Hadley v Przybylo [2024] EWCA Civ 250 deals with the issue of whether the costs of a fee earner's attendance at rehabilitation case management meetings were recoverable as costs in the litigation.

Background

In June 2020, the claimant suffered catastrophic injuries (including permanent brain damage) as a result of a road traffic collision. Proceedings were issued in November 2020 and liability was admitted shortly thereafter.

A costs management hearing took place in March 2023 before Master McCloud. The only phase that was in dispute was the 'Issue and Statements of Case' phase; the dispute centred on whether a fee earner's attendance at rehabilitation case management meetings (and meetings with deputies) were recoverable.

The Master examined the concept of 'costs' in litigation; she found that 'progressive' costs were recoverable whereas 'non-progressive costs' were not. She questioned whether the proposed costs for attendance at rehabilitation case management meetings were 'progressive', ultimately concluding they were not. In this regard, she highlighted the difference between occasional engagements with case managers or deputies (which would be recoverable in principle), and extensive attendance at such meetings (which would not).

The Master gave permission to leapfrog to the Court of Appeal; Coulson LJ gave the judgment of the court, to which Dingmans and Birss LJJ had contributed.

The court's findings: costs or damages?

The court addressed a number of preliminary issues, the only one of any significance being a brief discussion as to whether the costs of a fee earner's attendance at rehabilitation case management meetings were costs or damages. The court noted that whilst the cost of rehabilitation may well be recoverable as a head of special damages, it would be undesirable for claimants to have two bites at the cherry by claiming fee earner attendance as costs and then, if unsuccessful, claiming those same monies as damages. The court made no finding as

to whether the costs of fee earner attendance at rehabilitation case management could be claimed as damages, but the court gave a strong steer that such expenditure should generally be claimed as costs (not least because costs judges are best placed to assess the reasonableness of such costs).

The court's findings: the relevant principles

The court went on to note the three-part test in *In re Gibson's Settlement Trusts* [1981] Ch 179, namely, 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. The court went on to find that these three criteria provide the applicable general test as to the recoverability of any given item of cost. The court also went on to note (by reference to *Roach v Home Office* [2009] EWHC 312 (QB)) that it would be undesirable to lay down prescriptive guidance as to which costs were recoverable and which were not, this being because each case must be decided on its own facts.

Having made these points, the court summarised the applicable principles in this way:

(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 that meet these criteria will generally be recoverable;

(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.

(d) Therefore, 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.

The grounds of appeal

Having set out those principles, the court went on to consider the two grounds of appeal.

The first ground was that the Master had applied an incorrect test, this being because she had applied a test of whether the costs were 'progressive' or 'non-progressive' (this being something that was not supported by legal authority). The court found that the Master's reference to 'progressive' may well have been shorthand for the 'use and service' criterion in *In re Gibson's Settlement Trusts*, but that this was not entirely clear. The court noted that costs may be recoverable as being 'incidental' costs within the meaning of s 51 of the Senior Courts Act 1981, but not 'progressive'. As such, ground one was allowed (although the court stressed that the Master's error may have been more a matter of language than substance).

The second ground was that the Master had erred in not finding that the costs of attendance at rehabilitation case management meetings were recoverable in principle. In this regard, the court identified two issues: firstly, whether such costs recoverable in principle, and secondly, if they are, whether are there any limits that should be placed on the recoverability of such costs.

As to the first of these questions, the court found that the costs of attendance at rehabilitation case management meetings were recoverable in principle. This was (in part) as a result of a concession by the defendant but was also because a solicitors' involvement in such matters would generally be beneficial to both parties. As to the second of these questions, the court declined to give guidance as to what is and is not recoverable (echoing *Roach*), preferring instead to leave such matters to the costs judge.

The court went on to say this:

> '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.'

The court concluded by noting substantial costs were claimed for attending at rehabilitation case management meetings (namely, more than £130,000); the court noted that 'at the very least, these figures are plainly open to challenge'. The court went on to say this:

> '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.'

Comments

This case is one of a long line of cases which establishes the three-part test in *In re Gibson's Settlement Trusts* as being the test for deciding whether costs are or are not recoverable in principle. In this regard, it adds nothing new.

It is, however, difficult not to have a degree of sympathy for Master McCloud. This is because the phrase 'non-progressive' is frequently used by costs practitioners to refer to costs which are irrecoverable by virtue of them not being of use and service in the claim (namely, the first part of the three-part test in *Gibson's Settlement Trusts*). That term is, however, not defined in any authority of which the writer is aware, and in any event, may also be used to refer to costs which are merely unreasonably incurred. It is clear from the Court of Appeal's judgment that it is a term is ambiguous and is best avoided.

As to fee earner's attendance at rehabilitation case management meetings, it would be wrong to regard the regard the Court of Appeal's decision as being a green light to routine attendance. Indeed, the opposite is so; the court has stressed that each case must be decided on its own facts. In this regard, it should be noted that where substantial times are claimed, they tend to be significantly reduced or even disallowed on the grounds of reasonableness (see, for example, *BCX v DTA* [2021] EWHC B27 (Costs)). This being so, claimant practitioners would be well advised both to be selective about which meetings they attend and to keep a careful contemporaneous record of the reasons for their attendance.

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