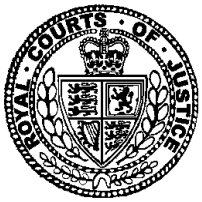

Neutral Citation Number: [2025] EWHC 69 (SCCO)
Case No: SC-2024-APP-000760

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Royal Courts of Justice
London WC2A 2LL

Date: 17/01/2025

Before :

COSTS JUDGE ROWLEY

- -

Between:

JXX (a Protected Party by his Litigation Friend ABB)	**Claimant**
- and -	
Mr Scott Archibald	**Defendant**

- -
- -

Benjamin Williams KC (instructed by **Thompsons LLP**) for the **Claimant**
Roger Mallalieu KC (instructed by **Horwich Farrelly LLP**) for the **Defendant**

Hearing date: 13 December 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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COSTS JUDGE ROWLEY

Costs Judge Rowley:

Introduction

1. This is my judgment in respect of the defendant's application for a declaration that the claimant's bill of costs is non-compliant with the Civil Procedure Rules and for orders that the detailed assessment proceedings are stayed until the claimant files and serves copies of the experts' fee notes and separate breakdowns of the costs of the medical agency and the experts. In default of the provision of these documents, the application seeks the claimant's bill of costs to be struck out in its entirety or the claims relating to medical evidence being assessed at zero.

2. This is therefore another judgment concerning the assessment of expert evidence produced with the involvement of a third party organisation. Conventionally, reference is made to medical experts whose reports have been produced via a medical reporting organisation ("MRO") and which have been described as "medical agencies" in some of the case law. However, there is nothing exclusive in the expert being from a medical discipline and this case is an example of experts from other disciplines being instructed to provide evidence and the same third party has been involved in procuring that evidence.

3. On 22 May 2023, HHJ Bird gave a widely reported decision in the case of Northampton General Hospital NHS Trust v Hoskin. That decision was appealed and an authoritative decision of the higher courts was expected to give guidance on what has turned out to be a long running issue. However, that appeal did not go ahead. That guidance remains desirable and I have already indicated to the parties that if either wishes to seek to take this matter further then I will give them permission to appeal. The parties in this case are in fact represented by the same counsel as in Hoskin – Benjamin Williams KC for the Claimant and Roger Mallalieu KC for the Defendant and whose arguments were as skilfully put forward as ever.

Background

4. The claimant was involved in a road traffic accident on 5 May 2018. Sadly, he suffered severe injuries including to his brain and as such he has become a protected party. I adopt the same course as was taken by Mr Williams in his written submissions and refer to the claimant rather than the claimant's litigation friend for simplicity.

5. The claim was settled at a joint settlement meeting on 28 March 2023 on terms involving a significant lump sum and periodical payments. Those terms were approved by the Court on 16 May 2023.

6. Detailed assessment proceedings were commenced on 20 September 2023 and the served bill of costs totalled £901,026.98. According to Mr Mallalieu's skeleton argument, the fees which are disputed in this application amount to £120,946.00 including VAT from a total figure for experts' fees of £253,859.96 including VAT. (I note that the witness statement of Mark Walmsley served in support of the application refers to a figure of £125,976.00 (including VAT) but nothing appears to turn on the precise figure.)

7. The disputed fees concern expert evidence sourced via Medical and Professional Services Limited ("MAPS"). They are an MRO and such organisations' activities were described as long ago as 2002 in the following terms:

> "In routine personal injury cases, where a medical report is required, it has become a common practice to instruct a medical agency to arrange a medical examination of the Claimant, to undertake the collation and obtaining of relevant medical reports, to arrange the appointment with the medical expert and the Claimant, deal with any cancellations or rearrangements, and to deliver the resultant medical report to the solicitors. Because of the specialisation, experience and expertise of the medical agency they are able to do this administrative work, at least as efficiently, expeditiously and economically as most firms of solicitors using their own fee earners." (HHJ Cook in Stringer v Copley (unreported)).

8. The phrase "routine personal injury cases" has been affected by the so-called whiplash reforms which required MROs to be chosen seemingly at random for the purposes of procuring a medical report. However, outside such cases, solicitors routinely use specific MROs and it was common ground in this case that the use of such organisations is uncontroversial in itself. The question is, as it has been since the time of Stringer, how to assess the fees involved.

