In the County Court at Liverpool
Case number : C03YM231

BETWEEN

DOREEN McKEOWN

and

DANIEL McKEOWN

Appellants/ Claimants

and

TANZA TOTTLE VENTON

Respondent/ Defendant

Before **His Honour Judge Graham Wood QC**

(sitting with District Judge Lee Jenkinson, Regional Costs Judge, as assessor)

Mr Benjamin Williams QC (instructed by Scott Rees solicitors) for the Appellants

Mr Robert Marven (instructed by DWF LLP solicitors) for the Defendant

Hearing date:

12th June 2017

Judgment

.....

His Honour Judge Graham Wood QC

Introduction

1. This appeal is concerned with the question as to whether the court can award indemnity costs in low value RTA claims which have exited the portal and where Part 36 offers made by claimants are not accepted within the requisite 21 day period.

2. In particular, the matter comes before the court with permission granted by myself on an earlier occasion from the decision of Deputy District Judge Haisley on 23rd September 2016, whereby on the Claimants' application pursuant to CPR 36.13 (4) he concluded that the Defendant's late acceptance of Part 36 offers (by approximately five weeks) in relation to both, did not entitle the Claimants to any additional benefits including those set out in CPR 36.17 (4) but instead the Claimants were limited to fixed costs pursuant to CPR 45.29B for the applicable stage, which came under table 6B because proceedings had already been issued.

3. The court has been told that this issue relating to the interpretation of Part 36 of CPR in the context of fixed cost cases is one which frequently arises and yet there is no binding authority on the point. A first instance decision from an experienced regional costs judge (DJ Besford) in **Sutherland v Khan** was referred to in the judgment of the learned deputy district judge, although it was not followed by him.

4. In hearing this appeal, the court has had the assistance of an assessor, District Judge Jenkinson, one of the regional costs judges for Merseyside, whose understanding of the fixed costs regime has been extremely valuable.

Background

5. The background circumstances can be stated quite shortly. The claims of Mr and Mrs McKeown arise out of a modest road traffic accident which occurred in May 2013. They sustained injuries which were the subject of medical evidence, and after solicitors were consulted and instructed, the claims proceeded in the first instance under the pre-action protocol for low value personal injury claims. They were not resolved within the portal, and accordingly when exiting the portal offers were made on their behalf pursuant to Part 36 in

the sum of £1500 for each claimant. These offers should have been accepted by 5 April 2016 but were not. The Claimants' solicitors issued proceedings but very shortly thereafter, the Defendant filed notice of acceptance of both offers, being out of time by several weeks (16th May 2016).

6. One of the consequences for this late acceptance, contended the claimant's solicitors, was that their costs between 5th April and 16th May should be paid by the defendant. Because the claim was the subject of the fixed costs regime under CPR 45.29B, the cost entitlement otherwise would be to the last "staging post" which as I have indicated would fall under table 6B, and column one, namely "*on or after the date of issue, but prior to the date of allocation under Part 26*". Whilst the specific consequence in terms of costs would have been a doubling of the entitlement on a fixed costs basis because the parties had reached settlement after proceedings had been issued, nevertheless the Claimants, by their solicitors, sought indemnity costs. The Defendant did not agree to pay indemnity costs, and in the absence of such agreement the Claimants made an application pursuant to CPR 36.13 (4) for the court to determine the liability for costs.

7. Thus the application came before Deputy District Judge Haisley at first instance.

The relevant provisions of CPR

8. The starting point is CPR 36.13. It is axiomatic that the generic provisions relate to both claimants' offers to settle and defendants' offers to settle.

