Case No: KA-2023-000124

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ON APPEAL FROM CENTRAL LONDON COUNTY COURT
HER HONOUR JUDGE BAUCHER
(Claim No. J00YJ778)

[2024] EWHC 304 (KB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/02/2024

Before :

MR JUSTICE KERR
(sitting with Judge Brown, assessor appointed under Part 35 of the Civil Procedure Rules 1998)

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Between :

DANIEL LUKE WOOLLEY	**Appellant / Claimant**
- and –	
MINISTRY OF JUSTICE	**Respondent / Defendant**

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Mr Daniel Grütters (instructed by **Duncan Lewis LLP**) for the **Appellant**
Mr Alex Carington (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 31 January 2024

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Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

Mr Justice Kerr :

Introduction

1. This appeal is against a decision of Her Honour Judge Baucher, sitting in the Central London County Court, to approve the amount of the costs budget of the appellant, the claimant in a personal injury action against the respondent, the defendant to the action. The trial is fixed for 15 and 16 July 2024. In her order of 2 June 2023, after a hearing that day, the judge limited the approved amount of the claimant's estimated costs to £26,225, upon "concluding that the Claimant's budget appeared disproportionate", in the words of paragraph 10 of the order.

2. The appeal is brought with the leave of Sir Stephen Stewart, sitting as a judge of this court, made on 19 October 2023. He directed that the court hearing the appeal should have the benefit of sitting with a Senior Courts Costs Office judge as an assessor, pursuant to Part 35 of the Civil Procedure Rules (**CPR**). Consequently, I have been ably assisted by Judge Brown, whose experience in matters of costs and costs budgeting and management is unrivalled in this jurisdiction. I am grateful for his assistance. The decision in this appeal is mine alone.

3. There are now two grounds of appeal, which I will set out:

> "First, in determining which costs of the Claimant's budget were 'reasonable and proportionate', the Learned Judge explicitly refused to have regard to the Defendant's budget, which the parties had agreed. This amounts to an error of law because (a) r.3.17 of the CPR required her, when making any case management decision, to 'have regard to any available budgets of the parties'; and (b) it was a relevant consideration in determining which costs were 'reasonable and proportionate' in the case.
>
> Second, the Learned Judge failed to consider and ensure that 'the parties are on an equal footing'. This amounts to an error of law because the purpose of costs management is to further the overriding objective (see r.3.12(2) of the CPR), which includes – by way of '[d]ealing with a case justly and at proportionate cost' (r.1.1(2) of the CPR) – ensuring that 'the parties are on an equal footing'. In the circumstances, the CMO restricted the Claimant – with whom lies the burden of proof – to estimated costs of £26,225 where the Defendant's equivalent costs were £37,727 (or 42% more)."

Facts and procedural history

4. The claimant was a remand prisoner at HMP Birmingham when, on 4 January 2019, he was assaulted by other prisoners there. In December 2021, he brought a personal injury claim, asserting that he had told prison staff about threats from one of his assailants on many occasions before the assault and had asked to be moved to a different wing, but his requests were ignored. He also asserted that prison staff failed to protect him from attack on the actual occasion of the assault. He claims damages for both physical and psychological or psychiatric injury. On his claim form, the claim was limited to £25,000 but this is an error. He has proceeded on the basis that the claim may be worth up to about £80,000.

5. In its defence in August 2002, the defendant complained of the vagueness of the pleaded claim and of delay; and denied that the claimant was at any known risk of violence from anyone or had asked to be moved to a different wing. The claimant was the aggressor, the defendant pleaded, though it accepted that on 3 January 2019 he did go down a flight of stairs, three assailants were involved and he sustained injury. Breach of the defendant's duty of care was denied. There was no Part 18 request, but the claimant was invited to provide, in a general sense, "fuller and better particulars to support the allegations made" (defence, paragraph 44).

6. The claimant obtained two expert medical reports. The defendant stated in its directions questionnaire that it did not seek to call expert evidence. Costs budgets were prepared in May 2023. The claimant's was based on a five day trial, one live witness on his side (the claimant himself), two witnesses of fact for the defendant and expert evidence being dealt with by Part 35 questions rather than live attendance. The total was £121,886, of which £50,705 were already incurred and £71,181 were estimated future costs.

7. The defendant's budget was £58,984, of which £21,257 was for incurred costs, with £37,727 estimated. It assumed two witness statements on each side, the need to instruct defence experts and the need for Part 35 questions to the claimant's experts. The defendant's budget was based on a two day trial. The figure for trial preparation was £4,832 including counsel's fee of only (the defendant being a government department) £800. For the trial itself, the figure was £13,988. The budget assumed the attendance of two solicitors at the trial, costing £12,288, while counsel's time costed trial fee was £1,600 (20 hours at £80 per hour).

8. In about mid-May 2023, the defendant produced a "Precedent R" budget discussion report, complaining that the claimant's budget was disproportionate. It proposed lower amounts in the column coloured orange, headed "[o]ffered"; to compare with the higher amounts in the column coloured yellow, stating the claimant's "[c]laimed" amounts. I need only refer to two of the entries.

9. At line 16, as against the claimant's claimed amount of £16,615 for trial preparation, the defendant "offered" £9,000, made up of £4,000 for time costs and £5,000 for disbursements. The defendant's comment on that comparison was (with spelling etc corrected):

> "Time and disbursements are too high. Involvement of one Counsel, Grade A and Grade D highly experienced is unreasonable and excessive. Most of the work should be delegated to the Grade D."

