Neutral Citation Number: [2024] EWHC 1372 (KB)

Case No: KB-2022-004340

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 June 2024

Before : Master Brown

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Between :

PXT **(A Child by her Mother and Litigation Friend, AXD)**	**Claimant**
- and - **MR DAVID ATERE-ROBERTS**	**Defendant**

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Alexander Hutton KC (instructed by **Bolt Burdon Kemp LLP)** for the Claimant
PJ Kirby KC (instructed by **Keoghs LLP**) for the Defendant

Hearing date: 2 May 2024
Draft circulated: 31 May 2024

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Approved Judgment

This judgment was handed down remotely on 6 June 2024 by circulation to the parties by email.

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Master Brown:

1. I am asked to order costs budgets in this case. The Claimant is a child, and her claim is not therefore automatically costs budgeted. Further, although when issued on 9 November 2022 no value was attributed to the claim in the Claim Form, it is said on behalf of the Claimant that in due course the claim is likely to be for more than £10 million and so for this further reason automatic costs budgeting provisions would not apply to this claim. The Defendant however applies for an order that the claim be costs budgeted arguing that on the particular facts of this case such costs management is appropriate and necessary. The Claimant opposes the application; it is said on her behalf that the claim is not suitable for costs budgeting and that the question whether the claim can be costs managed by cost budgeting can be reconsidered at a CMC anticipated in about May of next year.

2. There has been very detailed argument from both sides. Below I set out the background and, in summary, the various arguments. For reasons, which are also set out below (at some length), in this particular case, and having regard to the very serious and real concerns that without costs budgeting the costs will be excessive and unreasonable, in my judgment it is appropriate to costs manage this claim by costs budgeting and to do sooner rather later.

Background

3. The Claimant suffered serious injury on 10 October 2021, shortly before turning 11, when she was struck by a vehicle driven by the Defendant. Liability for that accident was agreed on an 85/ 15 split in the Claimant's favour. This compromise was approved on 22 June 2023 when I also made directions for the resolution of issues of quantum.

4. Amongst other injuries (including in particular hip and rib injuries) the Claimant appears to have suffered a serious brain injury. The Defendant has not yet served any medical evidence, and service of such evidence is not expected until November of this year. I have also only received some of the medical evidence which is likely to be relied upon by the Claimant. It is the brain injury which features in the evidence so far served and it is evidence in respect of this injury which is relied upon in this application.

5. In particular, Dr Agrawal, paediatric neurology expert, describes the Claimant as having suffered a "*very severe (catastrophic) traumatic brain injury (TBI)*". He says that the "*main brunt of this brain injury was borne by her right hemisphere of the brain resulting in left sided weakness and global developmental difficulties*". He goes on to say that she is "*left with severe neurodisability as a result with permanent problems in neurocognitive and behavioural domains*".

6. Further, and importantly for the purposes of the argument in this application, in a letter dated 1 June 2023 he says this:

> "*Although she already is displaying severe neurodisability as a result of her injury, it is too early for me to give an accurate prognosis to the full effects of her TBI. It is probable her disability and care needs will evolve in the coming years. As such, it*

> *would be my intention to reassess her in 2026, five years after her TBI, when I will be better placed to comment on her long-term prognosis."*

7. There appears, from the evidence currently available, to have been serious and substantial difficulties with the Claimant remaining in mainstream schooling and I am told she has not been attending school for some time. An Educational Psychology expert instructed by the Claimant says, as to the future, that she is likely to achieve a substantially lower level of academic attainment, employment, personal and economic independence to that which may have been achieved but for the injury.

8. Dr Mark Berelowitz, who is a Child & Adolescent Psychiatrist also instructed by the Claimant, considers that she also suffers from an Adjustment Disorder with Mixed Anxiety and Depressed Mood, which he says was caused by the accident and significant speech and language difficulties. He indicates that there were pre-existing educational and family issues but says that she was on a trajectory of improvement at school before the accident. He also concludes that she has neurocognitive disorder due to the traumatic brain injury, and that she has "*typical emotional issues of irritability, easy frustration, anxiety, disinhibition and fatigue*" which, he says, was caused by the accident. In his view there has been a significant exacerbation of attention and concentration issues following the accident but he attributes all of the anxiety and a very significant majority of the neurocognitive symptoms to the accident. He considers that the prognosis is guarded and that "*she needs to be under the care of a team that specialises in the range of issues with which she is now struggling* ..." She needs treatment for ADHD, neuropsychological support, a family therapist and a specialist school that "*understands her needs*". He goes on to say that "*it is not possible to know in advance how effective the treatments will be and what limits to the effectiveness of treatment will be persistent, because of the external injury*."

9. The Claimant's care expert, Maggie Sargent, has provided both a report dated July 2023 and a letter dated 14th September 2023 in which she says that it is too early to be clear about PXT's care needs and that she needs to have a programme of therapy and rehabilitation. Ms. Sargent considers that the Claimant needs 12 hours a day care with two to one support in the community because of her impulsive behaviour. There is reference in the evidence to a serious incident of self harm which appears to have prompted a high level of care (24 hours per day) more recently.

10. Interim payments have now been agreed in the sum of £1,025,000.

Case Management/ provision of costs information

11. The directions I gave on 22 June 2023 provided for disclosure, exchange of witness statements and expert evidence through to a further case management conference on the first open date after 1 May 2025 (referred to from now on as "the next CMC"). The order also provided, by consent but somewhat unusually in my experience, that if either side does not choose to serve an expert report in any of the above fields by the time specified, it does not prevent them from serving such an expert report later in the proceedings. It therefore envisaged that the question as to what expert evidence was required would be revisited at the next CMC.

