Neutral Citation Number: [2016] EWHC B32 (Costs)

Case No: JR 1505789

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 30/11/2016

Before:

MASTER ROWLEY

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Between:

Catherine King	**Claimant**
- and -	
Basildon & Thurrock University Hospitals NHS Foundation Trust	**Defendant**

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- -

Oliver Jones of **Just Costs** for the **Claimant**
Michael Brown of **Acumension** for the **Defendant**

Hearing dates: **30 and 31 August 2016**

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Judgment Approved

Master Rowley:

Introduction

1. On 31 August 2016 I concluded the assessment of the claimant's bill of costs. Having calculated the relevant amounts, the parties were agreed that of the £326,404.57 claimed, I had allowed £249,889.83 as being reasonably incurred and reasonable in amount.

2. The parties then addressed me on whether or not the reasonable amount was also proportionate given the factors set out in CPR 44.3(5). Having heard both parties' submissions, I concluded that the sum was indeed also proportionate and informed the parties of my decision. Other than expressing the general view that I did not think that I should follow the decision of Master Gordon-Saker in BNM v MGN Ltd [2016] EWHC B13 (Costs) in this case, I did not give reasons for my decision to the parties but indicated that they would follow in writing. This judgment sets out those reasons.

Submissions

3. The claimant's bill of costs arises out of a clinical negligence claim which went to a three-day trial before Mr Justice Jay in May 2015. Jay J found that the injuries sustained by the claimant were caused by the negligence of the surgeon and judgment in the sum of £35,000 together with costs was entered in the claimant's favour.

4. The claimant's bill was drawn in 5 parts. Mr Brown for the defendant said that the first 2 parts – which related to costs incurred prior to 1 April 2013 – should be ignored for the purposes of the proportionality test under 44.3(5). In any event, they only amounted to £13,401.20 of the £326,404.57 originally claimed. Parts 3 to 5 of the bill, as assessed, amounted to £213,495.17 plus VAT and that was the figure on which Mr Brown concentrated.

5. He referred to the new test of proportionality as being a sea change from the Lownds test promulgated by the Court of Appeal in Lownds v Home Office [2002] EWCA Civ 365. Whilst the costs should still be looked at on a global basis (albeit now at the end rather than the beginning), they should now include the additional liabilities i.e. the success fee and After The Event premium, rather than, to all intents and purposes, excluding them as had previously been the case. Mr Brown's submissions very much relied upon paragraphs 25 to 32 of Master Gordon-Saker's decision in BNM which are as follows:

> 25. CPR 48.1(1), in force after 1st April 2013, provides:
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> > The provisions of CPR Parts 43 to 48 relating to funding arrangements, and the attendant provisions of the Costs Practice Direction, will apply in relation to a pre-commencement funding arrangement as they were in force immediately before 1 April 2013, with such modifications (if any) as may be made by a practice direction on or after that date.
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> 26. CPR 43.2(1)(a), as it was in force before 1st April 2013, defined "costs" as including "any additional liability incurred under a funding arrangement". CPR 44.1, in force after 1st April 2013, defines "costs" with no reference to additional liabilities.
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> 27. A number of rules relating to funding arrangements in the CPR in force prior to 1st April 2013 are identified in paragraph 1.4 of Practice Direction 48, in force after 1st April 2013. They include CPR 43.2(1)(a) but do not include CPR 44.4(2) – the old test of proportionality.
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> 28. It seems to me that the intention was that the rules as to the recoverability of additional liabilities would be preserved in relation to those additional liabilities which remain recoverable after 1st April 2013. However the old test of proportionality was not preserved in relation to those additional liabilities. Had that been intended it could have been achieved quite easily by a further exception in CPR 44.3(7).
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> 29. CPR 44.4(2), the test of proportionality in force before 1st April 2013, was not a provision "in relation to funding arrangements". CPR 43.2(1)(k), in force before 1st April 2013, defined funding arrangements as conditional fee agreements, after the event insurance premiums and arrangements with membership organisations for the purposes of s.30 Access to

