Neutral Citation Number: [2015] EWHC 3255 (QB)

Case No: HQ13X01423

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/11/2015

Before :

MR JUSTICE GARNHAM

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Between :

Martin Rallison	**Claimant**
- and -	
North West London Hospitals NHS	**Defendant**

- -
- -

Eliot Woolf (instructed by **Stewarts Law LLP**) for the **Claimant**
Alexander Antelme QC (instructed by **Capsticks**) for the **Defendant**

Hearing dates: Tuesday 3rd November

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Judgment

Mr Justice Garnham :

Introduction

1. On the 28th October 2015 the parties to this action came to terms. It was agreed that in settlement of the action the defendant would pay the claimant the sum of £450,000 together with their reasonable costs to be subject to a detailed taxation if not agreed. The claimant indicated an intention to seek an interim payment of costs. The defendant has indicated a willingness to make such an interim payment. The parties differ, however, as to the size of that payment. The claimant claims £574,000; the defendant volunteers £250,000.

2. The matter came before me today, it being common ground that I am obliged to make some interim payment on account of costs.

3. By this action the claimant sought damages for injuries sustained as a result of negligence on the part of clinicians employed by the defendant NHS trust. The essential allegation is that on 3rd June 2010 the claimant was admitted to the defendant's hospital, Northwick Park. As was subsequently to emerge, he was suffering from a spinal abscess. An MRI scan was conducted on 4th June 2010 which was reported as being normal. Regrettably, it was not normal and proper consideration of the scan should have revealed that. As a result the proper diagnosis was delayed and the claimant was not transferred to the National Hospital for Neurology and Neurosurgery in Queen's Square as promptly as he should have been. As it was,

surgery was not carried out until 7th June 2010. At the heart of the dispute between the parties was the question, which would have been resolved at trial had the case not settled, as to precisely what difference earlier surgery would have made.

4. The claimant's pleaded case valued his claim at £3.9 million. His skeleton argument valued the claim at £3 million. Mr Woolf, who represents the claimant, volunteered to me that in settlement negotiations, the claimant had suggested that the case was worth "not less than £1.5 million". It follows that the claim was settled for a little over 11.5% of the claim as originally valued and about 30% of the minimum value advanced in settlement negotiations. As Mr Woolf put it to me, the claimant made a substantial discount for the risk of losing the claim entirely.

The Competing Arguments on Costs

5. The claimant has produced a schedule of costs to the date of trial which shows a total claim for costs of £1,126,938.53. That includes profit costs, which are subject to an uplift of 100% as a success fee, counsel's fees with their uplift, disbursements, and VAT. Mr Woolf contends that the claim for £570,000 on account of costs, which amounts to about 51% of the total, amounts to "a reasonable sum on account of costs" within CPR 42.2 (8). He makes the point that those costs include a £106,762.50 "After The Event" insurance premium ("ATE premium"). He emphasises that the amount allowed by way of interim costs does not have to constitute the irreducible minimum of costs that are likely to be recovered.

6. Mr Alexander Antelme QC, for the defendant, resists the making of an interim costs order in that sum. He says that £250,000 constitutes a proper amount to be paid at this stage. His primary submission is that the sum of costs claimed is disproportionate; his secondary submission is that a substantial proportion of the individual items of costs claimed could not be justified in any event. He asked me to take account of the fact that the total amount recovered was only £450,000. He says that, although not an entirely straight-forward claim, this was far from being the most complex of clinical negligence cases. He points to the significant discrepancy between the amounts claimed on the pleadings, the amount claimed in the skeleton and the amount which Mr Woolf volunteered was sought in negotiation. He compared all of that with the £450,000 in fact recovered.

7. Mr Antelme submits that a claim for £1.12 million of costs for the period up to the start of a trial of this sort is extraordinary and disproportionate. He submits that if the total claim appears disproportionate and there are grounds for concern about the necessity of some of the items claimed then I should limit the interim award to a figure that reflects those concerns.

Discussion

8. I remind myself, as was common ground between counsel, that the proper approach to costs incurred in respect of claims commenced before 1st April 2013 is as is set out under the former provisions of CPR 44.4 (2) of which provides:

> "*Where the amount of costs is to be assessed on the standard basis, the court will (a) only allow costs which are proportionate to the matters in issue; and (b) resolve any doubt*

> *which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party.*"

9. I remind myself also that I am not making any final determination on the amount of costs that the claimant will recover. Instead I am deciding what the appropriate figure should be to order the defendants to pay pending a formal assessment of costs, or negotiations and agreement. My task is to identify what would be a reasonable sum on account of costs in all the circumstances of this case.