12. Importantly for current purposes, I ordered that the Claimant should, by 4pm on 12 July 2023, serve an estimate of her costs from the date of this Order to the next CMC and that if the Defendant wished to apply for a costs management order with such an application to be heard at that further CMC, it should do so by no later than 14 days before the date of the next CMC. The Claimant had already provided the Defendant with a costs breakdown up to 27 February 2023 of some £253,000 (including VAT and including profit costs [solicitors' time] costs of £172,745 [excluding VAT]) and concerns as to the amount of costs claimed, underlay the reasons for the Defendant's request for the order that an estimate be served.

13. In accordance with the order of June 2023 the Claimant provided an estimate of costs up to the next CMC: future costs were put at some £185,000 (of which some £93,920 were profit costs [ex VAT]). In the estimate was a contingency for liaising with the Deputy, case manager and, a property finder, and a letting agent and attendance at quarterly MDT meetings (it is said, to monitor the care and rehabilitation package).

14. In December 2023 in support of a request for a further payment on account of costs, the Claimant sent to the Defendant's solicitors a detailed breakdown of costs and disbursements incurred up to 24 November 2023; the incurred profit costs were then put at just below £411,000 (ex VAT), (giving, it is said, a figure for costs significantly higher that the estimate of profit costs to the next CMC but with another 17 months to go).

15. The Claimant's solicitors have now served what they refer to as a short form bill of costs (broadly in the form a statement of costs) and a revised costs estimate. The total costs to date are now put at £850,000 (including VAT) with profit costs stated at £633,000 (excluding VAT) and expert fees at some £22,000 (excluding VAT). Estimated costs up to and including the next CMC are put at £262,000 (including VAT) to include profit costs of some £194,000 (excluding VAT) with expert fees of some £14,000 (excluding VAT).

16. Thus, in total, the figure for incurred and estimated costs to the next CMC substantially exceed £1m (including VAT) and excluding VAT the figure is over £900,000 of which profit costs are £827,000 (excluding VAT), and expert fees incurred and estimated at some £36,000 (excluding VAT). The Defendant has raised concerns about the accuracy of information provided (suggesting that costs have wrongly been allocated to liability, or are based on wrong hourly rates). It is not necessary to get into the detail of this matter. The main concern appears to be the extent to which the costs have now exceeded the previous costs estimate, and the sheer amount of costs now estimated and said to have been incurred. It appears to be common ground that the estimate provided in accordance with my order has turned out not to have been accurate, and during the course of the hearing it was suggested that the incurred and estimate costs have just about doubled since about November 2023.

17. In a detailed witness statement Ms Abrahams provides what appears to be substantial analysis of the case and the issues arising. She also seeks to explain why the earlier estimate has proved inaccurate. She says the work involved has turned out to be significantly more than was anticipated. She refers to significant emotional and behavioural difficulties on the part of the Claimant and particular difficulties with dysregulation, disinhibition and impulsivity as well as cognitive difficulties. She also refers to difficulties associated with the move of the Claimant and her Claimant's mother to larger rental accommodation

from Lewisham to Edgware in or about July 2023. Amongst other things it is also said that there has been particular difficulty with the deterioration in PXT's mental state with AXD, the Claimant's mother, also having faced substantial difficulties with her own mental health. There have been the difficulties with education which I have already alluded to. It is said that the estimate mistakenly only included one round of disclosure from June 2023 to May 2025, whereas in fact the court had provided for this every four months. I was told at one stage that disclosure has been over 3,500 pages, and there will be more to come over the next year. Further, witness evidence has, it is said, turned out to be more extensive than expected, particularly given the increasing vulnerability of the Claimant's mother (who is said to be the most important and substantial witness) requiring multiple meetings, as well as the other various witnesses including teachers to establish the position both pre-accident and post. The interim payment applications were, it is said, not included, as interim applications are usually not part of a budget (although the interim payments were agreed there were difficulties agreeing the costs of the application) and it is said that the work involved in the two applications since then, in August 2023 and February 2024 was substantial.

Relevant rules/guidance

18. CPR 3.12 provides:

Application of this Section and the purpose of costs management

3.12

(1) This Section and Practice Direction 3D apply to all Part 7 multi-track cases, except—

(a) where the claim is commenced on or after 22nd April 2014 and the amount of money claimed as stated on the claim form is £10 million or more; or

(b) …; or

(c) where in proceedings commenced on or after 6th April 2016 a claim is made by or on behalf of a person under the age of 18 (a child) (and on a child reaching majority this exception will continue to apply unless the court otherwise orders); or

(d) …

(e) the court otherwise orders.

(1A) This Section and Practice Direction 3D will apply to any other proceedings (including applications) where the court so orders.

(2) The purpose of costs management is that the court should manage both the steps to be taken and the costs to be incurred by the parties to any proceedings (or variation costs as provided in rule 3.15A) so as to further the overriding objective.

[my underlining]

19. CPR subrule 3.3 (3) provides,

(3) The court—

(a) may, on its own initiative or on application, order the parties to file and exchange costs budgets in a case where the parties are not otherwise required by this Section to do so;

(b) shall (other than in an exceptional case) make an order to file and exchange costs budgets if all parties consent to an application for such an order.

[my underlining]

20. Practice Direction s3D – Costs Management MA provides :

An order for the provision of costs budgets with a view to a costs management order being made may be particularly appropriate in the following cases—
…
(f) personal injury and clinical negligence cases where the value of the claim is £10 million or more.

21. 3.13 (3) provides:
The court—
1. (a) may, on its own initiative or on application, order the parties to file and exchange costs budgets in a case where the parties are not otherwise required by this Section to do so;
2. (b) shall (other than in an exceptional case) make an order to file and exchange costs budgets if all parties consent to an application for such an order.

22. Accordingly, proceedings having been commenced after 6 April 2016 and the Claimant being a child the costs management provisions under CPR r 3.12 (1) do not apply but the Court has the power to order costs budgeting in cases where it would not otherwise apply, under CPR rules 3.12(1A) and 3.13 (3). For costs budgeting to apply I must accordingly make an order to that effect. It appears to be common ground that in determining whether to make such an order I have a discretion which is to be exercised having regard to the overriding objective. The overriding objective requires a court to deal with cases justly and at proportionate cost, and insofar as practicable to consider the saving of expense.

