

Neutral Citation Number: [2018] EWHC 1891 (Ch)

Case Nos: HC-2016-003486

HC-2017-000758

HC-2017-001714

HC-2017-002499

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building, Fetter Lane

London EC4A 1NL

Date: 27/07/2018

Before :

CHIEF MASTER MARSH

Between :

VARIOUS CLAIMANTS

- and -

SCOTT FOWLER SOLICITORS (a firm)

WILSONS SOLICITORS (2007) LLP

LAW OFFICES UK LIMITED t/a Wilsons Solcitors

Edward Cohen (instructed by **Pennington Manches LLP**) for the **PM Claimants**

Susan Harris (Solicitor with **Walker Morris LLP**) for the **WM Claimants**

Oliver Campbell QC (instructed by **Maitland Walker LLP**) for the **MW Claimants**

Hugh Evans (instructed by **DAC Beachcroft LLP**) for **Scott Fowler**

Marie Claire O’Kane (instructed by **DWF LLP**) for **Wilson**

Hearing date: 30 May 2018

Judgment Approved

Chief Master Marsh:

1.

This judgment follows a hearing on 30 May 2018 at which the court received submissions concerning costs management in four claims that are being case managed together pursuant to an order dated 19 July 2017. At the end of the hearing I agreed with the parties that my decisions concerning the budget phases that have not been agreed would be recorded in a table and provided to them. The table will be annexed to the costs management order. It was also agreed that I would provide a short judgment dealing with the issues that were considered and briefly explain the approach I have adopted.

Background

2.

The four claims comprise:

(1)

Claim HC-2016-003468 in which 42 claimants, represented by Pennington Manches LLP (“PM”), pursue a claim against Scott Fowler Solicitors (“Scott Fowler”).

(2)

Claim HC-2017-000758 in which 56 claimants, represented by PM, pursue claims against Wilsons Solicitors (sued in two separate manifestations but both are referred to as “Wilsons”).

(3)

Claim HC-2017-001714 in which 17 claimants pursue a claim against Scott Fowler and 4 claimants pursue claims against Wilsons. The claims against Wilsons have been stayed. The claimants are represented by Walker Morris LLP (“WM”),

(4)

Claim HC-2017-002499 in which 107 claimants, represented by Maitland Walker LLP (“MW”), pursue a claim against Scott Fowler.

3.

The claimant groups are referred to as:

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The PM Claimants

-

The WM Claimants

-

The MW Claimants

4.

There was, at the outset, one additional claim brought against a firm of solicitors called Graham & Rosen but that claim is no longer pursued following settlement terms having been agreed. At a hearing on 22 February 2018, the claimants in a further claim, abbreviated as the “YLF Action”, applied for that claim to be case managed and tried at the same time as these claims. The application was rejected and the YLF Action continues on its own separate path.

5.

It is unnecessary to say much about the claims themselves. The claimants, many of who are resident abroad, agreed to purchase as an investment a long-leasehold interest in units of hotel accommodation and/or student accommodation which were to have been built at seven different

locations (hotels at Wembley and Woolwich and student accommodation at Birmingham, Bradford, Liverpool and Leicester). The transactions involved the payment of substantial deposits ranging from between 30% and 50% of the purchase price upon exchange of contracts. The developments were not built and the developers became insolvent. The deposits should have been protected against default by the developer by Deposit Protection Bonds taken out with Northern & Western Insurance Company Ltd (“NWIC”). However, NWIC did not pay out under any of the bonds and entered insolvent liquidation. It is alleged that Wilsons and Scott Fowler, who acted for the claimants, were in breach of their duties and liable for the claimants’ losses.

6.

The four claims are not subject to a Group Litigation Order. They have, however, been case managed in a manner that is similar to GLO claims. The liability for costs of the claimants is several and not joint. At the hearing on 11 September 2017, the parties were directed to identify generic issues and lead claims with a view to there being a trial of the generic issues and the lead cases. Directions were given for the claims to go forward to a trial with a provisional time estimate of 30 days with listing category A.

7.

It was intended that a further hearing fixed for 22 February 2018 would deal with, amongst other issues, costs management. However, that did not prove to be possible due to the hearing of applications by the MW Claimants and the claimants in the YLF Action to be joined to these managed claims.

