Claim No. KB- 2023-001585

IN THE HIGH COURT OF JUSTICE **Neutral citation number:**

[2024] EWHC 2181 (KB)

KING'S BENCH DIVISION

Before :

MASTER THORNETT

- -

Between :

MR NICHOLAS WORCESTER

(BY HIS WIFE AND LITIGATION FRIEND, DOMINIQUE WORCESTER)

Claimant

-and-

DR PHILIP HOPLEY

Defendant

Date: 21 August 2024

- -
- -

Mr Robin Dunne (instructed by Stewarts) for the **Claimant**
Mr David Arnot (instructed by Clyde & Co) for the **Defendant**

Hearing date: 16 July 2024

JUDGMENT

1. This is the reserved judgment following a hearing on 16 July 2024 as listed specifically to decide what costs order should be made following a Costs Management Conference on 15 May 2024.

2. By way of brief background, this is a clinical negligence claim concerning the Defendant's treatment of the Claimant's mental health during October 2014. Proceedings were issued in April 2023 and the Defence denies liability in full. By Order dated 13 February 2024 the court listed a sixty-minute Case Management Conference for 11 April 2024. By Paragraph 3 of that Order, the parties were directed to serve and CE File respectively their Precedent H and R forms and then seek to negotiate and agree their respective estimated costs. The direction stipulated that:

   In default of agreement, by e- mail to the Assigned Master's clerk, a party may either:
   (a) Request that a Costs Management Hearing is listed. Such request shall provide a time estimate and preferred dates; or
   (b) Request a direction from the court that further costs management is dispensed with and that costs shall be subject to Detailed Assessment.

3. From this, it was clear to the parties that Costs Management had been commenced but was subject to further directions and that budgeting – if it were further to proceed - would not be taking place in an active sense at the hearing on 11 April 2024.

4. The direction reflected a practice that has very typically been adopted by the Kings Bench Division Masters in recent years whereby case management is separated in time from costs management. Whilst the costs management is plainly consequent and reflective of case management, there are various reasons why budgeting is not found to be either convenient or appropriate to be conducted at the same time as case management. Principally because, in the very much higher value claims heard in the High Court[1], the range of contended directions takes time to resolve and the decisions reached in consequence more often than not alter the scope and value of the budgets. It is therefore found to be a more efficient use of time, for both advocates and the court, to defer costs management to a subsequent date rather than improvise during the case management hearing.

5. A short interim period is designed during which the budgets can be adjusted to reflect the directions by then given. Importantly, negotiation can then continue in respect of the adjusted budgets. When afforded this opportunity, it is very common for parties to agree their budgets and a Consent Order is filed to so conclude the costs management. The Costs Management Conference is vacated. Alternatively, it is very common for the parties to return to the Case Management Conference as listed but with a reduced number of issues for decision.

[1] i.e. Central Office as, at least possibly, not always the case in the District Registries

6. Consistent with the above established practice, at the hearing on 11 April 2024 directions were given for the trial of defined preliminary issues and a Costs Management Conference was listed for 15 May 2024. The costs order for the hearing on 11 April 2024 was "in the case", thus leaving open the question of what costs orders might be made at the Costs Management Conference. Crucially as well clearly, the latter being a separately listed hearing at which discrete issues to case management were to be concluded.

7. The interim period saw agreement of the Defendant's budget but unfortunately did not see agreement of the Claimant's budget. The Costs Management Conference proceeded and saw substantial reductions to the Claimant's budget. Estimated costs as sought a total figure of £342,263 were instead approved in the sum of £159,675; a total budget of £316,110.29 recorded. The reduction in the Claimant's estimated costs was by 53.35%, being just 3.58% above that offered by the Defendant. To illustrate the parties' respective positions Mr Arnot, Costs Lawyer for the Defendant, provided me at the hearing with the table that follows at the conclusion of this judgment.

8. In the Order sealed 11 June 2024 consequent to the hearing on 15 May, the court recorded certain observations and assumptions that had been expressed in the course of budgeting. One was that the "Issue / Statements of Case" phase had not been managed owing to the Defendant having indicated that an amendment was proposed to his Defence as well as possibly a revised Part 18 request to the Claimant.

9. Owing to the substantial reductions in the Claimant's estimated costs as approved, the Defendant indicated he would be seeking a specific costs order in its favour. Or at least other than "in the case". Costs for that hearing were accordingly expressed as reserved and hence the hearing of 16 July 2024 listed.

10. The Defendant submits that the court should exercise its discretion under CPR 44 by directing that (i) there be no order for costs in respect of the hearing on 15 May 2024; (ii) the Claimant pays the costs of the hearing on 16 July; and (iii) should the Claimant recover costs upon success, there should be a 50% reduction of such assessed costs of and occasioned by Costs Management.

