

[2021] EWHC 2776 (QB)

Case No: QB-2019-003882

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date:

Before :

MR JUSTICE CAVANAGH

Between :

MAGRET THOMAS AND OTHERS

- and -

PGI GROUP LIMITED

Richard Hermer QC, Benjamin Williams QC and Kate Boakes (instructed by **Leigh Day**) for the
Claimants

Charles Dougherty QC, Nicholas Bacon QC and Ognjen Miletic (instructed by **Hogan Lovells**)
for the **Defendant**

Hearing date: 22 September 2021

RULING ON THE COSTS OF THE APPLICATION FOR A COSTS CAPPING ORDER

Mr Justice Cavanagh:

1.

On 19 October 2021, I handed down a written judgment in relation to the Defendant’s application for a Cost Capping Order (“CCO”). The Defendant was seeking a CCO which would limit the Claimants’ recoverable future costs to £150,000 (or thereabouts), or alternatively, for a costs budget to be set for the Claimants’ future costs in the sum of £150,000. I will refer to this application as “the Costs Capping Application”. The judgment followed an oral hearing on 22 September 2021, during which I sat with Costs Judge Brown. For the reasons given in my written judgment, I rejected the Defendant’s application.

2.

At paragraph 108 of the judgment, I said that:

“108. On behalf of Judge Brown and myself, however, I wish to stress that it does not follow from this judgment that we accept that a costs budget should be set in the sum that the Claimants have set out in their Precedent H, or, indeed, in the sum that the Defendant has offered (in the event that its main argument failed). We will have to consider whether the proposed budgets are unreasonable and/or disproportionate on "normal" grounds, i.e. not on the grounds that were relied upon by the Defendant

when seeking a CCO in the sum of £150,000. We have decided that cost budgeting is a matter that Judge Brown and I should deal with jointly.”

3.

Accordingly, whilst the Defendant’s application for a CCO and/or for a costs budget for the Claimants of £150,000, has been rejected, Costs Judge Brown and I have yet to set the budgets for the parties’ future costs. We have invited and received further written submissions from the parties in relation to the costs budgets, and a hearing has been fixed for 19 November 2021 at which the costs budgets will be set.

4.

The parties have also filed written submissions in relation to the costs of the Costs Capping Application.

5.

The Claimants have applied for the costs of the Costs Capping Application. They seek an order that the Defendant shall pay the Claimants’ costs of and occasioned by the Costs Capping Application, to be subject to immediate detailed assessment on the standard basis if not agreed. The Claimants also seek a payment on account of costs in the sum of £30,000. The Claimants say that, in the alternative, they have no objection to an order for summary assessment, and suggest that, if the Court decides to deal with costs in this way, the assessment can be carried out at the same time as the costs budgeting exercise. The Claimants have not, as yet, filed a Costs Schedule in relation to the Costs Capping Application.

6.

The Defendant submits that the costs of the Costs Capping Application should be reserved and then determined at the forthcoming hearing on the costs budgets. Alternatively, if a costs order is made in the Claimant’s favour, the Defendant submits that there should be detailed assessment at the end of the proceedings, or, failing that, summary assessment of the Claimants’ costs.

7.

The parties agree that the costs in relation to the other matters of case management that were dealt with at the hearing on 22 September 2021 should be costs in the case.

Should the Defendant be liable for the Claimants’ costs of the Costs Capping Application?

8.

As I have said, the Defendant submits that I should postpone consideration of this issue until the costs budgeting hearing on 19 November 2021. The Defendant says that there was a significant commonality and overlap in its submissions regarding proportionality and how it should be applied in relation to a CCO and in relation to costs budgeting. Accordingly, the arguments in relation to proportionality which was at the heart of the CCO application would have been raised and determined in any event as part of the costs budgeting exercise. Moreover, if there is a significant reduction in the Claimants’ costs budget following completion of the budgeting exercise, it may be that the court deems it appropriate to reflect this in the order for costs.

9.

In fact, I had already indicated, in directions that I gave on 15 October 2021, that I saw no reason to postpone a decision on the costs of the hearing on 22 September 2021 until after the costs budgeting determination. At that stage, the Defendant had indicated that it submitted that I should postpone this

decision, but had not provided detailed submissions in support. In the circumstances, I have considered it appropriate to reconsider my view in light of the detailed submissions of the party and do not reject the Defendant's proposal simply because I had already indicated a view in my directions of 15 October 2021.

10.