10. The proper approach is set out in the commentary at page 62 of the Fourth Cumulative Supplement to the 2015 edition of the White Book, to which I was taken by counsel. The object of the rule is to enable a receiving party to recover part of his expenditure on costs before the potentially protracted process of carrying out a detailed assessment. As is noted in the commentary:

> *"Necessarily, the determination of a reasonable sum involves the court in arriving at some estimation of the costs that the receiving party is likely to be awarded by the costs judge in the detailed assessment proceedings or as a result of a compromise of those proceedings. In a case of any complexity, the evidence and submissions arguably relevant to that exercise may be extensive. The court has to guard against the risk that it may be drawn into costly and time-consuming satellite litigation. There is no rule that the amount ordered to be paid on account should be the irreducible minimum of what may be awarded on detailed assessment (Gollop v Pryke, November 29, 2011, unrep. (Warren J.)).*
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> *The relevant authorities were reviewed by Christopher Clarke L.J. in Excalibur Ventures LLC v Texas Keystone Inc [2015] EWHC 566 (Comm), February 3, 2015, unrep., where he concluded that what is a reasonable sum on account of costs will have to be an estimate dependent on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment and thus an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment. He explained (paras 23 and 24) that a reasonable sum would often be one that was an estimate of the likely level of recovery subject, as the costs claimants accept, to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad. In determining whether to order any payment and its amount, account needs to be taken of all relevant factors including the likelihood (if it can be assessed) of the claimants being awarded the costs that they seek or a lesser and if so what proportion of them; the difficulty, if any, that may be faced in recovering those costs; the likelihood of a successful appeal; the means of the parties; the imminence of*

> *any assessment; any relevant delay and whether the paying party will have any difficulty in recovery in the case of any overpayment."*

11. I adopt that guidance in the decision that follows.

12. In my judgment the general approach which Mr Antelme suggested I should adopt is correct. I should first decide whether, viewed globally, the amount claimed by way of costs appears to be disproportionate. If I decide it is then I should go on to consider, adopting a fairly broad brush approach, the necessity of the individual items claimed with a view to deciding how much would be a reasonable payment to make by way of interim payment.

13. In my view, there is an argument of real substance here that the total costs claimed is not proportionate to the complexity of the case, to the amount which it might reasonably have been anticipated would be recovered and to the amount actually recovered. This was a fairly typical clinical negligence case with significant, but not unusual, causation difficulties. The amount originally claimed, £3.9 million, and the amount pleaded, £3 million, seems, at least at first blush, to have been substantially greater than the genuine value of the claim. What Mr Woolf volunteered about the course of negotiations in the settlement meeting, namely that the claimant indicated that they valued the claim at no less than £1.5 million, is revealing in that regard. It is difficult to see how there could have been any genuine expectation of recovering £3 million or more. Even allowing for the ATE insurance and the uplift on fees, £1.1 million in costs was a very large amount for a claim that ultimately settled, before the trial had begun, for £450,000. I make it clear that in making those observations about proportionality, I am not expressing any final conclusion on the propriety of the claimed costs; I am simply exercising the jurisdiction I have on an application for an interim order of costs.

14. In those circumstances, in my view, it is necessary to consider the actual sums claimed in a little more detail. In that regard I accept the submissions of Mr Antelme that the hours allegedly devoted to the preparation of this case seem, at least at this stage, excessive. As he pointed out, and this was not challenged by Mr Woolf, the claimant's schedule of costs reveals that the senior solicitor working on this case apparently devoted 472.4 hours to preparatory work ahead of trial. Other solicitors spend 189 hours on documents and yet further solicitors spend 107 hours on correspondence. That is the equivalent of a solicitor working almost every working hour of some 23 weeks exclusively on the preparation of this case before it even got to trial. Of incidental interest is that that preparation produced a trial bundle consisting of just three lever arch files.

15. Those figures as to time spent by the solicitors preparing this case for trial are all the more remarkable given that it is evident that they relied heavily on counsel in preparing the case for trial. The costs schedule claims that 177 hours work was done by leading counsel and 199 by junior counsel, (although presumably that includes a substantial allowance in respect of their brief fees).

16. At least at this stage it is not easy to see how all these figures can be justified. In those circumstances I reject the claimant's claim for an interim award of costs in the

sum of £574,000. I regard the defendant's figure of £250,000 as much more realistic, although that requires some further consideration.

17. The suggested interim of £250,000 is intended to cover the ATE premium. It is highly likely that that premium will be recovered in full and no substantial argument was advanced by the defendant to the contrary. In my judgment the proper approach is to increase the £250,000 to £306,763 better to reflect the ATE premium.

18. In those circumstances I make an order that the defendant pays the claimant £306,763 on account of costs. I will ask counsel to draw up the appropriate order for my approval.