> Justice Act 1999. CPR 44.4(2) does not therefore survive beyond 1st April 2013 by virtue of CPR 48.1(1), as in force after that date. It survives only in the circumstances set out in CPR 44.3(7).
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> 30. The old test of proportionality applied to additional liabilities but rarely had an impact on assessment. If the base costs were reasonable and necessary the reasonable success fee would also be necessary. An after the event insurance premium, if reasonable, would rarely not be necessary; although greater enthusiasm developed for disallowing disproportionate or unreasonable premiums: Redwing Construction Ltd v Wishart [2011] EWHC 19 (TCC) (Akenhead J); Kelly v Black Horse Limited [2013] EWHC B17 (Costs) (Master Hurst); and my decision in Banks v London Borough of Hillingdon (unrep., 3rd November 2014).
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> 31. A consequence of the reduction of the base costs to a proportionate figure will be that the success fee, a percentage of those base costs, also reduces. It would be absurd and unworkable to apply the new test of proportionality to the base costs, but the old test of proportionality to the success fee.
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> 32. Ring fencing and excluding additional liabilities from the new test of proportionality would be a significant hindrance on the court's ability to comply with its obligation under CPR 44.3(2)(a) to allow only those costs which are proportionate.

6. In BNM, the claimant brought privacy proceedings against Mirror Group Newspapers Ltd for what is colloquially known as "phone hacking." The claimant instructed solicitors in March 2013 i.e. prior to the change in costs regime, but did not enter into a CFA or an ATE policy until after the change (18 April 2013 and 25 July 2013 respectively). Nevertheless, such proceedings can continue to be brought by claimants and their solicitors using CFAs with recoverable success fees because an exception for such cases was carved out of the general ending of recoverability caused by the enactment of the Legal Aid Sentencing and Punishment of Offenders Act 2012.

7. Following BNM, Mr Brown used the figure of £234,251.08 (i.e. the total of the reasonable costs including VAT) when comparing the costs claimed here with the sum in issue. This is the first of the 5 factors described by rule 44.3(5) which says:

> (5) Costs incurred are proportionate if they bear a reasonable relationship to –
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> (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;

> (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.

8. Mr Brown was clear in his view that costs of six times more than the damages could not be proportionate. If the case was worth more than the £35,000 awarded, it could not be any more than £50,000 and which would mean that the costs were still more than four times the potential damages. That could not be a reasonable relationship between costs and damages.

9. Mr Brown submitted that there was no monetary relief claimed. He accepted that the case went to trial with 2 experts on each side and that the case fought on breach of duty. As such he accepted that there was a degree of complexity on the issue of breach of duty but he did not think so in relation to quantum. In any event it was not an overly complex case: it was just a defended one.

10. In respect of conduct, whilst the case got into a third day rather than the two days expected, the budgets were amended to reflect that fact. Nevertheless, Mr Brown quite properly accepted that it was an extra cost of this case. Mr Brown concluded that there was no issue of reputation to the claimant or any issues of wider public importance. Consequently, the reasonable amount of costs claimed could not be said to be proportionate.

11. Mr Brown also referred to the case of May v Wavell Group [2016] EWHC B16 (Costs) where the claim settled for £25,000 in damages and was limited to £35,000 plus VAT for costs on the ground of proportionality. In this case proceedings had reached trial (unlike May) and consequently the defendant said the proportionate figure would be £70,000 i.e. twice the value of the claim plus the sums allowed for Parts 1 and 2 which made a total of £82,323.60.

12. Mr Jones, for the claimant, said there were four reasons to distinguish the case of BNM from the case before me. Two of those reasons related to the status of BNM and as such in my view were not reasons to distinguish it as such but merely, on Mr Jones' argument, ones which suggest that I should not be bound by it. Those reasons were that another costs judge's decision can only be persuasive and not binding and in any event the case of BNM is under appeal.

13. Mr Jones also pointed to the fact that in this case a Costs Management Order had been made which was not the case in BNM. Here the base costs for solicitors and counsel together with the disbursements and VAT amounted to £88,337.58. That compared favourably, in Mr Jones' submission, with the budget of £91,901.69 allowed by Master Cook when making the CMO.

14. The fourth reason for distinguishing the BNM case was that the additional liabilities here were incurred before 1 April 2013. Consequently, they were taken out when the old test of proportionality was in place and it was the claimant's legitimate expectation that, should the costs subsequently be assessed, that regime would apply in respect of the costs, whenever they were incurred.

