Case No: SC-2021-BTP-000671

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 22/11/2021

Before :

COSTS JUDGE ROWLEY

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Between:

Carl Gibbs (as Administrator of the Estate of Anita Jarrett Deceased)	**Claimant**
- and -	
King's College NHS Foundation Trust	**Defendant**

- -
- -

Steven Green (of **Irwin Mitchell LLP**) for the **Claimant**
Gareth Jones (of **Keoghs**) for the **Defendant**

Hearing dates: **21-22 September 2021**

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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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Costs Judge Rowley:

1. The parties came before me in September for the detailed assessment of the claimant's bill of costs. Those costs arose from a clinical negligence claim brought by the claimant in respect of the defendant's treatment of his mother.

2. The electronic bill of costs included the following entries;

   i) Line 99 - an issue fee paid of £10,000. (22 February 2017)

   ii) Line 129 - 24 minutes of time by a paralegal for "considering the file in light of court fee remission." (26 May 2017)

   iii) Line 506 – 6 minutes by a paralegal in "considering file in light of fee remission." (8 November 2018)

3. The apparent discrepancy between the fee being paid in February 2017 and fee earners subsequently considering a fee remission led to the following point of dispute:

> "The Claimant was self-employed, and was in receipt of Employment and Support Allowance (ESA) as well as the enhanced Living Component of Personal Independence Payment (PIPL), and the enhanced rate of the Mobility Component of Personal Independent Payment (PIPM). The Claimant would be eligible for an issue fee remission and incurring the fee is in reasonable costs. The Claimant is put to proof that an application for issue fee remission was considered, prepared, and the outcome of the same."

4. The reply to that point of dispute was set out in the following terms:

> "There is no requirement for a Claimant to mitigate their loss by reliance on the public purse. The Claimant relies on the Court of Appeal decision of Peters v East Midlands Strategic Health Authority [2010] QB 48, specifically paragraph 53 and the decision of Deputy District Judge Jones in Cook v Malcolm Nicholls Ltd Coventry County Court (11 April 2019)."

5. At the hearing, Mr Jones for the defendant, queried whether or not a fee remission application had been made and, if it had, whether it had been granted. At that point, the defendant was obviously checking whether or not the fee of £10,000 should have been claimed in the bill at all. He did not accept that the case of Peters was relevant since it related to the quantum of damages rather than costs but did accept that the case of Ivanov (see below) was potentially relevant. In particular, he relied upon paragraph 57 of the Ivanov judgement where it was said that the thrust of the relevant case law referred to the claimant having the opportunity to elect as to whom he should look towards in order to recover the fee that he has expended. The tenor of Mr Jones's submissions was that, if an application had been made and granted but the claimant had decided to pay the court fee anyway, then that was not a reasonably incurred cost.

6. Mr Green, for the claimant, clarified matters regarding the second and third entries in the bill to some extent. He said that no application for fee remission had been made and there had just been some brief consideration after the event (i.e. of payment of the fee). The fact that the fee earners had been thinking about fee remission could not carry any weight regarding the election to pay the fee at the time. Mr Green confirmed to me that the file notes recording the time claimed did not amplify this explanation.

7. In response, Mr Jones submitted that consideration after the event could still matter because there was a three-month period in which a claim could be made for a refund where a party was entitled to fee remission. He said that a consideration of whether a fee had been reasonably incurred should depend upon the facts of the case and therefore the attendance notes relating to the consideration of whether to apply could cast light on the reasonableness of the sum paid. It should not depend on a matter of principle as Mr Green had submitted (see below). If an application would have been made but for it being out of time, then that would put a different complexion on the reasonableness of incurring the fee.

8. Mr Green had produced a skeleton argument on this item before the hearing. Notwithstanding the reference to the cases of Peters and Cook in the reply to the points of dispute as being relevant authorities, Mr Green actually relied squarely upon the decision of HHJ Lethem on 17 January 2020 in the County Court at Central London in the case of Ivanov v Lubbe.

9. In that case, the defendant paying party relied upon CPR rules 44.3 and 44.4 to argue that a cost which could be avoided through fee remission ought to be disallowed as being unreasonably incurred. By contrast, the claimant argued that the issue was one of mitigation of loss. Incurring the court fee was not a failure to mitigate loss because the real issue was who should bear the burden of the fee – the tortfeasor on the one hand or the state on the other?

