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# TGC Costs Update

The Newsletter of the TGC Costs Team

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# Editorial

**By Richard Boyle and Matt Waszak**

**Welcome to the Sixth Edition of the TGC Costs Newsletter.** Since our last edition in December 2019, the world could scarcely feel more different. The Covid-19 pandemic, and its far-reaching effects on almost every aspect of our lives and work, needs no introduction. We hope that you and your families are safe and well; and that you have managed to overcome the different challenges of life during lockdown.

While our justice system has faced many significant challenges over the past few months, its wheels have continued to turn. Costs litigation has been no exception. The coverage of this newsletter is testament to the dedication and resourcefulness of our judges and costs practitioners.

Three months ago, the idea that remote court hearings could become part of a default approach to litigation was unthinkable. Now, there are few strangers to the use of electronic platforms and remote working. Their advantages have become readily apparent, and with that, a groundswell of support for remote working to become part of our 'new normal' in life after lockdown.

On that note, Simon Browne QC starts our latest edition, in his Silk Road column, with a topical insight into how our courts have harnessed remote technology, suggesting a route for the way ahead. Questions surrounding costs budgeting continue to prevail. In cases of 'overspend' James Laughland considers Mr Justice Turner's decision in *Hutson & oths v Tata Steel UK Limited* [2020] EWHC 771 (QB), while Richard Wilkinson considers whether "underspending" amounts to a good reason to depart from a court approved budget following District Judge Lumb's decision in Chapman v Norfolk and Norwich UHF Trust and Master Brown's decision in *Utting v City College Norwich* [2020] EWHC B20 (Costs).

We are also delighted to include articles about cases in which our costs team were instructed. In *Butler v Bankside Commercial [2020]* EWCA Civ 203, Simon Browne QC acted for the successful respondent in resisting a challenge to the Law Society Model CFA Agreement. Richard Boyle acted for the Lord Chancellor in *Fuseon Ltd v Senior Courts Costs Office & the Lord Chancellor [2020]* EWHC 126 (Admin), which concerned the esoteric issue of the High Court's inherent jurisdiction in circumstances of real injustice. In *Nema v Kirkland [2019]* EWHC B15 (Costs), Matt Waszak acted for the successful defendant in a case which concerned the interplay between CPR Part 36 and CPR Part 45. Finally, Mark James reports on the case of *Toczek v Sunseeker International Limited (Unreported, HHJ Richard Parkes QC, sitting at Winchester County Court on 29.06.20)*, an appeal which concerned the interpretation of a non-Part 36 offer and the application of CPR 36.13(5).

Lastly, readers will be well aware of the growing impetus in the market for the review of Guideline Hourly Rates. The notes of the Civil Procedure Rules Committee meeting in April 2020 record the formation of a sub-committee to review the issue. We await their conclusions with interest.

In the meantime, we hope that you enjoy reading on. And we hope to see you all very soon: if not in person, at the very least for a chat by Zoom/Microsoft Teams/ Skype (delete as appropriate)!

**Matt & Richard**

# Silk Road

By Simon Browne QC

**"Any change, even a change for the better, is always accompanied by drawbacks and discomforts"**
**Arnold Bennett, Author**

## The Pandemic

At the time of writing the Silk Road column for the last edition of the Temple Garden Chambers Costs Newsletter, none of us were aware of the devastating pandemic which was to descend upon us.

The lockdown was announced officially on 23rd March 2020. Nevertheless, many people, including those of us working in the courts in the days before had seen the signs of what was to come. I had attended a hearing before the Senior Costs Judge on 17th March 2020 and a directive had been sent out that very morning by the Lord Chancellor's Department that for the courts it was to be "Business as Usual". The optimism of the powers that be was to be admired, but we felt it was unrealistic.

Nevertheless, now over 12 weeks on, the Courts in this country have attempted, and to a large extent have succeeded, to keep "the wheels of justice" turning in the civil courts. This is to be compared to many other European jurisdictions simply shutting up shop and closing their courts.

## The Way Forward for the Courts

In appearing (remotely) before the Justice Select Committee on 22nd May 2020 the Lord Chief Justice, Lord Burnett of Maldon (formerly of these Chambers) revealed the mission of the Courts Service and provided interesting predictions as to the way forward.

It had always been the intention to keep the Courts operating but he accepted that statistics of success were difficult to obtain. Nevertheless, during lockdown it was now understood that the courts were operating between 50% to 90% capacity, the latter being the Commercial, Business and Property Courts and in Public Family Law.

The intention was that ALL courts should be open again by the end of June and that they would "sweat the estate" i.e. use the capacity of the courts to their maximum and utilise Recorders and Deputies to supplement full time Judges. Nevertheless, one can only raise an eyebrow if social distancing guidelines are to be followed.

As to the way forward, criminal trials, which have been badly hit, may require use of other civil court facilities given the space required for social distancing, therefore vacant venues such as hotel conference suites and sports halls were being considered as venues for temporary courts.

## The Use of Remote Technology

What of remote technology? Can anyone suggest that is not here to stay? The development of remote hearings for the legal profession, from the well-used traditional telephone conference based service to Zoom, MS Teams and Skype, has been like an adrenalin shot into the legal heart. It has shocked us into the use of remote technology in 5-10 weeks which otherwise may have taken some 5-10 years.

At the recent TGC Costs Webinar a number of questions related to the use and deployment of remote hearings. As I explained at the time the use of such technology is governed by a three tier system.

First, all matters in the courts are governed by the Courts Act 2003. The Coronavirus Act 2020 (Cl. 32 and Sch. 5) inserted new ss 85A to 85D into the Courts Act 2003. The provisions are in force from 25 March 2020 for a period of two years (ss 89-90 Coronavirus Act 2020).

Secondly, Practice Direction 51Y deals with "Video or Audio Hearings Pilot during the Coronavirus Pandemic – Pilot Scheme". It was introduced as a Pilot Scheme via

CPR Update 116, supplementing ss 85 A to 85D of the Courts Act 2003. It is in force until the Coronavirus Act 2020 ceases to have effect.

Thirdly, and of most relevance to practitioners is the Guidance given by the Lord Chief Justice on 19 March 2020 and the Protocol regarding Remote Hearings issue by the Heads of Division on 22 March 2020, and revised on 31 March 2020.

In the Protocol paragraphs 16 and 17 deal with the form of remote hearings as follows:

"**16**. Judges, clerks, and/or officials will, in each case, wherever possible, propose to the parties one of three solutions:- (i) a stated appropriate remote communication method (BT conference call, Skype for Business, court video link, BT MeetMe, Zoom, ordinary telephone call or another method) for the hearing; (ii) that the case will proceed in court with appropriate precautions to prevent the transmission of Covid-19; or (iii) that the case will need to be adjourned, because a remote hearing is not possible and the length of the hearing combined with the number of parties or overseas parties, representatives and/or witnesses make it undesirable to go ahead with a hearing in court at the current time.

**17.** If the parties disagree with the court's proposal, they may make submissions in writing by email or CE-file (if available), copied to the other parties, as to what other proposal would be more appropriate. On receipt of submissions from all parties, the judge(s) will make a binding determination as to the way in which the hearing will take place, and give all other necessary directions."

Of course, Microsoft Teams has taken over from Skype and Skype for Business and is used regularly by the Senior Courts Costs Office.

Since March 2020 the Master of the Rolls has supervised a survey of remote hearings which closed at the end of May 2020. In that "Rapid Review: The Impact of COVID-19 on the Civil Justice System" it is no surprise that the Review states: *"the move to remote hearings has been swifter and easier in the senior and commercial courts where resources are greater and levels of legal representation are higher and more problematic in the county court."*

The Deputy District Judge at the far flung County Court in the room next to the public lavatories with no windows and a dodgy telephone line would probably agree.

## The Way Ahead

Even though the intention of the LCJ is to re-open all Courts by the end of June 2020 social distancing measures look to be upon us all for a long while yet. The courts could well benefit from the use of remote hearings, not just for maintaining social distancing but for efficiency. As many practitioners appear nationwide the avoidance of travel and attendance for directions or shorter hearings has its obvious advantages.

