Neutral Citation Number: [2022] EWHC 637 (QB)

Case No: QB-2017-003099

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/03/2022

Before :

MASTER DAVID COOK

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Between :

MR OLUSEYE ADEROUNMU	**Claimant**
- and -	
DR DEBORAH COLVIN	**Defendant**

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- -

Andrew Roy (instructed by **Bolt Burdon Kemp**) for the **Claimant**
Sarah Christie-Brown (instructed by **Browne Jacobson LLP**) for the **Defendant**

Hearing date: 2 March 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MASTER DAVID COOK

MASTER COOK:

1. This is my judgment in relation to the costs of a preliminary issue trial in which I gave judgment on 20 August 2021, see ***Aderounmu v Colvin*** [2021] EWHC 2293 (QB). The preliminary issue required me to decide the issue of limitation which had been raised by the Defendant. As set out at paragraphs 2 to 4 of my judgment the issue arose in the following circumstances;

> "2. In this claim the Claimant alleges negligence on the part of the Defendant in failing to exclude a stroke and in failing to refer him for urgent investigations. The claim was issued on 10 October 2017, just under 8 years from the date of the injury. In the Particulars of Claim the Claimant asserts that he is a protected party."
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> 3. In her Defence the Defendant denies that the Claimant is a protected party and avers that at all material times the Defendant had the capacity to conduct litigation by reference to the criteria set out in the Mental Capacity Act 2005 (MCA). The Defendant then raises the defence of limitation, averring that any cause of action accrued on or around 23 November 2009.
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> 4. By his Reply the Claimant asserts that the limitation period has not started to run because, since the date of the accrual of the cause of action, he has lacked capacity to conduct the litigation within the meaning of the MCA and is therefore considered to be under a disability for the purposes of section 38(2) Limitation Act 1980 (LA). His secondary position, in the event that he is found to have capacity, is that he did not have the requisite knowledge for the purposes of section 14A of the LA from a date more than three years before 10 October 2017. Lastly, in the event that his date of knowledge is found to be more than three years before 10 October 2017 he seeks the disapplication of the provisions of the LA by exercise of the court's powers under section 33 LA."

2. I found firstly, that the Claimant had current capacity to litigate and had had capacity to litigate at all material times, secondly, that the claimant had acquired actual or constructive knowledge for the purpose of s.14A LA no later than 20 December 2010 and thirdly, for the purposes of s.33 LA it would be equitable to allow the action to proceed.

3. In the absence of agreement between the parties I reserved the question of the costs of the preliminary issue to the first costs and case management hearing.

The parties submissions

4. On behalf of the Claimant Mr Roy submits that:

   i) The Defendant should pay 70% of the Claimant's costs of the preliminary issue to reflect the fact he won.

ii) The costs should be on the indemnity basis to reflect that the Defendant had no reasonable grounds to resist relief under s. 33 LA.

iii) The 30% balance should be costs in case to reflect the fact costs would have been incurred in determining whether or not the Claimant had capacity irrespective of limitation.

5. Mr Roy submits that a claimant who succeeds on a preliminary issue trial on limitation should have their costs unless there is a strong reason to make a different order and the fact that they have to rely upon s 33 LA should not lead to a different result. Mr Roy relied upon the remarks of Kerr LJ in ***Eastman v London Country Bus Services Limited*** [1985] 1 WLUK 157;

> "The background in that regard is that the plaintiff put his case on limitation, on what turned into the preliminary issue with which we are dealing, on two grounds. First, he pleaded that the relevant date of knowledge was November 1981, whereas the judge ultimately found that it was the end of February 1979. Second, he pleaded that, if he were wrong on that, as he turned out to be, he would rely on section 33, with which we have dealt in our judgments. I should add that, even if he had not raised the issue on which he failed (that the date of knowledge was as late as he claimed), it has not been suggested that this matter would not have gone to court in any case under section 33. In the event it only occupied one day. What Mr Ripman has submitted is that whenever a plaintiff ultimately has to invoke section 33, even if he succeeds on that, the fact that he has been compelled to invoke that section, because he is outside the primary limitation period, ought to be reflected in an order for costs in some way. He has submitted that the plaintiff in such circumstances is asking for an indulgence."
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> We have not (and I stress this) been referred to any authority in this context, and we do not know whether any court has previously considered this submission of principle, in so far as it is a submission of principle.
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> In that situation, I would merely say for myself that I do not accept that when a plaintiff relies on section 33 he is thereby coming before the court in a situation where he is, so to speak, prima facie in the wrong ab initio, with the result that the order for costs should necessarily reflect the fact that he has had to invoke section 33. It seems to me that section 33 is part of the entire statutory framework dealing with limitation in claims for personal injuries or death, and is not to be separated from the other provisions dealing with limitation in that context."

