[2022] EWHC 1607 (SCCO)

Case No: SC-2022-BTP-000057

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Royal Courts of Justice
LondonWC2A 2LL

Date: 24 June 2022

Before: Costs Judge Brown
Between:

EVX

(A Minor by her Mother and Litigation Friend XYZ)

Claimant

- and –

JULIE SMITH

(Personal Representative of the

Estate of Dr Peter Smith, Deceased) **Defendant**

- -

Erica Bedford instructed by and for **Irwin Mitchell LLP**

Hearing date: 5 April 2022
(first handed out in draft on 15 June 2022)

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

Costs Judge Brown:

1. This is my decision in a claim by the Claimant's solicitors, Irwin Mitchell LLP, ('IM') against the Claimant, a child. It is a claim for payment by way of deduction from her damages of IM's fees and disbursements in respect of what they say is the shortfall in the recovery of base costs from the opposing party to the litigation, the Defendant. Overall, it is for the sum of about £28,113. The claim was made, in effect, by application to the court dated 27 May 2021 when I was asked to approve the deduction sought.

2. In this decision I am concerned to address the hourly rates of the fee earners whose work is claimed at Grade 'C' by reference to the grades as they appear in the Guide to the Summary Assessment of Costs 2021[1] and the earlier versions. The rates claimed are £235-£240 per hour. The information provided as to qualifications of the fee earners are set out in the Appendix; two are now solicitors (one qualified as solicitor on 1 March 2019), another qualified as a Chartered Legal Executive on 21 October 2019, others appear to be wholly unqualified but are claimed at Grade C rates by reason of what is said to be their experience, albeit that experience is largely unspecified.

3. A number of issues of principle arose at the hearing and I gave Ms Bedford the opportunity to put in further written submissions which she did on 27 April 2022, and for which I am grateful.

Background

4. The Claimant was around five weeks old in early 2015 when it was alleged her GP, now deceased, failed to diagnose and appropriately treat a condition (referred to as developmental dysplasia - a condition whereby the ball and socket hip joint fail to develop normally) in her left hip. The allegation focused on an examination on 23 April 2015 and as to whether any abnormality had then been detected. A diagnosis of dysplasia in the Claimant's left hip was however made on 17 December 2015 when the Claimant underwent a left open hip reduction on 15 February 2012. She has been left with scarring on her left hip and was left with a worse prognosis than would otherwise have been the case. It was anticipated by the expert instructed by the Claimant that she will require a pelvic osteotomy before the age 10 and will develop arthritis, requiring a hip replacement at age 50-60 and a revision at 75 (with a 20% chance of a second revision at age 85).

5. IM were first instructed under a conditional fee agreement dated 29 March 2016 although the work for which a claim is made includes work in February 2016 (the CFA having retrospective effect).

6. Proceedings were issued in the High Court on 22 October 2018. Liability was denied and the matter was timetabled through to trial to commence on 14 January 2021. Expert evidence was obtained from four experts on each side and it appears that the joint statements were favourable to the Claimant. The claim ultimately settled at a round table meeting on 10 November 2020, without admission of liability, in the sum of £225,000 subject to court approval.

[1] (see in particular Appendix 2 of the 2021 Guide),

7. The settlement sum was approved by Master Eastman on 9 March 2021. He allowed the sum of £16,420.00 to be paid to IM in respect of the success fee (£12,500.00) and ATE insurance premium (£3,920.00). The Master's order also included the following provision:

There shall be a detailed assessment of remaining costs payable by the Claimant to her solicitors in relation to the shortfall of costs on the indemnity basis pursuant to CPR 46.9 with permission to dispense with such an assessment upon the agreement of the Claimant.

8. On or about 28 April 2021 the parties to the underlying claim agreed the sum of £130,000 in respect of costs and interest (a sum, I should perhaps say, that I am asked to approve as part of this process).

9. I did not, at the outset, dispense with a detailed assessment of the solicitor's claim. It seemed to me that a detailed assessment of the costs claimed was in the interests of the Claimant. I set out my reasons for forming this view in various orders.

10. The Claimant's litigation friend, her mother, does not object to the deduction and Ms. Bedford argued at the hearing on 5 April 2022 that I should simply approve the deduction on the basis of this agreement. This was a matter that I considered had previously been dealt with and I had refused. I was not satisfied that the Litigation Friend would have had explained to her, and would have understood, on what basis the amount of the deduction was reasonable and appropriate; it is not enough in these circumstances that a Litigation Friend should be warned that a deduction would be made from damages (not least because such advice would, to my mind, be inaccurate or incomplete insofar as it did not also refer to the process of assessment which any claim for a deduction would generally involve). In any event it seems to me that the rules provide, in effect, that there must be a detailed assessment. Further, I was concerned that the Litigation Friend might be said to have a liability to the solicitors independent of the Claimant which produced a potential conflict such that I should be wary of any reliance on her consent (this was not, I should emphasise, conflict that that she would necessarily have appreciated and it may be that she understood that the costs sought by IM simply had to be paid from the Claimant's damages).

11. The instruction of the solicitors proceeded on the basis that the costs arising in this matter would be subject to detailed assessment under CPR 21 and 46.4 (unless it was not in the interests of the Claimant to have such an assessment) and, despite substantial and persistent opposition by IM and Ms. Bedford, I considered that there remained good reasons relating to the amount of the claim why there should be such an assessment of this claim.

12. I might add that a litigation friend, as here, is very often a member of the protected party/child's family and volunteers for the role. The rules, to my mind, require the court to consider the liability of the Claimant and the litigation friend for costs (as it would in respect of the claim for damages, as to which see *Dunhill v Burgin* [2014] UKSC 180). This benefits the claimant and the litigation friend, relieving the litigation friend of the need to make binding decisions as to costs on which they might have little understanding. Far from discouraging people to come forward to act as litigation friends (as it has been put to be me in other cases),

the protection afforded to the claimant and to the litigation friend appear to me to encourage their involvement.