However, having considered the Defendant's submissions, I remain of the view that it is appropriate for me to take a decision on the question of principle as to whether the Defendant should pay the Claimants' costs of the Costs Capping Application at this stage, rather than wait until the end of the costs budgeting hearing. My decision is that the Defendant should be liable to pay the costs of the Claimants in relation to the Costs Capping Application.

11.

The reason for my decision that the Defendant should pay the Claimants' costs of the Costs Capping Application is that the issue that was raised in that Application was discrete and entirely separate from the "normal" submissions that a party might make as regards whether a proposed costs budget was reasonable or proportionate. The Defendant's primary submission was that there should not be a costs budget for the Claimants' future costs at all, but that the court should impose a CCO instead. In the alternative, but very much as a subsidiary argument, the Defendant submitted that I should set a costs budget at £150,000, essentially for the same reasons that the Defendant relied upon in support of a CCO in the same amount. This was not part of the usual to-ing and fro-ing which the court might expect from parties to litigation who are disputing the other party's costs budget on the basis that the sums claimed were excessive and/or were more than was reasonably necessary to pursue the litigation and/or were disproportionate. This was not part of a normal costs budgeting exercise.

12.

The argument that this was a suitable case in which to impose a CCO failed, and so did the argument that any cost budget for the Claimants in excess of £150,000 would be disproportionate in all of the circumstances of the case. Put bluntly, therefore, the Defendant lost the Costs Capping Application and I do not see any reason why the normal principle that costs should follow the event should not apply.

13.

There is no reason to delay a decision as regards whether the Defendant should be liable for the costs of this issue until after the costs budgeting hearing. There is no significant overlap between the issues that were dealt with in the Costs Capping Application and the issues that will be dealt with at the forthcoming costs budgeting hearing. As the Claimants' counsel said in their written submission, the Defendant's proportionality argument as advanced at the 21 September 2021 hearing cannot be re-run for the costs budgeting exercise on 19 November 2021. The parties' submissions on whether the Defendant should pay the Claimants' costs of the Costs Capping Application have been fully set out in their written submissions (including Reply Submissions on behalf of the Defendant) and no purpose would be served by providing the parties with an opportunity to develop them further at the oral hearing on 19 November. Indeed, to do so would eat into the time set aside for costs budgeting and this would not be consistent with the overriding objective. There would be no reason why the decision on the costs of the Costs Capping Application would be affected by the outcome of the costs budgeting hearing on 19 November 2021.

The form of the order for costs

14.

As I have said, the Claimants' primary submission is that there should be an order for immediate detailed assessment, with a payment on account of £30,000. I do not accept that this would be the appropriate order to make. Such a detailed assessment would take a considerable time and would involve the parties in incurring considerable additional expense. It would be a complicated exercise, because the Costs Judge would have to disentangle the cost relating to the Costs Capping Application from the costs arising from the general costs management issues and the general costs budgeting exercise. All of these are equally reasons why I do not favour a detailed assessment at a later stage. Moreover, I do not see why the Claimants should have to wait until the end of the proceedings for the costs of a discrete part of the proceedings in which they were successful.

15.

This leaves a summary assessment of the costs of the Costs Capping Application. It is true that some of the same complications as I have referred to in relation to a detailed assessment will arise in relation to a summary assessment, but not to the same extent, and, at least, the summary assessment will be made by the judges who had the benefit of dealing with the Costs Capping Application, rather than by a Costs Judge who may not have any familiarity with the matters in issue.

16.

It follows that, in my judgment, it is in the interests of justice and in accordance with the overriding objective, for the Claimants' costs of the Costs Capping Application to be determined by summary assessment. It is not possible to do this now, because the Claimants have not yet provided a schedule of their costs of the Costs Capping Application. I will order, therefore, that the Claimants must file and serve a Schedule of the costs that it seeks in relation to the Costs Capping Application seven days before the hearing on 19 November. The summary assessment will then be dealt with at the hearing on 19 November. It is unfortunate that some of the time at this hearing will therefore be taken up by the summary assessment, but it is unavoidable and I hope and expect that the summary assessment will not take very long.

17.

As I have decided to make a summary assessment of costs in a few weeks' time, it is not appropriate nor necessary to order a payment on account. In any event, I would have been disinclined to do so as the Claimants have not provided a Schedule of their costs and the Defendant had not had a reasonable opportunity to make submissions on the figure that was proposed.

18.

In summary, therefore, I have decided that the Claimants should have their costs of the Costs Capping Application, to be determined by summary assessment at the hearing on 19 November 2021. I have amended the draft order that was helpfully provided to me by the parties so as to reflect this ruling.