> ***Costs consequences of acceptance of a Part 36 offer***
>
> ***36.13***
>
> *(1) Subject to paragraphs (2) and (4) and to rule 36.20, where a Part 36 offer is accepted within the relevant period the claimant will be entitled to the costs of the proceedings (including their recoverable pre-action costs) up to the date on which notice of acceptance was served on the offeror.*
>
> *(Rule 36.20 makes provision for the costs consequences of accepting a Part 36 offer in certain personal injury claims where the claim no longer proceeds under the RTA or EL/PL Protocol.)*
>
> *(2) ……..*
>
> *(3) Except where the recoverable costs are fixed by these Rules, costs under paragraphs (1) and (2) are to be assessed on the standard basis if the amount of costs is not agreed.*

…… (Part 45 provides for fixed costs in certain classes of case.)

9. It is worth pointing out that no argument is advanced in this case for standard basis costs. Because the fixed costs regime applies, any reference to standard basis, it is accepted, should be interpreted as a reference to fixed costs pursuant to 45.29B, (although the position adopted by Mr Williams QC was that standard basis costs were not fixed costs, because the **Broadhurst** case shows that assessed costs and fixed costs differ fundamentally and that he was contending for indemnity basis costs, not standard basis costs). For the balance of this rule I have omitted, for the sake of brevity, those aspects which are of no application.

(4) Where—

(a) ……or

(b) a Part 36 offer which relates to the whole of the claim is accepted after expiry of the relevant period; or

(c)……,

the liability for costs must be determined by the court unless the Parties have agreed the costs.

10. Clearly, 4 (b) is the provision which applies here. The rule goes on to prescribe the approach which should be taken on any court application:

(5) Where paragraph (4)(b) applies but the Parties cannot agree the liability for costs, 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.

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

(7) The claimant's costs include any costs incurred in dealing with the defendant's counterclaim if the Part 36 offer states that it takes it into account.

11. Because there is a direct link to CPR 36.17 (5) it is necessary to set out the relevant provision:

Costs consequences following Judgment

36.17

(5) 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—

(a) the terms of any Part 36 offer;

(b) the stage in the proceedings when any Part 36 offer was made, including in Particular how long before the trial started the offer was made;

(c) the information available to the Parties at the time when the Part 36 offer was made;

(d) the conduct of the Parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and

(e) whether the offer was a genuine attempt to settle the proceedings.

12. Paragraphs (3) and (4) referred to provide for the so-called benefits accruing to the parties where their earlier offers have been bettered on the judgment, and specifically paragraph (4) to a claimant.

(4) Subject to paragraph (7), where paragraph (1)(b) applies, the court must, unless it considers it unjust to do so, order that the claimant is entitled to—

(a) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;

(b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;

(c) interest on those costs at a rate not exceeding 10% above base rate; and

(d) provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below to an amount which is—

(i) the sum awarded to the claimant by the court; or

(ii) where there is no monetary award, the sum awarded to the claimant by the court in respect of costs—

Amount awarded by the court	*Prescribed percentage*
Up to £500,000	*10% of the amount awarded*
Above £500,000	*10% of the first £500,000 and (subject to the limit of £75,000) 5% of any amount above tha figure.*

13. CPR 36.20 deal specifically with the costs consequences where a claimant accepts a defendant's Part 36 offer in a fixed costs case (to which section IIIA) of Part 45 applies, including the consequences of late acceptance, and CPR 36.21 deals with the costs consequences following judgment, again in relation to a defendant's offer. There is no rule provision dealing with the specific cost consequences in relation to claimants' offers. It is unnecessary to set out the details of these provisions.

14. Section IIIA of Part 45 contains a comprehensive code dealing with the fixed costs regime for a variety of species of claim, including those pertinent to this appeal, namely low value personal injury claims in RTAs. Rule 45.20 9B is relevant:

Application of fixed costs and disbursements – RTA Protocol

45.29B

Subject to rules 45.29F, 45.29G, 45.29H and 45.29J, and for as long as the case is not allocated to the multi-track, if, in a claim started under the RTA Protocol, the Claim Notification Form is submitted on or after 31st July 2013, the only costs allowed are—

(a) the fixed costs in rule 45.29C;

(b) disbursements in accordance with rule 45.29I.

15. This rule is highly prescriptive, in that it limits the recoverability of costs in these cases. It provides for a number of qualifications, including 45.29J.