Nevertheless, having conducted a number of video remote hearings during "lockdown" I remain to be convinced that their benefits extend to any matter longer than half a day, and certainly not for evidence to be given by witnesses. Given that the current permission for video remote hearings extends until the end of the Coronavirus Act 2020 (in March 2022) I forecast that when we all return to the "new normal" the remote video hearings have an important part to play – but hopefully not to the detriment of a fair trial by attendance at court.

# When Costs Have Got The Runs

**James Laughland**

***In Hutson & oths v Tata Steel UK Limited* [2020] EWHC 771 (QB) Mr Justice Turner, sitting with Chief Master Gordon-Saker, was considering both a retrospective application to vary a budget for two completed phases and a prospective application for what should be budgeted for elements of forthcoming phases.**

This was a costs management exercise undertaken in the context of large-scale occupational disease litigation where the cost budgeting regime had been divided into separate over-arching phases, each containing some but not all of the usual Precedent H phases. Each separate overall phase (could they not have used different terminology?) was being budgeted sequentially at the commencement of that 'overarching' phase. Put simply, it was a staged or staggered costs budgeting exercise.

In relation to the retrospective application to vary a completed and previously budgeted phase, the Judge ducked the issue of deciding whether the court actually had the power to do this: *"For the sake of argument, without, however, purporting to reach any concluded view on the issue, I am prepared to assume that the Rules equip the court to exercise such a power"*.

The Defendant had argued that variation should only be permitted in respect of future costs, regardless of the timing of the preceding costs management order whereas the Claimant had argued that the Court's powers derived from CPR 3.15 gave full control, regardless of whether such control was exercised prospectively or retrospectively.

It is a shame that the opportunity was missed to give an authoritative view over the lower level conflicting decisions and where, as "Cook on Costs" states, the position *"remains very far from clear"*.

Nonetheless, having decided to presume the Court had the power to permit retrospective variation of completed phases, the Judge then set out compelling reasons why such would not be done on the facts of that case. Of most interest, perhaps, is the clear restatement that what is required are *"significant developments"*.

In *Hutson* the Claimants were arguing that an unsuccessful application by the Defendant for limitation to be dealt with as a preliminary issue had added about a year to the procedural timetable and that in that additional period there had been *"unforeseen additional expenditure"* including the adjournment of two CMCs. The Judge was not persuaded to assume that such delay in and of itself would either be a significant development or lead to additional unforeseen expenditure. The Defendant was already liable for the costs of the unsuccessful application so the Court needed to see, and could not see, that the collateral impact of delay had caused additional cost justifying a variation.

The Claimants had presented the variation application on the basis of the previously budgeted costs increased pro-rata over the additional period caused by the delay, but such was deemed insufficient proof of actual new and unforeseen expenditure. Such is a lesson for any future application made in other litigation: the claim that a significant development justifies a variation to the budget must be based on compelling evidence.

Another point of particular interest for use in other situations was the Judge's observation that *"the costs budgeting process must be much broader than that which is involved in an assessment"*. Elsewhere he observed that painting with a broad brush did not permit proportionate scrutiny.

In other words, the occasion of an interlocutory application retrospectively to vary a budget was not as good an opportunity as would be afforded on detailed assessment to see whether there was *"good reason"* to allow more than had been budgeted. Accordingly, the fact that the application for a retrospective variation was dismissed did not preclude a renewed application to try and show *"good reason"* later. Thus, it seems, a second attempt to bite the cherry is permitted.

# Salmon: Dead in the Water?

**Richard Wilkinson**

**We could all use some good news right now couldn't we? Something to make life just a little more certain, a little more predictable? In these worrying times is that headache a possible sign of Covid-19? Or, for cost lawyers, has it just been induced by attempting to advise clients whether judges will, or won't, accept that "underspending" amounts to a good reason to depart from a court approved budget? Yes it most definitely does, concluded HHJ Dight last year in *Salmon v Barts Health NHS Trust*.[1] Oh no it doesn't, reasoned DJ Lumb in *Chapman v Norfolk and Norwich UHF Trust*[2]. Both can't be right. But were either of them?**

Well, perhaps Pantomine season might now start drawing to a close, helped on its way by a healthy dose of good reasoning on good reasons from the SCCO.

Let's start by reminding ourselves of those two earlier, conflicting decisions. Both arose from budgeted cases. As so commonly happens, each case settled before certain phases were complete. Specifically, in each case the timing of settlement resulted in the receiving party spending less than had been approved in the expert and ADR phases. In both cases, understandably, the receiving party limited its claim to costs on assessment to that which had actually been incurred and, to that extent, 'departed' from the approved budget. As a result, in each case, the receiving party contended that the Court could, and should, subject those phases to detailed assessment in the old-fashioned way.

As we know, CPR 3.18 provides:

*"In any case where a costs management order has been made, when assessing costs on the standard basis, the court will-*

*(a) Have regard to the receiving party's last approved or agreed budgeted costs for that phase of the proceedings;*

*(b) Not depart from such approved or agreed budgeted costs unless satisfied that there is good reason to do so."*

Having reviewed the authorities (including *Harrison* and *Yirenki*), HHJ Dight held that merely awarding the lower sum claimed in the bill represented a departure from the budget which required a good reason to have been established and, crucially, that once this had been done *"it was open to the paying party to challenge the [lower] figure which was then being claimed by the receiving party, and they did not have to assert a further good reason to enable the court to do so."*[3]

Faced with identical facts, District Judge Lumb "respectfully disagreed" with this analysis,[4] making the forceful observations that were it correct, virtually every case would proceed to Detailed Assessment and it would perversely incentivise receiving parties to overspend in order to avoid the spectre of Detailed Assessment.

Despite reaching such starkly different conclusions, careful scrutiny of these judgments reveals some commonality of approach. Specifically, HHJ Dight found in the alternative that because the relevant phases were substantially incomplete, this too was capable of being a good reason such that the Master should have invited submissions on what an appropriate figure for the phase might be (*without* resorting to full blown line by line assessment).[5] Equally DJ Lumb took care to review the solicitor's files to satisfy himself there had been no "deliberate overspending" to use up the allowance in the budget and recognised that such evidence could be sufficient to satisfy the good reason test. He did *not* suggest the Court would never look behind an underspend.

And so we come to the latest in this triumvirate of cases, *Utting v City College Norwich*,[6] a decision of Master Brown dated 13 May 2020. Of note, the Master sat with HHJ Dight as an Assessor in the earlier case of *Salmon*. The Judge there noted that his assessor had agreed with the outcome, though not necessarily the route taken to reach it, without expanding upon their differences. Master Brown has now taken the

opportunity to enlighten us. He explains [para 17] that in his mind the good reason test was satisfied (only) because the assumptions upon which the budgets had been prepared in *Salmon* were not fulfilled.

In essence, Master Brown agrees with and adopts the reasoning of DJ Lumb in rejecting the idea that a mere underspend alone is sufficient good reason to open up the receiving party's budget to detailed assessment. Importantly however he recognised that where a phase is substantially incomplete, it would be unjust for the receiving party to receive the full amount of the budgeted sum *"where only a modest amount of the expected work had been done"*.[7] Surely an eminently sensible solution?

And so, I venture to suggest, the *Salmon* case is probably, rightly, breathing its last, at least with regard to the conclusion that any underspend enables the phase to be completely re-opened. What doubtless will survive however is the pragmatic guidance given by HHJ Dight as to *how* Cost Judges should approach matters where persuaded the phase is "substantially incomplete". The aim of reducing the length and complexity of detailed assessments can still be achieved, without injustice to the paying party, by bringing out of the cupboard that favoured tool the "broad brush". Parties ought to be able to make succinct submissions on the extent to which a phase is incomplete and the extent to which that has, or has not, fairly been reflected in the sums subsequently claimed. In most cases it should be obvious whether the sums claimed are "in the right ball-park" or not.

This depends of course on the parties having a clear/agreed understanding of exactly what work was anticipated to be done in each phase. The assumptions upon which a budget is approved by the Court will sometimes be very different from the assumptions made in the Precedent H. Both Receiving and Paying Parties should be astute to ensure any such changes are clearly recorded.

