Claim No: HQ09D04958
SCCO Ref: PTH 1106483

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
SENIOR COURTS COSTS OFFICE

Clifford's Inn, Fetter Lane
London, EC4A 1DQ

Date: 16 May 2012

Before :

SENIOR COSTS JUDGE HURST

Between :

SYLVIA HENRY	**Claimant**
- and -	
NEWS GROUP NEWSPAPERS LTD	**Defendant**

Simon Browne QC and Harvey Starte (instructed by **Taylor Hamptons**) for the **Claimant**
Nicholas Bacon QC and Adam Wolanski
(instructed by **Reynolds Porter Chamberlain LLP**) for the **Defendant**

Hearing dates: 4 & 5 April 2012

Approved Judgment

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

.....

Approved Judgment

Chief Master Hurst:

BACKGROUND

1. Sylvia Henry was employed by Haringey Council as a Senior Social Worker in their Social Services Department and was involved in both the case of Victoria Climbié and of the child known as Baby P. The Claimant was the subject of numerous defamatory articles in various newspapers. This particular case concerns a series of articles published in The Sun newspaper in respect of which readers were encouraged to sign up to an online petition calling for the dismissal of Ms Henry from her post. That petition attracted more than a million signatures. The proceedings were ultimately settled on payment of a substantial (but undisclosed) sum by way of damages, a Statement in Open Court and a prominent apology in The Sun newspaper. The apology published by The Sun on 10 June 2011 read as follows:

> "In our campaign to highlight the failings of the authorities to protect Baby P from his killers we identified staff at Haringey Social Services including one of the social workers Sylvia Henry. It is now clear that Ms Henry was not at fault or to blame in any way for the decisions contributing to Baby P's tragic death and should not have been a target for our campaign. She did her best for Baby P. It was also untrue to suggest that she was lazy and uncaring in her work and deserved to be sacked.
>
> Our articles refer to Ms Henry's involvement in the tragic case of Victoria Climbié, a young girl who had been abused and killed by her carers in Haringey some eight years previously. We accept that Ms Henry's evidence to the Laming Inquiry was truthful, and withdraw any suggestion that she lied to avoid criticism. We sincerely apologise to Ms Henry for these untrue allegations and we have agreed to pay her compensation."

2. The Claimant is entitled to recover her costs on the standard basis.

3. This case was one of the first, if not the first, case to be dealt with under the Defamation Proceedings Costs Management Scheme. Both parties exceeded the budgets which were approved by Master Eastman on 20 September 2010. The parties have agreed that three preliminary issues should be tried. The first is:

Whether there is good reason for the court to depart from the court approved costs budget as approved on 20 September 2010, following which:

i) *in the event that the court finds that there are no good reasons to depart from the budget the court will at that hearing determine the sums recoverable by reference to the budget;*

ii) *in the event that the court finds that there are good reasons why the budget should be departed from the court will determine by how much the budget*

should reasonably be exceeded and will if necessary provide directions in respect of the remaining budget items.

4. The other preliminary issues relate to success fees and VAT and are not the subject of this judgment.

THE PILOT SCHEME

5. Practice Direction 51D provides for a pilot scheme to operate from 1 October 2011 to 30 September 2012 at the Royal Courts of Justice and the District Registry at Manchester. It applies to proceedings in which the claim was started on or after 1 October 2009. At paragraph 1.3 the Practice Direction explains:

> "The Defamation Proceedings Costs Management Scheme provides for costs management based on the submission of detailed estimates of future base costs. The objective is to manage the litigation so that the costs of each party are proportionate to the value of the claim and the reputational issues at stake and so that the parties are on an equal footing. ..."

6. The remainder of the Practice Direction, so far as relevant to the issue before me, is as follows:

> **"Preparation of the Costs Budget**
>
> 3.1 Each party must prepare a costs budget or revised costs budget in the form of Precedent HA –
>
> (1) in advance of any case management conference or costs management conference;
>
> (2) for service with the pre-trial checklist;
>
> (3) at any time as ordered to by the court.
>
> ...
>
> 3.3 Each party will include separately in its costs budget reasonable allowances for –
>
> (1) intended activities, for example: disclosure, preparation of witness statements, obtaining expert reports, mediation or any other steps which are deemed necessary for the particular case;
>
> (2) specified contingencies, for example: any application on meaning (if required); specific disclosure applications (if an opponent fails to give proper disclosure); resisting applications (if made inappropriately by opponent);

(3) disbursements, in particular, court fees, counsel's fees and any mediator or expert fees.

3.4 Each party must update its budget for each subsequent case management conference or costs management conference and for the pre-trial review. This should enable the judge to review the updated figures, in order to ascertain what departures have occurred from each side's budget and why.

Discussions Between Parties and Exchange of Budgets

4.1 During the preparation of costs budgets the parties should discuss the assumptions and the timetable upon which their respective costs budgets are based.

...

Effect of Budget on Case Management and Costs

5.1 The court will manage the costs of the litigation as well as the case itself in a manner which is proportionate to the value of the claim and the reputational and public interest issues at stake. For this purpose, the court may order attendance at regular hearings ('costs management conferences') by telephone wherever possible, in order to monitor expenditure.

