Case No: SC-2021-BTP-000737

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 6/01/2022

Before:

COSTS JUDGE ROWLEY

- -

Between:

R (Tafida Raqeeb by her Litigation Friend, XX)	**Claimant**
- and -	
Barts Health NHS Trust	**Defendant**

- -
- -

Vikram Sachdeva QC (instructed by **Irwin Mitchell**) for the **Claimant**
Roger Mallalieu QC (instructed by **Keoghs**) for the **Defendant**

Hearing date: 9 November 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

Costs Judge Rowley:

Introduction

1. On 8 September 2021 I held a directions hearing by telephone in order to understand the claimant's request for "1 DAY Initial" set out on the request for a detailed assessment hearing. The parties had agreed almost all of the directions before that telephone hearing took place and, in particular, had agreed that a number of general points of dispute would be dealt with on one day and that the remainder of the detailed assessment would take place over a subsequent two-day period.

2. The first of those days took place on 9 November 2021 and the parties were represented by leading counsel on both sides: Vikram Sachdeva QC for the claimant and Roger Mallalieu QC for the defendant. The remaining days were listed for 19 and 20 January 2022 but, in the light of the draft version of this judgment, a later listing was agreed.

3. Preliminary point 1 has been dealt with and there is no need to say anything further about that issue in this judgment. The second preliminary point was described as "entitlement to costs". It is the central issue between the parties and submissions upon it took most of the day. Preliminary points 5 and 6 concern funding and hourly rates respectively. Preliminary point 7 concerns counsel's fees and is one which can only be dealt with fully at the detailed assessment hearing. To the extent that broad points can usefully be made, I have sought to make them as part of my decision concerning the entitlement to costs. Preliminary point 11 concerns the scope of the costs order dated 5 September 2019 and whether the extent of the costs claimed go beyond the terms of that order. I did not hear the parties in respect of that point which will need to go forward to the detailed assessment hearing.

Background

4. The bill of costs brought before the court is the claimant's and arises from an order made by MacDonald J sitting in both the Family Division and the Administrative Court on 3 October 2019. Paragraphs 3 and 4 of that order are as follows:

> "3. The Trust shall pay the Claimant 80% of her costs in the judicial review proceedings, such costs to be assessed on a standard basis if not agreed.
>
> 4. There shall be no order as to costs of the proceedings under the Children Act 1989 save for detailed assessment of the costs of the publicly funded parties."

5. The costs claimed under paragraph 3 of this order form most of the claimant's bill of costs. As mentioned above, costs in respect of a discrete costs order made on 5 September 2019 are also included.

6. I will use the same references to the parties as MacDonald J, not least because, rather unusually, the identity of the Litigation Friend has been anonymised as XX whilst the other parties' names have been publicised. The young girl who is the claimant in these proceedings is called Tafida. On 9 February 2019 she sustained a severe brain injury

which, despite urgent treatment, left her requiring full-time care at the Paediatric Intensive Care Unit of the Royal London Hospital.

7. It was the treating doctors' view that treatment for Tafida ought to be withdrawn and only palliative care be given. That was not a course of action with which Tafida's parents agreed and they contacted a number of hospitals around the world to see whether they could assist Tafida. One of those hospitals was the Gaslini Paediatric Hospital in Genoa. Having received a report from the doctors at that hospital, the parents made a request on 7 July 2019 to transfer Tafida to the Gaslini hospital. That application was refused on the following day.

8. One of Tafida's aunts initially instructed TKD Law to bring judicial review proceedings on Tafida's behalf and they were commenced on 16 July 2019. Almost immediately thereafter the identity of the litigation friend and the instructed solicitors became XX and Irwin Mitchell respectively. Meanwhile, and also on 16 July 2019, the Trust (i.e. the defendant in the judicial review proceedings) separately issued proceedings under the Children Act 1989 ("the Children Act") seeking a determination by the court as to the best interests of Tafida.

9. The two sets of proceedings were brought before MacDonald J on 22 July 2019. He granted permission for the Trust's decision to be judicially reviewed and ordered that the cases were to be heard concurrently (but not actually consolidated). Directions were given and the hearing took place between the 9 and 13 September 2019 with the judicial review being heard first and then the Children Act application. A combined judgement was handed down on 3 October 2019.

