Costs Law Update

Summer 2024

Gibbs Wyatt Stone

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Costs of Attendance at Rehabilitation Case Management Meetings

The Court of Appeal's decision in *Hadley v Przybylo* [2024] EWCA Civ 250 is something of a curiosity. It overturned the earlier decision of Master McCloud, who had decided, as a matter of principle, a fee earner's attendance at rehabilitation case management meetings was an irrecoverable cost in the litigation.

The claimant's representatives hailed the Court of Appeal's decision as a judgment that "*provides clarity regarding the recoverability of rehabilitation-related costs" and "a significant win for claimants*".

The figures are somewhat confusing from the judgment, but it seems as though more than £130,000 was being claimed in relation to such work, including incurred costs, and Master McCloud disallowed £52,000 of future costs as part of her costs management decision on the basis these costs were not "*incurred in the progression of the litigation*".

The issue in the earlier judgment was identified as:

> "*In particular that issue is where the inclusion of solicitor attendance time in the budget, for attending case management meetings with medical and other professionals in the course of management of the claimant's rehabilitation needs, and for meetings with financial and court of protection deputies said to be part of inputting into a Schedule of Loss, are in principle costs which may be included in a budget and whether, if so, it is appropriate to include those in the 'Issues Statements of Case' phase of the budget on Form H.*"

Master McCloud had concluded:

> "*Thus, the (numerous) attendances of the sorts proposed here do not in my judgment progress litigation in this case. … If (per contra) I had decided that these sums of proposed expenditure in principle would progress the litigation then I would indeed have next to consider whether the proposed extent of attendance was reasonable and proportionate. Were I to have to decide that I would say that the sum and the extent of proposed attendance is unreasonable and would have striven to budget a lesser sum.*"

The Court of Appeal disagreed on the issue of whether such costs were irrecoverable as a matter of principle:

> "*In our view, this element of the costs was recoverable in principle. … It would be wrong to decide that the costs of the solicitors'*

> *attendance at rehabilitation case management meetings are always irrecoverable. Equally, it would be wrong for the claimant's solicitor to assume that routine attendance at such meetings will always be recoverable. It will always depend on the facts.*"

However:

> "*We therefore agree with the Master (and the defendant) that, at the very least, these figures are plainly open to challenge. They seem to go well beyond the usual costs of reasonable liaison with case managers and deputies. We do not know if the claimant's solicitor operated on the assumption that he was entitled to attend every routine rehabilitation case management meeting, but for the reasons we have given, if he did, he was wrong to do so.*"

Having decided to allow the appeal, the question then arose as to what the consequences were. This is where it gets a bit odd:

> "*The claimant asked us to rule that, if the costs were recoverable in principle, they should be the subject of a detailed assessment, rather than sending the issue back to the cost budgeting process. The defendant does not dispute that disposal, since the case has been compromised (subject to the approval of the court), and all that is likely to remain is that detailed assessment of costs.*
>
> *We were initially concerned that if we followed that course, there would be no figure, other than that of the Master, for this phase of the cost budget. However, from a pragmatic perspective, we are persuaded that that will not matter. That is because we consider that, in all the circumstances, the Master's overall cost budget figures were fair and reasonable. In addition, although she had to accept the incurred costs for budgeting purposes, it is apparent that, on assessment, there may be significant argument about the level of these costs. The claimant's position is therefore properly protected.*"

This appears to mean that the claimant's budget, as approved by the Master for the relevant phase, will remain unaltered on detailed assessment. It is difficult to see how the claimant will be able to argue 'good reason' to depart from the budget if the Court of Appeal has decided the "*overall cost budget figures were fair and reasonable*".

The claimant will be able to seek recovery of the significant incurred costs at detailed assessment. However, given the concern expressed by Master McCloud and the Court of Appeal on the level of such costs, in can be anticipated that these are liable to be reduced significantly.

As such, it is odd that the claimant's solicitor claimed this judgment "*ensures that claimants, often in extremely complex matters involving catastrophic injury, can gain the necessary support and assistance throughout their case*". Although some costs relating to attendance at case management meetings may be recoverable, it appears likely this will be of an order of magnitude smaller than what the solicitor believed was reasonable and necessary during the claim itself.

