Case No: A81YM424

In the COUNTY COURT at
KINGSTON UPON HULL

Lowgate
Kingston upon Hull
HU1 2EZ

21st April 2016

B E F O R E:

DISTRICT JUDGE BESFORD

Miss S L Sutherland Claimant

v

Z A Khan Defendant

Judgment

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1. **District Judge Besford:** I apologise to the advocates for keeping them waiting, but I thought it was more important to give a decision today, rather than delay. It goes without saying that I have been assisted greatly by the submissions of both counsel, and the skeleton arguments. As I have already commented, I found the skeleton argument of Mr Smith of greater assistance than that of the claimant's solicitors, which being considerably longer is anything but a 'skeleton argument'.

2. The issue, I am told, is one that would appear not to have been argued previously and I echo the thoughts, I think of the Court of Appeal, that part 36 was meant to bring clarity to the parties, as opposed to bringing increasing amounts of satellite litigation.

3. Looking at this particular case, this is a claim in respect of a low value RTA. The brief details are that it was submitted to the portal on 31st July 2013, but subsequently came out on the issue of proceedings. The claim was defended, of sorts, as it was allocated and directions given. I understand that the bulk of the directions were complied with and pre-trial checklists were subsequently lodged. Some two days after the pre-trial checklists were lodged, the claimants made a compliant part 36 offer in the sum of £2,475.

4. The chronology thereafter becomes a little hazy, but both advocates accept that the offer was accepted by the defendants outside of the 21 day prescribed period by some 28 or 30 days. It is assumed, if only because of the silence on Mr Latham's brief, that the damages were thereafter paid.

5. Today the claimant makes an application to seek an order for costs in accordance with part 36 to include the additional benefits that accrue. The issue is the extent of any additional benefits the claimant is entitled to, and in particular, whether the claimant is limited to recovering fixed, standard or indemnity costs.

6. This, as I have already alluded to, was an RTA claim, which comes within part 45.29A of the rules. Under 45.29B, costs are limited to fixed costs under 45.29C and disbursements in accordance with 45.29I. There are however certain exceptions. The relevant exception is possibly 45.29J where the court considers there are 'exceptional circumstances'. Part 45.29, section IIIA does not incorporate any provision in respect of a claimant's costs flowing from any offers whether part 36 or otherwise. This is despite provision being made in respect of a defendant's part 36 offer.

7. The claimant made a valid part 36 which was accepted out of time, but prior to trial. My understanding, which I think is agreed by all the advocates, is that the proceedings on acceptance of that offer fall to be stayed under part 36.14. In such circumstances parties are encouraged to agree and pay costs. Where, as in this case, agreement is not reached part 36.14(5) provides:

> "Any stay arising under this rule will not affect the power of the court
> a) to enforce the terms of a part 36 order, or
> b) to deal with any question of costs, including interest on costs, relating to the proceedings."

8. As the parties have been unable to agree costs, the claimant issued their application under 36.14(5)(b) and 36.13(5).

9. On the issue as to fixed or other costs, Mr Smith maintains that the claimant in seeking additional costs/benefits is seeking to recover an amount pursuant to part 45.29J. The provision of 45.29J(1) allows the court:

> "If it considers that there are exceptional circumstances making it appropriate to do so, the court will consider a claim for an amount of costs (excluding disbursements) which is greater than the fixed recoverable costs referred to in rules 45.29B to 45.29H."

10. In broad terms, that is what the claimants are seeking. They are seeking to claim costs in excess of fixed costs. Mr Smith argues that they could have specifically applied under 45.29J, but accepts that under 45.29J there will be different considerations at play. The burden will be upon the claimant to show that there are exceptional circumstances to warrant an amount greater than fixed costs. Also 45.29K provides that even if there are exceptional circumstances, there are penalties if the claimant does not recover 20% or more that the amount of the applicable fixed costs.

11. It was initially thought that the claimants were not applying under part 45.29J, although it has been pointed out that part 45.29J costs are sought as an alternative in the claimant's application and substantial skeleton argument. The first issue is therefore whether costs are being sought under part 36.13 and 36.14 or part 45.29J.

12. My view is that part 45.29J is relevant when looking to exceed costs that ordinarily fall within part 45.29. The whole tenor of the claimant's application is that they are seeking an award of costs under part 36, which is a self-contained code. In my view, it would not make sense if, in reality, the claimants were seeking to proceed under 45.29J, an application of general relevance and in respect of which the claimant has to surmount a higher hurdle. I am therefore satisfied that the claimant's application is under part 36 and not under part 45.29J.

13. Looking at the application under 36.13 or 36.14, I must firstly determine a liability for costs. Unfortunately, part 36, whilst dealing with situations where the claimant accepts out of time a defendant's offer, would appear to be silent as to a defendant accepting a claimants' offers out of time or prior to trial. The nearest analogy is part 36.17, but it is accepted that part 36.17 can only apply where a judgment has been entered. That situation is not applicable here.