Claims for an amount of costs exceeding fixed recoverable costs

45.29J

(1) 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.

(2) If the court considers such a claim to be appropriate, it may—

(a) summarily assess the costs; or

(b) make an order for the costs to be subject to detailed assessment.

(3) If the court does not consider the claim to be appropriate, it will make an order—

(a) if the claim is made by the claimant, for the fixed recoverable costs; or

(b) if the claim is made by the defendant, for a sum which has regard to, but which does not exceed the fixed recoverable costs,

and any permitted disbursements only.

16. By this provision, the court has a reserved power in exceptional circumstances to award more than the fixed recoverable costs.

17. The basis of remuneration is also important, including the table of fixed costs and it would be helpful to set out the scope of those costs. I shall refer to the staging posts represented by the different figures in different columns later in this judgment.

Amount of fixed costs – RTA Protocol

45.29C

(1) Subject to paragraph (2), the amount of fixed costs is set out in Table 6B.

(2) Where the claimant—

(a) lives or works in an area set out in Practice Direction 45; and

(b) instructs a legal representative who practises in that area,

the fixed costs will include, in addition to the costs set out in Table 6B, an amount equal to 12.5% of the costs allowable under paragraph (1) and set out in Table 6B.

(3) Where appropriate, VAT may be recovered in addition to the amount of fixed recoverable costs and any reference in this Section to fixed costs is a reference to those costs net of VAT.

(4) In Table 6B—

(a) in Part B, 'on or after' means the period beginning on the date on which the court respectively—

(i) issues the claim;

(ii) allocates the claim under Part 26; or

(iii) lists the claim for trial; and

(b) unless stated otherwise, a reference to 'damages' means agreed damages; and

(c) a reference to 'trial' is a reference to the final contested hearing.

TABLE 6B

Fixed costs where a claim no longer continues under the RTA Protocol

A. If Parties reach a settlement prior to the claimant issuing proceedings under Part 7

Agreed damages	*At least £1,000, but not more than £5,000*	*More than £5,000, but not more than £10,000*	*More than £10,000*
Fixed costs	*The greater of—* *(a) £550; or* *(b) the total of—* *(i) £100; and* *(ii) 20% of the damages*	*The total of—* *(a) £1,100; and* *(b) 15% of damages over £5,000*	*The total of—* *(a) £1,930; and* *(b) 10% of damages over £10,000*

B. If proceedings are issued under Part 7, but the case settles before trial

Stage at which case is settled	*On or after the date of issue, but prior to the date of allocation under Part 26*	*On or after the date of allocation under Part 26, but prior to the date of listing*	*On or after the date of listing but prior to the date of trial*
Fixed costs	*The total of—* *(a) £1,160; and* *(b) 20% of the damages*	*The total of—* *(a) £1,880; and* *(b) 20% of the damages*	*The total of—* *(a) £2,655; and* *(b) 20% of the damages*

C. If the claim is disposed of at trial

Fixed costs	*The total of—* *(a) £2,655; and* *(b) 20% of the damages agreed or awarded; and* *(c) the relevant trial advocacy fee*

D. Trial advocacy fees

Damages agreed or awarded	*Not more than £3,000*	*More than £3,000, but not more than £10,000*	*More than £10,000, but not more than £15,000*	*More tha £15,000*
Trial advocacy fee	*£500*	*£710*	*£1,070*	*£1,705*

Submissions

18. This appeal was initially pursued on two premises. The first, in effect, sought to endorse the decision of District Judge Besford in **Sutherland v Khan** in arguing that CPR 36.13 (6), by making express reference to the matters listed in 36.17 (5) was giving access to a claimant, whose offer was not accepted in time, a number of benefits which were not limited to the situation where the offer was bettered at judgment, which included the payment of indemnity costs. Insofar as the learned deputy district judge did not interpret 36.13 (6) in this way, he was wrong in law. The second was a broader challenge which sought to draw on the most recent authority of **Broadhurst v Tan [2016] EWCA Civ 94**, and was directed to the discretionary exercise of the power to award indemnity costs "having regard to all the circumstances of the case". In this respect, it is said that the rationale behind the CPR, which was to create the carrot and stick of incentives and consequences when offers made in a genuine attempt to resolve litigation were unreasonably refused, was a highly relevant consideration. The deputy district judge in such circumstances fettered his own discretion by not accepting that he had a power to make such an order.