13. The CFA which was entered into with litigation friend provides as follows:

The hourly rates which currently apply to your claim are:

> *Grade 1 - Partners, associate directors, solicitors and legal executives with over 8 years post qualification experience and other fee earners of equivalent experience: £360 per hour.*
>
> *Grade 2 - Solicitors and legal executives with over 4 years post qualification experience and other fee earners of equivalent experience: £295 per hour.*
>
> *Grade 3 - Other solicitors, legal executives and other fee-earners of equivalent experience: £240 per hour.*
>
> *Grade 4 - Trainee solicitors, litigation assistants and other fee-earners of equivalent experience: £145 per hour*

The above hourly rates will apply to your claim until the review date on 1 May each year when we will notify you of any increase in our hourly rates. In the absence of any notification all of our hourly rates will automatically increase by a percentage equivalent to the increase in the RPI over the previous 12 months ending on 1 May. If a different percentage increase is to apply, we will advise you in writing as soon as possible after the review date.

14. Various letters, I should say, were sent providing revisions to these hourly rates. IM have a number of offices around the country but the branch that dealt with the claim is in Southampton.

15. I should make clear that I considered the hourly rate which was claimed for the Grade A fee earner at £315-320 per hour to be reasonable. The main fee earner in a claim such as this plainly bears significant responsibility and the rate seemed to me to reasonable in this context and having regard to the other factors under CPR 44.4 (3). My concerns arise with the junior fee earners who, with the exception of Ms. Causey for a limited period, were acting effectively, under, close supervision.

16. At the outset I was concerned that I had little or no information about the fee earners for whom the rates were claimed. I recorded in an earlier order my request that information as to the fee earners be provided with a Bill particularised in accordance with the decision of Steyn J in *Barking, Havering & Redbridge University Hospitals NHS Trust v AKC* [2021] EWHC 2607 (QB), 2021[2] (setting out their identity, status and litigation experience).Without this information it is plainly difficult, if not impossible, to tell what rate is payable for each individual under the terms of the CFA (the solicitors could not, of course, claim a higher rate that the litigation friend had agreed to pay). Although I did not order IM to provide this information, in a recital to an earlier order I indicated that failure to provide the information requested in the form requested may justify an inference that the provision of such information would not assist the Claimant's solicitors in respect of any consideration as to whether the

[2] Which was upheld in all material respects in the Court of Appeal, [2022] EWCA Civ 630.

hourly rates sought are properly claimed against the Claimant and/or may lead to a further adjournment.

17. In the event IM provided a further breakdown in electronic form which did identify the fee earners in the bill and provided some information in respect of these fee earners which I have set out in the Appendix. It will be noted that in respect of fee earners referred to as ‘quantum analysts’ there appear to be relevant qualifications and their experience is described as ‘13 years' experience’ and ‘8 year’s experience’.

18. The solicitors’ argument is that the Litigation Friend has approved the hourly rates by entering into a CFA which provided for the rates claimed. Such approval to the rates was provided after an oral explanation of the terms of the CFA. As I understand it, it is said that the agreement of the Litigation Friend to the hourly rates in the CFA and their updating prevented me assessing the sums payable (and reducing the sums by reference to their reasonableness) by the Claimant. Further, the Litigation Friend was told that costs would be claimed by way of shortfall from those recovered from the Defendant and gave her express agreement to the sums which were agreed in negotiations as payable by the Defendant with knowledge that the Claimant would be exposed to a claim for the shortfall. The approval, it is said, was informed consent to the costs and it was argued in those circumstances that there was not merely a presumption of reasonableness, but that presumption was irrebuttable so that the rates are deemed reasonable. IM assert in any event that the hourly rates are reasonable.

Relevant provisions

19. CPR r 46.4 provides:

Costs where money is payable by or to a child or protected party

(1) This rule applies to any proceedings where a party is a child or protected party and –

> *(a) money is ordered or agreed to be paid to, or for the benefit of, that party; or*
> *(b) money is ordered to be paid by that party or on that party’s behalf.*
> *(‘Child’ and ‘protected party’ have the same meaning as in rule 21.1(2).)*

(2) The general rule is that –

> *(a) the court must order a detailed assessment of the costs payable by, or out of money belonging to, any party who is a child or protected party; and*
> *(b) on an assessment under paragraph (a), the court must also assess any costs payable to that party in the proceedings, unless –*
> > *(i) the court has issued a default costs certificate in relation to those costs under rule 47.11; or*
> > *(ii) the costs are payable in proceedings to which Section II or Section III of Part 45 applies.*

(3) The court need not order detailed assessment of costs in the circumstances set out in paragraph (5) or in Practice Direction 46.

(4) Where –

> *(a) a claimant is a child or protected party; and*
> *(b) a detailed assessment has taken place under paragraph (2)(a),*

the only amount payable by the child or protected party is the amount which the court certifies as payable.

…

20. CPR 21.12 provides so far as material:-

Expenses incurred by a litigation friend

(1) Subject to paragraph (1A), in proceedings to which rule 21.11 applies, a litigation friend who incurs costs or expenses on behalf of a child or protected party in any proceedings is entitled on application to recover the amount paid or payable out of any money recovered or paid into court to the extent that it –
(a) has been reasonably incurred; and
(b) is reasonable in amount.

(1A) Costs recoverable in respect of a child under this rule are limited to—
(a) costs which have been assessed by way of detailed assessment pursuant to rule 46.4(2);
(b) costs incurred by way of success fee under a conditional fee agreement or sum payable under a damages based agreement in a claim for damages for personal injury where the damages agreed or ordered to be paid do not exceed £25,000, where such costs have been assessed summarily pursuant to rule 46.4(5), or
(c) costs incurred where a detailed assessment of costs has been dispensed with under rule 46.4(3) in the circumstances set out in Practice Direction 46.