23. In *CIP Properties (AIPT) Limited (Formerly known as Norwich Property Trust Limited) v Galliford Try*[2015] EWHC 3546 (TCC) Coulson J (as he then was) was considering whether to costs manage a case which had a value in excess of £10m (and was thus outside the regime for [automatic] costs budgeting). He said this:

27. I take the view that the exercise of the court's discretion under CPR 3.12(1) is unfettered. There is nothing in the CPR to suggest otherwise. The discretion extends to all cases where the claim is for more than £2 million (old regime) or £10 million (new regime). In such a case, if there is an application for the filing and exchanging of costs budgets, the court has to weigh up all the particular circumstances of the case, in order to decide whether, in the exercise of its discretion, such budgets should be provided. There is no presumption against ordering costs budgets in claims over £2 million or £10 million, and no additional burden of proof on the party seeking the order.

28. Costs budgets are generally regarded as a good idea and a useful case management tool. The pilot schemes (including the one here in the TCC) have worked well. They are not automatically required in cases worth over £2 million or £10

million, principally because the higher the value of the claim, the less likely it is that issues of proportionality will be important or even relevant. A claimant's budget costs of £5 million might well be disproportionate to a claim valued at £9 million, but such a level of costs is probably not disproportionate to a claim worth £50 million. Thus, whilst the fact that the claim is worth over £2 million or £10 million means that the court has to exercise its discretion in favour of the application before the filing and exchange of costs budgets are ordered, it seems to me that such an exercise of discretion should take into account all of the relevant material, without prejudging or making any specific assumptions one way or the other.

24. In *Sharp others v Blank* [2017] EWHC 141 (Ch) Nugee J (as he then was) was concerned with the issue as to whether to costs budget a multi party claim for some £350m. He held that the discretion was to be exercised having regard to a consideration as to whether overall costs management "*is likely overall to save expense and thereby enable the court to deal with the case more justly and more in accordance with the overriding objective or whether it would really be a waste of money and not achieve anything that was worth the money that had to been spent on it"* (see [8]) . In that case the claimants had put the costs management exercise at about £50,000 on either side, the defendants said their costs alone would be £175,000 and the judge proceeded on the basis that overall the costs would be about £225,000. The claimants were concerned to obtain more clarity as to the costs for the purpose of making an application for ATE insurance cover and the learned judge accepted that notwithstanding the value of the claim and the default position, that it should be costs budgeted.

25. Further assistance is to be found in the decision for Master Cook (now, of course the Senior Master in the King's Bench Division) in *CXS v Maidstone and Tunbridge Wells NHS Trust* [2023] EWHC 14(KB). There was considerable argument focused on this decision and I will deal with this decision in the course of considering the arguments below.

Argument/discussion

26. On behalf of the Defendant it is said that there are particular concerns arising from the estimates and general cost information; there was no good reason for the estimate to have increased or to have increased so much (doubling, or thereabouts) and that the costs are simply too high. It is said that in this case the overriding objective necessitates costs budgeting and that not doing so leaves a real risk that the proceedings will generate excessive and disproportionate costs. Mr. Kirby KC for the Defendant says there are real concerns about the hourly rates claimed (which he says are put variously at some 30-59% above Guideline Hourly Rates [GHR]), the extent of possible over involvement of solicitors in matters such as rehabilitation and implementing care regimes, insufficient delegation of work and concerns as to the sheer amount of time claimed in respect of, for instance, considering documentation. It is said that I should make an order for costs budgets to be exchanged and for a costs management hearing to take place as soon as reasonably practicable in order to manage these costs.

27. Whilst the order that I made in June last year envisaged that I may costs budget at the next CMC, Mr. Hutton KC for the Claimant accepted that in principle it was open to me to provide for costs management sooner. Indeed, it seems to me clear that the earlier order does not prevent me, if I think it appropriate, to costs manage sooner than envisaged not least

because it might be said the provision of further costs information is a material change of circumstances.

28. Further, Mr. Hutton did not seek to question the general efficacy of costs budgeting. The case he put was that not only is the Claimant a child, this is a case where the underlying rationale for the exception to automatic costs budgeting applies and that it is not appropriate by reason of the particular features of this case to impose cost budgeting, at least for the time being. He referred me in particular to the reasons that were given by the Civil Procedure Rules Committee for removal of children's claims from (automatic) costs management in 2015. They were reported in the Law Society Gazette (on 6 August 2022) as follows:

> '*Our unanimous view was that children cases could be removed from the regime, principally because of the time many such cases take to get to trial. It takes years for injuries to stabilise before a proper prognosis can be given and a trial date fixed. Budgeting for five to 10 years is not sensible*"[1]

29. Mr. Hutton said that the prognosis is not yet know and it will not be known until at the earliest 2026, some two years hence. Obtaining a prognosis in a case where there is an injury of this sort, involving the front lobes, will be particularly difficult, not least because the Claimant will be in her adolescence (when the brain might be understood to be changing rapidly). There will be real difficulties estimating costs in a case such as this with an uncertain and unstable clinical position.

30. Reliance was placed on further matters set out in the witness statement of Ms Abrahams. It is not necessary to set the detail of all the matters which are relied upon although I have considered the material. It is said that there are too many uncertainties in a claim by a 13 year old girl who has suffered a severe but yet, as it is put, a relatively subtle brain injury, and how it will pan out over adolescence. Those uncertainties include difficulties with schooling (the total absence of schooling recently, undermining her rehabilitation). There are further challenges including those that have come from the change in accommodation, the deterioration in hers and her mother's mental health conditions. There were issues as to whether the care/case management/therapy etc packages would, as it was put, stick, and whether the Claimant's behaviour and/or mental health will deteriorate further.

