

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
NEWCASTLE-UPON-TYNE DISTRICT REGISTRY

Claim No. 3NE90103

The Law Courts
The Quayside
Newcastle-upon-Tyne
NE1 3LA

Wednesday, 26th November 2014

Before:

HIS HONOUR JUDGE FREEDMAN

Between:

OLIVER HAVENGA
(A Child Suing by his Litigation Friend and Mother Julie Havenga)
Claimant/Appellant

-v-

GATESHEAD NHS FOUNDATION TRUST

-and-

SOUTH TYNESIDE HOSPITALS NHS TRUST
Defendants/Respondents

Counsel for the Claimant/Appellant:

MR CLEGG

Counsel for the Defendant/Respondents:

MISS BEDFORD

Transcribed from the Official Tape Recording by
Apple Transcription Limited
Suite 204, Kingfisher Business Centre, Burnley Road, Rawtenstall, Lancashire BB4 8ES
DX: 26258 Rawtenstall – Telephone: 0845 604 5642 – Fax: 01706 870838

Number of Folios: 45
Number of Words: 3,218

APPROVED JUDGMENT

A
B
C
D
E
F
G
H

Introduction

1. The appellant appeals against a Costs Management order made by District Judge Kramer on 20th May 2014. The District Judge reduced the appellant's total costs budget from £769,854.46 to £463,915.13. There are four specific rulings which the appellant seeks to challenge.
2. On 22nd August 2014, after hearing oral argument on behalf of the appellant, I gave permission to appeal.

The Claim

3. The appellant was born on 28.03.03 with hemiplegic cerebral palsy affecting the left side of his body. He has a number of disabilities including impaired hearing, limited speech and language capacity and mobility problems. He now lives in Guernsey with his family. It is intended that the family will remain living there for the foreseeable future.
4. It was alleged that the appellant's brain damage was caused by negligence on the part of the NHS Trust. Eventually, it was agreed that liability should be apportioned 75% /25% in the appellant's favour. This division of liability was approved by Mr Justice Walker on 02.05.14.
5. For the purposes of the Quantum hearing, evidence is to be obtained from a large number of experts in various disciplines. Directions have been given for each party to instruct their own experts in 6 different fields as well as the instruction of joint experts in speech and language and physiotherapy.
6. The appellant estimates the value of the claim to be in excess of £5 million.

A The Legal Framework

7. Costs Management was introduced into the Civil Procedure Rules by virtue of the Civil Procedure (Amendment) Rules 2013 which came into effect on April 1, 2013.

B Section 1(1) of CPR Part 3(2) provides that:

C *“The purpose of costs management is that the court should manage both the steps to be taken and the costs to be incurred by the parties to any proceedings so as to further the overriding objective.”*

D The Costs Management provisions apply to all multi-track cases and, inter alia, cases in the Queen’s Bench Division of the High Court.

E 8. Further guidance as to how the court is to exercise its costs management powers is given at the Practice Direction at (3)(e). In particular, at 2.3, it is made clear that it is open to the parties to agree the budgets but in the event that they are not agreed, the court will review them, making appropriate revisions. The court’s approval is only required in relation to the total figures for each phase of the proceedings but the court is entitled to have regard to the *constituent elements of each total figure*. The final sentence of PD2.3 is of utmost importance:

F *“When reviewing budgets, the court will not undertake a detailed assessment in advance but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs.”*

G *“When reviewing budgets, the court will not undertake a detailed assessment in advance but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs.”*

H For the sake of completeness, at 2.6, it is said that where there are significant developments in the litigation, it is open to a party to seek to revise its budget, whether upwards or downwards, submitting an amended budget for agreement and, in default, for approval by the court.

The Grounds of Appeal

A
9. Before turning to the four individual grounds of appeal, it is appropriate to record that
B the District Judge disallowed the involvement of junior counsel, concluding that this
C was a case which could properly be conducted by Queen's Counsel on his own. Such
does not form a ground of appeal but it is submitted that the cost budgeting undertaken
by the District Judge (particularly in relation to solicitors' time/costs) should be seen
through the prism that only one Counsel is to have conduct of this case as opposed to
what was originally envisaged, namely Leading and Junior Counsel.