**1.** Judgment dated 17/1/2019

**2.** Judgment dated 4/3/2020

**3.** Judgment para 36

**4.** Judgment para 16

**5.** Judgment para 37

**6.** [2020] EWHC B20 (Costs)

**7.** Judgment para 19

# CFA Challenges: *Helen Butler v Bankside Commercial Ltd* [2020] EWCA Civ 203

**Olivia Rosenstrom**

## Introduction

The Court of Appeal considered the interpretation of a provision in a standard form of conditional fee agreement ("CFA") made on Law Society terms. The relevant provision, clause 7(b)(iii) stated that *"[w]e can end this agreement if you reject our opinion about making a settlement with your opponent."* If the retainer was terminated on this basis, this triggered the solicitors' entitlement to payment of their basic charges and disbursements, as well as their success fee if applicable. The question for the Court of Appeal was whether such entitlement had been triggered in the instant case. Simon Browne QC of TGC appeared successfully for the Respondent.

## Background

Mrs Butler's claim for damages against Metris, arose out of the termination of a commercial agency. Her CFA with Bankside Commercial Ltd ("Bankside") contained the terms and provisions outlined in the introduction. Metris made a settlement offer of €90,000. Bankside advised her to counter-offer €90,000 plus 50 per cent of her costs. Mrs Butler failed to respond to their advice and Bankside terminated the retainer. Mrs Butler proceeded with her claim using different solicitors, and achieved an arbitration award of approx. £40,000. Relying on the terms of the CFA, Bankside thereafter sought to recover their costs bill, which was assessed at just under £210,000, less interim payments.

Bankside was successful before Master Yoxall. Mrs Butler's subsequent appeal was dismissed by Turner J who held that to construe 'making a settlement' as being limited to the consideration of any offers made by the opponent would be *"inconsistent with the language of the clause and would, in any event, lead to procedural distinctions devoid of either logical justification or practical coherence"*. He further stated that in the absence of a CFA a client may ignore the advice of her solicitors, however, where there is a CFA *"one would not expect the level of protection which they are afforded against the whims of the unreasonably optimistic client to turn upon the random happenstance of whether or not the other side has made an approach which can be categorised as a contractual offer capable of acceptance."* Thus, Turner J concluded that advice about making an offer fell within the meaning of clause 7(b)(iii). Mrs Butler appealed further.

## Court of Appeal

Mrs Butler argued for a narrow interpretation of the phrase: *"making a settlement"*, which would in practice be limited to advice about accepting an offer of settlement made by an opponent. The main arguments in favour of a narrow interpretation were:

- The literal meaning of "making a settlement" meant causing a settlement to be made, and did not include steps which might or might not lead to settlement.
- The basis of a CFA is that the solicitors' recovery of fees is dependent on the outcome of the case.
- A broad interpretation of the phrase, encompassing an opinion about the client making an offer, would allow solicitors to end their retainer simply because of a disagreement with the client about making a settlement offer, yet still retain their entitlement to a success fee if the client goes on to win.
- The narrow interpretation meant that the client *"cannot snatch a win"* from the solicitor by rejecting an acceptable offer, but locks the solicitors in where there is a disagreement concerning the making of an offer. Thus, the solicitors would only be entitled to their fees *"if money [wa]s on the table"*

- The broad interpretation did not sit well with clause 7(a) which applied where the client terminated the retainer. Where 7(a) applied, the solicitors had to choose between an unconditional payment of basic charges and disbursements, and a conditional payment of these sums plus the success fee, if the claim was successful. Clause 7(b)(iii), however, gave a potential entitlement to the success fee without any risk.

Bankside argued that the clear and natural meaning of 7(b)(iii) was broader and encompassed advice to make a settlement offer.

Lord Justice Lewison provided the leading judgment, dismissing the appeal for the following reasons:

- Both the CFA and the Law Society Terms addressed the refusal of a Part 36 offer. If 7(b)(iii) were limited to the acceptance of an offer already made, this would have been stated explicitly.
- The only possible reading of 7(b)(iii) was that the solicitors were entitled to their basic charges and disbursements, irrespective of the outcome of the case. That was a "major breach" of the "no win no fee" principle that the Appellant relied upon.
- The sums sought by Bankside respected the underlying bargain made when entering the CFA.
- There was no ambiguity in the words of 7(b)(iii). The clause was not confined to making a settlement. It extended to advice "about" making a settlement, which included advice about making settlement offers.
- Bankside's costs entitlement had therefore been triggered.

Thus, Lewison LJ agreed entirely with Turner J's judgment, and adopted and affirmed the same. Lord Justice David Richards and Lady Justice Rose agreed.

## Comment

This case provides useful guidance regarding the interpretation of a standard CFA in the context of settlement offers. The judgment will no doubt provide some reassurance for solicitors operating under a standard form CFA, where the client rejects or ignores advice regarding settlement offers. The broader interpretation favoured by the court, provides protection not only in relation to clients who refuse to accept reasonable settlement offers from an opponent, but also in relation to clients who ignore advice to make offers of settlement.

# What's the Interest in That Then? Part 36 Offers and Interest

**Matt Waszak**

## Introduction

Can a Part 36 offer made exclusive of interest be a valid Part 36 offer, either generally or in the context of detailed assessment proceedings under CPR 47? **No,** to both questions, said the Court of Appeal in *King v City of London Corporation* [2019] EWCA Civ 2266, handed down on 18.12.19.

Resolving a longstanding, previously unsettled issue- upon which[1] differing opinions had been expressed by Costs Judges- the Court of Appeal disagreed with the earlier decision of Nicol J in *Horne v Prescot (No 1) Ltd* [2019] EWHC 1322 (QB). With that, the arrival of welcome certainty to the market, it might be said.

## CPR Part 36 and Interest

The mandatory requirements of a Part 36 offer are well known. Under CPR 36.5, a Part 36 offer "must" be in writing; make clear that is it made pursuant to Part 36; specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with rule CPR 36.13 or CPR 36.20 if the offer is accepted; state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and if so to which part or issue; and state whether it takes into account any counterclaim.

Under CPR Part 36.5(4), a Part 36 offer which offers to pay or offers to accept a sum of money will be treated as inclusive of all interest until- (a) the date on which the period specified under CPR 36.5(1)(c) expires; or (b) if CPR 36.5(2) applies, a date 21 days after the date the offer was made.

In its judgment at [1], the Court of Appeal noted that Costs Judges had expressed differing views on the question of whether a Part 36 offer could be made exclusive of interest. Indeed, in *Horne v Prescot (No.1) Ltd [2019]* EWHC 1322 (QB), handed down on 24.05.19, Nicol J held, at [66(iii)], that interest did not need to be claimed in a Part 36 offer in detailed assessment proceedings because the entitlement to interest is automatic under the *Judgments Act 1838*.

## Court of Appeal's Judgment

The Court of Appeal considered two general questions:

**i.** Can a Part 36 offer generally exclude interest?

**ii.** If not, can a Part 36 offer nevertheless exclude interest in the context of detailed assessment proceedings under CPR Part 47?

## The general position

Two key arguments were advanced on behalf of Mr King, the Appellant.

The first, that CPR 36.5(4) does not impose a mandatory requirement but merely operates as a deeming provision, such that an offer which says nothing about interest is taken to include it. Newey LJ swiftly disposed of that argument: CPR 36.5(4) is mandatory.

The second of the Appellant's arguments was that there can be no objection to an offer excluding interest because CPR Part 36 allows an offer to be limited to part of a claim. Newey LJ also rejected that. An offer of "£x exclusive of interest" is not an offer in respect of "part" of a claim for the purposes of CPR Part 36. Interest is ancillary to a claim, not a severable part of it. A Part 36 offer must, if it offers to pay or accept a sum of money, be inclusive of all interest, as CPR 36.5(4) says. Interest cannot be hived off.

## Part 36 offers in detailed assessment proceedings

The Court then turned to the second question: can a Part 36 offer, made in the context of detailed assessment proceedings, exclude interest?

Yes it can, said the Appellant. A party, after obtaining judgment, is entitled to interest at 8% under the

*Judgments Act 1838* (in the case of a High Court judgment) or the *County Courts Act 1984* (in the case of a County Court judgment); and so a Part 36 offer *can* be made exclusive of interest in detailed assessment proceedings even if not possible more generally.