11. In summary, the Defendant maintains that the sequence of events commencing with the Claimant's service of an unrealistically high budget, even having had the opportunity to review and revise the same following the Case Management Conference, the Defendants' Precedent R form presenting and maintaining critical views in response, correspondence between the parties through to the considerable reductions made at the 15 May hearing all take the case beyond the typical and conventional "costs in the case" order, as follows what one might describe as an "ordinary" costs management hearing during which unremarkable adjustments and reductions are made following predictable submissions from the parties. Conversely, the Claimant submits that the process was indeed just that and the final arithmetical

reductions should not be taken as self-proving that any unreasonable expectation or approach had been adopted by the Claimant. Properly analysed, the Claimant says the exercise was no different to any other costs management hearing, following which an "in the case" costs order usually and indeed, the Claimant submits, should follow.

12. Plainly, the court has a wide discretion when making a costs order. Whilst familiar to all practitioners, for ease of reference CPR 44.2 provides as follows:

(1) The court has discretion as to –

(a) whether costs are payable by one party to another;

(b) the amount of those costs; and

(c) when they are to be paid.

(2) If the court decides to make an order about costs –

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order.

(3) The general rule does not apply to the following proceedings –

(a) proceedings in the Court of Appeal on an application or appeal made in connection with proceedings in the Family Division; or

(b) proceedings in the Court of Appeal from a judgment, direction, decision or order given or made in probate proceedings or family proceedings.

(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and

(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

(5) The conduct of the parties includes –

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant 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 or a particular allegation or issue; and

(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.

(6) The orders which the court may make under this rule include an order that a party must pay –

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date, including a date before judgment.

(7) Before the court considers making an order under paragraph (6)(f), it will consider whether it is practicable to make an order under paragraph (6)(a) or (c) instead.

(8) Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so.

13. The making of a specific costs order against a party following costs management is not unknown. Master Brown did so in *Reid v Wye Valley NHS Trust the Robert Jones & Agnes Hunt Orthopaedic Hospital NHS Foundation Trust* [2023] EWHC 2843, a case much relied upon by the Defendant although, as the Claimant keenly points out, is not binding upon me.

    In *Reid*, Master Brown reminded himself that the provisions of r.44.2 enable and endorse the principle that the court may readily depart from any assumed default position on costs (i.e. that costs follow the event or be "in the case") if it considers the facts so justify. The Master referred to early support for this proposition from Lord Woolf in *AEI Rediffusion Music Ltd v Phonographic Performance Ltd*[1999] 1 WLR 1507 where, at pages 1522 to 1523, Lord Woolf emphasised that then new procedural rules were intended to impose a higher discipline on parties in the conduct of ordinary litigation than had been the case.

    On the facts, Master Brown decided that there should be a 25% reduction of the claimant's costs if successful.

14. The Claimant observes that "costs in the case" following a CCMC is entirely appropriate given no successful party will at that stage be identified. Describing this

as the usual order, counsel for the Claimant Mr Dunne submitted that there should be no reason to depart from the usual order this unless the reason is a very obvious and unusual. Perhaps something as serious as misstatement, misconduct or abuse of process. The court should be reticent to penalise a party in costs following a hearing the very purpose of which was to hear competing views as to the proportionality of estimated costs. If an alternative approach was regularly adopted, it would invite satellite litigation, extend the time and expense of the litigation and serve to stifle reasonable argument about the scope and proportionality of proposed expenditure. If parties regularly were to be penalised in costs even if they had achieved an approved sum in excess of that offered by the opposing party, it would impliedly encourage defendants to never make realistic or reasonable offers: either in Precedent R forms or discussions that follow.

15. The Claimant submits that the provisions of r.44.2 are in any event ill-suited to the issues and considerations operative during a costs management hearing in principle, given the necessarily fluid process at work, in consequence there is no obvious concept of "win" or "success". However, if they are reasonably to be drawn upon, the starting point has to be to recognise the Claimant here as "the successful party" in that he still saw approved estimated costs in excess of those offered by the Defendant. It does not matter by how little or how much he was the successful party: *Fox v Foundation Pilling Ltd* [2011] All ER (d) 61 and the White Book (2024) at (44.2.13).

16. The Claimant points out that some of the reasons accounting for the reductions approved reflect events or assumptions that could not have been anticipated by the Claimant when preparing his budget. For example, that the "Issue/Statements of Case" phase was not budgeted at all because of intention expressed by the Defendant to amend (which, Mr Dunne observes, has still yet to manifest itself), Witness Evidence phase was approved on the basis of there being a reduced number of witnesses and ADR/Settlement on the basis that it did not include mediation or the costs of an approval hearing in event of pre-trial settlement. In this context, the reductions instead mark a difference of approach. The Claimant had not exaggerated his costs and there was no element of poor conduct.