10. On 5 September 2019, MacDonald J heard an application by the Trust for XX to be removed as Tafida's Litigation Friend in the judicial review proceedings and to be replaced either by Tafida's parents or by the Official Solicitor. That application was dismissed (hence the discrete costs order) and XX was added in her own right as the Fourth Respondent to the Children Act proceedings.

11. The proceedings understandably moved quickly from commencement to hearing. They involved numerous legal teams. MacDonald J summarised the representation of the various parties at paragraph 4 of his main judgment as follows:

> "In the application for judicial review Tafida acts through her litigation friend, XX]…Tafida is represented in the application for judicial review by Mr Vikram Sachdeva, Queen's Counsel, Ms Nicola Kohn and Mr Alan Bates of counsel. The Trust is the defendant to the application for judicial review and is represented by Ms Katie Gollop, Queen's Counsel. Tafida's parents, Shelina Begum and Mohammed Abdul Raqeeb are interested parties in the application for judicial review, represented by Mr David Lock, Queen's Counsel and Mr Bruno Quintavalle of counsel. The Trust is the applicant in the applications made pursuant to the Children Act 1989 and the inherent jurisdiction and the parents and XX are respondents to those applications, each party with the same legal representation as set out above. Tafida is a party to the application under the

> inherent jurisdiction and is represented by Mr Michael Gration of counsel through her Children's Guardian, Kay Demery."

Preliminary Point 5 - Funding

12. Tafida's representation was funded by legal aid, at least in so far as the instruction of Irwin Mitchell by XX, is concerned. I have seen the emergency legal aid certificate which is effective from 18 July 2019, and which contained a limitation regarding all steps up to and including the first oral review hearing said to be on 23 July 2019. It was at that hearing (actually 22 July 2019) that XX formally replaced her predecessor as Litigation Friend to Tafida. The limitation to the certificate was removed on 30 August 2019 when full representation was authorised up to and including the final hearing.

13. I have recorded my review of the legal aid certificates in the previous paragraph in case it deals with Preliminary point 5 in its entirety. I appreciate that I did not necessarily have all the representations from Mr Sachdeva on this point and so I do not make any formal decision. On the face of the replies, the retainer regarding the initial firm of solicitors and litigation friend is no longer issue in issue and the claimant had the benefit of legal aid throughout the relevant period covering work done in this bill. If, however, matters are not agreed as being set out in the reply then any remaining aspect will have to be dealt with on the detailed assessment hearing.

Preliminary Point 2 – entitlement to costs

14. It is apparent from the wording of MacDonald J's order that the claimant is entitled to her costs of the judicial review proceedings but not in respect of the Children Act proceedings, save for any legal aid costs which are not relevant here.

15. The defendant challenges the costs claimed in the bill on the basis that work done and disbursements incurred (particularly in relation to counsel's fees) relate, at least in part, to the Children Act proceedings and as such are not recoverable.

16. In its points of dispute, the defendant argues that the Children Act application was the central issue and that the judicial review application was subservient to it. Based on the House of Lords decision in Medway Oil and Storage Co Ltd v Continental Contractors Ltd [1929] AC 88, the defendant says that only the costs which are over and above those which would be incurred in the Children Act proceedings anyway may be recovered. As such, the defendant draws a comparison with the lion's share of the costs being allowed where there is a claim and only any additional costs incurred by a counterclaim in circumstances where both parties receive some form of order for costs.

17. Mr Mallalieu amplified this challenge in both his written and oral representations. Mr Sachdeva responded similarly forcefully as to why the judicial review proceedings were at least as important as the Children Act proceedings. Having had the chance to consider matters since the hearing, it seems to me that this was a cul-de-sac down which neither advocate nor the court needed to travel.

18. I have set out above how the litigation friend and her instructed solicitors came to represent Tafida in the judicial review proceedings. XX did not represent Tafida in relation to the Children Act proceedings as is made clear from the description by MacDonald J of the representation. Indeed, Tafida was represented by her Guardian

and an entirely different legal team. To the extent that XX was a respondent to the application – and that only appears to have been formally the case within the last few days before the hearing – she represented herself rather than Tafida.

