Neutral Citation Number: [2018] EWHC B7 (Costs)

Case No: JR 1702149

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 24/04/2018

Before:

MASTER ROWLEY

- -

Between:

Abdoulie Jallow	**Claimant**
- and -	
Ministry of Defence	**Defendant**

- -
- -

Sam Hayman of **BBK LLP** for the **Claimant**
Michelle Walton (instructed by **Jessica Wilson, Costs Lawyer**) for the **Defendant**

Hearing date: 12 April 2018

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Judgment Approved

Master Rowley:

1. This is my reserved judgment on the question of whether there are any good reasons to depart from the budget set by a Costs Management Order ("CMO") in this case. For the reasons I set out below, I have concluded that there are no good reasons to depart from the claimant's budget.

2. By way of brief background, the claimant is a Gambian national and came to the United Kingdom in order to join the British Army. During a tactical exercise he sustained Non-Cold Freezing Injuries to his hands and, in particular, his feet. He left the Army as a result of these problems and instructed Bolt Burdon Kemp LLP ("BBK"), recognised as specialists in claims against the military, to bring a claim on his behalf.

3. Liability was agreed on a 75/25 basis prior to the commencement of proceedings but the parties were at loggerheads on the question of quantum and consequently the claimant commenced proceedings in February 2015. Following the filing of a defence, a Costs and Case Management Conference was listed for hearing before Master Leslie on 12 October 2015.

4. At that CCMC, Master Leslie concluded that the claimant's budget of £148,262.28 was too high and reduced it to £120,000 plus VAT and additional liabilities. That figure included the incurred costs. The estimated costs were claimed in the budget at £107,777.28 and were reduced to £78,505.50 by Master Leslie's order.

5. The terms of that order are unconventional in that Master Leslie set a single figure for the total of the budget, rather than totals for each phase, but nothing turns on that point in respect of this decision. I was provided with a note from the defendant's costs advocate at the CCMC which indicated that Master Leslie had set the budget on the basis of the claim being worth £300,000. Mr Hayman, who appeared for the claimant before me and also on the CCMC, said that in fact the quantum of the claim was put on two bases depending upon what findings of fact the judge made in the final hearing in relation to the employment of the claimant with the defendant. There were therefore two different sums claimed in the alternative in the schedule of loss. They were £185,000 or £312,000.

6. A number of Part 36 Offers were made by the parties which ranged from £50,000 to £175,000. The claimant ultimately accepted the defendant's Part 36 Offer of £90,000 on 23 December 2016 which was roughly four weeks before the assessment of damages hearing was due to take place on 25 January 2017.

7. The claimant commenced detailed assessment proceedings on 13 February 2017 and served a bill of costs seeking £188,085.02 inclusive of additional liabilities. The hourly rates contained in the bill range from £140 per hour for grade D fee earners up to £330 per hour for grade A fee earners in the latter stages of the case. At the hearing before me, I reduced some of those hourly rates in principle. The reductions were to be applied in respect of the incurred costs but would only be applied to the budgeted costs if I found that the reduction to those hourly rates should be considered a good reason to depart from the claimant's budget.

8. In addition to arguing that the reduction of hourly rates was a good reason to depart from the budget, the defendant also pointed to the sums claimed in the particulars of claim of £300,000 compared with the settlement figure of £90,000 and argued that the reduction in the damages was also a good reason to depart from the budget. If I were with the defendant in relation to the hourly rates point, the effect, according to the defendant, would be simply to reduce the hourly rates claimed in the budgeted parts of the bill for the relevant fee earners. If I were with the defendant in relation to what I would describe as the valuation issue, then in addition to reducing the hourly rates, the defendant would seek to argue that all of the other items challenged in the points of dispute in respect of budgeted costs should also be considered.

<u>The valuation issue</u>

9. Ms Walton, who appeared on behalf of the defendant, set out her argument succinctly in her skeleton argument as follows:

> "5. The Claimant's Budget was approved based on a valuation of £300,000:
>
> i. The figures as approved were only approved as they were deemed proportionate to the value given by the Claimant of £300,000;
>
> ii. The Defendant did not accept this valuation at the time, and as the claim settled for £90,000 gross it is clear that the valuation was far too optimistic;

> iii. If the true value of the Claim had been known at the time of Budgeting, the Defendant submits the approved figures would be much lower;
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> iv. To allow the approved figures would result in the costs being disproportionate, therefore under CPR 1.1 and 44.3(2) must be reduced."

10. At the hearing, Ms Walton produced an attendance note from Ms Cosgrove the defendant's costs advocate with a note of Mr Leslie's judgment which I have referred to above. Mr Hayman did not accept that it was a verbatim note, albeit that it was written largely in that fashion, or indeed that it was an accurate reflection of Master Leslie's judgment given the absence of any direct note of the arguments put before him beforehand. Nevertheless, he was content to proceed on the basis of Ms Cosgrave's note.