Discussion and conclusion

17. The Claimant is correct in principle that it would not be appropriate for the court regularly to depart from an "in the case" costs order following "ordinary" costs management just because a party has seen their budget reduced. I agree that even though the court may, and often does, express critical views during the course of costs management, that should not necessarily lead to a costs penalty.

18. That said, I disagree with the submission that r.44.2 is not readily suited to justify a specific costs order if the circumstances of a particular case are justified. Especially when, as here, the court had listed a separate hearing for the exclusive purpose of costs management, with an expectation that the intervening period provided should

prompt the parties to reconsider their respective positions. The notion that because costs management is necessarily interwoven with the process of case management then both should be treated as within an enveloped whole, during which process the court should always adopt a holistic "in the case" approach, substantially overlooks the wide discretion the court has on costs and the factors listed in r.44.2 to be taken into account when deciding costs.

19. In short, a party that resolutely proceeds to a separately listed costs management hearing with an overly ambitious budget should not readily assume that the court will be willing to see both its time and resources and those of opposing parties' engaged without any potential consequence in costs.

20. Neither do I agree that if there is to be an order other than "in the case", the starting point is that a party that secures approval of a sum at least something in excess of that offered by an opponent thereby establishes "success" and so should avoid an adverse costs order against them. Not least because success could equally be defined as that of the opposing party in securing substantial reductions. Hence, as I am satisfied, why it is appropriate for the court to take a more rounded and general view of the process that took place.

21. Leading from this point, Mr Dunne's submission that specific costs orders against parties following costs management will deter reasonable offers from opponents before the hearing rather works both ways. An assumption that costs management should always see an order "in the case" as much encourages parties to maintain an unrealistically ambitious approach and to proceed to the hearing without any consideration of their opponents' submissions. In effect, to "chance their luck on the day". That is hardly a reasonable or appropriate approach.

22. I have reminded myself of the Claimant's revised Precedent H dated 1 May 2024, the Defendant's revised Precedent R and the respective submissions made at the hearing on 8 May. The following factors were found particularly relevant on the question of proportionality during budgeting:
    - The Claimant's solicitors practise from a London EC4A address and so seek to justify rates enhanced to any comparative guideline. Estimated costs had been calculated based on a variety of hourly rates ranging from £195 for a Paralegal to £555 for a Partner;
    - By far the most substantial financial element in each phase of estimated costs reflected the proposition that the work would be principally carried out by a partner. Given the nature of the claim, the addition of work by a Paralegal could not realistically be inferred to provide substantial additional value to the core legal work and preparation;
    - There was therefore little if any structured delegation, despite the Precedent H listing interim fee earners at the level of Senior Associate, Associate, Junior

Associate and Trainee Solicitor. Even in the phase Disclosure where, given the £15,487 already incurred, a reasonable inference was any further disclosure going to the preliminary issues ought to be readily understood and processed instead by qualified lawyers of more interim status;

- Witness Statements phase proposed some 30 hours of partnerial time at £16,650 but, in addition, Paralegal work at £4,875, the involvement of Leading Counsel at £3,000 and Junior Counsel at £2,550;
- A similar sequence of involvement featured in the Expert Report phase where only one expert discipline (psychiatry) had been permitted for the purposes of the preliminary issue trial. However, the figures proposed were for a Partner at £13,875, Paralegal £2,975, Leading Counsel £6,600 and Junior Counsel at £3,400;
- The Claimant proposed that the preparation and submission of written information for the purposes of listing by Kings Bench Judge Listing should engage a Court Clerk, Paralegal and a Partner all in a total sum of £1,155;
- Sixty hours would be spent preparing for trial, involving (again only) the Partner and Paralegal;
- For a six-day trial, the Partner would be engaged for 67 hours at a cost of £37,185, as well the Paralegal at £2,340, Leading Counsel at £28,800 and Junior Counsel at £17,000;
- ADR was sought to be approved in the total sum of £61,525.

23. I hasten to add that the above factors are not intended as an exhaustive list of all that was explored during case management. Further, to iterate, hourly rates were not in themselves subject to approval, nor that approval of figures for estimated costs carried any implied direction as to who should carry out that work. The question of which fee earner the Claimant's firm proposed to carry out the work was instead relevant only in considering the proportionality of the resultant figure sought.

24. I draw no adverse inference upon the reduction in the Claimant's approved costs because the Issue/Statements of Case phase was not cost managed owing to the Defendant's inchoate revised position as to amendment.

25. I instead focus upon that that was cost managed. In doing so, it is appropriate both to look at the detail itself but also take a step back and consider the process as a whole. As with any hearing, the court draws upon its experience by taking stock of the various points and arguments raised and their significance in terms of the decisions ultimately reached.

