IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 2 November 2015

Before :

MASTER O'HARE

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Between :

Mrs Mavis Ann Hobbs	**Claimant**
- and -	
Guy's and St Thomas' NHS Foundation Trust	**Defendant**

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- -

Mr Harrington (instructed by **Simpson Millar LLP**) for the **Claimant**
Mr Regnauld (instructed by **Acumension Ltd**) for the **Defendant**

Hearing dates: 9 October 2015 and 2 November 2015

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Judgment

MASTER O'HARE :

1 The bill in this case relates to a clinical negligence claim which ended pre-issue on the acceptance of the Defendant's offer to settle the claim by paying £3500 plus costs. The bill claimed £32,329.12 and proceeded by way of provisional assessment at which I reduced it on grounds of reasonableness by about two thirds. Most of that reduction related to the hourly rate claimed and the costs of a conference with counsel. I then made a further reduction on grounds of proportionality. The total allowed provisionally was £9879.34 including VAT plus the costs of provisional assessment (£1694.70 including VAT).

2 The Claimant's solicitors requested a post-provisional hearing of five hours which was held on 9 October 2015. In fact slightly more than five hours was spent at that hearing during which I re-assessed the bill on grounds of reasonableness but only heard argument as to what if any further adjustment was appropriate on grounds of proportionality.

3 Thus the primary purpose of this reserved judgment is to state and explain my decision as to proportionality. However, I shall first set out the basic facts of this case, then summarise the rulings I made as to hourly rates, and the conference I disallowed and then state and explain my decision as to proportionality.

Background facts of the claim

4 The claim related to injuries and losses suffered by the Claimant's husband, Mr Leslie Hobbs, now deceased. In February 2011 he had had a lump surgically removed from his forehead. On discovering another lump, near the ear, he returned to his General Practitioner on 22 March 2011. On that day his General Practitioner sought to make an urgent appointment for him at the Defendant hospital. However the appointment which Mr Hobbs was given (4 April 2011) was for a breast clinic and this mistake was not corrected by the Defendant, despite the Claimant's family's best efforts to do so.

5 Mr Hobbs attended as directed on 4 April 2011 and saw another specialist on 6 April 2011. After more pushing from the family, a follow up appointment was made for him which he attended on 20 April 2011. This led to a further appointment for tests, the earliest date for which was 4 May 2011. On receipt of the results of those tests further arrangements were made leading to radical surgery on 6 June 2011.

6 That operation took about ten hours to perform after which Mr Hobbs (then aged over 80) suffered confusion and delirium and spent a long time in hospital recovering. He was discharged from hospital on 13 July 2011.

7 Mr Hobbs and his family first contacted their solicitors in the Summer of 2011 but no retainer was made until 25 January 2012, some weeks after receipt of the Defendant's letter of response to the formal complaint which the family had made. Legal aid was applied for and was obtained on 13 March 2012. In April 2012 the solicitors wrote to the Defendant notifying them of the grant of legal aid and seeking medical records.

8 By mid January of the next year, 2013, the solicitors had received a report from Mr P.H. Henderson, Consultant Plastic Surgeon. He was in no doubt that the treatment Mr Hobbs had received was sub-standard, the operation having been delayed by about a month [Report, para 6.1]. He suggested that the lump may have increased in size by 50% to 100% over that period [Report, para 6.3] but subsequently suggested that the opinion of a Consultant Oncologist should be taken on this point [Letter dated 5 February 2013, final paragraph]. In his opinion the operation might have been shorter by one hour had the operation been performed earlier but he could not say whether the longer operation had worsened the post-operative confusion and delirium [Report, para 8.5]. He felt that this was a question for an Anaesthetist or Geriatrician or possibly a Neurosurgeon [Report, para 8.5].

9 On 9 June 2013, the solicitors received a report from Dr David Spooner, Consultant in Radiotherapy and Oncology. He felt that the relevant period of delay by the Defendant was five weeks [Report, paras 4.1 and 4.2] and agreed with Mr Henderson's view that the total volume of the lump is likely to have increased by at least 50% during the period of delay [Report, para 4.5].

