# "Successful" claimant's costs recovery restricted to 6.7% of budget

PD -v- RLBUH NHS T

**Key points**

- Successful claimant's costs recovery restricted after fully contested trial to a fixed sum reflecting just 6.7% of the budgeted base fees and disbursements; and
- Claimant ordered to pay all of the defendant's costs following a Calderbank.

**The claim and result at trial**

The claimant (C) underwent surgery on 11 November 2010. During that surgery C's spleen was torn or incised but this was not recognised until 36 hours later when C underwent an emergency laparotomy and splenectomy. As a result of the surgery, C was left with an incisional hernia plus other significant sequelae. Damages were agreed eventually, subject to liability at £150,000.

Four months after surgery, C entered into a conditional fee agreement(CFA) and on 1 October 2012 sent a letter of claim (LOC) which alleged that the initial laparoscopic surgery should have been converted to open surgery which would have obviated the need for splenectomy.

The letter of response (LOR) contained a full denial and NHSLA's file was closed.

The particulars of claim (POC) (March 2014), which predominantly advanced a case alleging negligent failure to avoid the need for splenectomy also alleged, for the first time, delay in identifying the need for laparotomy. The defence (served July 2014) admitted some delay, albeit five hours less than C had alleged.

In September 2015, D served its expert evidence, which conceded the full period of delay alleged by C. The defence was amended in June 2016 to reflect this concession. All other allegations remained in issue.

In October 2015, D made a Calderbank offer of £5,000 plus £20,000 costs. C rejected that offer and in March 2016 made a £167,000 part 36 offer. C then offered alternative dispute resolution (ADR), which D refused at the time as being inappropriate (agreed by the Judge) and in July 2016 D offered £5,000 under part 36. C counter-offered eight days later at £110,000.

After a four-day trial in September 2016, C was awarded £2,500 for the pain and suffering and avoidable blood transfusions during the agreed period of delay but the rest of C's case was rejected.

**Arguments on costs**

C contended that he was entitled to costs as the successful party. He referred to guidance in the White Book and to recent judgments of Jackson LJ suggesting that if D wanted to protect its position it ought to do so by way of part 36. C said that D had been slow to make a part 36 offer and had initially made only a partial admission on delay. He argued that the case had been reasonably pursued with expert evidence in support.

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C said that the £20,000 costs in the Calderbank offer was not attractive, hence being reasonably rejected. C's budgeted 'incurred' base costs and disbursements alone were already around £50,000 by Feb 2015. C also argued that D had been unreasonable in failing to consider ADR.

At the eleventh hour, in oral submissions, C accepted that any failure on part of its case should result in a reduction of C's own costs of not more than 5%.

**Judgment on costs**

HHJ Parker found that C was the successful party but agreed with D that the extent of C's success was very small and limited indeed as he ran issues of greater substance and importance to trial, on which he was unsuccessful. He accepted D's argument that, even if C had succeeded, under CPR 44.2, the proper exercise of discretion ought to lead to C recovering significantly reduced costs and D recovering a substantial proportion of its costs.

HHJ Parker therefore found it was logical to consider and award costs as appropriate over the following three periods:

1. Letter of claim to Calderbank – Defendant do pay the claimant's costs in the fixed sum of £10,000.
2. Expiry of Calderbank to part 36 – Claimant do pay the defendant's costs to be assessed.
3. Part 36 to Trial – Claimant do pay the defendant's costs to be assessed.

HHJ Parker accepted D's arguments that, in reality, the great majority of the costs incurred by both parties were in relation to C's main case (the splenectomy) and that C had lost every contested issue at trial. He accepted D's argument that the delay in amending the defence was irrelevant to costs since C knew from service of the expert evidence that D's expert would concede that point. The judge accepted D's argument that the failure to allege delay in the LOC was relevant conduct under CPR 44.2 because D had been given no opportunity to avoid litigation. Had delay been alleged pre-issue, it would have been admitted. C would however have incurred some costs in any event in valuing the delay.

