IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)

No. CH-2019-000230 / D80NE064

[2019] EWHC 2820 (Ch)

Rolls Building
Fetter Lane
London, EC4A 1NL

Tuesday, 3 September 2019

Before:

MR JUSTICE NUGEE

B E T W E E N :

EASTEYE LIMITED — Claimant

- and -

MALHOTRA PROPERTY INVESTMENTS LIMITED & ORS — Defendants

MR C. MORGAN (instructed by Square One Law LLP) appeared on behalf of the Claimant.

MR M. PRYOR and MR F. BANNING (instructed by Clarke Mairs LLP) appeared on behalf of the Defendants.

J U D G M E N T

(Please note this transcript has been prepared from poor quality recording)

MR JUSTICE NUGEE:

1 I have before me an application for permission to appeal, and if permission is granted for the appeal itself, against an order of Deputy District Judge Pescod sitting in the Business and Property Courts in Newcastle-upon-Tyne. The order is dated 3 May 2019. It was an order made without an oral hearing in relation to costs management in this action. As I will come to in more detail, at paragraph 5 of his order, he recorded his decision on a number of matters pursued between the parties. At paragraph 5(iv), he said this:

> "£120,000 is allowed in respect of the Claimant's trial phase and instruction of leading Counsel is not approved."

2 It is that paragraph of his order against which the appeal is sought to be brought. I will say now that I propose to grant permission to appeal. The appeal has, in fact, taken more than half a day to argue, which is no criticism of counsel, and I am satisfied that there are plainly matters which merited proper consideration on appeal and, for those reasons, I have indicated that I will grant permission to appeal.

3 The action concerns properties in the centre of Newcastle in what appears, from what I was told, to be a historic part of the city and, in particular, to a number of properties lying between a street called Cloth Market and a street called Grey Street just north of the cathedral. It is not necessary, for the purpose of this judgment, to explain the complexities of the property holdings which the claimant and defendants, who are all property companies, respectively hold. I was taken on a very careful and immensely helpful tour of both plans of the site and photographs which are before me and which it is difficult to summarise. However, in essence, the claimant has certain property holdings adjacent to Cloth Market including, in particular, a property which can be called the White Hart Yard property, consisting of a number of buildings arranged around a yard, and also an adjacent property, which is called 10 Cloth Market which has alongside it an alleyway known as Ship's Entry. Both White Hart Yard and Ship's Entry, in the latter case through a passageway which has been called the Dogleg, have, or would have were they not blocked, access to a public highway called Grey's Court.

4 There are three defendants but they are all associated companies owning a number of different parcels of land including a parcel which has property on either said of and above the Dogleg and two other parcels adjacent to Ship's Entry, and also, in particular, a historic building which has previously been used as a public house which is called Balmbra's at 6-8 Cloth Market. The photographs indicate that this area of Newcastle is ripe for redevelopment but as was explained to me by counsel, there are a number of historic buildings and it is not surprising, given that and the perplexity of the landholding, that it has taken some time for planning permission to be obtained for development which both respects the site and the requirement for developments to be commercially viable. However, those parties have plans to develop their respective sites.

5 The litigation was triggered when, after a period of what I was told had been mutual cooperation, the parties fell out in September 2017. The defendants, I am told, threatened to exercise what they claim to be rights over Ship's Entry as part of their plans to redevelop Balmbra's. The claimant issued proceedings from declarations they had no such rights and claiming an injunction, and as a result of successive rounds of pleading, the issues have been elaborated on, so that there are now a number of matters in issue for a trial which is now

expected to last twelve days, plus a further three days in relation to judgment and to take place in Newcastle at the end of October this year. There are a number of issues in relation to not only the rights of way and other alleged rights to use access to Ship's Entry as a fire escape but also a claim by the defendants that both White Hart Yard and Ship's Entry are public highways under the Highways Act.

6 That is the shape of the litigation and the order under appeal is a costs budget order. There have been a number of costs budgets prepared but the one which came before the Deputy District Judge included, in the usual way, a Precedent H for each party setting out their proposed figures for the phases still to be heard and the relevant one is the trial phase. The total figure put forward in the trial phase for the claimant in their Precedent H, and I should say this is when the time estimate was slightly shorter, was £210,020, the bulk of that being disbursements as follows: a total of £35,200 was put in the Precedent H for fee earner time of the claimant's solicitors made up of two fee earners, a grade A fee earner in the sum of £24,640 and a grade D fee earner in the sum of £10,560; some relatively minor disbursements totalling £3,840 for experts' costs; other disbursements, which I have taken to be court fees in the sum of £1,480, and the remainder of £169,500 being counsels' fees broken down as to £139,000 for leading counsel and £30,500 for junior counsel, it being the intention of the claimant to instruct both leading and junior counsel. Junior counsel, Mr Charles Morgan, who has appeared before me, has been involved with the case throughout.