The Appellant relied on Nicol J's analysis in *Horne v Prescot (No 1) Ltd* [2019] EWHC 1322 (QB). Nicol J had, of course, answered the question in the affirmative. His analysis, summarised shortly, was follows:

**i.** Interest would be added automatically by virtue of the Judgments Act 1838: it did not need to be claimed.

**ii.** The Bill of Costs would not have included interest. Interest did not feature in the claim which was the detailed assessment proceedings.

**iii.** Interest formed no part of the claim. The Part 36 offer to settle, made exclusive of interest, was of the whole of the claim.

**iv.** Accordingly, the validity of the Part 36 offer was not affected by the inclusion of the words 'exclusive of interest'.

Newey LJ dismissed the Appellant's arguments and disagreed with the conclusion reached by Nicol J in *Horne v Prescott***.** An offer exclusive of interest cannot be a valid Part 36 offer even if made in detailed assessment proceedings. A Part 36 offer to accept a sum of money is to be treated as inclusive of "all interest". There is no reason why those words should not extend to interest payable under the *Judgments Act 1838* or *County Courts Act 1984***.** The provisions of CPR 47.20(4)- which provides for CPR Part 36 to apply to the costs of detailed assessment proceedings subject to certain modifications- do not affect that.

## Conclusion

In *Gibbon v Manchester City Council [2010]* 1 WLR 2081, Moore-Bick LJ described Part 36 as "a carefully structured and highly prescriptive set of rules". If parties want the substantial benefits which flow from Part 36, the rules must be followed in every respect. While a warning made in respect of the previous version of Part 36, it applies, said Coulson LJ in this case[2], with equal (if not more) force to the current, fuller version.

As ever, practitioners are well advised to follow that salutary guidance. Part 36 arguments are no strangers to the civil courts. And it is unlikely to be too long before Part 36 returns to the appellate courts once again.

**1.** As noted in the Judgment at [1]

**2**. See his judgment at [59]

# *Ainsworth v. Stewarts Law LLP:* Court of Appeal Guidance on Points of Dispute

**Sian Reeves**

## Introduction

In *Ainsworth v. Stewarts Law LLP* [2020] EWCA Civ 178, the Court of Appeal gave guidance regarding points of dispute in solicitor/client costs disputes. This guidance will also be of relevance to between the parties costs disputes.

## Background

This was a second appeal from the decision of the Senior Costs Judge to dismiss Mr. Ainsworth's points of dispute relating to document time at a hearing of a solicitor and own client assessment.

The points of dispute challenged the entirety of hours claimed for document time, and made no offers at all, either in respect of specific hours in the documents schedule or on a global basis. None of the objections listed any specific objections to the time claimed. Rather, the objections were drafted as follows:

*"As with the timed attendances upon the Claimant, the Claimant is mindful of the requirements of the Civil Procedure Rules as to the need to keep Points of Dispute brief and succinct. It must therefore be stated that all entries are disputed. By way of general indication however, the Claimant can confirm the main issues with the document time are as follows:*

***1.*** *Significant duplication between fee earners*

***2.*** *Wholly excessive time expended by fee earners reviewing documentation provided by the Claimant*

***3.*** *Too much time claimed generally in relation to preparation*

***4.*** *An excessive level of time claimed in relation to drafting of communications*

***5.*** *Unnecessary inter-fee earner discussions arising due to the duplication*

***6.*** *Excessive time spent collating documentation*

***7.*** *Significant preparation time claimed in relation to meetings with the Claimant.*

*It can be confirmed that the above stated list is not exhaustive of the issues but provide a general overview as to the reason why the time claimed is unusual in nature and/or amount. The Claimant reserved their position generally."*

Stewarts' replies objected to this generalised challenge to the document time on that basis that it did not permit it to *"provide any meaningful response"*. The replies put Mr. Ainsworth on notice that it would seek the dismissal of this point in the absence of *"itemised"* points of dispute being served. Despite this, Mr. Ainsworth did not provide any further reasons for the objections.

At the hearing before the Senior Costs Judge, Mr. Ainsworth's costs draftsman indicated that he wanted the judge to consider document time on a broad brush basis, and apply an appropriate reduction. In line with their replies, Stewarts objected to this approach. Having been invited to do so, Master Gordon-Saker dismissed the objection to document time, on the basis that it had not been properly pleaded. He found that Mr. Ainsworth's approach put both Stewarts and the court in difficulty:

*"I read the papers in the light of the points of dispute as they are pleaded and I was not able to identify which particular items are challenged or why".*

This decision was upheld by HHJ Klein (sitting as a High Court Judge) and by the Court of Appeal.

## The Court of Appeal

Asplin LJ pithily identified the important issue raised by the appeal:

*"**2...** It raises the question of how detailed points of dispute must be on a solicitor and own client assessment, particularly where a challenge is made to all of the items in an invoice on a number of grounds."*

When dismissing Mr. Ainsworth's appeal, the Court of Appeal expounded a number of key conclusions which are relevant to the requirements of points of dispute:

First, the procedure in CPR Part 47 applies to a solicitor and own client assessment subject to CPR r. 46.10 (assessment procedure) and any contrary order of the court. Consequently, PD47 8.2 (which addresses the content of the points of dispute), and the guidance at Precedent G (the costs precedent for points of dispute) are directly relevant to solicitor and own client assessments.

Second, *"Common sense dictates that the points of dispute must be drafted in a way which enables the parties and the court to determine precisely what is in dispute and why"* [58]. Whilst points of dispute must be short and to the point (PD47 8.2), they must also be focused. At [39], the Court of Appeal gave guidance as to what this requires in practice:

*"In the case of a solicitor and own client assessment, it seems to me, therefore, that in order to specify the nature and grounds of the dispute it is necessary to formulate specific points by reference to the presumptions contained CPR 46.9(3) which would otherwise apply, to specify the specific items in the bill to which they relate and to make clear in each case why the item is disputed. This need not be a lengthy process. Having explained the nature and grounds of dispute succinctly, the draftsman should insert the numbers of the items disputed on that ground in the relevant box. The principle is very simple..."*

## Practice point

The judgment should not be read as encouraging or requiring protracted points of dispute. The Court of Appeal cannot have been clearer: they must be short, to the point and focused. The overarching requirement is that the points of dispute make clear precisely what is in dispute and why.

In practice, this means that it is insufficient to base an objection to an item on the bill which contains multiple parts (such as document time) on generalised grounds of challenge only. Specific objections to specific items are required. This could be achieved by producing a counter schedule of document time. Alternatively, it could be achieved by grouping specific objections together under identified headings and cross-refencing these to specific document times claimed. Whatever method selected, it is imperative to ensure that points of dispute make clear precisely what is disputed and why. Any points of dispute that fall short of these requirements is vulnerable to being struck out.

# The High Court's Inherent Jurisdiction and Real Injustice: *Fuseon Ltd v Senior Courts Costs Office & the Lord Chancellor* [2020] EWHC 126 (Admin)

**Richard Boyle**

**I appeared on behalf of the Lord Chancellor in costs proceedings in the High Court, Administrative Division, before Lane J. The Claimant was a firm of letting agents which had been victim of a fraud by one of its co-directors leading to six figure liabilities. The Claimant informed Greater Manchester Police. However, the police declined to investigate, stating that austerity meant that they had to prioritise other crimes. As a result, the Claimant brought a private prosecution. The Claimant was based near Bolton but instructed solicitors in London. The prosecution was successful and the former director sentenced to three years' imprisonment.**

The trial judge granted the Claimant its costs of bringing the prosecution to be paid from public funds: a prosecution costs order under s.17 of the Prosecution of Offences Act 1985. The Claimant's costs were £427,909.66 (inc VAT). Those costs were determined by a Determining Officer, an employee of the Lord Chancellor, pursuant to the Costs in Criminal Cases (General) Regulations 1986. The Determining Officer allowed costs of £200,000 (ex VAT) after a re-determination. The Claimant appealed to Master Rowley who dismissed the appeal. The Master also refused to certify any points of principle of general importance. Under regulation 11, such a certification was required to appeal the decision of the Master to the High Court.