10 Correspondence with Mr Hobbs' family at that time suggests that they felt some disappointment that the period of delay in the operation had not been found to be longer. The solicitors next made arrangements for a telephone conference with Mr Nicolas Yell of counsel attended by Mr Hobbs' son in law and by both experts.

11 The telephone conference took place on 17 October 2013. In a witness statement prepared for the hearing before me the solicitor, Mr Stefanovic, attributes to this conference the acceptance by Mr Henderson that the period of delay in the operation

was five weeks not the one month he had suggested in his Report. Performing the operation earlier would have lessened the amount of disfiguration to Mr Hobbs head but that extra work (bone drilling) had not increased the duration of the operation by more than the hour or so he had previously suggested [Witness Statement, para 10].

12 Starting in November 2013 the solicitors sought the help of Dr D.M. Levy, Consultant Anaesthetist who was willing to provide advice pro bono. On 23 January 2014 the letter of claim was sent to the Defendant. This provoked some further correspondence before receipt of the Defendant's letter of response in May 2014 which admitted a two to three week delay but denied any longer delay and denied that the delay had increased the duration of the operation or the need for bone-drilling.

13 Mr Hobbs died on 29 April 2014, a few days before receipt of the Defendant's letter of response. There is no suggestion that his death had been accelerated by any wrongful act of the Defendant. The conduct of his claim now passed to his widow, the Claimant in these proceedings. Legal aid not being available to her, she entered into a conditional fee agreement with the solicitors. The date of entry into that CFA is such that the Claimant is not entitled to recover from the Defendant any success fee which may be payable to the solicitors.

14 On 13 May 2014 the Defendant made a Part 36 offer of £1500. The Claimant's solicitors advised her that this offer was too low, that she should make a counter-offer of £10,000 but should consider carefully any further offer from the Defendant of £5000 or more. Later in May 2014, the Claimant served a Part 36 offer of £10,000. The Defendant served a revised offer of £3000 on 3 September 2014 and the case finally settled on 24 September on a payment of £3500 plus costs.

Solicitor's Hourly rates

15 Almost all of the profit costs claimed in this bill relate to work done by Mr Stefanovic, a senior solicitor with many years experience of clinical negligence work. The bill correctly describes him as a Grade A fee earner whose office is located in the City of London. The bill claimed £300 per hour in respect of him. In the provisional assessment I selected as a starting point the Outer London rate for a mid range Grade B fee earner and did not allow any enhancement on that rate (£200 ph) except some inflation enhancement for work done after April 2014 (£210 ph).

16 At the hearing Mr Harrington argued for a restoration of the £300 rate on grounds of importance of the case (including public importance given that it was a claim against a public body) and on grounds of complexity. Although Mr Stefanovic's office is based in the City of London, £300 is significantly below the guideline for that area (£409) and is also below the guideline for Central London (£317). He submitted that, although the claim was not of high value, a middle range Grade B fee earner would not have had sufficient experience to conduct it. He drew attention to the fact that, for a fee earner to be accredited by the Law Society in clinical negligence work, 8 years' post-qualification experience must be proved together with actual experience of conducting a cerebral palsy claim. In the alternative he argued that, if the Outer London guideline was adopted, the starting point should be made at the top of that guideline (£267) from which an enhancement of only 12.5% was needed to bring the rate to £300. In his submission this case could not have been adequately conducted by a fee earner at Grade

B save one who had substantial medical expertise prior to qualification as a solicitor. Such a fee earner he argued would easily merit an allowance at or near £300.

17 I did not increase the hourly rates I had allowed provisionally. Grade A rates are appropriate only for Grade A fee earners doing Grade A work. I do not accept that this case merited a Grade A fee earner at any stage. To my mind the claim had no complexity worthy of mention and no public importance. In my judgment Mr Harrington's submissions greatly over-estimated the complexity and importance of this case and substantially under-estimated the abilities of an average middle range Grade B fee earner. A fee earner at Grade B or below would have been entitled to defer to advice received from a more senior practitioner (whether solicitor or counsel) had any points of sufficient complexity arisen in this case. In my judgement the conduct of this case was not of such weight or responsibility which would make comparable the hourly rate applicable for a Grade B fee earner in Central London.