11. Ms Walton submitted that Master Leslie clearly thought the value of the claim for the purposes of budgeting was £300,000 based on the attendance note. This court was in a much better position, given that the case has now settled, to take a more accurate view of the value of the claim in the light of the settlement figure in particular. Ms Walton also referred to the defendant's counter schedule which argued for a figure of £18,000 on a full liability basis. In her submission the case was never worth anything near £300,000 given that liability had been compromised. The only reason that settlement occurred at a figure of £90,000 was because that was the correct value of it. If the claimant took the view that the case was worth considerably more than £90,000 then there would have been no reason not to pursue the case to the damages hearing which was not far away.

12. Mr Hayman did not accept that the settlement value reflected the sums that were in issue. If the case had gone to trial four weeks later, he said that the claimant would have been contending for the full £312,000 plus general damages. The settlement figure reflected the risks of the litigation and the inherent uncertainty as to the level at which damages would be awarded. That was so even though only quantum was in issue given the Part 36 Offers that had been made.

13. In any event, in Mr Hayman's submission, the fact that the case subsequently settled for less than had been claimed could not be a good reason to depart from the budget. If the defendant had considered that Master Leslie was in error in allowing £120,000 plus VAT and the additional liabilities as the reasonable and proportionate sum of this claim, they should have appealed that decision rather than coming to the detailed assessment and seeking to argue that it had not been properly set.

14. I do not accept this last argument of Mr Hayman's and, as I indicated during the proceedings, it seems to me that from time to time the paying party, where it is the defendant, will inevitably seek to argue that the budget set by a judge at the CCMC was determined based upon a false understanding of the value of the claim.

15. In the previous regime regarding proportionality i.e. as described in Lownds v Home Office [2002] EWCA Civ 365, the Court of Appeal was alive to the issue of the sums claimed being found to be rather higher than the sums actually achieved. The then

Master of the Rolls set out the test as being what it was reasonable for the claimant to consider that he could recover in the proceedings. He went on to say, at paragraph 40:

> "The rationale for this approach is that a claimant should be allowed to incur the cost necessary to pursue a reasonable claim but not allowed to recover costs increased or incurred by putting forward an exaggerated claim and a defendant should not be prejudiced if he assumes the claim which was made was one which was reasonable and incurs costs in contesting the claim on this assumption."

16. I would respectfully suggest that the Court of Appeal's dicta will apply equally to arguments raised on this point under the new regime. The essence of the point is whether it was reasonable for the claimant to believe that his case was worth the sum that he claimed. It is only if he could not reasonably have had that belief, because his claim was exaggerated in some way, that the budget might be considered to have been set on a false premise and as such should be departed from on assessment.

17. That is not the case here. The claimant was "employed" by the defendant for a period of 14 months before he left. That is a very limited period on which to base a substantial loss of earnings claim. The situation in respect of being in the Army is further complicated by the various points (in this case 4 years, 7 years and 12 years) at which the claimant might have left the Army. As I indicated in respect of other decisions that I gave in this case, the claimant's claim in quantum was inevitably going to be based on a certain amount of conjecture. It is in fact for that reason that both sides relied upon employment expert's evidence. It seems to me that this is just the sort of case where a wide variety of potential sums might be achieved at an assessment of damages hearing, depending upon how the evidence pans out. Consequently, it was likely to be settled somewhere in the middle given the risks involved to both sides of adverse findings by the judge. That is what happened in this case.

18. In my judgment, the claimant did not exaggerate his claim. He put forward alternative cases as to quantum which demonstrates that he was alive to the issues surrounding the potential level of damages to be recovered. Therefore, the ultimate settlement of this claim did not falsify in any way the premise of Master Leslie's setting of a budget in a case where the sums in issue were £300,000. Consequently, I reject the Defendant's argument that the valuation of the case is a good reason to depart from the budget.

<u>The hourly rates issue</u>

19. There have been several decisions by costs judges in relation to whether or not a reduction in the hourly rates allowed for the incurred parts of the bill ought to be carried over to the budgeted parts of the bill. Those judgments set out many of the rules governing costs management and the case law upon them in great detail. I do not propose to reiterate them here. There is, in my view, little that is controversial in how the budgeting judge is to go about setting the budget. He or she is exhorted by paragraph 7 of Practice Direction 3E to approve total figures of budgeted costs for each phase of the proceedings. That approval is not achieved by undertaking a detailed assessment of the costs in advance but by considering whether the budgets as claimed fall within a range of reasonable and proportionate costs. If they do not, he or she will revise the budgets until they do so.