A dismissal with no right of appeal would normally signal the end of the road. However, the Claimant brought an unusual action, seeking to invoke the High Court's inherent jurisdiction to quash the decision of the Master. There is Court of Appeal authority for such a jurisdiction, *R v Supreme Court Taxing Office ex parte John Singh and Co* [1997] 1 Costs LR 49, but a party must establish a real injustice and the Court of Appeal noted that the circumstances in which the jurisdiction should be exercised would be *"very rare indeed"*.

The Claimant therefore brought an action in the Administrative Division of the High Court against the Senior Courts Costs Office and the Lord Chancellor; the Lord Chancellor being responsible for the Determining Officer and the public funds from which the costs would be paid. The Senior Courts Costs Office took a neutral stance at the hearing, as is conventional in the circumstances. The Claimant challenged the Master's decisions in relation to hourly rates and the *Singh* deduction, the latter a method by which a Determining Officer can deem the costs too high and apply a deduction which Jackson LJ had compared to the new proportionality test.

Lane J held that there had been a real injustice. He stated that it was unlikely, to say the least, that an error of law would give rise to real injustice unless it was also shown that maintaining the defective decision would cause very serious prejudice. One must have regard to the nature of the financial loss, by reference to that person's financial means. He also cited the important role of private prosecutions. This guidance will provide a hurdle for future actions to pass although one must question whether a party suffering a significant financial loss will be *"very rare indeed"*.

While it will not be every day that a party seeks to invoke the High Court's inherent jurisdiction, the judge made a number of comments of more general application. In relation to hourly rates, he held that, although the Master had cited the correct test, the Master had asked himself whether there were, in the local area, firms who would have had no difficulty in bringing this prosecution whereas he should have asked whether the Claimant *"acted reasonably"* in instructing his solicitors. In relation to the *Singh* discount, the judge held that the discount should have been applied by reference to particular classes or categories of costs incurred rather than the costs as a whole, drawing analogy with *West v Stockport NHS Foundation Trust & Demouilpied v Stockport NHS Foundation Trust* [2019] EWCA Civ 1220. He held that there there may be grounds to compare the costs of private prosecutions with those charged by the CPS in some cases but not on the facts of this case.

# Nema v Kirkland: Can Fixed Costs Cases be Subject to Detailed Assessment?

**Robert Riddell**

## Introduction

In *Nema v Kirkland [2019]* EWHC B15 (Costs), Master Leonard was faced with the question as to whether it was suitable to conduct a standard basis assessment of disputed disbursements in a case to which the fixed recoverable costs rules applied. Matt Waszak acted for the successful Defendant.

## The facts

The Claimant was injured in a road traffic accident, and subsequently instructed solicitors to initiate proceedings against the Defendant for damages including for personal injury. A Claim Notification Form (CNF) was sent under the protocol for low value personal injury claims. Thereafter, the claim exited the MOJ portal. The Claimant issued proceedings. At an early stage, the Defendant made a Part 36 offer of £5,500, which the Claimant accepted within time.

Following acceptance of this offer, the Claimant's solicitors sent to the Defendant a schedule of their costs, which were calculated by reference to Section IIIA of CPR Part 45. However, the Claimant also claimed for counsel's fees of advising and settling the Particulars of Claim (in the sum of £456) and an engineer's fee for taking photographs (in the sum of £42). The Defendant disputed both heads of loss but agreed to pay the remaining costs "in full and final settlement". Prior to receiving the Defendant's settlement cheque, the Claimant issued detailed assessment proceedings, for the full amount of costs as originally claimed with an additional £271.32 for drawing up and checking the bill.

## The Defendant's application

The Defendant applied to strike out the Notice of Commencement on the basis that the Claimant was not entitled to a detailed assessment of costs which were fixed by reference to Section IIIA of CPR 45. The Defendant argued that, under the amendments made to CPR Part 36 and introduced simultaneously to the creation of the fixed costs regime, the Claimant, on acceptance of the offer, was entitled only to the appropriate stage of the fixed recoverable costs in Table 6B of CPR 45.29C and to those disbursements listed in CPR 45.29I.

Indeed, such disbursements were properly to be considered 'fixed'. Where there was a dispute about a particular disbursement, the Defendant submitted the correct procedure was for a party to make an application under CPR 36.20(11), which required the Court to make an order for costs where the parties do not agree the liability for fixed costs. Taken as a whole, the fixed costs provisions represented a self-contained code specifically designed to obviate the need for disproportionate assessment hearings.

The Claimant asserted that disbursements falling under Section IIIA of CPR Part 45 could not be said to be 'fixed costs'. CPR 44.9(1) provided authority for an assessment on the standard basis where a party has a right to costs following acceptance of a Part 36 offer (CPR 36.13(1)); in a fixed costs case, that assessment was to be made in the light of CPR 36.20, which set the parameters of the costs to be recovered. Properly construed, the provisions in CPR Part 36 provide for an assessment in which fixed costs will be allowed for solicitors' fees and disbursements will be assessed on the standard basis. The Claimant contended it was inappropriate to make an application to the Court for any disputed disbursements because an interim application as defined by CPR 45.29H did not encompass quantification of costs for which the rules provided for summary and detailed assessments.

## Judgment

Master Leonard rejected the contention that non-fixed disbursements are to be regarded as fixed costs. In his judgment, CPR 36.13(3) simply confirms that cases where the recoverable costs are fixed are not subject to the general rule that a claimant's costs will be assessed on the standard basis. The Master considered the rules provided for two mechanisms for the recovery of costs following acceptance of a Part 36 offer: either detailed assessment on the standard basis – an expensive procedure quite unsuitable in fixed costs cases – or, alternatively, recovery of fixed costs and disbursements under CPR 36.20. The logical conclusion of how the two provisions interact is that where the fixed costs regime bites, the standard basis assessment procedure is disapplied.

Given that the fixed costs rules provide (in the Master's judgment) a comprehensive and self-contained procedure, the Master accepted the Defendant's submission that an interim application for an order in respect of disputed disbursements should be treated as a fixed cost interim application. The costs of that application – fixed at £300 inclusive – were more proportionate than the costs of a provisional assessment allowed for under CPR 47.15 (£1,800 inclusive).

## Comment

The Master's judgment was concerned with the proportionality of the approach adopted by the Claimant's solicitors, in a case where the sum in issue were £564. The Master echoed similar sentiments expressed by Master Haworth in *Mughal v Samuel Higgs & EUI Limited* (SCCO unreported, 6 October 2017) that the whole purpose of the fixed costs regime was to avoid the necessity of either summary or detailed assessment. Proceeding to an assessment where the cost of preparing the bill was over half the sum of the value of the disputed disbursement was plainly disproportionate. Further, accepting the Claimant's approach could lead to undesirable inconsistency between cases where disbursements are fixed and not fixed: for instance, soft tissue injury cases subject to CPR 45.29I(2A) would remain subject to the CPR 36.20 procedure, whereas a dispute regarding an non-fixed disbursement would proceed to detailed assessment.

Some evidence that this reasoning has been adopted also in the County Court can be seen in the decision in *Ivano v Lubbe* (County Court unreported, 17 January 2020) where HHJ Lethem concluded that the appropriate mechanism for resolving disputes over elements of the fixed costs regime was by way of application under Part 23, rather than any form of assessment.

# To the Supreme Court, and Beyond?

**James Yapp**

**In this latest chapter of the *Ho v Adelekun*[1] saga the Court of Appeal reluctantly allowed the Defendant in a QOCS case to set off a costs order in its favour against a costs order in favour of the Claimant.**

This case grapples with what constitutes 'enforcement' of a costs order in a QOCS case. More fundamentally, the Court of Appeal questioned the nature of the QOCS regime itself: is it an adjunct to the usual costs rules or a self-contained code?

## Background

The underlying appeal concerned a dispute over whether the Claimant was limited to fixed costs after she had accepted the Defendant's Part 36 offer[2]. The Court of Appeal decided that she was. The parties agreed that the Defendant should have its costs of that appeal.

The interesting issue in dispute was whether the Defendant could set off the costs order in its favour against the costs it owed to the Claimant.