10. At line 17, as against the claimant's claimed amount of £17,317 for the trial, the defendant "offered" £11,000, made up of £7,000 for time costs and £4,000 for disbursements. The defendant's comment on that comparison was (with spelling corrected):

> "The estimated length of trial is 2 days not 5 days. Time and disbursements are high. The fee earner must be very familiar with the case, he should be able to consider, preparing for trial and advising client so preparation should be minimal."

11. That document was prepared in anticipation of the forthcoming costs and case management conference (**CCMC**) listed for 2 June 2023. On 23 May 2023, the claimant's solicitors wrote to the Government Legal Department thanking them for the budget discussion report, saying the claimant did not propose to produce one, disagreeing with the proposition that the trial should last for only two days rather than five, suggesting there was little to be gained by further dialogue and concluding with the words:

> "[s]ubject to our reservations that your budget is pitched tactically and unrealistically low, it is agreed."

The CCMC on 2 June 2023

12. The CCMC was conducted remotely and lasted from 3pm to 3.30pm, later than planned. The judge's list was, as she explained, overloaded. She apologised that counsel had been kept waiting. She had a defendant's bundle in front of her, which she explained, she had read, or at least the proposed directions, agreed draft directions and pleadings. After a minor technical issue, the hearing was resumed and the judge confirmed that she understood the directions were agreed.

13. It was established that the claimant would call one witness only (himself), while the defendant was likely to call two witnesses. Mr Carington, for the defendant, said he intended to serve a Part 18 request for further information but it was not ready yet. That was not in the agreed directions. The judge said she thought the process of getting the request served and answered would slow the preparation of witness statements. She decided, without objection from either side, to put back the date for exchange of witness statements from 4 September to 6 October 2023.

14. The judge asked the value of the claim, to which Mr Carington responded that it was said to be about £80,000 though the defendant thought that was unrealistic. The judge agreed with Mr Carington that, on present indications, the pleaded award for pain, suffering and loss of amenity of £50,000 to £55,000 appeared unrealistic. The next topic was the length of the trial. The judge considered that and decided she would list it for two days. She was not impressed by the suggestion of Mr Grütters, for the claimant, that CCTV evidence would prolong it beyond two days. There is no complaint in this appeal about the two day listing.

15. The judge then turned to costs budgets. Mr Carington confirmed that the defendant's costs budget was agreed and that it was based on a two day trial. She asked if the claimant's budget was agreed and was told by Mr Carington that it was not. She ascertained that the defendant's (agreed) budget was for about £58,000. She then found the claimant's budget and noted that it was for £121,886. She invited Mr Grütters to address her on proportionality as "[i]t does not seem proportionate to me on the face of it". Mr Grütters did so.

16. The discussion then proceeded as set out in the next three pages of the transcript, as set out in the appendix to this judgment. It includes remarks made by the judge, addressed to Mr Grütters, of which complaint is made in this appeal, to which I will need to return. Following that discussion, the hearing concluded at 3.30pm and the

judge made her case and costs management order, including paragraph 10 which is the decision appealed against and reads as follows:

> "10. Upon the Court concluding that the Claimant's budget appeared disproportionate, the Claimant's budget is approved as follows on the basis that the following figures for estimated costs (totalling £26,225) are reasonable and proportionate:
> (l) £1,500 for issue /statements of case;
> (2) £l,000 for disclosure:
> (3) £2,800 for witness statements;
> (4) £3,500 for expert reports;
> (5) £3,175 for pre-trial review;
> (6) £8,000 for trial preparation;
> (7) £3,250 for trial; and
> (8) £3,000 for alternative dispute resolution."

The first ground of appeal: disregard of the defendant's costs budget

17. There are two parts to the first ground of appeal. The first part is whether the judge wrongly disregarded or refused to hear submissions on the content of the defendant's budget, either as an obligation on the court under rule 3.17 of the CPR or because the defendant's budget had potential relevance and the claimant was entitled to make submissions based on it. In the second part of this first ground of appeal the claimant asserts that the judge overlooked specific points about the complexity of the issues and the vulnerability of the claimant.

18. Rule 3.17 is in Part 3 of the CPR, headed "the Court's Case and Costs Management Powers". It has three sections to it. The first, Section I, deals with "Case Management"; Section II deals with "Costs Management" and Section III with "Costs Capping". Rule 3.17 is headed "Court to have regard to budgets and to take account of costs". Rule 3.17(1) and (2) provide:

> "3.17—(1) When making any case management decision, the court will have regard to any available budgets of the parties and will take into account the costs involved in each procedural step.
>
> (2) Paragraph (1) applies whether or not the court has made a costs management order."

19. Mr Grütters submitted that a "case management decision" in rule 3.17 includes a costs management decision setting the approved amount of a party's costs budget. He referred me to the notes in White Book (2023) volume 1, at 3.17.1, immediately beneath rule 3.17, which reads as follows:

> "**Rule 3.17: Effect of rule**
> The CPR have the overriding objective of enabling the court to deal with cases justly and at proportionate cost (r.1.1(1)). The court must seek to give effect to the overriding objective when exercising any power given to it by the CPR, including any case management power (r.1.2). This rule reinforces the point that the court's 'costs management' powers are 'a feature of or adjunct to' case management. The intention is that every case management decision should be made with full consideration of its cost implications. If the effect of making a particular case management direction is to render a particular phase of the proceedings or procedural step of the claim disproportionate (by

reference to the definition of proportionality stated in r.44.3(5)) then that direction will not be given."