5.2 At any case management conference, costs management conference or pre-trial review, the court will have before it the detailed costs budgets of both parties for the litigation, updated as necessary, and will take into account the costs involved in each proposed procedural step when giving case management directions.

5.3 At any case management conference, costs management conference or pre-trial review, the court will, to the extent the budgets are not agreed between the parties, record approval or disapproval of each side's budget and, in the event of disapproval, will record the court's view.

5.3A For the avoidance of doubt, the court cannot approve costs incurred before the date of the first costs management conference. However, the court may record its comments on those costs and should take those costs into account when considering the reasonableness and proportionality of all subsequent costs.

5.3B When approving or disapproving a budget, the court will not attempt to undertake a detailed assessment in advance, but will consider whether the budgeted totals for each stage of the work are within the broad range of reasonable and proportionate costs.

...

5.5 Solicitors must liaise monthly to check that the budget is not being exceeded. In the event that the budget is or is likely to be exceeded, either party may apply to the court to fix a costs management conference as described in paragraph 5.1 above.

5.6 When assessing costs on the standard basis, the court –

(1) will have regard to the receiving party's last approved budget; and

(2) will not depart from such approved budget unless satisfied that there is good reason to do so."

THE CLAIMANT'S BUDGET

7. The Claimant's budget approved by the court is sub-divided into nine categories. Both Counsel have helpfully, in their skeletons, set out in tabular form the budget category, the amount of the approved budget, the amount claimed and conceded and the difference between the approved budget and the amount claimed or conceded (see below).

8.

Budget Category	Budget Amount	Claimed Amount	Conceded	Difference
Pre action	20,550	28,914	£14,645	8,364
Issue/Pleadings	92,261	93,921	£92,261	1,660
CMC	14,437	17,038	£11,377	2,601
Disclosure	11,250	87,556	£11,250	76,306
Witness statements	12,487	228,891	£12,487	216,404
Expert Reports	17,500	14,793	£14,300	*[2,707]*
PTR	7,725	3,310	£3,310	*[4,415]*
Trial Preparation	191,425	157,790	£103,497	*[33,635]*
Settlement	13,670	17,924	£13,670	4,254
	381,305	650,137		

9. In respect of the Pre-action, Issues/Pleadings, CMC and Settlement categories, the Claimant has exceeded the approved budget by relatively modest amounts. In respect of Experts' Reports, PTR and Trial Preparation the amounts claimed are less than the approved budget, largely because the ten day trial which had been budgeted for did not take place. Had those been the only figures in issue, it would not have been proportionate for the paying party to have pursued this issue any further. In respect of Disclosure and Witness Statements, however, the approved budget has been exceeded by significant amounts. In the case of Disclosure the approved budget has been exceeded by £76,306, and in respect of Witness Statements by £216,404.

10. It is common ground between the parties that the court will not depart from the approved budget unless satisfied that there is "good reason" to do so (in accordance with paragraph 5.6 of the Practice Direction) and it is also agreed that "good reason"

is not defined, and that it involves a value judgment upon the evidence and materials put before the Costs Judge.

11. In summary, the Claimant's case is that the Defendant maintained a robust defence up to trial, that in the latter stages heightened its allegations against the Claimant. The Defendant, simultaneously, re-amended its defence on more than one occasion and served ten additional lists of documents. The Claimant's ATE insurance covered only a small proportion of the potential adverse costs. She was a homeowner who would have lost her house if she had lost her case at trial. The Defendant had raised their allegations against the Claimant from "incompetence" to "criminal incompetence". The case settled very shortly before trial. It is the Claimant's submission that the tactics adopted by the Defendant, when analysed, gave rise to extra work that would make it fair and proper to find good reason to depart from the costs budget.

12. The Defendant's case is that there is no good reason to depart from the Claimant's budget, as approved on 20 September 2010. They argue that those representing the Claimant have failed to comply with the terms of the Practice Direction, so that neither the Court nor the Defendant were aware of the significant increase in costs. It is the Defendant's case that the Claimant's budget was flawed. In Mr Bacon's submission the scheme is necessarily dependent on solicitors ensuring, so far as is practicable, that their budgets and their costings for both past and future costs are carefully prepared.

EVIDENCE

13. The Claimant's solicitor Daniel Taylor served a witness statement dated 28 February 2012 in accordance with my directions of 13 January 2012. Ben Beabey served a witness statement in response dated 20 March 2012. Daniel Taylor served a further witness statement dated 30 March 2012, together with further exhibits. Mr Bacon objected to this evidence being admitted, saying that there had been no provision for it in the directions which had been given, and that the Defendant had not had time to assimilate the contents of the second witness statement. I decided to allow the evidence in, on the basis that since this was the first case to reach this stage under the Pilot Scheme, it was sensible for me to have as much information as possible. The Defendant was offered time in which to consider the new evidence but elected to proceed, having managed to obtain the attendance of Junior Counsel who had been instructed by the Defendant in the substantive proceedings.

