Case No: QB/2016/0026

[2016] EWHC 1322 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

The Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 22 April 2016

BEFORE:

MR JUSTICE PICKEN

BETWEEN:

CHURCHILL

Claimant/Respondent

v

BOOT

Defendant/Appellant

(Transcript of the Handed Down Judgment of

WordWave International Limited

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Official Shorthand Writers to the Court)

MR COLM NUGENT appeared on behalf of the Claimant

MR N LEWERS appeared on behalf of the Defendant

Judgment

As Approved by the Court

1. MR JUSTICE PICKEN: This is an application, today, for permission to appeal against the order made by Master Eastman on 12 January 2016 when he refused the Claimant permission to amend his costs budget pursuant to CPR Part 3, Practice Direction 3E - Costs Management, section 7.6.

2. Briefly, the background is as follows. The Claimant was involved in a road traffic accident on 27 September 2008. The Defendant was the driver of the car involved in that road traffic accident. It was alleged by the Claimant that the Defendant was liable to him in respect of the road traffic accident. The Claimant's claim was put at approximately £2 million, at least ultimately, reflecting the traumatic brain injury which he apparently sustained in the road traffic accident.

3. Since the order made by Master Eastman in January this year, the matter has been settled. This was the result of a successful mediation. As at the time of the settlement, I was informed in Mr Nugent's skeleton argument that the incurred costs amounted to £115,450. In fact, there has been produced, for the purposes of this hearing, a witness statement from Mr Gary Bennett, the Claimant's solicitor, dated 12 April 2016 in which, at paragraph 37, the following is stated:

> "It is unlikely that the claimant's costs of the entire action will exceed £131,000 plus VAT, £22,000, subject to agreement or detailed assessment. However, comparing like with like, the original costs budget did not include Vat or additional liabilities. Removing the VAT element, the costs of the mediation, which the defendants agreed to meet separately, and the additional liabilities which are not subject to costs budgeting, the total cost will not exceed £118,560 which is only very slightly more, (5% or so), than the original budget permitted figure of £114,000."

Mr Bennett refers in that paragraph to the original budget permitted figure as being £114,000. In fact, the original budget figure, which was the figure approved by Master Eastman on 16 June 2014, was for slightly more than that, namely £114,492.57. That is a figure which was net of VAT.

4. Attached to Mr Bennett's recent witness statement is a schedule which outlines incurred costs amounting to £124,463 odd (I leave out of the count, the pence) and which refers to estimated further costs of £3,000. Those estimated further costs are described as being in respect of an infant settlement hearing and Mr Nugent, for the Claimant, explains that they are costs which have now been incurred, that hearing having taken place. In total, therefore, the figure given in that costs schedule, which is £127,462.02, now represents incurred only costs rather than a combination of incurred and estimated costs. There is a curiosity about the schedule in that there is an entry in respect of settlement discussions in which the description is given as follows:

> "Instructing counsel to attend JSM and mediation and attending with counsel."

Alongside that entry are figures for incurred costs amounting to £24,190.43 made up of disbursements of £14,544.83 and time costs (solicitors' costs) amounting to £9,645.60. The reason why I describe that entry as something of an oddity is because, as has been

explained by Mr Bennett, and confirmed by Mr Nugent, the costs of the successful mediation earlier this year have been borne not by the Claimant but by the Defendant. It would appear that the £24,190.43 figure therefore includes an element of costs relating to the mediation which ought not to be there. It includes also, however, the costs of a joint settlement meeting which took place a year or so before. It may be that this is the explanation for Mr Bennett's description of the costs as not being likely to exceed £118,560. It is not altogether satisfactory that matters are unclear in the way that they are but there it is.

5. I mentioned that the costs budget was set on 16 June 2014. That, as I say, is in an order which was made by Master Eastman that day. The consequence of what Mr Bennett has to say about the costs amounting to just over £118,500 is, on the face of it, that there is a small overrun in respect of costs amounting to just £4,000, or so. Mr Nugent, however, explains before me today that there is a concern that in the proceedings before the costs judge, in the event that there cannot be agreement on costs, the Defendant might take the line that the costs recoverable should be considered, as it were, on an item by item basis rather that in a global fashion, with the consequence that the argument is not about whether the costs budget has been overrun to the tune of some £4,000 but is a more specific and focused argument which might result in rather less than the costs budget figure being recoverable. This, then, is the context in which the present application for permission to appeal comes before me.