Conference in October 2013

18 In my provisional assessment I had disallowed, as between the parties, all profit costs and disbursements relating to the conference and stated that:

> "On basis of experts' reports received, a conference is NOT a reasonable step for a Grade B fee earner to take".

19 That ruling would not justify a disallowance in respect of counsel's work of course and therefore I allowed a fee for counsel as against the legal aid fund. However, the solicitors have decided not to make any claim for costs payable legal aid only.

20 At the hearing I was referred to the witness statement I have already summarised and to a Note from Counsel dated 16 September 2015. Nevertheless I remain of the view that this conference was, at best, premature. It achieved no advantage in the conduct of the claim that had not already been achieved from perusal of the two expert reports obtained. Counsel shares a view which was also expressed by Mr Stefanovic that (in counsel's words)

> "… it was necessary to pin the Surgeon down on the duration of that negligent delay …"

21 I do not accept that. The divergence of view between the experts on this topic was not more than one week and the conference provided no additional insight on the question whether the extra delay had had any deleterious effect on Mr Hobbs other than an increase in pain and discomfort for an extra week. To my mind counsel is not correct when he says

> "The conference saved costs being incurred at a later stage of the proceedings by identifying the issues and our case on them."

22 These issues had already been identified in the experts' reports. I also respectfully reject, as an over-statement, counsel's assertion that

> Had the advice [given at the conference] been negative, the claim would not have been pursued."

23 It was an indisputable fact that Mr Hobbs' treatment had been delayed for a few weeks by the mistake the hospital made which sent him to a breast clinic rather than a head and neck clinic.

24 At the hearing Mr Harrington also argued that, if the work of the conference was disallowed, some notional fees should be added back to replace the advantage the conference had provided, including the instruction of an Anaesthetist, Dr D.M. Levy). However, this possible line of development had already been suggested by Mr Henderson in his report (noted above).

Proportionality

25 Two tests of proportionality apply in this case. In respect of work done before April 2013 (Parts 1 and 2 of the bill) the test known as the *Lownds* test applies. However, no questions arise as to proportionality in these parts of the bill. In respect of work done on or after 1 April 2013 (Parts 3 and 4 of the bill) the test which has come to be known as the *Jackson* test applies. Rule 44.3(5) states:

> "Costs incurred are proportionate if they bear a reasonable relationship to—
> (a) the sums in issue in the proceedings;
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> (b) the value of any non-monetary relief in issue in the proceedings;
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> (c) the complexity of the litigation;
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> (d) any additional work generated by the conduct of the paying party; and
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> (e) any wider factors involved in the proceedings, such as reputation or public importance."

26 Rule 44.3(2) states:

> "Where the amount of costs is to be assessed on the standard basis … Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred …"

27 As yet there is little by way of authoritative guidance as to how this new test is to be applied. The CPR quoted above implement one of the recommendations made by Sir Rupert Jackson in his Review of Civil Litigation Costs: Final Report (December 2009).

> "… in an assessment of costs on the standard basis, proportionality should prevail over reasonableness and the proportionality test should be applied on a global basis. The court should first make an assessment of reasonable costs, having regard to the individual items in the bill, the time reasonably spent on those items and the other factors listed in [what is now CPR 44.4(3)] and consider whether the total figure is proportionate. If the total figure is not proportionate, the court should make an appropriate reduction. There is already precedent for this approach in relation to the

assessment of legal aid costs in criminal proceedings: see *R v Supreme Court Taxing Office ex p John Singh and Co* [1997] 1 Costs LR 49." (Final Report, para.37).

28 *R v Supreme Court Taxing Office ex p John Singh and Co* concerned the assessment of costs in criminal cases and gave rise to what is known there as the "*Singh* adjustment". This obliges the court to carry out "what might be called the audit exercise in relation to the individual items on the bill" (see judgment of Latham J., approved by Henry L.J. at p.56). Thereafter, there must be

> "a sensible assessment of the consequence of aggregation in the light of the overall complexities of the case and, above all, the experience of the Determining Officer and Taxing Master".