CLAIMANT'S SUBMISSIONS

14. In his witness statement of 28 February 2012 Mr Taylor sets out the articles published by the Defendant in The Sun newspaper, commencing on 13 November 2008, and continuing on an almost daily basis through to 19 February 2009. The pre-action protocol letter of 2 March 2010 ran to 14 pages with a 12 page Schedule and set out in detail the matters complained of.

15. At the invitation of the court the Claimant, through Mr Taylor, has produced breakdowns of the additional work/costs not budgeted for. 20 separate breakdowns have been produced as follows:

DTB1 – following service of disclosure list, 8 October 2010;

DTB2 – following publication of two Serious Case Reviews;

DTB3 – following service of disclosure lists on 22 October 2010 and 4 November 2010;

DTB4 – following non-party disclosure applications;

DTB5 – following the BBC Panorama programme;

DTB6 – following service of supplemental list of documents on 16 December 2010;

DTB7 – following the pre-action protocol letter from Clive Preece;

DTB8 – witness evidence prior to re-re-amended defence (after draft);

DTB9 – following various supplemental lists of documents;

DTB10 – dealing with Janet Lamb;

DTB11 – dealing with Miss McNamara;

DTB12 – following service of the re-re-re-amended defence;

DTB13 – following re-re-re-amended defence;

DTB14 – attending Claimant and witness statement;

DTB15 – following disclosure applications against Haringey and NCPCC;

DTB16 – following disclosure requests Whittington Hospital and MPS;

DTB17 – regarding approaching NSPCC re "CIDS";

DTB18 – dealing with reply following re-re-re-amended defence;

DTB19 – witness attendance following the 4 May 2011;

DTB20 – statements/hearsay notices served by the Defendants.

16. Of these the most substantial appear to be the costs spent following service of the various disclosure lists and supplemental lists of documents, attending the Claimant and witness statement (£101,244.75 plus disbursements of £34,150) and dealing with the re-re-re-amended defence and reply.

17. In the Claimant's Amended Particulars of Claim the articles complained of are set out and the meaning attributed to each is dealt with. The defence admitted each of the articles and the meaning attributed to it, save that the Defendant denied attributing sole blame to the Claimant. The defence raised the defence of justification. The particulars of the justification defence were drawn from two sources, namely the serious case review summaries, and secondly the letter of claim itself, which had set

out the full details of the case. The defence had originally contained a plea of fair comment, but that eventually fell away.

18. Budgets had been exchanged on 13 September 2010. The Claimant's budget totalled £539,847, and the Defendants £531,746. In respect of witnesses, the Claimant budgeted £12,487.50, and in respect of disclosure £11,250. Mr Browne points out that, in addition to the fair comment defence not being relied on, meaning that no journalists were required as witnesses, the Defendant's third party disclosure budget was greatly exceeded. Master Eastman approved the budget on 20 September 2010.

19. On 1 October 2010 the Defendant served a re-amended defence withdrawing the defence of fair comment. On 8 October the Claimant's list of documents were served, as was the Defendant's list which Mr Browne says was incomplete and in improper form. The Claimant's solicitors complained to the Defendant's solicitors and there was subsequent correspondence concerning Defendant's disclosure. The Claimant also began a claim for aggravated damages. A further disclosure list was served by the Defendant on 22 October. On 26 October the Serious Case Reviews were published in full. They had previously only been available as summaries. The Claimant had not known that the Serious Case Reviews would be published prior to the trial and this had not been budgeted for. These documents were served by the Defendant as part of its case on 10 March 2011 in its sixth supplemental list of documents. The Claimant continued to complain to the Defendant about the defective disclosure. The Defendant requested 27 classes of documents from the Claimant. On 10 November 2010 the trial was listed for 13 June 2011. Mr Browne submits that the case was fast moving. In respect of the ten additional disclosure lists the Defendant argues, that in the main they were not of much assistance or relevance to the Claimant, nor for the most part did they contain material of which the Claimant was unaware. The first supplemental list was served on 16 December 2010 and related to the Victoria Climbié disciplinary proceedings in respect of which the Defendant alleged that the Claimant had lied and placed a false file note on the file.

20. Between September and December 2010 there were what Mr Browne called intensive proceedings. On 12 January 2011 the Defendant disclosed a pre-action protocol letter to them on behalf of Clive Preece, who had been the Claimant's supervisor, who was intending to pursue a claim against News Group Newspapers Ltd. Clive Preece contradicted the Claimant's version of events.

21. From the beginning of 2011 the Claimant's witness statement was being prepared, and, as a result of the Defendant's amendments to the defence, and their continual service of supplemental lists of documents (up to the end of May 2011), the witness statement required constant updating, none of which had been budgeted for.

22. On 4 February 2011 the Defendant was seeking further disclosure from Haringey and was asking questions of Haringey about disclosure already made. In a separate letter they informed the Claimant that their profit costs were £99,340 and disbursements £38,251. This was the first mention of the costs budget by either side. The Claimant's solicitors did not respond.

23. A draft of the Defendant's re-re-amended defence was served on 10 February 2011, the final version being served on 8 March. The re-re-amended defence had been promised by the Defendant in early December 2010.