6. Returning to the order which was made on 16 June 2014, it is worth bearing in mind that, in the order which was made that day, directions were given which included permission for the parties to rely upon expert evidence in the following disciplines: neurology, neuropsychology, psychiatry care, accident reconstruction and employment. Specifically, the order provided, in paragraph 5 under the heading "experts' reports", as follows:

> "The claimant has permission to rely on the following experts whose reports have already been served."

There was then set out a list of experts, including a neurology expert who, unfortunately, has since died with the result that, in paragraph 6 of the order, permission was granted to the Claimant to rely upon an additional replacement neurological expert. The order went on, in paragraph 7, to provide for the exchange of accident reconstruction experts on a date in September 2014. The order then went on to say as follows, in paragraphs 8 and 9:

> "8. The reports (or as a appropriate updated reports) of the neurologists, neuropsychologists and psychiatrists to be exchanged by 4pm on 21st November 2014.
> 9. The reports (or updated reports) of the care experts to be exchanged by 4pm on 23rd January 2015."

The order then made similar provision for the exchange of employment reports (or updated reports) to be achieved by 20 February 2015, before then going on in paragraphs 11 to 14 to make provision for the exchange of joint expert reports. Also, at paragraph 9, under the hearing "trial directions", the order was made that the trial would be in London "with a time estimate of five days."

7. Returning now to the application which was before Master Eastman in January 2016, this was supported by a witness statement made by the Claimant's solicitor, as I say, Mr Gary Bennett, which was dated 19 October 2015. Specifically, in paragraph 4 of that short witness statement, Mr Bennett stated as follows in relation to the period after 16 June 2014:

> "Since then much has happened. It has now become apparent that the original costs budget is not realistic. The original date fixed for trial was adjourned. This has meant that further medical examinations have taken place. There have been joint meetings between the experts. None of them appear to be agreed. It seems that all the experts will have to attend court to give evidence."

Mr Bennett then exhibited to his witness statement a revised costs budget in the sum of £239,643.84. In a short judgment, dismissing the application made by the Claimant, Master Eastman started referring to Practice Direction, section or paragraph 7.6, which he set out. This was in the following terms:

> "Each party shall revise its budget in respect of future costs upwards or downwards if significant developments in the litigant warrant such revisions. Such amended budgets shall be submitted to the other parties for agreement. In default of agreement, the amended budget shall be submitted to the court, together with a note of (a) the changes made and the reasons for those changes and (b) the objections of any other party. The court may approve, vary or disapprove the revisions, having regard to any significant developments which have occurred since the date when the previous budget was approved or agreed."

8. The Master then went on to ask himself whether there had been "a significant development so as to justify the amendment of the budget." He explained that, in his view, there had not been. He stated as follows in paragraph 2:

> "The trial has possibly extended from four to five days, but I do not consider that to be significant in a case of this sort. This was always going to be a contested trial. The previous budget allowed £10,000, for example for attendance of the all the experts as needed. It was not at that stage clear or thought that the experts would not be needed. There was provision made for experts' attendance. An enormous amount of money seems to have been spent above that budgeted for by the claimant on experts' reports between now and then. At the time of the last budget, disbursements for experts ran at just shy of £15,000 and with a further £8,500 to be spent. I am told that nearly £53,000 has been spent so far."

He continued in the next paragraph as follows:

> "In my judgment, this case has gone out of control and the solicitor managing it, it would appear, had, frankly, no regard to or respect for the budget or what was budgeted or allowed to be spent. The numbers that I am shown in the breakdown prepared by that solicitor, Mr Bennett, proposed to be spent and him wanting budgeting for in respect of experts are ridiculous in my judgment…"

The Master then concluded, in the same paragraph, as follows:

> "Putting all this together, I am completely satisfied that this is a budget where there has not been a significant development in any shape or form. What has happened is that this case has taken a course that was predictable and should have been predicted when the original budget was made…"

9. On behalf of the Claimant, it is acknowledged by Mr Nugent that this is an appeal, or a proposed appeal, which entails an attack on the exercise by the Master of a discretion. On this basis, it is accepted that the appropriate guidance is that which was set out by the House of Lords in **G v G** [1985] 1 WLR 647 at page 652, letters (d) to (f), where Lord Fraser said this:

> "…the appellate court should only interfere when they consider that the judge of the first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted but has exceeded the generous ambit within which a reasonable disagreement is possible."