31. Mr. Hutton argued that the decision in_ *Sharp* should be seen as a case which turned on its particular facts. In that case there being substantial need on the part of the claimants in that case to costs budget in order to obtain ATE insurance (presumably so that the level of indemnity could be ascertained). But such circumstances do not exist here.

Reasons

32. There are, as the Senior Master held in *CXS*, sound policy reasons behind the decision to exempt children's claims from automatic costs management. Plainly it is not sensible to costs budget over a 5 to 10 years period. Quite apart from the difficulties

[1] This were earlier set out in the White Book to the same effect.

obtaining a stable prognosis, there are inherent difficulties costs budgeting over very lengthy periods and that consideration may be a good reason not to costs budget. There is also the potential for budgets to require variation and this may require multiple applications such that there is a real risk that the costs time, effort associated with costs budgeting will outweigh the benefits. However, it is not said that in other respects a claim by a child, the nature of the funding arrangement for instance, or the other features of such a claim, are so different from claims brought by protected parties- and such parties are not exempted from the automatic provision. Indeed the Practice Direction makes clear that personal injury claims for £10m or more are generally suitable for costs budgeting. Indeed, it is perhaps to be emphasised that there is no complete <u>exemption</u> from costs budgeting for claims brought by children, as appears from the rules.

33. I understand the concerns that Mr. Hutton and Ms Abrahams have raised. The issue as to when a prognosis may be given has no doubt been considered by Mr. Agrawal with some care. However, as I have indicated, there is at least some real prospect that he will be able to give a prognosis in respect of the brain injury in 2026, albeit this is not guaranteed. Indeed whilst Mr. Agrawal's letter provides at least some indication as to when this claim might be ready for trial, I would accept that there was nothing that he had said in this regard which is 'set in stone'.

34. In June last year I was asked to provide permission for reliance on reports from quite a large number of experts at the hearing (including experts in care and case management, speech and language therapy, and physiotherapy). I did not give permission to rely on an accommodation expert for reasons which are not necessary for me to go into, but anticipated dealing with the matter at the next CMC. One might have questioned why I gave extensive directions for witness statements and such a wide range of experts if trial was a long way off. It seems to me not unrealistic to suppose that if a final prognosis can be given in or about 2026 the assessment may well be possible sin 2027 – some three years away. The Defendant's proposal is that I costs budget later this year before service of their reports and do so for a period up to the next CMC. If it then proves appropriate at the next CMC I can then costs budget forward to trial, which would be a period of 2/3 years. If that were not possible, and a further CMC at some later date were appropriate, then I could cost budget in the interim. If it were the case that a final prognosis can be given in 2026 then, as things stand, I would be surprised if there were not some attempt to settle the claim by way of a JSM or otherwise. In any event the absence of certainty as to whether a prognosis can be given in 2026, and even if trial were not possible until some time later than I have suggested, would not, to my mind, prevent fair and effective costs budgeting.

35. I should say that I do not see the budgeting of a claim such as this as an expensive exercise (or anticipate costs anything remotely close to the figures which are cited in *Sharp*). Nor do I anticipate that this exercise would be very demanding of effort or time consuming. Indeed in this case, and as Mr. Kirby pointed out, any such concerns are very less apparent that they might be in the ordinary case, at least in respect of the period up to the next CMC; costs estimates and costs statements have already been served by the Claimant up to May 2025. Preparing a cost budget should, I anticipate, be a straightforward exercise for the Claimant. Costs information is generally required for reserve purposes by the Defendant's insurers and I would be surprised if the Defendant could not produce a budget fairly easily. In the ordinary case, solicitors are expected to provide cost information to their client (presumably the insurer for the Defendant) and an inter partes budget should not perhaps add much to the information provided in this way. Although in

general a significant amount of time is, as I understand it, taken by courts generally costs budgeting, the determination of a cost budget in any individual case of this sort should not take long; even in cases where costs are relatively large, costs management hearings in the KB should not take longer than about an hour. Counsel need not attend. Advocacy may be provided by costs draftsman or costs lawyers and may, if appropriate, sensibly be done by solicitors themselves (who may know more about the case than anyone). Budgeting has been in place for a long time now. Those preparing costs budgets should be familiar with the procedure and the general approach. There is now a much greater expectation that costs budgets should be agreed; indeed, in my experience costs budgets can and not infrequently are agreed and if not in whole, at least in large part; if they cannot be agreed then resolution should not take long. I should also mention that as I understand it, claims brought by adult protected parties can take a substantial time to come to trial (in adult brain injury cases there can sometimes be trials of independent living) but a claim can be costs budgeted in parts to accommodate this; and there are generally no particular difficulties with budgeting on this basis.

36. In *CXS* Master Cook rejected an application by a defendant in a complex clinical negligence claim in which the claimant was had cerebral palsy at birth. He had serious concerns about the level of costs incurred in that case. However I do not think this decision forms a "precedent", which requires me to reach the same conclusion, as was rather suggested by Mr. Hutton. Importantly it seems to me the Master was being asked to budget in the period of about 5 years during which period the claim was stayed. Thereafter the first substantive CMC was expected to take place; indeed in that case it was thought there may not be final resolution until some years after the stay had ended. As the Master indicated, there would be many years before a final prognosis could be made and directions made for trial. That case, as the Master indicated, was typical of the kind of case the CPRC costs sub-committee had in mind when approving the exception from automatic costs budgeting.

37. As it seems to me clear the relative timescales in this case are different, and significantly so in my view. I understand that it cannot be stated with certainty that a final prognosis will be available in 2026, and possibly for some period after that. I do not however see that that would provide any substantial difficulties with costs budgeting - even if it proved that a final prognosis were not possible in 2026. There is at least some reasonable expectation that there can be an assessment of damages within a period that is reasonable for costs budgeting purposes, and indeed substantial directions for the resolution of this matter have already been given with this in mind.