29 Further persuasive guidance has been given by Lord Neuberger in a lecture delivered on May 29, 2012.

> "… the obvious way of introducing proportionality is that … adopted in the [Final Report], namely by effectively reversing the approach taken in Lownds. In this way, as Sir Rupert said, disproportionate costs, whether necessarily incurred or reasonably incurred, should not be recoverable from the paying party. To put the point quite simply: necessity does not render costs proportionate. Reference to necessity can be said to be positively misleading as it suggests necessary to achieve justice on the merits: substantive justice. A fundamental tenet of both Woolf and Jackson, accepts that that aim must be tempered by the need for economy and efficiency, and, above all proportionality. On one view, once one has a proportionality requirement, necessity may add nothing; on another view, any test which incorporates necessity is one which will all too easily see necessity trump proportionality. However, it may well be that it is right to retain necessity as a requirement, provided that it is borne firmly in mind that it is one of two hurdles which have to be cleared."(Lord Neuberger MR)

30 In *Kazakhstan Kagazy PLC v Zhunus* [2015] EWHC 404 (Comm) Leggatt J gave guidance on the approach to proportionality which should be taken in hard fought litigation, with neither side showing any sense of moderation, where the sums in issue exceeded many millions of pounds.

> "[13] In a case such as this where very large amounts of money are at stake, it may be entirely reasonable from the point of view of a party incurring costs to spare no expense that might possibly help to influence the result of the proceedings. It does not follow, however, that such expense should be regarded as reasonably or proportionately incurred or reasonable and proportionate in amount when it comes to determining what costs are recoverable from the other party. What is reasonable and proportionate in that context must be judged objectively. The touchstone is not the amount of costs which it was in a party's best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances. Expenditure over and above this level should be for a party's own account and not recoverable from the other party. This approach is first of all fair. It is fair to distinguish between, on the one hand, costs which are reasonably attributable to the other party's conduct in bringing or contesting the proceeding or otherwise causing costs to be incurred and, on the other hand, costs which are attributable to a party's own choice about how best to advance its interests. There are also good

policy reasons for drawing this distinction, which include discouraging waste and seeking to deter the escalation of costs for the overall benefit for litigants."

31 In this case I provisionally assessed that it was reasonable for the Claimant to incur costs exceeding £11,000 plus VAT in order to obtain medical records and appropriate expert evidence, send a letter of claim and settle this claim pre-issue. In my view it is right to take into account Parts 1 and 2 in this calculation even though, if the total is disproportionate, it would be wrong to disallow any costs in Parts 1 and 2 on the basis of the Jackson test of proportionality.

32 I next considered whether the sum allowed as reasonable was also proportionate. The answer would be yes if I were to apply the test propounded by Leggatt J: I had already assessed what was the lowest amount which the Claimant could reasonably have been expected to spend in order to have this case conducted and presented proficiently, having regard to all the relevant circumstances. However, I do not think that test applies in cases such as this where the amount of reasonable costs will inevitably exceed the value of the claim. *Kazakhstan Kagazy PLC* was a case where the sums in issue bore no relation to the costs however high they were. However the amount of the sums in issue is one of the factors I have to take into account here and, indeed, it is the first factor listed in CPR 44.3. I provisionally ruled that the sum I had allowed as reasonable was not proportionate. In doing so I had regard to the factors listed in CPR 44.3(5) (especially (a) and (c)).

33 When considering what reduction to make on grounds of proportionality I decided against chopping off a slice of all of the costs I had just found to be reasonable. In my view it is better to target particular items of work which it was disproportionate to do in the particular circumstances of the case in hand. In the result I disallowed the costs of three items which now appear, with hindsight, to be inconsistent with the true value of the claim.

Costs incurred in respect of Dr D.M. Levy, Consultant Anaesthetist which I notionally valued at £600 plus VAT.