This seems to have been important as the claim settled by acceptance of a Part 36 offer. Per Coulson LJ in *Cartwright v Venduct Engineering Ltd*[3], the settlement would be *"outside the words of rule 44.14(1)"* so QOCS barred enforcement of the order against the Claimant herself.

## The Rules

CPR 44.12 appears within Section I of Part 44 CPR, which is headed "General":

*"**(1)** Where a party entitled to costs is also liable to pay costs, the court may assess the costs which that party is liable to pay and...*

***(a)** set off the amount assessed against the amount the party is entitled to be paid and direct that party to pay any balance..."*

Section II of Part 44 contains the QOCS rules. 44.14(1) provides that, subject to the exceptions at 44.15 and 44.16, orders for costs against a claimant can be enforced without permission *"but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for damages and interest made in favour of the claimant"*.

## The Arguments

The Defendant argued that the Court of Appeal should not depart from its previous decision in *Howe v MIB* (unreported, 6th July 2017). In *Howe* Lewison LJ (in an unreserved judgment) held that 44.14 does not preclude setting off costs against costs because:

i. set-off is not a species of enforcement; and

ii. 44.14 deals with enforcement without the permission of the court, whereas an order for set-off under 44.12 requires the court's permission.

Moreover, in his judgment, ordering such a set-off would not go against the thrust of Jackson LJ's recommendations.

While the Court of Appeal is usually bound by its own previous decisions, the Claimant's case was that the decision in *Howe* was given per incuriam.

The Claimant contended that the court did not have jurisdiction to order such a set-off in a QOCS case. Section II of Part 44 is a self-contained code which provides a claimant with costs protection other than in the circumstances specified in that Section. This regime precluded setting off costs against costs, there being no equivalent to 44.12.

Moreover, the Claimant argued that *Howe* undermined access to justice as claimants may be left with a liability to pay their own solicitors' costs without the fund from which that liability would usually be settled.

On this point the Defendant argued that while QOCS was intended prevent a claimant from having to make a net payment to the defendant unless an exception applies, it can never have been expected to remove any risk of a claimant owing more to his solicitor than he had received from the defendant.

## Decision

Newey LJ delivered the lead judgment. He refused to depart from the decision in *Howe*. Whilst it might have been decided differently with the benefit of fuller argument, it had not been given per incuriam.

Once the issue of principle was determined, Newey LJ saw no reason not to exercise the court's discretion to allow the set-off[4].

## Here's what they would have done

Newey LJ said that were there no authority on the issue he would have been inclined to accept that *"where QOCS applies, the Court has no jurisdiction to order costs liabilities to be set off against each other..."* and that *"Section II of CPR Part 44 represents a self-contained code [limiting a defendant to] set-off against damages and interest under CPR 44.14"*.

In his view there were compelling reasons to conclude that "enforced" in the context of 44.14 (unlike in other contexts) extended to set-off. Defendants will commonly "enforce" costs orders against a successful claimant's damages by way of set-off, a practice that those drafting the QOCS regime surely intended. Given that 44.14 does not expressly provide for a set-off against damages, the power to so order must arise from 44.14.

Males LJ said there was a *"powerful case"* for calling the decision in Howe into question. Whether or not it was correctly decided, there were *"powerful arguments on each side of the issue as to what the law should be"*. Both Newey LJ and Males LJ recommended consideration by the Rules Committee.

## The Future?

Permission to appeal to the Supreme Court has been granted and I understand the CPRC has decided to await the outcome of that appeal before taking action.

For now, defendants will be heartened by the preservation of the status quo. The decision of the Supreme Court is awaited with interest.

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**1.** [2020] EWCA Civ 517

**2.** See previous TGC Costs Update

**3.** [2018] EWCA Civ 1654

**4.** c.f. *Faulkner v Secretary of State for Business, Energy and Industrial Strategy* [2020] EWHC 296 (QB). Turner J held that he was bound by *Howe*. He refused to exercise his discretion to allow the Defendant to set off the costs of the action (the Claimant having discontinued) against a costs order made in Claimant's favour on Defendant's 'very weak' application to reinstate and strike out.

# Holiday Offer Goes Wrong

**Mark James**

## Introduction

Have you ever made, or received, an offer to settle for a sum of money which makes no mention of costs? The prudent course would be ask if costs are included or excluded (i.e. a request for clarification under CPR r. 36.8). But what if you don't and you either accept or find that, in a later argument about costs, the offer is said by the offeror to be for a sum of money plus costs? The latter is what happened in *Toczek v Sunseeker International Limited*, Unreported, HHJ Richard Parkes QC, sitting at Winchester County Court on 29 June 2020.

I acted for the (successful) appellant and Matt Waszak acted for the respondent. A copy of the judgment will be made available on Temple Garden Chambers' website.

## The facts

*Toczek* was an employer's liability personal injury claim. The claimant alleged that his asthma had been made worse following exposure to harmful fumes during the course of his employment. Breach of duty was admitted at an early stage. Quantum remained in dispute. Proceedings were issued. Around the time the Defence was due, the parties made a flurry of offers and counter-offers. On 19 October 2017 the defendant's insurers made a Part 36 offer in the sum of £14,000. On 1 November 2017 the claimant's solicitors made a Part 36 counter-offer of £35,000. The same day, the defendant's insurers sent out an offer that was to become the focus of much argument. The key sentence read:

"*In an attempt to settle this matter and deal with the Proceedings by consent, we are prepared to offer your Client £18,000 in full and final settlement of the whole of his claim against the Insured.*"

There was no mention of costs; no mention of Part 36; and, no mention of the offer being without prejudice save as to costs.

The claimant's physical condition appeared to get worse. The 1 November 2017 offer was not accepted. A couple of months later the claimant's solicitors made a Part 36 offer to settle in the sum of £50,000. By this time solicitors were on the record for the defendant. After taking stock, they made a Part 36 offer to settle in the sum of £18,000 on 16 April 2018.

The litigation progressed. Six months later, the defendant's solicitors dropped a bombshell. They disclosed social media reports which demonstrated that the claimant was not as badly affected by his breathing difficulties as he had claimed. Their medical report said much the same. The claimant's solicitors had a frank discussion with their client. On 23 October 2018 they accepted the Part 36 offer dated 16 April 2018 out of time.

The parties were not able to agree costs. It was common ground that (a) the defendant should pay the claimant's costs up to 22 November 2017; and, (b) the claimant should pay the defendant's costs from 8 May 2018 onwards. There was dispute about who should pay the 5½ months of costs in between these dates. The defendant argued that the 1 November 2017 offer was to pay £18,000 plus costs; that it should have been accepted; that the rest of the litigation had been fruitless; and, thus, the claimant should pay those costs. The claimant argued that the 1 November 2017 offer was inclusive of costs; that, he had done better than that offer by a substantial margin; and, therefore, the defendant should pay those costs. Deputy District Judge Kirkconel decided that, looked at objectively, the 1 November 2017 offer was for £18,000 plus costs. Since it was not in Part 36 form, he took that offer into account under CPR r. 44.2(5)(a) and decided there should be no order for costs from 23 November 2017 to 7 May 2018 inclusive. He commented that the defendant's medical evidence raised some "very clear

difficulties" for the claimant but was not invited to, and did not, make any finding of dishonesty.

The claimant appealed on two grounds. **First**, that the DDJ had misconstrued the offer of 1 November 2017. **Second**, that he failed to apply the "formidable obstacle" test endorsed by the Court of Appeal in *Tuson v Murphy* [2018] EWCA Civ 1461.

## Construction

HHJ Parkes QC held that the offer dated 1 November 2017 was ambiguous as to whether costs were, or were not, included. Following *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 and applying "commercial common sense" the Designated Civil Judge held that the offer was to be construed as being for £18,000 plus costs. The DCJ pointed out that it was clear that "in its context" the defendant was trying to settle the matter by raising the £14,000 offer of two weeks earlier to £18,000. Business common sense surely pointed to this being a simple raise of £4,000, in the context of a series of offers that entailed a figure of damages plus costs. The notion that the offer should have been understood as an offer of £18,000 including costs seemed to the judge to fly in the face of common sense, for it was plain that such an offer would have represented no or no worthwhile improvement on the existing offer of £14,000 plus costs. Indeed, it might well have represented a lower offer than the Part 36 offer already made. The appeal on this ground failed.