20. The words in quotation marks "a feature of or adjunct to" case management are not attributed. It is not clear from what source, if any beyond themselves, the learned editors of the White Book are quoting. Mr Grütters suggested that the emphasis should be on the word "feature" rather than "adjunct" and that a case management decision in rule 3.17 included a costs management decision; the latter was a species or subset of the former, rather than a separate creature.

21. Mr Grütters submitted that the judge discourteously interrupted him on three separate occasions when he attempted to refer to the content of the defendant's costs budget, on each occasion refusing to consider it. That, he said, was contrary to her duty under rule 3.17 because the amount to be allowed for the claimant's budget was a "case management decision" and the court was therefore required "to have regard to any available budgets of the parties".

22. Even if rule 3.17 was not directly applicable, Mr Grütters submitted, the defendant's budget was not immaterial to the proportionality of figures in the claimant's proposed budget and he should have been allowed to make submissions based on the content of the defendant's agreed budget for the various phases. The judge, however, refused to have regard to it and therefore misdirected herself by disregarding a relevant consideration. It was also procedurally unfair, he said, to refuse to allow the claimant to make relevant submissions in support of his case.

23. He made clear that he was not arguing that there had to be anything like parity as between the parties' respective budgets; but he pointed out that the judge had indicated that a figure in the range from about £60,000 to £80,000 overall would be about right for a case such as this one. The defendant's total budget, at nearly £59,000 was just below the bottom end of that range, meaning the figures in it could in principle be of some help in arriving at proportionate equivalent figures for the various phases in the claimant's budget.

24. Mr Grütters submitted that the latter phases covered by the budget, namely trial preparation and the trial itself, normally involved something closer to an equal amount of work on each side than was the case at the start of the trial, where the claimant, bearing the burden of proving the claim, would necessarily incur higher "front loaded" costs than would the defendant, which would normally begin to incur significant costs later in the evolution of the case, at the stage of responding to the claimant's case.

25. The claimant would have wished to submit to the judge that the defendant's budget figures for trial preparation and trial were potentially a legitimate starting point for consideration of what figures would be fair, reasonable and proportionate on the claimant's side for those phases. The claimant was prevented from making those submissions, Mr Grütters contended; the judge was unwilling to entertain them and made that clear in language that should not have been used.

26. He suggested that, had the judge not unfairly refused to hear his arguments, he might have secured approval for the amount of £11,000 in respect of the trial phase (albeit it excludes the brief free, which is part of the earlier trial preparation phase); that was the amount offered in the defendant's Precedent R document which she had referred to earlier when approving certain agreed figures for earlier phases in the budget. He said the claimant wanted to rely on, but was prevented from relying on, the figure of just under £14,000 in the defendant's budget for cost of the trial.

27. Furthermore on the issue of proportionality, Mr Grütters submitted that the judge failed to consider, as required by the practice direction PD 3D (costs management) the factors set out in rule 44.3(5) (sums in issue, complexity, additional work generated by the other party, wider factors such as reputation or public importance and additional work or cost arising from vulnerability of a party or witness); and in rule 44.4(3)(c) and (h) (importance of the matter to all parties and the receiving party's last approved or agreed budget).

28. In particular, he argued that the judge took no account of the claimant's vulnerability, which was supported by a psychiatric report and would mean he would have to take frequent breaks when giving evidence. On the issue of wider importance, Mr Grütters intended to submit that the claimant's assailant enjoyed a position of privilege and was permitted to deal drugs; and intended to rely on a report about HMP Birmingham from His Majesty's Inspector of Prisons, criticising the management of the prison on the ground that such activities were taking place.

29. For the defendant, Mr Carington began by reminding me that where the court makes a case or costs management decision the threshold for interfering with the decision on appeal is high. The decision must be wrong or unjust because of a serious procedural or other irregularity: CPR, rule 52.21(3); see also *Gray v. Commissioner of Police for the Metropolis* [2019] Costs LR 1105, per Lambert J at [11] and [14].

30. Mr Carington emphasised that hearings such as this tend to be decided under time pressure, as this one was, with the judge making decisions with summary or little reasoning as the hearing proceeded, rather than in a reasoned judgment at the end. It would be wrong to expect "detailed and nuanced reasons" (*Gray*, per Lambert J at [16]); often, they will be expressed in shorthand form. For general principles governing costs management, he referred me to rules 3.12 and 3.15, and PD 3D.

31. He submitted that a costs management order was not a "case management decision" within rule 3.17. The structure of Part 3 is to separate the case management provisions in Section I from the costs management provisions in Section II; and a "costs management order" is provided for in rule 3.15. He submitted that rule 3.17 is concerned with the expense attributed to procedural steps in the action, such as disclosure, a site visit by an expert, and the like. It was not directed at what amount would be proportionate in a costs management order.

32. It is therefore wrong to say that rule 3.17 makes the other side's budget a mandatory relevant consideration, Mr Carington argued. He preferred the term "adjunct" to the term "feature" in the White Book note at 3.17.1, where the words in quotation

marks refer to costs management powers being "a feature of or adjunct to" case management. A costs management order and a case management order were two different things, he submitted.