Costs incurred in respect of the Part 36 offer to settle for £10,000 which I notionally valued at £200 plus VAT.

On other profit costs in the relevant period, the difference between the Grade B rate I had allowed and £165, the appropriate rate for a Grade C fee earner: I notionally valued this discount at £400 plus VAT.

34 In my judgment, although it was reasonable for the Claimant's solicitors to incur these costs it is unfair to expect the Defendant to pay for these items (*cf* the view taken by two of the Lords Justices in *Medway Primary Care Trust v Marcus* [2011] P.I.Q.R. Q4, a case in which the claimant reasonably sought damages exceeding £500,000, necessarily incurred at least £50,000 pre-issue but ultimately won only £2000). The rule against the use of hindsight in costs assessment (*Francis v Francis and Dickerson* [1955] 3 All ER 836) is a rule based upon reasonableness, which, today, is trumped by proportionality (see r.44.3(2), quoted above).

35 The adjustment I made on grounds of proportionality reduced the total costs provisionally allowed to a figure below £10,000 (including VAT but excluding the costs of the provisional assessment). Whilst such an expenditure is high in respect of a claim of that value which settles pre-issue, I did not think it disproportionate in all the circumstances. I did not think it right to disallow the expenditure on medical records or expert reports. Even in modest value clinical negligence claims it is necessary to incur costs on these items. I did not allow these items of costs on grounds of necessity since that is trumped by proportionality. I allowed them having regard to the fact that clinical negligence claims have more complexity and involve more work than do other claims of similar value.

36 In the post-provisional assessment, the costs I allowed as reasonable rose by about £800 plus VAT. However this did not cause Mr Regnauld (the advocate for the paying party) to challenge as too small the reduction I had previously made on grounds of proportionality. The only argument I must now rule upon is whether or not the reasonable costs I have allowed are disproportionate.

37 I did not accept the written submissions filed on behalf of the Claimant which argued that some costs (including probate costs and photocopying) should be excluded from the proportionality test nor that other costs should be excluded on the basis of their absolute necessity.

38 As to the oral submissions made by Mr Harrington, I did not accept his submissions that this case had public importance which I should take into account under factor (b). I accept that I should have regard to this case as a clinical negligence claim and indeed I did so. I do not accept his submission under factor (d) that the work that was done was additional work generated by the conduct of the Defendant. It is true that the claim would have been avoided if the Defendant had accepted liability and volunteered compensation either in 2011, in response to the complaint then made, or in 2012, in response to the letter from the solicitors which mentioned legal aid and sought medical records. However, the ordinary steps taken by the Defendant in these years do not, in my judgment, amount to conduct which put the solicitors to "additional" work in this case.

39 Mr Harrington's final submissions were that I should not take into account VAT or the costs of drawing and checking the bill. At the provisional assessment I did not take VAT into account but did take into account the costs of drawing and checking the bill. I accept Mr Harrington's submissions on these points. I should calculate the figure of reasonable costs without taking into account VAT or the costs of drawing and checking the bill. This is how proportionality is dealt with in the many cases now subject to costs management under CPR 3.12.

40 Suitably adjusted the reasonable costs provisionally allowed by me would have been lower by about £1100 excluding VAT. Of the £800 added at the post-provisional hearing, £200 relates to the costs of drawing the bill. Deducting £1100 but adding back £600 makes the post-provisional figure of reasonable costs lower than the provisional figure by about £500 excluding VAT.

41 In the result I am not persuaded that my provisional assessment that these costs are disproportionate would have been different if I had omitted the costs of drawing and

checking the bill. More importantly, now the post-provisional figures are known, I remain of the view that the reasonable costs allowed in this case are disproportionate and should be reduced by £1200 plus VAT as described above.

42 A draft of this judgment having been sent to both sides in advance, neither side attended the hearing today. I will hear argument if necessary as to the costs of this detailed assessment on 9 November 2015 at 11.00 a.m. I direct that the time limited for appealing from this decision does not begin until today. If any written requests for permission to appeal have been made I will deal with them by letter.