Neutral Citation Number: [2024] EWCA Civ 250

Case No: CA-2023-001351

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KINGS BENCH DIVISION
Master McCloud
[2023] EWHC 1392 (KB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/03/2024

Before:

LORD JUSTICE COULSON
LORD JUSTICE DINGEMANS
and
LORD JUSTICE BIRSS

- -

Between:

Thomas Hadley (A Protected party by his Litigation Friend, Laura McCarry)	**Appellant**
- and -	
Mateusz Przybylo	**Respondent**

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- -

Christopher Barnes KC & Matthew Stockwell (instructed by **Gamlins Law Limited**) for the **Appellant**
Andrew Davis KC (instructed by **Keoghs LLP**) for the **Respondent**

Hearing date: 28 February 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 15 March by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE COULSON:

1 Introduction

1. This is the judgment of the court, to which we have all contributed. For clarity, we shall refer to the appellant as "the claimant", and the respondent as "the defendant".

2. The first issue for us to decide is whether there is an issue for us to decide. Master McCloud ("the Master") was confident that she had decided, as a matter of principle, that a fee earner's attendance at rehabilitation case management meetings was, as a matter of principle, an irrecoverable cost in the litigation[1]. It is in respect of that principle that the Master gave 'leapfrog' permission to appeal to this court. However, on behalf of the defendant, Mr Davis KC argues that, on analysis, the Master decided no point of principle at all.

3. If the Master did decide a point of principle, it raises a potentially important issue in personal injury litigation: is the cost of a fee earner's attendance at rehabilitation case management meetings irrecoverable in law as costs in the litigation? In her judgment dated 22 June 2023, the Master disallowed some £52,000 worth of future costs at a costs budgeting hearing, because she concluded that these were not "incurred in the progression of litigation".

4. We set out, in Section 2, a brief chronology and, at Section 3, the principal elements of the Master's judgment. At Section 4, we deal with a variety of tangential matters, raised by leading counsel on both sides, which we consider to be immaterial to the main issues we are required to decide. In Section 5, we analyse whether there is an issue of principle at all. Thereafter, having set out the law in Section 6, we set out our analysis of the two grounds of appeal in Sections 7 and 8. There is a short summary of our proposed disposal of this appeal in Section 9. We are grateful to both leading counsel for their written and oral submissions.

2 The Chronology

5. On 8 June 2020, the claimant, Tom Hadley, was waiting at a road junction in King's Lynn, in order to make a right-hand turn. The defendant, Mateusz Przybylo, drove into the back of the claimant's car, shunting it into the path of an oncoming vehicle.

6. The claimant suffered catastrophic injuries. In addition to numerous broken bones, and damage to his spleen, bladder, kidney and lungs, he suffered a traumatic brain injury, permanent brain damage and sub-arachnoid haemorrhaging. He was on a ventilator until 24 July 2020. On 9 September 2020, he was transferred from Addenbrooke's Hospital to the Central England rehabilitation unit in Leamington Spa. In March 2021, he was transferred to the Sue Ryder neuro-rehabilitation unit at the Chantry House in Ipswich. His next step-down facility was Askham village in Cambridgeshire. On 4 August 2022, following an order made by the Court of Protection, he was discharged into the community. He has a team of carers that provide 24 hour care, with one carer at all times, sleeping overnight. It appears that

[1] She also included within this category attendance at "meetings with financial and Court of Protection deputies said to be part of inputting into a Schedule of Loss". So when we refer below to "rehabilitation case management meetings" we include these meetings too.

the defendant's solicitors have been closely involved in each of these separate stages of the claimant's ongoing rehabilitation.

7. These proceedings were commenced on 5 November 2020. In the defence dated 12 January 2021, paragraph 3 said: "For the purpose of this action only, but not further or otherwise, it is admitted that the road traffic accident on 8 June 2020 was caused by the negligence of the defendant".

8. The relevant cost budgeting hearing before the Master took place on 29 March 2023. The Master's judgment was dated 22 June 2023. Since then, we are told that the case has been compromised subject to the approval of the court. The terms of the proposed settlement include the payment of an agreed lump sum of £5.6 million together with an annual sum of £170,000 for case and care management. When capitalised, this amounts to a total of around £14.5 million. If the costs are not agreed they will be the subject of a detailed assessment. In such circumstances, the issue about costs in this appeal is not academic, and remains 'live' between the parties.