19. Mr Williams QC has appeared for the claimants on this appeal although he did not draft the skeleton argument. Whilst he stands by the submissions of the author of the skeleton in relation to the first challenge, it is no longer his primary submission. He accepts that the application of CPR 36.17 (5) to consequences other than post-judgment by District Judge Besford was somewhat strained. Instead he has developed the second limb which invites the court to recognise that there is a residual power or inherent jurisdiction in the context of CPR 36 to make orders for indemnity costs where offers were accepted out of time. Because Part 36, whilst confirming that a claimant is entitled to his costs in such circumstances, is otherwise silent as to the nature or basis upon which such costs should be awarded, the discretion of the court is at large.

20. There is specific provision in CPR 36.20 which deals with the situation where a defendant's offer was accepted late, whereby the defendant's costs entitlement is capped at the appropriate fixed costs rate, says Mr Williams QC, but there is no equivalent provision in relation to claimants. He posed the question: to what extent is the court's discretion to award indemnity costs constrained? Insofar as the deputy district judge believed that it was, he was fettering his discretion and thus wrong. The indemnity costs principle, derived from CPR 44, is not limited to those cases which are exceptional, or where conduct is deserving of opprobrium. To demonstrate this, Mr Williams QC took the court to several authorities, both those dealing generally with the indemnity costs principle, and those said to be pertinent to the present case, where indemnity costs were awarded by "analogy"

21. The first, and in his submission, seminal case on which Mr Williams places reliance is that of **Petrotrade Inc v Texaco Limited [2002] 1 WLR 947**, in which damages were sought for breach of contract by Petrotrade, and a summary judgment application was made. When this was granted at first instance, it transpired that the claimant had bettered its own Part 36 offer made at an earlier stage by approximately $7000. This was a time when the civil procedure rules were being implemented for the first time, and on the summary judgment hearing the judge refused the claimant's application for an award of enhanced interest and cost pursuant to CPR 36.21 (which was one of several predecessors to CPR 36.17) because the judgment was not being obtained "at trial". On appeal this decision was upheld by Lord Woolf (the driving force, of course, behind the procedural reforms in 1999 and the CPR) but in a judgment with which both Clarke LJ and Latham LJ concurred, held, obiter, that the court always had power to order costs on an indemnity basis, and to award interest at such rate as was considered to be just, and further that in this case, although the first instance judge's decision would not be interfered with, it would have been appropriate to do so on the basis that Part 36 offers should carry a value for a claimant, and were intended to create incentives. Thus, the fact that an offer had been made and declined was a highly relevant consideration.

22. At paragraph 58 the Master of the Rolls identified the inherent jurisdictional power notwithstanding the restriction in the rules.

> "58. It will be noted that the opening words of rule 36.21 are "This rule applies *where at trial*"(my emphasis). Those words are not to be ignored. They mean that the rule does not apply where, as in this case, summary Judgment is given under Part 24. .....This may seem surprising, but it is to be borne in mind that a court always has the power to order costs on an indemnity basis. The court also has the general power to award interest at such a rate as it considers just....."

23. Lord Woolf went on to address the culture and rationale behind the CPR and the context in which an indemnity costs order could be made at paragraph 63ff:

> "63. The ability of the court to award costs on an indemnity basis .....should not be regarded as penal because orders for costs, even when made on an indemnity basis, never actually compensate a claimant for having to come to court to bring proceedings. The very process of being involved in court proceedings inevitably has an impact on

a claimant, whether he is a private individual or a multi-national corporation. A claimant would be better off had he not become involved in court proceedings. Part of the culture of the CPR is to encourage Parties to avoid proceedings unless it is unreasonable for them to do otherwise. In the case of an individual proceedings necessarily involve inconvenience and frequently involve anxiety and distress. These are not taken into account when assessing costs on the normal basis. .....

