Neutral Citation Number: [2018] EWHC 1747 (QB)
Case No: Appeal Ref:QB/2017/0302, Claim No: HQ14C04067

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM SENIOR COSTS OFFICE
MASTER NAGALINGAM DATED 16TH NOVEMBER 2017

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/07/2018

Before :

MR JUSTICE GOSS
And a Costs Master

- -

Between :

JXA **(by his Mother and Litigation Friend VLA)**	**Claimant/ Appellant**
- and -	
KETTERING GENERAL HOSPITAL NHS FOUNDATION TRUST	**Defendant/ Respondent**

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- -

John Foy QC (instructed by **Fieldfisher LLP**) for the **Claimant**
Roger Mallalieu (instructed by **Acumension**) for the **Defendant**

Hearing dates: 29th June 2018

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Judgment Approved

Mr Justice Goss :

Background

1. This is an appeal from decision of Master Nagalingam made on 16th November 2017 in relation to the claimant's costs in proceedings brought against the defendant for damages for clinical negligence. I have sat with Costs Judge James and have been greatly assisted by her and by counsel representing both parties.

2. The proceedings related to the claimant's birth on 27th October 2010 at Kettering General Hospital during which as a result of a period of near total asphyxia in utero he suffered quadriplegic cerebral palsy, although this was not diagnosed immediately. Solicitors were consulted in March 2013. The claimant's mother and litigation friend selected Mr Paul McNeil a senior partner in Fieldfisher LLP, based in the City of London, as a result of a search on the internet and by reason of Mr McNeil's highly regarded expertise in clinical negligence claims. In due course, after a significant number of experts on both sides had been instructed and reported, agreement was reached on the issue of liability, which was settled on the basis of 90% liability attaching to the defendant. The question of damages cannot be resolved for many years, but it is agreed that they will run into many millions of pounds, potentially £20 million.

The issue and grounds of appeal

3. The matter came before Master Nagalingam for the assessment of costs on the standard basis. CPR44.3(1) applied. Any doubt as to the reasonableness of the incurred costs fell to be exercised in favour of the defendant as the paying party. The issue in the case is whether the hourly rate cost was reasonably incurred and reasonable in its amount, which must be objectively reasonable in the circumstances of the particular case.

4. The grounds of appeal are that the Master

    1. Applied the wrong test and failed to have regard to any or any proper reasonable interest of the claimant given the importance of the litigation to him.

    2. Failed to take into account or give sufficient weight to the relevant considerations as set out in the Bill of Costs and the replies and the submissions made orally at the hearing on 16 November 2017.

    3. Gave undue weight to less relevant factors including the theoretical availability of alternative and unnamed solicitors across a number of geographic locations, in particular outer London, Nottingham, Birmingham and Manchester.

    4. Failed to properly consider the effect of inflation on the claimed hourly rates between year ending 31 March 2013 and 16 November 2017.

5. The Master determined that the appropriate hourly rates for the claimant's solicitors as the receiving party should be

a. £350 for a Grade A partner.

b. £200 for a Grade C assistant solicitor.

c. £150 for a Grade D trainee/paralegal.

6. The rates contended for had been

a. £380 to 31 March 2013 then rising at the rate of £10 pa every 31 March up to £420 to 16 November for a Grade A partner.

b. £150 rising at £10 pa to £190 over the same period for a Grade D trainee/paralegal.

c. £270 for a Grade C solicitor from 1 January 2017.

The law

7. It is well established and common ground that determining whether costs have been "reasonably incurred" is a two-stage process. First, having regard to all relevant considerations whether the successful party has acted reasonably in employing the solicitors who had been instructed and, secondly, whether the costs charged were reasonable compared with the broad average of charges made by similar firms practising in the same area; that while availability of less expensive solicitors elsewhere might be relevant to the determination of the first question, it had no relevance to the second (Wraith v. Sheffield Forgemasters Ltd, Truscott v. Truscott [1998] 1 WLR 132 (CA)).

8. The relevant matters, identified at p 141 C-F of the judgment of Kennedy LJ in Wraith, as adapted to this case, are

(1) The importance of the matter to the claimant.

(2) The legal and factual complexities, as he might reasonably be expected to understand them.

(3) The location of his home.

(4) Any natural desire to instruct solicitors further afield.

(5) Why Mr McNeil and Fieldfisher LLP were chosen.

(6) The location of Fieldfisher LLP, including their accessibility him and their readiness to attend at the relevant court.

(7) What, if anything, he might reasonably be expected to know of the fees likely to be charged by Fieldfisher LLP as compared with the fees of other solicitors whom he might reasonably be expected to have considered.

Discussion

9. The claimant's primary complaint is that the Master did not answer the first question as to whether it was reasonable to instruct Mr McNeil and so his decision as to whether the charging rate was reasonable was flawed. I address that ground first.

10. In his judgment, given during the assessment hearing, the Master referred to the claim being one of substantial value, clearly at the very highest end of importance to the claimant and it was an exceptionally complicated case. When he turned to the choice and instruction of solicitors he acknowledged that the purpose of the court was to "look objectively as to what is a reasonable choice was and thereafter a reasonable rate to apply" (paragraph 19). He referred to the guideline rates generally as being "a guideline" and it did not necessarily follow that other firms around the country that may have been able to deal with a case of this nature would have charged less than the claimant's solicitors. He also referred to the use of counsel and found nothing unusually high or that he could criticise.

11. The Master concluded, in paragraph 27, as follows: -

> "Taking all of those factors into account, and with regards to the guidance in the White Book with respect to consideration of comparable firms doing comparable work, I don't find that I need to make any ruling as to what location is appropriate. The ruling must be in relation to what rates are appropriate, based on comparable firms doing comparable work, and in relation to the submissions that have been helpfully made by both advocates today."