3 The Master's Judgment

9. The cost budget put forward on behalf of the claimant sought £1.18 million in costs. Of that, about 50% (over £500,000) had already been incurred by the time of the hearing before the Master. These figures were, on any view, high: for example, in respect of the "Issue and Statements of Case" Phase in Precedent Form H, it was said that £163,185 had already been incurred. The Master ordered that the parties engage in ADR in respect of the future costs. They did so successfully, and leading counsel on both sides stressed the value and economy of that exercise.

10. Following ADR, only one item of future costs remained in dispute. That concerned the "Issues and Statements of Case" Phase. At Practice Direction 3D10, the assumptions for this phase are:

"

- Preparation of Claim Form
- Issue and service of proceedings
- Preparation of Particulars of Claim, Defence, Reply, including taking instructions, instructing counsel and any necessary investigation
- Considering opposing statements of case and advising client
- Part 18 requests (request and answer)
- Any conferences with counsel primarily relating to statements of case
- Updating schedules and counter schedules of loss
- Amendments to statements of case"

11. During the cost budgeting debate, the point was taken on behalf of the defendant that the estimated future costs identified in respect of this phase, namely £68,400, were too

high. There is a dispute, which we address below, as to how this point arose and the precise nature of the defendant's challenge.

12. It was this which, in her judgment at [2023] EWHC 1392 (KB) the Master identified at [1] as being "something of interest legally". She identified the issue in these terms:

> "In particular that issue is where the inclusion of solicitor attendance time in the budget, for attending case management meetings with medical and other professionals in the course of management of the claimant's rehabilitation needs, and for meetings with financial and court of protection deputies said to be part of inputting into a Schedule of Loss, are in principle costs which may be included in a budget and whether, if so, it is appropriate to include those in the 'Issues Statements of Case' phase of the budget on Form H."

13. The Master summarised the parties' respective arguments at [4] and [5] of her judgment and, at [6], noted there was no relevant authority which assisted. At [8], the Master noted that the costs already incurred under this section of Precedent Form H were £163,185. That was not, of course, what she was concerned with; she was concerned with the future costs of this phase only[2]. The Master noted that "after ADR, the total claimed by way of <u>future</u> costs in the budget before me (as time costs) is 258 hours (£68,400)". She said:

> "…That breaks down to 48 hours on the schedule, counsel and so on (£12,900). The rest is expense of attending on the deputies for health and welfare and finance, and the case manager. Some 60% is for the case manager and 20% each for attendance on, effectively meetings with, deputies. All this was framed as being part of the maintenance of the Schedule of Loss."

14. At [9] the Master also differentiated between those cases where some legal charges relating to case management/rehabilitation "in a medical sense" can be properly claimable in some parts of the cost budget, such as, say, time incurred liaising over a witness statement from the case or care manager; instead, she said, "this case focusses on the very different and specific question of the expense of lawyers actually attending case management meetings on a regular and in this case very extensive basis."

15. The Master then turned to deal with what she described as "the concept of 'costs' in litigation." She said:

> "10. I accept the Defendant's argument at hearing that it is a general principle that 'costs' are legal costs which are incurred in the progression of litigation. They may be pre-action, for example, or they may be reasonably incurred but found in hindsight not to be useful, yet such costs can still be 'progressive' even if they rule out some things which are then not pursued. But costs which are inherently non-progressive are not in my judgment 'costs' properly claimable in a budget between the parties. It is not unusual in assessing a bill of costs to disallow items with the brief statement 'non-progressive', for

[2] As noted in the commentary at paragraph 3.12.5 of the White Book 2023, it is only in exceptional cases that a court can reduce, as part of a budgeting exercise, costs already incurred.

> example and it seems to me that if costs fall into that category then they are not suitable for inclusion in a budget.
>
> 11. If costs are progressive, then for the purposes of budgeting one has to proceed to fix the reasonable budget sum as a best judicial estimate of future costs, doing the best one can without the assistance of actual material showing work done, such as a Costs Judge would have at a detailed assessment. But the question "are these in principle claimable at all as costs?" is a latent but usually uncontentious one lurking in any costs decision as to quantum whether in budgeting or assessment of costs. It has raised its head in this case."

