



Neutral Citation Number: [2023] EWHC 14 (KB)

Case No: QB-2019-000825

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 January 2023

Before :

MASTER COOK

Between :

CXS
(A Child by her father and Litigation Friend NXS)
- and -
MAIDSTONE AND TUNBRIDGE WELLS NHS
TRUST

Claimant

Defendant

Alexander Hutton KC (instructed by **Bolt Burdon Kemp LLP**) for the **Claimant**
Simon Readhead KC (instructed by **Weightmans LLP**) for the **Defendant**

Hearing date: 21 December 2022

Approved Judgment

This judgment was handed down remotely at 10.30am on 12 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MASTER COOK

MASTER COOK:

1. This judgment deals with two discrete issues arising from case management conference (CMC) which took place before me on 21 December 2022. The first issue is the Claimant's application for a further interim payment on account of costs. The second issue is the Defendant's application for a costs management order. To some extent these issues are interrelated.

Background to the applications

2. The Claimant CXS was born on 22 June 2015 and is now aged seven. She sustained a hypoxic ischaemic brain injury around the time of her delivery and has since been diagnosed with cerebral palsy.
3. A Claim Form was issued on 8 March 2019 on the instructions of CXS's father acting as her litigation friend claiming damages for personal injuries, loss and damages against the Defendant. Liability for the claim was admitted in full by the Defendant in its Letter of Response dated 18 March 2019.
4. By an order of Deputy Master Bard dated 3 October 2019, by consent, judgment was entered against the Defendant for an amount to be assessed at a separate hearing if not agreed.
5. On 25 June 2020 I made an order staying the claim until 5 September 2022
6. At the CMC it was agreed between the parties that the claim would be stayed further until 6 September 2027 when CXS will be 12 years of age.
7. During the period of the previous stay, CXS's family moved on 23rd February 2022 from a three-bedroomed townhouse across three floors to a new rental property as CXS was struggling on the stairs and there was no room for carers or therapy. The new rental property has had some adaptations, but CXS still needs to use one flight of stairs. Both her parents work full time outside the home, her mother as a senior house steward for the National Trust (she is responsible for a National Trust house, including their antique collections and responsible for the volunteers) and her father as a relationship manager for a major bank. There is a case manager, Nikki Ounsworth, and an agency support worker who is contracted to provide 35 hours per week 39 weeks per year . The Claimant goes to various clubs and activities.
8. CXS attends a mainstream school but she has started a year behind her age-matched peers due to her developmental delays, and an Educational Health and Care Plan (EHCP) has been put in place with 32 hours of 1:1 support, with a personal budget for therapy provision by a private team of therapists. An education consultant, Jennifer Mellor, is in place and a submission has been made to the local authority to increased hours of support. Educational psychologists Heather Forknall and Dr Florence Charles have been involved in seeking to obtain more hours support in the EHCP, particularly in the light of CXS's fatigue. An assistive technology expert, Helen Simon, has visited the school to make recommendations about the provision of technology/IT to assist the Claimant.

9. During the period of the stay, and for the purposes of providing the report required by the order of 25th June 2020, Dr Hedderly, a paediatric neurologist, saw CXS on 7th April 2022 and produced a report dated August 2022. She concluded that the Claimant had the following difficulties;

“Four limb Motor Disorder (Cerebral Palsy) - predominantly dyskinesias with dystonia. CXS is ambulant over short distances, with some wheelchair use in the community. Right side affected more than left.

Fine motor control difficulties with reduced coordination of movement and limited dexterity.

Sensory processing difficulties

Speech difficulties with dysarthria and mild dysphagia with some drooling

Fatigue

CXS is in mainstream education with ongoing requirement for interval reassessment of her cognitive, emotional, social communication and behavioural development.”