19. Mr Sachdeva made great play of the difference in standing of XX in the two proceedings and I think he was right to do so. It seems to me that the sort of case where Medway Oil applies requires the same parties to be involved in a claim and counterclaim (or possibly more than one set of proceedings involving the same parties) representing themselves. There is a third option where one party has the costs of the action but the other has the cost of a particular issue or issues but that adds nothing to the point. In this sort of case, the pragmatic decision in Medway Oil leads to the claimant receiving their costs and the defendant only receiving a limited amount by comparison for the counterclaim. The harshness that the Medway Oil approach can occasion can be reduced by a special direction of the court if it is asked to do so.

20. In this case XX was acting as the conduit for Tafida to bring her claim for judicial review and there is no comparison between that status and her being brought into proceedings in her own right in respect of the "best interests" decision required of the court by the Trust. She was no form of conduit for Tafida to exercise her rights in the Children Act proceedings: that was managed by the Guardian and her instructed lawyers.

21. Consequently, it does not seem to me that Medway Oil, or the line of authority running from it, has any bearing on the circumstances of this case. The defendant's point of dispute therefore gets off on the wrong foot by making an assumption that the two sets of proceedings which the court, for entirely understandable reasons, decided to manage together must inevitably require Medway Oil to apply in some shape or form. This flawed starting point then leads to the need to attempt to describe one or other set of proceedings as being the superior or more central proceedings so that it can equate to a claim and therefore that the other inferior or peripheral application takes the place of the counterclaim. No such classification is either appropriate or required in this case.

22. It is common ground that if the costs only relate to the judicial review proceedings, then they may be recovered subject to the usual test of reasonableness and proportionality. Equally, if the costs only relate to the Children Act proceedings, then they are not recoverable. Should the costs be "common" between the two sets of proceedings then they should be divided so that only the element which relates to the recoverable judicial review proceedings is allowed on assessment.

23. This description of what needs to be done on assessment does not deal with common costs which are not divisible, such as a court fee, which has to be paid in its entirety in order to pursue the successful claim. In its points of dispute, the defendant says that the claimant has no entitlement to recover indivisible common costs. That statement is the culmination of the point of dispute and, as I understand it, is the result of its argument that the judicial review proceedings are the peripheral proceedings when compared to the Children Act proceedings in accordance with Medway Oil. Since I have concluded that Medway Oil does not apply to this case, then the position taken in the point of dispute is one I reject.

24. It is my experience that common costs are rarely non-divisible in any event. Almost all work which is common between two issues or two parties et cetera can properly be

divided between the recoverable and unrecoverable element. Even the level of some court fees will depend on the extent of the claims brought and may be divided between successful and unsuccessful claims or parties. The only problem is a practical one. It is extremely time consuming to contemplate each attendance note or other documentation in order to come to a conclusion on where to divide each piece of work. The authorities are keen to stress that a blanket approach to the percentage that is recoverable is not the way the court should proceed. This approach was taken by Master Simons in Jean Mary Doris Haynes (personal representative of the estate of Brian Haynes deceased) v Department for Business Innovation and Skills [2014] EWHC 643 (QB) and was only upheld by Jay J in the absence of any other option. In practice, the allowance of the same percentage may become the de facto approach when a similar proportion appears to be appropriate on reviewing a number of items of work.

25. To the extent that there are any non-divisible items however, then it seems to me that the receiving party is correct in saying that they are recoverable in full. That is the tenor of the authorities in cases such as Haynes (see paragraph 37).

26. As, I have said, I expect most of the common costs to be divisible. Indeed, I think that this is the heart of the defendant's real complaint. The points of dispute give item 107 regarding document time as an example where work that has been done must relate to both sets of proceedings but no attempt to divide the work between the two proceedings has been attempted. Mr Sachdeva's response was that the claimant was in invidious position in the absence of the defendant making it clear as to which entries were said to be susceptible to division. That is not necessarily a very helpful submission, but it was more informative than the reply which simply refers to the submissions to the preliminary points generally.

27. During the course of the hearing, it became clear that it would assist me for more documentation to be lodged with the court than had been provided by the claimant in order simply to deal with the preliminary issues. Having looked through that documentation, I will now provide some examples in order to demonstrate why, in my view, there is some substance to the defendant's challenge regarding the need to have divided the time spent here.