16. The Master then asked herself whether the proposed costs relating to attendance at rehabilitation case management meetings were, in principle, progressive of the litigation. She concluded that they were not. Amongst other things, she said:

> "14. The argument that simply attending on these individuals is an 'integral part' of producing the Schedule of Loss, and hence allowable for inclusion as a budget item under that head is weak, in my judgment. Information about case management, or incurred expenses of such things as money management can be achieved by the occasional letter to the case manager or relevant deputy or from obtaining documents for later disclosure, in the disclosure phase, and ultimately also in the Case Manager's or Deputies' witness statements which may or may not be needed for the purposes of a formal deputyship expert. Those are *qualitatively* different things from attending meetings for input into a Schedule of Loss, as is claimed here on a very significant scale. Thus, nothing in this decision says that in principle some phases in a budget cannot include engagement with case managers or deputies, such as for disclosure or witness statements and occasional letters. Past deputyship costs one notes are a matter of fact based on invoices possibly assessed by the SCCO, and the future cost of deputyship is a matter for a deputyship expert…
>
> 16. Thus, the (numerous) attendances of the sorts proposed here do not in my judgment progress litigation in this case. Note that I am not here saying that these costs are 'unreasonable' or 'disproportionate': those would be the tests I would apply if I were accepting that in principle they were 'costs' for the purposes of a budget in the first place.
>
> 17. If (*per contra*) I had decided that these sums of proposed expenditure in principle would progress the litigation then I would indeed have next to consider whether the proposed extent of attendance was reasonable and proportionate. Were I to have to decide that I would say that the sum and the extent of proposed attendance is unreasonable and would have striven to budget a lesser sum. However, that question strictly does not arise given my decision above."

4 Clearing The Undergrowth

17. There are a number of matters raised by each side which tended to obscure the primary issues before us. It is therefore sensible to clear them out of the way at the outset.

4.1 The Raising of the Point Originally

18. On behalf of the claimant, the complaint is made that the defendant's objection in relation to the rehabilitation attendance was not raised until the original hearing before the Master on 29 March 2023 and that, in consequence, the claimant's solicitors were not in a position to deal properly with the objection. The defendant's solicitors say that there is nothing in this point, because the transcript of the hearing shows that the complaint was anticipated and addressed by the claimant's solicitor.

19. On an analysis of the relevant documents, and the transcript of the hearing on 29 March, it seems to us that the defendant's challenge went to the reasonableness and proportionality of the time spent, and therefore the amount of the estimated future costs. The defendant was saying simply that the future costs for this item, described as "working with the case manager and deputies throughout", were much too high. The claimant's response to this criticism explained, for the first time, that the costs included the solicitor's attendance at <u>all</u> rehabilitation case management meetings, and also regular meetings with Court of Protection ("CoP") deputies. It was that explanation which led the Master, for the first time, to identify the claim as giving rise to a point of principle, as to whether such costs were recoverable at all.

20. No criticism of anyone is intended by explaining the genesis of the debate in this way: it can sometimes happen that an issue arises in this slightly haphazard way. In any event, we do not consider that it makes very much difference how the issue emerged, provided that it can be decided without any prejudice to either party. That brings us to the next point.

4.2 The New Evidence

21. Mr Barnes KC submitted that, as a result of the way in which the issue arose, the claimant should now be allowed to rely on four lengthy witness statements which were not before the Master. The first is from Simon Roberts, the solicitor acting for Mr Hadley's litigation friend; the second is from Emma Gaudern, the Property and Affairs Deputy appointed for the claimant; the third is from Lisa Barnes, who used to be the claimant's Case Manager; and the final statement is from Kirsty Dickinson, who is the claimant's current Case Manager. These statements deal at length with the particular difficulties experienced by all those involved in providing help and assistance to the claimant following the accident, and purport to explain why the figures are so high.

22. On behalf of the defendant, Mr Davis KC submitted that these statements were inadmissible because they were not before the Master, and because they contain the sort of detailed material which would not normally be deployed at a cost budgeting hearing in any event.

23. We consider that there is force in both these objections. In addition, we consider that these statements would have been of little utility to the Master, even if they had been made available to her, because they are primarily concerned with the history of the

litigation, and the difficulties experienced by both the solicitors and the Case Managers in the medical case management so far. They were therefore primarily concerned with the incurred costs, which was not a matter for the Master at the cost budgeting hearing.

24. However, this court is now in a rather different position. The potential settlement of the case means that the costs remain the only live issue. Furthermore, we are being invited, if we allow the appeal, to refer the matter to a detailed assessment of costs. At that stage, the Master's statement of principle – if that is what it was – will become relevant, not only to the cost budgeting exercise, but to the incurred costs too. It will therefore matter whether she was right or wrong. So it seems to us that we should have regard to the witness statements, but only to the extent that they inform our consideration of the Master's possible statement of principle. Even then, we regard them of very limited assistance: they are much too long; they raise issues on the merits which are irrelevant to the appeal; and they give rise to as many questions as answers as to why the costs incurred by the claimant's solicitors in respect of rehabilitation appear to be so high.