20. The budgeting judge will not fix or approve the hourly rates claimed and the details set out in the pages behind the front page of the budget (which are used by the party to calculate the totals claimed) are provided for reference purposes only.

21. There is also nothing controversial in saying that the assessing court needs to find a good reason to depart from the budget, whether that is upwards because the receiving party seeks to claim costs above the budget, or downwards because the paying party wishes to challenge items claimed within the allowed budget.

22. The superior courts, such as the Court of Appeal in the leading case of Harrison v University Hospitals Coventry & Warwickshire NHS Trust [2017) EWCA Civ 792 have steered clear of seeking to define what a good reason may be. It is a fact sensitive matter to be dealt with on a case specific basis. The comments of various Court of Appeal and High Court judges suggest that the test is deliberately left rather wide so that the assessing judge's discretion is not fettered as to what can be considered to be a good reason.

23. Davis LJ in Harrison cautioned against costs judges adopting a lax or overindulgent approach to the need to find good reason. The need to do so was described by him as a "significant fetter on the court having an unrestricted discretion: it is deliberately designed to be so."

24. This last comment is echoed by Carr J in Merrix v Heart of England Foundation NHS Trust [2017] 1 Costs LR 91 at paragraph 83 where she states:

> "Fundamentally, this conclusion reflects what is in my judgment the clear intention of costs management as set out in CPR 3.18(b), namely to reduce the cost of the detailed assessment process by the treatment of agreed or approved cost budgets as binding, absent good reason to proceed otherwise. If this approach be right, the scope and cost of detailed assessment of costs on a standard basis will indeed be reduced materially. Jackson LJ's view was that the burden of costs management, if done properly, would save substantially more costs than it generates, even if he reached no final conclusions and made no final recommendations in the *Final Report* as to how that would be achieved. It is achieved if there is a saving in the time and costs needed for detailed assessment, rather than duplication of time and expense in an unfettered landscape (even if the budget is seen as a strong guide)."

25. There are numerous other passages that could be quoted in terms of the aims of costs management. It is, on any account, a time intensive exercise being undertaken on the great majority of multitrack cases. If there is to be any saving in the costs incurred overall, then those costs must be saved at detailed assessments. The only way of doing so is to reduce the time involved in detailed assessments or indeed the need for them in the first place. Those aims will only be met if the good reason test comes with a high threshold to pass.

26. Davis LJ in Harrison at paragraph 44 considered that the ability of the assessing judge to depart from the budget, where there was a good reason to do so, went a considerable

way to meeting the defendant counsel's prediction that detailed assessments would become a mere rubberstamping of CMO's. This is so, but it does not mean that good reasons will necessarily be easy to find.

27. Mr Hayman sought to argue that a good reason founds essentially the same test as a "significant development" in the litigation, which is required to persuade the court that a CMO should be amended. I do not accept that submission. In my view, the phrase "good reason" is wider than "significant development." Whilst it may well be that, for example where the trial went on for rather longer or rather less time than was anticipated, this would be a good reason to justify an increase or decrease from the budgeted figure. But it does not have to be an unexpected development after the last CMO for it to be a good reason, in my view.

28. There is, however, another test which has long been employed in detailed assessments which, in my view, does have some similarities to the good reason test. In detailed assessments, there are regularly challenges made to the retainer of the receiving party as to whether that party is liable to their solicitor for costs so as to raise an indemnity principle challenge. It has long been held (see for example Hazlett v Sefton Metropolitan Borough Council [2001] 1 Costs LR 89) that a party who instructs a solicitor is liable to pay the costs of that solicitor. If the paying party wishes to challenge that position it needs to demonstrate that a "genuine issue" exists. Consequently, the solicitor's certificate to the receiving party's bill of costs that the receiving party is obliged to pay the solicitor's costs is normally conclusive.

29. It seems to me that a similar test to the "genuine issue" test is intended by the "good reason to depart" terminology in CPR 3.18. In place of the solicitor's certificate is the approval of the budget by the court. In either situation, the judge at the detailed assessment is not going to entertain a challenge unless something is raised which is specific to the case before the court. There is nothing specific to this case regarding the hourly rates challenge. If they are reduced here, exactly the same point would apply in any other case. That, in itself in my view points to the conclusion that a reduction in the hourly rates ought not to be a good reason to depart from the budget.

30. The defendant's argument in relation to hourly rates starts from a quotation in the White Book in the notes to CPR 3.18 which also found favour with Carr J in the case of Merrix (paragraph 73):

> "As the notes to CPR 3.18 in the White Book reflect, the fact that hourly rates at the detailed assessment stage may be different to those used for the budget may be a good reason for allowing less, or more, than some of the phase totals in the budget."