D
10. It is convenient to look at each ground of appeal in turn:

(i) Reduction in Solicitors' Time Re Statement of Case

E
The complaint here is that the District Judge reduced Grade A solicitor time from the
F claimed 68.15 hours to 30 hours, despite the fact that there was no allowance for junior
G counsel. The broad submission is that the District Judge failed to appreciate the
crucial and significant role which a Grade A solicitor will perform in relation to the
preparation of statements of case (such will include the preparation of the schedule of
loss, consideration of the counter-schedule of loss and the amendment/revision of the
H schedule of loss). It is argued that the District Judge misunderstood the role which a
Grade A solicitor would play: by way of illustration only, it is said that the reference to
a solicitor *acting as a conduit* (34n, 29) demonstrates that the District Judge failed to
appreciate the extent to which a Grade A solicitor would be involved in relation to the
statements of case. Further, it is submitted that contrary to what the District Judge
states at 34O (5-10), there will be no overlap between the time spent by a Grade A
solicitor and the time spent by Leading Counsel in drafting the schedule of loss.
Specifically, it is said the Grade A solicitor will need to undertake detailed

A
B
C
D
E
F
G
H

preparations to enable Leading Counsel to draft a schedule; the schedule will then need to be carefully scrutinised by the solicitor; and (of particular importance) it will need to be discussed in detail with the family, as will the counter-schedule and any revised schedule. So, it is said, an allowance of 68.15 hours for a Grade A solicitor is by no means unreasonable; or, to put it another way, to allow only 30 hours is unreasonable and not proportionate to the complexity and value of the case and the amount of work actually required.

(ii) Reduction in Solicitors' Costs Re Expert Reports

The appellant sought 326.7 hours at Grade A and 103.10 at Grade C. The District Judge reduced the time to 100 hours at Grade A and 40 at Grade C. The broad criticism here is that the District Judge failed to understand the need for Leading Counsel and a Grade A solicitor to see the experts in conference in the presence of the family; and that there would need to be more than one such conference. It is said that the District Judge again appeared to be suggesting that work was being done twice over but, says Mr Clegg, that overlooks the fact that both a Grade A solicitor and Leading Counsel have specific roles to play in relation to the experts. As to the former, it is said that not only will it be necessary for a Grade A solicitor to attend at the conferences with the experts but also to attend to the follow-up which will involve writing letters inviting the experts to amend/supplement their reports and to liaise as between the various experts. In short, what is required is an ongoing dialogue between an experienced solicitor and all of the experts in the various disciplines. In relation to the hours allowed at Grade C, it is argued that this underestimates the enormous amount of work involved in organising the experts to visit the appellant and his family and in organising the various conferences, as well as ensuring that experts' reports and

A
B
C
D
E
F
G
H

follow-up letters are produced on time. Again, the submission made by Mr Clegg is that the large reduction in hours rendered the budget neither reasonable nor proportionate.

(iii) Reduction in Costs for Experts' Fees

The appellant sought £66,975 in respect of experts' fees which was reduced by the District Judge to £49,000. In effect, the District Judge allowed £7,000 per expert (assuming 50 percent of the fees for the two joint experts). In essence, it is said that this was insufficient when account is taken of travelling expenses, experts' time in visiting Guernsey, experts' attendances at conferences, joint experts' discussions and the preparation of joint statements as well as revised supplementary reports. In effect, the appellant argues that a figure of approximately £9,500 should be allowed per expert as against the £7,000 which the District Judge permitted.

