BILLS TO BE SPLIT WHERE WORK SPANS APRIL 2013
(+ SPLIT WHERE THERE HAVE BEEN COSTS MANAGEMENT ORDERS)

P v Cardiff and Vale University Local Health Board
Senior Courts Costs Office
17 August 2015

Following a detailed assessment of costs following a successful clinical negligence claim, the master was required to determine issues regarding the format of the claimant's bill, the proportionality of the costs claimed, and the costs of costs budgeting. The claimant had alleged that clinical negligence at the defendant health board's hospital had caused his mother injury and death. In 2012 he entered into a conditional fee agreement with a firm of solicitors which provided for a success fee of 100 per cent. He issued proceedings in June 2013 seeking total damages of £440,000. The defendant denied liability and causation. In September 2014 the court approved the claimant's costs budget. The claim was settled in January 2015, two weeks before the trial date. The defendant was to pay £205,000 damages with costs on the standard basis. Following the detailed assessment, the claimant's costs were assessed in the sum of £340,000. Of the sum allowed, the total base costs were £159,000, of which the base costs incurred after the amendment to CPR Pt 44 on 1 April 2013 were £138,000. The bill was not divided into parts to reflect work done before and after 1 April 2013, the phases of the budget, and the costs of costs budgeting.

Judgment accordingly. (1) The approach to proportionality under CPR Pt 44 had changed on 1 April 2013. The old test of proportionality applied to work done before that date. In cases where both approaches to proportionality had to be taken and the costs were to be assessed on the standard basis, it was convenient and necessary to divide the bill into parts so as to distinguish between the two periods (see paras 13-17, 26 of judgment). In applying r.3.18, the court would need to know which costs were claimed in relation to each phase of the proceedings and would need to know which costs claimed within each phase were incurred before the budget was agreed or approved, as those costs would have to be assessed, and which costs were incurred after. Because the bill had not been drawn in parts corresponding with the phases of the budget, the court had been unable to comply with r.3.18 (paras 27-33). Applying CPR PD 3E para.7.2, on detailed assessment it would be necessary to identify the costs of initially completing Precedent H and all other costs of the budgeting and costs management process. Where a costs management order had been made and the receiving party's budget had been agreed or approved, it would be necessary and convenient to divide the bill so as to identify the costs of initially completing Precedent H and the other costs of the costs management process, unless those costs could be clearly identified some other way (para.34). (2) Because the bill had not been divided appropriately, it was difficult to identify the work done before 1 April 2013. The master assumed that the total base costs claimed before that date were about £45,000. Those costs were not disproportionate. The case was complex and liability and causation had been disputed throughout. Considerable evidence had had to be obtained and significant amounts of work done. The case was of significant importance to the deceased's family and to those who had treated her (paras 18-19). The costs of £138,000 allowed for work done after 1 April 2013 were also proportionate. Considerable further work had been done and evidence obtained. The costs bore a reasonable relationship to the sums in issue and to the complexity of the litigation. The costs allowed were likely to be within the amount of the budget approved by the court (paras 22-23). (3) The caps imposed by PD 3E para.7.2 included additional liabilities but not VAT. In practice, the only relevant additional liability would be a success fee. Any success fee claimed on work done in relation to the budgeting and costs management process was part of the recoverable costs under para.7.2. VAT also fell within the expression "recoverable costs". As between the paying party and the receiving party, VAT was not a tax but a sum recoverable by the receiving party under the indemnity provided by the costs order. On that basis, the capped recoverable costs would include both success fees and VAT. However, it seemed unlikely that the intention had been not to follow the only other example where a cap was imposed, namely

r.47.15(5). The cap on the costs of provisional assessment was £1,500, including additional liabilities, but excluding VAT and any court fee (paras 35-38).

Official Transcript.

BP (suing as Administrator of the estate, and on behalf of the dependants of MP, deceased) v Cardiff & Vale University Local Health Board

Case No: AGS/1503814

High Court of Justice Senior Courts Costs Office

17 August 2015

2015 WL 4744961

Before: Master Gordon-Saker Senior Costs Judge

Date: 17th August 2015

Hearing dates: 3rd, 4th and 5th August 2015

Representation

- Mr Anthony Mahoney (of Hugh James Involegal) for the Claimant.
- Mr David Kiernan (of Acumension) for the Defendant.

Judgment

Master Gordon-Saker:

1 The Claimant is entitled to his costs of a claim for damages for clinical negligence pursuant to an order of Swift J dated 13th February 2015. On the detailed assessment of those costs issues arose as to the proportionality of the costs claimed, the format of the Claimant's bill and the costs of costs budgeting. These are the reasons for the decisions that I made on those issues.