A further oddity about this decision is the context of how the original issue arose. The Master was being asked to approve a figure for future work as part of the costs management process. The Court of Appeal's decision is of almost no value to this issue: "*It would be wrong to decide that the costs of the solicitors' attendance at rehabilitation case management meetings are always irrecoverable. Equally, it would be wrong for the claimant's solicitor to assume that routine attendance at such meetings will always be recoverable. It will always depend on the facts.*" How does this assist a judge undertaking costs management where the decision as to what to allow for any given phase will always be made on a broadbrush basis? What should judges factor in if work relating to attendance at rehabilitation case management meetings is being sought? £5,000, £10,000, £50,000?

The Court of Appeal noted, as to this issue: "*it is important that it should now be the subject of a definitive ruling*". However, their answer appears to be little better than: 'it depends'.

Can You Enforce An Order for An Interim Costs Payment On Account?

Where the court orders a payment on account of costs, can that order be enforced? At this stage, the costs themselves have not yet been assessed. All that has been ordered is an interim amount until the actual amount due is determined.

The note at 70.1.3 of the White Book 2024 suggests enforcement is not possible:

> '*Judgment or order for the payment of costs*
>
> *Orders for payment on account of costs not yet quantified can be obtained under r.44.2(8) or r.47.16(1). See SCCO Guide at para.1C-136. But costs must be quantified before payment can be enforced...*'

However, the note is not particularly helpful as it does not give any authority for this view.

(The position in relation to interim costs certificates is clear because of the wording of PD 47 para.16.12: '*An interim or final costs certificate may be enforced as if it were a judgment for the payment of an amount of money*', but this makes no mention of general orders for payments on account.)

Interestingly, there does not appear to have been any previous case law directly on this issue.

Clarity has now been provided in *Patel & Ors v Awan & Anor* [2024] EWHC 464 (Ch).

Unsuccessful defendants were ordered to pay the claimants' costs of the proceedings and make a payment on account of those costs. Payment was not made, and the claimants obtained a charging order against the defendants' property, relying on the order for the payment on account. They then sought an order for the sale of the property.

The defendants argued:

> "*the Order is not enforceable by any method that would require payment now because it is based on a contingent liability that has yet to be determined. It is not yet therefore due. This is based on the premise that until there has been a detailed assessment of the costs under paragraph 2 of the Order the sum that will be due cannot be properly ascertained. Consequently whether for the purposes of the Charging Orders Act or most other forms of enforcement there is not yet any sum due under paragraph 3 because it is an interim payment on account of the sum in paragraph 2. There is no sum which can be enforced.*"

Master Kaye concluded:

> "*My conclusion on the question of whether paragraph 3 of the Order is enforceable by way of a charging order and subsequently an order for sale is therefore that:*
>
> > *i) an interim payment on account is an enforceable money judgment/costs order which falls due on the date specified in the relevant order and if the order is silent then is payable and due for payment in accordance with any applicable rule, practice direction or statute setting the due date for payment and enforceable;*
> >
> > *ii) If such an order or judgment remains unpaid after the due date it is then enforceable as a judgment debt in the same way as any other order of the court for a sum of money;*

iii) There is no magic to the words in section 1 of the Charging Orders Act for these purposes. An interim payment on account is a sum which is payable and which has become due if the time for payment has passed."

Duty to Provide Breakdown of Medical Agency Fees

Is a receiving party required to provide a breakdown between the cost of an expert report and the costs of a medical reporting organisation (MRO) approached to provide the report, or is it permissible for the receiving party to submit a bill which simply includes the fee charged by the MRO to provide the medical report?

This is not a new issue. As far back as 2002 His Honour Judge Cook (of *Cook on Costs* fame), sitting in the Kingston upon Thames County Court, in *Stringer v Copley*, concluded:

> "*there is no principle which precludes the fees of a medical agency being recoverable between the parties, provided it is demonstrated that their charges do not exceed the reasonable and proportionate costs of the work if it had been done by the solicitors.*
>
> ...
>
> *whilst there is much to commend the use of medical agencies, it is important that their invoices (or 'fee notes') should distinguish between the medical fee and their own charges, the latter being sufficiently particularised to enable the cost officer to be satisfied they do not exceed the reasonable and proportionate cost of the solicitors doing the work.*"

The previous Senior Costs Judge, Master Hurst, endorsed this view in *Claims Direct Test Cases Tranche 2 Issues* [2003] EWHC 9005 (Costs).

