs in relation to that in its disclosure phase but see below). This case focusses on the very different and specific question of the expense of lawyers actually attending case management meetings on a regular and in this case very extensive basis.

**The concept of 'costs' in litigation**

10. I accept the Defendant's argument at hearing that it is a general principle that 'costs' are legal costs which are incurred in the progression of litigation. They may be pre-action, for example, or they may be reasonably incurred but found in hindsight not to be useful, yet such costs can still be 'progressive' even if they rule out some things which are then not pursued. But costs which are inherently non-progressive are not in my judgment 'costs' properly claimable in a budget between the parties It is not unusual in assessing a bill of costs to disallow items with the brief statement 'non-progressive', for example and it seems to me that if costs fall into that category then they are not suitable for inclusion in a budget.

11. If costs are progressive, then for the purposes of budgeting one has to proceed to fix the reasonable budget sum as a best judicial estimate of future costs, doing the best one can without the assistance of actual material showing work done, such as a Costs Judge would have at a detailed assessment. But the question "are these in principle claimable at all as costs?" is a latent but usually uncontentious one lurking in any

costs decision as to quantum whether in budgeting or assessment of costs. It has raised its head in this case.

**Are these proposed costs in principle progressive of the litigation?**

12. It seems to me that the question one must ask, where a whole category of expense is sought but is challenged, is:

    "*Does an item of a specific type in a budget materially progress the case?*".

    If it does not, then it is not a budgetable or recoverable head of costs in principle.

13. In my judgment having a fee earner attending rehabilitation case management meetings is not progressive in the above sense and does not fall within the notion of 'costs'. Likewise a fee earner attending on deputies so as to seek input into the ongoing drafting of the case in the form of the Schedule, when deputies do not properly play a part in such work, is not progressive. It is for the Claimant to consider whether at trial they may be claimable as damages.

14. The argument that simply attending on these individuals is an 'integral part' of producing the Schedule of Loss, and hence allowable for inclusion as a budget item under that head is weak, in my judgment. Information about case management, or incurred expenses of such things as money management can be achieved by the occasional letter to the case manager or relevant deputy or from obtaining documents for later disclosure, in the disclosure phase, and ultimately also in the Case Manager's or Deputies' witness statements which may or may not be needed for the purposes of a formal deputyship expert. Those are *qualitatively* different things from attending meetings for input into a Schedule of Loss, as is claimed here on a very significant scale. Thus, nothing in this decision says that in principle some phases in a budget cannot include engagement with case managers or deputies, such as for disclosure or witness statements and occasional letters. Past deputyship costs one notes are a matter of fact based on invoices possibly assessed by the SCCO, and the future cost of deputyship is a matter for a deputyship expert.

15. It is true that the Rehabilitation Code requires consideration by both sides of whether rehabilitation would assist and that it is intended that both sides will

collaborate in relation to consideration of rehabilitation needs. However, that does not in my judgment bear an interpretation that having lawyers attend rehabilitation meetings amounts to litigation costs. It may arguably form part of damages but that is not a matter for me.

16. Thus, the (numerous) attendances of the sorts proposed here do not in my judgment progress litigation in this case. Note that I am not here saying that these costs are 'unreasonable' or 'disproportionate': those would be the tests I would apply if I were accepting that in principle they were 'costs' for the purposes of a budget in the first place.

17. If (*per contra*) I had decided that these sums of proposed expenditure in principle would progress the litigation then I would indeed have next to consider whether the proposed extent of attendance was reasonable and proportionate. Were I to have to decide that I would say that the sum and the extent of proposed attendance is unreasonable and would have striven to budget a lesser sum. However, that question strictly does not arise given my decision above.

18. It was pointed out after the hearing in this case that, apparently, the Defendant sent a representative to attend one Case Management meeting. The Defendant clarified that no costs had been included for attendance at that meeting in the Issues and Statements of Case phase but a sum of £368.90 had been included in the disclosure phase for a remote attendance at one Multi-Disciplinary Team meeting. In my judgment that does not alter the principle above and it is entirely possible that, if objection had been taken, I would have excluded it from the Defendant's budget to the extent that it was time cost of attendance. In this instance the item is included by the Defendant as past costs so I am not empowered to disallow it any more than I can in relation to any MDT meeting attendances which may be included in the Claimant's 'Incurred Costs' totals. That is a matter for a Costs Judge in due course. The Claimant's side at the stage of draft judgment also pointed out that the Defendants had expended legal costs on other forms of interaction with the case manager and over rehabilitation. I make no comment on recoverability of such costs

given that this judgment is focussed on the narrow issue of principle already identified.

19. I shall allow as the budgeted (i.e. future) costs £20,000 for the Issues and Statements of Case phase as a whole.

**Which phase?**

20. I shall express a view as to the correct phase for such sums if they were in principle allowable in a budget. My view is that no current phase is appropriate for such sums. If they were to be allowable in principle I lean to the view that a separate phase or phases should be added *ad hoc* by the Judge to incorporate them as a specific identified category in any particular case, assuming the sum can be budgeted judicially and is not too unclear to be determined in advance (in which case one might expressly decline to budget the item and leave it for detailed assessment). It may be hoped that some guidance can be given either by any appellate court or the Rules Committee if ultimately I am wrong and time cost of this sort is recoverable, as costs, at all in principle.

21. Because of the importance of this decision I give leave to the Claimant to appeal, and will hear argument as to any 'leapfrog' in view of the impact it might have more widely. As to form of order if not agreed I will hear argument at a handing down hearing, and will hand down in absence of parties if agreed.

JUDGE: MASTER VICTORIA MCCLOUD

HANDED DOWN 22nd June 2023