6. On behalf of the Defendant Ms Christie-Brown submits that the court should make an issue based costs order to reflect the fact that the Defendant won on the issues of

capacity and date of knowledge so that the Claimant would only be awarded the costs of the s.33 LA issue.

7. Alternatively Ms Christie-Brown submitted that the Claimant should be deprived of his costs of the limitation issue by reason of the manner in which the issue was pursued. In particular she relied upon the following matters:

   i) Dr Kirwilliam, neuropsychologist, provided a report to Ms Trask, solicitor for the Claimant, dated July 2017, in which he concluded that the Claimant had the capacity to conduct proceedings and made a series of recommendations as to how the Claimant could be assisted in doing so.

   ii) Ms Trask's explanation to the court for seeking further evidence following receipt of the reports of Dr Feltbower and Dr Kirwilliam on this matter was that her "*gut feeling"* had guided her approach.

   iii) Ms Trask's explanation for failing to send the Claimant's medical records to Dr Dilley when he first assessed the Claimant was that she needed the assessment done quickly and yet she instructed Dr Dilley on 13 November 2017, nearly 4 months after the date of Dr Kirwilliam's report.

   iv) If Ms Trask had accepted the report of Dr Kirwilliam, capacity would not then have been an issue in the case.

   v) Had Dr Dilley been in possession of the Claimant's medical records at the time of his first assessment (including those records referred to at paragraph 85 my judgment and at the very least the GP records) it would be reasonable to assume that this would have affected the foundation of his opinion. At paragraph 35 of my judgment I observed that it was "*unfortunate that she did not"*

   vi) The finding by the court at paragraph 87 of the judgment that Dr Dilley had a tendency to downplay the importance of the medical records and speculated that the Claimant must have had support in making decisions.

   vii) The observation by the court at paragraph 93 of the judgment that Dr Soeterik did not give weight to the wider body of evidence including the Claimant's educational records and the contradictions in the accounts given by him as to his capabilities.

   viii) That the records and accounts given by the Claimant had all been considered in detail by the Defendant's experts within their reports.

The law

8. As provided by CPR 44.2 any order for costs is a matter of discretion, the relevant parts of the rule are as follows:

> "Court's discretion as to costs
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> 44.2 (1)
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> The court has discretion as to –

(a) whether costs are payable by one party to another;

(b) the amount of those costs; and

(c) when they are to be paid.

(2) If the court decides to make an order about costs –

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order"……

(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

(5) The conduct of the parties includes –

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and

(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.

(6) The orders which the court may make under this rule include an order that a party must pay –

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

> (f) costs relating only to a distinct part of the proceedings; and
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> (g) interest on costs from or until a certain date, including a date before judgment.
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> (7) Before the court considers making an order under paragraph (6)(f), it will consider whether it is practicable to make an order under paragraph (6)(a) or (c) instead.
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> (8) Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so."

9. The rule requires the court to consider whether it would be practicable to make a percentage order or an order from or down to a certain date before making an issue based costs order.

10. In the case of ***Pigot v The Environment Agency*** [2020] EWHC (Ch)1444 Stephen Jourdan QC sitting as a judge of the High Court helpfully summarised the principles to be drawn from the cases where one party has succeeded overall but has lost one or more issues, and the unsuccessful party seeks an issue based costs order:

> "6. I would summarise those principles as follows:
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> (1) The mere fact that the successful party was not successful on every issue does not, of itself, justify an issue-based cost order. In any litigation, there are likely to be issues which involve reviewing the same, or overlapping, sets of facts, and where it is therefore difficult to disentangle the costs of one issue from another. The mere fact that the successful party has lost on one or more issues does not by itself normally make it appropriate to deprive them of their costs."
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> (2) Such an order may be appropriate if there is a discrete or distinct issue, the raising of which caused additional costs to be incurred. Such an order may also be appropriate if the overall costs were materially increased by the unreasonable raising of one or more issues on which the successful party failed.
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> (3) Where there is a discrete issue which caused additional costs to be incurred, if the issue was raised reasonably, the successful party is likely to be deprived of its costs of the issue. If the issue was raised unreasonably, the successful party is likely also to be ordered to pay the costs of the issue incurred by the unsuccessful party. An issue may be treated as having been raised unreasonably if it is hopeless and ought never to have been pursued.
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> (4) Where an issue based costs order is appropriate, the court should attempt to reflect it by ordering payment of a proportion of the receiving party's costs if that is practicable.

> (5) An issue based costs order should reflect the extent to which the costs were increased by the raising of the issue; costs which would have been incurred even if the issue had not been raised should be paid by the unsuccessful party.
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> (6) Before making an issue-based costs order, it is important to stand back and ask whether, applying the principles set out in CPR r.44.2 , it is in all the circumstances of the case the right result. The aim must always be to make an order that reflects the overall justice of the case."

11. In ***Fox v Foundation Piling Ltd*** [2011] EWCA Civ 790 Jackson LJ stated:

> "62.There has been a growing and unwelcome tendency by first instance courts and, dare I say it, this court as well to depart from the starting point set out in rule 44.3 (2) (a) too far and too often. Such an approach may strive for perfect justice in the individual case, but at huge additional cost to the parties and at huge costs to other litigants because of the uncertainty which such an approach generates. This unwelcome trend now manifests itself in a (a) numerous first instance hearings in which the only issue is costs and (b) a swarm of appeals to the Court of Appeal about costs, of which this case is an example.

12. As to the general approach to costs, in the case of ***Young v Chief Constable of Warwickshire Police & Anor*** [2022] EWHC 447 (QB) Mr Justice Martin Spencer endorsed the guidance given by Waller LJ in ***Straker v Tudor Rose*** [2007] EWCA Civ 368:

> "11. How then would the rules suggest one should approach a case such as this? The court must first decide whether it is case where it should make an order as to costs, and have at the forefront of its mind that the general rule is that the unsuccessful party will pay the costs of the successful party. In deciding what order to make it must take into account all the circumstances including (a) the parties' conduct, (b) whether a party has succeeded on part even if not the whole, and (c) any payment into court."
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> 12. Having regard to the general rule, the first task must be to decide who is the successful party. The court should then apply the general rule unless there are circumstances which lead to a different result. The circumstances which may lead to a different result include (a) a failure to follow a pre-action protocol; (b) whether a party has unreasonably pursued or contested an allegation or an issue; (c) the manner in which someone has pursued an allegation or an issue; and (d) whether a successful party has exaggerated his claim in whole or in part."

13. Ultimately all decisions on costs are fact specific and involve the principled exercise of discretion.

Discussion and conclusions

14. I have no hesitation in concluding that it is appropriate to make an order for costs. This is contested clinical negligence litigation and there are no relevant offers.

15. The Claimant is clearly the successful party. If the preliminary issue had been lost his claim would have come to end. The starting point must be that pursuant to CPR 44.2(2)(a) he is entitled to his costs.

16. I reject Mr Roy's submission that the costs should be on the indemnity basis. There was nothing out of the ordinary or unreasonable about the conduct of the Defendant in resisting the s.33 LA issue, see ***Esure Services Linited v Quarcoo*** [2009] EWCA Civ 595.

17. I do not accept Ms Christie-Brown's submission that this is a suitable case for an issue based costs order. The preliminary issue in this case was defined as one of "limitation" and as Kerr LJ pointed out in the case of ***Eastman*** there is a single statutory regime governing limitation in claims for personal injury and death. In any event the issue of the Claimant's capacity in this case was inextricably linked to the issues of date of knowledge and the exercise of the Court's discretion under s. 33 LA such that it would not be appropriate to describe them as discreet or distinct issues.

18. I do however consider there is much force in the points made by Ms Christie-Brown concerning the manner in which the Claimant's experts were instructed and which are summarised by me at paragraph 7 above. I can see no reason why Dr Dilley was not provided with the relevant medical and immigration records before being asked to prepare his report. Even if this material did not cause him to conclude that the Claimant had capacity it would have been considered by him in a structured manner within the context of his report and it would not have been necessary for so much time to be taken up in cross examination putting the records to him.

