Neutral Citation Number: [2025] EWHC 260 (KB)

Case No: 90PE156

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PETERBOROUGH DISTRICT REGISTRY
(SITTING AT IPSWICH COUNTY COURT)

Date: 6 February 2025

Before :

HHJ KAREN WALDEN-SMITH

- -

Between :

MR LEON ZAVOROTNII **(by his litigation friend Zoia Sircovscaia)**	**Claimant**
- and -	
MR LUCASZ MALINOWSKI	**Defendant and Part 20 Claimant**
(1) MR PLAMEN NIKOLOV **(2) NATIONAL FARMERS UNION MUTUAL INSURANCE SOCIETY LIMITED**	**Third Parties**

- -
- -

JOHN GREENBOURNE (instructed by **SLATER AND GORDON**) for the **Claimant**
LUCY WYLES KC (instructed by **IRWIN MITCHELL LLP**) for the **Defendant**

Hearing date: 20 December 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 6 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Approved Judgment

HHJ Karen Walden-Smith

1. This is the judgment with respect to a discrete point raised at the costs case management hearing on 20 December 2024 as to whether the costs order be "costs in the case" or whether the defendant should be entitled to its costs. I am sorry that, as a consequence of sitting commitments, it was not possible to deal with this judgment earlier.

Factual Background

2. The claimant, Mr Zavorotnii, a Moldovan resident in the UK with his parents and the defendant, Mr Malinowski, were working together on a night shift as cleaners at premises on the Norton Industrial Estate, Norton, Malton, North Yorkshire ending at about 6am on 31 March 2018. Mr Malinowski was driving the claimant home. Mr Zavorotnii was sitting in the front passenger seat of the defendant's VW Bora motor vehicle ("the car") when it was in collision with a stationary Volvo HGV tractor and trailer registration number UHZ 6206 ("the HGV") at approximately 6.16am. Mr Malinowski pleaded guilty to driving without due care and attention at the time and place of the accident.

3. The HGV had been driven by the first third party, Mr Plamen Nikolov, who parked the HGV roadside and without lights overnight. Mr Plamen Nikolov pleaded guilty to allowing a vehicle to remain stationary during darkness without lights at the time and place of the accident. The second third party, the National Farmers Union Mutual Insurance Society Limited ("the NFU") is the insurer for the first third party.

4. Mr Malinowski brought a claim against Mr Plamen Nikolov and the NFU for an indemnity or contribution pursuant to the Civil Liability (Contribution) Act 1978 alleging negligence on the part of Mr Plamen Nikolov for leaving the HGV on the road at night without displaying parking lights. The third-party proceedings between the defendant and the third parties have been settled.

5. The proceedings have had a tortured history as a consequence of the claim being initiated against Mr Malinowski's Polish insurers. That claim was dismissed and proceedings were brought outside the three years provided by section 11 of the Limitation Act 1980 ("LA 1980") against Mr Malinowski. I allowed the matter to proceed against Mr Malinowski pursuant to the provisions of section 33 of the LA 1980.

6. Judgment has now been entered in favour of Mr Zavorotnii who alleged that Mr Malinowski was negligent in that he failed to see and/or appreciate the presence of the parked HGV so as to drive the car into the rear of the trailer resulting in Mr Zavorotnii suffering serious personal injuries and consequential loss and damage. The injuries alleged are skull and facial fractures, severe traumatic brain injury, dental damage, psychiatric and/or psychological injury, visual impairment, almost a complete loss of sense of smell, partial loss of taste, mid/moderate right-sided hearing loss, and pneumothorax with lung confusions. Mr Zavorotnii additionally complains of permanent serious neurocognitive impairments, cosmetic deformity, organic personality change, dental problems, speech impairment, possible respiratory disability and impairment of the senses of sight, hearing, smell and taste. It is his case that he has not been able to continue with his studies, his plans for the future have come to an end, and his future ability to live independently and/or work is uncertain. It is currently said that he lacks mental capacity to litigate.

7. Mr Malinowski admits the accident and admits to pleading guilty to driving without due care and attention. Judgment for damages has now been entered against him. Neither the injuries to Mr Zavorotnii nor causation are admitted. The third parties deny negligence on the basis that HGVs park overnight on the road in the vicinity of the accident on a regular basis and that this was something that Mr Malinowski ought to have been aware of. It is further said that the accident occurred within 20 minutes of the end of the "lighting up" and there was already natural light available to see the HGV. Further, while the trailer was not lit it did have multiple reflectors and was clearly visible.

8. The complexities of the case are partly caused by the language barriers for both Mr Zavorotnii and his mother, his litigation friend, which requires constant translation of documents and oral communications. The quantum aspect of the claim is also complex as a consequence of the different injuries Mr Zavorotnii says he has suffered and the consequences of those injuries.