24. On 15 February 2011 the Claimant wrote to the Defendant agreeing to the re-re-amended defence on terms as to costs: "The Claimant shall have all costs of and arising from the amendment in any event, including the costs of preparing and serving an amended reply." Mr Browne submits that the terms of that letter meant that the Claimant's solicitors were putting the Defendant's solicitors on notice that further work was being generated. The Defendant agreed to the costs terms on 24 February. In Mr Browne's submission the wording agreed to by the Defendant goes further than the usual "costs of and caused by" in Costs Practice Direction paragraph 8.5, since the wording is conjunctive with the costs of amending the pleading being separate to the costs of dealing with the substantive amendment. Paragraph 8.5 of the Costs Practice Direction states:

> "Where for example the court makes this order on an application to amend a statement of case the party in whose favour the costs order is made is entitled to the costs of preparing for and attending the application and the costs of any consequential amendment to his own statement of case."

25. The order made by Eady J on 13 April 2011, on the Defendant's application for permission to file and serve a re-re-re-amended defence, stated:

> "The Claimant shall have her costs of and arising from service of the re-re-amended defence and re-re-re-amended defence and of amending the reply as a consequence."

26. Mr Browne submits that the meaning of the wording of that order is the same as the wording agreed between the parties in correspondence.

27. The Defendant's defence was served on 24 June 2010, and included the defence of fair comment. The defence was amended on 15 July, and re-amended on 1 October, when the defence of fair comment was withdrawn. The re-re-amended defence was served in draft on 10 February 2011, and in its final form on 8 March 2011. On 18 March a draft re-re-re-amended defence was served, a further version being served on 7 April.

28. Paragraph 77 of the defence states: "the words complained of were true in substance and in fact". The original defence stated that the meanings in which the Defendant would justify the words were that the Claimant had been grossly negligent, and therefore shared responsibility for Baby P's torture, abuse and death. The re-re-amended defence asserted that the Claimant was one of the social workers who grossly neglected their duty to protect Baby P when he was on the council's "at risk" register and being abused, and that she was one of those to blame for indefensible failures to intervene. In addition, it was asserted that while working at a NSPCC Centre in 1999 the Claimant had failed to take any steps to help a vulnerable child called Victoria Climbié, whose case had been referred to the Centre, and, in order to cover up her failures, had lied during the Victoria Climbié Inquiry. The re-re-re-amended defence additionally asserted that the Claimant had shown a cavalier and uncaring disregard for the safety of children in cases which obviously required urgent attention to protect the child; failed to treat cases with the importance and urgency they required; and neglected her responsibilities to children at risk. That section of the defence concluded that, by reason of those matters, the Claimant had acted in a

"criminally" (ie, gravely) incompetent manner; was unfit ever to work with vulnerable children again; and her continued employment with Haringey posed a risk to vulnerable children in Haringey. The defence also indicated that the Defendant would, if necessary, rely upon Section 5 of the Defamation Act 1952.

29. Mr Browne points out that the additions made by the re-re-amended defence were the first time that these meanings had been ascribed to the words complained of and was also the first mention of Victoria Climbié in the pleadings. All of this went to the defence of justification, which covered a further 21 pages of the defence. In Mr Browne's submission these amendments were bringing in new matters with an extensive range of amendments. Those representing the Claimant had requested full particulars at the outset of the proceedings. In his submission the re-re-amended defence was a ground shift in the case which referred both to further disclosure and witnesses.

30. Both Daniel Taylor for the Claimant and Ben Beabey for the Defendant submitted lengthy witness statements and exhibits demonstrating on the one hand, the difficulties caused by the Defendant's serial amendments of the defence and the service of numerous lists of documents, and on the other, attempting to show that the amendments and further documents had a relatively minor effect on the conduct of the case. It was Ben Beabey's witness statement which took Daniel Taylor's witness statements section by section and contradicted what was being said by putting a different interpretation on the various events as they had happened. As a result of that witness statement Daniel Taylor served his further witness statement, which I decided to admit.

31. On 1 April 2011 the Defendant wrote referring to its budget, stating that it had instructed Leading Counsel in early March, which meant increased costs. It indicated that it intended to apply for a costs management conference. On 13 April Eady J heard the Claimant's application for specific disclosure, which was dismissed; the Defendant's application to strike out the Claimant's claim for aggravated damages, which was allowed; and, the Defendant's application to file and serve a re-re-re-amended defence, to which I have already referred. The order was sealed on 21 April. The hearing before Eady J was the only hearing since the case management conference before Master Eastman on 20 September 2010.

32. The Claimant's solicitors were involved in intensive work on witness statements, which were to be exchanged on 13 May. On 19 May the Defendant served its amended budget and applied for a further CMC, which was listed for 8 June. Following a joint settlement meeting the case settled in the early hours of 4 June 2011. On 9 June a statement was read in Open Court and on 10 June the apology was published in The Sun.

33. Mr Browne submits that the Defendant does not state that it relied on the Claimant's costs budget in settling the proceedings on 4 July 2011, although the Defendant now states that it was entitled to rely upon the budget. There is no suggestion of prejudice put forward by the Defendant. The Defendant itself exceeded its own budget, and in Mr Browne's submission did not comply with the costs budget regime any more diligently than did the Claimant. There were no further CMCs or costs management conferences after the initial hearing on 20 September 2010. Neither party liaised monthly as to the costs budget. The best that the Defendant could say is that it

produced a revised costs budget on 19 May 2011, but the costs management hearing was fixed for 8 June 2011, five days after the joint settlement meeting and five days before trial. The case settled before that hearing could take place.