33. As for the relevance of the other side's budget to the proportionality of one's own budget, irrespective of rule 3.17, Mr Carington referred me to passages in cases where judges had played down the usefulness of comparison between the two; see *Gray*, per Lambert J at [25]: "nor are comparisons between the parties' budgets based on the number of hours of work which might be produced by applying different hourly rates, determinative or even particularly relevant"; and Chief Master Marsh in *Various Claimants v. Scott Fowler Solicitors (a firm)* [2018] EWHC 1891 (Ch), at [17], which I will set out in full:

> "I would add that although some comparison between budgets may be informative, the court is not a slave to comparison. There can be good reasons why similar work in the hands of different legal teams will result in a higher or lower budget. These reasons include, to name but a few, matters such as which party bears the greater burden of conducting the claim, the place where the work is carried out, a choice of more or less senior counsel (or two counsel rather than one) or simply a difference in the way in which the legal team is expected to operate. More fundamentally, there can be genuine differences of view about the likely amount of work that will be required. Save in claims that are routine and of a type that become 'commoditised', there is no one objectively correct way of conducting litigation. This explains why the court is required to consider whether the costs fall within a range of reasonable costs; with the costs of different parties likely to fall within different parts of that range. And although the agreement of a budget phase removes the court's ability to set a budget for that phase, the figure that has been agreed is only of passing interest to the court. The court might take the view that another party's budget for that phase should be set at a higher or lower figure when the test under paragraph 7.3 is applied."

34. The "test under paragraph 7.3" is that formerly set out in the old practice direction PD 3E, the text of which is set out in the same judgment at [14]. It included the proposition at 7.3(1) that "[t]he court has no power to approve the costs of budget phases that have been agreed between the parties". Neither party disputed that proposition, although it no longer features in the relevant practice direction; see, in similar vein, rule 3.15(2)(a) providing that a costs management order will "record the extent to which the budgeted costs are agreed between the parties".

35. Mr Carington also referred me to Joanna Smith J's useful resumé of nine "key principles" and guidance in *Various SAM Borrowers v BOS (Shared Appreciation Mortgages) No. 1 plc* [2022] EWHC 2594 (Ch) at [15]. The first is, again, that where budgeted costs are agreed, the court can do no more than record that agreement, though it may comment if it has reservations as to the agreed figures. The seventh echoes the remarks of Chief Master Marsh, already quoted. The eighth emphasises that while it is helpful to have an eye on the overall budgeted figure, the court's task is to proceed on what I would call a "total cost per phase" basis.

36. Mr Carington submitted, therefore, that the content of the defendant's budget was not a mandatory consideration and the judge was right to regard it as unhelpful. She invited Mr Grütters to address her on proportionality and he did so, Mr Carington submitted. In his skeleton argument, he outlined the court's process and

decision for each phase of the claimant's budget, both those agreed and those not agreed. She was right to adopt that approach; the claimant's budget was far too high and the overriding objective includes ensuring that litigation is conducted at proportionate cost.

37. As for the second limb of this ground of appeal, Mr Carington submitted that the judge was well aware of the arguments about the complexity of the issues and the vulnerability of the claimant but rightly decided to base her budget approval decisions on a two day trial, a decision not challenged in this appeal. The judge was not bound to allow higher budgeted amounts to take account of unsuccessful arguments about complexity and vulnerability; her decision to dismiss those arguments was open to her and a matter for her judgment.

38. I come to my reasoning and conclusions on the first ground. First, I accept entirely that decisions of this kind are likely to be made at speed, under time pressure and item by item as the hearing progresses, with summary reasoning at best. It will sometimes be sufficient to say that the submissions of X are preferred to the submissions of Y. The judge's reasoning is then taken as that in X's submissions. Nothing in this judgment should be taken to require more detailed reasons for cost management decisions than are currently given. The rules need not be referred to; the judges know them and, absent any contrary indication, are taken to apply them.

39. Second, the value of comparisons between budget figures for particular phases is, as has been recognised in the authorities cited by Mr Carington, limited and may in some cases be nil or virtually nil. This is for the reasons given by Chief Master Marsh in the *Various Claimants v. Scott Fowler Solicitors (a firm)*, cited above. I would add to them the point that budgets may be drawn and sometimes agreed at levels influenced by tactical considerations. The claimant's solicitors suggested as much in this very case, commenting that although the defendant's budget was "pitched tactically and unrealistically low", it was agreed.

40. A defendant may budget on the low side in a personal injury claim knowing that it is unlikely (because of qualified one way costs shifting) to recover its costs even if successful in defending the claim, in the hope of exerting a downward pull on the claimant's budget. Conversely, a claimant may have little incentive to challenge the amount of the defendant's budget, knowing that the claimant is unlikely to have to pay the defendant's costs even if the claim fails and preferring to use the size of the defendant's budget to make the claimant's appear the more respectable. Thus there are good reasons for caution about the value of comparison between budgets.

41. That is not the same as saying that the other side's budget is intrinsically irrelevant and should *a priori* be disregarded as an irrelevant consideration. None of the authorities goes that far. Chief Master Marsh rightly recognised that "some comparison between budgets may be informative". That obvious proposition flows from the equally obvious point that the parties are litigating the same case on the same issues; and, particularly in the latter stages of trial preparation and conduct of the trial, the tasks to be performed tend to be quite similar – though less so in the early stages of the claim where the claimant's costs are front-loaded.

42. Third, in the light of those observations the rival interpretations of CPR rule 3.17 are not critical and I need not express a concluded view on them. There is some force in both sides' arguments. On the one hand, approving the amount of a budget phase is, as a matter of ordinary language, an act done as part of the court's management of the case. On the other hand, Part 3 treats case management separately from costs management. Whichever interpretation is correct, rule 3.17 is clearly directed primarily at the expense of a procedural step such as disclosure or expert evidence, rather than at the making of a costs management order.

43. Fourth, agreed budget phases are outside the scope of the court's approval function, but are subject to the court's right to comment if it has reservations about the agreed amount. In the words of Chief Master Marsh, "the agreement of a budget phase removes the court's ability to set a budget for that phase"; but the other party's unagreed figure for the same phase may be approved at a lower or higher level; the agreed figure may be "only of passing interest to the court".