……

(3) No application may be made under this rule for costs or expenses that –
(a) are of a type that may be recoverable on an assessment of costs payable by or out of money belonging to a child or protected party; but
(b) are disallowed in whole or in part on such an assessment.
(Costs and expenses which are also "costs" as defined in rule 44.1(1) are subject to rule 46.4(2) and (3).)

(4) In deciding whether the costs or expenses were reasonably incurred and reasonable in amount, the court will have regard to all the circumstances of the case including the factors set out in rule 44.4(3) and 46.9.

(5) When the court is considering the factors to be taken into account in assessing the reasonableness of the costs or expenses, it will have regard to the facts and circumstances as they reasonably appeared to the litigation friend or to the child's or protected party's legal representative when the cost or expense was incurred.
....
(7) The amount which the litigation friend may recover under paragraph (1) in respect of costs must not (in proceedings at first instance) exceed 25% of the amount of the sum agreed or awarded in respect of—
(a) general damages for pain, suffering and loss of amenity; and
(b) damages for pecuniary loss other than future pecuniary loss,
net of any sums recoverable by the Compensation Recovery Unit of the Department for Work and Pensions.

(8) Except in a case to which [certain fixed costs provisions apply], *no application may be made under this rule for a payment out of the money recovered by the child or protected party until the costs payable to the child or protected party have been assessed or agreed.*

[my underlining]

21. It is notable that in deciding the amount the child should be expected to pay the court <u>will have regard</u> to all the circumstances of the case including the factors set out in rule 44.4(3) and 46.9.

22. CPR r 46.9 provides:
Basis of detailed assessment of solicitor and client costs
....

(3) Subject to paragraph (2), costs are to be assessed on the indemnity basis but are to be presumed –
(a)to have been reasonably incurred if they were incurred with the express or implied approval of the client;
(b)to be reasonable in amount if their amount was expressly or impliedly approved by the client;
(c)to have been unreasonably incurred if –
(i) they are of an unusual nature or amount; and
(ii) the solicitor did not tell the client that as a result the costs might not be recovered from the other party.

23. CPR 44.3 provides

44.3
(1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) 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.
(Rule 44.5 sets out how the court decides the amount of costs payable under a contract.)

24. CPR 44.4 provides:
Factors to be taken into account in deciding the amount of costs

(1) The court will have regard to all the circumstances in deciding whether costs were
(a) if it is assessing costs on the standard basis –
(i) proportionately and reasonably incurred; or
(ii) proportionate and reasonable in amount, or
(b) if it is assessing costs on the indemnity basis –
(i) unreasonably incurred; or
(ii) unreasonable in amount.

(2) In particular, the court will give effect to any orders which have already been made.

(3) The court will also have regard to –
(a) the conduct of all the parties, including in particular –
(i) conduct before, as well as during, the proceedings; and

(ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;
(b) the amount or value of any money or property involved;
(c) the importance of the matter to all the parties;
(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;
(e) the skill, effort, specialised knowledge and responsibility involved;
(f) the time spent on the case;
(g) the place where and the circumstances in which work or any part of it was done; and
(h) the receiving party's last approved or agreed budget.

25. Before turning to my decision, to my mind some significant preliminary matters need to be addressed.

The application of the presumptions in 46.9 (3)

26. It is plain that, as the law stands[3], in order to benefit from the presumptions in their favour it is necessary for solicitors to establish informed consent to the incurring of the costs on the part of the Litigation Friend (*McDougall v Boote Edgar Esterkin (a Firm) [2001] 1 Costs L.R. 118, Herbert v HH Law Ltd [2019] EWCA* Civ 527 [37] and [38]. In *McDougall* Holland J, in the context of an argument about hourly rates and the presumptions (in the RSC), said:

> *"To rely on the Applicants' approval the solicitor must satisfy me that it was secured following a full and fair exposition of the factors relevant to it so that the Applicants, lay persons as they are, can reasonably be bound by it. "*

27. In *Herbert* the Court of Appeal made clear that the overall burden of showing informed consent, as a pre-condition to the presumption applying, is on the solicitor (at [38]).

28. This requirement cannot, it seems to me, be satisfied by the mere fact of the Litigation Friend's consent to the relevant type or amount of costs to be incurred. If it were otherwise then the word 'informed' would be redundant.

29. The term '*unusual nature or amount* 'is not expressly defined in CPR 46.9 (3) (c). In *ST v ZY* [2022] EWHC Senior Costs Judge Gordon-Saker considered the effect of *inter partes* costs budgets in the context of a claim by solicitors against the damages received by a child for substantial sums in excess of the budget in three phases. The claimant's solicitors advanced no argument *inter partes* (ie between the parties to the underlying litigation) that there was a good reason to depart from the budget in respect of two of those phases and effectively offered to accept the approved budget figures from the defendants in the action. In the context of a consideration of the presumption at 46.9(3)(c), the Senior Costs Judge rejected the submission that the term "unusual" should be read as being 'unusual' between solicitor and client. He held that this would be to ignore the purpose of the rule and went on to say:

> *"To avoid the presumption the solicitor is required to explain to the client that the costs may not be recovered because they were unusual. "Unusual" must therefore be read in the context of a between the parties assessment. Of course we are not here concerned with costs which are merely "unreasonable". A solicitor is not required to*

[3] Noting the appeal in *Belsner v Cam Legal Services Ltd* [2020] EWHC 2755 (QB)

inform the client that particular costs may not be recovered because a court may conclude that they were not reasonably incurred or reasonable in amount."

30. Holding that the costs claimed in excess of the budgets were unusual, to avoid the presumption of unreasonableness the Senior Costs Judge held that the solicitors should have told the client that *as a result of their unusual nature or amount*, the costs might not be recovered from the other party. The litigation friend was told that there would be a shortfall, and given estimates of what the shortfall would be, but she was not told about the budget or the effects of the budget and, accordingly, the claims against the Claimant's damages for the excesses failed.