DEFENDANT'S SUBMISSIONS

34. The main plank of Mr Bacon's argument is that Practice Direction 51D requires the parties to comply with it, and it is only on the basis that they had done so, that the Court would be in a position to find that there is good reason to depart from the approved budget.

35. Mr Bacon points to the correspondence between the parties' solicitors in August 2010. On 11 August, Farrers wrote to Taylor Hampton:

> "In anticipation of the CMC on 20 September, we have instructed our costs draftsman to prepare the necessary costs budget (precedent HA) in accordance with paragraphs 4.1 and 4.2 of the Practice Direction CPR 51D.
>
> As you will be aware, given the above, the rule in paragraph 2(2) of PD 51D is such that there is no requirement to file and serve a standard costs estimate that would otherwise have accompanied our allocation questionnaire. Rather, it is for both sides to discuss the assumptions and proposed timetable upon which their respective costs budgets are to be based, before actually preparing a budget. We will, therefore, want to discuss such assumptions with you by telephone during the week beginning 6 September."

36. Taylor Hampton replied on 12 August, indicating that they wished to have the CMC moved from 20 September because their client was away. They continued:

> "As you are in any event seeking costs estimates at the CMC pursuant to Practice Direction CPR 51D, the time allotted on 20 September 2010 is clearly going to be insufficient."

37. The response to this dated 25 August from Farrers was:

> "It is not our client who is "seeking" costs estimates for the purposes of the case management conference and the costs management exercise. As is clear from our letter of 11 August (to which you have not replied) both parties are bound by the relevant provisions of the CPR. Indeed, the order of Master Eastman (which we copied to you with our letter of 29 July to ensure you had a copy) has reminded the parties of their obligations under the relevant Practice Direction. The Master also specifically allocated two and a half hours for the hearing on 20 September so as to include the costs management exercise.

> Your letter of 12 August does not indicate whether or not you will be available during the week beginning 6 September for a discussion to assist in the preparation of our client's costs budget, such that we will be in a position to lodge it with the Court not less than seven days before the hearing on 20 September. Will you be available for such a discussion during the week beginning 6 September? Given your client has instructed you under a CFA, this makes costs management all the more imperative in this case ... We are not prepared therefore to allow any slippage in the costs management exercise. We wish to be clear: we are taking this (earliest) opportunity on 20 September to ask Court to ensure your client's CFA costs are managed in a proportionate and reasonable way. We will obviously be better informed when we see your costs budget ahead of the hearing in accordance with CPR 51D, paragraph 4.2."

38. There was no response to that letter, and on 13 September 2010, Farrers wrote:

> "Despite our letters of 25 August (and our short letter of 1 September) we did not hear from you at all in response to our invitation for a discussion to assist in the preparation of costs budgets ahead of next Monday's hearing. We have therefore had to prepare our costs budget unilaterally without the benefit of a discussion with you.
>
> We confirm that we will lodge our client's costs budget with the Court during the course of tomorrow, with apologies to the Court for being one day late. We are agreeable to exchanging costs budgets in accordance with Practice Direction 51D.4. Please let us know if you are in a position to exchange tomorrow."

39. Taylor Hampton wrote on 14 September stating:

> "We will be responding to you very shortly with regard to the costs management aspects at paragraph 4 of your letter."

40. There is no indication in the correspondence produced to me that they ever did so. On this basis, Mr Bacon argues that the Claimant's solicitors ignored their obligations under the Practice Direction and totally failed to comply with its provisions.

41. With regard to the Claimant's budget, he submits that the solicitors are under duty to take care in the preparation of their budgets, based on the assumptions set out in Form HA. It is up to solicitors to make appropriate allowances for, eg disclosure, applications and witnesses, and to incorporate contingency provisions, if necessary.

42. If a party's budget is to be exceeded, the solicitor is required to inform the opponent of the position, and the party should also liaise in respect of the budgets. In this case, he says the Claimant's solicitors carried on regardless. Accordingly the Defendant was entitled to assume that the budget was not being exceeded. He argues that the

Claimant's solicitors must have been aware that the budget was being exceeded and should have informed the Defendant's solicitors and the Court, and should have discussed the fact that the budget was being exceeded.

43. Given the Claimant's solicitors' total failure to comply with the Practice Direction, Mr Bacon argues that Mr Browne's submissions get him nowhere in trying to establish good reason to depart from the budget.

44. Mr Bacon suggests that the problem for Mr Taylor with regard to witness statements was not, as he suggests, that he had not anticipated the need for further witnesses beyond the two that he had budgeted for, but that his budget was flawed from the outset. The Defendant's costs lawyers have analysed the Claimant's bill and according to their analysis, when Mr Taylor budgeted for £12,487 in respect of witnesses on 13 September 2010, his firm had already incurred costs of £13,071.24 on witness statements, so that by the time the budget was approved, the budget sought for witness statements had long since been utilised. The Claimant does not accept this analysis of the costs, and the issue has not been tested before me. It is, however, part of the basis of Mr Bacon's submission that the budget was flawed and/or poorly prepared from the outset, and that therefore this cannot amount to a good reason to depart from it. To do so would, he says, run a coach and horses through the scheme.