64. The power to order indemnity costs .....is a means of achieving a fairer result for a claimant. If a defendant involves a claimant in proceedings after an offer has been made, and in the event, the result is no more favourable to the defendant than that which would have been achieved if the claimant's offer had been accepted without the need for those proceedings, the message of Part 36.21 is that, prima facie, it is just to make an indemnity order for costs ..."

24. At paragraph 72 he set out the approach which should have been taken through the exercise of the court's discretion where the rules did not enable the power to be exercised expressly:

"72. Both the offers were followed by a summary Judgment granted by Langley J. In accordance with what I have said earlier in this Judgment, because they were summary Judgments means that the terms of Part 36.21 did not apply. It is still necessary, however, to consider whether, if Part 36.21 did or did not apply to the Judgment, this is a case where the judge in the exercise of his discretion should have made an indemnity order for costs or an order in relation to interest which
would be above the normal rate."

25. In a concurring judgment Clarke LJ said at paragraph 85:

"85. ..... In a case to which CPR 36.21 does not apply because the defendant is not held liable "at trial" within the meaning of CPR 36.21(1)(a), I do not think it is appropriate to apply the subsequent paragraphs of that rule as if the rule did apply. However, the court has a wide discretion as to both interest and costs. I entirely agree that the making and refusal of a Part 36 offer is a highly material factor in deciding how those discretions should be exercised."

26. Similarly at paragraph 89 Latham LJ endorsed the principle:

"89. It seems to me that, by analogy, it is right for the court to take into account the fact of an offer under Part 36 in a situation where Part 36.21 does not strictly apply."

27. It is in this respect that Mr Williams QC refers to the award of indemnity costs by "analogy". Addressing the general principles derived from the leading authority of **Excelsior Commercial v Salisbury Hammer [2002] CP Rep 67**, he accepts that there must be some circumstance taking the case "out of the norm", but this did nothing more than emphasise the broad nature of the discretion which the court had.

28. Reference was made to CPR 44.2 (4) (c) which dealt with offers to settle which did not come within Part 36, but which were relevant circumstances to be taken into account by the court when considering this broad discretion. Insofar as a such an offer might be relevant, it was not stretching the discretion where there was an applicable offer accepted months late

for a claimant to be compensated in relation to actual costs because of the emotional and financial pressure which he was put under.

29. Mr Williams QC relied upon the case of **Howell v Lees Millais [2011] EWCA Civ 786**, which involves a complicated set of facts relating to a trust, but which demonstrated, he submitted, another example of the validity of a claimant being awarded costs by analogy even though the relevant offer was not a Part 36 offer. He accepted that in **F and C Investments v Barthelmy [2013] 1 WLR 548**, Davies LJ had taken a robust approach in a case where the relevant offers were stated not to be offers under Part 36, by rejecting the use of Part 36 by "analogy" and the entitlement to any award of indemnity costs. The successful defendant was attempting to use Part 36 as a guide to the court in applying its discretion under CPR 44.3. It was submitted by Mr Williams QC that Davies LJ was led into error. Neither the case of **Petrotrade**, nor the expansive and broader approach of the Master of the Rolls in **Howell** was quoted before the court, and therefore the case is of limited authority.

30. The most recent case upon which Mr Williams relied was **OMV v Petrom v Glencore [2017] EWCA Civ 195**. This was not a case about indemnity costs, but interest, and it demonstrates that in a situation where a defendant had acted unreasonably in refusing to mediate, interest could be more than compensatory. In effect, the rules of the game had changed and the parties were to be encouraged both to make and accept reasonable offers of settlement.