4.3 Which Phase?

25. There was some debate, both before the Master and before us, as to whether the 'Issues and Statements of Case' was the correct phase of the budget for the identification of these costs. We conclude that it probably was. None of the phases, or the assumptions that go with them, are an obvious fit for this element of the costs claim, but this was probably the most apposite phase in which to include them. We note that it was the same phase under which a similar claim was addressed by Costs Judge Brown in *BCX v DTA* [2021] EWHC B27 (Costs), referred to in greater detail below.

26. We would also be very reluctant to start suggesting changes to the deliberately wide description of the phases within Precedent Form H. Form H applies to all civil litigation, so it cannot be expected to provide a bespoke fit for every type of claim. That also provides an explanation as to why the mere fact that the stated assumptions do not expressly include a particular item of cost (such as the attendance at rehabilitation case management meetings in issue in this case), cannot be regarded as determinative. The stated assumptions should not be read as if they had statutory force.

4.4 Damages, not Costs?

27. Finally, there is a suggestion in the defendant's submissions, reflected at [13] of the Master's Judgment, that these costs may be recoverable, not as costs, but instead as a head of special damages. We offer no view about that, beyond expressing our general reluctance to encourage the claiming of particular items of costs as damages in the same proceedings. That is primarily because the judges who decide these cases, and the damages to be awarded to a claimant, are skilled in those tasks, but not necessarily so experienced in the assessment of costs. There is also the risk of 'double-dipping'; it is important to avoid the situation where a claimant is permitted to claim items as damages in circumstances where the same items have been ruled at a cost budgeting hearing to be irrecoverable as costs. The point relied on by Mr Barnes by reference to *McGregor on Damages* 21st Edition, at paragraph 21-011, is inapplicable to the

present situation: that is talking about claims for the costs of *earlier* proceedings as damages in *later* proceedings, and the basis on which they should be assessed. That is not this case.

28. Our task is to decide whether or not, if she did decide a point of principle, the Master was right to conclude that these costs were irrecoverable in principle *as costs*. Their potential recovery as damages is immaterial to that question.

5 The First Issue: Did The Master Decide A Point Of Principle?

29. As noted above, the first issue for us to decide is whether, in her judgment, the Master decided a point of principle. If she did, we need to consider the claimant's submissions that her answer was wrong in law. If she did not, and her decision was a discretionary case management decision going to the reasonableness and proportionality of a particular cost, then it seems to us that there can be no scope for any appeal: see *Broughton v Kop Football (Cayman) Limited* & Ors [2012] EWCA Civ 1743 at [51], endorsed by Lord Neuberger in *HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Limited & Anr* [2014] 1WLR 4495; [2014] UK SC64 at [13].

30. The Master plainly thought that she was deciding a point of principle: see [1], [9], [12], and the first part of [14] of her judgment. Moreover, as she said she would do in the transcript of the hearing before her, the Master thought it important enough to give 'leapfrog' permission to appeal so that this court could give a definitive ruling on what she considered to be an issue of principle.

31. There are, however, three indications that, in reality, the Master may not have decided a point of principle. First, there is what she said in the latter part of [14] of her judgment, set out at paragraph 16 above, in which she appears to disavow a decision in principle (save possibly in relation to this particular phase of the budget, as opposed to any other phases).

32. Secondly, Mr Davis has demonstrated that, notwithstanding what the Master said in her judgment, she did allow a modest sum in the budget for these attendances. On his figures, set out in his helpful skeleton argument at paragraphs 65 and 66, he identified that the amount allowed by the Master (£16,000) exceeded the figure of £12,900 claimed in relation to liaising with counsel and working on the Schedule. The balance of £3,100 must therefore have been included to cover the liaison with other professionals, including the case manager (although the Master did not expressly say so). Mr Barnes did not challenge that analysis.

33. Thirdly, the Master repeatedly referred to the extent of the time, and therefore cost, estimated to be spent on this phase. Thus, in [9] she refers to attendance "on a regular, and in this case a very extensive basis". In [14] she refers to the attendance "claimed here on a very significant scale". These references suggest that what the Master was concerned about was the point made by the defendant originally, namely that the future costs of these attendances were unreasonable and disproportionate.

34. Despite these points, however, we consider that the Master did decide a point of principle. Certainly that is what she thought she was doing, and the language of her judgment, in the round, supports that. We refer in particular to [1], [9], [11], [13] and

[14] of her judgment, the relevant parts of which are set out at paragraphs 12-16 above. We also refer to [15], where the Master acknowledges the need for collaboration, but says that that does not mean that "having lawyers attend rehabilitation meetings amounts to litigation costs".