45. In addition, Mr Bacon argues that the additional witnesses appear to have cost no more than £7,777.12, and this provides no explanation of the additional £216,404 now claimed.

46. With regard to disclosure, Mr Bacon argues that Mr Taylor runs into the same problem. Disclosure was budgeted at £11,250, but is now claimed at £87,556, an increase of £76,306. Mr Bacon, again relying on the analysis by the Defendant's costs lawyers, submits that the base costs incurred on disclosure at the time of the budget in September 2010 was £499. He suggests that the budgeted figure of £11,250 was unlikely ever to accommodate a realistic assessment of the disclosure costs. According to his analysis that figure was exceeded within two weeks of the CMC, and a day before the Defendant's list of documents was served. On this basis, he argues that the Claimant's budget under this head was poorly prepared, ill thought out and flawed from the outset. Mr Taylor did not inform the Defendant that the budget had been exceeded.

47. On 19 May 2011, Mr Beabey emailed Mr Taylor:

> "... You said you'd let us have an indication of your costs to assist in the present settlement talks. We don't need any detailed breakdown, just the figures with whatever caveat you may feel you want to give, so we have a clear idea of the level of your client's costs to date."

48. In Mr Bacon's submission the first time that the Defendant was informed that the Claimant's budget had been exceeded was in a telephone call on 20 May 2011. This was less than a month from the start of the ten day trial. The case settled two weeks later.

49. Another of Mr Bacon's arguments is that Mr Taylor exceeded his own budget on witness statements and disclosure without any help from the Defendant. He suggests that it is not open to Mr Taylor to assert that the reason he exceeded his budget was unexpected work arising from amendments to the defence, and the third party disclosure applications. He states that the Claimant was kept informed of these applications, but this did not result in Mr Taylor seeking or applying to update his budget at any stage. The Claimant's solicitors did not attend those hearings, and the disclosure produced from the applications was, in his submission, limited. Although there were ten supplemental lists, he suggests that the documents disclosed were short and enabled the Defendant to make the "limited amendments" it made to its defence. This assertion is dealt with at some length by Mr Beabey in his witness statement at paragraphs 33 to 43.

50. Mr Bacon points out that the Defendant's budget included a sum in respect of these applications, which were originally budgeted at £80,229.64. The Claimant was aware of the applications and their likely costs. Mr Taylor did not apply to amend his budget or add to the contingency column to reflect the possibility that documents obtained in the third party disclosure applications might have generated more work. In short, Mr Bacon submits that Mr Taylor's failure to comply with the Defamation Proceedings Costs Management Scheme Practice Direction provides no good reason to justify departing from the budget. Mr Taylor did not liaise monthly to check the budget was not being exceeded, or apply to the Court for a costs management hearing, nor did he update his budgets for subsequent hearings. When the matter came before Eady J in April 2011, Mr Taylor had the opportunity, which he did not take, of updating his budget. No mention was made of the fact that the budget had already been exceeded.

51. In submission, had Mr Taylor complied with his obligations under the Scheme, the budget would have been subject to further scrutiny and/or disagreement by the Court or the Defendant. He suggests that Mr Taylor ran roughshod over the requirements of the Practice Direction and must now suffer the consequences.

52. He says that the Defendant, on the other hand, played by the rules by specifically inviting the Claimant to discuss the assumptions and proposed timetable behind the costs budget. On 4 February 2011, the Defendant updated the Claimant on its budget:

> " We write to update you such that your client is aware that our client's overall base costs and disbursements, excluding VAT in this matter to 31 December 2010, amount to £137,591.52 comprising profit costs of £99,340, and disbursements of £38,251.52. We should be grateful if you could provide us with an indication of your client's present base costs and disbursements to date."

53. The Claimant did not respond. On 1 April 2011, the Defendant's solicitors sent a further update:

> "We refer to our client's costs incurred in this matter and in particular our previous costs estimate.

> We would like to advise you that as at 28 February 2011, our client's base costs and disbursements incurred and billed (to 28 February) amounted to £191,320.92, comprising £130,150 profit costs, and £61,170.90 disbursements."

54. The letter goes on to point out that the costs incurred up to 28 February were below the sums budgeted to that point, but that the Defendant had recently engaged the services of Leading Counsel and that additional costs had been incurred during the month of March. Additional costs were also being incurred as a result of the third party disclosure applications against Whittington NHS Trust and the Metropolitan Police. The letter states:

> "Our client's costs are likely to have exceeded the previous costs estimate to this stage, when taking account of costs incurred in the month of March."

55. The Defendant indicated it intended to revise its estimate for future costs between that point and trial, and that it intended to apply for the Master to fix a Costs Management Conference in accordance with paragraph 5.1 of the Practice Direction. On 19 May 2011, the Defendant wrote to Master Eastman and sent a copy to the Claimant's solicitors enclosing the Defendant's updated costs budget seeking a costs management hearing. Mr Bacon submits that the Claimant did not engage in the process.

