



Neutral Citation Number: [2021] EWHC 2195 (Admin)

Case No: E90CF029

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2021

Before :

THE HONOURABLE MRS JUSTICE FOSTER DBE

Between :

HR

Claimant

(A Protected Party by his Litigation Friend the Official
Solicitor)

- and -

**ANEURIN BEVAN UNIVERSITY LOCAL
HEALTH BOARD**

Defendant

Owain Thomas QC (instructed by NWSSP Legal & Risk Services) for the Claimant
Winston Hunter QC (instructed by Horwich Cohen) for the Defendant

Judgment on a costs issue after written submissions

THE HONOURABLE MRS JUSTICE FOSTER DBE

1. This is my decision on one element of the costs of an Application heard by HHJ Harrison and reserved by his Order dated 9 May 2019. The parties have been unable to agree an element of costs incurred in connection with the identity of the Claimant's Litigation Friend.
2. The matter came before me on 14 April 2021 as an Application to approve a settlement in respect of the Claimant who acts through his Litigation Friend. I do not repeat here the very sad circumstances of his case, in final resolution of which the Respondents to this application, Aneurin Bevan University Local Health Board, agreed the terms of a settlement approved by me. The sums in respect of which the settlement was entered was in the region of a capitalised value over £7 million. En route to this settlement certain difficulties arose concerning the Litigation Friend. Litigation involving that issue is the subject of the costs disagreement between the parties.
3. There have been written submissions in respect of the costs disagreement and I am grateful to counsel for both parties for their materials which included a note of the judgement given by HHJ Harrison concerning replacement of the Litigation Friend.
4. There were two applications before the judge - first, an application by the Claimant's solicitors that the Official Solicitor be invited to be Litigation Friend in place of the Claimant's ex-wife Rozi Aktar who had been initially appointed to that role. There was also a cross-application by a Mr Mushtaqur Rachman, an uncle of the family, who asked to be appointed as Litigation Friend rather than the Official Solicitor. The judge accepted the Claimant's application to replace Rozi Aktar with the Official Solicitor

and he rejected the uncle's application. The Defendant health board were not present for those applications.

5. The health board accept it must pay the costs of the settlement proceedings, but the Claimant proposed an Order for costs with the following phrase inserted such that costs payable by the Defendant were:

“...to include the Claimant's cost of and occasioned by the withdrawal of Rozi Aktar as Litigation Friend and the appointment of the Official Solicitor to act as Litigation Friend.”

6. Whilst the health board has accepted that it should pay the basic costs associated with making an application under CPR 21.7, the costs associated with the contested application (including the two hearings to determine it) should not be paid by them.
7. The health board contends that without the decision by the family member to contest the appointment of the Official Solicitor the application to replace the Claimant's ex-wife would have been straightforward. The only contest was amongst the family, it was only the family who challenged the application by the Claimant to substitute the Official Solicitor. It is clear the course eventually taken was in the minds of the Claimant's representatives in February 2019, at an earlier aborted, approval hearing.
8. At the hearing before the judge Rozi Aktar made clear she did not wish to continue in the role of Litigation Friend. The judge indicated he had a wide discretion to appoint under CPR 27.3 which required that the person appointed must be able fairly and competently to conduct the litigation on behalf of the Claimant. He determined that that person was the Official Solicitor, after hearing evidence that indicated

complications in the settlement process. It appears that instructions were given to accept an offer in settlement but the Claimant's family, or some of them, contacted the Defendant's solicitors directly which caused them to withdraw the offer. It appears that Mr Mushtaqur Rachman had been involved in dismissing the case manager and in terminating various contracts. The Claimant's solicitors were concerned that the collective decision-making by the family would make the position difficult going forward. Further and significantly in my judgement, there had been a breakdown between the uncle and the Claimant's legal team. Accepting that religious and cultural input was appropriate, the judge nonetheless declined to accept the uncle as substitute Litigation Friend, holding that any necessary cultural input was available from experts instructed. In other words, the uncle lost his application to be substituted because the judge was not persuaded of the requirements under CPR 21.

9. This rather unhappy background to the issue shows that there were disagreements as to what was in the best interests of the Claimant in the family. It is also clear in my judgement that the decision of the learned judge was the obvious outcome.
10. The Claimant argues this was a complicated matter and the hearings before the judge were part and parcel of a wholly unexceptionable application to replace the Litigation Friend. They argue that "the costs of and occasioned by the application [were] inevitable" and remind the court that it has a wide discretion to award costs "of or incidental to" proceedings under section 51 of the Senior Courts Act 1981.
11. The Claimant puts its detailed case in terms that the court should make an Order that the Defendant health board pay the costs because he seeks only an Order that those costs be assessed and, as such, the Claimant will recover only a reasonable and

proportionate sum in any event. That submission, however, does not deal with the point of principle as to whether it is right for there to be an Order against the Defendant. That question is not necessarily the same as asking whether the Claimant himself ought to have to bear the cost although that might be the result if an Order against the Defendant is not made.