8.

Directions were given for costs management at both directions hearings. At the first directions hearing the parties were given an opportunity to apply for an order that costs management should not apply to these claims (which have an aggregate value of about £5.7 million). No such application was made. Each cohort of claimants was directed to produce one budget. Thus, for example, there is one PM budget although they act for claimants in two claims. The order made on 22 February 2018 also directed that:

(1)

Updated budgets were to be provided with incurred costs calculated up to 22 February 2018. All subsequent costs were to be treated as prospective costs and therefore capable of being managed by the court.

(2)

Prospective costs were to relate only to the lead cases, save in relation to settlement negotiations, mediation costs and disclosure on generic issues.

(3)

There was to be no provision for expert evidence.

(4)

The parties were to assume the trial would last 30 days with 25 sitting days; two days were allocated to judicial pre-reading and three days to a period after the close of evidence and before closing speeches.

9.

Even with the trial of lead claims and generic issues, which will considerably reduce the burden on the parties and the trial judge, the management of the claims both before and during the trial is far from straightforward. There are 22 lead claims to be tried. They are divided between the three claimant groups and the two defendants in the following way:

- PM Claimants against Wilsons 8 lead claims
- PM Claimants against Scott Fowler 6 lead claims
- WM Claimants against Scott Fowler 4 lead claims
- MW Claimants against Scott Fowler 4 lead claims

Total 22 lead claims

10.

The Wilsons Defendants are dealing with 8 lead claims and the Scott Fowler Defendants are dealing with 14 lead claims.

11.

The number of claimants is not an accurate indicator of the number of transactions that are involved because (a) there were joint purchasers and (b) some purchasers acquired more than one unit. Furthermore, although the PM Claimants between them purchased units in all seven developments, that is not the case with the other claimant groups.

12.

There are further differences between the parties. Wilsons dealt with three developments and produced three versions of their report on title. In addition, there are allegations in some of the claims against Wilsons that additional assurances were given. Scott Fowler dealt with five developments and there were three versions of their report on title.

13.

The 'choreography' of the trial will require careful organisation because it should not be necessary for all the parties to attend the entire trial. I accept, however, when considering budgets some flexibility is needed about the number of days that each party will need to attend the trial because the position is currently uncertain.

14.

It is unnecessary to set out the provisions of CPR Part 3 and Practice Direction 3E that provide the framework for costs management. The core provision is contained in PD3E paragraph 7.3 and, broken down into its constituent elements, it provides that:

(1)

The court has no power to approve the costs of budget phases that have been agreed between the parties.

(2)

Where budget phases are not agreed, the court will review them and approve the budget with appropriate revisions.

(3)

The court's approval is to the total figure for the budget phases but the court may have regard to the constituent elements of each total figure.

(4)

The court will not undertake a detailed assessment in advance.

(5)

The court will consider whether the budgeted costs fall within the range of reasonable and proportionate costs.

15.

The provisions of paragraph 7.3 are now supplemented by paragraph 7.10 which emphasises that costs management concerns the totals allowed for each phase of the budget and:

(1)

It is not the role of the court to fix or approve the hourly rates claimed in the budget; and,

(2)

The underlying detail in the budget is provided for reference purposes only to assist the court in fixing the budget.

16.

I emphasise that the court is not required to have regard to the constituent elements of each budget phase (it may do so) and the court's task is to decide whether the total for each phase falls within a range of reasonable and proportionate costs. Both the words I have emphasised are found in the Practice Direction and they point clearly to the nature of the task the court is to carry out. It is not a calculation. Reasonableness may involve having close regard to the calculations in the budgets; proportionality does not. The total costs in a budget phase may be reasonable when the arithmetic set out in Appendix H is looked at, but it may not be proportionate. And the court is not looking to establish what the budget figure should be objectively ascertained to be, but rather a figure that falls within the applicable range applying the reasonableness and proportionality tests alongside each other. Both of those tests are, however, objective. Thus, the court is not bound by a party's choice of representative in the sense that a party is entitled to choose an expensive law firm and/or to be represented by leading and junior counsel. The court makes no judgment about such choices. It is only interested in whether the total figure per phase is reasonable and proportionate.

17.