44. Against that background, I come back to the hearing in this case. The judge said, as noted above, that the claimant's budget appeared disproportionate and invited submissions from the claimant on proportionality. Mr Grütters began by conceding that the claimant's budget must be reduced because the trial was to be for two not five days. He then said that in relation to trial preparation, "the defendant's budgeting outstrips that of the defendant [*sic – claimant*]".

45. He started to say that the "only real issue of dispute I would imagine would be in relation to". The judge then interrupted: "I am asking you, I am not asking for what you imagine, I am asking you to address me on proportionality." That was unfortunate because Mr Grütters had used the verb "imagine" in the sense of "believe", while the judge turned the same verb back on him using it in the pejorative sense - when addressed to a barrister in court - of "envisaging something unreal" or "indulging in fantasy".

46. The judge turned the discussion away from the topic Mr Grütters wanted to mention, the defendant's budget, continuing: "I am asking you to address me on proportionality. If there is nothing further you want to say in relation to the fact that is under CPR 48 [*sic – 44*] that I need to address then that is fine, we will just go straight to it." She steered away from the defendant's budget to whether the claimant was a remand prisoner released since the incident, a relevant point because it is more difficult and expensive to take instructions from someone in prison.

47. The judge then said she was satisfied it was not a complicated matter, it was a two day trial, relatively straightforward and of limited value. It was then that she indicated that she would expect an overall budget in the region of £60,000 to £80,000. The claimant's, she observed, was "double what I expected to see in reality". She then addressed the claimant's budget item by item, ascertaining in some but not all cases what figures were agreed or not agreed.

48. The first item was "[s]tatement of case", corresponding to item (1) in the subsequent order: "issue / statements of case". The judge asked if the amount for that item was agreed. It was not, said Mr Carington. She asked Mr Carington what

was offered in the Precedent R and he replied £1,500. She asked Mr Grütters "[w]hat are you saying?" and he replied that the claimant can accept that. The judge responded "[t]hank you. So that element is agreed". That was, indeed, the amount recorded as item (1) in the subsequent order.

49. The judge briefly mentioned the cost of the CCMC, but the next item she addressed was disclosure. That was not agreed. In the Precedent R, the defendant had offered £3,500. The judge did not ask what was offered but commented that £12,500 had been spent on disclosure already. She allowed £1,000 for disclosure, the figure appearing as item (2) in the subsequent order.

50. The judge then turned to the next phase, witness statements. Mr Grütters accepted that there would have to be a significant downward adjustment from the £6,500 in the claimant's budget. The judge asked Mr Carington what was offered. He said £2,800. The judge said she considered that proportionate and that was the figure appearing as item (3) in the subsequent order.

51. The next budget phase considered was experts' reports. The judge asked Mr Carington what was offered; he replied £3,500. The judge said she considered that figure to be proportionate and would adopt it. Thus, that was the figure that appeared as item (4) in the court's subsequent order.

52. The judge then turned to the cost of the pre-trial review (**PTR**). The judge asked what was offered and Mr Carington replied "£2,000 for solicitors' costs". Mr Grütters said the claimant could accept that, but the judge commented that "you cannot accept individual bits of phases"; as she had said a little earlier, "it has to be for the whole phase". She took a figure of £3,175 for the whole PTR phase and that was the figure that appeared as item (5) in the court's subsequent order.

53. Next, the judge turned to the trial preparation phase and asked if the claimant's budget for that phase was agreed. Mr Carington replied: "No, Your Honour. There is an offer of £9,000 for that phase to allow for preparation also counsel's brief fee for the two day trial." Mr Grütters asked to address the court on that and the judge replied "[y]es." Mr Grütters wanted to make a point about the defendant's budget for this phase combined with the trial phase. He began:

> "… if we take the trial preparation and trial together as, it is really up to the parties as to how they divide the work between preparation, the trial itself, counsel and which grade earner does which sort of work."

54. At that point, he sought to allude to the defendant's budget, saying:

> "If we are looking at the budget from the defendant they, not having the burden, have a cost associated roughly at £19,000. If we take the, so it appears strange for any offer made to the defendant [*sic - claimant*] not to at least match those fees."

55. The judge again repeated Mr Grütters' word back to him, this time the adjective "strange", twice:

> "Well, strange or not the Court is not interested in strange, I am afraid. It is interested in proportionality and I remind myself of the limited value of this claim. I am going to budget it for this phase, £8,000, how you spend it is a matter for you."

56. The judge did not respond to the claimant's invitation to consider the figure of £19,000 in the defendant's budget for trial preparation and trial combined. The defendant had offered £9,000 for the trial preparation phase, not including the trial itself, in its Precedent R document. The judge did not ask Mr Carington what figure was offered for this phase, but Mr Carington volunteered that it was £9,000. The judge's figure of £8,000 was item (6) in the court's subsequent order.

57. The judge then turned to the budget phase for the trial itself. She asked Mr Carington what amount was offered. He said "[t]he offer advanced is £11,000 for the trial which it also seemed high to me, I have to say." The judge did not ask Mr Grütters if he wanted to say anything further. She said:

> "Yes, well in terms of the figures that are put forward obviously this is advanced for a five day case, so if we are looking at now a one [*sic - two*] day case and solicitors having to attend then all we have got is, it is going to be what one refresher fee, £3,250 for this phase. How it is spent is a matter for the parties."

58. Mr Grütters attempted to return to the subject of the defendant's budget, interjecting (with some "cross talk" and the judge saying "I am sorry, Mr Grutters"):

> "Your Honour, the budget of the defendant, which presumably must equally be proportionate and reasonable has a budget of nearly £14,000 … for a two day trial."