31. Ms Bedford says that the presumptions in CPR 46.9 (3) (c) apply but argues, as I understand it, that the approach of the Senior Costs Judge in *ST* should not apply to a consideration of hourly rates.

32. Further, I understood Ms. Bedford to argue that were it to be established that the client had provided informed consent that would create an irrebuttable presumption under CPR 46.9(3)(c). In the event it was not necessary for me to consider this contention in detail but below I address both this and the contention in the previous paragraph.

Reliance on the terms of the written agreement in the assessment/legal basis for the assessment

33. Underlying IM's case was a contention, in effect, that the Litigation Friend's agreement to the hourly rates in the CFA was determinative and that I should give effect to what were said to be principles of 'freedom of contract'.

34. In this context I asked whether the CFA was being relied on as a contentious business agreement (within the meaning of section 59 of the 1974 Act). Such agreements may, of course, exclude an assessment (or part or all of the costs claimed[4] from an assessment, see sections 59 and 60 of the 1974).

35. IM do say that the CFA was a contentious business agreement. However they also say, as I read Ms Bedford's submissions, that it is clear from the terms of the CFA that they contracted with the Litigation Friend on the basis that the liability of the Litigation Friend for costs would be determined by an assessment of a bill following an application under section 70 of the 1974 (a 'solicitor /client' assessment' or 'Solicitors Act' assessment[5]) and that the parties have chosen this as an <u>alternative</u> to liability for costs under a contentious business agreement[6].

36. It would follow, it seems to me, that a written agreement as to costs is not determinative of the sums due by way of costs. It seems clear that a 'Solicitors Act' assessment, proceeds not by way of determination of what is due on an agreement as to costs but upon an assessment (or taxation) of the reasonableness of the charges set out in a bill (required by section 69 of the 1974); a solicitors' cause of action for remuneration is ordinarily on their <u>bill</u> not the agreement[7]; hence under CPR 46.9 (3) (a) and (b) 'approval' (or agreement) of the client to pay costs merely creates a <u>presumption</u> of reasonableness.

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[4] Including as to hourly rates, see in particular section 59 (1) and section 60 (1) of the 1974 Act.
[5] Albeit the Act does not as such provide for an assessment but assumes that there one under the common law or otherwise.
[6] Following the approach in *Acupay System LLC v Stephenson Harwood*, SCCO 25 June 2021).
[7] *Walton v Egan [1982] 1 QB 1231* at pages 1237G - 1238 A

37. This is also clear from and, confirmed (if any such confirmation is required) by a consideration of the legislative history and earlier cases.

38. The direct precursor of the provisions relating to contentious and non-contentious business agreements in Part III of the 1974 Act was the Attorneys and Solicitors Act 1870. *Friston on Costs* says at [1.82] and [1.83]) that prior to the coming into force of that Act, agreements between solicitors and clients as to costs were governed by two common law principles: the first that it was contrary to public policy for a solicitor to recover by agreement more than would be awarded on taxation; the second, was that the fiduciary relationship between solicitor and client made it necessary for the solicitor to show that any such agreement had not been unduly affected. In general, an agreement that precluded taxation in respect of costs yet to be incurred had to be favourable to the client to avoid being set aside.

39. In *Clare v Joseph* [1907] 2 KB 369, when explaining the effect of the 1870 Act, the Court of Appeal said that an agreement between solicitor and client as to fees would be viewed with suspicion. Fletcher–Moulton LJ said this at p376:

> *Let us now consider the state of the law on this subject at the date of the coming into operation of the Act of 1870. At that date agreements between a solicitor and his client as to the terms on which the solicitor's business was to be done were not necessarily unenforceable. They were, however, viewed with great jealousy by the Courts, because they were agreements between a man and his legal adviser as to the terms of the latter's remuneration, and there was so great an opportunity for the exercise of undue influence, that the Courts were very slow to enforce such agreements where they were favourable to the solicitor unless they were satisfied that they were made under circumstances that precluded any suspicion of an improper attempt on the solicitor's part to benefit himself at his client's expense.*
>
> [My underlining]

40. The approach of the Courts in a taxation (assessment) of a bill to an agreement as to costs is explained by the following passage in the judgment of Erle CJ in *Philby v Hazle* (1860) 8 CB (NS) 647:

> "*Regard being had to the words of the enactment, and the policy of the law, which had in view of the protection of the client against the attorney's greater knowledge of professional charges, it seems to me to prohibit attorneys from making agreements like this with their clients, to this extent, that the attorney cannot be allowed to take advantage of the agreement where it would give him more than the law would otherwise have given him, that is, more than would have been allowed him by the master on taxation. The inclination of the cases is, that an agreement whereby the attorney was to get a larger sum than the ordinary allowance cannot be enforced. In Drax v. Scroope , 2 B. & Ad. 58l, 1 Dowl. P. C. 69, I observe that Lord Tenterden and Littledale, J., do not carry out the principle to the extent of saying that the attorney must give his services for one inflexible taxable rate of remuneration: on the contrary, they rather seem to sanction the notion that he may under particular circumstances stipulate for higher remuneration for journeys; but still the bill must be so presented as to enable the master to exercise his discretion as to whether or not the client should be charged at the increased rate*."

41. It is perhaps also to be noted that whilst the 1870 Act permitted the court in effect to exclude taxation and to give effect in certain circumstances to a written agreement, it did so subject to the court being satisfied that the agreement was fair and reasonable. The meaning

of fair and reasonable is addressed by Lord Esher, then Master of the Rolls, in *re Stuart, ex parte Cathcart* [1893] 2 QB 201: as he makes clear, in considering whether an agreement as to costs is fair and reasonable, the court is concerned not just with the mode of obtaining the agreement ('the fairness') but whether the payments sought are reasonable in amount (a separate matter). In short, the provisions confer a substantial degree of protection on the client against written agreements that are unfairly obtained, and without informed consent, or (importantly for these purposes) are unreasonable in amount. That approach, as I understand it, remains good law under the provisions dealing with contentious business agreements in Part III of the 1974 Act (see in particular section 61 of the 1974 Act).