## The "formidable obstacle" test

The costs consequences of a late acceptance of a Part 36 offer are set out in CPR 36.13(5). This provides that:-

*"...the court must, unless it considers it unjust to do so, order that (a) the claimant be awarded costs up to the date on which the relevant period expired; and (b) the offeree do pay the offeror's costs for the period from the date of expiry of the relevant period to the date of acceptance."*

It is worth emphasising the use of the mandatory language "must". In *Smith v Trafford Housing Trust, [2012]* EWHC 3320 (Ch), Briggs J (as he then was) gave much quoted guidance on the identical position that prevails when a claimant fails to beat a defendant's Part 36 offer at trial (what is now CPR r. 36.17(3)). He pointed out that in each case the court was trying to assess who in reality was the party responsible for costs being incurred which should not have been; that each case turned on its own facts; and, that there was no limit on the circumstances that may, in any particular case, make it unjust for the ordinary consequences of late acceptance to apply. He then said (at [13d]):

*"Nonetheless, the court does not have an unfettered discretion to depart from the ordinary cost consequences set out in [what is now CPR r. 36.17(3)]. The burden on a claimant who has failed to beat the defendant's Part 36 offer to show injustice is a formidable obstacle to the obtaining of a different costs order. If that were not so, then the salutary purpose of Part 36, in promoting compromise and the avoidance of unnecessary expenditure of cost and court time, would be undermined."*

The "formidable obstacle" test was applied to the situation where a claimant accepts a Part 36 offer out of time by the Court of Appeal in *Tuson v Murphy*. The rational is that, had the claimant accepted the Part 36 offer in time, the defendant would have been required to pay the claimant's costs up to the date of acceptance under CPR r. 36.13(1). Thus, it will usually only be just to depart from the ordinary order if something has happened to undermine the basis on which the Part 36 offer was made. Any other approach would encourage expensive satellite litigation. In Tuson v Murphy the Court of Appeal concluded that a distinction was to be drawn between:

**a)** A case where the facts known to the defendant's advisers at the time of the Part 36 offer do not change significantly during the period before the delayed acceptance; and,

**b)** A case where the defendant's advisers' assessment at the time of making the Part 36 offer of the true value of the case, based on the facts then known to them, is upset or undermined by subsequent events or subsequently discovered facts.

The Court of Appeal said that, in the first type of case, *"it is highly unlikely to be unjust to apply the default costs rule."*

In *Toczek* there was no suggestion that the defendant's advisers' assessment of the true value of the case was upset or undermined by subsequent events or subsequently discovered facts. The defendant's solicitors had the claimant's Facebook postings, but it is not suggested that they did not factor them in to their assessment when they made the Part 36 offer on 16 April 2018. Even if the defendant had discovered later facts that undermined its advisers' assessment of the value of the claim, it could have withdrawn the offer or have made a *Calderbank* offer. In those circumstances,

the defendant should be taken to have been content to compromise on the basis of paying the claimant's costs to the end of the relevant period by reference to its assessment of matters as they then stood. The judge below had failed to properly apply the "formidable obstacle" test. The appeal would be allowed. The defendant must pay the claimant's costs up to, and including, 7 May 2018.

## Practice Points

- Offers should be clearly expressed and free from ambiguity. The costs consequences of accepting or not accepting should be spelled out, ideally by reference to Part 36.
- Confronted with an ambiguous offer, the offeree should seek clarification before accepting.
- Where the defendant uncovers evidence of dishonesty any extant Part 36 offers should be withdrawn and an application made to amend the Defence or Counter Schedule to allege fundamental dishonesty. If the defendant wishes to try to settle such a claim, it should make a *Calderbank* offer, e.g., to pay the claimant's costs up to the date on which the dishonesty and/or deliberate exaggeration manifested itself (e.g. service of a witness statement) but then requiring the claimant to pay the defendant's costs on an indemnity basis thereafter.
- Where a Part 36 offer is accepted out of time and a party wishes to seek an order other than the ordinary order, its evidence should concentrate on how its assessment of the claim at the time it made the Part 36 offer was upset or undermined by subsequent events or subsequently discovered facts.

# Does a Calderbank Offer to Settle Costs Expire at the Door of the Detailed Assessment Hearing?

**Harriet Wakeman**

## Overview

In *MEF (A Protected Party, by his Mother and Litigation Friend, FEM) v St George's Healthcare NHS Trust* [2020] EWHC 1300 (QB), the key issue to be determined on appeal was whether a Calderbank offer to settle (without any express time limit) could be accepted once the substantive hearing, here a detailed assessment hearing, had commenced, or whether such an offer would automatically lapse at the start of the hearing.

## Factual Background

The Claimant's claim was a clinical negligence claim arising from a severe hypoxic brain injury sustained at birth. The claim was settled in March 2017 and was approved by the Court on 25th April 2017 with an order that the Claimant's liability costs be assessed. The Claimant's bill of costs totalled £621,455.57 and detailed assessment proceedings commenced on 6th April 2018.

Thereafter, negotiations took place between the parties. In a letter dated 27th September 2018, the Defendant offered to pay £440,000 in full and final settlement of the Claimant's costs ("the September 2018 offer"). The offer did not set any time for acceptance, nor did it include any express condition that the Claimant would be responsible for the Defendant's costs of the detailed assessment, after the date for acceptance of the offer. On 19th August 2019, the Defendant wrote to the Claimant and stated that *"The Defendant's offer dated 27/09/18 is only capable of acceptance subject to the agreement of the Defendant's costs of Detailed Assessment incurred since that date"* ("the August 2019 offer"). It was common ground between the parties that this email amounted to a re-instatement of the earlier offer, but subject to the variation that the Claimant was to pay the Defendant's costs of the detailed assessment from 27th September 2018.

The detailed assessment hearing began on 17th September 2019 before Master Brown. By the end of the second day, and according to the Defendant's representatives, the Claimant's bill had been reduced to below £440,000. This was as a result of reductions made in the course of the hearing by the Master and in light of the concessions made within the Claimant's replies.

In a letter dated 18th September 2019, also sent by email at 4.11pm the same day (before the end of the second day of the hearing), the Claimant sought to accept the September 2018 offer, as reinstated in the August 2019 offer. A dispute arose between the parties as to whether the Claimant's email constituted a valid settlement of the proceedings given that the Court was midway through the detailed assessment hearing.

In a separate hearing, Master Rowley concluded that the Claimant had validly accepted the August 2019 offer. The Defendant appealed.

## The Appeal

On appeal, the Appellant sought to persuade the Court that the August 2019 offer lapsed automatically after a reasonable time, which was no later than the start of the detailed assessment hearing.

When considering the appeal, the Court took into account the approach taken within the Part 36 regime. It noted that where a Part 36 offer is made in respect of the costs of detailed assessment, the court's permission is required to accept such an offer once the detailed assessment hearing has started. The Court also considered basic contract law principles of offer and acceptance and noted that where the duration of an offer is not limited, it will come to an end after the lapse of a reasonable time. The Court stated that what constitutes a "reasonable time" is a question of fact, to be determined by reference to the circumstances of the particular case and the contractual context in which the offer was made.

The Court concluded that the August 2019 offer did not lapse at the door of court and remained open for acceptance. As such, the Claimant's acceptance of the offer gave rise to a valid contractually binding settlement of the detailed assessment proceedings. The following factors appear to have been pertinent to the Court's decision:

**i.** In a detailed assessment hearing, each party knows as the hearing progresses, how well or badly the hearing was going. They therefore might be able to ascertain whether the ultimate outcome would be better or worse than an offer which has been made.

**ii.** The Part 36 procedure was available to the Defendant, who instead chose to use a Calderbank offer.

**iii.** The previous offers made by the Defendant since April 2018 were relevant. None of these offers included an absolute time limit for acceptance. The Defendant was aware throughout that it could withdraw the offer made, but did not do so.

