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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
[2019] EWHC 1780 (QB)

No. QA-2019-000026

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 24 May 2019

Before:

MRS JUSTICE LAMBERT

B E T W E E N:

AKHEEM GRAY

Claimant

- and -

COMMISSIONER OF POLICE FOR THE METROPOLIS

Defendant

Hearing Date: 21 May 2019

MR M. WESTGATE QC (instructed by Hodge Jones & Allen Solicitors) appeared on behalf of the Claimant.

MR G. THOMAS (instructed by Weightmans Solicitors) appeared on behalf of the Defendant.

J U D G M E N T

MRS JUSTICE LAMBERT:

- 1 This is an appeal from a costs budgeting decision made by HHJ Baucher at the Central London County Court on 4 January 2019. Permission was granted by Walker J on 15 March 2019.
- 2 At the hearing of the appeal, the Claimant/Appellant was represented by Mr Martin Westgate QC and the Defendant/Respondent by Mr George Thomas. I am grateful to them both for their helpful and focussed submissions.

Background

- 3 The underlying claim arises from the Claimant's arrest on 14 August 2014 following a domestic incident involving his partner and his subsequent prosecution and acquittal on a charge of obstructing the police in the execution of their duties. The claim alleges that there was no lawful basis for the Claimant's arrest, that the police were acting beyond their powers, that they knew that they were acting beyond their powers and that the police had conspired to fabricate an account of the circumstances of the arrest. It is common ground between the parties that, at the heart of the case, is a stark factual dispute between the Claimant and his partner on the one hand, and the police officers involved in the incident on the other. The trial is to take place with a jury with a time estimate of five days.
- 4 The Defendant's costs budget of £44,301, including incurred costs, was agreed before the hearing. The Claimant's costs budget sought £91,427 (future costs only) and, although some sums claimed in the budget had been agreed before the hearing, the sums sought for the preparation of witness statements, the trial preparation and the costs of trial remained in dispute. The Defendant made discrete offers in respect of the disputed items and a global offer of £40,494. HHJ Baucher allowed £44,140 in respect of future costs which, when incurred costs were brought into account, produced a total costs figure to the conclusion of a 5-day trial in the order of £68,600.

Grounds of Appeal

- 5 The Grounds run to several paragraphs but drill down to the following points:
 - a) The Judge failed to address proportionality lawfully. She placed far too much weight upon the low value of the claim, which was around £10,000 - £15,000, but did not take into account the importance of the case beyond its value to both sides, its complexity and the amount of work which would be involved in preparing for trial and running the trial.
 - b) The sums budgeted for witness statements, trial preparation and for the trial itself were manifestly too low. The effect of the budget rendered the litigation uneconomic: in spite of the constitutional significance of the claim, it would be impossible for the Claimant to litigate the action to trial as the costs allowed were too low.
 - c) The Judge made three "free-standing" mistakes: she failed to appreciate that the trial was listed for 5 days and not 3 days (to which she referred at one point); she appears to have been influenced by the fact that the Claimant was publicly funded; and she failed to give reasons for allowing a sum for witness statement preparation which was lower than that which had been offered by the Defendant.

The Hearing

- 6 The costs and case management hearing lasted 20 minutes. From the transcript it is apparent that it was a relatively informal and discursive hearing. It was conducted briskly and efficiently, with the Judge making a series of decisions as the hearing progressed. I focus below on the three items in the costs budget which are the subject of scrutiny in this appeal.

Witness Statements

- 7 The sum sought in the Claimant's budget was £9,060 representing 6 hours of counsel's time and 30 hours of solicitor's time. Ms Reed (the costs lawyer who appeared on behalf of the Claimant at the costs budget hearing) justified the figure on the basis that an "*inordinate amount*" of time would need to be spent taking instructions from the Claimant. Two witness statements (the Claimant and his partner) were needed. Also there would be a need to take instructions on the witness statements which would be served by the Defendant. The work would involve taking the Claimant's factual instructions in detail on the incident and that almost every element of the incident was in dispute; there were large numbers of reports and documents which had been disclosed by the Defendant which would need to be reviewed and then cross referenced. All of this work would take much longer because the Claimant suffered from autism and had other mental health difficulties.
- 8 The Judge was informed that the Defendant had made an offer of £5,250 for this phase. She recorded this fact but noted that she had to bear in mind "*reasonable proportionality in accordance with CPR 44.3(5)*". She allowed £4,000 only in the budget. She noted that the work would involve drafting two witness statements for the Claimant and reviewing a number of statements for the Defendant. She noted (and listed) the various factors which she had to take into account in assessing reasonableness and proportionality under CPR 44.3(5). In reaching her decision she stated that she recognised that the action was "*different from the normal type of case as there was to a jury trial*" but that, that apart, she thought that the issues were relatively straightforward. It is apparent that the factors which most influenced her decision were the low value of the claim, the fact that work which would be needed for the witness statement preparation had already been undertaken (and reflected in the incurred costs) and her judgment that, for claims of this type, the issues were not complicated. The Judge did not explain why she had allowed a lower sum than that which had been offered by the Defendant.