The judge was persuaded by D's submission that, having regard to the new formulation of the proportionality rule, (i.e.in a case that straddled 1 April 2013, the Court should have regard to the fact that the Lownds test would apply only to pre-April costs and that the new rule applied thereafter) when considering the effectiveness of the Calderbank (i.e. whether C would have done better to accept it), the Court should consider not just the costs that C had in fact incurred but also the costs which, on assessment, would be proportionate to the sum of damages awarded. £20,000 was clearly more than reasonable and disproportionate in respect of a claim for £2,500.

Moreover, he agreed it was reasonable to use a Calderbank offer because a part 36 would have exposed D to all of C's reasonable costs, which may have been disproportionate to the sum recovered (the claimant's 'approved' budgeted costs to trial were in the sum of £150,628.55 plus additional liabilities). The judge agreed with D that C ought to have accepted the Calderbank and that C's failure to accept was not related to the costs offered. If it were, C would have accepted D's subsequent part 36 offer rather than counter-offer £167,000. Moreover, if costs really were the issue C could and should have counter-offered in respect of costs.

**ADR**

HHJ Parker rejected the C's argument that D's costs should be reduced for a failure to engage in ADR. He accepted there was no reasonable/realistic prospect that ADR would have achieved settlement or any real narrowing of the issues. Had D agreed to ADR, HHJ Parker recognised this would have only increased costs substantially and the cost of ADR would have been more than what the claimant was actually awarded.

**Claimant's limited costs award**

HHJ Parker considered the potential injustice that might arise if he found C should have accepted the Calderbank but C subsequently recovered more than the £20,000 on assessment. In making his order HHJ Parker followed the submission of counsel for D that only judgment for a fixed sum equal to or less than the costs on offer in the Calderbank could prevent the risk that C might recover more on assessment.

C was awarded a fixed sum of £10,000 to reflect the costs C would have incurred in any event had the delay issue been investigated and settled pre-issue but C was ordered to pay all of D's costs from the last day for accepting the Calderbank. The fixed sum included additional liabilities and VAT.

**Practice points**

Use Calderbank offers where appropriate.

**Contact information**

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THE COUNTY COURT AT LIVERPOOL

Claim No. 3YS64693

35 Vernon Street
Liverpool

Thursday, 8th December 2016

Before:

HIS HONOUR JUDGE PARKER

Between:

PD

Claimant

-v-

RLBUH NHS T

Defendant

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Counsel for the Claimant: MISS ROBERTS

Counsel for the Defendant: MISS FANNERAN

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JUDGMENT APPROVED BY THE COURT

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APPROVED JUDGMENT

1. THE JUDGE: This is a judgment on the issue of costs following the trial.

2. Background

This judgment deals with the issue of costs following the judgment that I gave in respect of the claimant's claim for damages for personal injury, loss and damage arising out of his claim in clinical negligence against the defendant. The judgment in respect of that claim is to be found in the hearing bundle at divider 11. I gave judgment for the claimant in the sum of £2,500, together with interest of £144, and adjourned the case for consideration of the appropriate costs order. I heard argument on 5th December 2016 and Mr Pickering appeared on behalf of the claimant. He had appeared on behalf of the claimant at the trial. Miss Fanneran stood in place of Mr Feeney, who was the counsel at the trial.

3. Chronology

The following is a brief chronology. On 11th November 2010, the claimant underwent the original laparoscopic operation. On 13th November 2010, the claimant underwent the laparotomy and splenectomy. On 1st October 2012, the claimant sent the letter of claim. On 1st February 2013, the defendant sent the letter of response. On 7th March 2014, the particulars of claim were signed. On 9th July 2014, the defence was signed. On 16th October 2015, the defendant made a Calderbank offer of £5,000 damages plus £20,000 costs. On 11th December 2015, the claimant rejected the defendant's £5,000 Calderbank offer. On 26th January 2016, the joint report of Professor Keighley and Mr Scott was received by the defendant. On 21st March 2016, the claimant made a Part 36 offer of £167,500. On 23rd March 2016, the claimant offered ADR. On 7th April 2016, the defendant rejected the claimant's offer. On 23rd May 2016, the claimant amended the particulars of claim to add an allegation of failure to extend the incision and allegations about causation arising from the delay in proceeding to laparotomy. On 20th June 2016, the amended defence was signed. On 13th July 2016, the defendant made a Part 36 offer of £5,000. On 21st July 2016, the claimant rejected the defendant's offer to settle. On 21st July 2016, the claimant made a Part 36 offer of £110,000. On 18th August 2016, the defendant rejected the claimant's offer, and the trial commenced on 12th September 2016.