(iv) Reduction in Solicitor Time Re Trial Preparation and Trial

The appellant sought 74.5 hours at Grade C time for Trial Preparation which was reduced to 25 hours. For the Trial, the appellant sought 45.5 hours at Grade A time and 79 hours at Grade C time. The entirety of the time at Grade C rate was deleted from the budget. Underpinning the appellant's complaint is that the trial was likely to last ten days. In fact, the District Judge found that the trial was more likely to last five days [34AH at 15-21]. The District Judge also found that it was "wholly disproportionate" to have two fee-earners in attendance [34A1 at 11-17]. In response to this, Mr Clegg argues that the District Judge failed to understand the specific roles which a Grade A and a Grade C solicitor would perform at the trial. The Grade C solicitor would need to ensure the attendance of all the experts and other witnesses and generally to supervise them during the course of the trial whereas the Grade A solicitor

would effectively be acting as Junior Counsel to Leading Counsel (at least, for some of the time) as well as attending on the appellant's family.

11. In summary, the appellant says that the District Judge came to wrong decisions in relation to each of the four matters in the sense that he exceeded the generous ambit of discretion afforded to him when making Case Management decisions.

The Respondents' Submissions

12. Miss Bedford's starting point is that the court should have regard to the respondents' budget which was agreed in the total sum of £157,322.50. Whilst, of course, she acknowledges that it is inevitable in a case such as this that the appellant's solicitors will need to spend substantially more time on case preparation and in looking after the family, she makes the point that the agreed budget on the part of the respondents provides context for the revised budget ordered by the District Judge. The revised budget remains at nearly three times the amount of the respondent's budget.

13. Coupled with the above, by way of a general submission, Miss Bedford says that it would be a bold finding for this Court to conclude that the budget set by the District Judge did not meet the criteria of reasonableness and proportionality. On the contrary, she argues that this was a proportionate budget which is compliant with the overriding objective. Further, and in seeking to uphold the decision of the District Judge, she says that an analysis of the transcript demonstrates that he took into account all relevant factors and there is no question of him taking into account any irrelevant factors.

14. Dealing briefly with her responses to each of the grounds of appeal, Miss Bedford submits that it was open to the District Judge to conclude that the amount of hours claimed in relation to the preparation of the statement of case was excessive and that,

A

on the face of it, there appeared to be a degree of duplication. To reduce the amount allowed for this phase of the proceedings, says Miss Bedford, was well within the District Judge's discretion.

B

15. In relation to ground (ii) it is submitted that the District Judge was entitled to conclude that the estimated costs in respect of experts' reports were disproportionate and that there was an element of duplication. It is said, specifically, that the District Judge was correct to adopt the appropriate "light touch" required for budgeting and, as it happens, he agreed with the figure advanced by the respondent.

C

D

16. As to experts' fees/disbursements, Miss Bedford says quite simply to conclude that an allowance of/ £7,000 per expert was outside the band of reasonable discretion is unsustainable.

E

17. Her submission is broadly the same in relation to the fourth ground of appeal, whilst emphasising that the court proceeded on the assumption that the trial would last five days, whereas the appellant's budget has been calculated on the premise that it would last ten days.

F

My Decision

G

H

18. I remind myself at the outset that this appeal is being brought against a case management decision. The Court of Appeal has frequently said that an appellate court should be slow to interfere with a case management decision. That must be more particularly so in the context of assessment/budgeting of costs where the judge (inevitably) has a very wide discretion. Insofar as is necessary, I refer to the test laid down by Brooke LJ in Tanfern Limited v Cameron MacDonald [2000] 1 WLR 1311 at 32:

A

“...the appellate court should only interfere when they consider that the judge of the first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible...”

B

C

And, of course, CPR 52.11 makes it clear that an Appeal is limited to a review of the decision of the lower court. An Appeal should only be allowed where the decision was “wrong” or “unjust”.

D

19. As Miss Bedford points out, there would be no basis for a finding that, as a matter of law, the judge failed properly to direct himself. Equally, there would be no grounds for coming to the view that the District Judge failed to take into account factors which he ought to have taken into account, albeit that it is argued that he did not give sufficient weight to matters raised during the course of the hearing. The ultimate question seems to me to be this: did the judge exceed the generous ambit of his discretion in making the reductions which he did? Alternatively, did the revised budget fall within the range of what is both reasonable and proportionate?