Trial Preparation

- 9 The sum claimed in the budget was £21,890 reflecting around 70 hours of solicitor's time and 25 hours of barrister time. The Judge concluded that £7,000 was the proportionate figure. She took into account that the trial was to last five days and that as many as ten witnesses would be giving evidence. She again remarked that the factual issues were not so complicated for this type of case. She noted that how the sum was to be spent was a matter for the Claimant's advisors but she questioned whether the sum which had been allocated for junior counsel's trial preparation was reasonable and proportionate.

Trial Costs

- 10 In respect of trial costs, the sum claimed was £31,600. The Judge allowed £19,000. The Judge was informed that around £19,500 had been budgeted for counsel's brief fee and refreshers at an hourly rate was £300. She expressed the view that counsel's hourly rate was too high and that it was disproportionate for a claim of relatively modest value.

The Appeal

- 11 Mr Westgate recognises that the costs ruling was made by the Court exercising its case and costs management powers and, as such, the threshold for this Court interfering with the decision under CPR 52.21(3) is a high one. He submits that the hurdle is more than comfortably overcome however as the Judge made a number of errors of principle. Those errors are independent in their own right but lead to the wider conclusion that the approved budget was simply too low to enable the claim to be pursued.
- 12 At the heart of his appeal is the submission that the Judge erred in adopting an unlawful approach to the evaluative judgment involved in assessing proportionality under CPR 44.3(5). Without wishing to detract from the sophistication of Mr Westgate's oral submissions, the appeal boils down to two points: first that the Judge placed far too much emphasis upon the low value of the claim and second that she failed to take into account or place sufficient weight upon various other aspects of the case. Those other aspects were the intrinsic complexity of civil actions against the police; the number of details of the incident which were in issue and the difficulties which the Claimant's solicitors would have in taking the Claimant's instructions given his mental health issues; the sheer volume of material which would have to be considered in order to prepare for trial, both witness statements and documents; the need to ensure that in terms of the number of hours of legal preparation there should be equality between the parties.
- 13 Dealing with the Defendant's submissions shortly, what they amounted to was that the budgeted figures were robust but fair, that the Judge took into account proportionality, that she did not fail to take into account relevant factors or place undue weight on particular factors of the case but she undertook a balanced approach to the relevant factors in CPR 44.
- 14 I need only reference the legal principles briefly. There is no dispute. It is common ground that costs management decisions form part of the court's case management powers. I should not lightly interfere with a case management decision and even very robust case management decisions should be upheld. However, such latitude should not be afforded if it is clear that there has been an error of law. The budgeting judge is making an evaluative judgment of the reasonable relationship between the costs and the factors set out in 44.3(5) those being: the sums in issue in the proceedings; the value of any non-monetary relief; the complexity of the litigation; the additional work generated by the conduct of the paying party; and wider factors involved in the proceedings such as public importance. Again, it is common ground that the budgeting judge is required to bear in mind reasonableness and proportionality under CPR 44.4.3 and that the factors set out in 44.3(5) involve substantial overlap. Under CPR 3EPD at paragraph 7.3, when reviewing budgeted costs, the Court is not required to undertake a detailed assessment in advance, but is to consider whether the budgeted costs fall within the range of reasonable and proportionate costs.

Discussion and Conclusion

- 15 In considering the Grounds of Appeal and Mr Westgate's submissions, I make the following preliminary points.