9. The claim was case managed on 14 October 2024 (with an extended time estimate of 2 ½ hours – CCMCs are usually listed for 90 minutes) with a further CCMC to take place on 6 June 2026. As a consequence of the time it took to deal with the directions, the costs management could not be dealt with. I arranged for further time to be provided on 20 December 2024 to deal with cost management of three phases of the litigation: disclosure, witness statements and experts.

10. I am very grateful to counsel, Mr Greenbourne for the claimant and Ms Wyles KC for the defendant, for their focussed submissions on the costs management of these three stages. The overall figures I allowed for these three stages was £308.909.30. This figure compared with the sum that had been sought by the claimant to be budgeted for work going forwards in the sum of £511,125.30 and the amount offered by the defendant, which was £261,374.30.

The cost budget figures

11. By allowing £308,909.30 for the three stages of disclosure, witness statements and experts, I was allowing 18.2% over that which had been offered by the defendant (£261,374.30) for the three stages and 40% below that which the claimant was seeking to be budgeted (£511,125.30). Breaking down to the phases, I allowed 53% of that which had been budgeted for with respect to disclosure; 41 % of that which had been budgeted for with respect to the witness statements; and 65% with respect to that which had been budgeted for the expert phase.

12. In cost budgeting I had taken into account the complexities of the case, particularly with respect to quantum, and the potential value of the claim. I am also very familiar with the very different positions of the claimant and the defendant in high value personal injury claims, which is particularly heightened in a case such as this where the individual claimant lacks capacity to litigate, and both he and his litigation friend do not have good, or any, English.

The costs order on costs budgeting

13. Costs budgeting is an important part of the case management of a case and the usual order made on a costs and case management conference is costs in the case, it being necessary for the court to manage a case to trial – including costs budgeting.

14. The hearing on 20 December 2024 was not a costs case management hearing but an additional hearing to deal with costs budgeting of three specific phases. The reason that the hearing was needed was that the differences between the parties was such that it required additional time of the court. It is not unusual for a KB Master to separate case management from costs management. While costs management is consequent upon the case management it can be helpful for parties to have time to consider budgeting once determinations have been made as to which directions are being given.Consequently, a separate costs management hearing is not necessarily a bad thing to happen and it is to be hoped that the differences between parties on budgets can be resolved or narrowed if there is that additional time after directions are made. If issues are resolved, the costs hearing can be vacated or at least reduced with the number of issues for determination being limited.

15. It is essential for the court to deal with cases justly and at proportionate cost taking into account the complexity of the issues involved, the amount of money involved and the importance of the case in order to further the overriding objective (CPR 1.1). The parties are required to help the court to further the overriding objective (CPR 1.3). This particular case is complex, at least with respect to quantum, where significant damages are sought (potentially £multi-millions). While plainly of the utmost importance to the claimant, it does not have any wider significance. The time spent by the court in managing the case, while more than would normally be necessary, was properly needed in order to deal with all the issues being raised between the parties.

16. The defendant seeks an order in this case which departs from the norm by submitting that the court should not simply be making an order that the costs be in the case, but instead order that the claimant pay the costs of the costs management hearing on 20 December 2024.

17. The basis upon which this submission is made are the two recent authorities of Master Thornett: *Nicholas Worcester (by his wife and litigation friend Dominique Worcester) v Dr Philip Hopley* [2024] EWHC 2181 (KB) and *Jenkins v Thurrock Council* [2024] EWHC 2248 (KB), which were decided respectively in July and September 2024. Counsel were not able to refer me to any other authorities and my own researches have not revealed any further consideration of this point.

18. In *Worcester v Hopley*, the defendant submitted that the court should exercise its discretion pursuant to the provisions of CPR 44 by directing no order for costs for a costs management hearing on 15 April 2024, that the claimant pay the costs of a costs management hearing on 15 May 2024 when it was determined that the claimant's costs be budgeted to only 44.08% of the claimant's estimated costs, which were a 3.58% increase of the amount offered by the defendant and, should the claimant recover costs upon success there "should be a 50% reduction of such assessed costs and occasioned by Costs Management".

19. In this particular matter, similar to the submissions in *Worcester,* the defendant submitted that the claimant had served an unrealistically high budget and that the significant reductions to that budget took the case beyond the typical and conventional "costs in the case" order. The claimant contended that it was no different from any other cost management hearing and that the usual in the case costs order should be made. The court should limit any condemnation of the claimant's costs schedule for budgeting to giving a "shot across the bow" so that the claimant's solicitor would be on a warning for any further similarly "ambitious" costs budgets.

20. In *Worcester,* Master Thornett made reference to the decision of Master Brown in *Reid v Wye Valley NHS Trust the Robert Jones and Agnes Hunt Orthopaedic Hospital NHS Foundation Trust* [2023] EWHC 2843, when it was held that CPR 44.2 enabled the court to depart from any assumed default position on costs if it considers the facts justify the court in so doing.