56. Mr Bacon suggests that it is clear from the transcript of the hearing before Master Eastman that the Claimant, through her counsel and solicitors, knew about the third party disclosure applications to be made by the Defendant and, could therefore have budgeted in respect of work to be generated by those applications, or at least put in an appropriate contingency.

57. With regard to the Claimant's assertion at paragraph 12 of the skeleton argument that the Defendant did not rely on the Claimant's budget, Mr Bacon argues that he does not have to show reliance on the budget. In his submissions budgets are intended to be relied on by both sides. It is important for budgets to be updated, and to inform the other side if the budget is to be exceeded. In the absence of such information, the other party is entitled to assume that the budget is still on track as approved.

58. Turning to the costs of amendments and the Claimant's assertion that there is a contractual agreement to pay the costs of any extra work done, even if those costs exceeded the budget, Mr Bacon accepts that the Defendant did agree to pay the Claimant's costs as set in the letter of 24 February 2011. The wording of this agreement is, however, in his submission, the standard order made on an amendment and by practice and convention, it is well known that it covers:

i) The costs of taking instructions on the amendment; and

ii) The costs of physically amending the pleadings consequential on the amendment.

59. By agreeing to pay the costs in the form of words used, the Defendant was not agreeing to pay all the costs that the Claimant might choose to incur after the re-re-amended defence was served, including all the work associated with disclosure and

witness statements. The Claimant's budgeted figure for issues/pleadings was £92,261, the amount claimed under this head is £93,921. The Defendant has conceded the budgeted figure, the parties are therefore only £1,660 apart. Under this head, Mr Bacon submits that the Claimant has been offered practically all of the costs of the amendments in any event.

60. In the course of correspondence commencing in July 2010, the Defendant's solicitors kept the Claimant's solicitors informed of their third party disclosure applications, particularly in respect of Haringey Council. Mr Taylor was grateful for being kept informed and asked to be copied into any future letters. He said that the Claimant was considering making a similar request to Haringey, but, that in order to keep costs down, would not do so if he received copies of future replies or information received from Haringey, and suggested that the parties should share the reasonable costs of making such requests in future. A similar disclosure request was made to NSPCC at the end of August by the Defendant. This too was copied to Mr Taylor. By letter of 14 September 2010, the Claimant's solicitors confirmed that the Claimant would consent to disclosure "of such material as is relevant to these proceedings", and also confirmed that the Claimant was agreeable to sharing the costs of any Freedom of Information request.

61. Dealing with the ten disclosure lists served by the Defendant, Mr Bacon submitted that a large proportion of the documents were already known to Mr Taylor (because the Defendant's solicitors had copied the Claimant's solicitors into the disclosure correspondence) and there was little which was new to Mr Taylor. He suggested that it was inconceivable that Mr Taylor could not have anticipated the disclosure.

62. Mr Bacon argues that in the amended Particulars of Claim (at paragraph 11) the Claimant's natural, ordinary and inferential meaning, attaching to the words complained of, were put extremely high, but that at paragraph 6 of the defence, the paragraph was admitted, save that it was denied that the words attributed sole blame for Baby Peter's torture and death, to the Claimant. In Mr Bacon's submission, the big picture did not change and the pleadings budget was not seriously exceeded. The defence asserts that the words complained of were true in substance and fact, suggesting that the Claimant was grossly negligent, was guilty of indefensible failure to intervene, that she had failed to take any steps to help Victoria Climbié, and that she had lied during the Climbié enquiry. Mr Bacon suggests that the allegations against the Claimant could not get any worse, or be put at any higher level, so that the subsequent amendments were all pleaded within the umbrella of the main allegation, of gross negligence. He suggests that the allegation of criminal incompetence did not seriously increase the gravity of the allegations. He suggests that the Claimant's solicitors must have known that amendments would need to be made to the pleadings and that the budget would need to be amended. The Defendant kept the Claimant informed, but the Claimant did not so inform the Defendant.

CONCLUSIONS

63. Mr Browne points out that the Defendant was represented by Counsel before Master Eastman, who told the Master the defence was not sure whether there would be an amendment. He points out that the Defendant breached PCC rules, it did not adhere to the pre-action protocol, did not substantiate its defence of justification, and never asked the Claimant for her comments prior to publication. He says that the choice for

the Court is to accept what the Defendant says, ie that Practice Direction 51D is a draconian and restrictive scheme which must be adhered to, or to allow "all factors to go into the mix". He suggests that if there were compliance with the requirement for monthly notification of the state of the budget and Case Management Conferences, there would be no reason why a budget should ever be departed from, in which case there would be no need for the provision relating to "good reason". I do not accept that proposition. Mr Browne points out that under CPR Rule 44.3B, Limits on Recovery under Funding Arrangements, there is a paragraph at the end of the Rule informing the reader that Rule 3.9 sets out the circumstances the Court will consider on an application for relief from sanction for failure to comply with any Rule, Practice Direction or Court Order. Practice Direction 51D does not contain any such indication. He submits that it is not intended to operate in a draconian manner, and that therefore breach of the Practice Direction is not a matter for an application for relief from sanction. In his submission I must take all the circumstances into account, particularly the fact that if a Defendant makes the Claimant do extra work, that Defendant must pay for it. The Defendant failed to meet time limits in respect of disclosure and witness statements. He also submits that the decision in this case would not be setting a precedent since he suggests that it is a wholly unique case. Again, I do not accept that submission.