7 The hearing, as I have said, was not an oral hearing and took place on paper. In support of it, Gillian Tatt, a partner in the claimant's solicitors, made a third witness statement dated 22 February 2019 and she identified that the defendants, as against the claimant's figure of £210,020, had offered only £120,000 for the claimant's trial phase and that was the figure which appeared in the Precedent R but it was not broken down at all. She, at paragraphs 15 and following, explained that the principal reason why it had not been possible to agree the claimant's costs for trial and trial preparation was because the claimant had budgeted for leading and junior counsel for trial whereas the defendants had asserted that the use of leading and junior counsel was unreasonable and disproportionate. The defendants themselves have not instructed junior and leading counsel and indeed, in their Precedent H, their figure for trial preparation and trial, the brief fee being included in trial preparation, involved a total for counsel (this is junior counsel) of £70,000 for trial preparation and a further £34,000 for trial.

8 Ms Tatt then addressed the guidance given by Evans J in the case of *Juby v London Fire and Civil Defence Authority and Saunders v Essex County Council* (unreported, 24 April 1990), referred to in the **White Book**, and the factors which he had suggested were those most likely to affect the decision whether or not to instruct a leader. She then made submissions as to why instruction of both leading and junior counsel was justified under the headings of "Value" and "Importance to the Claimant", referring in particular to the "complex legal issues, interpretation of historic records, and substantial facts", the overall submission being that the involvement of leading counsel for trial was entirely proportionate. She asked the court to determine the budget on the outstanding issues on the basis of written submissions and without a telephone hearing.

9 For their part, the defendants made submissions in writing dated 22 February 2019. In those submissions, they made it clear at paragraph 11 that they contended that the use of leading and junior counsel was neither reasonable nor proportionate. What they said was this, and this was specifically in relation to the witness statements, as the claimant's Precedent H had claimed a figure for use of leading counsel in preparing witness statements, but the points are deployed later in relation to both trial preparation and trial:

> "Use of both Leading and Junior Counsel in this phase is neither reasonable nor proportionate. The case concerns rights of way over two relatively short and somewhat insignificant alleyways in central Newcastle. The rights involved are not unimportant to the parties but also cannot be described as being of any great or transcending importance. The Claimant has to date instructed an experienced Junior Counsel (Mr Charles Morgan of 1978 call). Leading Counsel is an unnecessary, unreasonable and disproportionate luxury. The Claimant is of course entitled to avail itself of this luxury if it wishes but not at the Defendants' expense..."

10 Then under "Trial preparation" at paragraph 13, the defendants repeat their objection to the use of leading counsel:

> "The litigation is no so complex as to necessitate the use of Leading and experienced Junior Counsel..."

11 Under "Trial" at paragraph 18, they said this:

> "The observations set out in paragraph 11 above regarding the use of Leading and Junior Counsel are repeated..."

12 At 19:

> "Taking the above into account the Defendants have offered £90,040 for counsel, all of which is allocated to Junior Counsel as opposed to the £169,500 for Leading and Junior Counsel..."

13 The overall amount offered against that phase was £120,000. It is possible by comparing the claimant's Precedent H with the submissions of the defendants to identify how that £120,000 is broken down. What they were, in effect, offering is that the sum claimed for the grade A fee earner should be allowed but be the only sums allowed for fee earner time. The disbursements for the experts and other disbursements should be allowed. The balance of £120,000 should be available for counsel, namely £90,040 which is referred to in those submissions. It is against that background that the Deputy District Judge made the order that he did. It is apparent from his order that he preferred the submissions of the defendants to the submissions of the claimant.

14 In this appeal, Mr Morgan submits that although that is apparent, the reasons why he preferred the submissions of the defendants to the submissions of the claimant are not apparent. That, he says, is in itself a ground of appeal and before me he has formulated, without objection from Mr Pryor who appears for the defendants, a proposed new ground of appeal, Ground 1A, which is to the following effect:

> "The Deputy District Judge gave no reasons for his decision. The reason cannot safely or reliably be discerned from the material before the Judge and neither the basis upon which the Judge approached the questions of reasonableness and proportionality nor the factors considered by the Judge nor his conclusions in respect of them can be understood or properly challenged. His decision cannot stand and must be taken afresh by the court hearing this appeal."