9. In his points of dispute in this case, the defendant compared report fees of Mr Elston, a consultant ophthalmologist, whose first report was the result of a direct instruction by the claimant's solicitors Thompsons LLP ("Thompsons"), but whose subsequent evidence was obtained via MAPS. On the basis of what the defendant described as a "stark and shocking" disparity in fees, the point of dispute stated:

> "The Claimant is accordingly required to file and serve a breakdown in respect of each and every fee rendered by MAPS in this case showing the fee charged by the expert and by MAPS separately in order that the paying party and Court can arrive at a reasonable and proportionate allowance.
>
> Pending this further information the Defendant puts in dispute each and every fee charged by MAPS and declines to make any offer for any such fees at this time. In the interests of brevity this dispute will not be repeated to every individual fee as appears in this phase but is intended to apply to each and every such item."

10. In his reply to that point of dispute, the claimant said:

> "Regarding the reasonableness of the fees claimed, the Claimant refers to the MAPS Service User Document attached (Appendix A) which details the extent and nature of work undertaken by MAPS.
>
> In pure cost terms it has been proven that medical agencies provide a cheaper service than if the solicitors had undertaken

> the work for themselves. The CPR recognises and advocates the use of agencies. MAPS are acknowledged to provide an efficient and valuable service instructing experts for the prompt preparation of expert medical reports. Most firms of solicitors, even those dealing with a high volume of personal injury cases, do not have access to a databank of suitable experts such as is available to medical agencies. It is refuted that the use of this service leads to an unreasonable increase in the amount of costs incurred. Whilst the disbursement in respect of the report is slightly increased the conducting solicitors' profit costs are significantly reduced. Further still, medical agencies are able to vet expert reports and ensure that they are not only medically and factually accurate but also comply with the current Rules. As they are a bulk provider of work for the medical experts, they are able to keep down the fees charged for the actual report. As per Stringer v Copley Cook HHJ 30 May 2002, the agency fees claimed are therefore reasonable.
>
> The claimant submits that all expert fees are reasonable and proportionate on a global basis, particularly taking into account the specialist skill, knowledge and expertise of the experts involved.
>
> A breakdown of the experts' fees has been requested from MAPS and will be provided upon receipt."

11. The service user document appended to that reply sets out the brochure of MAPS' services. They very closely follow the terms of the reply and indeed, in essence, the description of Judge Cook from 20 years ago.

The law

12. The oft quoted cases in this area of Stringer v Copley, Woollard v Fowler [2005] EWHC 90051 (Costs) and Hoskin have all required more information to be provided in support of the fees claimed than the MAPS invoices currently provide. In Stringer, Judge Cook said:

> "I am satisfied that there is no principle which precludes the fees of a medical agency being recoverable between the parties, provided that 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."

13. The then Senior Costs Judge Hurst described this rather tartly in Woollard as being trite costs law. He then said, at paragraph 24:

> "… The rationale for allowing claimants to recover fees, augmented by the charges of medical agencies, has always been that the agencies are carrying out work that would otherwise be performed by the solicitor at greater cost. The agencies themselves have always been the first to emphasise this point…"

14. Judge Bird took the same view in Hoskin and was followed by the last Senior Costs Judge in an extempore decision in CXR v Dome Holdings Ltd on 14 August 2023. Senior Costs Judge Gordon-Saker said:

> "… In my view, the comments of the late His Honour Judge Cook and the reasoning of His Honour Judge Bird are the more compelling… 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 Cook suggested in *Stringer*: of deciding whether those fees are more or less than the solicitor would have charged for doing the same work."

The Claimant's argument

15. Mr Williams' main argument was that the line of cases following Stringer had started from the wrong position. It was not a case of the expert's fee being augmented, to use the word from Woollard, by the MRO's charges. Instead, it was the MRO being instructed by the solicitor to obtain a medical report (for example) and the MRO producing that report by engaging a suitable expert and providing all of the ancillary services regarding records, appointments etc. The fee claimed was the one which the claimant was liable to pay and it was the one appropriately invoiced and vouched on the assessment.

16. Looked at in this way, the requirement in paragraph 5 of Practice Direction 47:

> "On commencing detailed assessment proceedings, the receiving party must serve the paying party and all other relevant person the following documents –
>
> …
>
> (c) copies of the fee notes of counsel and of any expert in respect of fees claimed in the bill;
>
> (d) written evidence as to any other disbursement which is claimed, and which exceeds £500…"

was satisfied because the fees claimed in the bill were those of MAPS rather than the expert. This interpretation gainsaid Judge Bird's view that the requirement was to serve a fee note for the expert and that MAPS could not be described as such.