4. The Law

In dealing with costs which were incurred before 1st April 2013, the Civil Procedure Rules 44.3 at 44X.3 in the *White Book* provides:

> "(1) The court has discretion as to –
>
> (a) whether costs are payable by one party to another;
>
> (b) the amount of those costs; and
>
> (c) when they are to be paid.
>
> (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.

(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and

(c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

(5) The conduct of the parties includes –

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the practice direction – pre-action conduct or any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and

(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.

(6) The orders which the court may make under this rule include an order that a party must pay –

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date, including a date before judgment."

5. In dealing with costs from 1st April 2013, CPR 44.3 becomes, interestingly, 44.2. CPR 44.3:

"(1) Where the court is to assess the amount of costs it will assess those costs –

(a) on the standard basis; or

(b) on the indemnity basis,

but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.

(2) Where the amount of costs is to be assessed on the standard basis, the court will –

(a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and

(b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.

(5) Costs incurred are proportionate if they bear a reasonable relationship to –

(a) the sums in issue in the proceedings; [...] and

(c) the complexity of the litigation..."

6. Submissions on Behalf of the Claimant

Mr Pickering provided a skeleton argument and also a reply to the defendant's skeleton argument, which I have considered. In his oral submissions he invited the court to deal with the issues in three distinct periods of time: the first period, the proceedings up to and including 21 days after the Calderbank offer; the second period, the proceedings after 21 days post the Calderbank offer and before the Part 36 offer had expired; and the third period, the proceedings after 21 days post the Part 36 offer. He suggested that in dealing with the costs issues there were various things that the court could do. The appellate cases that were set out in the bundle of authorities provided the background to principles but, in his submission, it was appropriate to look at general statements of principle and apply them to the facts of the case. He said that the crux of the claimant's submission was that this is a case where the defendant could have made an early Part 36 offer. They knew that they were in difficulties with the delay in proceeding to laparotomy and splenectomy and they have acknowledged delay in their defence. They also knew, he suggested, that the delay was likely to sound in more than nominal damages. They could have sought the protection of a Part 36 offer but did not do so for too long – but that was their choice.

7. He said that the importance of the Part 36 provisions as a standalone procedure had been emphasised by Lord Justice Jackson in *Medway Primary Care Trust & Another v Marcus [2011] 5 Costs LR 808*:

"Part 36 (amongst its other purposes) affords protection for defendants who have a weak case on liability but a strong case on quantum. Such defendants can and should protect their position on costs by making an appropriate Part 36

offer at an early stage. If only defendants and their insurers would take this course, a large amount of unnecessary litigation would be avoided."

8. Mr Pickering also relied upon the judgment of Lord Justice Jackson in *Trevor Michael Fox v Foundation Piling Limited [2011] EWCA Civ 790*:

> "I hope that the forthcoming amendment to Rule 36.14 will point the way to a more clear-cut approach to the costs rules in future. In the context of personal injury litigation where the claimant has a strong case on liability but quantum is inflated, the defendant's remedy is to make a modest Part 36 offer. If the defendant fails to make a sufficient Part 36 offer at the first opportunity, it cannot expect to secure costs protection."

9. Mr Pickering argued that there had been a series of amendments to Part 36 after these decisions which made the code more coherent. He acknowledged that the letter of claim at divider 5 in the bundle does not make any criticism of the defendant for the delay in proceeding to laparotomy. However, the particulars of claim does do so at paragraph 27, and I read:

> "(i) Failed to act sufficiently rapidly in response to the concerns expressed at 1400 hours on 12th September 2010.
>
> (ii) Failed in the light of those concerns to take sufficient note of the reading noted in paragraph 14 above and to bring the claimant back to theatre and to perform the splenectomy at or about 1600 hours on 12th November 2010."