35. Moreover, since the Master's judgment has a neutral citation number, it is likely that it will be cited by defendants in catastrophic injury cases in support of the proposition that the cost of the claimant's solicitor's attendance at rehabilitation case management meetings, and attendance on CoP deputies, are not in principle recoverable as costs. This would allow what the Master called "a whole category of expense" to be successfully challenged by reference to her decision. She may have been right or she may have been wrong, but since the matter has been argued out before us, it is important that it should now be the subject of a definitive ruling. As the Master was herself at pains to point out, it was necessary for the claimant to "seek a ruling [from the CoA], if they wish, on appeal, as to the correct approach" [6]. We therefore conclude that the Master did decide a point of principle and we should address whether her decision was right or wrong.

36. That conclusion also provides a complete answer to Mr Davis's submission that this court should not intervene, because the Master made a case management decision: see paragraph 29 above. On our analysis, although a dispute about reasonableness and proportionality would have been a matter for the Master's discretion, she went much further in formulating her judgment in the way that she did. We therefore turn to see whether or not the Master was right as a matter of principle.

6 The Applicable Principles

6.1 General

37. A party can recover the "costs of and incidental to the proceedings": s.51(1) of the Senior Court Act 1981. This had been identified in a number of cases as being wide wording conferring a broad discretion: see *Aiden Shipping Co. Limited v Interbulk Limited* [1986] AC 965 at 975 and *Roach v Home Office* [2009] EWHC 312 (QB); [2010] QB 256 at [22]. The words "incidental to" widen, rather than reduce, the ambit of the provision: see *In re Gibson's Settlement Trusts* [1981] Ch 179 at 184F-G.

38. *In re Gibson's Settlement Trusts* is often cited for the proposition that, in order to be recoverable, the costs must relate to something which (i) proved of use and service in the action; (ii) was relevant to an issue; (iii) was attributed to the defendant's conduct (i.e. that which gave rise to the cause of action in the first place). These can perhaps be summarised as utility, relevance and attributability. Although, on a proper analysis, Sir Robert Megarry V-C was, at 186H of his judgment in that case, identifying those three strands of reasoning by reference to the earlier case of *Frankenburg v Famous Lasky Film Service Limited* [1931] 1 Ch. 428, we consider that these three criteria provide the applicable general test as to the recoverability of any given item of cost.

39. Beyond the general statements noted above, we derived limited assistance from the other authorities to which we were referred. Indeed, even *In Re Gibson's Settlement Trusts* is not directly on point, since that was primarily concerned with the principles to be applied in assessing whether costs incurred for work done prior to the commencement of civil proceedings were recoverable as costs of and incidental to the

proceedings. The present case, by contrast, was originally concerned with cost budgeting, and the recovery or otherwise of *future* estimated costs. Likewise, both *Roach* and *Fullick v The Commissioner of Police for the Metropolis* [2019] Costs LR 1231 applied *In re Gibson's Settlement Trust* without adding to or refining it, and were concerned with a specific head of cost (attending an inquest) which does not arise here.

40. However, the last paragraph of the judgment in *Roach* is of some significance. Davis J (as he then was) had been asked to lay down guidelines as to what categories of pre-action costs may be recoverable, and what were not. He declined to do so. He said:

> "…It seems to me that the discretionary regime available to costs judges in this context, and the application of section 51 of the Supreme Court Act 1981 and CPR r 44, will not be advantaged by further guidelines (so-called): each case should properly be decided by reference to its own circumstances. I am fortified in this view by the suggestion, as to which I express no opinion, that what is decided in these cases (which relate solely to inquests preceding a subsequent resolution of civil proceedings) may also be relevant in other contexts: for example, attendance prior to civil proceedings at a criminal trial involving death by dangerous driving or a criminal trial involving health and safety issues. Better, I think, to leave it to costs judges to decide each case on its own facts by reference to section 51 and the subordinate statutory rules and having regard to the principles indicated in *In re Gibson's Settlement Trusts* [1981] Ch 179."

6.2 Costs in Respect of Rehabilitation

41. The reasonable costs of the claimant's rehabilitation are recoverable as special damages in a personal injury claim: see *Brown v Alexander* [2018] 7 WLUK 716. In that case, HHJ Wood KC, sitting as a judge of the High Court, stressed that "early intervention with proactive rehabilitation was in the interests of all concerned, not least the compensating party". As he went on to explain at [36], if a claimant can return to work or achieve a level of independence, that would have a profound effect on future loss claims. Furthermore, he said, as the rehabilitation progresses, the claimant's financial needs become clearer.