10. Dr Hedderly concluded, that CXS is best described at GMFCS 2 (I being the mildest form of motor disability, V the most severe) and that: *“She will benefit from a review of motor skills in her early teens. The motor function will also be linked to her emotional development as dystonia and dyskinesias can worsen with anxiety or mood disturbance. There is a link at a neurobiological level with motion and emotion and she will need support to balance the networks which should optimising her control over both domains.”* She has made very good progress overall and her speech is now largely intelligible, her behaviour is currently much better than it was (partly due to the increased ability to communicate), but she will need continued input from various therapists, with wheelchairs, seating and bathing equipment etc. She has an increased risk of epilepsy in the range of 10% with the risk of it being intractable uncontrolled epilepsy being probably less than 5% [paragraphs 11.5 to 11.11].
11. It is clear from the report of Dr Sophie Thomas, neuropsychologist, that CXS’s neuropsychological profile is mixed and complex. Her overall IQ is 106 (better than 66% of her peers) but she is easily distracted, she has issues with her memory and significant fine motor impairments (and, although she is ambulant, she is unsteady on her feet, has falls and is often fatigued) and *“she is held back by significant impairments relating to motor and language skills, and likely some difficulties relating to attention”*. While CXS had made a qualitative improvement since Dr Thomas’s previous assessment, CXS will remain *“vulnerable to emotional and mental health difficulties as she develops greater insight into the difference between her abilities and that of her peers and visible difference”*. Dr Thomas said that it was *“too early for reliable prognostication”*, and *“the brain continues to develop into young adulthood, particularly the frontal lobes, the functioning of which will dictate social and life skills”* [paragraph 12.1].
12. CXS’s case is therefore complex and there is great uncertainty as to how her disabilities will play out in the context of her life until her brain has fully developed. Interim

payments on account of damages totalling £950,000 have been made by the Defendant to date.

13. The parties have agreed four payments on account of costs totalling £480,000. The Claimant's application is for a further £325,000 which would take the total paid on account to £805,000. The Claimant relies upon the witness statement of Ms Claudia Hillemand dated 9 December 2022. The application is opposed, the Defendant relies upon the witness statement of Mr Dan McCauley dated 12 December 2022.
14. The parties were largely agreed on the applicable legal principles which were summarised by me in *RKK v Hampshire Hospitals NHS Foundation Trust* [2019] EWHC 275 (QB). The Court has jurisdiction to make a costs order down to the date of the hearing of the application and by making an order for an interim payment on account of those costs on the basis of "established principles". The "established principles" are perhaps best summarised in the judgment of Christopher Clarke LJ in the case *Excaliber Ventures LLC v Texas Keystone* [2015] EWHC 566 (Comm). Firstly, it is wrong to approach the question of a reasonable amount on account as being a test as to the "*irreducible minimum*" to be recovered on detailed assessment, it should simply be a "*reasonable sum*". It cannot admit of every possible challenge to a bill, even those which are fanciful, see paragraph 22.
15. Secondly, a "*reasonable sum would often be one that was an estimate of the likely level of recovery subject, as the costs claimants accept, to an appropriate margin to allow for error in the estimation*", such as taking the lowest figure in the range of an estimate of what may ultimately be recovered, or fixing on a single sum and then applying a discount. But if the latter approach is to be adopted, the discounted figure is not to be much lower than the estimate of a fixed sum, see paragraph 23.
16. Thirdly, in determining whether to order any payment on account and its amount the court should take into account all the relevant factors, "*including the likelihood (if it can be assessed) of the claimants being awarded the costs that they seek or a lesser and if so what proportion of them; the difficulty, if any, that may be faced in recovering those costs; the likelihood of a successful appeal; the means of the parties; the imminence of any assessment; any relevant delay and whether the paying party will have any difficulty in recovery in the case of any overpayment.*", see paragraph 24.
17. On behalf of CXS Mr Hutton KC submits that this is a claim which is likely to be of the highest value and points to the following features;
 - i) It is clear that the Claimant will require the input of a number of different specialties going forward, including speech and language therapy, physiotherapy, occupational therapy, assistive technology, psychology/neuro-psychology, etc. That will amount to a significant annual cost averaged over her lifetime;
 - ii) The Claimant will also require significant levels of equipment, including wheelchairs, seating, vehicles etc.
 - iii) The Claimant will require suitable adapted housing (probably to be purchased) with no stairs (or possibly limited) stairs for her to negotiate in the South East of England, where house prices are very high;