59. The judge responded:

> "Mr Grutters, you need to be familiar with the rules. You have agreed that budget. That is the defendant's costs. That is a matter for you. The whole idea of the budgeting process with these [*Precedent Rs*] and each party putting forward their respective positions is designed to try and get the parties to reach agreement. If they do not, the Court budgets and the Court's primary regard is proportionality in relation to the whole overall of the claim, which is why I said what I said at the start about £60,000-£80,000 and also in terms of the individual phases. So, that is what it is going to be £3,250."

60. The judge's suggestion there was, first, that Mr Grütters was not familiar with the rules; presumably, the costs budgeting rules. I find that remark surprising. There is nothing in the evidence I have seen to support any lack of familiarity on Mr Grütters' part with the rules relating to costs budgeting. He seemed to me well versed in them. I do not know why the judge thought otherwise, but she should not have said so in court without good reason. If made without good reason, such remarks may make the receiving party feel it is not getting a fair hearing.

61. Second, the judge noted that the defendant's budget was agreed, which it was. In the rest of the passage I have just quoted, the judge appears to be indicating that agreement to the other side's budget does not mean it is reasonable; and that where agreement is not reached, the court looks primarily at proportionality overall (£60,000 to £80,000 being the approximate reasonable amount for this claim); and

also proportionality in relation to each budget phase. There is nothing to indicate a willingness on the judge's part to consider any argument Mr Grütters wanted to make that relied on the amount of the defendant's budget and phases within it.

62. The figure of £3,250 for the trial phase was, as the judge had stated, the figure appearing at item (7) of the court's subsequent order. For completeness, at item (8), which was not controversial, the figure was £3,000, thus producing the total approved estimated costs in the sum of £26,225.

63. In my judgment, it is inescapable that that judge closed her mind to any argument based on a comparison with items in the defendant's costs budget. It is no answer to that proposition that the judge said she had read the bundles. She had not had sufficient time, through no fault of her own because of her overloaded list, to look at the documents in detail. She did not claim or demonstrate familiarity with the defendant's budget or the figures in the defendant's Precedent R. Her responses to Mr Grütters' attempts to refer to the defendant's budget show that she was not prepared to entertain arguments based on its content.

64. The judge thereby disregarded a relevant consideration, as the claimant asserts in the first ground of appeal. The defendant's budget was not intrinsically irrelevant; "some comparison between budgets may be informative", as was said in *Various Claimants v. Scott Fowler Solicitors*. The defendant's budget did not become irrelevant merely because it was agreed or because the judge may have disagreed with the reasonableness of the amounts in it. Mr Grütters was entitled to make submissions about it, for what they were worth, and was prevented from doing so.

65. There was accordingly, in my judgment, a procedural or other irregularity within CPR rule 52.21(3). The irregularity was the judge closing her mind to a relevant consideration and not entertaining argument on it. It was, in my judgment, a serious irregularity because of the language used by the judge when addressing Mr Grütters on three occasions: when she used his word "imagine"; when she used his word "strange", twice; and when she suggested he was not familiar with the rules.

66. I have some sympathy with the judge because of the difficult, pressurised conditions in which she had to do her job. Most judges have experienced similar stresses in their court work and it may be difficult to maintain the utmost courtesy at all times, but when treatment of a party or his counsel falls short as in this case, the appellate court's duty is to say so. The language used was indefensible.

67. It may be thought that Mr Grütters' points based on a comparison with the defendant's budget were likely to be weak forensic jury points which may not have impressed the court. That is of potential relevance to the question of remedy, to which I will come shortly. It does not excuse the refusal to hear the arguments. The first ground of appeal succeeds on that basis.

68. I do not uphold the arguments of the claimant supporting the second part of the first ground of appeal. The claimant asserts that the judge overlooked specific points about the complexity of the issues and the vulnerability of the claimant. I reject

that. I agree with Mr Carington that the judge understood and considered the arguments about those matters.

69. She was aware the claimant would contend that the defendant tolerated his assailant's reprehensible and illegal activities at the prison. The claimant agreed that the trial would be listed for two days and, therefore, whatever complexities lay in the issues and any vulnerability of the claimant could not take more than two days in all to air in court. I find no merit in this part of the appeal.

The second ground of appeal: failure to consider and ensure that the parties were on an equal footing

70. The claimant submits that the judge failed to deal with the costs budgets in a manner that kept the parties on an equal footing. While Mr Grütters made clear he was not arguing for any principle of parity or anything close to it, the costs management order, he submitted, restricted the claimant to estimated costs of £26,225 even though the claimant bears the burden of proving liability, while the defendant's estimated costs, albeit agreed by the claimant, were £37,727, i.e. about 42 per cent more than the allowed estimated costs of the claimant.

71. In my judgment, this point adds nothing to the first ground and has no merit independently of it. In so far as the complaint is that the judge failed to weigh in the scales the amount the defendant would be able to spend on the case compared with what the claimant would be able to spend, I have already addressed the complaint when upholding the first ground of appeal. The judge should have been willing to consider arguments based on a comparison with items in the defendant's budget, even if the comparison might be of only passing interest to the court.

72. In so far as any separate or independent complaint is made that the judge did not allow the claimant a high enough budget for estimated costs, the short answer is that the figures she allowed did not fall short of what was needed for him to bring his case to court and instruct competent counsel. As Mr Carington pointed out, the overall claimant's budget including incurred costs was £76,930, towards the upper end of the range from £60,000 to £80,000 envisaged by the judge for a claim of this magnitude and complexity.