42. *Brown v Alexander* was not, however, concerned with costs, but with whether rehabilitation reports provided subsequent to an initial rehabilitation assessment were subject to legal professional privilege, and thus protected from disclosure or use in the litigation, or whether they could be referred to by medico-legal experts. It was the defendants in that case who were arguing that the reports were covered by privilege. The judge rejected that submission. He stressed at [37] that, whilst rehabilitation "is a fluid process", that did not mean that the involvement of the compensator at the outset, when the INA report was commissioned and a rehabilitation plan drawn up and agreed by the compensator, was in some way provisional. At [39] he said that the single and comprehensive procedure in respect of commissioning, considering, questioning and finally agreeing on the rehabilitation course did not have to be repeated each and every time it was necessary to revise the rehabilitation plan.

43. We were referred to two of the useful guidance documents relating to rehabilitation. The *Guide to the Conduct of Cases Involving Serious Injury* is known as the *Serious*

Injury Guide. This makes repeated references to rehabilitation (see section 6) and the need for collaboration (see, for example paragraphs 1.2 and 6.7). The appendix refers to 'open book' rehabilitation best practice in these terms:

> "Effective dialogue concerning rehabilitation progress and related challenges are a central part of case planning under the SIG.
> The defence insurer / lawyer should be encouraged to attend periodic meetings/ conference calls with the case manager and claimant lawyer to provide an oral update on rehabilitation progress and current rehabilitation goals and objectives.
> What are the benefits of such a level of access and transparency?
> 1. Improved dialogue around rehabilitation may serve to control the amount of case reporting obligations on the case manager, over and above what is clinically required on good rehabilitation practice.
> 2. Interim funding requests can be discussed and understood (or even volunteered by the defence insurer) and agreed promptly.
> 3. Delays in funding can be avoided.
> 4. The environment encourages fact to replace perception and the case manager gains first-hand experience understanding of any areas of concern.
> 5. Medico legal assessments can be planned and programmed to dovetail with the rehabilitation work.
> 6. Medico legal driven case manager reporting time can be minimised.
> 7. A forum is created that enables views and suggestions from experienced medical legal experts can be fed into the case manager in a timely manner to the benefit of the claimant.
> Insurers who are given this high level of access to the rehabilitation should always act in the best interests of the rehabilitation; if they disagree with the plans or actions the meetings are a perfect opportunity to air these in an open and transparent manner in order to try to resolve the concerns by dialogue.
> This approach improves the way the rehabilitation process dovetails with the claim process and is just another example of the way that route mapping and collaborative working has developed over time as the Guide has been applied in practice.
> Many claimant lawyers and defence insurers successfully progress cases on this basis. At the Serious Injury Guide participant workshop on 21 November 2018 there was universal support for this approach to rehabilitation, if it could be achieved."

44. In addition, the *Rehabilitation Code* (the guidance referred to by Judge Wood in *Brown v Alexander)* was first published in 1999. The 2015 version identifies the specific obligations imposed upon the claimant's solicitor in Section 2. In particular:

> "2.1 The claimant solicitor's obligation to act in the best interests of their client extends beyond securing reasonable financial compensation, vital as that may be. Their duty also includes considering, as soon as practicable, whether additional medical or rehabilitative intervention would improve the claimant's present and/or longer-term physical and mental well-being. In doing so, there should be full consultation with the claimant and/or their family and any treating practitioner where doing so is proportionate and

> reasonable. This duty continues throughout the life of the case, but is most important in the early stages."

45. Further, paragraph 7.5 of the *Rehabilitation Code* provides:

> "7.5 With catastrophic injuries, it is especially important to achieve good early communication between the parties and an agreement to share information that could aid recovery. This will normally involve telephone or face-to-face meetings to discuss what is already known, and to plan how to gain further information on the claimant's health, vocational and social requirements. The fact that the claimant may be an NHS in-patient should not be a barrier to carrying out an INA."

46. Finally, we refer again to *BCX v DTA*, noted already in paragraph 25 above. It was said that this supported the Master's approach in principle in ruling out the costs of attendance at rehabilitation case management meetings. We do not read the case that way. In *BCX,* Costs Judge Brown considered the solicitor's involvement with the case manager and the consequential claim for costs. He ruled out much of it, concluding at paragraph 60(4) that "I consider much of the time spent dealing with the case manager to be unreasonable. The solicitors' expertise lies in the recoverability of the costs of care in the claim but not otherwise as to the appropriateness of any particular care or rehabilitation: these were matters falling within the expertise of the care manager engaged in this case". But it is equally clear that Costs Judge Brown did not rule out recovery for that attendance as a matter of principle: indeed, he said that in certain cases attendance at multi-disciplinary team meetings might be reasonable. His assessment of the claim for costs was therefore quantitative rather than qualitative.