The background

2 On 31st March 2009 the Claimant's mother, MP, underwent a quadruple heart bypass operation at the University Hospital of Wales, which is managed by the Defendant. On 12th April 2009 MP suffered a cardio-respiratory arrest and a severe hypoxic brain injury which the Claimant attributed to failings in diagnosis, care and treatment.

3 On 30th September 2009 the Claimant instructed Hugh James, a firm of solicitors in Cardiff, to act on behalf of his mother. A public funding certificate was granted to MP on 21st November 2009. Sadly on 5th December 2010 MP died as the result of the effects of an infection. The Claimant attributed her death to the consequences of the brain injury.

4 The public funding certificate was discharged. On 4th February 2012 the Claimant entered into a conditional fee agreement with Hugh James. The agreement was expressed to have retrospective effect and to cover work done from 8th December 2010. It provided for a success fee of 100 per cent unless liability and causation were agreed or the subject of a judgment, in which case the success fee would reduce to 25 per cent.

5 Proceedings were issued on 24th June 2013. The Defendant denied both liability and causation. A schedule of loss was served in October 2014 seeking total damages of a little over £440,000; of which the principal claims were for general damages for pain, suffering and loss of amenity (£150,000) and gratuitous care (£147,664). Permission was given for both parties to adduce evidence from experts in cardiac surgery, nursing and intensive care. On 29th September 2014 the court approved the Claimant's budget in the sum of £218,384.25. The incurred costs were £102,695.45 giving a total of incurred and budgeted costs of £321,079.70.

6 The case was listed for trial over 5 days in February 2015. The claim was settled at a round table meeting on 21st January 2015 on terms that the Defendant would pay damages of £205,000 together with costs on the standard basis. The settlement was approved by the court on 13th February 2015 and the damages under the Fatal Accidents Act were apportioned between four of the five children of MP. Two of MP's children are disabled.

7 The total of the Claimant's bill was £586,456.73. That included a success fee for both solicitors and counsel of 100 per cent, an after the event insurance premium and value added tax. The base costs claimed were £295,269.32. The bill was divided into parts which reflected changes in the funding arrangements and changes in the rate of value added tax. It was not divided into parts to reflect the phases of the budget, work done before and after 1st April 2013 or the costs of budgeting.
8 In the narrative to the bill the Claimant contended that:
The base fees claimed in the bill of costs are within the budget set by the court, even allowing for the fact that the matter did not proceed to trial.

9 The Defendant did not challenge that. No point was taken as to the format of the bill.
10 Over the course of a good-humoured hearing which lasted less than 2 full days, with a very short hearing on the third day to consider the proportionality of the costs allowed for work done after 1st April 2013, I decided amongst other things:

- i) That the costs claimed for work done before 1st April 2013 did not appear to be disproportionate.
- ii) That the costs allowed for work done after 1st April 2013 were not disproportionate.
- iii) That the bill should have been divided into parts to reflect the phases of the budget, work done before and after 1st April 2013 and the costs of budgeting.
- iv) That, for the purposes of the caps prescribed by paragraph 7.2 of Practice Direction 3E, the costs of budgeting included additional liabilities but did not include value added tax.

11 The result of the detailed assessment was that the Claimant's costs were assessed in the sum of £339,671.89. That was less than the Defendant had paid on account. The parties agreed that the Claimant should pay the Defendant's costs of the detailed assessment proceedings in the sum of £8,750.
12 I was told that, of the sum allowed, the total base costs were £158,567.77, of which the base costs incurred after 1st April 2013 were £138,202.97.
Proportionality
13 Before 1st April 2013 CPR 44.4(2) provided:
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.

14 Guidance as to the operation of CPR 44.4(2) was given by the Court of Appeal in Jefferson v National Freight Carriers plc [2001] EWCA Civ 2082 and Home Office v Lownds [2002] EWCA Civ 365.
15 From 1st April 2013 CPR 44.3 provides:

(2) 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. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and

b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.

...
(5) Costs incurred are proportionate if they bear a reasonable relationship to –
a) the sums in issue in the proceedings;

b) the value of any non-monetary relief in issue in the proceedings;

c) the complexity of the litigation;

d) any additional work generated by the conduct of the paying party; and

e) any wider factors involved in the proceedings, such as reputation or public importance.

16 The genesis of the new rule was chapter 3 of the final report of Lord Justice Jackson's Review of Civil Litigation Costs. Lord Neuberger gave guidance as to how the new rule was to be applied in the 15th lecture in the implementation programme on 29th May 2012:
...it seems likely that, as the courts develop the law, the approach will be as Sir Rupert described it: ' ... 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 CPR rule 44.5(3) . The court should then stand back 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 a 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 5.13)

17 CPR 44.3(2)(a) and (5) apply only to cases commenced on or after 1st April 2013 but do not apply to work done before that date: CPR 44.3(7) . The present case commenced after 1st April 2013 but work was done before that date. Accordingly the "old" test of proportionality applies to the work done before 1st April 2013 and the new test applies to work done after that date.