This passage was approved with approval by Brooke LJ in **Tanfern v Cameron-MacDonald** [2000] EWCA Civ 3023, at paragraph 32.

10. Against this background, three proposed grounds of appeal have been raised on the Claimant's behalf. First, it is suggested that Master Eastman "…erred in law and fact to refuse the application to amend the costs budget and find that there had not been a significant development in the case." In support of this ground, the first point which is made is that the claim doubled in size from £1 million to £2 million since the original costs budget was set in June 2014. It is pointed out, in particular, that the increase is attributable to an increase in the value of the future care aspect of the Claimant's claim. Reference is also made to the fact that, since the original costs budget, it has been appreciated that the Claimant is at an enhanced risk of developing Alzheimer's disease. I am not satisfied, however, that these matters are ones which can constitute a significant development for the purposes of the relevant Practice Direction. I agree with the submission which is made by Mr Lewers, on behalf of the Defendant, that a doubling of the size of the claim does not necessarily mean or justify an increase in costs. In any event, it seems to me that there is considerable force in the observation which is also made by Mr Lewers, that the so called developments relied upon by the Claimant would have been capable of being envisaged at the time that the original costs budget was set. I see force, in particular, in the point made that provision was provided for the service of a second report by Maggie Sergeant, the care expert. Furthermore, I

note that the risk of the Claimant developing Alzheimer's disease was discussed by Professor Weller, the Claimant's psychiatry expert, in his first report dated September 2012 with, I am told by Mr Lewers (although I have not seen the report myself) an appendix devoted specifically to that topic; in other words, the risk was addressed in a report produced before the time when the costs budget was set.

11. Other matters relied upon by the Claimant in this context include the fact that the trial was adjourned for a period of between six and nine months as a result of an order made in January 2015. Even leaving aside the fact that the adjournment was apparently (or so I am told by Mr Lewers) the result of the Claimant's own failure to give full disclosure and the inability of one of the experts to examine the Claimant, it does not seem to me to follow that, merely because a trial is adjourned, a significant development can be said to have occurred. It is, of course, possible that an adjournment could amount to a significant development but, in this case, it is difficult to see on what basis this, of itself, might by the position. Mr Nugent, in fairness, recognised that adjournment, of itself, is not always going to amount to a significant development.

12. The suggestion is then made by Mr Nugent, on the Claimant's behalf, that the giving of further disclosure which was ordered by the court in January 2015 amounts to a significant development. I do not regard this as a tenable suggestion in circumstances where it is apparent from the correspondence that the Defendant has sought the further disclosure in February and March 2014, and so several months before the hearing which took place before Master Eastman on 16 June 2014. Mr Lewers makes the observation that, in any event, the type of disclosure which came to be ordered in January 2015 is what might be described as standard for claims of this sort. It included employment records and educational records which, Mr Lewers pointed out, would be expected to be produced. It seems to me, again, that there is force in that submission. Mr Nugent, in fairness to him, was inclined to accept that the giving of the disclosure, itself, would not have amounted to a significant development. His submission entailed a linkage between the giving of the disclosure, when it was given and the effect on the expert evidence which then came to be served. As to that aspect, I again reject the submission that the expert evidence which was served in this case, in any shape or form, amounted to a significant development which was not contemplated or contemplatable when the costs budget was set in June 2014.

13. I have already referred to the fact that the June 2014 order made by Master Eastman itself identified the expert disciplines in relation to which permission was to be given to the parties to adduce. There can be no issue that the expert evidence which came to be served fell within the categories which were identified in that order. Moreover, I am clear that it was always envisaged that the experts would review disclosure of the types of documents which were sought and, ultimately, ordered in January 2015, and that reports would need to be served which dealt with that material.

14. I have previously set out passages from the June 2014 order which refer in several places to the service or exchange of "updated" reports. This is a reflection of the fact that, by the time the June 2014 order was made, the Claimant had already served the experts' reports which were identified in the order itself. The use of the word "updated", therefore, contemplated the service of additional or second or supplemental reports. When one then comes to consider the order which was made a year later, in

June 2015, by Master Leslie, it is possible to see that nothing in that order entailed service of reports which were previously not in contemplation. Specifically, and ignoring for these purposes the report referred to in paragraph 1(a), since this was a report which the Defendant was given permission to rely upon, in paragraph 1(b), provision was made as follows:

> "The parties have leave to serve supplementary reports from their medical experts commenting on the disclosure and witness statements only by 4.00 pm on 20 July 2015."