15 On that basis, he is inviting me not only to set aside the Deputy District Judge's order insofar as it relates to the trial phase for the claimant's budget but to redo the exercise

myself and on the basis of the material before me invites me to approve the sum as put forward in the claimant's Precedent H for leading and junior counsel, although given that the trial length has now been increased, it is common ground the figures would, in any event, have to be updated to be reflective of the trial as now anticipated.

16 The argument has concentrated very largely on the question whether the reasons given by the Deputy District Judge were adequate or not. For that, I was referred by both parties to the decision of the Court of Appeal in *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, a decision in which the Court of Appeal considered three separate cases in which an appeal had been brought on the basis that the judges below had given inadequate reasons for their decisions.

17 The judgment of the court, handed down by Lord Phillips of Worth Matravers MR, is lengthy and cannot easily be summarised but I was referred in particular to [14] and [27]-[30] which deal specifically with appeals in relation to costs. One of the three cases before the court concerned an appeal against a costs order after trial in which the judge had made an order that there be no order as to costs without spelling out any particular reasons for making such an order. At [14], the Court of Appeal said this in relation to costs orders:

> "Decisions on liability for costs are customarily given in summary form after oral argument at the conclusion of the delivery of the judgment. Often no reasons are given. Such a practice can, we believe, only comply with article 6 [of the European Convention on Human Rights] if the reason for the decision in respect of costs is clearly implicit from the circumstances in which the award is made. This was almost always the case before the introduction of the new Civil Procedure Rules, where the usual order was that costs 'followed the event'. The new rules encourage costs orders that more nicely reflect the extent to which each party has acted reasonably in the conduct of the litigation. Where the reason for an order as to costs is not obvious, the judge should explain why he or she has made the order. The explanation can usually be brief."

18 Then at [27]-[30], they reverted to the question of costs and at [30], they said this:

> "Where no express explanation is given for a costs order, an appellate court will approach the material facts on the assumption that the judge will have had good reason for the award made. The appellate court will seldom be as well placed as the trial judge to exercise a discretion in relation to costs. Where it is apparent that there is a perfectly rational explanation for the order made, the court is likely to draw the inference that this is what motivated the judge in making the order. This has always been the practice of the court - see the comments of Sachs LJ in *Knight v Clifton* [1971] Ch 700 at 721. Thus, in practice, it is only in those cases where an order for costs is made with neither reasons nor any obvious explanation for the order that it is likely to be appropriate to give permission to appeal on the ground of lack of reasons against an order that relates only to costs."

19 In the event, they dismissed the appeal in the case where the appeal was against the costs order on the basis that the reasons deducible from the judge's provisional order as to costs had to be that he thought the action had resulted in a draw and that that was a conclusion which they considered was open to him (see at [109] to [117]).

20 In the present case, the thrust of Mr Morgan's submission has been that it is simply not possible for the claimant to understand why the Deputy District Judge came to the conclusion that he did that the defendants' submissions should be preferred and that it is not possible for the claimant to know whether the Deputy District Judge had even applied the right test. It was common ground before me, and supported by the authorities to which I was referred, that the correct test for whether the costs of employing leading counsel should be allowed on an assessment of costs is that given by Woolf LJ in *Dudley Magistrates Court ex p Power City Stores Limited* (1990) 154 JP 654 where Woolf LJ said this:

> "...the clerk was asking himself the wrong question. What he was asking himself was this: could a junior counsel or a senior solicitor reasonably have conducted the case on behalf of the applicants? The answer he came to was that a senior solicitor or junior counsel could have properly conducted the matter on behalf of the applicants. However [counsel for the receiving party] submits that what he should have asked himself was whether the applicants acted reasonably in employing leading counsel, which is an entirely different question. The answer to that question would be very different [the transcript reads 'difficult' but it must mean 'different'] on the facts of this case from the answer to the question with the justices' clerk obviously asked himself. You can have many situations - and [counsel for the receiving party] accepts that this is one such situation - where junior counsel or a senior solicitor could adequately deal with the case. But it was none the less reasonable for a defendant to employ leading counsel."