10. HHJ Lethem considered that the burden of proof lay with the claimant. Rule 44.3 clearly placed that burden on the receiving party to satisfy the court that the costs were reasonably incurred and reasonable in amount. The judge did not accept that there was any unpredictability in applying for fee remission which was in fact a scheme regularly used by litigants in person. He described the crucial question in the following terms at paragraph 50:

> "The core argument is whether it is reasonable to expect a Claimant to use the scheme or alternatively whether this places a burden on the taxpayer that is unreasonable. In this respect I agree with [claimant's counsel] that there is a loss where fee remission is utilised. The public purse is depleted by the amount that would otherwise have been paid. On this basis there is less in the public purse to devote to the justice system as a whole. Thus, any suggestion that there is not a loss where fee remission is utilised is misconceived. I am satisfied that [claimant's counsel] is right to characterise the dispute as over who bears the loss, the public purse or the tortfeasor."

11. At paragraph 54, HHJ Lethem records the difference between damages and costs in terms of the reversal of the burden of proof on a standard basis assessment. The

defendant counsel apparently could not identify any other relevant factor distinguishing damages from costs and consequently the judge asked himself whether or not that reversal of proof was sufficient to disapply the Peters decision which concerned the issue of damages. He decided that it was not and found Peters to be of assistance when considering the opportunity for an innocent party to elect to pursue the tortfeasor where he has two potential avenues of recompense. In particular, he cited paragraph 89 of Peters regarding whether it was reasonable for a claimant to believe that a wrongdoer should pay rather than the taxpayer. Paragraph 89 says:

> "There is much to be said for the view that it is reasonable for a claimant to prefer self-funding and damages on the simple ground that he or she believes that the wrongdoer should pay rather than the taxpayer and/or council taxpayer. In other words, it is not open to a defendant to say that a claimant who does not wish to rely on the State cannot recover damages because he or she has acted unreasonably… We heard no argument on this approach to the mitigation issue and we express no concluded view about it."

12. Similarly, HHJ Lethem referred to the case of Bee v Jenson (No.2) [2007] All ER 791 where the claimant was entitled to look to the wrongdoer rather than to rely upon insurance that the claimant already possessed. He also referred to the case of Parry v Cleaver [1970] AC 1 which had been cited by the claimant's counsel and where Lord Reid had said in vivid terms:

> "It would be revolting to the ordinary man's sense of justice, and therefore contrary to public policy, that the sufferer should have his damages reduced so that he would gain nothing from the benevolence of his friends or relations or of the public at large, and that the only gainer would be the wrongdoer. We do not have to decide in this case whether these considerations also apply to public benevolence in the shape of various uncovenanted benefits from the welfare state, it may be thought that Parliament did not intend them to be for the benefit of the wrongdoer."

13. Having cited these various authorities, HHJ Lethem came to the conclusion at paragraph 55 that:

> "These cases represent a formidable body of case law that allows the Claimant to legitimately elect to make their claim against the tortfeasor as opposed to relying on alternative sources of funding. [The defendant's counsel] has not been able to suggest any fundamental distinction that would lead to a diametrically different decision whether loss is represented by a hearing fee as opposed to a head of damage."

14. Consequently the judge found it was reasonable for the claimant to pass on the cost of the hearing fee to the defendant.

15. Mr Green took me through the Ivanov decision at some length and described it as a binding authority. When I queried that description, he downgraded it to being a very

persuasive authority. Following Mr Jones's reply, I indicated to the parties that I did not think that the cost was recoverable and that I did not agree with the Ivanov decision. I informed Mr Green that I appreciated this was likely to be a matter of some importance to his firm and that as such I proposed to provide written reasons for my decision. Since there would be conflicting decisions, I would grant permission to appeal should he wish to take matters further. We concluded the remainder of the detailed assessment and I am now providing those written reasons.

Decision

16. Since this is an assessment on the standard basis, the starting point is CPR rule 44.3(2):

> "(2) Where the amount of costs is to be assessed on the standard basis, the court will –
>
> (a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and
>
> (b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party."

17. The burden of proof is clearly on the receiving party to demonstrate that the costs are reasonable and proportionate. In this case the claimant, as receiving party, has provided no evidence to demonstrate that this item of costs has been reasonably incurred. In particular, there is no evidence as to the thought process in incurring the court fee of £10,000 in circumstances where the claimant was, sadly, very ill and presumably might have been eligible for fee remission. The two entries in the electronic bill subsequent to the payment of the court fee suggest that the paralegal looking at the case at the time thought there may have been a fee remission application in place.

18. Consequently, on the ordinary principles of a standard basis assessment, the court must be in some doubt as to whether or not a court fee has been reasonably and proportionately incurred. For the remainder of this decision I proceed on the basis that a fee remission was available. The claimant was too ill to work and, absent any contrary information, appears very likely to have been entitled to a fee remission.

19. It clearly would not have been too difficult for the claimant and her solicitors to make an application for fee remission. If the application had been turned down then that would be the end of the defendant's challenge. In my view, the costs of making an application where the claimant may potentially be entitled to fee remission are recoverable between the parties. The paying party may well take the point when it comes to a detailed assessment and time spent to establish the position, in my view, generates costs which are reasonably incurred in principle.