26. In doing so, I am not at all persuaded that the process was, as the Claimant submits, entirely routine and not out of the ordinary because the issues in contention typically touched upon hourly rates being said to be too high, proposed time excessive and the use of two counsel in conjunction with work at partnerial level disproportionate. Whilst I agree that these considerations in themselves may well often be routine and

ordinary in such hearings, the figures in question and the time and attention that had to be attended to them in this particular case marks a distinction.

27. Neither can the disproportionality of the Claimant's budget and its reduction be simply excused away with comparisons between the Claimant's assumptions during the preparation of his budget and alternative assumptions expressed by the court during costs management. It is important to distinguish between assumptions expressed as to the basis on which budgeting took place[2] and the objective consequence of budgeting to a party. In approving a sum, the court ultimately does not direct that a proposed aspect of work should not be carried out, neither does it direct how the approved sum should be spent. Instead, it applies an evaluative approach to proportionality if less obvious work (or at least justifiable expense) appears to have been factored into a party's budget.

28. Hence, whilst the Claimant's Witness Statement phase had assumed a statement was required from the Claimant's treating CBT expert whereas the court assumed that the evidential input could be more cost effectively established, the substantial reduction of that phase reflected the court not being persuaded that, howsoever chosen to be spent by the Claimant, the amount should be anywhere near the sum sought.

29. Parties must be prepared to account for not just what work justifies their estimated costs but why the figure claimed is also proportionate.

30. The overall impression and conclusion I reached was that the Claimant's Precedent H was unreasonable and unrealistic in terms of proportionality. It led to a polarised approach between the parties on budgeting that had prevented settlement and so necessitated a separate hearing proceeding that either might have been vacated or, even if not, should have followed a more conventional process of modest arithmetical adjustment and modification, rather than fundamental deconstruction of the Claimant's proposals and as led to sizeable reductions.

31. I therefore conclude that it is appropriate in this case for the court to make the following specific costs orders:

    31.1 There be no costs for the Costs Hearing on 15 May 2024. It seems to me unnecessary to conclude whether that hearing might have been avoided entirely. The central point is that the Defendant's budget had been agreed in advance and the hearing was spent in significant and fundamental deconstruction of the Claimant's adopted approach. There should be no case for the Claimant ultimately receiving costs (if successful on liability) for having adopted that approach. In that the Defendant seeks no order, rather than

[2] Principally provide to clarify and assist a Costs Judge during any subsequent Detailed Assessment

an order in his favour for that hearing, the Claimant ought to see this as a benefit;

31.2 The Claimant has been unsuccessful in persuading the court to pass off the exercise as “in the case”. He should pay the Defendant’s costs of the hearing on 16 July 2024;

31.3 The element to which the Claimant increased his preparation for costs management by adopting figures that did not find favour with the court is not an easy one to assess, if it should be recognised in principle. One might argue that lower figures would have made no difference in terms of the preparation and hence costs of cost management. That said, taken as whole, both the Claimant’s original and revised Precedent H forms evidence a more elaborate approach than might have been adopted and so I infer a process of additional formulation the Defendant ought not come to pay for. I reduce the Claimant’s costs management costs (such as may come to be assessed) by 15%.

Appendix

	Claimant 1st costs budget	Defendants Offers	Claimant updated costs budget	Defendants Offers	Claimant's proposals	Approved by the Judge	% reduced
Issue, Statement of Case	£ 18,625.00	£ 7,250.00	£ 19,965.00	£ 7,250.00	£ 15,000.00	£ -	n/a
Disclosure	£ 39,350.00	£ 5,000.00	£ 7,830.00	£ 5,000.00	£ 6,000.00	£ 5,000.00	-36.14
Witness Statements	£ 20,675.00	£ 10,000.00	£ 27,075.00	£ 10,000.00	£ 25,000.00	£ 13,000.00	-51.99
Experts	£ 64,900.00	£ 18,550.00	£ 40,300.00	£ 18,550.00	£ 30,000.00	£ 22,000.00	-45.41
PTR	£ 2,795.00	£ 1,675.00	£ 2,330.00	£ 1,675.00	£ 2,330.00	£ 1,675.00	-28.11
Trial Preparation	£ 151,072.00	£ 50,297.00	£ 104,368.00	£ 45,518.00	£ 90,000.00	£ 49,000.00	-53.05
Trial	£ 151,495.00	£ 53,200.00	£ 98,835.00	£ 46,400.00	£ 85,000.00	£ 49,000.00	-50.42
ADR/S	£ 85,608.00	£ -	£ 61,525.00	£ 20,275.00	£ 61,525.00	£ 20,000.00	-67.49
Totals	£ 534,520.00	£ 145,972.00	£ 362,228.00	£ 154,668.00	£ 314,855.00	£ 159,675.00	-55.92