10. He acknowledged that the letter of response considered what the letter of claim had said, but he suggested that, despite the fact that the letter of claim did not refer to the delay allegation, the defendant could still have considered making an admission. That, in my judgment, is a poor point. To suggest that the defendant should have raised an issue that was not raised by the claimant himself is to take criticism too far. Mr Pickering suggested that the defence at divider 8 of the bundle only makes a partial admission in respect of delay:

> "(4) In relation to paragraph 27, it is admitted that the laparotomy and splenectomy should have occurred by 2100 hours on 12th November 2010. It is denied that the procedure should have been undertaken by 1600 hours as there was no indication to proceed to surgery at that time."

11. Mr Pickering suggested that the duration of symptoms was important from the point of view of quantum. The defendant had the breach evidence from Mr Scott in his report of 4th September 2015:

> "3.07. Given the recorded description of hypotension, tachycardia and high drainage losses recorded at around 1400 hours on 12th November, the possibility of haemorrhage should have been considered at that time. At this point the drain had accumulated at least 550 millilitres and had had to be changed, and the claimant was requiring boluses of gelofusin to maintain his blood pressure.
>
> 3.08. Approximately twelve further hours passed before the intra-abdominal haemorrhage was recognised. In my view there were several missed

opportunities to make the diagnosis of post-operative bleeding, including the untimed post-operative ward round on 12th November, the junior doctor review at 1820 hours and the nursing assessment at 2000 hours. These missed opportunities may be open to criticism.

3.09. For the reasons given, recognition of the intra-abdominal haemorrhage in the claimant was delayed by approximately twelve hours. On the balance of probabilities, this delay caused twelve hours of unnecessary illness and suffering, including persistent hypotension, increased loss of blood and increased transfusion requirement."

12. Mr Pickering suggested that the defendant had the report from Mr Scott but did not make the full admission until the defence was amended in June 2016. Mr Pickering also suggested that the defendant have made a Calderbank offer when they could have made a Part 36 offer. The allowance for damages in the Calderbank offer was exactly the same as the Part 36 offer. The joint expert report of 21st January 2016 was clear. At page 30 the experts agreed that the reoperation should have occurred soon after 1400 hours on 12th November 2010. However, there was still no Part 36 offer until July 2016.

13. Mr Pickering contended that the defendant should pay the claimant's costs for period 1 and period 2. In period 3 the defendant had the protection of the Part 36 offer, although he suggested that their failure to attend for alternative dispute resolution should be taken into account in how to calculate the costs that the defendant is entitled to. Before the Part 36, however, there was no reason why the defendant should not make a Part 36 offer and before the Calderbank offer there was nothing for the claimant to accept in terms of an offer. He suggested that there was no reason to make a Calderbank offer as distinct from a Part 36 offer so that the defendant had some form of costs protection. He suggested that the proportionality and reasonableness test would protect the defendants on costs.

14. In terms of periods 1 and 2, Mr Pickering suggested that the claimant was the successful party: the defendant was writing a cheque for damages for the claimant which made the claimant successful. The *Medway v Marcus* decision can be distinguished, he argued, because it is clear from the judgment of the President that the successful part of the claimant's case was considered to be (a) an afterthought, (b) without the support of expert evidence, (c) first raised during closing address, and (d) scarcely part of the claim considered. Furthermore, Mr Pickering argued that five years post-*Medway v Marcus* there is now a greater reliance on Part 36.

15. If the court was against Mr Pickering in terms of the costs of the second period post Calderbank then Mr Pickering suggested that the court should take into account the following: my findings at paragraph 5 of my judgment that the claimant had not sought to exaggerate the consequences of his complications but rather had shown fortitude; that he had brought a claim that was supported by an expert; that there had been no procedural misconduct or exaggeration on his part and that he had enjoyed partial success; further, that the only significant offer was a single Calderbank offer.