Work done before 1st April 2013

18 Because the bill has not been divided appropriately, it is difficult to identify the work done before 1st April 2013. Parts 1 to 5 fell wholly before that date. Part 6 covered the period from 21st February 2012 to 29th September 2014. The total base costs in Parts 1 to 5 were £25,009.06. The total costs in Part 6 were £145,651.85 excluding value added tax. It seems to me that only a fairly modest part of that would relate to base costs incurred before 1st April 2013. For present purposes I have assumed that the total base costs claimed before 1st April 2013 were about £45,000, although the true figure may well be lower.

19 It is not in issue that this was a complex clinical negligence case in which both liability and causation were disputed throughout. Preparation of the claim involved close analysis of the treatment provided to MP from a number of disciplines. In this early period the medical records were obtained, cardiothoracic and ENT experts were instructed in relation to liability and a Neurologist was instructed in relation to condition and prognosis. Following MP's death work was done in relation to new claims on behalf of the estate and on behalf of the dependants. Work was done on quantum, witness statements were drafted, a letter of claim was sent to the Defendant and counsel settled the particulars of claim, advised on quantum and settled the schedule of loss. Had MP lived, the damages claimed would have been significantly greater; but after her death the claim was still of substantial value. The case was of significant importance both to MP's family and to those who treated her. In all the circumstances I cannot say that the costs claimed for work done before 1st April 2013 appear to be disproportionate to the matters in issue.

Work done after 1st April 2013

20 On behalf of the Defendant Mr Kiernan told me that it would not be fair to include any additional liabilities when considering the proportionality of the costs allowed for work done after 1st April 2013. He relied only on the figure of £138,202.97.

21 As the point was not argued, I reach no conclusion as to whether when considering under the new rule the proportionality of costs incurred after 1st April 2013 additional liabilities should be taken into account.

22 The work done after 1st April 2013 included the issue of proceedings, costs budgeting, instructing nursing and intensive care experts on liability and causation, further work on the witness statements, directions hearings, disclosure, updating the costs budget, amending and re-amending the claim with consequential amendment and re-amendment of the Defence, a Part 18 request, considering the statements of 14 witnesses for the Defendant, conferences with counsel and the experts, considering the evidence of the Defendant's experts, arranging the experts' meetings, considering the joint statements, updating the schedule of loss, arranging and attending the round

table meeting, concluding the settlement and obtaining the court's approval. This case involved a considerable amount of lay and expert evidence (supplementary statements and reports were served by both parties). The issues on liability and causation developed significantly over the course of the case.

23 Having conducted an assessment of the reasonableness of the individual items, standing back, profit costs, counsel's fees, experts' fees and other disbursements of £138,202.97 are not, in my judgment, disproportionate. This was a complex clinical negligence case which settled less than 2 weeks before trial. The costs allowed bear a reasonable relationship to the sums in issue in the proceedings (a claim for £440,000 which settled for £205,000), even allowing for the costs incurred before 1st April 2013, and to the complexity of the litigation. This is not a case where additional work was generated by the conduct of the Defendant, nor were there any wider factors involved. Importantly, the costs allowed are likely to be within the amount of the budget approved by the court (although the court has not been able to comply with CPR 3.18 because of the way in which the bill was drawn). No further reduction in the costs allowed is necessary to achieve the court's goal of only allowing costs which are proportionate to the matters in issue.

The format of the bill — proportionality

24 Paragraph 5.8 of Practice Direction 47 provides:

Where it is necessary or convenient to do so, a bill of costs may be divided into two or more parts, each part containing sections (2), (3) and (4) above.

25 Sections (2), (3) and (4) refer to the conventional format of bill, namely background information, items of costs claimed under the headings set out at paragraph 5.12 and a summary showing the total costs claimed. Paragraph 5.8 goes on to identify six circumstances in which it will be necessary or convenient to divide a bill into parts. These include where there has been a change in legal representative or where part of the costs claimed relate to a period when the receiving party had legal aid. It is clear from the word "include" in paragraph 5.8 that the list of circumstances is not intended to be definitive. It has become standard practice for bills to be divided when there has been a change in funding arrangements from private retainer to conditional fee agreement, as indeed was done in the present case, yet this is not one of the circumstances listed under paragraph 5.8. Where the receiving party has received interim statute bills from his solicitor it is conventional for the between the parties bill to be divided into parts which accord with the solicitor and own client bills. Again this is not a circumstance listed under paragraph 5.8.