31. In my view, the notes to the White Book do not take the defendant very far. The fact that the hourly rates allowed at the detailed assessment are different from those originally used in the budget does not, in my view, found a good reason. This case is a good example of why the make-up of the estimate on which the budgeted costs are subsequently agreed or approved is not relevant to the subsequent detailed assessment. In this case the solicitor who had conduct for the first two years (which was, more or less, up to the CMO) left the firm and the case had to be reallocated. The claimant and his solicitors took the view that a more experienced solicitor was required to deal with the difficulties in the quantum claim. Consequently, the work was done at a higher

hourly rate than had been envisaged in the budget. It has always been my understanding that the approved phased total can be used by senior or junior fee earners at differing hourly rates as the party considers to be appropriate. If it were otherwise and, as in this case, the fee earner who had originally been acting was no longer able to do so, a slavish adherence to the rates set out in the calculations for the original budget would mean that an application to amend the underlying details to the budget would be required even though there may be no wish to amend the budget totals themselves. That seems to me to be an unlikely proposition and this illustration explains why I have said above that once the phase total has been approved the underlying figures are no longer relevant.

32. The real nub of the defendant's challenge can be found in the tension between the need to allow reasonable and proportionate costs on an item by item basis in detailed assessments and the need for certainty of recovery as expected by the use of CMOs. In RNB v London Borough of Newham [2017] EWHC B15 (Costs) Master Campbell set out his concern about the absence of any court scrutiny of the hourly rates in the budgeted parts of the bill and the effect this would have on individual items. He put it this way at paragraph 22 of his judgment:

> "the allowances in the costs budget were made by reference to phases without the court having commented upon the hourly rates, either in respect of the incurred or budgeted costs. At the assessment hearing, I made reductions to the hourly rates claimed for the incurred costs to a level which has meant that the overall recovery by the claimant the period of work before the CMO has been reduced by significant amounts. Were that not to be reflected in the budgeted costs, that would mean that the Claimant will appear to recover an hourly rate *as set out in Precedent H for the budgeted stage* at a level that significantly exceeds the figure I consider to be reasonable and proportionate for the pre-budget stage." [italics added]

33. For the reasons I have given, I do not agree with Master Campbell in relation to the italicised reference to the hourly rates in the precedent H but otherwise I share his concern about the lack of court scrutiny. The budgeting judge has not approved or fixed the hourly rates and therefore the only person who could consider them is the judge on the detailed assessment. If it is the case that the receiving party can claim any hourly rate (as long as it does not offend the indemnity principle) in the budgeted costs without it being assessed by the court, that does not sit easily with the assessing judge's responsibility to allow only reasonable and proportionate costs on an item by item basis. This is all the more so where that judge has already found that the hourly rates claimed in the incurred costs parts of the bill were unreasonable. Assuming they are the same rates in the budgeted parts then then they are, by definition, unreasonable hourly rates. This is essentially the high watermark of the defendant's argument.

34. The assumption on the part of the defendant is that if each item is claimed at an unreasonable hourly rate in the budgeted part of the bill, then the totality of the items in each of those parts must equally be unreasonable. This would be so in a conventional detailed assessment. However, the budgeted part of the bill is not dealt with by a conventional detailed assessment. The court has to accept that the budgeted figures for taking the case to trial (as recorded in the CMO) are reasonable and proportionate.

Therefore, if the sums subsequently claimed in the bill are within that budget they are, on the face of it, also reasonable and proportionate. Where, as here, the case got to within a short period before trial, and therefore it can be assumed that much, if not all, of the work had been done within the various phases and the costs were still within budget, the presumption is all the stronger in my view that the costs incurred are reasonable and proportionate.

35. As I have set out above, it is for the party and his or her solicitor to determine who exactly does the work that needs to be done. Where the costs overall are within the budget that has been set, there can be no legitimate criticism in using a senior or a junior solicitor, leading or junior counsel to carry out the work. This is true, even if the work is all carried out at ostensibly unreasonable hourly rates. If it comes within the budget that has been set, it will turn individually "unreasonable" items into a reasonable and proportionate sum overall. As I put it colloquially at the hearing, two odd numbers added together will still make an even number.

36. My concern, and I suspect Master Campbell's, is that the lack of scrutiny at a detailed assessment of the hourly rates claimed will encourage parties to incur costs up to the budget set for each phase on the basis that they are unlikely to have to withstand scrutiny at a detailed assessment. As such there will be an inflationary element which is only kept in check by conventional detailed assessments. But this concern is something which has to yield to the aims of costs management in making detailed assessments shorter. For a long time, the work of the costs judge has been described as the compounding of "much sensible approximation" to achieve justice. Ultimately the use of CMOs is simply a further example of that pragmatism.

37. Accordingly, I find for the claimant that there is no good reason to depart from the budget by virtue of the reduction to the hourly rates in this case.