38. Moreover, even if there were a greater degree of uncertainty about when a final prognosis can be given and when an assessment may take place, and even if, in respect of claims brought by children, there was a presumption against costs budgeting which could only be displaced by good reason (which is not, I think, what the rules say in terms), the concerns which the Defendant has raised in this case in my judgment substantially outweigh any of the concerns about costs budgeting. In short, I am persuaded that the Defendant's concerns provide a clear and compelling justification amounting to a good reason for taking the steps which the Defendant has asked me to take.

39. Costs of over £1 million are in my judgment, at the very least, concerning. It was floated in the hearing that if the costs were to be at this level by May 2025 they could be

double that and be nearer £2m – perhaps more in the end. I am not sure that these sorts of figures were seriously refuted by Mr. Hutton. In any event in my judgment, sitting both as a costs judge and as KB master, there are real apprehension that such costs would go substantially beyond what is reasonable or proportionate.

40. In expressing these concerns, I have fully in mind the factors set out in CPR 44.3(5). There will be work undertaken or expense incurred due to the vulnerability of the Claimant and, it would appear, the Litigation Friend. The sums in issue and the amount or value of any money involved are high; I accept that in due course the claim may have a value over £10 million. I accept, of course, that the claim is of the utmost importance to PXT and her family (in terms of her life-changing injuries requiring paid support, care and therapies). The need for skill, specialised knowledge and responsibility on the part of solicitors is also evident. I refer below to some of the complexities in the claim but would note that the burden in respect of such complexities is shared at least substantially with the experts.

41. Mr. Hutton has asserted that there was additional work generated by the conduct of the Defendant. He maintained the Defendant has conducted this litigation in respect of quantum to date aggressively and he suggested the tone of the inter partes correspondence from them is aggressive. Mr. Hutton complained that the Defendant has pressed the causation/pre-existing difficulties which he said has generated a lot more work both on witness evidence and expert evidence, even though he says that the pre-existing difficulties were mild and without a diagnosis. He also said the Defendant was reluctant to agree to interim payments but then argued about whether they should pay the costs of the applications for them for weeks before eventually agreeing (as, he says, they ought to have done in the first place). Mr Kirby said that the requests for interim payments were premature, and it was necessary for the Defendant to see the underlying documents and supporting documents before agreeing them. If that is right it might indicate a good ground for questioning some of the costs associated with the applications. Indeed it strikes me as hardly surprising that the Defendant should want to investigate the pre-accident position (even accepting there may be force in Mr. Hutton's points about causation). I have however difficulty seeing why concerns of this nature are so very remarkable and I am not persuaded that these points about conduct in this case really weigh heavily against costs budgeting. If parties behave unreasonably then this may be a good reason to depart from a budget.

42. Reference was made by Mr. Hutton to the comment by Master Cook in *CXS* that that case "*bristl*e[d] *with complexity and unknowns*". He said the same was true here. I accept that there are significant complexities. There are inevitably also some unknowns. Mr. Hutton has set out the considerable challenges associated with the claim with some care in his skeleton argument, and it is not necessary for me to set out all of them in detail here. Reference was made to the difficulties for PXT attending schools in Lewisham (after the brain injury but before the move) which has been followed by ongoing difficulties over many months since August 2023 finding her any suitable schooling (and he suggested this may end up in a challenge to the local authorities in the education tribunal). The extent of the need for ongoing care may also be uncertain (not least because a high level of care sems to have been put in place following an incident of self harming and threats of suicide- which have resulted in increased need for paid care to 24 hour care). There are further complications as the parents are said to have gone through what is described as an acrimonious divorce and reference was made to the Claimant's father's poor social condition. The Claimant's sister JXT is also said have her own pre-existing disabilities; indeed, as I have already noted the

Claimant's mother is said to have had mental health difficulties since PXT's injuries and it is said that she has sometimes struggled under the weight of her responsibilities.

43. As serious as all the matters are, and as sympathetic as I am to such difficulties, I do not see them as presenting any hurdles to costs budgeting. However invidious it may be to make any general comparison with other cases, such difficulties and challenges in claims brought for serious injury in other cases do not prevent costs budgeting.

44. For the avoidance of doubt, I should say that I have borne in mind everything that has been said in defence of the costs, and the possible justification for earlier costs estimate being inaccurate (it is not necessary for me to make any ruling on this and the parties did not require me to). Ms. Abrahams and Mr Hutton referred to challenges of obtaining instructions from AXD. Mr. Hutton also tells me that there is a vast treating team of 8 people in professional care, case management and therapy team to liaise which requires advice from the legal team as to what kind of package should be recoverable. There are also said to be a large number of experts to liaise with, as well as the case managers and the MDT, an Educational Consultant and the Claimant's mother in terms of schooling. It is said that liaison with the deputy is essential to provide advice about recoverable items, including the care package, the accommodation, equipment, transport and holidays. Mr. Hutton says that there was a substantial amount of documentation in this case, referring also to very substantial applications for interim payments since the initial approval order of the court (for which he says documentation had to be marshalled). I note that there have been the challenges outlined above with the family's move to larger rental accommodation. Indeed, Ms Abrahams says in her witness statement that "[this] *case has been one of the most complex and labour-intensive cases I have ever been involved in*".

45. But again I am not satisfied that these challenges prevent the court from effectively and fairly costs budgeting. In my judgment, in contrast perhaps to the position in *CXS*, where the court was asked to cost budget during what was effectively a stay and notwithstanding all the complications referred to in the evidence, it seems to me that reasonable and safe assumptions can be made as to the work reasonably required for the purposes of costs budgeting (as they are in other cases where significant challenges of the sort relied upon arise). It will in any event always be open to the parties to apply for variations of a budget.