15. As far as the 5 factors in 44.3(5) are concerned, Mr Jones accepted that the sum in issue was at most £50,000 and said that the only non-monetary relief was the vindication of the ultimate result. He did not accept Mr Brown's categorisation of the complexity of the case or the additional work caused as a result of the defendant's conduct. In Mr Jones's submission, this was not just a defended claim. The treating surgeon had been subjected to judicial criticism by Jay J following the giving of his evidence in court. According to the attendance note of the claimant's solicitors, the judge had described the consultant's evidence as "a disgrace." An extra witness statement had been served by the treating consultant in an attempt, according to Mr Jones, to influence the discussions of the experts retained by the parties. The case went into a third day as a result of the treating consultant's attempts to protect his reputation. As such the case was not defended on an economic basis. Nevertheless, the claimant's ability to keep within the budget set by Master Cook was a weighty consideration in favour of proportionality.

16. As far as the case of May was concerned, Mr Jones was of the view that it was difficult to import its rationale into this case. In May there had only been two phases reached before settlement had occurred. Here all 11 phases had been reached. There was also complexity and work created by the paying party's conduct here which were not factors in May. As such, Mr Jones argued that the costs already allowed were both reasonable and proportionate.

17. In response, Mr Brown pointed out that the sums budgeted for a pre-trial review and alternative dispute resolution had not been used and so the comparison with the sums allowed by Master Cook was not an appropriate one.

Decision

18. In my view, the base costs figure of £88,337.58 is almost always going to be proportionate for a clinical negligence case which reaches a three-day trial. It would only be the case that a very modest amount of damages might render such a level of costs to be disproportionate and I do not accept that £35,000 is a very modest amount of damages. Therefore, having decided that I should only consider the base costs figure when considering proportionality, it seemed clear to me that the costs obviously bore a reasonable relationship to the damages. That view was only strengthened by the complexity involved in fighting a breach of duty defence, particularly in circumstances where the treating surgeon was clearly concerned about protecting his reputation and additional costs were incurred as a result.

19. The only issue as far as I was concerned in relation to proportionality was whether or not I should use the base costs figure of £88,337.58 or the total figure of £234,251.08 (both figures being inclusive of VAT for simple comparison.) I am not at all convinced that I would have allowed the latter figure as being proportionate if I had come to a different conclusion regarding the relevance of the additional liabilities.

20. In my view, the reforms arising from the reports of Sir Rupert Jackson, enshrined in LASPO 2012 and the recasting of the CPR as of 1 April 2013, sought to produce a completely new regime from that date. No longer would success fees and ATE premiums be recoverable from the opponent save for very limited cases such as in BNM itself. Costs incurred by the parties would be subject to the more stringent proportionality test and, elsewhere in the rules, cases would be subject to prospective

costs control through budgeting. Part 48 sought to preserve, as if in aspic, the pre-April 2013 regime for cases which had begun before that date until such cases concluded.

21. According to CPR 44.3(7) the new proportionality test does not apply in relation to cases commenced before 1 April 2013 and it is easy to see that the old rules are applied in such cases as if there had been no change of costs regime. But the proportionality test in 44.3(5) is also excluded from costs incurred in respect of work done before 1 April 2013 where proceedings were commenced thereafter. In such cases, the court is still to allow additional liabilities in respect of the pre 1 April 2013 work and the question of the proportionality of them will be governed by the old rules. In the present case that would be Parts 1 and 2 of the bill. It would be a bizarre outcome in a case such as this, if success fees were to be allowed on two parts of the bill and potentially not at all on the remaining three parts of the bill even though in principle they are recoverable throughout. But, as Mann J clearly demonstrates in Various Claimants v MGN [2016] EWHC 1894 (Ch) at paragraphs 19 and 20, that is the likely effect of otherwise recoverable additional liabilities being included within the sum allowed as being proportionate for base costs.

22. As Master Gordon-Saker points out at paragraph 26 of his judgment, the definition of "costs" in the CPR prior to 1 April 2013 included additional liabilities, but the current definition of "costs" makes no such reference to additional liabilities.

23. The key phrase in the new proportionality test in 44.3(5) states that *"costs incurred are proportionate if they bear a reasonable relationship to…"*. The word "costs" as now defined refers to profit costs and disbursements but does not include additional liabilities. Given that the proportionality test in 44.3(5) only applies to work carried out since that definition of costs has come into being, the obvious interpretation is that it only relates to the base costs of a CFA. It is not clear to me why additional liabilities should necessarily be caught by a test which is based on a definition recast specifically to exclude such liabilities.