42. Against this background and in particular the matters set out in *Clare v Joseph* I think it is clear why 'approval' (or agreement) by a client merely creates a presumption in a 'Solicitors Act' assessment and also why such approval must be 'informed'.

43. Whilst I understand that the Court of Appeal is expected shortly to consider whether, when entering into a retainer, a solicitor is in a fiduciary relationship, it seems to be clear that the common law has, at least as appears in *Clare v Joseph*, generally regarded solicitors as being in a position of trust when entering into a retainer with their client. It is not at all clear anything has changed since the earlier decisions *Friston* cites in the passages I have referred to above; indeed, it might well be said that funding arrangements have, if anything, become more complex, such that the opportunity for exercising undue influence is much greater. For what it is worth, it also seems to me that clients do in general often simply trust a solicitor when entering a retainer and that this is perhaps borne out by agreements to pay high success fees in straightforward RTA cases where liability cannot properly be in dispute[8]. Be that as it may, it seems to me that the concerns set out in *Clare v Joseph* continue to underlie the presumptions in 46.9 (3) (as I understand Ms Bedford to accept in her written submissions).

44. I should perhaps also say (although it makes no difference to the outcome) that I think the more obvious basis for an assessment of a claim such as this against the damages of a child or protected party is under CPR rules 21.12 and 46.4 and that this assessment is not a 'Solicitor Act' assessment. There is, it seems to me, a distinct statutory basis for the assessment of this claim which arises because of the status of the claimant. The assessment takes place without a bill (which would be a necessary pre-condition to an assessment under section 70 of the 1974 Act). Indeed, that there a distinct basis for assessment is perhaps why r 21.12 requires the Court in such an assessment only to *"have regard"* to the presumptions in 46.9 (3) which would ordinarily apply on an assessment as between a solicitor and client.[9]

45. It is difficult, in any event, to see how any special status can be afforded to written agreements in this assessment: the claimant (a child or protected party) cannot be any worse off in such an assessment than he or she would be if challenging a contentious business agreement or in a 'Solicitors Act' assessment.

46. Nothing, to my mind, about this approach offends the principles of '*freedom of contract'*. The solicitors entered into an agreement with the Litigation Friend on the understanding that the rules under CPR 46.4 and 21.12 applied and that their costs would, subject to the exceptions provided by these rules, be subject to assessment.

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[8] See also *HH v Herbert* and in this context arrangements of the sort described at [82] in *Belsner v Cam Legal Services Ltd* [2020] EWHC 2755 (QB).

[9] Further, of course it may be said that the claim is against the Claimant's damages, a fund (see CPR rule 47.18).

Decision

47. In my view the rates claimed for the fee earners described all of whom are either without qualification or are recently qualified, are unusual in amount.

48. It is clear, addressing myself to the factors in CPR 44.4 (3), that the claim for damages was a matter of considerable importance to the Claimant who has been left with significant prospect of requiring further treatment. The damages claimed of over £400,000 and the damages awarded are, on any view, substantial in the context of personal injury generally. The claim has been handled with skill and care. Both sides acting co-operatively in trying to resolve the claim.

49. I agree that the claim carried significant risk and some complexity. Risk is a matter which is normally compensated for in the success fee. However, the issue of liability, which carried significant risk, involved matters of some complexity and potentially the input of expert evidence as to what happened in the relevant examination. That said, against a spectrum of clinical negligence generally, this claim was not of high complexity either in respect of liability or quantum. Indeed, whilst the sums at stake were substantial the assessment of quantum was not so obviously different from many other cases where there is a prospect of future treatment being required; indeed, aside perhaps from its value it is far from obviously a High Court case. Moreover, on the more complex issues there was substantial input from counsel as well as, more generally, the senior fee earner.

50. Although the Guideline Hourly Rates ('the GHR') are no more than a guide and a starting point at that, for summary assessment, nevertheless they are intended to be reflective of rates actually charged; and they are, of course, generally taken as a starting point for detailed assessment. In the case of work outside Central London they are generally reflective of a broad range of rates actually charged by solicitors. The instruction of specialist clinical negligence solicitors in a high value claim would justify some uplift on the ordinary guideline rates for, at least, the lead or Grade A fee earner. As I have already noted the rates claimed for the Grade A fee earner start at £315 and rise to £320 and I do not consider they are unreasonably high. I am concerned with the rates of the junior fee earners who were, with limited exception, as I have indicated, acting under supervision.

51. The 2021 Guideline hourly rate (GHR) for a grade 'C' fee in the National 1 band (applicable to Southampton) was £178 per hour. The GHR for a grade 'C' fee in the National 1 band in the 2010 guidance was £161. The retainer in this case covered the period February 2016 to March 2021. To state the obvious the claimed hourly rates are very substantially in excess of the 2021 GHR. If the weighted midpoint of the work between this and the 2010 rates, which appears to fall in or about 2018/2019, is taken, this might suggest a GHR of somewhere between £170 - £176, and the problem is more acute.

52. My conclusion that these rates are unusual is supported by a cross check using the former A/B factor approach as set out and considered in *Higgs v Camden and Islington Health Authority* [2003] EWHC 15 (QB). By this approach the GHR assume a 'B' factor uplift of 50%. The rates claimed assume an uplift of close to a 100% uplift of the 'B' factor (as I understand Ms. Bedford to accept). Historically at least, a 'B' factor of this sort would represent work which was truly exceptional on the part of the fee earners (*Johnson v Reed Corrugated cases* [1997] Costs LR 180). Whilst I make no criticism of the standard of work in this case, the nature of the work undertaken is far from exceptional. Not only, as I have

repeatedly noted, was much of the work of the relevant fee earners substantially under supervision there was a very significant level of input from and reliance upon counsel. I have already taken the view that the time taken in some respects was excessive. Much of the work by these fee earners concerns the preparation of a schedule of loss. Some checking by senior fee earners would be expected of the schedule. I would however expect Grade D fee earners to be preparing many of the appendices (of travel expenses etc) and much of the more complex work on a schedule such as this could have been done by junior counsel at rates not dissimilar to those claimed here, for less time than was claimed.