19. This was as, I observed in my judgment, a difficult case and issues arose beyond the control of the parties arising from the indisposition of Dr Ballard which caused the case to overrun. The question I must resolve is whether the issues identified by Ms Christie Brown should be taken into account under CPR 44.2 (4) (a) and (5) (c) and if so, to what extent.

20. In my judgment for such conduct to be relevant to the level of costs received by the successful party the court must be satisfied that conduct identified has caused an increase in the amount of costs that would otherwise have been incurred. In other words there must be a causal relationship between the conduct and the extra costs incurred.

21. I fully accept, as submitted by Mr Roy, that Ms Trask was acting in good faith and on "gut feeling" in what was a difficult case, however as I have observed there was no good reason why she did not ensure Dr Dilley and later Dr Soeterik had the contemporaneous medical and immigration records available to her. Indeed it might be said in a difficult case such as this there was every good reason why she should have provided the very information which the court found to be critical to the issue of capacity.

22. Having conducted this trial I can safely conclude that the costs of the preliminary issue were increased by the issues I have identified. In the circumstances I find that the necessary causal connection has been established.

23. In my judgment the Claimant should receive 70% of his costs of the preliminary issue on the standard basis to be assessed if not agreed. I am not persuaded by Mr Roy's submission that any balance however calculated should be costs in case on the basis that capacity would have to be determined in any event. The costs involved here are the costs referable to the preliminary issue as it was ordered by the court.

24. I am asked to make a payment on account of costs. Mr Roy submitted that the Claimant should receive 70% of his incurred costs and 90% of his budgeted costs.

25. CPR 44.2 (8) provides:

> "(8) Where the court orders a party to pay costs subject to detailed assessment it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so."

26. The usual approach of the court to an interim payment on account of costs where there has been no costs management order is to award such sum as the court can be certain the receiving party will obtain at a detailed assessment, see ***Excalibur Ventures LLC v Texas Keystone Inc*** [2015] EWHC 566 (Comm). This is often an impressionistic exercise based on an estimate of the likely level of recovery subject to a suitable margin to allow for error in the estimation. I do not accept that there is any rule of practice to the effect that a 30% reduction would usually be made to the sum sought. The court will look at the relevant factors on a case by case basis and take into account the factors which are likely to come into play on any detailed assessment. The court will proceed on a conservative basis and will be astute to avoid overpayment.

27. This however is a claim which has been subject to costs management. I made a costs management order in relation to the preliminary issue on 4 March 2020. By that order I approved claimant's budgeted costs in the sum of £85,410. The costs management order recorded that Claimant's incurred costs of £309,766.08 were not agreed.

28. Where a costs management order has been made the court can proceed with a greater degree of certainty with regard to the budgeted costs. In ***Thomas Pink Ltd v Victoria's Secret UK Ltd*** [2014] EWHC 3258 (Ch) Birss J as he then was, was persuaded to make an award of 90% of budgeted costs on the basis that unless there is good reason to depart from the budget, the budget will not be departed from. The judge was prepared to accept that there were vagaries of litigation and that things may occur on any assessment which is why he did not arrive at a higher figure.

29. It has not been suggested to me that there is any reason to depart from the budget. Like Birss J, I would award the Claimant 90% of his budgeted costs. That is a sum of £76,869 which I will round up to £77,000.

30. The incurred costs are a wholly different matter. I am far from satisfied that they accurately represent the incurred costs of the preliminary issue. Many of the items seem referable to the wider costs of the action. There are clearly substantial issues to be taken

with regard to the level of pre-action costs and in the issue pleadings and expert reports phases. There are also the usual points which will be made in relation to profit costs in relation to hours and hourly rates. I am of the view that there may well be a very substantial reduction to the sum claimed at the detailed assessment. In the circumstances I am only prepared to award a sum of £23,000. The incurred and budgeted sums allowed total £100,000. I will award 70% of this sum to reflect the costs order I have made. It may well be appropriate to add VAT to the final sum as the costs set out in a precedent H are net of VAT.

31. I will therefore order an interim payment on account of costs in the sum of £70,000 plus VAT. I would ask that counsel draw up an appropriate form of order.