## Comment

Whilst not every unwithdrawn Calderbank offer will be capable of acceptance during a detailed assessment hearing, this case serves as a timely reminder of the need for caution when drafting Calderbank offers, which do not fall within statutory code that Part 36 offers. In particular, parties should always be mindful of the offers that have been made in the proceedings, the terms of those offers, and be aware of the risks of leaving a Calderbank offer, with no time limit for acceptance, on the table once a detailed assessment hearing has begun.

# High Court Stresses the Costs Importance of Engaging with Requests for ADR

**Anthony Johnson**

***Halsey v. Milton Keynes* [2004] EWCA Civ 576 and subsequent case-law emphasised the importance of Alternative Dispute Resolution by holding that a departure from the general rules on costs can be justified where a party had acted unreasonably in refusing to participate in ADR. The requirement to engage with ADR has become more formalised over time, the current wording of CPR 44.3(ii) provides that 'the efforts made, if any, before and during the proceedings in order to try to resolve the dispute' is one factor that the Court should have particular regard to when considering a party's conduct. The standard Directions in respect of Multi-Track cases now include the following paragraph:**

*"At all stages the parties must consider settling this litigation by any means of Alternative Dispute Resolution (including Mediation); any party not engaging in any such means proposed by another must serve a witness statement giving reasons within 21 days of that proposal; such witness statement must not be shown to the trial judge until questions of costs arise."*

In spite of this strong steer towards ADR, the High Court have recently dealt with three cases in which a defendant was punished for a failure to engage with ADR. The common thread running through all three cases is that each defendant was of the view that their defence was so strong that they had no intention to concede anything, and thus believed that ADR would serve no purpose. Three separate judges strongly disagreed with this approach.

In *DSN v. Blackpool FC* [2020] EWHC 670, the Defendant was ordered to pay indemnity costs to the Claimant for a period of nine months prior to the Claimant's Part 36 offer which he had beaten at trial due to its failure to engage in settlement negotiations. After receiving settlement overtures from the Claimant's representatives, the Defendant's solicitors filed a witness statement in accordance with the Standard ADR Direction which stated that it believed that it had a strong defence and that 'no purpose would be served by any form of ADR'. Griffiths J. characterised this as a flat refusal to consider ADR. Paragraph 28 best summarises the reasoning behind his judgment:

*"The reasons given for refusing to engage in mediation were inadequate. They were, simply, and repeatedly, that the Defendant "continues to believe that it has a strong defence". No defence, however strong, by itself justifies a failure to engage in any kind of alternative dispute resolution. Experience has shown that disputes may often be resolved in a way satisfactory to all parties, including parties who find themselves able to resolve claims against them which they consider not to be well founded. Settlement allows solutions which are potentially limitless in their ingenuity and flexibility, and they do not necessarily require any admission of liability, or even a payment of money. Even if they do involve payment of money, the amount may compare favourably (if the settlement is timely) with the irrecoverable costs, in money terms alone, of an action that has been successfully fought. The costs of an action will not always be limited to financial costs, however. A trial is likely to require a significant expenditure of time, including management time, and may take a heavy toll on witnesses even for successful parties which a settlement could spare them. As to admission of liability, a settlement can include admissions or statements which fall short of accepting legal liability, which may still be of value to the party bringing a claim."*

In *BXB v. Watch Tower* [2020] EWHC 646, the unsuccessful defendant was ordered to pay indemnity costs from the date of its refusal to participate in a Joint Settlement Meeting. Chamberlain J. found that the defendant had not only acted unreasonably in being silent in the face of the invitation to the JSM, but also by breaching the Order containing the Standard Direction that it explain such a refusal in a statement. His judgment emphasised that:

*"One important purpose of a joint settlement meeting is to convey a defendant's view about the strength of its case. In any event, the possibility of agreeing quantum subject to liability provides a good reason to engage in discussions even in a case where the defendant is confident about its case on liability. In this case, that would have shortened the trial and avoided some of the intrusive questioning which in the event was necessary."*

In some respect, the decision was even more stark in *Wales v. CBRE* [2020] EWHC 1050 because there the defendant managed to successfully resist the claimant's claim, yet was nevertheless deprived of 50% of its costs for a substantial period of the proceedings. HHJ Halliwell, sitting as a High Court Judge, felt that the failure to engage in mediation prior to the issue of proceedings had deprived the defendant of the opportunity to communicate to the claimant that the conceptual basis for his claim was unsound. The defendant had 'brought the litigation on itself' by failing to address his 'genuine sense of grievance'. The Judge further commented that the defendant 'appeared to have lost sight of the wider observations' about the advantages of mediation made by the Court of Appeal in *Halsey*.

It would be going too far to suggest that the upshot of these cases is that a party *must* always agree to a proposal for ADR from the other side, even where they consider the same to be a waste of time and money. However, a party that wishes to reject such an approach must be in a position to justify themselves in detail, and their response must include more that simply stating that they feel that they have a strong case and think that they will succeed at trial. In the many cases where the Standard Direction reproduced above has been included in the Order, a party would be taking a significant risk by failing to comply with it.

It is suggested that such a justification should include reference to proportionality, e.g. the cost of the suggested method of ADR when compared to the potential saving that could result from it. It will be important to make clear that no 'collateral' benefits would be expected to result from an unsuccessful ADR, e.g. agreement as to quantum, narrowing of the issues, some agreement as to the future conduct of the case etc. If the party has made written proposals of settlement (even to 'drop hands') that are as advantageous to the other party as it would be able to make in the course of ADR then this is something that could be highlighted. Ultimately, the aim for any party adopting such a stance should be to convey to the Court that they have made a considered decision not to go down the route proposed by their opposite number, rather than merely adopting a dismissive approach due to their confidence in the merits of their own case.

# *XDE v North Middlesex University Hospital Trust* [2020] EWCA Civ 543

**Daniel Laking – Case summary**

**This case arose from a clinical negligence claim.** The Claimant's solicitors belatedly realised that work required on the case would exceed the funding certificate granted by the Legal Services Commission ("LSC"). The LSC required the solicitors to make a formal application to extend the certificate. Instead, the solicitors sought the discharge of the certificate and entered into a CFA-lite with ATE premium. The judge at first instance held that, applying the guidance in *Surrey (A Child) v Barnet and Chase Farm Hospitals*, legal aid and CFA-lite funding were equivalent and therefore it was neither necessary nor reasonable for the change in funding to take place. The additional liabilities were disallowed.

The Court held that *Surrey* was of general application and that legal aid and CFA-lite funding were broadly equivalent. The court had to ask whether a party's reasons for changing funding methods were reasonable. That involved an examination of the advice provided, the circumstances pervading at the time and whether the solicitors' advice was erroneous or self-serving. In the instant case, the solicitors had failed to limit their spending to that approved by the LSC and so had changed to CFA-lite. Furthermore, CFA-lite was not so obviously preferable to legal aid as a funding method such as to avoid the need to justify the change. The solicitor's reasons for changing funding methods were unreasonable and the judge was correct to find that the additional liabilities were not recoverable.

# *Dunbar v Virgo Consultancy Services* [2019] EWHC B12 (Costs)

**Ellen Robertson – Case Summary**

**The court considered whether the defendant's fees for legal services provided should reasonably be limited to a particular sum.**

The defendant had submitted a bill for £70,000 plus VAT for work undertaken in assisting with the defence of the claimant's son, who had been charged with serious criminal offences in Crete, including manslaughter with intent. The claimant's son was acquitted of all charges in 2014.

Master Leonard held that the failure of the defendant to give any estimate or other advice on costs until the retainer had concluded meant that the defendant should not recover any costs unreasonably incurred as a result of that failure. He held that the defendant had effectively sacked the Greek legal team without the claimant's knowledge or authority, and that having done so, it was incumbent upon them to at least assist the claimant in identifying and managing additional costs.

As they had failed to do so in breach of their professional obligations, the claimant was not aware of any obligation to pay more than the €30,000 he had agreed to pay the original Greek legal team, and an additional £10,000 he had agreed to pay the defendant. He did not authorise any expenditure above that level. The court therefore determined that any costs exceeding that were unreasonably incurred.

## Disclaimer

These articles are not to be relied upon as legal advice. The circumstances of each case differ and legal advice specific to the individual case should always be sought.

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