Remedy

73. By CPR rule 52.21(3), the court will allow an appeal where the decision of the lower court was (a) wrong or (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court. It is in one sense difficult to say that the decision was "wrong". The claimant's allowed budget for estimated costs was within the range open to the judge and not so low that the claimant is unable to bring his claim to court and secure justice. Had the judge been willing to hear the claimant's arguments about the defendant's budget, the outcome might have been no different. But the real problem with the decision below is that it was marred by a serious procedural and other irregularity, as I have explained.

74. Mr Carington made submissions to the effect that nothing Mr Grütters could have said about the defendant's budget would be likely to have persuaded the judge to allow a greater amount than she in fact allowed. The outcome was fair and the appellate court should not disturb it. However the question here is whether the decision of the lower court was *unjust* because of the serious procedural or other irregularity. That is not the same test as whether, on the balance of probabilities (or applying some other perhaps higher standard), the outcome would have been the same if the irregularity had not occurred.

75. In the cases cited in the White Book notes to rule 52.21 (see in the 2023 edition at 52.21.5), I find none where a remedy has been refused because a serious procedural or other irregularity occurred but the decision was nonetheless just. Normally, if the irregularity is serious, the decision will be unjust. Conversely, if the decision is just, the irregularity will not be serious. A rare case where a remedy was refused despite a serious procedural irregularity is, as it happens, my own decision in *Samuels (t/a Samuels & Co Solicitors) v. Laycock* [2023] EWHC 1390 (KB).

76. In this case, I have concluded that the decision was unjust and cannot stand for a number of reasons. First, the irregularity occurred. Second, it was unusually serious because it occurred in court and violated the fundamental principle of equal treatment of the parties before the court. Third, it is an unattractive proposition to say that a person whose mind was closed to a particular line of argument would have made the same decision if her mind had been open to it.

77. Fourth, I am far from sure that the outcome would have been the same if the judge had heard Mr Grütters' submissions in full. The judge might have adopted the offered amount of £9,000 for trial preparation, instead of £8,000. She might have adopted the offered amount of £11,000 for the trial, or a figure closer to that amount, than the £3,250 she chose. She had previously shown interest in some, though not all, the amounts "offered" by the defendant in its Precedent R document and had adopted some, though not all, the defendant's offered amounts.

78. That is normal practice and in the spirit of CPR rule 3.15(2)(a), requiring the court to indicate to what extent the budgeted costs are agreed. If the agreement is reached before the costs management hearing, the court and the parties are bound by it. Figures may also be informally "agreed" at the hearing in the manner that happened in this case, by the claimant accepting a figure offered in a Precedent R document and the judge adopting that figure. While that is not normally treated as agreement within rule 3.15(2)(a), the defendant's offer can exert an influence on the court.

79. Fifth, the parties have faced uncertainty about the claimant's budget since this appeal has been pending. They have known since the appeal was brought that the judge's decision is challenged and, since Sir Stephen Stewart's order of 20 October 2023 granting permission to appeal, that the challenge would be allowed to proceed. The trial is fixed for this summer, in July 2024. I do not know what sums may have been expended by the claimant during the period of uncertainty but if any have, the balance between incurred and estimated costs will have changed.

80. The just solution is, in my judgment, to remit the whole of the claimant's costs budget back to the county court for reconsideration by another judge, unless the amount of that budget is agreed. If it is not agreed within 14 days of the court's order in this appeal, the matter should be relisted in the county court.

Appendix – excerpt from transcript of CCMC hearing on 2 June 2023

MR GRUTTERS: Your Honour, that budget is on the basis of a five day trial. Your Honour, of course the budget would have to be adjusted downwards on the basis of a two day trial. Having said that, in relation to trial preparation of the trial itself, it seems that the defendant's budgeting outstrips that of the defendant, assuming you know the pro rata deduction from five days to two days. So, the only real issue of dispute I would imagine would be in relation to…

JUDGE BAUCHER: I am asking you, I am not asking for what you imagine, I am asking you to address me on proportionality. If there is nothing further you want to say in relation to the fact that is under CPR 48 that I need to address then that is fine, we will just go straight to it. In terms of the matters that I have to have regard to, it seems to me disproportionate on the face of it, the budget. It is a two day personal injury trial, the claimant is no longer detained in prison. I do not know whether, it was a remand injury, was it not?

MR GRUTTERS: It was indeed, Your Honour.

JUDGE BAUCHER: Yes, I do not know whether he was subsequently acquitted or if the matter was not pursued or whether he served his sentence but it matters not in relation to the matters I have to determine. I am satisfied that it is not a complicated matter, the conduct of the parties is not relevant and in terms of the value and complexity of the case, it seems to me a relatively very straight forward matter and it is of limited value. So, with those factors in mind for a two day trial I consider that I would have anticipated a budget of starting at probably the bracket of half that, by about £60,000 up to potentially £80,000. So, it is double what I expected to see in reality. So on those matters then we will just go forward in the usual way. Statement of case, is that agreed?

MR CARINGTON: No, Your Honour.

JUDGE BAUCHER: What has been offered? If you can just tell me the figure offered, it saves me bringing up the [[Precedent] R?].

MR CARINGTON: Yes, the proposed amount, we are looking at updating a schedule of loss. In effect of the outstanding loss it is the handicap in the open labour market which in reality is [inaudible] rule where the parties make a very rough and ready calculation. I can't see it taking very long and £1,500 is offered for updating the schedule on effectively one had of loss.