- iv) She will require significant ongoing care for life, as stated by Dr Hedderly;
 - v) In terms of life expectancy, although no figure has been put on it yet, it is clear that this is likely to be long. Being ambulant (albeit she fatigues easily and requires a wheelchair for this), she is in the longest category of life expectancy on the Strauss data usually applied to these cases, such that the impairment from a full life expectancy is likely to be small.
18. He submitted that this is the kind of case where the very highest claims are made, with relatively subtle but significant physical and cognitive/behavioural difficulties and a relatively unimpaired life expectancy. Claims in this category are often seen in the region of (on a fully capitalised lump sum basis) £20 million or £30 million or £40 million.
19. Putting flesh on the bones Mr Hutton referred to the extensive material emanating from treating therapists in relation to CXS's neuropsychological position;

“Professionals Reports from SENDist Appeal and Annual Review

2.3.22 Occupational Therapy Report of Laura Myers dated April 2020

2.3.23 Physiotherapy Report of Nicki Keech dated April 2020

2.3.24 Educational Psychology Report of Heather Forknall dated April 2020

2.3.25 Speech and Language Therapy Report of Chelsea Roy dated April 2020

2.3.26 Occupational Therapy Report and costings of Laura Myers dated June 2021

2.3.27 Physiotherapy Report and costings of Nicki Keech dated 18 June 2021

2.3.28 Speech and Language Therapy Report and costings of Chelsea Roy dated June 2021

2.3.29 Educational Psychology Report of Heather Forknall dated 21 June 2021

2.3.30 Dietician Report of Rebecca McManamon dated 17 June 2021

2.3.31 Neuropsychology Report of Dr Byard dated 8 June 2021

Key Notes from Treating Team / MDT Minutes

2.3.32 Neuropsychology Notes from Dr Katie Byard - April 2020 – July 2021

2.3.33 Physiotherapy notes from Nicki Keech - June 2019 – January 2021

2.3.34 Occupational Therapy notes from Laura Myers - May 2019 – April 2021

2.3.35 Occupational Therapy notes from Annamarie Wagner – April 2021 – July 2021

2.3.36 Speech and Language Therapy notes from Chelsea Roy - July 2019 – July 2021

2.3.37 Educational Psychology notes from Heather Forknall – January 2020 – December 2020

2.3.38 Notes from Jennifer Mellor (education consultant) - November 2019 – July 2021

2.3.39 Educational Psychology Focused Initial Rehabilitation Assessment and Costings from Dr Florence Charles dated 16 March 2022

2.3.40 Support Worker notes/logs from Ms CXP (support worker) – August 2021 - February 2022

2.3.41 Helen Simons, Assistive Technology

2.3.42 MDT notes – March 2020 - October 2021”.

20. He pointed out that all this material and much more has had to be considered by the Claimant's solicitors [BBK] and by the experts instructed for the Claimant, including very substantial liaison between the numerous treating therapists and other professionals, the expert therapists for the claim, the Deputy and case manager and BBK who manage the litigation process and advise on what is reasonably recoverable as part of the damages claim. As such he suggested it was clear that the difficulties, uncertainties and complexities of a case like this are significantly greater than a case, for instance, where, very sadly, a claimant is GMFCS V, very severely physically disabled and suffering from multiple and profound learning disabilities. Their task is very different indeed to the Defendant's legal team's task in this regard. It is inevitable in these circumstances that the legal costs will be considerable.
21. Mr Hutton KC then drew the court's attention to a number of issues derived from the evidence of Ms Hillemand which demonstrated the difficulties and challenges faced by CXS's parents, in trusting and interacting with medical and legal professionals and in particular the multidisciplinary treating team and the Claimant's Deputy, which, she stated, required "*careful and sensitive management.*", see paragraph 40;
- i) Trust is crucial as "*a lack of trust has the potential to seriously undermine efforts to establish a rehabilitation and care package and to result in a revolving door of therapists and carers, which is to the detriment of the child, who requires continuity of care and stability to thrive.*", see paragraph 41.
 - ii) Ms Hillemand says that the parents have struggled to trust professionals and she has had to work intensely hard at, in effect, "keeping the show on the road", in terms of accommodation, care, equipment and therapy, see paragraph 43.
 - iii) Ms Hillemand has delegated to others, and particularly Ms Hema Wanza, in the BBK team but this required a lot of work to ensure that the parents trust others, see paragraph 67.
 - iv) The parents have struggled with change and can be rigid in their thinking, such that they require a great deal of support, and the relationship between them and the multi-disciplinary team has been difficult and close to breakdown at times, with various resignations of treating therapists. BBK, and in particular Ms Hillemand, has played a crucial role in maintaining and/or reviving very difficult relationships, see paragraphs 46 and 48.
 - v) The parents have required extra time to make decisions in order not to be "*overwhelmed*", further details of those difficulties are set out by former treating neuropsychologists Dr Byard and Dr Precious, see paragraphs 48 to 57.
 - vi) There have been various specific challenges listed at paragraph 58 of her statement, all of which are crucial in relation to the value of the claim for damages;
 - a) Ms Hillemand has found it essential to attend some meetings to provide a consistent approach, and has been involved in discussions around moving property, introducing care and therapy and purchasing