21 Mr Morgan says one does not know whether the Deputy District Judge asked himself the right question, that is would it be reasonable for the claimant to employ leading counsel, or asked himself the wrong question, namely, could experienced junior counsel have conducted the case himself? Nor does one know, he says, why he reached the conclusion that it was not appropriate to incur the costs of leading counsel, whether it was the case that it was not reasonable, or whether it was the case where although reasonable it was not proportionate, having regard to the various factors identified by Evans J such as the complexity of the case, the value of the case, and the like. It is not necessary for me to identify the list of factors which were identified by Evans J in that case.

22 As I say, there was no dispute between the parties as to the principle. It is accepted that since the purpose of costs budgeting is to set a fairly prescriptive framework in advance of the assessment of costs that similar considerations should apply when setting a budget as would apply when assessing costs on a detailed basis after trial: see the remarks of the Court of Appeal in *Harrison v University Hospitals Coventry & Warwickshire Trust* [2017] EWCA Civ 792 which make it clear that on a detailed assessment in a case where a costs management order has been made, the court is empowered to sanction a departure from the receiving party's last approved or agreed costs budget, be it upwards or downwards, only if it is satisfied that there is a good reason for doing so and hence the process of budgeting costs imposes "a significant fetter" on the court's discretion. In those circumstances, there is no dispute that the principles applicable in a detailed assessment at the end of the trial as to whether it was reasonable to employ leading counsel, are equally applicable to the costs budgeting process before trial as to whether the costs of employing leading counsel should be approved or not. In those circumstances, Mr Morgan submits that the reasons that have been given for the Deputy District Judge's order are not adequate.

23 In accordance with the guidance given in the *English v Emery* case, the defendants' solicitors asked whether there were any further explanations of the reasons for the Deputy

District Judge's order but the response that was received was that there was nothing in his notebook which indicated what his reasons were. For his part, Mr Pryor said that although briefly expressed, the words at paragraph 5(iv) of the order do amount to an explanation of why the Deputy District Judge only allowed £120,000 for this phase: he, in effect, indicated that he had accepted the submissions of the defendants and, therefore, that he had concluded it was not reasonable or proportionate for the claimant to instruct leading counsel.

24 I intend to clear out of the way some points which do not seem to me to be significant. There was a suggestion in Mr Morgan's skeleton argument that what the Deputy District Judge was attempting to do, wrongly, was to preclude the claimant from recovering any costs in relation to leading counsel and that that was not something that he should have been doing. He referred, and again there was no dispute that he was right about this, to Practice Direction 3E, paragraph 7.3, which reads:

> "In so far as the budgeted costs are not agreed, the court will review them and, after making any appropriate revisions, record its approval of those budgeted costs. The court's approval will relate only to the total figures for budgeted costs of each phase of the proceedings, although in the course of its review the court may have regard to the constituent elements of each total figure..."

25 Also, to paragraph 7.10 of the Practice Direction which reads:

> "The making of a costs management order under rule 3.15 concerns the totals allowed for each phase of the budget. It is not the role of the court in the cost management hearing to fix or approve the hourly rates claimed in the budget. The underlying detail in the budget for each phase used by the party to calculate the totals claimed is provided for reference purposes only to assist the court in fixing a budget."

26 I do not read the Deputy District Judge's order as precluding the claimant from recovering, should they choose to employ leading counsel and should they succeed at trial, and obtain a costs order, any costs which have, in fact, been incurred on leading counsel. Mr Pryor made it clear that it was not the defendants' position that the claimant would, in those circumstances, only be able to recover the costs of instructing junior counsel. As the paragraphs in the Practice Direction, to my mind, make clear, although the court in making costs management decisions and approving the costs budget for a particular phase may well have regard to the way in which those costs have been broken down in the parties' respective presentations, the order itself does not do more than fix the total budget for each phase.

27 In this case, the total budget fixed by Deputy District Judge Pescod was £120,000 for the claimant's trial phase and it is up to the claimant whether it spends all of that on junior counsel, or spends some of it on junior counsel and some on leading counsel, or indeed spends all of it on leading counsel. If they succeed in obtaining a costs order, they can expect to receive £120,000 for the trial phase. It would be possible to depart from the budgeted amount only if good reason is shown. So I do not regard that, in itself, as being a flaw in the Deputy District Judge's order. Rather, I agree with Mr Pryor. The words which the Deputy District Judge has added to paragraph 5(iv) in his order are not intended to limit recoverability below the £120,000 so that nothing could be recovered in respect of leading counsel, but are intended to explain why the figure of £120,000 has been approved rather

than the higher figure sought of £210,000; and that is because the Deputy District Judge was not satisfied it was appropriate to employ leading counsel.