I would add that although some comparison between budgets may be informative, the court is not a slave to comparison. There can be good reasons why similar work in the hands of different legal teams will result in a higher or lower budget. These reasons include, to name but a few, matters such as which party bears the greater burden of conducting the claim, the place where the work is carried out, a choice of more or less senior counsel (or two counsel rather than one) or simply a difference in the way in which the legal team is expected to operate. More fundamentally, there can be genuine differences of view about the likely amount of work that will be required. Save in claims that are routine and of a type that become 'commoditised', there is no one objectively correct way of conducting litigation. This explains why the court is required to consider whether the costs fall within

a range of reasonable costs; with the costs of different parties likely to fall within different parts of that range. And although the agreement of a budget phase removes the court's ability to set a budget for that phase, the figure that has been agreed is only of passing interest to the court. The court might take the view that another party's budget for that phase should be set at a higher or lower figure when the test under paragraph 7.3 is applied.

Proportionality

18.

The court must apply both the reasonableness and the proportionality tests, but the former may yield to the latter. In practice, although PD3E, paragraphs 7.3 and 7.10, require the court to consider each budget phase separately, and therefore to consider the proportionality of each phase total, it is helpful for the court to undertake an initial overall review of proportionality by reference to the factors in CPR44.3(5):

"Costs incurred are proportionate if they bear a reasonable relationship to –

(a)

the sums in issue in the proceedings;

(b)

the value of any non-monetary relief in issue in the proceedings;

(c)

the complexity of the litigation;

(d)

[omitted]

(e)

any wider factors involved in the proceedings, such as reputation or public importance."

19.

In this case it is common ground that only factors (a) and (c) are of relevance.

20.

I observe that CPR44.3(5)(c) does not require the court to ask the question: "Is this litigation complex". Instead, it requires the court to consider the relationship between the complexity, such as it may be, and the litigation costs of the claim or phase. It is therefore not a binary complex/non-complex test to be applied but rather a graduated test and I find it is helpful to form a view about where the litigation sits in the range of litigation in the High Court. It also requires the court to consider the complexity of the individual budget phases. The claim overall may not be particularly complex whereas aspects of the work may be of a different order. Disclosure may, for example, be more complex than is usual for a case of that type and, if so, proportionality in that phase may produce a higher figure than would otherwise be the case.

21.

I consider that the individual claims in this litigation are relatively straightforward professional negligence claims. However, complexity is added by two factors.

(1)

The number of test claims to be tried and, to a lesser extent, the number of claims overall that will have some effect on settlement negotiations and mediation. In all likelihood, settlement negotiations will not proceed on an individual case by case basis but rather by reference to settlement formulae.

(2)

The length of the trial and its choreography. The category A listing for trial derives from those two factors and that categorisation particularly affects the range of reasonable and proportionate costs for that phase.

22.

This is a different approach to the one adopted by Morgan J in *Group Seven Ltd and others v Nasir and others* [2016] 2 Costs LO 303 but I am satisfied that it directly accords with the requirements of Practice Direction 3E for the reasons I have explained.

23.

The headline figures concerning the relationship between the sums claimed and the budgeted costs are:

(1)

PM Claimants: Value of claims £3,513,000: Budgeted costs £2,624,000.

(2)

WM Claimants: Value of claims £1,120,000: Budgeted costs £616,000.

(3)

MW Claimants: Value of claims £2,557,000: Budgeted costs £1,011,000.

(4)

Wilsons Defendants: Value of claims £2,330,000: Budgeted costs £1,318,000.

(5)

Scott Fowler Defendants: Value of claims £4,363,000: Budgeted costs £838,000.

24.

In *Group Seven Ltd v Nasir* Morgan J observed at paragraph [22] that: “The rules do not prescribe any particular mathematical relationship between the costs and the sums in issue. It would obviously be inappropriate to do so.” I respectfully agree. CPR 44.3(5) specifies that the costs must bear a reasonable relationship to all the proportionality factors, to the extent they are relevant. The relationship must be ‘reasonable’ (itself a term that will normally exclude the application of arithmetic) and the court’s evaluation will usually be multi-factorial. Later in his judgment at paragraph [24] Morgan J considered the figures for costs and the value of the claims in the cases before him but there is nothing in that paragraph, contrary to the submissions made to me, that lays down any principle that costs in excess of 50% of the value of the claim are disproportionate.