equipment, in order to progress the support the Claimant has. This is illustrated in examples in relation to purchasing a power wheelchair, to creating a therapy room etc.

- b) There have been extra challenges caused by the parents both working full time and only being available after 8pm, which has caused conflict and upset with some of the professionals involved;
 - c) Ms Hillemand explains that progress has been made in relation to all these, and other, challenges and that, with the parents accepting Ms Hema Wanza more, more can be delegated to her. But it is clear the progress can be fragile and unpredictable.
- vii) Ms Hillemand is clear that, in her opinion, if she had not provided the input she has, *“I think the package would have broken down, I do not think my relationship with the Claimants parents would have lasted, which ultimately would have led to the case being moved to another firm, thus increasing costs further.”* , see paragraph 69.
22. Against this background Mr Hutton KC explained the short-form detailed bill of costs to date which had been prepared by BBK . The total costs incurred down to 16 November 2022 were £1,155,262 which included disbursements of £92,000 and VAT of £189,000. Of this sum £225,000 was incurred before judgment was entered on 3 October 2019 and a further £620,000 was incurred since judgment was entered.
23. Mr Hutton KC indicated that the Claimant was seeking a further £325,000 which would take the total of interim payments on account of costs to £805,000. This sum would be just under 70% of the amount of the short-form bill. In the circumstances he submitted that this is an archetypal case, to exercise the jurisdiction referred to in the case of **RKK**, and to make an order in favour of the Claimant for costs incurred to date, and to make an order for the payment on account of those costs. Further, when doing so he suggested the court should bear in mind that the Claimant’s costs will continue to be accrued over the months and years to come, with an almost inevitable costs order in the Claimant’s favour, so that the likelihood for repayment of any overpayment of costs paid on account is truly miniscule or immaterial.
24. On behalf of the Defendant Mr Readhead KC made the point that the costs incurred to date are significant by any standards. He pointed out that the costs incurred in the period between 4 October 2019 and 16 November 2022 were more than twice those incurred before judgment was entered on 3 October 2019 in circumstances where the claim was fully investigated both in relation to breach of duty and causation with the assistance of several liability experts and leading and junior counsel. There were also investigations into quantum and correspondence between the parties concerning the appropriate experts to be instructed. He also made the point that the claim has been stayed since 4 October 2019.
25. Mr Readhead KC pointed to Mr McCauley’s observation at paragraph 17 of his witness statement to the effect that BBK had received multidisciplinary team input from the Claimant’s proposed quantum experts in the fields of accommodation, physiotherapy, care and assistive technology. He questioned whether it was either necessary or reasonable to be incurring these further costs at this stage.