46. The Claimant has not yet served a report from a neuropsychologist. Such reports often provide a reasonably objective measure of the extent of disability (being based on testing). It has been said that the brain injury in this case was in some measure subtle. The views of a neuropsychologist can be expected to assist in determining whether and to what extent disability is due to neurocognitive difficulties or whether it might have a psychiatric explanation. There may well be complex and difficult issues of causation for the experts to address and witness statements will no doubt address the pre-existing position. Even allowing for the points made by Mr. Hutton it appears a reasonable area of enquiry; indeed I would suspect that this is a matter which the Claimant's advisers were aware needed to be addressed at an early stage. There is at least some indication of features in the pre-accident documentation which require consideration. Quite how such issues will feature after the investigation is uncertain. However, even accepting the difficulties associated with such matters, again I do not accept that they prevent the court effectively costs budgeting. Such matters arise in other costs budgeted claims.

47. But, even if those factors which Mr. Hutton referred to weighed more heavily against costs budgeting than I think, and might on their own constitute reasons for not costs budgeting, in my view there is in this case a good reason to costs budget. That is for the very reason that costs budgeting is considered an effective form of costs management in other cases. It reduces the risk that costs become excessive and disproportionate, and reduces the prospect that detailed assessment will be required. It can also be expected to reduce the costs of dealing with costs issues and provide some transparency as to the parties' respective liabilities in respect of costs and this, in turn, can enhance settlement.

48. I have some concerns about the explanations given for the costs estimates proving so inaccurate, not least of which is the suggestion that more issues had to be dealt with in the witness statements than it was said had been anticipated. But without making any finding on the particular points raised by the Claimant (and as to the various competing reasons as to why the earlier estimate has proved inaccurate) which is not necessary for these purposes, I think there is clearly substance to the concerns raised by the Defendant about both the extent of the departure from the earlier estimates/costs information and the level of costs generally. Ordinarily I would expect that at least in the great many cases estimates can be expected to provide reassurance that costs are likely, within a range, to be reasonable and proportionate, but that is not the case here.

49. Hourly rates are not determined in costs budgeting but it is clear that costs budgeting should not be carried out subject to a later determination of the hourly rate (*Yirenkyi v Ministry of Defence* [2018] EWHC 3102 (QB). In fixing a reasonable and proportionate budget, regard may be had to reasonable hourly rates. In the recent costs statements the rate for Grade A work in 2024 is put at £560 per hour; for the Grade B, £490, the grade C (2 - 4 years qualified) £395 per hour, and the paralegal £210. The GHR for London 2, which appears to be suggested as a reasonable starting point, are £398/£308/£260/ £148 respectively. If the grade A fee earner is to hand over much of the work involved in client communication to a lower grade fee earner who speaks Gujarati (and is therefore in a better position to communicate with the litigation friend, whose first language I am told this) I understand it will be to a Grade B fee earner whose hourly rate will be claimed at £490 per hour. It is said that the uplift on the relevant GHR rates appears substantial (indeed is might be observed they are not perhaps such a long way for GHR for London 1 - very heavy commercial and corporate work by Central London solicitors). It is accepted by the Defendant that the Claimant's solicitors are recognised as specialists in personal injury work and it is said that this would no doubt be recognised by some adjustment to the GHR, typically some enhancement of the main fee earner (whichever method is used to determine the appropriate rate). But the Defendant, understandably in my view, does not accept that the rates claimed are the 'going rates' as appears to be suggested in the witness statement of Ms. Abrahams (nor, as I understand it, is her assertion that her firm enjoys the sort of pre-eminent position in this type of work which her witness statement might imply).

50. The Defendant is also concerned at the level of involvement of the litigation team in the treatment and rehabilitation of PXT. There is said to be a real concern that the partner in particular is stepping outside of the appropriate areas of work of a litigation solicitor and into work of managing the case manager and treating team. Managing costs through budgeting will help set the boundary or at least allow thought to be given to the boundary between litigation services and non-litigation services. It is contended that there is a high level of input into day to day care activities such as the move into private rental accommodation, the

management of professional care, the consideration and approval of educational activities, holidays etc, and the consideration of potential schools and issues regarding team dynamics.

51. In *Hadley v Przybylo* [2024] EWCA Civ the Court of Appeal decided that in principle costs associated with rehabilitation such as attending at MDT meetings may be claimed in principle. But as appears from the outcome of in the appeal and the terms of the judgment ([60] and [61]) the Court had concern the amount of time on activities such as liaising with a Deputy (see [2] footnote 1) and as to the regular attendance on MDT meetings (see in particular [47])) . Importantly, it is not suggested that in principle the work associated with rehabilitation cannot be costs budgeted (and work budgeted can conveniently be dealt with in the phase Issue and Statement of case, see [25]). In this case it is said that there has been only one attendance at an MDT meeting. Plainly some such work may be reasonable. I also understand the need to develop a good working relationship with their client, a point made by Ms. Abraham, but again, there is, to my mind, substance behind the Defendant's concern. The claim in damages, it seems to me, may well include a claim for case and care management alone of some £170,000 per annum (see exhibit CAB14). The anticipation on the part of the Claimant appears to be of significant case management by the case manager overseeing the tenancy for the home occupied by the Claimant and her mother, overseeing the care package, auditing the care (checking invoices), co-ordinating therapy provision and attending and chairing of the MDT meetings. Indeed the care manager is understood to be involved in securing a school for the Claimant and supporting her at school. Without making any finding on this, I am not satisfied that the witness statement of Ms Abraham does dispel sufficiently or at all the Defendant's concerns, referring as it does to a significant level of input by solicitors in the rehabilitation and care package (see para. 69).