It is apparent that this paragraph constituted an echo of paragraph 8 in the order made on 16 June 2014 because of the reference in that earlier order to the exchange of "updated reports". The same, essentially, applies to the other paragraphs in the June 2015 order. Paragraph 1(c) provided for preparation of a joint experts' report, as did 1(e). Again, these paragraphs simply mirror the paragraphs which were contained under the heading "joint experts' reports" in the order made a year earlier. The same applies to paragraph 1(d) concerning service of care experts' and employment experts' reports. Specifically as to the care expert evidence, which was adduced on the Claimant's behalf from Maggie Sergeant, Mr Lewers makes the submission that it would be somewhat surprising if a further report was not going to be served in circumstances where the report which was produced in the first instance dated back to 2013. Mr Lewers' submission is that, plainly, this would need updating and that this would have been contemplated by the court in making the order back in June 2014. Mr Lewers suggests that it ought also to have been contemplated by the Claimant's lawyers. I agree with that submission. As a result, it is difficult to see how it can be suggested that the subsequent expert evidence can amount to a significant development in the sense of a development which was significant and previously unexpected.

15. The same, essentially, applies to certain of the other medical evidence adduced on the claimant's behalf. Mr Lewers points out that the relevant doctor's evidence would have to have been served, in any event - by that, I mean his second report. I agree with that submission also. I agree, specifically, with the observation made by Mr Lewers that the doctor would inevitably need to consider the further disclosure given by the claimant. The same, essentially, applies to Professor Weller. It seems to me, again, that there is force in Mr Lewers' submission that his further expert report may well have been delayed because of delays in the giving of disclosure by the Claimant but did not entail a type of additional work which could not have been contemplated when the original costs budget was established back in June 2014.

16. In the circumstances, I see no merit in the proposed first ground of appeal and refuse permission to appeal in relation to it. The Master exercised his discretion in a manner which is not realistically open to challenge by way of appeal in view of the guidance given in **G v G**. I bear in mind in this context, also, that the Master is very experienced in this area of the law and practice and in relation, specifically, to the type of costs budgeting issue which arose for his consideration in January this year.

17. I turn, then, to the proposed second ground of appeal. This is that the Master "erred in a matter of fact by finding that the case had taken a predictable route which should have been predicted when the original budget was made as being a reason for not amending the budget". This proposed ground of appeal, essentially, duplicates the

first proposed ground of appeal. It entails arguments concerning the increasing of the trial length from four to five days notwithstanding, I note, the direction made by Master Eastman in June 2014, which was that the trial should be fixed with a time estimate of five days.

18. I have already addressed other matters which are raised in this context concerned with the adjournment of the trial, the giving of additional disclosure, and the suggested further expert evidence. Another matter raised concerns the mediation which took place earlier this year. However, in circumstances where the Defendant has agreed to pay the Claimant's reasonable costs of that mediation, this is not a matter which assists the Claimant. In the circumstances, I, again, see no merit in this proposed ground of appeal. Again, the Master exercised his discretion in a manner which is not realistically open to challenge by way of appeal in view of the guidance given in **G v G** and followed in the **Tanfern** case.

19. I turn, therefore, to the final proposed ground of appeal which is that the Master "was wrong to hold that there had been no regard for the additional budget". The suggestion is made, in particular, that the Master misunderstood the position and failed to consider and apply the Overriding Objective. Once again, there is no merit in this challenge. The adjournment of the trial did not result in significant additional steps having to be taken and so significant additional costs having to be incurred, nor did the other matters relied upon by Mr Nugent. Again, in my judgment, the Master's exercise of discretion is not susceptible to challenge.

20. Insofar as the Master's observations concerning the costs having "got out of control" are concerned, there seems to me to be force in what he had to say. I have in mind, in particular, that whilst in the approved costs budget, the Claimant included incurred disbursements of £14,844, together with an estimated further £8,500, in the event in the revised costs budget which was before Master Eastman in January this year the figure for incurred disbursements amounted to a somewhat larger amount, namely £50,342. Similarly, in relation to solicitor's time costs, there appears to have been an overspend of nearly £8,500. In short, I consider that there was more than ample justification for the view expressed by the Master.

21. In the circumstances, I am clear that permission to appeal should be refused in relation to all three proposed grounds of appeal. I need not, accordingly, address the matter raised in the respondent's notice, a legal matter, submitted on behalf of the Defendant concerning the ability of the Master to approve incurred costs and, therefore, decline to deal with that aspect.