26. Mr Readhead KC pointed to the hourly rates being charged for “partner preparation” of £530 per hour, a sum significantly in excess of the current hourly guideline rate of £373 per hour for London band 2 covering the City and Central London. He compared the total costs of disbursements, which includes experts’ fees, of just £92,000 to the level of profit costs of £874,262 and invited the court to conclude that this level of costs at this stage of the case was manifestly excessive.
27. In the circumstances, Mr Readhead KC submitted, that if this claim is to be stayed for a further five years it is reasonable that there be an order requiring the parties to file and exchange costs budgets with a view to a costs management order being made by the court so as to ensure that the case was dealt with justly and at proportionate cost in accordance with the overriding objective. This he submitted was the express purpose of costs management encapsulated in CPR 3.12 (2).
28. Mr Readhead KC accepted that CPR 3.12 (c) excluded claims made on or behalf of a person under the age of 18 from costs management. However he pointed out that CPR 3.13 (3) makes specific provision for the court, on its own initiative or on application, to make an order bringing such a claim within the costs management provisions. He also placed reliance on the guidance given in PD 3 para 2(f) to the effect that an order for the provision of costs budgets with a view to a costs management order being made may be particularly appropriate in personal injury and clinical negligence cases where the value of the claim is £10 million or more.
29. Mr Readhead KC accepted that the final resolution of this claim may not be for some years after the current stay is lifted by the court. He also accepted that BBK would need to undertake further work in the duration of the stay. He referred to the issues raised by Ms Hillemand at paragraphs 70 to 78 of her witness concerning the high levels of uncertainty in this case and the consequent difficulty in providing an accurate estimate of the likely costs. He submitted that the court when deciding the reasonable and proportionate costs for a particular phase would have regard to the factors set at CPR 44.3(5) and 44.4 (3).
30. Mr Readhead KC submitted consideration of the CPR 44 factors includes a consideration of the work that will be required to be done as well as the circumstances in which the work will be carried out. It therefore followed that the practical difficulties to which Ms. Hillemand referred can and will be taken into account by the court and properly reflected in the budget. The fact that the claim is complex or “labour-intensive” is not a reason not to make a cost management order if the court considers that it is otherwise appropriate to do so.
31. In the circumstances Mr Readhead KC invited me to make a costs management order limited to the duration of the stay namely to 6 September 2027 rather than to make any further interim payment on account of costs. He referred to CPR 3.13 (4) which provides that the court may, in a substantial case, direct that budgets are to be limited in the first instance to part only of the proceedings and extended later to cover the whole proceedings.
32. In response Mr Hutton KC accepted the court had a discretion to apply costs management to this claim but submitted that it would be wholly inappropriate on the facts of the case.

Discussion and conclusions

33. On any view the £1,155,262 costs incurred by BBK to date is high. To put the matter into some form of context, this court has extensive experience of cases involving claimants with cerebral palsy, multiple experts and a potential value of over £20 million. Where such claims are subject to costs management approved budgets usually fall in a range of £750,000 to £1,500,000. I readily accept that in such cases the incurred costs would usually be much lower as the period of time between issue and the first CCMC would be much shorter. In this case proceedings were issued almost four years ago and it will be almost a further five years before the first substantive CMC.
34. I also readily accept that BBK have had to undertake a considerable amount of work in relation to CXS's care and therapy regime and the management of the interim payments on account of damages. I note the terms of the stay contained in the order dated 25 June 2020 permitted the following steps;
- i. Insofar as may be required from time to time the Claimant shall be at liberty to apply for further interim payments on account of damages
 - ii. Pursuant to CPR31.11, the Claimant shall continue to comply with her duty to provide disclosure relevant to the issue of quantum, such duty to be discharged by way of keeping all relevant documents and serving a fully up to date List of Document upon the Defendant by 5 September 2022
 - iii. The Claimant shall apply to the Court for a further CMC to be listed before the Master for the first open date after 5 September 2022, the time estimate 1.5 hours
 - iv. By 5 September 2022, the Claimant shall obtain and serve upon the Defendant expert evidence in the fields of paediatric neurology and paediatric neuropsychology;
 - v. For the avoidance of doubt, the effect of the stay shall not preclude the Claimant from obtaining and being provided with such legal advice as may reasonably be required in relation to the general management of her claim and in relation to the management and application of the interim funds obtained on her behalf
 - vi. Such costs reasonably incurred in relation to the general management of the Claimant's claim and in relation to the management and application of the interim funds obtained on the Claimant's behalf to be recoverable on the standard basis to be assessed if not agreed."
35. The work reasonably undertaken by BBK in relation to providing legal advice and in relation to the general management of the claim and the application of interim funds must however been seen in the context that there is a Deputy and a Case Manager in place. The disparity between the cost of disbursements £92,000 and profit costs of

£874,262 down to 6 November 2022 is clearly the root of the Defendant's concern that that the case is not being conducted in a proportionate manner. In particular, I accept the Defendant has a genuine concern and may well be able to argue in due course that much of the solicitors' time recorded in relation to experts and in liaising with CXS's parents may not be reasonably incurred. However the fact remains, both parties accept that a substantial amount of work has had to be undertaken by BBK in connection with this claim and that acceptance is reflected in the amount of the voluntary payments made on account of costs down to 30 August 2022 in the sum of £480,000.