28. From the papers I have seen, there was an email discussion between Mr Sachdeva and his instructing solicitor on 3 September 2019 regarding the need for an email to be sent to the court objecting to what was perceived to be an attempt to vary the order of MacDonald J informally by the Trust. Within that email discussion, the MacDonald J order is described as expressly requiring the claimant *"to provide a Position Statement (which can only relate to the IJ [Children Act] proceedings) and a Skeleton (which could only relate to the JR)."*

29. I do not have a copy of any letter or email actually sent to MacDonald J's clerk but there is a draft email which also uses the same description as I have set out above. It is difficult to conclude that any work on the position statement does not fall on the irrecoverable side of the line under the orders ultimately made in this case. Nevertheless, time is claimed on page 45 of the bill of costs in Schedule 2 by both the partner and paralegal for considering counsel's draft position statement. Furthermore, in the skeleton argument for the hearing on 5 September 2019, at paragraph 16, reference is made to the process of finalising the position statement and skeleton argument on the afternoon of 2 September when the Trust's application was received.

Counsel's fees and the solicitors time for work done appears to be either all irrecoverable on the basis that it relates to the position statement or is partially irrecoverable on the basis it should be divided between work on the position statement and the skeleton argument.

30. As a further example, I refer to an email from Irwin Mitchell on 7 August 2019 at 14:34 to the other parties regarding an extension of time for service of the claimant's skeleton argument from 28 August 2019 until 2 September 2019. The request was made in order to enable full consideration of evidence that might be filed by the Trust up to 30 August 2019 *"in respect of both proceedings."*

31. The email continued by saying that *"the view of our counsel is that our skeleton argument cannot reflect any evidence that has been provided per paragraph 21 [of the order]. Whilst this evidence may only be pertinent to the best interests decision, it does not seem right that we are not able to reflect on it within the skeleton argument."*

32. Mr Sachdeva's fee note has an entry for 9 August 2019 (i.e. two days later than the email above) for £900 claimed for *"preparation – advocacy preparation"*. It is by no means certain that this entry relates to matters such as that contained in the email communications (which is another of the defendant's concerns). But to the extent that it does, it is not clear whether any account has been taken in the fee claimed in the bill to reflect consideration of evidence that was only pertinent to the Children Act application.

33. By contrast, Mr Sachdeva charged £8,000 for his attendance at the directions hearing on 22 July 2019. The extent of the entry in Counsel's fee note is *"advocacy – interim hearing"*. In the bill £8,000 is simply charged as a brief fee to counsel at item 34. The hearing clearly involved both sets of proceedings and I can see why the defendant would say therefore that Counsel was instructed in relation to both sets of proceedings and that therefore this fee should be divided. However, having had the benefit of considering the papers that I have been provided with, I am content that Mr Sachdeva was instructed simply in relation to the judicial review proceedings on that hearing and that there would be no need to divide the fee.

34. These examples amply demonstrate why detailed assessment hearings where division is, or may be, required are time-consuming affairs. There is little for it but to consider each item that is claimed. Mr Mallalieu sought to argue that the medical evidence all related to the "best interests" decision and as such related to the Children Act proceedings. But the order of 22 July 2019 specifically gives permission to Tafida to rely on expert evidence in the judicial review proceedings (see paragraph 7). Whilst that permission is limited to some relatively narrow issues concerning the medical and welfare impact on Tafida being transferred to the Gaslini hospital, the effect of that order is that medical records would need to be obtained and considered in order to instruct the experts et cetera. It is simply not possible to draw a line through work in relation to medical evidence on the basis that it all relates to the Children Act proceedings.

35. It is, and always has been, for the receiving party to draft the bill of costs to reflect any necessary division of the work that has been done. There is no realistic way, absent the receiving party's file, for the paying party to be able to interpret the time claimed in order to be able to challenge items in the bill in the fashion contended for by the

claimant. If that division has not been carried out, bills are regularly returned in order for them to be redrawn. Where, as here, the receiving party argues that it is not required, then it will have the effect of the court receiving more speculative arguments from the paying party and being required to spend longer on each entry before reaching a decision.