- 16 First, as I have already remarked, the hearing was short and discursive with the Judge making a series of decisions on the points raised as she went along. Her reasons were short, often a few sentences only. The parties inform me that the way in which the hearing was conducted was typical for a costs and case management hearing for understandable reasons: finite court resources do not permit detailed judicial pre-reading, lengthy hearings or reserved or delayed judgments. It follows, I find, that in hearings of this type, not only is it necessary to look at the transcript as a whole for the Judge's reasons, but it would be wrong for me to look for detailed and nuanced reasons for the Judge's decisions. It is to be expected that reasons will often be expressed in shorthand form.
- 17 Second, I remind myself that the Judge was not only entitled, but obliged, to take into account that the claim was of relatively low value. I mention this only because at times Mr Westgate's submissions, which focussed upon the complexity of the case and the amount of work which would be required to bring the case to trial, appeared to overlook that one of the factors which the Court was required to take into account under CPR 44.3(5) was the sum in issue in the proceedings and the need for the costs to bear a reasonable relationship with the value of the claim.
- 18 Third, I find that the Judge was entitled to conclude that the issues for trial were relatively straightforward. Mr Westgate criticised the Judge for making what he submitted to be an inappropriate comparison between the claim and other civil actions against the police, on the basis that civil actions against the police are all by their nature very complicated. I do not find that the criticism to be justified. The Judge was told on a number of occasions, and the point was repeated before me, that at the heart of the case was a series of factual disputes about who did, or said, what during the course of the incident. No doubt, the exploration of those issues before the jury would require care and a thorough knowledge of the papers, but the action does not raise novel or even particularly difficult issues of law. Nor do various types of evidence which require particular care and which can be time-consuming to consider (for example, CCTV footage, or bodycam footage or mobile phone records) and which as Mr Westgate submitted may often be found in such cases, feature in this particular case.
- 19 Further, I accept the point made by Mr Thomas that the sums claimed and allowed in respect of each of the three phases of the litigation should not be looked at in a compartmentalised way, otherwise costs may be duplicated. So, just as it is necessary in considering the amount which is allowed for witness statements to take into account the costs which the Claimant had already incurred in respect of earlier phases of the litigation including disclosure, similarly the sums allowed for trial preparation and the trial hearing incurred need to be considered together.
- 20 Against these initial observations and findings, I now consider the various points made by Mr Westgate. I find I can do so relatively briefly.
- 21 Dealing first with the costs budget for witness statements. I reject the submission that the Judge placed too much weight on the value of the claim at the expense of the other features of the litigation which were identified by Ms Reed. The Judge clearly did take into account the value of the claim but in her short reasons she also referred to other factors: the costs which had already been incurred in the earlier phases of the litigation; the fact that the action was to be tried by a "*judge and jury*" and that the Claimant was vulnerable. She recorded that she had reviewed the pleadings and "*what was involved.*" Although the Judge's reasoning was not detailed, I find that she took into account, albeit briefly, the relevant elements of the proportionality judgement required under CPR 44.3(5).