6.3 Applicable Principles

47. It seems to us, therefore, that the following principles apply:

(a) The recoverability of costs will depend on the application of the three criteria in *In re Gibson's Settlement Trusts*;

(b) The reasonable and proportionate costs of the claimant's rehabilitation which meet these criteria will generally be recoverable: see *Brown v Alexander* and both the *Serious Injury Guide* and the *Rehabilitation Code*;

(c) The precise amount of recoverable time spent by a solicitor in respect of rehabilitation will always depend on the facts of each individual case: see *Roach.* It is unwise to set out guidelines or rules that are intended to apply in every case: again, see *Roach.*

(d) Therefore, as a matter of common sense, it would be unusual to rule that any generic category of cost was irrecoverable in principle; by the same token, it would be wrong to assume that, even if the generic category is recoverable, every item that made up that category was automatically recoverable. In every case, it will depend on the facts.

7 Analysis

7.1 Ground 1: The Applicable Test as to Recoverability

48. The claimant complains that the Master applied the wrong test as to recoverability. She said at [10] that the general principle was that 'costs' "are legal costs which are incurred in the progression of litigation". She went on to say:

> "…But costs which are inherently non-progressive are not in my judgment 'costs' properly claimable in a budget between the parties It is not unusual in assessing a bill of costs to disallow items with the brief statement 'non-progressive', for example and it seems to me that if costs fall into that category then they are not suitable for inclusion in a budget."

The claimant's argument is that the categorisation of costs between "progressive" and "non-progressive" costs is a division unknown to the authorities. It is not the test set out in *In re Gibson's Settlement Trust*. Therefore, it is said that the Master erred in principle when, at [12] and [13], she said that a fee earner attending rehabilitation case management meetings was not progressive and therefore was not recoverable as costs.

49. In response, the defendant argued that the expression "progressive of the litigation" was simply shorthand for the 'use and service' criterion in *In re Gibson's Settlement Trusts* and that it was not a departure from the test of 'costs of and incidental to' the litigation. The words were deployed by a very experienced judge, well-used to assessing costs, and there is no proper ground of complaint.

50. In our view, the Master's categorisation may well have been shorthand, but it was at least potentially unhelpful. It may have equated to the 'use and service' criteria in *In re Gibson's Settlement Trust*, but that is not entirely clear. Moreover, if an item of cost has to "materially progress the case" to be recoverable, then there must be a risk that some items of cost would fail to meet that test, but would be recoverable under the wide words of s.51. In particular there is a risk that, if all that matters is whether or not the item materially progressed the case, then incidental costs, which are recoverable in principle under s.51, and which have been found to encompass a wider category then simply the costs of the case, may become irrecoverable. This can be illustrated by reference to the *Roach* and *Fullick* line of cases. There, it might have been difficult to say that the attendance at the inquest "materially progressed" the litigation. But the costs were found to be recoverable because they were incidental to the litigation.

51. Accordingly, we consider Ground 1 of the appeal is well-founded: on the face of the judgment, the Master may have applied the wrong test. But of course, that could simply be a matter of the language that she used, rather than a matter of substance. So success on Ground 1 does not necessarily get the claimant home. The real issue is whether the Master was right to say, as she does at [13], that "having a fee earner attending rehabilitation case management meetings…does not fall within the notion of 'costs'."

7.2 Ground 2: Are These Costs of Attendance Recoverable in Principle?

52. It is the claimant's case that the cost of attendance at rehabilitation case management meetings (and attendance on deputies) is a recoverable cost in principle, and that the judge was wrong to rule otherwise. Mr Barnes expressly accepted that challenges as to reasonableness and proportionality were open to the defendant, but were for another day. Mr Davis submitted that, whilst a legal representative could gather information from an injured person's rehabilitation team, regular and extensive attendance at weekly meetings was not recoverable as costs. To that extent, Mr Davis relied on the decision in *BCX v DTA.*

53. We consider that, on analysis, there was very little difference between the parties' positions. The defendant does not contest the importance of appropriate rehabilitation in this sort of case (paragraph 46 of Mr Davis's skeleton). The defendant also accepts that recoverable costs can include the cost of interim remedies and/or interim protection of a litigant's position pending final determination of his or her claim, and that this might include obtaining funds to meet a claimant's rehabilitation and other needs (paragraphs 48 and 49 of Mr Davis' skeleton). The defendant therefore accepts that "the role of a legal representative litigating a personal injury claim can be said reasonably to include costs for the purposes of furthering the claimant's rehabilitation needs" (paragraph 50 of Mr Davis' skeleton).