36. The position is not, as Mr Sachdeva, contended, that all the work is recoverable unless it can be specifically shown to be additional work that would not have occurred in any event. That approach runs far too close to the non-divisible common costs situation (or even a Medway Oil approach as Mr Mallalieu pointed out) than is appropriate for dividing common costs in this case.

37. Nor does it mean that if, for example, a brief fee would be reasonable if it only dealt with a recoverable aspect, then it will be allowed in full even if the fee also covered an irrecoverable aspect. The authorities are clear in my view that in such circumstances, the court has to assume that the brief covered both aspects and needs to be divided. If the receiving party obtained a very good deal with counsel's clerk on the fee, the paying party is entitled to share in that good fortune.

38. These various examples and comments amount to a recognition that the defendant can have some expectation of a reduction of the fees claimed in this bill, notwithstanding that I prefer the claimant's general approach.

39. Separately, it does seem to me that, in this case, the Court's understandable decision to run the proceedings concurrently may have saved costs in some areas but it will inevitably have increased costs in terms of the number of parties with which to communicate and the issues with which other parties considered important. As one example, videos of Tafida were provided to Irwin Mitchell by another party and they were then passed to counsel. It was not clear to the solicitors when forwarding them to counsel whether they would be of any particular assistance, but it seems to me to be unrealistic to conclude that it was unreasonable to consider such evidence provided by other parties. If there had not been concurrent proceedings, then that evidence probably would not have been provided, but that is the price for proceedings being run very quickly and in conjunction with other proceedings.

40. During the course of the hearing, I did express the view that preliminary points such as this one often proved difficult to determine in any conclusive fashion. Notwithstanding counsel's best efforts I have, it seems to me, only reached the position of giving some guidance in relatively broad strokes with the details needing to be filled in at the detailed assessment hearing. Nevertheless, it appeared to be the point on which the parties were most anxious to have some determination and therefore I have tried to provide some examples of the points raised and the views that I hold about them.

41. In relation to the perceived inadequacy of detail in counsel's fee notes, there is nothing in my view which requires the receiving party to provide any particular level of information regarding the fees that are claimed. The sums claimed are set out in Counsel's fee notes and that is sufficient for purposes of the indemnity principle. Thereafter, it is a matter for the receiving party as to whether or not it can prove that the fees incurred were reasonable in nature and amount. To the extent that there is inadequate explanation on the fee notes, it is the receiving party which takes the risk

since the benefit of the doubt will be exercised in favour of the paying party. I do not propose to make any form of order which requires further information to be provided.

Preliminary Point 6 – Hourly rates

42. The points of dispute posit a two-stage test which is usually only employed where "distant" solicitors have been instructed by the receiving party in order to challenge the use of solicitors in a more expensive area than the location of the receiving party. In this case however, the claimant resided in a hospital in Whitechapel, London E1 and the solicitors instructed were in Manchester. The first stage of the "Wraith" test i.e. "Was it reasonable for the client to instruct solicitors in the location in which they are situated?" is easily answered in the affirmative. There can hardly ever be any criticism of a receiving party who instructs solicitors in a less expensive area of the country.

43. The second element of the test is to consider, in the context of the circumstances of the case, whether the hourly rates charged were reasonable for a firm in the location of the claimant's solicitors?

44. The events of this case all took place during a short period in 2019. The guideline hourly rates ("GHR") operative from 1 October 2021 are, in my view, likely to be the preferred starting point in most cases (rather than the 2010 version). Where the work is as recent as 2019, it seems to me there is really no argument that the correct starting point is the 2021 guideline figures. The hourly rates claimed by the solicitors for each GHR grade of fee earner and the National Band 1 rates in the 2021 version are as follows:

Grade	Claimed	National Band 1
A	£315	£261
B	£275	£218
C	£235	£178
D	£140	£126

45. The central point made by the points of dispute in relation to the hourly rates claimed is that the "baton of responsibility and importance to the claimant" had been passed to leading and junior counsel and that the solicitors relied heavily upon counsel's specialised knowledge and skill to take the case forwards. As such the defendant contends that the claimant's solicitors did not *"have to exercise any more skill, effort and specialised knowledge than that of an un-specialised solicitor."*

46. In both his written and oral submissions, Mr Mallalieu supported this point by making reference to what he described as the day to day handling of the matter by counsel. In his submission, the degree of legal complexity in the judicial review proceedings, though arising from a grave and complex case, was the sort that experienced counsel on both sides would be familiar with and primarily involved points of law which would be identified and then developed and argued by counsel. The degree of skill, responsibility and expertise reasonably required of the claimant's solicitors was minimal.

