IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

No. HQ17P00870

[2018] EWHC 3532 (QB)

Royal Courts of Justice

Tuesday, 16 October 2018

Before:

MASTER DAVISON

B E T W E E N :

OHOUD AL-NAJAR
(A PROTECTED PARTY BY HER LITIGATION FRIEND KHADIA AL-ALMULLA)
AND OTHERS

Claimants

- and -

THE CUMBERLAND HOTEL (LONDON) LIMITED — Defendant

MR R. VINEY (instructed by Hodge Jones & Allen LLP) appeared on behalf of the Claimants.

MISS C. CHURCH (instructed by Clyde & Co) appeared on behalf of the Defendant.

J U D G M E N T

MASTER DAVISON :

1 This is an unusual claim arising out of the extraordinary and shocking events of the night of 5 and 6 April 2014 when a man named Philip Spence, a violent criminal, entered the Cumberland Hotel with the intention of stealing. He gained access to the interconnecting rooms where nine members of an extended family were staying. He attacked the first to third claimants, who are sisters, with a claw hammer, causing very serious facial and head injuries.

2 There has been a direction for a trial on liability only. Liability is complex. At a CCMC on 16 November 2017 Master Eastman approved the parties' budgets for that trial. The claimants' budget was approved in the total sum of £1,028,197, (only a small reduction from the budget that was submitted). The claimants now, by this application, seek to revise the disclosure phase of that budget.

3 The Guidance Notes appended to Practice Direction 3E on costs management set out standard assumptions for each phase which do not require to be repeated in each party's budget. So far as relevant, the specific assumptions set out in the claimants' budget read as follows:

> "Anticipated costs include completing claimants' list and reviewing own documents, considering defendant's list and *presumed to be extensive documents* disclosed to include cross-reference of previous disclosure, liaising with counsel on disclosure. Assumes standard and electronic disclosure proceeds in compliance with directions and requests made and that no further applications are required."

4 The amount that was approved for the phase was £62,626.50. That was, in fact, agreed by the defendants and therefore approved by Master Eastman. I am told and I have no reason to doubt that the claimants' solicitors were expecting somewhere between 1,000 and 1,500 documents, which they expected would fill twenty to thirty lever arch files. (I will say that it is perhaps not only with the benefit of hindsight that it might have been prudent to have recorded that in the assumptions.) Be that as it may, what arrived comprised 3,250 documents filling fifty-five lever arch files. The scale of that is getting on for double what was anticipated and the claimants further say, (though I do not attach too much importance to this), that they were not forewarned by the defendants that that was the number of documents that would be forthcoming even though, so the claimants say, the defendants must have known that that was the case.

5 The claimants seek an increase in the budget from that figure of £62,626 to a figure of £111,811. That is an increase of £49,185 which in percentage terms is a 78 per cent increase. Most of the increase is in the solicitor hours but the figure allowed for counsel has doubled and the figure allowed for the expert has gone from £1,440 to £9,000, which is an eightfold increase.

6 The question is whether the claimants are entitled to revise their budget because there has been "a significant development in the litigation". That phrase derives from para.7.6 of the Practice Direction which I will read out in full:

> "Each party shall revise its budget in respect of future costs upwards or downwards, if significant developments in the litigation warrant such

> revisions. Such amended budgets shall be submitted to the other parties for agreement. In default of agreement, the amended budgets shall be submitted to the court, together with a note of (a) the changes made and the reasons for those changes and (b) the objections of any other party. The court may approve, vary or disapprove the revisions, having regard to any significant developments which have occurred since the date when the previous budget was approved or agreed."

7 That is the wording of the Practice Direction. As to its interpretation, some assistance is derived from the decision of Chief Master Marsh in the case of *Sharp v Blank & Ors* [2017] EWHC 3390 (Ch). I will read out the relevant paragraphs which are paras.33 and 37:

> "33. The circumstances in which paragraph 7.6 is engaged are fact specific. Significance must be understood in light of the claim – its size, complexity and the manner in which the litigation has unfolded – and also from the likely additional costs that have been, or are expected to be, incurred. The amount of the additional expense is not determinative, but it is difficult to conceive that a development leading to modest additional legal expenditure, that is modest in proportion to the amount in the relevant budget phase or phases, is likely to be significant development.
>
> "37. Reference was made in argument to *Murray and Stokes v Neil Dowlman Architecture Ltd* [2013] 3 Costs LR 460 at [17] and *Elvanite Full Circle Ltd v AMEC Earth & Environmental (UK) Ltd* [2013] EWHC 1643 (TCC). Both cases related to the pilot scheme which contained quite different wording. It is obvious, however, that a mistake in the preparation of a budget, or a failure to appreciate what the litigation actually entailed, will not usually permit a party to claim later there has been a significant development because the word 'development' connotes a change to the status quo that has happened since the budget was prepared. If the mistake could have been avoided, or the proper nature of the claim understood at the time the budget was prepared, there has been no change or development in the litigation. By contrast, if the claim develops into more complex and costly litigation than could reasonably have been envisaged, that may well be the result of one or more significant developments."

8 From the Practice Direction and the decision of Chief Master Marsh I would derive the following broad principles:

(a) Whether a development is "significant" is a question of fact which depends primarily on the scale and complexity of what has occurred.

(b) If what has occurred is something that should reasonably have been anticipated by the party seeking to revise its budget, then that party will probably be unable to label it significant or, for that matter, a development.

(c) However, there is no requirement that the development must have occurred other than in the normal course of the litigation. That is clear from the final sentence of para.37 of Master Marsh's decision which I have quoted and also from the fact that in that case a revision of the trial estimate, the disclosure of 984 documents and the service of an expert report were all characterised as significant developments.

(d) As a matter of policy, it seems to me that the bar for what constitutes a significant development should not be set too high because, otherwise, parties preparing a budget would always err on the side of caution by making over-generous (to them) assessments of what was to be anticipated.

(e) Lastly, and I think this is uncontentious, if there has been a significant development, then the question is whether the figures in the revised budget are reasonable and proportionate in the light of the development.

9 I have come to the clear conclusion that there has been a significant development. The disclosure has been of a scale and complexity that is much larger than was actually budgeted for, which was not, in fact, envisaged and which could not reasonably have been envisaged. In coming to that last conclusion I ask the question: was the assessment in the original budget a reasonable one? If it was, then *ex hypothesi*, what has occurred is something that falls outside that reasonable assessment. What is required is a standard of reasonableness. It is no answer to the application to say that disclosure on the scale that has occurred could have been foreseen or anticipated. That would be to impose an altogether unrealistic burden and encourage the sort of bloated, defensive budgets which are to be deprecated. I find that the assessment of the disclosure phase in the original budget was a reasonable one. It follows that disclosure that has come in at approximately double what was then anticipated amounts to a significant development in the litigation.

10 As to the amount that is now sought in the revised budget, it seems to me that with one qualification it is reasonable and proportionate. It is in fact less, one can work out, than the amount that Master Marsh allowed in the *Sharp* case, if the arithmetic is done on a *pro rata* basis. It amounts to very roughly three hours per ring-binder of documents disclosed and that seems to me if anything an underestimate. It allows double the figure for counsel, which again seems about right. The only figure that has caused me to raise an eyebrow is the eightfold increase in the expert's costs. That is unexplained and that figure, at the risk of tinkering, I will not approve. I would allow a doubling in the expert's costs but no more than that.

CERTIFICATE

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