16. In terms of period 1 and considering whether the order for costs should be issue-based or proportionate, Mr Pickering suggested that the defendant had the opportunity to protect itself by making a Part 36 offer. The fact that they did not was their problem. The risk of an issue-based approach was that it would depart from the basic approach of Lord Justice Jackson. A single mathematic approach would also be inappropriate – in

other words, to apply the percentage of damages success to the costs – because a successful part of the claim would have required a detailed colorectal surgical report and haematology report and further input from solicitor and counsel in any event. He also argued that even though there was a partial admission in the defence of 9th July 2014, there was still no Calderbank offer until October 2015. However, he recognised that there was no pleaded sequelae in the particulars of claim that sounded eventually in damages. He recognised that his only point for period 3 was the failure to attend ADR.

17. Mr Pickering also rightly acknowledged the case of *Halsey v Milton Keynes General NHS Trust [2004] 1 WLR 3002, 16-29*, in particular:

> "In deciding whether a party has acted unreasonably in refusing ADR, these considerations should be borne in mind: (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success."

18. In dealing with whether there should be any interim payment made on account of the defendant's costs, he suggested that at tab 20 the defendant's budget was £62,268, which would inevitably be subject to deductions, he said, and the defendant was contending for £37,500. He suggested that an appropriate figure would be £24,000.

19. Submissions on Behalf of the Defendant

Miss Fanneran on behalf of the defendant also provided a skeleton argument and a reply to the claimant's skeleton argument. She argued, on behalf of the defendant, that the defendant was the successful party, which was the starting point for considering who should pay the costs. She said this was because the limited success of the claimant was on a point that took a miniscule amount of time to deal with it. It took up no time at all in the run-up to trial or at trial. The amount of damages were insignificant, demonstrated by reference to my judgment in suggesting that the award would no doubt be felt by the claimant to add insult to injury. She said that the issue had not been raised in the letter of claim and the defendant had thereby been deprived of an opportunity to avoid litigation. She recognised that within her written skeleton argument she had said boldly, to use her phrase, that the issue of the length of delay made no difference to damages and had put that too boldly. What she meant was that it made no difference to the way that the case was run. She said that from the moment the joint statement was served, the claimant would know that the amendment to the defence was a technicality and that the defendant would have an uphill task to show that the delay was less.

20. Miss Fanneran placed reliance on the *Medway v Marcus* case, suggesting that the facts are remarkably similar, although she then sought to argue that the President's assessment of afterthought was wrong, seeking to answer Mr Pickering's argument that the case could be distinguished from the present case on its facts. When the delay was pleaded in the particulars of claim, the extent to which the issue was dealt with by the parties was minimal. It was pleaded in paragraph 27 of the particulars of claim that there was no pleaded case on causation, she argued. She invited the court to bear in mind the impact on costs that the issue had had. In time and costs, it was minimal. The issue raised by the defence was a difference of five hours of pain and suffering. All of this was against a backdrop where the claimant's case was all about avoiding the laparotomy and the splenectomy. It was not primarily about delaying proceedings to the

reoperation. Parties should, she said, only bring proceedings when reasonable and proportionate to do so.

21. Miss Fanneran sought to highlight the different approach towards costs both pre and post 1st April 2013 and said that the test of proportionality was now retrospective rather than the test set out in the decision of *Lownds v Home Office [2002] 2 Costs LR 79*, where the Lord Chief Justice Lord Woolf gave guidance as to the resolution of this case in a case where the claimant had recovered significantly less than he had claimed:

> "Whether the costs incurred were proportionate should be decided having regard to what it was reasonable for the party in question to believe might be recovered, thus (i) The proportionality of the costs incurred by the claimant should be determined having regard to the sum that it was reasonable to believe that he might recover at the time he made his claim; (ii) the proportionality of the costs incurred by the defendant should be determined having regard to the sum that it was reasonable for him to believe that the claimant might recover should his claim succeed. This is likely to be the amount that a claimant has claimed for a defendant will normally be entitled to take a claim at its face value. The rationale for this approach is that a claimant should be allowed to incur the costs necessary to pursue a reasonable claim but not allowed to recover costs increased or incurred by putting forward an exaggerated claim, and the defendant should not be prejudiced if he assumes a claim which was made was one which was reasonable and incurs costs in contesting the claim on this assumption."