54. So what the defendant was really complaining about in this case was the large sums that had either already been incurred, or were included in the future costs, by reference to rehabilitation and, in particular, the attendance at every routine rehabilitation case management meeting. The Master appeared to agree with that complaint. She referred on a number of occasions to the amount of time being claimed under this head: at [14], for example, she said that the amount claimed was "on a very significant scale". To that extent, of course, she was echoing what Costs Judge Brown had said in *BCX.*

55. As we see it, there are two issues. First, is this element of costs recoverable in principle? Secondly, if it is, are there any limits that this court should place on its recoverability at this stage, or should those be addressed on assessment?

56. In our view, this element of the costs was recoverable in principle. There are three reasons for that. First, and most obviously, the defendant's fair concessions, summarised at paragraph 53 above, indicate that, in principle, these costs could be recoverable, subject, of course, to questions of reasonableness and proportionality.

57. Secondly, it seems to us that the *Serious Injury Guide* and the *Rehabilitation Code* both envisage the possible involvement of a solicitor in ongoing rehabilitation meetings. Whilst the extent of them, and the amount of necessary attendance, is a matter for the assessment of the cost budget or detailed assessment, both of those guides would clearly indicate that, as a matter of principle, this was a recoverable category of costs.

58. Thirdly, it is tolerably clear from the evidence that we have seen in the statements that this is a case where the claimant's solicitor's involvement in the rehabilitation of the claimant has generally been beneficial for both parties. We also note that the

defendant's solicitor has attended one or more of these same meetings, again suggesting that, in principle, this is a recoverable item of cost.

59. Standing back, and addressing this as a matter of principle, we echo what we said at paragraph 47(d) above. It would be wrong to decide that the costs of the solicitors' attendance at rehabilitation case management meetings are always irrecoverable. Equally, it would be wrong for the claimant's solicitor to assume that routine attendance at such meetings will always be recoverable. It will always depend on the facts.

60. In this case, therefore, what may or may not be recoverable on assessment is a matter for the costs judge. That is why we do not need to address the witness statements in any detail, or reach any conclusions as to Mr Barnes' explanation for the extent of this category of costs. However, we should say that, at first sight, the figures – both in relation to the costs incurred, with which the Master was not directly concerned, and the future costs – seem very high. We note that, in his oral submissions, Mr Barnes accepted that the claim for the future costs before the Master was "less compelling" than the claim in respect of the claimant's solicitor's earlier involvement in the rehabilitation meetings. That may be an understatement. We also note that Costs Judge Brown baulked at a claim for £86,000 odd in *BCX v DTA*, whilst in the present case, the costs claimed under the same head is for more than £130,000.

61. We therefore agree with the Master (and the defendant) that, at the very least, these figures are plainly open to challenge. They seem to go well beyond the usual costs of reasonable liaison with case managers and deputies. We do not know if the claimant's solicitor operated on the assumption that he was entitled to attend every routine rehabilitation case management meeting, but for the reasons we have given, if he did, he was wrong to do so. There was no such default or blanket entitlement, and the *Serious Injury Guide* and the *Rehabilitation Code* do not justify a contrary approach. And whilst it is accepted that a damages claim for the costs of rehabilitation can be the subject of a reduction if the judge concludes that they were spent on poor or inadequate case management (see *Loughlin v Singh & Ors* [2013] EWHC 1641 (QB), where Kenneth Parker J reduced the damages under this head of claim by 20%), so that a solicitor needs to keep an appropriate eye on the rehabilitation plans going forward, that does not justify any sort of default or blanket entitlement either.

62. Accordingly, with that potentially large caveat, we allow Ground 2 of the appeal.

8 Disposal

63. The claimant asked us to rule that, if the costs were recoverable in principle, they should be the subject of a detailed assessment, rather than sending the issue back to the cost budgeting process. The defendant does not dispute that disposal, since the case has been compromised (subject to the approval of the court), and all that is likely to remain is that detailed assessment of costs.

64. We were initially concerned that if we followed that course, there would be no figure, other than that of the Master, for this phase of the cost budget. However, from a pragmatic perspective, we are persuaded that that will not matter. That is because we consider that, in all the circumstances, the Master's overall cost budget figures were fair and reasonable. In addition, although she had to accept the incurred costs for

budgeting purposes, it is apparent that, on assessment, there may be significant argument about the level of these costs. The claimant's position is therefore properly protected.

65. Accordingly, for the reasons we have given, we allow the appeal. But the only real consequence is that the defendant can take all the reasonableness/proportionality arguments that they always wanted to take at the assessment stage. Those are arguments for which, as we have said, we have sympathy. In all those circumstances, we would urge the parties to agree a realistic order as to the costs of this appeal.