25.

In *Marks and Spencer plc v Asda Stores Ltd* [2016] 5 Costs LR 837 HHJ Hacon (sitting as a judge of the High Court) remarked at paragraph [11] that all Morgan J in *Group Seven v Nasir* was suggesting was “... that as a starting point, if the court comes to the view that the costs budget in question significantly exceeds half the value of the claim, then this may raise a rebuttable indication that those costs are not proportionate”. With respect, I do not consider that is what Morgan J was suggesting given what he said at paragraph [22] of his judgment and it does not accord, in any event, with the

provisions of paragraph 7.3 of Practice Direction 3E. That paragraph makes no reference at all to the overall costs in the budget and requires the court to focus on the costs of each budget phase. It is of course helpful to have an eye to the overall figure, but it is not the focus of the task that is given to the court. Furthermore, it is unhelpful to put restraints on the proportionality test by the use, even as a starting point, of an arithmetical relationship between two figures when the test is not an arithmetical one.

Charging rates

26.

Group Seven v Nasir is not authority for the proposition that the Guideline Rates for the summary assessment of costs may not be exceeded. They are of some assistance, but they are far from being an infallible guide to the rates that may be allowed on a detailed assessment. At the risk of stating the obvious, a “guideline” does not fix the rates that will play a part, but no more than that, in forming a view about whether the total figure for a budget phase falls within a range of reasonable and proportionate costs.

27.

I observe that it is common for little or no information to be provided about counsel’s hourly rates and the estimated hours. Furthermore, information is often not provided about how brief fees have been calculated. The most striking example in these claims relates to the budget for the Wilsons Defendants in which fees of £500,000 are estimated for leading counsel for the trial with no explanation whatever provided in the budget, or the assumptions. Inevitably, in the absence of a cogent explanation for a substantial brief fee, the court is likely to conclude that the estimate is aspirational. I consider it is essential, if the court is to undertake costs management in accordance with the Rule and Practice Direction, either for the assumptions in a budget to explain how counsel’s fees for the trial have been estimated or for this information to be provided with the budget in a covering letter.

Incurred costs

28.

I was asked to provide a comment about the costs of the PM Claimants that were incurred before the claim was issued and up to the date of the budget. The total figure is £925,000. This is certainly a substantial figure in relation to claims with a value slightly in excess of £3.5 million. However, the court has very limited information about the work that was undertaken and there is real difficulty in making a comment that is of value. To my mind, merely to say that the figure appears to be too large and/or disproportionate serves little purpose. A Costs Judge on a detailed assessment will have all the material that is required to make a full analysis. I declined to make a comment.

PM Claimants’ budget

29.

Mr Cohen who appeared for the PM Claimants set out in some detail in his skeleton argument why it is to be expected that their budget is higher than any other party. Broadly I accept that with claims against both Wilsons and Scott Fowler, and the largest number of lead claims, it is inevitable that the PM Claimants will have more work to do than the other claimant groups, particularly as Penningtons Manches has acted as the lead solicitor. However, it appeared to me that looked at objectively, and even taking into account the fact that many of the claimants are resident abroad, there is no objective

need for the work to be undertaken at City of London rates. And it is also striking that the work model is partner heavy.

30.

The estimates for the budget phases were all significantly in excess of figures that are reasonable and proportionate.

31.

Disclosure was budgeted at £392,000, which is an astonishingly large figure for a claim of this type. The claimants' disclosure will not be heavy. 865 budgeted hours appears to me to be both pessimistic and unrealistic. The use of counsel should be limited to dealing with legal issues and an estimated figure of £11,200 is excessive.

32.

Witness statements were budgeted at £275,000. Although the assumption is that 25 statements will have to be prepared, they should not be long statements if they comply strictly with the guidance set out at paragraphs 19.1 to 19.5 of the Chancery Guide. The statements should all follow a similar pattern and the work of obtaining the information that is required in them can be organised with the help of a questionnaire. Some of the witnesses are abroad and that is a relevant factor. The review of the statements of the other claimants should be brief. The defendants' statements will of course need to be considered carefully. 450 hours is far more time than can be justified. I accept that a review of the statements of the claimants (in draft where appropriate) and the defendants is required but an estimated charge of £18,400 is excessive.