14. Looking at part 36.13 and part 36.13(5) and (6) in particular, I have to take into account all the circumstances of the case, including the matters listed in rule 36.17(5). The defendant submits that in reality if I am going to make an award of costs under 36.13(5), I have two choices. I can either make an award on the standard basis, or alternatively I can make an award on an indemnity basis. By dint of clever footwork, Mr Smith submits that if I was to make an award of costs on the standard basis, then I should look to part 45.29B which stipulates that 'the only costs allowed' are fixed costs. So, an order for standard costs would circuitously bring the claimant back to part 45.29B and fixed costs.

15. Mr Smith argues that I should make an order for costs on the standard basis, as an order for indemnity costs requires that I am satisfied that there has been some bad

faith, unreasonable conduct, or something to warrant an indemnity costs order against the defendants. Mr Smith rightly points out that, in brief, this action is not one where criticism can attach to either party. I am told the action ran its predicted course. The only criticism against the defendant is that they did not accept the part 36 offer within the relevant period. Mr Smith refers to the case of *Fitzpatrick Contractors Ltd v Tyco Fire v Integrated Solutions (UK) Ltd [2010] 2 Costs LR 115,* before Coulson J. Mr Smith helpfully took me to paragraph 17 onwards of that judgment. The very argument that is being put forward by the claimant for indemnity costs, namely the defendant's failed to accept an offer, failed. Any presumption that the claimant should be awarded indemnity costs was not followed by Coulson J.

16. Coulson J gave a number of reasons at paragraph 17 onwards why he did not follow such an argument. It is put by Mr Smith that *Fitzpatrick* involved a very large value claim, and one would have thought with the sums involved, if there was going to be an order for indemnity costs, that *Fitzpatrick* was the appropriate case for such an order.

17. Mr Latham, on behalf of the claimant prays in aid firstly what perhaps can be described as a swinging of the pendulum as to the importance and effect of part 36. In general part 36 offers are meant to have teeth; it is meant to encourage both parties to make and accept offers; and it is meant to incentivise parties to do so. Perhaps as an indication of the pendulum swinging *Broadhurst & Anor v Tan & Anor [2016] EWCA Civ 94,* is a recent example where the Court of Appeal refers to a "*generous outcome*" where a party obtains a more advantageous judgment or outcome.

18. In addition, in the course of submissions I was referred to *Petrotrade Inc v Texaco Ltd [2000] All ER (D) 724,* which is mentioned by Coulson J in *Fitzpatrick.* Coulson J dealt with these cases at paragraph 22:

> "I accept Mr Thomas's submissions that the other cases relied upon by Fitzpatrick, namely *Petrotrade, Hook* and *Read,* do not offer very much assistance to the central question here, which is whether a rebuttable presumption in favour of the indemnity costs, taken from a rule dealing with a situation following a trial, where the offer has not been accepted, should be inferred into a rule dealing with the position prior to trial, where the offer has been accepted. I do not accept that the present situation is analogous to those cases. In all three of them, the courts were endeavouring to apply the words of the old CPR 36.21, in a commonsense way, to achieve a just and sensible result and to prevent injustice; they all arose after a trial on the merits, (either on a summary or a full basis). In contrast, I conclude that the replacement of old CPR 36.21 - the new CPR 36.14 - does not apply to the present case, because there has been a settlement, and it has occurred before the trial. The claimant has therefore been spared the cost, disruption and stress of the trial."

19. The interpretation of these cases put forward by Coulson J is not, with respect how I read the more recent cases coming forth from higher courts. My understanding is, as I have alluded to, that there has been a tightening up as to the 'carrot and stick effect' of part 36 offers. To my mind, notwithstanding the comments of Coulson J, if there was no incentive or penalty there would be little point in a defendant accepting offers early doors, as opposed to waiting immediately prior to trial. It also seems to me unsatisfactory that there should be penalties flowing if you do not beat an offer at trial, whereas if you settle before trial there are none. This position does not sit

comfortably with the overriding objective of saving expense. In my view, I think that *Fitzpatrick* is perhaps a statement of the law as it was in 2009, but not necessarily the way the law in respect of part 36 is being interpreted in 2016.

20. In conclusion, I do not find that the court has to find that the defendant has, in some way been guilty of inappropriate behaviour or conduct capable of censor before I can consider making an order for costs on an indemnity basis.

21. Going back to 36.13(6):

> "In considering whether it would be unjust to make the orders specified in (5), the court must take into account all the circumstances of the case, including the matters listed in rule 36.17(5)."