28 Another point which, to my mind, can be cleared out of the way is the question whether this decision is to be described as a case management decision or not. It is clearly part of the court's overall powers of managing cases but it is more precise to call it a costs management decision. Equally, I do not intend to spend time on whether it is properly described as a discretion, or as is normally referred to a structured discretion, or an exercise in assessment or judgment. It is plain that many costs decisions can properly be described as discretionary decisions. The incidence of costs after trial is a classic case where costs are in the discretion of the court, and the court has a full range of options available to it and may order one side to pay the other side's costs, or a proportion of the costs, or costs of particular issues, or make no order as to costs, or even cross orders as to costs.

29 This budgeting decision is not quite like this. This is a binary decision, as was suggested to me by Mr Pryor, as to whether it was appropriate to allow the costs of employing leading counsel or not. There is, in fact, a subsequent decision as to whether, if the costs of employing leading counsel are allowed, that should be the costs of employing leading counsel alone, or leading and junior counsel. That is a supplementary question to the question whether it was or was not appropriate to allow the costs of employing leading counsel. If I had to characterise it, I would characterise that not so much as the exercise of a pure discretion but as an exercise of judgment.

30 The practical result, however, does not seem to me to turn on how one characterises it. It is well established that, in general, appellate courts are slow to interfere with decisions of lower courts and would generally only do so in cases where it can be shown that the lower court has gone wrong. As is well known, showing that the lower court has gone wrong cannot be achieved simply by asking the appellate court to reach a different decision as if it were deciding the case for itself. One has to identify a flaw in the lower court's decision. Such flaws usually, but not exhaustively, have been a failure to take relevant matters into account, or taking irrelevant material into account in reaching a decision, reaching a reason that no lower court could properly have reached, or going wrong on a question of principle, or, as the *English v Emery* case identifies, reaching a decision that is so unreasoned as to be unfair because it does not enable the losing party to know why it is that they have lost.

31 Having put aside those considerations, I come to what I consider to be the critical question which is whether the reasons expressed in his order by the Deputy District, which I will read again, "and instruction of leading counsel is not approved", do or do not constitute such a failure to give reasons as to amount to a ground of appeal in themselves. I have had cogent argument from both counsel but, in the end, I find myself persuaded to prefer the submissions of Mr Pryor for the defendants which is that although it is true that the reasons are briefly expressed, they are given. As the Court of Appeal itself says in the *English v Emery* case, in costs matters, decisions are often expressed summarily.

32 In the present case, there was a stark choice between the claimant's position which was that leading counsel was justified and reasonable, which would give a figure of £210,000, and the defendants' position, which was that leading counsel was not justified or reasonable and hence a figure of £120,000 should be approved. The Deputy District Judge really had to choose between them. The reasons for the respective positions were helpfully identified by Ms Tatt's witness statement which set out under the various heads the matters urged by the claimant on the court, and by the defendants' written submissions which (more than once) simply say that the case did not merit the employment of leading counsel. It is not irrelevant

that the particular Deputy District Judge had previously been a fulltime District Judge and was now retired, and I was told an experienced judge. It is not irrelevant that he himself had seen this case twice before, both for case management and costs management purposes and that as the Court of Appeal say in *English v Emery*, judges should be assumed to know what they are doing unless it can be shown that they have gone wrong.

33 I think that on the material that I have been shown, it is possible to discern from the Deputy District Judge's very briefly expressed reasons that he preferred the submissions of the defendants as to the appropriateness of employing leading counsel and that that can only have been because he was not persuaded that the value, complexity, and heaviness of the case justified leading counsel. As I have suggested, that is ultimately a question of judgment or assessment and even if he had spelled out at great lengths what the factors were, I rather doubt that at the end he would have said more than having regard to the perceived complexity, length, heaviness, importance, and value of the case he was not satisfied that it was reasonable and proportionate to engage leading counsel. I take the point that the claimant is left not knowing precisely whether he thought it was not reasonable, or although reasonable was not proportionate, but the overall message is clear that he was not satisfied that this was a case that justified leading counsel.