17. Mr Williams raised numerous examples and counter factual arguments to support his submission. To take one example, an expert accountancy report prepared by a large organisation such as Grant Thornton, would be invoiced in the name of Grant Thornton and not the partner who had created the report and who would give evidence if the case went to trial. This was a common event in the provision of expert evidence and it was no longer the case that an individual professional was instructed who produced an invoice for their individual labours. In the Grant Thornton scenario, it would be a nonsense, Mr Williams suggested, for the relevant partner to produce an invoice to Grant Thornton for their individual work.

18. Mr Williams' proposition was that this was analogous to the requirement being sought by the defendant in this case of the expert producing an invoice to MAPS which then had to be disclosed, perhaps together with a separate invoice by MAPS for its efforts.

19. I have only set out one of Mr Williams' various analogies because, however attractively they were presented, it seemed to be that they all fell down because of the absence of someone dealing with the quasi legal work in the same way as an MRO. In the Grant Thornton scenario, whoever within Grant Thornton carried out the work, a piece of expert evidence bearing the Grant Thornton name would be created and an invoice in its name would be produced. However many people within Grant Thornton were involved in the production of the report, none of them would have reduced the solicitor's work in instructing Grant Thornton which is the raison d'être of the MRO.

20. For those of us who remember a pre MRO world of personal injury litigation where in-demand experts would provide appointment dates more than a year ahead, the evolution of MROs has been a valuable addition to both sides. Yet it is the question of how valuable that contribution is which is at the heart of this case.

21. Mr Mallalieu highlighted the difficulty with the claimant's argument in his submission regarding the use by a solicitor of an intermediary to instruct counsel to attend a hearing and provide any ancillary services counsel needed to provide the required advocacy. An invoice encompassing both counsel's fees and the intermediary's work would not be appropriate.

Information from the MRO

22. It can be seen from the final line of the extract from the replies set out in paragraph 10 that the claimant expected MAPS to produce a breakdown of the experts' fees. However, MAPS has decided against this course of action and, in a letter dated 22 January 2024 to Thompsons, Mr David Stothard, the managing director of MAPS stated that it was not MAPS' standard policy to supply such information which it regarded as being:

> "…unimportant and misleading when considering the overall reasonable cost of obtaining the medical expert evidence in any particular case, as well as being confidential."

23. Mr Stothard went on to say that:

> "…included in the reasonable charge which is made, is the work undertaken by the company which solicitors would otherwise have to do. However, the work done is not the same in an identically comparable way.
>
> The courts are well versed in deciding what is a reasonable amount to charge for a medical expert witness report in personal injury and clinical negligence cases, and the incidental work which a solicitor carries out to obtain it."

24. Mr Stothard concluded his letter by saying:

> "In our view the various fee notes charged to you throughout this case for the required expert evidence are entirely reasonable in respect of the reports which have been produced and the work involved in obtaining them."

The case of Mr Poulter

25. This approach of MAPS obviously came as something of a surprise to the claimant and his solicitors. It is also a volte face compared with the case of a Mr Poulter which came briefly before me earlier in the year before being compromised by the parties. That compromise was very largely facilitated by the claimant withdrawing approximately £60,000 of experts' fees (excluding VAT) which had been procured using MAPS by Thompsons. As part of the compromise, Mr Poulter agreed to the information that had been provided being available for use in other cases. In Poulter, not only were the invoices originally provided by MAPS disclosed, but also invoices provided by experts to MAPS. It was therefore possible to make some calculations as to the amount by which the invoice provided by the expert to MAPS had been increased to reach the level of the invoice provided by MAPS to Thompsons. Mr Mallalieu told me that the average percentage came to 59.84% and that the range of such percentages was from approximately 30% to approximately 70%. Whilst Mr Williams did not disagree with the figures as such, he pointed out that they were simply arithmetical calculations from another case.

26. Mr Mallalieu did not seek to argue that the same percentages must be applicable in this case but he went so far as to provide indicative figures if the percentages were similar. I do not think that I can draw any adverse conclusions from those percentages. Having heard no argument on the point, it is possible that they are percentages which ought to be allowed in any event on an assessment. I do, however, accept Mr Mallalieu's basic point that the sums in issue are potentially significant. Mr Mallalieu's calculations suggested a little more than £40,000 might be at stake on invoices of £120,000.

Discussion

27. The approach of MAPS has left the claimant, it seems to me, in something of a bind. The reply to the point of dispute refers to MAPS' involvement requiring a "slight" increase in the fee but nevertheless resulting in a "significant" drop in the solicitors' own charges. Yet, to the extent that MAPS' charges have to be justified by demonstrating the work it has done, there is no such evidence currently to hand and that position is not, as things stand, expected to change.