26 The approach to proportionality in respect of work done on or after 1st April 2013 is different to that in respect of work done before that date. In any case in which both approaches need to be taken it will be necessary to identify the work which falls before and after that date and to identify the sums claimed for the work done before and after that date. In my judgment where the case commenced on or after 1 April 2013, the bill covers costs for work done both before and after that date and the costs are to be assessed on the standard basis it must be both convenient and necessary for the bill to be divided into parts so as to distinguish between costs claimed for work done before 1 April 2013 and costs claimed for work done on or after 1 April 2013.

The format of the bill – budget phases

27 CPR 3.18 provides:

In any case where a costs management order has been made, when assessing costs on the standard basis, the court will –

a) have regard to the receiving party's last approved or agreed budget for each phase of the proceedings; and

b) not depart from such approved or agreed budget unless satisfied that there is good reason to do so.

28 Accordingly on a detailed assessment the court will need to know which costs are claimed in relation to each phase and will need to know which costs claimed within each phase were incurred before the budget was agreed or approved, as those costs will have to be assessed, and which costs

were incurred after. It is in respect of the latter only that the court will not depart from the figure for the phase in the approved or agreed budget (unless there is good reason to do so).

29 With effect from 1st October 2015 in any case in which a costs management order has been made a receiving party will be required to serve with the notice of commencement a breakdown of the costs claimed for each phase of the proceedings. But that breakdown will show only the *total* sums for costs incurred before and after the budget which are claimed in each phase. It will not identify the phase into which the individual items of work in the bill fall.

30 In order for the paying party and the court to know which items of work are claimed in relation to each phase the bill would need to be drawn in parts which reflect the phases. Although multi-part bills tend to obscure the overall picture, it seems to me that (unless a sensible alternative can be devised) in a case in which a budget has been approved or agreed and the costs are to be assessed on the standard basis it will be both necessary and convenient to draw the bill in parts which correspond with the phases of the budget.

31 Within each part it will also be necessary to distinguish between the costs incurred before and after the budget was agreed or approved. This could be done without further sub-division by use of italics, bold, superscript or some other formatting device.

32 The new format of bill, which is shortly to be the subject of a pilot in the Senior Courts Costs Office, should avoid these difficulties. Where a bill has already been drawn without being divided into phases, one possible course to avoid re-drawing the bill would be to serve schedules setting out the individual items of costs claimed in relation to each phase. I understand that a number of courts have directed this.

33 Because that was not done in this case the court has not been able to comply with CPR 3.18.

The format of the bill – the costs of budgeting

34 Paragraph 7.2 of Practice Direction 3E provides –

Save in exceptional circumstances-

a) the recoverable costs of initially completing Precedent H shall not exceed the higher of £1,000 or 1% of the approved or agreed budget; and

b) all other recoverable costs of the budgeting and costs management process shall not exceed 2% of the approved or agreed budget.

Accordingly on detailed assessment it will be necessary to identify (a) the costs of initially completing Precedent H and (b) all other costs of the budgeting and costs management process. Where a costs management order has been made and the receiving party's budget has been agreed by the paying party or approved by the court it will be both necessary and convenient that the bill be divided so as to identify the costs of initially completing Precedent H and the other costs of the budgeting and costs management process, unless those costs can be clearly identified in some other way. In the present case it was necessary for the parties to spend time in the hearing to identify the items of work which related to the budgeting and costs management process. Had the overall result been different the Claimant may have been expected to pay the costs of that in any event.

The costs of the budgeting and costs management process

35 In my view the caps imposed by paragraph 7.2 of Practice Direction 3E include additional liabilities but do not include value added tax. In practice the only additional liability that will be relevant is a success fee.

36 Although the present, non-exhaustive, definition of costs (CPR 44.1(1)) does not expressly include additional liabilities it seems to me that any success fee claimed on work done in relation to the budgeting and costs management process must be part of the "recoverable costs" for the purposes of paragraph 7.2. For, if it is not part of the recoverable costs, what is it?

37 It seems to me that value added tax also falls within the expression "recoverable costs". As between the receiving party and its solicitor value added tax is tax for which the solicitor must account. As between the paying party and the receiving party it is not tax but a sum recoverable by the receiving party under the indemnity provided by the costs order (i.e. costs).

38 On that basis the capped "recoverable costs" would include both success fees and value added tax. However it would seem highly unlikely that the intention of the Civil Procedure Rule Committee was not to follow the only other example where a cap is imposed: CPR 47.15(5). The cap on the costs of provisional assessment is £1,500, including additional liabilities, but excluding value added tax and any court fee.