64. Daniel Taylor for the Claimant sought to support his case by lodging 20 boxes of documents containing The Sun articles, the pleadings, correspondence, lists of documents, witness statements, hearsay notices and other supporting documents, including the Serious Case Reviews. Having considered the witness statements and exhibits it became clear to me that in order fully to test the assertions and counter-assertions being made it would be necessary for both Daniel Taylor and Ben Beabey to be cross-examined and taken through the relevant documents, a process which would have taken an inordinate amount of time, and would not, in the end, have greatly assisted me in deciding whether or not there was good reason to depart from the approved budget. The impression I am left with, having read the witness statement and exhibits, and heard the submissions, is that Ben Beabey's protestations that the actions of the Defendant should not have had any major effect on the way in which the Claimant was dealing with her case rings somewhat hollow. The Defendant in these proceedings mounted a vigorous and lengthy defence which was amended four times. They served ten lists of documents. I do not suggest that the Defendant was not entitled to act as it did, but it cannot now try to pass off this constantly changing scenario as being no more than a minor inconvenience to the Claimant.

65. I am in no doubt whatsoever that if the bill in this case were to be the subject of detailed assessment, those representing the Claimant would be able to argue very strongly that the costs incurred were both reasonable and proportionate. This hearing is, however, not a detailed assessment, but a preliminary issue as set out in paragraph 3 above and the sole question, which I have to decide, is whether there is good reason for the Court to depart from the Court approved budget. It is true that neither side managed to keep within its budget but the Defendant did at least make some attempt to comply with Practice Direction 51D. First by seeking to discuss the budgets prior to the CMC, and subsequently by informing the Claimant's solicitors of the costs being incurred, and ultimately revising its budget and seeking a further CMC. The Claimant's solicitors for their part do not appear to have responded to the Defendant's

solicitors in any meaningful way in respect of the budgets, save for a telephone call on 20 May 2011, shortly before the case settled.

66. Mr Browne says that no figures were entered in the contingency columns because the Claimant did not know how many third party applications there would be, nor what quantity of documents would be disclosed. In my view, there was nothing to prevent the Claimant from incorporating a figure to deal with these unknown issues.

67. It is clear that the Claimant did not keep either the Defendant or the Court informed of the fact that its budget was being exceeded. Although Mr Browne does not accept the Defendant's analysis of the costs budget, saying that the Claimant's costs lawyer arrived at lower figures in his analysis, the fact is that the budget has been exceeded by a very significant amount, and there has been no attempt by the Claimant to pass this information on. The fact that both sides exceeded their budgets does not assist the Claimant. The Defendant kept the Claimant informed, but the Claimant gave no indication to the Defendant.

68. The provisions of the Practice Direction are in mandatory terms. Each party *must* prepare a costs budget or revised costs budget (paragraph 3.1), each party *must* update its budget (3.4), solicitors *must* liaise monthly to check that the budget is not being or is likely to be exceeded (paragraph 5.5). The objective of the Direction is to manage the litigation so that the costs of each party are proportionate to the value of the claim and reputational issues at stake, and so that the parties are on an equal footing (paragraph 1.3) I am forced to the conclusion that if one party is unaware that the other party's budget has been significantly exceeded, they are no longer on an equal footing, and the purpose of the cost management scheme is lost.

69. Whilst, as I have said, I have no doubt that the Claimant could make out a very good case on detailed assessment for the costs being claimed, the fact is the Claimant has largely ignored the provisions of the Practice Direction and I therefore reluctantly come to the conclusion that there is no good reason to depart from the budget.

70. I am acutely conscious, both that this is the first case under the Defamation Proceedings Costs Management Scheme to reach this stage in the proceedings, and also, that a significant amount of money is at stake, I would therefore be prepared to grant permission to appeal under CPR Rule 52.3(6)B. Mr Browne suggests that this case would not set a precedent, however, although my decision would not be binding on any other Court, the issues raised in this case are, in my views, sufficiently important to require a definitive binding decision to be given.

71. The other question which I have to decide, is the extent to which costs are recoverable in respect of the amendments. Mr Browne argues that the form of words used in the letter of 15 February 2010 are sufficiently wide to enable the Claimant's solicitors to claim, not only the costs of and occasioned by the amendments and reply, but also all the work associated with it. Mr Bacon suggests that the form of words does not get the matter beyond paragraph 8.5 of the Costs Practice Direction which I have quoted at paragraph 23 above. I agree with him. There would be no reason for the Defendant to agree that form of words if they thought that they were laying themselves open to costs above and beyond the norm. Accordingly, in my judgment, the Claimant is entitled to recover the costs of preparing for and attending the

application and the costs of any consequential amendments to his own statement of case, as set out in paragraph 8.5 of the Costs Practice Direction.