22. Miss Fanneran argued that the test of proportionality now trumps the necessity test appearing in the *Lownds* case. The proceedings were issued after the new provisions came into force and so the transitional provisions applied. They require the court to assess pre-2013 costs on a *Lownds* basis and post-2013 costs under the new costs regime. It was known that in February 2015 the claimant's solicitors were suggesting that their costs were £50,000 together with additional liabilities and ATE premium. When the defendant was considering whether to make a Part 36 or Calderbank offer, she argued, the defendant was faced with a case that straddled both sides of proportionality: on the one hand the reasonable and proportionate prospective test; on the other, the damages and costs proportionate to that, which was in fact recovered test, set out in 44.3(2) and (5). She acknowledged that there was no definition anywhere of proportionality. She said that the Part 36 offer was made on a commercial basis because the defendant knew it would give extra protection and the Calderbank was made because of the uncertainty at the time around the impact of the transitional and new costs provisions.

23. Miss Fanneran suggested that the President and Lord Justice Tomlinson in the *Medway v Marcus* case were both saying that the court should not allow the rules to give rise to an unjust payment of costs based on the Part 36 procedure. She said that the claimants knew what their work in progress was in October 2015 when the Calderbank offer was made. The claimant's solicitors should have worked out what they had incurred to date and also considered proportionality. They should have realised that they would not recover anything like those costs and should have realised that the offer of £20,000 was a good offer. However, it was the damages offer that led to the rejection of the Calderbank offer. Their counteroffer to the £5,000 damages offered was £167,000. There should have been an analysis, she argued, on how likely the claimant was to

succeed and the Calderbank offer should have been accepted. However, they did not consider the costs because they thought that they would beat the offer on damages. The offer of £20,000 costs was proportionate when set against the recovery of £5,000 damages offered. The simple question is, she said, whether the claimant would have been better off in accepting the Calderbank offer. If costs was the only issue arising out of the Calderbank they could have come back and made their own costs counteroffer or served their own Calderbank. The fact is that even when £5,000 was offered, pursuant to Part 36, they rejected it, and that is highly relevant in considering the effectiveness of the Calderbank offer. Indeed, eight days after the Part 36 offer the claimant made a counteroffer of £110,000.

24. Counsel invited the court to consider the *Fox v Foundation* case and paragraph 45:

> "Parties are quite entitled to make Calderbank offers outside the framework of Part 36. Where a party makes such an offer and then achieves a more advantageous result, the court's discretion is wider. Nevertheless it may well be appropriate to order the party which has optimistically rejected the Calderbank offer to pay all costs since the date when that offer expired."

25. Reference was then made to Mr Pickering's skeleton argument paragraph 17 on page 6, where he refers to the notes to the 2016 *White Book* at 44X3.3. The point was made that the cases referred to a situation where the claimant has beaten the defendant's offer, and in the present case, of course, the claimant failed so to do.

26. Miss Fanneran suggested that if the claimant had succeeded on everything apart from the delay issue it would obviously be the claimant who was the successful party, so why not in reverse? She then made reference to the decision in *HLB Kidsons v Lloyd's Underwriters [2008] 3 Costs LR 427* and the decision of Mrs Justice Gloster, as she then was. Worthy of note in paragraph 13 is her mantra that an order should reflect the overall justice of the case. Miss Fanneran argued that the defendant's point was that the claimant had lost everything at trial. That is important in considering who is successful on the issue of costs. In dealing with the issue of conduct, she suggested that whilst it is right that there has been no exaggeration on the part of the claimant, the claimant does not get brownie points for being an honest claimant.

27. In dealing with whether there should be an issues-based decision, she said that the assessment of delay-issue costs would be, to use her phrase, a nightmare, and so an issue-based approach would not help.

28. On the issue of whether the ADR issue should affect the amount of costs recovered by the defendant post-Part 36 expiry, she reminded the court that the burden is on the unsuccessful party to show that there should be a departure from the usual costs rule. The court should determine whether there was an unreasonable refusal to attend for ADR in all the circumstances of the case. However, the defendant should only be deprived of its costs if it would be unjust to award all those costs. She maintained that the defendant was entitled to say that the case was watertight.