21. In *Jenkins v Thurrock Council,* Master Thornett referred his earlier decision of *Worcester* and set out the following:

> "The court agreed that merely because a budget comes to be reduced ought not to see a penalty in costs against a party that had relied upon ordinary and typical reasoning in support of their budget. However, the court had been satisfied that factors featured in r.44.2 were entirely appropriate to consider and apply if time and resources had instead been expended, by both the court and opposing parties, unravelling an unreasonable or unrealistically ambitious budget despite material and justified concerns having been expressed in advance by parties in their Precedent R form and thereafter… the court is entitled to take a rounded overview when considering the costs of the budgeting exercise, drawing upon and applying its experience of costs management in the context of the particular case in hand. Accordingly, the court is as much entitled to interpret and apply factors such as success and conduct featured within r. 44.2 following a Costs Management Hearing as it is at conclusion of any other hearing. Parties are not in principle immune from costs considerations in costs management hearings."

Discussion and conclusion

22. The decisions of Master Thornett in *Worcester* and in *Jenkins* and Master Brown in *Reid* are, of course, not binding on this court. However, the general principle enunciated by Lord Woolf in *AEI Rediffusion Music Ltd v Phonographic Performance Ltd* [1999] 1 WLR 1507, that the CPR is intended to impose a higher discipline on parties in conducting litigation still holds good and CPR rule 1 sets out the need for the courts to further the overriding objective and for the parties to assist the court in the furtherance of that overriding objective.

23. In this case, the claimant can properly say that he succeeded at the costs management hearing in that he obtained an order approving budgeted costs, over the three phases being dealt with, which was £47,535 (or 18.2% more than was offered by the defendant). That is a significantly greater percentage increase over that which was

offered by the defendant in *Worcester* (3.58% increase). However, in this case the success of the defendant was far greater in reducing the amount being sought by the claimant. The reduction for the three phases being dealt with was from £511,125.30 down to £308,909.30, a reduction of £202,216. The amount allowed was 60% of the total sought.

24. Proportionate use of court time requires parties to ensure that they work together to endeavour to narrow issues and, insofar as it is possible, agree matters (CPR 1.3)

25. There is, in my judgment, no reason as to why the costs order on a costs management hearing must always be "costs in the case". While that may be the usual order, particularly where the court is dealing with both directions OK and costs in a costs case management hearing, the court is not precluded from exercising its discretion under CPR 44.2. Indeed, making a costs in the case order is an exercise of that discretion. The consequences of a costs in the case order always being made in a costs management hearing is that a claimant would be able to seek to push forward entirely unrealistic and ambitious costs budgets without any costs sanction.

26. CPR 44.2 provides the court with a wide discretion when making a costs order, including whether the costs are payable by one party to another, the amount of those costs and when they are to be paid. The general rule is that the successful party pays the unsuccessful party, but the court has a discretion to make a different order and, in deciding what order (if any) to make about costs, the court will have regard to all the circumstances including the conduct of all the parties, whether a party has succeeded on part of its case (even if not entirely successful) and an admissible offer to settle. The offer to settle does not directly apply to the issue of costs budgeting but it does point to the court looking at the conduct of the parties in seeking to reach agreement on costs budgeting. In looking at conduct, CPR 44.2 refers to consideration being given to both reasonableness and exaggeration.

27. In my judgment, having taken into account the complexities and difficulties in this case, the claimant did continue with an overly ambitious costs budget which verges on the edge of being described as "unrealistic". That is despite having the time subsequent to the case management hearing in October 2024 to consider how to limit the dispute and reduce the costs being sought. The claimant did not reduce the costs budget on two of the three phases being budgeted subsequent to the case management hearing on 14 October 2024 but increased the sum. The total sum for disclosure increased from £52,737.17 to £61,463.16; the total sum for witness statements increased from £71,647.20 to £77,088.02. As a consequence there was not a narrowing, but a widening of the dispute with respect to those phases. There was a reduction in the total figure claimed for the expert phase and some agreement with respect to those figures, but not with respect to time costs or disbursements for counsel.

28. While, in my judgment, the claimant had been overly ambitious in the sums it sought to have approved as its budget for work going forwards, the fact that the claimant achieved 60% of that which it sought, and obtained approval to expend costs which were 18% above that offered by the defendant, mean it cannot be said that the claimant was entirely unrealistic. The claimant did, however, come very close to such a finding. In the circumstances, I have determined that on the correct figures in this matter the appropriate order is one of costs in the case. However, parties need to be aware that while the usual order will be "costs in the case" that is not the only order that could be

made. In future, costs management hearings, which result in the party seeking the court's approval of its costs budget (usually the claimant) being overly ambitious and unrealistic, with the approved budget being significantly lower than that claimed or only marginally above that which is offered, may result in a costs order for the costs management hearing being ordered against the party seeking approval.