52. Without wishing to be in any way comprehensive, there are other concerning features (as there were in *CXS*). The disparity between the costs of experts and profit costs is one such matter and which is perhaps particularly apparent here (perhaps more so than in *CXS*) . Rather like Master Cook, I think this can be an indicator that a case is not being conducted in a proportionate manner and indicative of excessive costs. Further, notwithstanding the likely number of documents (which I understand will be substantial) the time spent on documents strikes me as a matter of very considerable concern (it is suggested by the Defendant that some 1419 hours has been spent on this, which on some people's measure of a reasonable estimate of a full uninterrupted week's work, might equate to about 40 weeks of work).

53. In *CXS* costs were perhaps at a similar level to those here and notwithstanding his concern about those costs, Master Cook was not persuaded that costs budgeting was necessary. In my judgment on the facts of this case and for the very reason that costs budgeting is considered appropriate for other substantial personal injury, it is appropriate here. I consider that in this case costs budgeting is likely to lead to the very substantial saving of expense. I suspect that in many cases involving children there are difficulties in obtaining stable prognosis and appropriate cost management can be achieved in light touch way by the requirement to serve estimates (such estimates providing 'yardsticks' against which costs may later be assessed). But without making any finding as to why specifically the earlier costs information provided was inaccurate, in my judgment it is clear the controlling of costs in this way has not worked and in any event, given the very large increase in costs, I lack the necessary confidence that it will work in future.

54. Of course, if I did not order costs budgeting any costs payable by the Defendant, are likely to be subject to detailed assessment. In any such assessment it would be open to the Defendant to challenge as unreasonably incurred, unreasonable in amount or disproportionate in amount (without having to show good reason) and thus have costs disallowed. As Mr. Kirby argued, this is, of course, true of every dispute and yet costs budgeting was introduced so that the level of reasonable and proportionate costs could be considered throughout the course of proceedings - and introducing as it does the need to show good reason to depart from a budget. Leaving costs management to the end of the case is likely to lead to what Mr. Kirby described as a further lengthy and costly procedure, by which time the costs including the unreasonable costs have been incurred. I think Mr. Kirby is right about this. In this case detailed assessment would require the preparation of a Bill, Points of Dispute and Replies and associated with this (albeit preliminary) work are substantial costs. I canvassed that any detailed assessment might last a week without either party demurring substantially- it may take longer. Whilst costs are assessed after the event in a detailed assessment the reasonableness of costs are generally to be determined without the benefit of hindsight. In any event it is not at all clear to me that detailed assessment necessarily offers any better form of costs determination (most likely the determination the reasonableness of, for instance, time spent on attending on the Claimant in the case would be based on sensible approximation, or as it sometimes put, on a 'broad brush' approach). In any event in my judgment it seems, for all the reasons Mr. Kirby has articulated that leaving costs to detailed assessment is not adequate or appropriate in circumstances where the court can manage them now. I would expect that the costs of costs management will be, if not properly described as a fraction, then a very modest proportion of the costs of detailed assessment. Phased budgeting should enable the Claimant's solicitors to carry out their work at proportionate and reasonable cost and give both sides a clear idea of the level of costs that are likely to be incurred and their respective liabilities- a matter which, as I have indicated, should generally enhance settlement.

55. Mr. Hutton argued that it was inevitable that there will be a detailed assessment given, as I understand his point, the amount of incurred costs; he asked, rhetorically, why the court would go to the time and expense of generating a whole additional layer of costs now of a separate costs budgeting exercise? But costs management of a substantial proportion of the costs claimed by costs budgeting will provide a framework for settling at least estimated costs and reduce the amount which would be subject to detailed assessment in the ordinary way, and thus reduce the sums in dispute. In any event when estimated costs are budgeted experience suggests budgets might at very least aid agreement of costs generally either at a joint settlement meeting or shortly thereafter and that this accounts for the much greater degree of agreement in respect of costs that now occurs in claims such as this. Managing recoverable costs will, in my judgment, reduce the prospect that detailed assessment will be required and reduce the risk that excessive and disproportionate costs will be incurred, in accordance with the overriding objective.

56. Mr. Hutton's case was that recovery of damages was likely to be very high. He said that this case has a long way to go, with likely further interim payment applications every few months, and with a very uncertain trial date. It will, as I understood his case to be, a vastly expensive claim for damages - the suggestion being that the level of costs would be modest against the damages. As appears from Mr. Hutton's skeleton it is said it is very likely that the claim will have a value in excess of £10 million and that the claim may benefit from the exemption from automatic cost budgeting on this basis. I have borne this in mind. I am not,

as things stand, clear what the likely reasonable level of the claim will be. Although I am prepared to assume for these purposes that the claim is likely to have a value in excess of this sum, I consider it at the very least doubtful that there will be contested applications for interim payments with the regularity suggested (noting that the costs of such an application can be dealt with outside of costs budgeting). Further, some caution is, I think, required before making many of the assumptions Mr. Hutton urged me to make. Indeed, it may be that proportionality proves to be a particular concern. But in any event even high value claims need be conducted proportionality and at reasonable cost.

57. Having considered all the points made by Mr. Hutton, closely and carefully developed as they were, and issues arising as to the utility, practicality and the expense of costs budgeting and on weighing up all the relevant matters I am satisfied, that I should make an order for costs management by costs budgeting and for reasons which are apparent from the above, that such costs budgeting should start soon.

58. There are, however, two further issues which arose in the hearing and which it is appropriate for me to deal with, albeit briefly, and even though their resolution is not necessary for my decision.

59. First, in *CXS* reference is made to the to the availability an assessment under CPR 46.4(2)(b) as protection to a defendant and as a reason for not cost budgeting. Such an assessment generally takes place at the end of a claim when solicitors acting for a claimant seek to claim costs against the child or the protected party. It may be required when the solicitors seek payment of a success fee or reimbursement of an ATE premium (as an additional liability) (such expenses not being recoverable against the defendant to the claim) but such a claim is generally made when the costs claimed against the defendant have been agreed or assessed, and the amount recovered between the parties has fallen short of the amount the solicitors say is due (giving rise to what is referred to as a 'shortfall' claim). An assessment under 46.4 is required to protect the interests of the child or protected party and it takes place after *inter partes* costs have been assessed. Often (if not normally) shortfall claims are not pursued and solicitors waive such a claim so a detailed assessment is not required and the remaining matters can be dealt with summarily. It is not however clear to me that the provision set out in of 46.4(2)(b) does substantially protect a defendant against excessive costs being incurred by the claimant's solicitor; it is for the benefit of a protected party and a child.