JUDGE BAUCHER: What are you saying, Mr Grutters?

MR GRUTTERS: Your Honour, we can accept that.

JUDGE BAUCHER: Thank you. So that element is agreed. The cost of the CCMC, what I would say in that regard, I would say that was disproportionate and the order will so reflect. Disclosure, what else, why have we, what are we going to be doing for another £7,000 in respect of disclosure? I presume this is not agreed, is it?

MR CARINGTON: It is not agreed, Your Honour.

JUDGE BAUCHER: No. Well, what is the justification for this given we spent £12,500 on it already, Mr Grutters?

MR GRUTTERS: Your Honour, there will be prison records that need to be disclosed that have not been disclosed, as we said the CCTV, the wing book, the investigation report there will need to be sifting of those documents by a Grade D earner.

Cross talk.

JUDGE BAUCHER: Yes, well I could sift them in five minutes. You spent on your own, never mind going into the hours, 50 hours supposedly sifting these documents and if you have not been sifting those I do not know what else you have been doing. In view of the incurred costs there is no need for counsel to be involved. I consider to be the proportionate figure for this £1,000. In terms of the witness statements, £6,500 to take one witness statement and to look at the two statements from the defendant?

MR GRUTTERS: Your Honour, I would agree that given that if there is indeed only going to be three witness statements that that figure should be adjusted downwards significantly.

JUDGE BAUCHER: What has been offered, Mr Carington?

MR CARINGTON: £2,800 was offered.

JUDGE BAUCHER: Yes, well I consider that to be proportionate, £2,800 it is. In terms of the experts reports, what has been offered in that regard?

MR CARINGTON: £3,500, Your Honour. We are looking in effect of reviewing potentially questions and reports from the defendant's two experts.

JUDGE BAUCHER: And what, yes? I do not see there is a need for counsel to be engaged further of it in respect of it, any observations on the offer that it is advanced?

MR GRUTTERS: Your Honour, no.

JUDGE BAUCHER: No. Well I will not surprise you to think that I consider that to be proportionate and that is what it is going to be for the experts, £3,500. In terms of the pre-trial review, it is pre-trial check list there is going to be a pre-trial review. I can see the Court fee and counsel's attendance. It is solicitors costs that is the issue, is it not, presumably in that regard, Mr Carington?

MR CARINGTON: Yes, Your Honour.

JUDGE BAUCHER: Yes, anything you want to say in that regard. What is the offer that has been put forward then?

MR CARINGTON: I think the offer was £2,000 for solicitors costs.

JUDGE BAUCHER: Yes, well it has to be for the whole phase but in any event, Mr Grutters, is there anything you want to say about this phase?

MR GRUTTERS: Your Honour, if that is the offer the claimant can accept that.

JUDGE BAUCHER: Yes, well he cannot do that that is not how budgeting, you cannot accept individual bits of phases. The judge is required to budget the phase, and what I am going to budget for this phase is £3,175. The trial preparation, is that phase agreed?

MR CARINGTON: No, Your Honour. There is an offer of £9,000 for that phase to allow for preparation also counsel's brief fee for the two day trial.

JUDGE BAUCHER: Yes.

MR GRUTTERS: Your Honour, if I may address you on that?

JUDGE BAUCHER: Yes.

MR GRUTTERS: Your Honour, if we take the trial preparation and trial together as, it is really up to the parties as to how they divide the work between preparation, the trial itself, counsel and which grade earner does which sort of work. If we are looking at the budget from the defendant they, not having the burden, have a cost associated roughly at £19,000. If we take the, so it appears strange for any offer made to the defendant not to at least match those fees.

JUDGE BAUCHER: Well, strange or not the Court is not interested in strange, I am afraid. It is interested in proportionality and I remind myself of the limited value of this claim. I am going to budget it for this phase, £8,000, how you spend it is a matter for you. And in terms of the trial, what is the offer advanced there?

MR CARINGTON: The offer advanced is £11,000 for the trial which it also seemed high to me, I have to say.

JUDGE BAUCHER: Yes, well in terms of the figures that are put forward obviously this is advanced for a five day case, so if we are looking at now a one day case and solicitors having to attend then all we have got is, it is going to be what one refresher fee, £3,250 for this phase. How it is spent is a matter for the parties.

MR GRUTTERS: Your Honour, the budget of the defendant, which presumably must equally be proportionate and reasonable has a budget of nearly £14,000 –

Cross talk.

JUDGE BAUCHER: I am sorry, Mr Grutters.

MR GRUTTERS: – for a two day trial

JUDGE BAUCHER: Mr Grutters, you need to be familiar with the rules. You have agreed that budget. That is the defendant's costs. That is a matter for you. The whole idea of the budgeting process with these [president R's?] and each party putting forward their respective positions is designed to try and get the parties to reach agreement. If they do not, the Court budgets and the Court's primary regard is proportionality in relation to the whole overall of the claim, which is why I said what I said at the start about £60,000-£80,000 and also in terms of the individual phases. So, that is what it is going to be £3,250. Is ADR agreed, or not?

MR CARINGTON: Your Honour, it is not agreed. I would propose £3,000 which would be £1,500 for counsel and £1,500 for solicitors negotiations.

JUDGE BAUCHER: Any observations on that, Mr Grutters?

MR GRUTTERS: Your Honour, no.

JUDGE BAUCHER: No. Well, I consider that to be proportionate so £3,000 for the ADR phase. The order which I would be asking you to draw, Mr Grutters, on the presumption that it is your directions or are they yours, Mr Carington?

MR CARINGTON: I think they have been passed between the parties, Your Honour. …

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