47. In addition, Mr Mallalieu's submissions also traversed the argument that the judicial review proceedings were tangential to the Children Act proceedings and as such were less important than if the solicitors had been instructed in the Children Act proceedings to determine the child's best interests. In his reply to Mr Sachdeva's submissions on this point, Mr Mallalieu referred to cases such as those which go to the Supreme Court which are extremely complex but are essentially dealt with by counsel. The solicitors' allowance of costs by the Supreme Court costs officers is consequently modest.

48. In his submissions, Mr Sachdeva queried whether the guideline hourly rates were really relevant, whichever ones were taken as a starting point. He said that the case was ground-breaking in that, unlike other well-known cases, the English doctors considered treatment to be futile, or at least not in the patient's best interests, and so objected to transfer to another country on that basis. Mr Sachdeva submitted that the level of skill, effort and specialised knowledge of the claimant's solicitors was necessary to be able to pursue such a case. It was literally a life-or-death decision that was involved in the proceedings.

49. I have already determined that the 2021 rates would be the starting point in this case. That seemed to me to be the main argument regarding the hourly rates in themselves. The defendant has offered figures that are above the 2010 guideline rates but below the 2021 version. If a similar increase above the 2021 guideline rates was calculated it would reach figures approaching the rates actually claimed, even though they were offered on the basis of the solicitors taking little responsibility or demonstrating any real skill.

50. Given the vital nature of these proceedings, it seems to me that the hourly rates claimed are in fact entirely reasonable and that there is little need to go through the seven pillars of Wisdom (ignoring the budgeting aspect) in CPR 44.4(3) in any detail. In particular, it is hard to imagine any case involving more importance to the client or, given the need for urgent action, one which would score more heavily on the circumstances in which the work was done.

51. There are undoubtedly cases where the subject matter does not require the need for specialist solicitors or only needs a junior solicitor to carry it out in an appropriate fashion. In such cases, the hourly rate that can be recovered will be reduced to a non-specialist firm or more junior solicitor rate.

52. In this case, the defendant did not go so far as to say that the case did not require a specialist solicitor. Indeed, Mr Mallalieu said, when canvassing the extent of the counsel's fees, that the defendant was not saying that the higher grade solicitors at Irwin Mitchell were unskilled et cetera.

53. Instead, it is the defendant's case that the claimant's solicitors did not display their skill in this particular case. The defendant says that by the choice of its counsel and the nature of the arguments being run, the solicitors have rendered their own expertise unnecessary and as a result they should be reduced on a between the parties' assessment. It might be said that the choice of expert counsel was perhaps a reflection of expert solicitors. But leaving that to one side, it is in my view, a remarkable suggestion that a case whose own weight clearly justified using expertise to pursue it, can be downgraded in the choice of an appropriate solicitor by that solicitor's choice of external assistance.

54. It was this discussion which led me to make sure that I had the benefit of papers between the solicitors and counsel in order to form a view about the expertise on show. Having done so, I am clearly of the view that expertise was evident in the solicitors' dealings with counsel. The papers reminded me of files seen where commercial law firms and leading and junior counsel are acting quickly in relation to injunctive proceedings with rapid return dates et cetera. There is very much a team effort between solicitors and counsel in terms of communication with other parties, the drafting of documentation, the strategy and so on. That is the clear impression I was given in this case by reading the correspondence and documents with which I was provided.

55. I therefore conclude that the solicitors not only had the requisite skill, effort and specialised knowledge and responsibility appropriate for this grave case but also demonstrated it in their dealings with counsel and other solicitors. There is no warrant in my view for there to be a reduction in the hourly rates claimed simply on the basis that counsel was also involved in dealing with matters. The issue on assessment will be whether there was too much involvement of counsel, as the defendant contends. To the extent that the defendant is correct then either the solicitors' charges or counsel's fees will be reduced. But that does not mean that the hourly rates claimed by the solicitors should be reduced in any event.

56. Accordingly, I allow the hourly rates as claimed.