20. Consequently, if, as appears to be the case here, it was simply overlooked, should the court allow the fee as being reasonably incurred in any event? In my judgment the answer is no.

Damages

21. A party bringing a claim for damages has to mitigate the loss suffered as a result of the wrongdoing. Whilst this is often described as a duty to mitigate, a number of judges have explained that this is not quite right. For example, Sir John Donaldson MR in The Solholt [1983] 1 Lloyd's Rep 605 said:

> "A plaintiff is under no duty to mitigate his loss, despite the habitual use by the lawyers of the phrase 'duty to mitigate'. He is completely free to act as he judges to be in his best interests. On the other hand, a defendant is not liable for all loss suffered by the plaintiff in consequence of his so acting. A defendant is only liable for such part of the plaintiff's loss as is properly caused by the defendant's breach of duty."

22. The extent of the loss properly caused by the defendant's breach of duty has always been a battleground between parties. In Peters, the question was whether or not the claimant's future care should be paid for by the wrongdoer or left to the care provided by the State. The Court of Appeal concluded that the claimant did not need to take the risk involved in the local council's provision of accommodation and as such made out her claim that her need for privately funded accommodation was a loss that had been caused by the defendant's breach of duty.

23. In similar ways the courts in the other cases cited in Ivanov concluded that the claimant had made a reasonable choice to claim a cost from the wrongdoer rather than from some other source. As such they satisfied the doctrine of mitigation which was described by Leggatt J (as he then was) in Thai Airways International Public Company Ltd v KI Holdings Co Ltd (formerly known as Koito Industries Ltd) & Another [2015] EWHC 1250 (Comm) as follows at paragraph 33:

> "The basic test which the doctrine of mitigation involves is whether the claimant has acted reasonably in response to the defendant's wrong. Insofar as the claimant has acted reasonably, costs and benefits accruing to the claimant are included in the calculation of damages. Insofar as the claimant has not acted reasonably, the claimant's damages are assessed as if it had."

24. If it is assumed that mitigation in respect of damages is akin to mitigating the extent of the costs incurred, has the claimant acted reasonably in this case by not completing a fee remission form but simply paying the court? In the absence of any explanation or evidence in this context, it seems to me that inevitably the question has to be answered in the negative. The assessment of costs must then proceed as if he had acted reasonably, using the Thai Airways formulation, which would mean there being no issue fee paid because a fee remission could have been claimed.

25. In Ivanov, the claimant put the argument in respect of mitigation of loss as being a question of whether the loss should be borne by the wrongdoer or the State. As the submissions to HHJ Lethem record, if the claimant had taken advantage of the fee remission then she would have sustained no loss. The description of her mitigating her loss therefore is inapposite. It is in fact a question of whether it was reasonable for her to incur an expense. The loss not actually incurred by the claimant, having used the fee

remission scheme, is then said to be transposed to the State on the basis that it does not have to be paid by the wrongdoer.

26. The claimant's counsel in Ivanov is said to have described the idea that there was in fact no cost if the fee remission scheme applied as being "misconceived" because there was still a cost to the State where parties litigate. HHJ Lethem agreed with the claimant's counsel that there was a loss where fee remission is utilised because "the public purse is depleted by the amount that would otherwise have been paid."

27. As far as I can see, there was no evidence put forward by the claimant's counsel as to this loss to the State and it was submitted as essentially a matter of common sense. In other words, where court proceedings are commenced, the court will expect to receive a fee in accordance with the Civil Procedure Fees Order 2008 (as amended). If it does not receive that fee, then there is reduced income to the Court Service and that affects the administration of justice overall.

28. I regret to say that I do not think that is necessarily correct. It seems to me to be equally plausible that, by bringing in a fee remission scheme, Parliament would expect all those who qualify for that remission to use it. After all, the fees often represent a significant sum: here it was £10,000. As such, any calculation made of the number of people being exempt from using court fees by Parliament would be considered prior to the bringing in of the scheme and, where appropriate, when it was adjusted thereafter. To the extent that a person entitled to use the scheme did not do so, that would then be an unexpected lessening of the cost in Parliament's calculations. The fact that legally aided claimants are specifically prohibited from using the fee remission scheme by the Order, suggests, in my view, that Parliament was alive to the extent of the cost likely to be incurred and took the view that fees for legally aided claimants should come from the Legal Aid budget rather than the Court Service budget.

29. It would also have been possible for Parliament to require paying parties to reimburse the State for fees foregone where the Claimant had been entitled to a fee remission in the first place. That would be a similar approach to where injured claimants have received benefits as a result of their injuries and the wrongdoer is subsequently required to meet the cost of those benefits provided by the State via the Compensation Recovery Unit.