Notwithstanding this clear guidance, MROs have been incredibly reluctant to comply, and the courts have often done little to enforce any such requirement.

This issue is not going away, and the tide seems to be turning in favour of paying parties.

The following three cases, interestingly, all concern the same MRO, namely Premex Services Ltd.

As far as detailed assessment is concerned, the key provision is found at PD 47 dealing with the documents that must be served on the paying party when commencing detailed assessment proceedings. PD 47 para.5.2(c) requires service of:

> '*copies of the fee notes of counsel and of any expert in respect of fees claimed in the bill*'

In *Northampton General Hospital NHS Trust v Hoskin* (County Court at Manchester, 22/5/23), HHJ Bird was considering an application, made by the paying party, requiring the receiving party to provide a breakdown of the invoice issued by Premex, showing how much related to the medical expert's fees and how much related to the services provided by Premex. He concluded:

> "*I am satisfied that it is clear that PD 47 imposes a duty on the receiving party to provide the fee note of any expert instructed and, where such costs are claimed details of the costs of any MRO. Premex is not an expert. Its invoice cannot be described in any sensible way as a fee note and is in any event not the fee note of the expert.*"

As such, he proceeded to make an Unless Order requiring a breakdown to be provided, in default of which the relevant items in the bill would be assessed at zero.

The current Senior Costs Judge, Gordon-Saker, reached the same conclusion in *CXR v Dome Holdings Ltd* (SCCO, 14/8/23):

> "*the comments of the late His Honour Judge Cooke and the reasoning of His Honour Judge Bird are the more compelling. ... First, the Practice Direction requires the fee notes of the expert and, second, in the*

absence of a breakdown of the fees of the expert and the agency, it is impossible to do the exercise which His Honour Judge Cooke suggested in Stringer: of deciding whether those fees are more or less than the solicitor would have charged for doing the same work.

Accordingly, subject to submissions, I would require the claimant to provide a breakdown of the fee notes issued by Premex so as to show the separate fees of the expert and the agency."

The more recent decision of HHJ Saggerson (County Court at Central London, 8/3/24) in *Aminu-Edu v Esure Insurance Company Ltd* dealt with this issue in a slightly different context. The matter had commenced in the MOJ Portal and was subject to fixed costs. As such, the detailed assessment process was not applicable. The receiving party had applied for determination of their fixed costs and disbursements pursuant to CPR 36.20(11) (as it then was). Independently, the paying party had made a Part 18 application seeking a breakdown of the medical fee.

Premex sought to refuse the request on the basis of "commercial sensitivity". This went nowhere:

"*I did not hear any submissions on 'commercial sensitivity'. There is nothing in it. The commissioning party and the paying party, in my judgment, are entitled to know how much the doctor is charging and how much the agency is charging. If transparency drives down prices by generating competition, so much the better.*"

The argument often deployed by claimant solicitors is that they are unable to provide a breakdown as this information is not within their control. It is in the control of the MRO who are not a party to the action. Again, this went nowhere:

"*The Claimant (or her advisers) can use agencies that are prepared to be transparent rather than those who are not. Alternatively, the work can be done in-house as it always was.*"

HHJ Saggerson ordered that a breakdown be provided, failing which the disbursement would be reduced from £2,916 down to £900.

It appears that no appeal was pursued in respect of any of these judgments. One can only speculate as to why Premex decided not to pursue an appeal. (The *Hoskin* case had been listed to be heard by the Court of Appeal, but the appeal was apparently abandoned.) HHJ Saggerson had commented that: "*The unavoidable suspicion is that the absence of transparency indicates that the agencies have something to hide.*". The failure to appeal these decisions does little to alleviate that suspicion.

Solicitors using MROs to source their expert reports would be well advised to ensure that they use MROs who are willing to provide the necessary breakdown.

Contact Us …

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