33.

The main issue about the PTR phase is the amount of solicitors' time estimated at 56 hours. The PTR phase is a limited one and although I would expect the estimated costs for this claimant group to be greater than the other parties, it should not exceed them by a substantial margin.

34.

The budget estimates 450 hours of solicitors' time for trial preparation. This figure is difficult to understand and to my mind bears little relationship to what is reasonable and proportionate.

35.

In the trial phase the estimated hours of the solicitors are reasonable, but account must be taken of the rates within the estimate. Counsel's fees for trial are estimated at £259,000 using Mr Cohen's daily rate/refresher of £4,000. This is a high figure for junior counsel (albeit he is very experienced). I accept that the PM Claimant group will need to attend for much of the trial period.

36.

The ADR phase is estimated to be £275,000. It is right that settlement negotiations will need to take account of each claimant and will involve communications with each of them. However, 480 hours of estimated time is far too high.

37.

Mediation is estimated at (rounded £113,000) based on 210 hours of solicitor time and £10,000 of counsel's fees. The underlying assumption is that four days will be occupied by the mediation. This period cannot be justified.

The WM Claimants

38.

The value of these claims is smaller than the other two groups and they have only four lead claims. Relatively minor adjustments are required to disclosure, witness statements and PTR phases about which no comment is required. The trial phase was estimated at £381,000, a figure that is greater than any other party, other than the Wilsons Defendants. The estimate is based on an assumption that leading and junior counsel will be instructed. It also seems that little account has been taken of the limited number of lead claims and therefore the reduced need to attend the trial. I do not accept that running the trial on the basis that two counsel, leading and junior, will be briefed is either reasonable or proportionate. An estimate of £260,000 for counsels' fees considerably exceeds what is reasonable and proportionate.

39.

I consider that the assumptions upon which the estimate for solicitors' time for the trial is based are pessimistic but I recognise that a law firm with a base in Leeds is likely to incur a greater number of hours during the trial and that daily travel is not a practical proposition.

40.

The MW Claimants

41.

Their budget was agreed at an overall figure of £1,029,000.

Wilsons Defendants

42.

The budget was agreed save for the trial phase which totals £723,000. This is almost twice the size of any other party's trial phase estimate. The solicitors' time is estimated to be 500 hours. The budget is based on the assumption that leading and junior counsel will be briefed. Leading counsel's fees are estimated at £500,000 and junior counsel's fees are estimated at £125,000. No justification for these figures has been provided. An aggregate cost for the trial phase of £723,000 is neither reasonable nor proportionate.

43.

I accept that the Wilsons' legal team at the trial will have a great deal of work to do but I have regard to the huge disparity between the defendants for this phase and bear in mind that the value of claims the Scott Fowler defendants are facing is nearly double the amount faced by the Wilsons Defendants.

Scott Fowler Defendants

44.

I need only make observations about the trial phase which is estimated at £346,000. No points arise concerning solicitors' time. Counsel's fees are based upon one counsel being instructed. He is very experienced, having been called in 1987. A helpful breakdown has been provided. The figure assumes a brief fee of £150,000, refresher fees at £3,250 per day for 20 days and time spent considering transcripts on days when counsel is not in court, weekend work and work on closing submissions amounting to £30,000 and a fee for considering the judgment and the hand down hearing.

45.

The estimate for the brief fee equates to 45 days work and cannot be justified. I do not consider that additional charges may be included in the estimate for weekend working.

Footnote

46.

Since the costs management hearing some of the claims have been settled. I have, nevertheless, felt it appropriate to hand down this judgment.

ANNEX 1

Notes.

1.The figures in italics are those conceded on behalf of the provider of the budget at the hearing, and therefore are not the same as the figures in the budgets.

2.The future response figure does not include past costs, and may as a result be different from the Precedent Rs.