53. As is clear from CPR r 21, I am expressly required to have regard to the presumptions in CR 46.9 (3). There is accordingly, to my mind, and having regard to the background to these provisions I have set out above, no basis for saying that that the hourly rates cannot be assessed – and thus reduced in assessment- even if they are agreed.

54. I reject the argument that such rates were not unusual because, it was said, they were normal for IM and they are major providers of services in the field of personal injury. It barely needs me to explain why. Not only am I not satisfied that the rates are normal or that IM occupy such a dominant position in the field of personal injury work that whatever rates they charge should be regarded as usual, I have to look at the matter across the board. I accept that rates of many firms seen in assessment can be sometimes high, indeed it is very often because the hourly rates are high that the claims are disputed, but costs budgeting reveals a broader range of hourly rates.

55. It strikes me, in any event, as difficult to say that these rates are anything other than unusual (making all due allowances for the nature of this claim) when they exceed by a substantial margin the Guideline rates for a Grade B fee earner in the National 1 band (that rate being £218 for 2021) this being for solicitors and legal executives with over 4 years' experience. They are not far off the GHR for a Grade A fee earner in 2021 (£260).

56. I would also reject the contention that the rates could not be said to be unusual for these purposes if there was some real possibility that they might be recovered. In advancing this argument Ms Bedford focussed on some of the work done by the fee earner Ms. Causey, which she said involved minimal supervision from the Grade A fee earner, in respect of which she said there was such a possibility. But not only am I not satisfied that the limited amount of work by this fee earner on which Ms Bedford focussed could be described as exceptional or close to exceptional (which seems to underlie this contention), it also seems to me clear that Ms. Bedford's approach would be to misapply the test. CPR 46.9 (3) (c) uses the word 'unusual'; it is clear when reading the whole of the provision (and the requirement that the solicitor tell *client that as a result the costs might not be recovered from the other party*) that it contemplates that even unusual costs may be recoverable. As appears from *ST v ZY*, the term 'unusual' is not to be equated with 'unreasonable'.

57. I would respectfully agree with the decision of the Senior Costs Judge as to the meaning of 'unusual' in CPR 46.9 (3) (c) in *ST v ZY*: that is to say that it must be read in the context of a between the parties assessment. I should emphasize however that it is not necessary for me to do so in order to reach the conclusion that I have above that the rates are unusual (even if such an approach might reinforce my conclusions). Indeed, as I say, I did not understand Ms. Bedford to take issue at least in her final written submissions with the approach of the Senior

Costs Judge in the context of the issues arising in that case[10]. It is plain to me that the provisions are intended to protect the interests of the client in litigation. This is apparent from the requirement that the solicitor tell the client that if costs are unusual that as a result the costs *might not be recovered from the other party*: a concern which clearly underlies this provision is to protect the client from unrecovered costs in the event of the success in the litigation.

58. As noted above, CPR 46.9 (3) (c) (ii) provides that where costs are unusual the solicitor should tell the client that <u>as a result</u> the costs might not be recovered from the other party. It is plain, in my view, that it is not enough for the Litigation Friend to have been informed of the prospect that there would be a shortfall in the recovery of the costs from the Defendants, nor that she was informed of the amount that the solicitors say would be payable by way of shortfall as the case went on, nor indeed that she approved settlement of costs with the Defendant in circumstances (when she would have anticipated that a claim would be made for shortfall). As explained in *ST* it is clear that the terms of CPR 46.9(3) (c) (i) and (ii) are linked so that the solicitor's explanation must be directed to the unusual nature of the costs: in this case, the hourly rates.

59. It is also clear from the judgment of Holland J in *McDougall*, in the context of consideration of the presumption <u>in favour</u> of reasonableness, that in order to benefit from a presumption of reasonableness informed consent must be *"secured following a full and fair exposition of the factors relevant to it so that the Applicants, lay persons as they are, can reasonably be bound by it."* The explanation required should be directed to the recovery of the hourly rates agreed. The defects and inadequacies identified by the learned judge in *McDougall* in the explanation provided by the solicitors in that case concerned the anticipated approach of the taxing officer in 'party and party' taxation; these concerns would appear to be central to his decision that consent in that case was not informed (see in particular, [10] (a)]). Of course, if solicitors were to inform the client, as does occur, that their hourly rates are unusual and that as a result the costs might not be recovered from the other party, they would have greater protection against a contention that the costs are unreasonable. But in this case, there was no such explanation.

60. It is perhaps relevant to note that the prospect that their hourly rates would not be recovered from the Defendants in the *inter partes* costs claim is relied upon by IM as a reason why I should in this case approve the settlement of the *inter partes* costs claim even though it is less than the amount claimed. The Litigation Friend was informed of an obligation to pay a shortfall in relatively opaque terms, without reference to the reasons why all the sums claimed may not be recoverable. This was notwithstanding that the solicitors were, it seems to me, likely to have been fully aware that the relevant hourly rates were unlikely to be recoverable from the Defendant.