30. It may be that neither of these possibilities were specifically contemplated when the fee remission scheme was introduced. But nor is there anything before me or, on the transcript of Ivanov, before the court there to evidence an unexpected shortfall to the Court Service. What is clear from the updates available on the Government website is that the application form EX160 and its accompanying explanatory documents are revised on a regular basis. Such amendments must be the product of consideration of the scheme and how it is functioning.

31. It does not seem to me to be appropriate to conclude that a claimant who uses the fee remission scheme, even though they might have been entitled to oblige the wrongdoer to pay the fee, has caused the State to lose money it was expecting to receive. It is just as likely that such claimants are precisely following a model designed by the State. A Claimant who pays a court fee they did not have to pay, which they may not recover and which involves some cash flow impact on them or their lawyers seems to me to be

a less likely prospect on any Government model and is at least as likely to upset the State's calculations.

32. Paragraph 89 of Peters refers to recovery of a loss that has been incurred, not to the incurring of an expense after the damages have been settled. It does not seem to me that a decision to incur an expense for another party to pay, rather than the tax-payer as a whole, can justify the incurrence of a fee which would otherwise not have been required. In this case, there is nothing to suggest that the claimant even consciously took that decision. I do not accept that the receiving party is in a position to elect whether or not to require the opponent to pay court fees where that party is entitled to a fee remission.

Damages and costs

33. The foregoing is all predicated on the basis that there is a comparison to be drawn between mitigation of loss of damage and the reasonable incurrence of fees and expenses. In my judgement that comparison is not borne out. It is not unusual in bills of costs drawn in personal injury or clinical negligence cases for certain claims for costs to be challenged on the basis that they were in fact damages and should have been claimed in the original proceedings rather than the detailed assessment proceedings. For example, the treatment cost incurred by a doctor rather than a medical report prepared, possibly by the same doctor. There are also items which can be claimed as damages where similar items cannot be claimed as costs. A simple example would be the cost of travelling to see a medical expert such as a train ticket which would be an item of special damage. However a train ticket purchased by the claimant for visiting his solicitor to discuss the claim would not be recoverable as a cost of the litigation.

34. In the context of set off, Lord Scott in Lockley v National Blood Transfusion Service [1992] 1 WLR 492 said:

> "A set-off of costs against costs, when all are incurred in the prosecution or defence of the same action, seems so natural and equitable as not to need any special justification. I would expect a party objecting to the set-off to give some special reason for the objection. It is, in my opinion, less obvious that a set-off of costs against damages would always be justified."

35. The suggestion, it seems to me, is that there is a qualitative difference between the damages sought to compensate the claimant for their losses and the legal costs incurred in pursuing the wrongdoer through the courts. The essence of damages is a remedy to fill a hole caused by the wrongdoer. The essence of costs is, by comparison, the building of a structure which will enable the damages claim to be brought forward. Any reduction in damages fails to fill the hole: any reduction in costs simply reduces the size of the structure required. Only the damages reduction has any detrimental impact upon the claimant.

36. The oft quoted dicta of Leggatt J (as he then was) in Kazakhstan Kagazy Plc and Others v Zhunus and Others [2015] EWHC 404 (Comm) concerns reasonableness in incurring costs albeit that it is often prayed in aid in respect of proportionality. At paragraph 13 he said:

> "The touchstone is not the amount of costs which it was in a party's best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances. Expenditure over and above this level should be for a party's own account and not recoverable from the other party. This approach is first of all fair. It is fair to distinguish between, on the one hand, costs which are reasonably attributable to the other party's conduct in bringing or contesting the proceeding or otherwise causing costs to be incurred and, on the other hand, costs which are attributable to a party's own choice about how best to advance its interests. There are also good policy reasons for drawing this distinction, which include discouraging waste and seeking to deter the escalation of costs for the overall benefit for litigants."

37. I would respectfully suggest that this passage describes how a litigating party is meant to "mitigate" its legal spend in the conduct of court proceedings. The costs are being incurred rather than that they are a loss which is being reduced by mitigation. In this light, incurring a court fee which did not need to be incurred can only be seen as escalating the costs incurred by one or other of the litigants. Such expenditure is for the party's own account. In other words, it is a solicitor and client cost, not one recoverable between the parties.

38. In my judgment, a party who does not consider whether they are entitled to a fee remission and, thereafter make an application if there is any doubt, risks being unable to recover that fee from their opponent. If the opponent can demonstrate that the receiving party appeared to fall within the remission scheme, the onus will be on the receiving party to justify why the court fees were incurred. If as here, there is no such justification put forward, the fee should be disallowed under CPR 44.3. Such a party has not incurred the lowest amount it could reasonably be expected to spend. At the very least there has to be a doubt which is to be exercised in favour of the paying party.