29. <u>My Decision</u>

In my judgment, the claimant is, to a limited degree, a successful party. The claimant has successfully argued and pleaded a claim in delay in proceeding to the laparotomy and the splenectomy reoperation. Initially, whilst it was admitted that there had been

some delay, the extent of the delay was not admitted. Furthermore, notwithstanding the fact that the case was pleaded in March 2014, there was no Calderbank offer until October 2015. Whilst it is right to acknowledge the absence of specific pleading of causation in terms of additional pain and suffering and additional blood transfusion, there was no attempt by the defendant to seek further particulars of causation, and it must be recognised, in my judgment, that the first part of the causation is obvious.

30. In bringing the claim, the claimant has achieved limited success by the award of damages and interest. That, in my judgment, could not have been done, even if the matter had been set out fully in the letter of claim and proceeded to settlement pre-issue without the claimant incurring some costs. In those circumstances, if the claimant had acted entirely in accordance with the pre-issue protocol for clinical negligence claims he would have been entitled to some costs applying the pre-1st April 2013 test.

31. I bear in mind that the issue upon which the claimant was successful was very limited in its scope and that the claimant ran issues of far greater substance and importance for the issues of negligence and loss and damage upon which he was unsuccessful. Whilst I am just about persuaded that for period 1 the claimant is entitled to some costs as a successful party, against that analysis I have to set out the following findings: (1) the issue of delay was not raised in the claim; (2) the particulars of claim did not properly set out the causation of the delay.

32. In looking at the matter in the round and the legal criteria set out earlier in this judgment, an award of a fixed sum of costs of £10,000, payable by the defendant to the claimant for period 1 meets the overall justice of the case. In arriving at the sum of £10,000, I have had to do the best I can to reach a judgment on what would be a fair and proportionate sum by way of costs assuming that the claimant had observed the pre-issue protocol and takes into account the extent of the issues pursued and the limited nature of the successful issue and modest award of damages.

33. I have decided to make an award of a fixed sum rather than to apply a percentage to the claimant's costs because, in my judgment, to seek to unravel which part of the work related solely to that issue would be a wholly disproportionate, if not impossible, task. I recognise, of course, that I have had to do the best I can in all the circumstances, knowing what the costs claimed by the claimant's solicitors were in February 2015, albeit some eight months before expiry of period 1.

34. Having received the report from Mr Scott in September 2015, the defendant made a Calderbank offer on 16th October 2015. That Calderbank offer provided for damages that were twice that recovered by the claimant. The offer of costs was also, in my judgment, twice that which the claimant was properly entitled to. The claimant rejected the defendant's Calderbank offer and, in so far as the claimant was troubled by the limit on the costs offer, did not attempt to negotiate upon it. In light of the fact that the defendant was making such a limited offer, set against the basis for the claim, the defendant was, in my judgment, entitled to be concerned about the issue of costs and to seek to protect itself against disproportionate costs. In my judgment, the defendant was entitled, against the factual backdrop of this case, to seek to protect itself by making a Calderbank offer in the way that it did. On the facts of this particular case, it was reasonable to do so and to choose this mechanism rather than the Part 36 mechanism. The defendant is entitled to its costs in respect of period 2, to be assessed on the standard basis in default of agreement.

35. The claimant made a Part 36 offer of £167,500 on 21st March 2016. This was dramatically in excess of the eventual award. The defendant made a further Part 36 offer of £5,000 on 13th July 2016. This was twice the amount of damages recovered by the claimant. The claimant rejected the defendant's Part 36 offer on 21st July 2016. The claimant made a Part 36 offer of £110,000 on the same day. There was, in my judgment, no reasonable or realistic prospect that ADR would achieve a settlement or, for that matter, any real narrowing of the issues. It was destined to fail. Had the defendant agreed to ADR, that would simply have increased costs by an amount that significantly exceeded the eventual award of damages. It would have been a disproportionate and useless exercise. The only hope of ADR resulting in settlement was if the defendant had got cold feet and offered even more than the claim was worth. This was a case where the claimant ran his claim all the way to a contested trial and at trial lost on every point in issue. There is no good reason why the defendant should not recover their costs in respect of period 3, as defined by both counsel, to be subject to detailed assessment on a standard basis if not agreed.

*(End of judgment)*

*(Discussions as to costs orders followed)*

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