61. Whilst Ms. Bedford did not take issue in her written submissions with the correctness of the decision in *ST v ZY* she submitted that it did not apply in respect of hourly rates. Her point was that in respect of costs budgets there is an express rule of court which prevented any recovery of costs over and above a budget sum. The recoverable hourly rate, she says, is a discretionary matter having regard to the eight pillars of wisdom (CPR 44.3(4). However, not only is the distinction Ms. Bedford seeks to make not as clear as she sets out (good reason can justify a budget overspend) I can see no reason why nevertheless the hourly rates should not

[10] I note the obiter comments of Lavender J in *SGI Legal LLP v Kratysz* [2021] EWHC 1608 (QB) at [102] in the context of determination that it was not necessary to resort to the presumptions in determining the reasonableness of the costs claimed [89].

be treated in the same way as any other component of costs for the purposes of this rule. It is true that the overall sum of costs payable is a function of the hourly rate and time: and thus, it may not matter whether the hourly rate is reduced to reach an overall amount that is reasonable. But as a matter of principle, I see no reason, in circumstances set out above, and given the approach of Holland J in *McDougall*, why the solicitors' hourly rates are not subject to the relevant presumptions and why the approach of the Senior Costs Judge should not apply to them. His approach is predicated on a view as to the meaning of the term 'unusual' which cannot vary in its application to different components as to costs. The hourly rates are, moreover, a matter on which you would expect to see some such explanation to a litigation friend as to the recoverability of the rates payable. Of course, a sophisticated user of litigation services may have difficulty showing that any consent to the rates was not on an informed basis. But it was not suggested to me that this was the case here (I am told the Litigation Friend came to IM through an internet search).

62. In the circumstances there was, in my view, no informed consent to the hourly rates claimed; and there is therefore no presumption of reasonableness. Further, in the absence of the requisite explanation, to my mind, the rates are presumed unreasonable. In any event, and whatever presumptions may apply (and whether I am right or not in the approach set out above), having regard to the relevant factors (the eight pillars), to my mind the rates are clearly unreasonably high for the work done.

63. Rates of £235 - £240 per hour in this period are closer to rates which might be appropriate for at least a Grade B undertaking substantial personal injury work of significant difficulty and significant responsibility. I would add that, even if the rates claimed were reasonable, the overall sums claimed would need (further) adjusting to account for the efficiency and experience that is ordinarily implicit in such rates.

64. I should perhaps add that to my mind it does not follow that the hourly rates will necessarily be regarded as unreasonable simply because they are unusual or because no adequate explanation was provided. Moreover, I do not accept Ms. Bedford's contention, as I had initially understood it, that the presumptions are irrebuttable. In *McDougall* in Holland J said as follows:

> *As it seems to me, if there was client approval of that rate as uniformly applied to the hours then a presumption is raised for the purpose of r.15(2) sufficient to displace indemnity taxation of that item…. What if I uphold Master Pollard's finding in favour of a presumption? I have no doubt but that then his taxation of this item has to be upheld. True, I accept the submission that the 1986 change from the terms of Order 62 r.29 to the already cited Order 62.r15 served to leave any such presumption rebuttable, but I can conceive of no basis for rebuttal when and if I am satisfied of informed approval.*

65. Holland J found there was no informed consent to the hourly rates in that case and he did not strictly need to address the question as to what would have happened had he found that there was informed consent. Indeed, I can see that if the full explanation that Holland J envisaged had been provided, it may perhaps have been difficult in the context of that case to see that the hourly rates would not also be reasonable. However, Nichol J (also obiter) in *Murray v Richard Slade* [2022] Costs LR 43 (at [63]) rejected the argument that the presumptions were rebuttable. He said that that argument was contrary to the language of 44.6.9(3). He noted that the Practice Direction says in terms that the presumption may be rebutted and considered that to be an accurate statement of the position.

66. Ms. Bedford's argument was that evidence to rebut the solicitors' contention that there was informed consent was not advanced by the Litigation Friend and therefore the presumption was not rebutted. But the court will only find that the presumption arises under CPR 46.9 (3) (a) or (b) if it is satisfied that there was informed consent to the approval. As the Court of Appeal explained in *HH v Herbert* (at [38] [11]) the overall burden of showing informed consent is on the solicitors. However, as the Court also made clear the pre-condition of the presumption is informed consent. It seems to me that the absence of any rebuttal evidence in respect of informed consent does not make the presumption irrebuttable. The background to CPR 46.9 (3), which I have set out above, makes this clear that in general written agreements are not determinative even in a 'Solicitors Act' assessment.

67. Turning then to the individual fee earners, I note the grading of fee earners in the GHR is as follows:

> *[A] Solicitors with over eight years post qualification experience including at least eight years litigation experience and Fellows of CILEX with 8 years' post-qualification experience.*
>
> *[B] Solicitors and Fellows of CILEX with over four years post qualification experience including at least four years litigation experience.*
>
> *[C] Other solicitors and Fellows of CILEX and fee earners of equivalent experience.*
>
> *[D] Trainee solicitors, trainee legal executives, paralegals and other fee earners.*
>
> .....
>
> *"Legal executive" means a Fellow of the Chartered Institute of Legal Executives. Those who are not Fellows of the Institute are not entitled to call themselves legal executives and in principle are therefore not entitled to the same hourly rate as a legal executive.*
>
> *Clerks without the equivalent experience of legal executives will be treated as being in the bottom grade of fee earner i.e. trainee solicitors, paralegals and fee earners of equivalent experience. Whether or not a fee earner has equivalent experience is ultimately a matter for the discretion of the court." [my underlying]*

68. It is well established that a claim may be made *inter partes* for a rate for a fee earner which is higher than their professional qualification might suggest and to do so on the basis of equivalent experience. In *Patural v Marble Arch Services Limited* [2015] EWHC 1055) Cox J allowed an hourly rate at Grade B for a solicitor who had been admitted some three years previously in circumstances where the fee earner had 15 years' litigation experience. She held:

> *"I accept his submission that it is the experience of the representative which is of particular relevance here, experience frequently being as valuable if not more valuable in this area than an academic or professional qualification. The guidelines relied on by Ms Ackland are not binding instruments and the considerable experience of the assessors*