60. But I should perhaps say that there is at least some basis for thinking that costs budgeting may be beneficial for protected parties and children in an assessment under CPR 46.4. That is because there may be a presumption in certain circumstances that costs in excess of a budget are unreasonable: see *JXC v NIS* [2023] EWHC 1000. Thus costs budgeting may provide some protection to a protected party or child from a claim by their solicitors in costs. In this case it is not necessary for me to go into this matter in any detail because Mr. Hutton told me (Mr. Kirby not objecting to me being told about it, rather than evidenced in the normal way) that there is a funding arrangement in place such that the Claimant will not be expected to pay costs in excess of those recovered for the Defendant (by way of additional liability or by way of a claim for a shortfall). It would seem to follow that there would be no assessment at all under CPR 46.4 (see PD 46.4 2.1 (a)). So it is not clear to me that the points that are made in *CXS* about CPR 46.4 apply here.

61. Second, there is an issue arising as to cost protection (QOCS) and the fact that issue of this claim pre-dated the recent changes to QOCS in Part 44 (which came into effect on 6 April 2023). In *The Scout Association v Bolt Burdon Kemp* [2023] EWHC 2575 it was common ground that QOCS protection applied to costs orders in detailed assessment and in that case, on appeal, Freedman J agreed with the conclusion of Costs Judge Leonard at first instance, that the claim by the defendants for costs against the solicitors themselves under section 51(3) of the Senior Courts Act 1981 was, in the absence ground for wasted costs being made out, inconsistent with such costs protection. In *Challis v Bradpiece* [2024] EWHC 1124 (SCCO) Deputy Costs Judge Roy KC found, following argument, that QOCS did apply in detailed assessment proceeding but held that the competing arguments as to whether this we are very finely balanced and gave permission to appeal. It thus appears, as things stand, that cost protection that QOCS costs protection does apply in detailed assessment. And, in the light of the decision of the Supreme Court in *Ho v Adelekun* [2021] 1 WLR 5132 and the decisions of the Court of Appeal in *Cartwright v Venduct Engineering* [2018] 1 WLR 6137 and *Harrison v University Hospitals of Derby* [2023] 4 WLR 8, any costs orders in favour of the Defendant, including any costs awarded in detailed assessment proceedings, could only be set off against any damages and interest ordered in favour of the Claimant. So if the Defendant were successful at detailed assessment and was awarded costs in his favour he could enforce that costs order at that assessment but only up to the total amount in money terms of the damages and interest ordered in favour of the Claimant. Any costs orders in favour of the Defendant could not be set off against any damages and interest which were payable to the Claimant pursuant to a settlement or a *Tomlin* order or the acceptance of a Part 36 offer, rather than pursuant to an order of the court. Thus, if costs protection does apply in detailed assessment (and Mr. Hutton say that this must be regarded as doubtful) the Defendant (effectively the insurer) faces the prospect that if damages are agreed either in a *Tomlin* order or by way of acceptance of part 36 offer (in respect of which there is perhaps at least a substantial prospect), the Defendant could not at detailed assessment, even if successful, obtain an enforceable order for costs. Whilst the protection is one conferred by Parliament it was not clear to me that it might not be a factor that would also weigh in favour of costs budgeting rather than leaving the costs disputes for detailed assessment.

62. Mr. Kirby submitted that it was a factor that should weigh in his favour in the exercise of discretion. The short point being that this claim having been issued before the recent QOCS amendments, the Defendant has a significant disadvantage and that these provisions created something of a 'free hit': any Part 36 offer (or other admissible offer) in the detailed assessment is deprived of much its force as the usual costs consequences would, as I understood the point, not be applicable. Mr Hutton's response to this was that there was no such 'free hit' as even if the Defendant were not likely to recover his costs if successful, any admissible offer would mean the Claimant would not receive her costs and this was a real and sufficient incentive to settle costs. In any event it was argued that Parliament must be considered to have had this in mind when instituting QOCS as is inherent in cost protection; and for this reason it cannot properly be taken into account in when exercising my discretion.

63. For reasons which are apparent from the above, I am satisfied that whether or not there is any cost protection in detailed assessment, and whether or not Mr. Hutton is right about the points he makes that I should order costs management. It is significant enough that the parties are exposed to a substantial dispute which would require the preparation of Bills, Points of dispute etc and further, the prospect of a detailed assessment with substantial costs.

Indeed I am not sure that I heard quite as full argument on this as might have been appropriate on the second point that Mr. Hutton raised. But I should perhaps record that I would have rejected the contention that cost protection could not substantially affect the costs incentives that come with Part 36 offers and thus effect the detailed assessment process; in short, that it would constitute a real and significant disadvantage to the Defendant. The Claimant's solicitors would, of course, risk recovery of their own time spent on costs recovery. But not to incur any enforceable costs liability for the other side's costs substantially reduces the downside of declining an otherwise good offer and reduces the prospect of settlement[2]. Further, and on a relatively superficial consideration of the points made by Mr. Hutton, and without deciding this point, I should also say that I had some difficulties seeing why this matter should not add weight to, or perhaps accentuate, the concerns I have with the submission that it would be preferable that costs should be left to detailed assessment.

[2] And on this point some reference to the conduct of solicitors in *PXE v Scout Association* [2023] EWHC 158 (SCCO) in pursuing arguments which were said by the defendants to have said to have justified the order against the solicitors might be justified: see [12]- [23])).