24. In my view, treating the word "costs" as only referring to base costs fits in with the provisions of Part 3 in relation to costs budgeting which were also brought into the CPR in April 2013. For example, in rule 3.15 the court *"may manage costs to be incurred by any party in any proceedings"* and in doing so will make a costs management order. Such an order will record the extent to which budgets are agreed between the parties and, to the extent they are not agreed, will record the court's approval after making appropriate revisions. *"The court will thereafter control the parties' budgets in respect of recoverable costs."* Precedent H, which sets out the costs to be managed, expressly excludes any additional liabilities that may still be recoverable between the parties. Consequently, the only interpretation of the recoverable costs which the costs management order is controlling, is that they are the base costs of a CFA as set out in the Precedent H. The court is required to set a budget which is specifically described as allowing reasonable and proportionate costs notwithstanding that it excludes additional liabilities.

25. In my judgment, being consistent with the costs management arrangements and avoiding bizarre outcomes in bills which involve both proportionality tests, point towards the rules being interpreted as continuing to require the court to assess the base costs and additional liabilities separately.

26. Furthermore, the purpose of the Jackson reforms in initiating a sea change could have resulted in Parliament disallowing the recoverability of success fees and ATE premiums from 1 April 2013. But it did not do so and has allowed for the run-off of recoverable success fees and premiums in the main and the continued recoverability of success fees or premiums in particular instances. It seems to me that the fact that additional liabilities are still allowed for by the provisions of CPR rule 48.1 simply means that they remain in existence. It does not mean that they have to be assessed in the aggregate with the base fees using a test which has no recognition of additional liabilities. This is particularly so when aggregation will render those additional liabilities effectively irrecoverable in practice.

27. My reading of paragraph 1.4 of the Practice Direction to Part 48 is that the provisions relating to funding arrangements merely "include" the 5 lettered subparagraphs and it is not intended to be an exhaustive list. It would undoubtedly have caused confusion to include 44.2(a) (the old proportionality provision) specifically within that list because it reached much wider than simply funding arrangements. I do not think the absence of 44.2(a) from paragraph 1.4 of the Practice Direction should require me to conclude that additional liabilities need to be included with base fees when applying the new proportionality test.

28. Consequently, I think the reasonable costs so far allowed can be assessed using the 44.3(5) test for proportionality on the basis that the costs to which it refers are only the base costs. The additional liabilities would then fall outside that proportionality test.

29. Success fees are simply a percentage of the base costs allowed and in my view, if the base costs have been allowed at a proportionate figure, a success fee at a percentage agreed by the parties or allowed by the court would also be proportionate. Indeed proportionality, in a general sense, is often talked about in percentage terms.

30. In respect of ATE premiums, the Court of Appeal in Rogers v Merthyr Tydfil County Borough Council [2006] EWCA Civ 1134 determined that such premiums were necessary under the old regime. I can see no reason in principle why the approach in Rogers cannot still apply to ATE policies taken out prior to April 2013 (or otherwise considered to be "pre-commencement") simply because proceedings were not commenced until after 1 April 2013. In any event, I agree with Master Gordon-Saker's comment that courts have become more willing to consider the reasonableness of the figure claimed and reduce it where appropriate.

31. I respectfully disagree with him as to whether the allowance of recoverable additional liabilities over and above the sum allowed for proportionate base costs is a significant hindrance to the court's role in allowing only reasonable and proportionate costs. In any event, it is only a transitional problem for the great majority of additional liabilities and the remaining, discrete, areas continue by dint of the express will of Parliament.

32. Accordingly, when considering whether the costs in this case were proportionate, the relevant costs to consider against the five factors in 44.3(5) were in my judgment the base costs, exclusive of success fee and ATE premium, in the sum of £88,337.58.

Next steps

33. At the hearing on 31 August, I dealt with the costs of the detailed assessment and similarly assessed the claimant's costs of the detailed assessment proceedings which I had awarded to her. Matters are therefore at an end assuming that payment of the assessed costs has been made by the defendant.

34. Consequently, there is no need for the parties to attend at the handing down of this judgment. If the defendant wishes to seek permission to appeal then I will deal with that request on paper provided that any such request is made within 14 days of the handing down. Thereafter any application for permission to appeal would need to be made to the appellate court which would be a High Court Judge, most obviously in the Queen's Bench Division.