12. The Claimant relies on the fact that the need for a Litigation Friend at all was entirely the result of the Defendant's conduct and that a Litigation Friend might cease to act for a variety of reasons in proceedings, and the mere fact of the replacement does not render such a cost unreasonable.
13. In order to support the argument that the Claimant should recover the costs of the family contesting the appointment of the Official Solicitor, the Claimant has explained that religious and cultural issues dictated that the injured Claimant's wife be divorced from her injured husband. She has remarried. These cultural aspects were addressed by expert evidence which explained also the importance of the role and the status of the Claimant in the religious and cultural life of the community, which status HHJ Harrison fully accepted.
14. It is said in support, that there were tensions in the litigation because of the family's strong feeling about the manner in which the litigation was being conducted and also certain views as to the Claimant returning to live with his family. It is further said that it was:

“...evident that the whole litigation was a significant source of stress and concern for the Claimant's family and his community and for [his wife the Litigation Friend] who was the initial point of contact between the legal team and the family. These pressures began to impact adversely on the Litigation Friend as the claim approached a potential resolution. There is no doubt that her obligations as Litigation Friend, which she understood and the four pressures that

were coming from others were undoubtedly a major source of the difficulties that arose.”

15. The Claimant has referred to a number of the cases cited in Part 44 in the White Book to support a submission that these costs are within the meaning of “of or incidental to” and ought to be recoverable against the Defendant.
16. These authorities deal primarily with costs incurred in respect of matters preliminary to the proceedings in question, none deals with the situation at hand here, nor, in my judgement are any of them really comparable. It is unnecessary for me to canvass these authorities or decide whether or not such costs may properly be described as “of or incidental to” so as to found the court’s jurisdiction to award costs at all – although my preliminary view is that costs of the general nature sought here (i.e. the costs incurred in the course of a change of Litigation Friend) may well come within the description “of or incidental to” the medical negligence proceedings. I proceed on the assumption, in the Claimant’s favour, that the court does have jurisdiction, and do not decide the point.
17. I am nonetheless quite clear that, as a matter of the exercise of my discretion under section 51 of the Senior Courts Act 1981, costs beyond the basic costs of making the application to substitute the Official Solicitor on paper are not recoverable against the health board. The reasoning for this conclusion is as follows.
18. Returning to first principles, the foundation for the exercise of judicial discretion on costs appears from section 51 of the Senior Courts Act 1981 which provides relevantly:

“Costs

“[51 Costs in civil division of Court of Appeal, High Court and county

courts]

“(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in-

(a) the civil division of the Court of Appeal;

(b) the High Court;

[(ba) the family court;] and

(c) [the] county court,

shall be in the discretion of the court.

“(2) Without prejudice to any general power to make rules of court, such rules may make provision for regulating matters relating to the costs of those proceedings including, in particular, prescribing scales of costs to be paid to legal or other representatives [or for securing that the amount awarded to a party in respect of the costs to be paid by him to such representatives is not limited to what would have been payable by him to them if he had not awarded costs].

“(3) The court shall have full power to determine by whom and to what extent the costs are to be paid.”

and from CPR 44.2 (1):

“The court has discretion as to:

(a) Whether costs are payable by one party to another;

(b) The amount of those costs;

(c) ...”

And

“(2) If the court decides to make an Order about costs –

- (a) The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but*
- (b) The court may make a different Order.”*

19. There follow the various matters which the court will take into account and in particular, of course, “all the circumstances of the case”.
20. Recognising the requirement to have regard to the relevant circumstances, I have particular regard to the position of the family. I accord great respect to them for wishing to ensure that the Claimant who was so grievously injured should be properly cared and catered for in his disability. However, the law is clear that the interests of the Claimant and the family are not co-terminus and stringent safeguards are in place generally in the CPR 21 jurisdiction to ensure that a Claimant has independent representation and has a Litigation Friend with carefully defined duties to the court as well as to the Claimant. The involvement of the family here, contrary to the advice of the Claimant’s advisors, whilst understandable, did not in my judgement represent a reasonable approach. Whilst the Claimant’s representatives were clear as to the best outcome for the Claimant, and opposed the family member’s application, in all the circumstances of this case the family member took the risk of an adverse outcome and cannot lay the costs consequently at the Defendant’s door.
21. It is clear that the actions of the Defendant had nothing whatever to do with the family’s refusal to accept the replacement of the Litigation Friend by the Official Solicitor, and that the Defendant had no part in the inter-family dispute that produced the uncle’s application. Importantly, it is clear from the history that the Claimant’s legal advisers did not believe it to be in the Claimant’s best interest to replace the

Claimant's ex-wife with another family member: such background history as HHJ Harrison relates makes plain why that may be so. This ought therefore to have been a simple application to replace a Litigation Friend with the Official Solicitor without a contested hearing – or hearings. It may be that the Claimant could have recovered costs against the failed applicant uncle – indeed it is trite that the usual rule is that the unsuccessful party pays the costs involved. Whatever the position as between the uncle and the Claimant, and in any event, it is not appropriate for the Claimant to recover the costs of the uncle's unsuccessful application against the health board.

22. Put another way, in light of the overriding objective to do justice, it is in my judgement not just to fix the Defendant health board with the costs incurred by the Claimant in what was, in truth, an inter-family dispute in which they played no part and which the Claimant's legal representatives acting in his best interests were dragged.
23. Accordingly, such costs as the Defendant is required to pay to the Claimant do not include the costs of the two contested hearings.
24. As indicated, the assessed costs of an application on paper to replace Rozi Aktar may be recovered against the Defendant in respect of the new Litigation Friend but no more.