PENNINGTON MANCHES CLAIMANTS

	Incurred	Future claim	Total	Agreed	Future response	Master's decision
Preaction	£436,244.63	-	£436,244.63	-	-	-
Issue/SoC	£311,640.75	-	£311,640.75	-	-	-
CMC	£143,880.73	-	£143,880.73	-	-	-
Disclosure	£12,301.80	£379,960	£392,261.80	No	£83,680	£175,000
WS	£1,699.10	£272,920	£274,619.10	No	£93,975	£125,000
PTR	-	£58,586	£58,586	No	£29,840	£35,000
Trial prep	£60.44	£246,090	£246,150.44	No	£84,050	£100,000
Trial	-	£372,000	£372,000	No	£356,640	£235,000
ADR/stmt	£18,590.29	£256,300	£274,890.29	No	£78,955	£50,000
Mediation	£323.40	£113,050	£113,373.40	No	£62,190	£50,000
Total	£924,741.14	£1,698,906	£2,623,647.14			

WALKER MORRIS CLAIMANTS

	Incurred	Future claim	Total	Agreed	Future response	Master's decision
Preaction	£4,011.46		£4,011.46	-	-	-
Issue/SoC	£17,808.17	£2,275	£20,083.17	Yes	-	-

CMC	£14,042.83	-	£14,042.83	-	-	-
Disclosure	£3,374.11	£47,510	£50,884.11	No	£27,600	£40,000
WS	-	£42,575	£42,575	No	£23,650	£35,000
PTR	-	£27,125	£27,125	No	£24,125	£25,000
Trial prep	-	£36,125	£36,125	Yes	-	-
Trial	-	£355,275	£355,275	No	£325,525	£200,000
ADR/stmt	£2,428	£51,700	£54,128	Yes	-	-
Contingency	-	£11,625	£11,625	No	£9,375	£9,375
Total	£41,664.58	£574,210	£615,774.58			

MAITLAND WALKER CLAIMANTS

	Incurred	Future claim	Total	Agreed	Future response	Master's decision
Preaction	£218,876.50	-	£218,876.50	-	-	-
Issue/SoC	£140,061.80	£2,885	£142,946.80	Yes	-	-
CMC	£73,509	£12,875	£86,384	Yes	-	-
Disclosure	£5,800.50	£56,125	£61,925.50	Yes	-	-
WS	£48,250	£50,550	£98,800	Yes	-	-
PTR	-	£21,125	£21,125	Yes	-	-
Trial prep	-	£47,125	£47,125	Yes	-	-
Trial	-	£277,620	£277,620	Yes	-	-
ADR/stmt	-	£25,350	£25,350	Yes	-	-
Contingency	-	£31,000	£31,000	Yes	-	-
Total	£486,497.80	£524,655	£1,011,152.8			

WILSONS DEFENDANT

	Incurred	Future claim	Total	Agreed	Future response	Master's decision
Preaction	£233,099.25	-	£233,099.25	-	-	-
Issue/SoC	£175,830.33	-	£175,830.33	-	-	-
CMC	£81,233.20	£10,955	£92,178.20	Yes	-	-

Disclosu re	£5,423	£143,975	£149,398	Yes	-	-
WS	-	£62,550	£62,550	Yes	-	-
PTR	-	£28,875	£28,875	Yes	-	-
Trial prep	-	£34,150	£34,150	Yes	-	-
Trial	-	£523,200	£523,200	No	£350,000	£205,000
ADR/ stmt	£4,956.50	£14,275	£19,231.50	Yes	-	-
Total	£500,542. 28	£817,980	£1,318,522 .28			

SCOTT FOWLER DEFENDANT

	Incurred	Future claim	Total	Agree d	Future response	Master's decision
Preaction	£47,818.1 4	-	£47,818.1 4	-	-	-
Issue/SoC	£45,483.3 5	£6,000	£51,483.3 5	Yes	-	-
CMC	£43,275.5 2	£12,780	£56,055.5 2	Yes	-	-
Disclosur e	£9,774.7	£67,750	£77,524.7 0	Yes	-	-
WS	-	£55,848	£55,848	Yes	-	-
PTR	-	£29,200	£29,200	Yes	-	-
Trial prep	-	£86,270	£86,270	No	£62,670	£75,000
Trial	-	£345,810	£345,810	No	£255,810	£237,000
ADR/stmt	£788	£26,780	£27,568	Yes	-	-
Continge ncy	-	£61,000	£61,000	Yes	-	-
Total	£147,139. 71	£691,438	£838,577. 71	Yes		