On that basis he allowed the rates to which I have referred.

12. Counsel for the claimant sought clarification as to the Master's finding in relation to the use of a London solicitor. After enquiring whether he was required to do so, he was pressed into ruling in these terms: -

> "I take into account the location of the claimant as a starting point, and I look at comparable firms doing comparable work. In terms of the theoretical locality as a starting point I would consider firms within the Outer London area to be a reasonable point at which the claimant could have looked at firms well outside of their area, but, of course, I am aware myself of firms, for example, in Nottingham or Manchester or other legal centres which the claimant, I think, could have reasonably gone to as well. I accept that there will be a consequent effect on travel time as a result of that, but in terms of a locality, I take a theoretical locality as Outer London, but as I am guided by the White Book I can take into account comparable firms doing comparable work, and that will account for firms around the country, including within the location of your instructing solicitors' firm."

13. The claimant submits that the conclusions to be drawn from these passages is that the Master did not directly answer the first question and, when pressed, indicated that he took

a theoretical locality of Outer London. The implication of what he said is that he found that it was unreasonable for the claimant to have instructed Mr McNeil.

14. On behalf of the defendant it is submitted that the Master was clearly aware of the principles to be applied and, on consideration of those matters identified in relation to the objective assessment of the reasonableness of the decision to instruct Mr McNeil, he was justified on the evidence to rule as he did. It is accepted that this was high value complex litigation of considerable importance to the claimant and that Mr McNeil was and is an acknowledged leader in the field. Emphasis is placed on the absence of evidence of consideration by the claimant of any other potential solicitors that could have been instructed, or of their costs or that advice was given that Mr McNeil's rate was higher than others in this field. Reference is made to the approval of the test of reasonableness including legal advice or its absence as being a relevant circumstance in paragraphs 23 and 26 of the judgement of the Court of Appeal in Surrey v. Barnet & Chase Farm House Hospitals NHS Trust [2018] EWCA Civ 451.

15. I am satisfied that the Master did not directly address the first question as he should and decided whether the choice of Mr McNeil was objectively reasonable in the circumstances. When pressed, he implied it was (or may have been) an unreasonable choice, indicating that he took a theoretical locality of Outer London but, guided as he was by the White Book, he then went on to say that he could "take into account comparable firms doing comparable work, and that will account for firms around the country, including within the location of Fieldfisher LLP.

16. However, that conclusion is not determinative of the appeal. The question then has to be addressed as to whether, in the final analysis, the hourly rates claimed by Mr McNeil were reasonable and that the Master was wrong not to allow them and to set the rates that he did. Pursuant to CPR.44.3, any doubt as to the reasonableness of the rates had to be resolved in favour of the defendant.

17. In this regard, the Master had no evidence as to what rates other firms engaged in this type of work charged or the level of expertise of such firms. What he did have was a claim for an incremental year on year raising of the rates charged. He took account of the guideline rates for the summary assessment of costs. On behalf of the claimant it is emphasised that these rates are for significantly less complex cases and no more than guidelines, and are rates set in 2010 and take no account of subsequent inflation. The defendant answers by referring to the absence of any evidence justifying the incremental annual increase or the impact of inflation on this market over the period in question, the refusal by the Master of the Rolls in July 2014 to adjust the hourly rates following the proposals of the CJC Cost Committee's Report of May 2014 (which proposed a reduction in City rates) and submits that it would be wholly wrong for the Master to have transposed a back-calculated approach or adopted a general inflationary approach.

18. It is not entirely clear how the Master reached his decisions as to the appropriate hourly rate but he appears, on the evidence before him and applying his knowledge of the hourly rates charged and allowed in cases of this seriousness carried out by firms around the country, including London and even in the City, to have concluded that the claimed rates were too high and allowed rates that accorded with his knowledge and experience. He recognised the gravity and complexity of the case and allowed rates significantly in excess of the rates for summary assessment.

Conclusion

19. I find that the Master did err in not directly answering the first question in relation to the reasonableness of the claimant's decision to instruct Mr McNeil and Fieldfisher LLP. Further, his judgment lacked clarity as to why he considered Outer London rates to be appropriate but, nevertheless, he did take account of City rates. He also clearly recognised the complexity of the litigation and reflected that in determining the rates that he did.

20. In the event of allowing the appeal, I was invited to determine what cost rates would be reasonable for firms practising in the same area. In this regard I have been greatly assisted by the knowledge and experience of the Costs Judge sitting with me. Her expertise and experience as to the firms engaged in this type of case both in London and nationally has guided me in the conclusion to which I have come. The Master had a broad discretion in this regard, applying CPR44.4. I am satisfied on all relevant facts and applying appropriate considerations that the rates determined by the Master fell within the reasonable band of decisions open to him, notwithstanding his failure to answer clearly the first question in the required two stage process.

21. In these circumstances, although the claimant technically succeeds in relation to the first ground of appeal, the outcome of the appeal is that the hourly rates found by the Master are, nevertheless, the appropriate rates for this claim and the appeal, in its result, is dismissed.

Costs

22. It was agreed by both parties that the costs should follow the appeal. I have a broad discretion in relation to the appropriate order as to the costs of the appeal. There was technical merit and some success in relation to the grounds of appeal although the claimant has not ultimately succeeded in the outcome. I consider the appropriate order on the appeal in all the circumstances is 'no order as to costs'. I give liberty to both parties to make written submissions to me within 7 days if they seek to persuade me to make a different order. If either party does seek a different order, such submissions should be served on the other party and be responded to within 7 days. If no submissions are received by the court within that time-frame, the final order of the court will be that there is no order as to costs.