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[11] "*If the solicitor wishes to rebut the challenge by relying on the presumption in CPR 46.9(3)(a) or (b), the burden lies on the solicitor to show that the pre-condition of the presumption, informed approval, is satisfied. Once the solicitor has adduced evidence to show that the client gave informed consent, the evidential burden will move to the client to show why, as a result of having been given insufficiently clear or accurate or comprehensive information by the solicitor or for some other reason, there was no consent or it was not informed consent. The overall burden of showing that informed consent was given remains on the solicitor.*

> *in this appeal is that litigation experience of this length, prior to qualification, would always be recognised and taken into account in determining the appropriate grade of fee earner and hourly rate*

69. However, such claims are subject to compliance with the indemnity principle. That is to say that the claim *inter partes* cannot exceed the amount that the receiving party is liable to pay. In this case the retainer, which grades the fee earners numerically, also refers to the need for an unqualified fee earner to have "*equivalent experience*" in order to justify a charge a Grade C rates: see [13] above.

70. I accept that Ms. Causey had some day to day conduct in the latter stages of the claim. It seems to me however that even at that stage she was working with counsel and ultimately under the supervision of a grade A fee earner (see for instance, item 1203). I think a reasonable hourly rate is £210 once she had obtained her CILEX qualification. In respect of the period up to that date she is described as being a senior Paralegal and having "Grade C experience". It is not clear to me what this means, nor is it clear to me how much litigation experience she had at the relevant time. Further information or clarification is required, it seems to me, before I can be satisfied that in respect of this earlier period she has "*equivalent experience"* to other fee earners of this grade with the appropriate qualification, as the retainer envisages. It is not <u>any</u> experience that qualifies for these purposes and plainly IM cannot be entitled to more than their retainer permits them.

71. In respect of Ms. Doherty, she appears to do work on medical notes which is more commonly associated with a Grade D (and is claimed at this rate for much of her work) but I allow a Grade C rate at £210 per hour for the work she did once qualified albeit I will in due course look at the time spent. Ms. Phipp appears to do a modest amount of work in respect of the medical records, and I propose, as things stand, allowing her work at a Grade D rates.

72. As to the other fee earners, Ms. Bedford relies upon the general description as to their experience. I am bound to say I am not sure what a 'quantum analyst' is; presumably someone employed to work on the schedule of loss. The further difficulty is that the Breakdown does not say what experience they have. I think further information is required before I can decide whether they qualify for Grade C status. As I indicate above, the term 'equivalent experience' cannot mean in the case of wholly unqualified staff, any experience at all. However, if and to the extent that equivalent experience is shown then I can see that might justify an hourly rate close to that allowed for Ms. Causey doing work of difficulty associated with the schedule. However, work preparing schedules of travel expenses and other relatively routine appendices to schedules and the like seems to me to be generally to be Grade D work.

73. It might be said that IM have already had an opportunity to provide the relevant information and clarification, but I will provide them with a further opportunity to do so in respect of the individual fee earners for whom I have not so far specified the rate. I will also consider the hourly rate of Mr Brighton when considering the time spent in respect of costs work.

74. As I have indicated above even if I were wrong, and the hourly rates claimed should not be reduced on the assessment, nevertheless I do not see that the outcome in this assessment is likely to be affected. Two assessors can reasonably reach the very same overall allowance even if they differ on the reasonable hourly rate. The higher the hourly rate, the greater the efficiency

expected and, as I have indicated above, the rates of £235- £240 to my mind connote a high degree of efficiency in respect of the relevant work.

Appendix

LTM*	LTM Name	LTM Status	Further Relevant Information	LTM Rate	LTM Rate Effective From
ALD (C) 18	Alice Doherty C (May 18- April 19)	Solicitor 0-4 (May 18- April 19)	DOQ 01/03/19	235.00	Period A - Initial instruction to 30/04/19
ALD (C) 19	Alice Doherty C (May 19- April 20)	Solicitor 0-4 (May 19- April 20)	DOQ 01/03/19	240.00	Period B - 01/05/19 onwards
AD (C) 19	Andrew Davies (SDU) C (May 19- April 20)	Senior Quantum Analyst (May 19- April 20)	13 years' experience	240.00	Period B - 01/05/19 onwards
EP (C) 17	Eleanor Phipp C (May 17- April 18)	Solicitor 0-4 (May 17- April 18)	DOQ 01/06/16	235.00	Period A - Initial instruction to 30/04/19
MB (C) 20	Mark Brighton (Costs) C (May 20- April 21)	Costs Lawyer (May 20- April 21)	DOQ 2017	158.00	Period B - 01/05/19 onwards
NC (C1) 16	Nicole Causey C1 (May 16- April 17)	Senior Paralegal (May 16- April 17)	Grade C experience from 2016	235.00	Period A - Initial instruction to 30/04/19
NC (C1) 17	Nicole Causey C1 (May 17- April 18)	Senior Paralegal (May 17- April 18)	Grade C experience from 2016	235.00	Period A - Initial instruction to 30/04/19
NC (C1) 18	Nicole Causey C1 (May 18- April 19)	Senior Paralegal (May 18- April 19)	Grade C experience from 2016	235.00	Period A - Initial instruction to 30/04/19
NC (C1) 19	Nicole Causey C1 (May 19- April 20)	Senior Paralegal (May 19- April 20)	Grade C experience from 2016	240.00	Period B - 01/05/19 onwards
NC (C2) 19	Nicole Causey C2 (May 19- April 20)	CILEX 0-4 (May 19- April 20)	DOQ 21/10/19	240.00	Period B - 01/05/19 onwards
NC (C2) 20	Nicole Causey C2 (May 20- April 21)	CILEX 0-4 (May 20- April 21)	DOQ 21/10/19	240.00	Period B - 01/05/19 onwards

TM (C) 19	Thomas Marsden (SDU) C (May 19- April 20)	Senior Quantum Analyst (May 19- April 20)	8 years' experience	240.00	Period B - 01/05/19 onwards