34 That, I think, was sufficient to satisfy the requirements laid down by the Court of Appeal in *English v Emery*. It is not, in general, conducive to the efficient and cost-effective dispatch of costs management decisions if every part of those decisions has to be justified with extensive reasons like a judgment after trial. In those circumstances, I am not satisfied that Ground 1A of the Grounds of Appeal is made out.

35 There remains Ground 1 of the Grounds of Appeal. Ground 1 sets out a number of reasons why it is said that the Deputy District Judge's judgment is wrong and seeks to rely on the nature of the case, namely its importance, value, and legal and factual complexity. It is the case that this is not, and Mr Pryor did not suggest that it was, an entirely simple and routine case. It will involve an investigation into the history of the area spanning 200 years or so. It does involve two experts on each side, one dealing with the highways issue, their evidence being largely directed to what the historical evidence is as to usage, and what inferences can properly be drawn from it, the other being surveyors who, as I understand it, have investigated the physical condition of the properties in question and what inferences can safely be drawn from that as to their historic use.

36 It is also the case that there were a large number, I am told some 50 or so, witnesses of fact, although many of the defendants' witnesses, I understand, are quite short and amount to evidence as to the use they made of the alleyways some years ago. It is the case that the law involved requires some specialist understanding both of the law of easements and the law in relation to highways. I have found it much less easy to discern the potential significance of the claim. It is clear that Mr Morgan is suggesting that the defendants have advanced claims in relation to the properties in the belief that that would enhance their negotiating position, and it is a reasonable inference that that is the case. However, the extent to which even successful assertion of public rights of way over these properties would, in practice, be an obstacle to the claimant's planned development of the properties, or will affect the value of the properties is not something for which there is any real evidence before the court or on which Mr Morgan, for perfectly understandable reasons, has relied.

37 There is some evidence as to the value of the claimant's properties, or at any rate what the claimant offered to sell them for, which, as Mr Pryor said, is not very strong evidence for what they are actually worth. There was no evidence as to the impact of this litigation on

the value of the properties involved. It is no doubt, as is accepted, not unimportant to the parties to clear up the question of highways and, without it, it might well be very difficult to progress the proposed development, but I do not know how significant the impact of this litigation on the development might turn out to be.

38 Those factors are all factors that were put before the Deputy District Judge in Ms Tatt's witness statement on the one hand and the defendants' submissions on the other. Had it been a matter for me, I can well see that there is much to be said on those factors, but that is, as Mr Pryor reminded me, not the exercise on which an appellate court is embarked. An appellate court is not there to substitute its own view on the material placed before it in substitution for the decision in the lower court. The appellate court is there to set aside decisions which are wrong.

39 In order to find that the decision is wrong, there does have to be a degree of wrongness which can be characterised as one which is perverse or could not be reasonably reached by the court below. I find it impossible to conclude, despite what I might or might not have done had it been a matter for me, that the Deputy District Judge has gone wrong in deciding that the case would not have justified the employment of leading counsel.

40 In those circumstances, it seems to me that I am obliged to refuse this appeal and allow the Deputy District Judge's order to stand. It will, of course, be open to the claimant if successful to seek to persuade whoever conducts the detailed assessment to depart from £120,000 for the trial phase (or, rather, the substituted figure given the increased length of the trial) but as already referred to, it would have to show good reason to do so.

41 I have been conscious of the fact that it is much easier for a trial judge after trial to form a view as to whether the employment of leading counsel was reasonable or not than it is for a costs management judge to form a view before trial. At one stage, I flirted with the idea of devising a way in which that issue could be left to the trial judge. However, it does seem to me, in circumstances where I am not persuaded that there is any need to interfere with the Deputy District Judge's order, that the question does not arise. In any event, although it is true that it is much easier to determine subsequently whether the case was sufficiently heavy to merit leading counsel at trial, the whole process of costs budgeting is designed to give both parties, both the paying party and the receiving party, as much certainty as can reasonably be achieved before trial as to the costs recoverable after trial and it is a necessary feature of achieving that that the parties have to trust the costs management judge to take a view as to the position, even if that is bound to be a less well-informed decision than a decision made retrospectively.

42 Obtaining certainty, or a reasonable degree of certainty, as to the budget necessarily involves sacrificing the greater degree of precision that can be obtained by looking back as to how the trial, in fact, developed as opposed to predicting how the trial is likely to happen. But this is the price that has to be paid to achieve the benefits of costs budgeting at all.

43 In those circumstances, I will dismiss this appeal.

CERTIFICATE

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This transcript has been approved by the Judge