36. I have concluded, accepting the submission of Mr Hutton KC, that it would not be appropriate to make a costs management order limited to the period of the stay as proposed by Mr Readhead KC. There are very sound policy reasons behind the decision to exempt children's claims from costs management. As stated in the notes to the White Book at 3.12.3, the CPRC costs sub-committee responsible for this provision noted that typically such cases took many years to come on for trial and it may take many years for injuries to stabilise before a proper prognosis can be given and a trial date fixed. It is also relevant that the provisions of CPR 46.4 (2) (b) will require a detailed assessment of the costs payable to the Claimant in the proceedings unless there is a default costs certificate. This affords a level of protection to the Defendant against excessive costs being incurred by the Claimant's solicitor.
37. It seems to me that the current case is typical of the kind of case the CPRC costs sub-committee had in mind when approving this provision. There will be many years before a final prognosis can be made and directions made for trial. The case currently bristles with complexity and unknowns. There is not in my judgment sufficient certainty to enable sensible assumptions to be made concerning the extent of the work required in the duration of the stay to provide the basis for a budget. If incorrect assumptions are made there is the potential for further applications to vary the budget which would just add another layer of cost to the proceedings, alternatively a budget may be set which is artificially high. I consider the Defendant's concerns about the level of incurred costs are adequately catered for by the requirement for a detailed assessment at the conclusion of the claim.
38. I therefore turn to the Claimant's application for a further interim payment on account of costs. I have no doubt that the Claimant is entitled to a costs order down to date of this application as there is no relevant offer and no other relevant factor which would militate against such an order being made.
39. In the circumstances the sole question I must address is what amount, if any, is a reasonable sum in the circumstances. As the cases make clear the determination of a reasonable sum involves the court in arriving at some estimation of the costs the receiving party is likely to be awarded by the costs judge in the detailed assessment proceedings or as a result of the compromise of those proceedings. In undertaking that task there will always be a degree of uncertainty which will vary from case to case. At one end of the scale a judge may be asked to make an interim payment on account of costs having heard a trial or a specific application. In such a case the judge is better placed to have a detailed appreciation of the likely range of costs particularly in a case which has been subject to costs management. At the other end of the scale there are cases such as the present where the judge has had little involvement in the detail of the case and there is no costs management. In such a case the judge will have far greater difficulty in establishing the likely range of costs.

40. Mr Hutton KC pressed for a sum of £325,000 which he said amounted to just under 70% of the short-form bill. Mr Readhead KC was reluctant to put a figure on what he thought a reasonable sum might be. Reading between the lines I think his position was that the sum already paid by the Defendant of £480,000 was a reasonable amount.
41. I have already indicated that I have serious concerns about the level of costs incurred to date by BBK in this case. Equally I have accepted there are complex issues which potentially explain costs of this magnitude. However these issues are potentially in dispute between parties and I have no doubt they will fall to be considered further at any detailed assessment. In the circumstances I do not think it is useful to approach this case on the basis of a standard percentage reduction to the short-form bill of 70% as urged by Mr Hutton KC.
42. The voluntary interim payments on account of costs to date have been made as follows;
 - i) 30 April 2019 - £150,000
 - ii) 11 March 2020 - £80,000
 - iii) 26 June 2021 - £150,000
 - iv) 30 August 2022 £100,000.
43. It is not possible from the shortform-bill to estimate accurately the sum which has been incurred from 30 August 2022 down to the present, although the preparation for the CMC and some consideration of the expert evidence would be the minimum. In any event I may take into account the entire period from the entry of judgment. Given the uncertainties I have referred to above and the unusual features of this case I am prepared to make an order for payment of a further £80,000.
44. This results in total interim payments on account of costs to date of £560,000. I am satisfied that this sum represents a reasonable amount to be paid on account in the circumstances of this case. I do not think the fact the Claimant may go on to incur further substantial costs in the future is a factor which should lead to any increase in the sum which I have found to be reasonable.
45. I would be grateful if counsel could draw the appropriate order. Finally, I would observe that this would seem to be an appropriate case for the parties to produce costs estimates in advance of the CMC which will take place in September 2027.