28. What is present is the information from the Poulter case to suggest that the MAPS' own element of the composite invoice (i.e. the overall invoice provided by MAPS to Thompsons) is a potentially significant element of the whole.

29. In these circumstances, I suspect it will come as little surprise to the claimant or MAPS that I find little succour in Mr Stothard's belief that the fees charged are reasonable as set out at paragraph 24 above. I have quoted from Mr Stothard's letter at paragraph 23 above the express confirmation that MAPS' charges include quasi-legal work, even if it not carried out in a comparable way. Unfortunately for MAPS, the justification of MRO charges has, since the time of Stringer, been based on a comparison of the work done by a third party being cheaper than if it had been done by the claimant's solicitor.

If the MRO decides not to justify its charges by way of evidence, it seems to me to be likely that the composite fee would be reduced on assessment. Whether that reduction would ultimately be borne by the claimant or MAPS is not a matter before this court.

Comparing expert evidence

30. In the absence of any evidence as to the MRO input, Mr Williams was compelled to accept the logic that the invoices which have been served would need to be judged simply on whether they were reasonable for the report (or similar work product) produced by the expert without any additional quasi-legal work having been carried out.

31. A comparison of the MAPS' invoice in this manner would be a comparison of "apples and apples" with expert evidence procured directly by Thompsons. The onus would then be on the defendant, as I think it should be, to challenge any fees he considered to be too high when assessed on this basis. Mr Williams pointed out that the defendant's insurer and legal team would no doubt have access to fee notes from similar, or indeed probably the same, experts from other cases which could be deployed to show the level of a reasonable fee. Mr Mallalieu did not accept that to be appropriate, but the force of his argument seemed to me to be against the notion that such evidence would be comparing "apples and pears" because the MAPS' invoice would be said to include both the expert evidence and the quasi-legal work. If that latter component was considered to be valueless, then the claimed fee would stand or fall on the expert evidence produced.

32. Requirements on defendants to produce evidence in order to argue quantum challenges have been imposed by the Court of Appeal in numerous credit hire decisions and in at least two decisions on ATE premiums. I do not suggest that anything similarly compulsory is required here. It is, after all, a matter for the defendant as to the effort he wishes to make. But I do not accept Mr Mallalieu's argument about the defendant's ability to produce evidence to assist the court being somehow inappropriate. Indeed, a leitmotif in his submissions was that parties should produce information to assist the court, if necessary by compulsion, rather than the court simply having to do its best with less information than was known to exist. Those submissions were generally aimed at the claimant's apparent failure to provide information but the sauce would apply to both goose and gander.

33. Mr Stothard's letter suggests that courts are used to assessing the reasonable of experts' fees and the costs of obtaining that evidence. This is of course perfectly true. But, that assessment is usually based, at least in my experience, on the expert's fee note relating solely to the expert's fees and, separately, details of the solicitors' time and effort. They are not assessed as a single figure, and the information provided makes it clear as to who did what.

Disposal

34. During submissions there was some comparison of the limited information sometimes to be found on fee notes rendered by counsel and which still needed to be assessed by the court. Mr Mallalieu suggested that the court could require more information to be provided if it felt it necessary and that is undoubtedly the case. But on a standard basis assessment, the burden would be on the receiving party to evidence its claims and if the

terms of a laconic invoice induced the court to have doubts about the reasonableness of a bald figure on a fee note, it would be the receiving party who would suffer. I have to say that it would not be my immediate response to provide the receiving party with a chance to get its house in order simply to facilitate the assessment of a fee which had been claimed from the paying party for a number of months before the assessment. The broad approximations required of costs judges often involve assessments based on limited evidence before the court.

35. Nevertheless, the sums in issue here are significant and the issue is one which potentially affects many cases. As such, I am not convinced that my immediate reaction is correct here. In my judgment, the better course is essentially to put the claimant's side to an election.

36. The fees in the composite invoices will either be assessed:

    a) on the basis of the expert's evidence and the MRO work in obtaining that evidence if the information sought in paragraphs 2 and 3 of the defendant's draft order is provided; or

    b) on the hypothetical basis that there had been no MAPS' involvement and the fees claimed are solely for the expert's evidence, if no such information is provided.

37. For the avoidance of doubt, the term "expert's evidence" includes attendance at conferences and other work in addition to the formal production of reports or attendance at trial.

38. It is for the claimant's side to decide on which of the two approaches these fees will be assessed and it will need to be given a period of time in which to decide which course to take. At the end of that period, the defendant will be entitled to produce any comparative evidence he wishes to rely on, whichever option has been followed.