- 22 I do not find that the Judge's reasoning was flawed or that the sum allowed was manifestly too low. By the time of drafting witness statements, the Claimant's solicitors would already have a reasonably detailed proof of evidence for the purpose of drafting the pleadings and for the evaluation of the merits of the claim needed for public funding. Also, a substantial sum had already been incurred in connection with disclosure. I accept Mr Thomas's point that it must be assumed that a substantial amount of work had already been undertaken in analysing the disclosure including cross referencing those documents and reports both internally and with the Claimant's instructions. Closer scrutiny of the disclosure lists, as examined by Mr Thomas in his submissions, reveals that a very large number of the documents that were disclosed were, in fact, common to both parties. This supports the belief that the lion's share of the documents would have already been considered by the Claimant's lawyers, even before they were listed and disclosed by the Defendant. Although it was submitted that the Claimant was vulnerable by reason of his mental health problems (and the Judge appeared to acknowledge the difficulty which this may present) the extent of those mental health problems should not be overstated. The Particulars of Claim, which the Judge stated she had reviewed, made no reference to his health problems even in respect of the damages claim, which included aggravated damages. Nor was the Judge taken to any document which explained the extent of the mental health problems. Although those health difficulties have to be borne in mind, viewed in context, they do not justify a significant increase in the costs to be allowed for witness statement preparation.
- 23 I move on then to consider the costs allowed for trial preparation. The Judge was told that this was a five-day trial with, possibly, ten witnesses. Even if the Judge had mistakenly thought that the trial was three days only, I accept Mr Thomas's submission that this is not a factor which would have depressed the costs of preparatory work. The Judge found that £7,000 was the proportionate figure to allow for this phase of the preparation. In reaching her conclusion, she again referred to the factors in CPR 44.3(5), noted that the factual issues were not complicated. I find no error in her approach. Nor is the sum allowed manifestly too low. The Claimant's budget sought the costs of 70 hours of solicitor's time for the production of the various bundles for trial and for liaising with Counsel, the Claimant and the Court. This number of hours, or anything like it, is impossible to justify. Nor given the involvement of Counsel in earlier phases, is it easy to see how the hours claimed for Counsel's trial preparation could easily be justified.
- 24 Again, I am unable to identify any error of law in the Judge's approach to trial costs. The Judge made clear that she appreciated that the action was of significance in comparison with other personal injury cases. She remarked in response to Ms Reed "*I do know that*" and "*I do know the distinction but I am just trying to get more in the proportionality aspects of it.*" She also noted that the trial was listed for 5 days and that it was a "*judge and jury case.*" It appears that one reason for her allowing the figure of £19,000 was that she thought that an hourly rate for Counsel of £300 was too high for a claim valued at £15,000 at most ("*you'd be lucky to get over the small claim – the fast track limit.*") She was I find entitled to reach that view and entitled to use her assessment as to the appropriate hourly rate for Counsel in reaching her budgeted figure. However, as she observed, in allowing £19,000 she was not stipulating how the amount should be allocated as between Counsel and solicitor which was a matter for the Claimant's legal team.
- 25 Overall therefore, I do not find that the transcript of the hearing reveals that the Judge has made any error of law. I do not find that she adopted an impermissible and distorted approach to the proportionality assessment under CPR 44.3(5). There is nothing in the transcript which suggests to me that she did not have in mind the fact that this case was a case of considerable importance to both parties notwithstanding its value. She used the phrase "*judge and jury case*" as a shorthand reference to the fact that the trial was not run of

the mill and that there were wider factors involved in the proceedings under CPR 44.3(5)(e). Nor are comparisons between the parties' budgets based upon the number of hours of work which might be produced by applying different hourly rates, determinative or even particularly relevant. Under CPR 3EPD.4 at paragraph 7.3, the Judge is not required, in reviewing the budget, to analyse the detail of the costs sought by reference to its constituent elements and at paragraph 7.10, it is made plain that the Court's function at the budgeting hearing is not to approve or disapprove hourly rates. The Judge correctly observed that how the sums allocated to various phases were to be spent was not a matter for her. All that she was required to do was to assess whether the budgeted costs fell within a reasonable range.

- 26 I do not find that the amounts allowed were manifestly too low or that the result of the budget was that the litigation was no longer economic. I agree with Mr Westgate to the extent that I accept that the Judge's costings were low, and perhaps lower than those which would have been allowed by other judges (including me). However, that is not the test. The Claimant's legal team will need to conduct the litigation efficiently. There will need to be a clear demarcation between Counsel and solicitor to ensure that there is no duplication of work, particularly in relation to trial preparation. But I do not accept that the Claimant will be unable to instruct competent counsel within the budget or that the sum budgeted was so low as to prevent the litigation from being pursued.
- 27 Finally, I deal with the further self-contained points raised by Mr Westgate. First, I find that the Judge was not required to spell out why the figure which she allowed for witness statements was less than the figure offered by the Defendant. The reason is obvious: the figure offered by the Defendant was not the proportionate figure. It goes without saying that, if a Defendant (or any party) makes an offer, that offer does not become the benchmark below which the cost cannot be budgeted. Second, I do not accept the Judge was impermissibly influenced by the fact that the Claimant was funded by legal aid. Having noted that fact, she then went on to say that this was not relevant and that it played no part in her considerations. I find no reason to doubt that statement. Finally, I have already dealt with Mr Westgate's third self-contained point which related to a possible misunderstanding during the witness statements consideration and trial preparation that the judge was dealing with a three-day rather than a five-day trial. Even if she was working on that misapprehension (and I make no finding on the point, one way or the other) the mistake would not have operated to depress the figures which she allowed in respect of her budgeted amounts.
- 28 For these reasons, notwithstanding Mr Westgate's excellent submissions, I refuse the appeal.
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This transcript has been approved by the Judge