E

F

20. With those introductory remarks, I need now to turn (briefly) to the four grounds of appeal.

G

(i) Reduction in Time Re Statement of Case

H

I think that there is force in the submission that having excluded Junior Counsel, it is inevitable that there will be a greater need for Grade A solicitor time than otherwise would have been the case. I accept the proposition that a Grade A solicitor would need to spend a considerable amount of time

A
B
C
D
E
F
G
H

reviewing the schedule of loss and the counter-schedule and explaining matters to the family. It will also be necessary for a Grade A solicitor to engage in discussions with counsel as to the statements of case. In such circumstances, I think that only to allow 30 hours for Grade A solicitor time errs on the low side. I would have accepted that there is likely to be more than 30 hours' input from a Grade A solicitor, although, in my view, the 68 hours claimed is simply too much.

(ii) Reduction in Solicitors' Costs Re Expert Reports

The District Judge made a very substantial reduction in relation to this phase of the case. Again, I think there is force in the submission that it is likely that a Grade A solicitor will spend a considerable amount of time dealing with the experts and considering their reports and that, although there may be a degree of duplication between work done by a Grade A solicitor and Leading Counsel, in many respects ,that is unavoidable. It is the fact that a Grade A will need to be acquainted with all of the experts' reports and will need to attend conferences with the experts as well as seeking supplementary reports. Generally, he will be responsible for coordinating all of the expert material. In such circumstances, again, I would have been more generous than the District Judge, although I would not have allowed anything close to the 326 hours claimed by the appellant.

(iii) Reduction in Costs for Experts' Fees

It is conceivable that the fees charged by the experts to include expenses will in fact exceed £7,000 per expert. On the other hand, I think that £7,000 per

A
B
C
D
E
F
G
H

expert, even in a case of this magnitude, is entirely reasonable. I myself would not have allowed any more than £7,000 per expert.

(iv) Reduction in Solicitors' Time Re Trial Preparation and Trial

In relation to this final phase of the case, I think that I would have been persuaded to allow somewhat more time for Trial Preparation at Grade C and, equally, I would have accepted that the presence of a Grade C solicitor at trial, at least for some of the time, would be justified. I would not, however, have allowed 79 hours of Grade C time, not least because it seems to me that the underlying premise that this is likely to be a ten-day trial is not justified, at least at the present time.

21. It follows that if I were in a position to undertake costs budgeting, de novo, in relation to three of the four grounds of appeal, I would have allowed more solicitor time than the District Judge. But it is not the role of the appellate court to tinker with costs budgets. At the risk of repetition, the role of the appellate court, in these circumstances, is to decide whether the budget as revised by the District Judge was reasonable and proportionate. Only if I conclude that the revised budget was outwith what can be described as reasonable and proportionate and that, therefore, the District Judge had exceeded his wide ambit of discretion can I interfere with the overall budget.

22. Accordingly, and although I have some sympathy with some of the matters raised on behalf of the appellant's solicitors, I remind myself that, nevertheless, this is a costs budget which approaches half a million pounds. That is, on any view, a very substantial sum. I also need to take into account the respondents' costs budget: this may have been pared down to a minimum but it is signed off as *reasonable and*

A

proportionate. In determining whether the District Judge was wrong in the exercise of his discretion, it must be relevant to note that, nevertheless, he allowed a budget for the appellant which was nearly three times the amount sought on behalf of the respondents.

B

23. At all events, I have come very firmly to the conclusion that the overall budget as revised by the District Judge was well within the range of his discretion and that the budget itself is both reasonable and proportionate. The fact that I might have been a little more generous does not mean that the decision of the District Judge fell outside his wide ambit of discretion, far less that it was wrong.

C

D

24. This appeal is therefore dismissed.

E

25. I trust that Counsel will be able to agree an Order in relation to the costs of this Appeal.

F

G

H