22. If one looks at 36.17(5), that says:

> "In considering whether it would be unjust to make the orders referred to in paragraphs (3) and (4), the court must take into account all the circumstances of the case including …"

23. Paragraph (3) is the costs consequences which flow in favour of the defendant and (4) is the costs consequences which flow in favour of the claimant. As I read 36.17(5), I am required to consider whether it would be unjust to make the orders that would ordinarily flow under 36.17(4), which provides:

> "The court must, unless it considers it unjust to do so, order that the claimant is entitled to …"

24. There follows a list of benefits, including interest and indemnity costs.

25. So, by looking at 36.13(6), I have regard to all the circumstances of the case including the maters listed in part 36.17(5). Part 36.17(5) starts with the premise that the claimant is entitled to the benefits under sub-section (4) which should only be denied if it would be unjust. The factors that I have to have regard to under 36.17(5) are the terms of the part 36; stage of the proceedings; information; conduct; and whether the offer was a genuine to settle.

26. In this case the terms of the part 36 offer were clear and unambiguous and the parties accept it was a valid part 36 offer – nothing turns on this circumstance. The stage of the proceedings the offer was made and how long before the trial – the offer was made at an appropriate stage, presumably after the witness statements and medical evidence had been exchanged. Again, nothing turns on this circumstance. Information available to the parties – one assumes this was a very simple claim. Both parties had the material information to make and consider the offer at the time it was made. Conduct – again nothing has been brought to my attention to suggest it is relevant. Lastly, a genuine offer to settle – I do not know what the potential value of the claim was, but I have not been told that the offer made was in any way a sceptical one or anything other than a genuine attempt to settle the proceedings. I think as Mr Smith alluded to, in reality, the proof of the pudding is in the eating, in as much as the offer was made, and it was subsequently accepted.

27. It follows that for the court to deny the consequences that flow from accepting a part 36 out of time the court has to make pretty exceptional findings and there has to be some very good reason as to why it is unjust not to make the usual order. The very fact that the claimant obtains a 'windfall', most certainly does not constitute unjustness, under part 36.17.

28. For all these reasons, I find that the usual consequences of part 36 should flow. I hope the advocates will correct me if I am wrong, that what the claimant is seeking is fixed costs, up to the last section and thereafter, I think you are looking for indemnity costs, is that right?

29. **Mr Latham :** The position as it's set out in the written submissions, I think, points to …

30. **District Judge Besford :** I think that's what they're saying.

31. **Mr Latham :** Yes, if you'll forgive me a moment Sir. I don't want to get this wrong, because it's so important.

32. **District Judge Besford :** Be assessed … it's paragraph 79. Costs to be assessed on the indemnity basis from the end of the earliest applicable relevant period.

33. **Mr Latham :** Yes that's it.

34. **District Judge Besford :** And prior to that I think you're saying … I thought I'd read actually that you wanted fixed costs.

35. **Mr Latham :** I think … here we are paragraph 69. Oh not it's not that paragraph at all sorry. There is a paragraph in here, I'm afraid I'm rather struggling to see the wood for the trees, which deals with the difficulty that might arise if you only assess part of the costs. But I think it's also right for me to acknowledge that in *Broadhurst*, that's exactly what the court did.

36. **District Judge Besford :** *Broadhurst*, that's the way they went. Now the other way round is, which we discussed at the very beginning, is to give you standard costs and that comes within my discretion as the assessing judge, doesn't it?

37. **Mr Latham :** It does. Yes, it's this paragraph of the judgment in *Broadhurst*, paragraph 33. It refers to …

38. **District Judge Besford :** That's under a different rule.

39. **Mr Latham :** It is. It goes to the difficulty … here we are, paragraph 31:

> "As we have seen, Judge Robinson considered that Parliament could not have intended a claimant should recover indemnity costs in a 3A case because of potential difficulties such as interpretation entail. I accept that there are bound to be some difficulties of assessment, where the costs are partly fixed and partly assessed, but I also accept the submission of Mr Williams and the written submissions of Mr McQuater on behalf of the

> Association of Personal Injury Lawyers that these are overstated by Judge Robinson."

40. **District Judge Besford :** Then he goes on to say:

> "Where a claimant makes a successful part 36 offer, in a section 3A case, he will be awarded fixed costs to the last staging point provided by rule 25.29C."

41. **Mr Latham :** Yes and then he will be awarded costs to be assessed on the indemnity basis, in addition, from the date the offer became effective.

42. **District Judge Besford :** I didn't quite know what you were pushing me for, but I think I have to be guided by that.

43. **Mr Latham :** Well, I think the skeleton has sought indemnity costs, but I accept what the Court of Appeal says, which post dates the skeleton to some extent. I don't think that particular paragraph has reworked since *Broadhurst.*

44. **District Judge Besford :** In the alternative, if I give them to you on a standard basis, I think I would have to have regard to the quantum of costs set out in the fixed regime.

45. **Mr Latham :** Yes.

46. **District Judge Besford :** I don't know what your costs are, but whether it would be reasonable and proportionate to allow an amount in excess of that.

47. **Mr Latham :** Which exceeded that yes. I think it's probably sensible to have the fixed costs brought to the point and then the indemnity after.

End of judgment

We hereby certify that this judgment has been approved by District Judge Besford.

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