31. A similar argument was advanced on the question of indemnity costs by analogy in the Technology and Construction Court before Coulson J in the case of **Fitzpatrick Contractors Ltd v Tyco Fire and Integrated Solutions and Others [2009] EWHC 274**. In that case the claimant had made an offer pursuant to CPR Part 36 in the sum of £10.25 million in February 2008, but it was only after the defendant had failed on several preliminary issues almost a year later that the offer was accepted. Thus the matter was substantially compromised, and whilst there was no issue on the interest payable on the settlement sum, the claimant believed that it was entitled to indemnity costs, because it had been induced into making an offer pursuant to CPR Part 36 in the expectation that if successful trial, indemnity costs would be recovered. This was sufficient not to give rise to a rebuttable presumption that indemnity costs would be recovered where there was late acceptance of the offer by analogy with CPR 36.14 (now CPR 36.17) or at the very least because of the defendant's conduct in not applying its mind to appropriate evaluation of the offer. In respect of the rebuttable presumption argument, Coulson J said this at paragraphs 26 and 27:

> "26. I do not accept that a claimant is "induced" into making an offer pursuant to CPR 36 simply because of the prospect that, if it was successful at trial, it would get indemnity costs. That is simply one possible incentive, and should not be over-emphasised. Nor do I consider that it would be a disincentive to a claimant in the position of Fitzpatrick to make any such offer at all, if it thought that the offer would be accepted out of time in circumstances where it would not recover indemnity costs. A claimant makes a Part 36 offer for a whole variety of reasons, not least in the hope of forcing the defendant to an early settlement. By so doing, the

> claimant also buys itself costs protection for the future, whether that costs protection is measured by either the standard or the indemnity basis. In addition, a claimant with a large claim, where Parts of it may be uncertain, is well advised to make a Part 36 offer in any event because, even if the claimant does not beat the offer, if its actual recovery comes closer to the amount of its own offer than to the amount of any offer made by the defendant, the claimant will still be in a strong position to recover all its costs following the trial.
>
> 27. Accordingly, for policy reasons, it seems to me that it would be wrong to presume an entitlement on the Part of a claimant to indemnity costs in these circumstances. Such a presumption would, I think, hinder rather than promote early settlements, for the reasons that I have sketched out above."

32. Mr Williams QC, whilst accepting that **Fitzpatrick** was a binding authority, sought to distinguish it on the basis that he was not arguing that a rebuttable presumption applied, but in any event he submitted that Coulson J did not give the authority of **Petrotrade** the pre-eminence which it deserved.

33. On behalf of the Defendant, Mr Marven relied on his skeleton argument. He submitted that the mandatory rule in CPR 45.2 9B has not been displaced by any aspect of CPR Part 36.20 and indeed by sub-paragraph (2) was specifically preserved. It is only in relation to CPR 36.17 which dealt with post-trial consequences that the Court of Appeal in **Broadhurst** had acknowledged that the indemnity cost benefit specifically referred to in that rule should be given precedence over a presumption that fixed costs applied.

34. He challenged the submissions advanced by the Claimants which presupposed that where the rules were silent as to the basis of costs it was open to make a determination as to either indemnity or standard basis costs. This, he said, was a fallacy, because indemnity costs are always provided for. In the context where standard basis costs are replaced by fixed recoverable costs, the latter become the norm. Insofar as the Claimants appear now to be inviting the court to exercise its broader discretion under rule 44, he submitted by reference to paragraph 14 of the judgment of the deputy district judge, that this had been no part of the case at first instance. On questions of policy, if it was right to presume an entitlement to indemnity costs this, in fact, would create a reverse incentive to press on to trial, where a defendant was faced with the prospect of a penalty for late acceptance, in the hope that it could do better than the claimant's offer.

35. Mr Marven submitted that if the rules committee had wanted to indicate a greater sanction for late acceptance by a defendant of a claimant's offer, in the context of fixed recoverable costs (or even generally) it could have done so. He accepted that there would be circumstances where a defendant in a fixed costs case could take advantage within the staging posts of waiting until accepting the offer but that was simply part of the "swings and roundabouts" just as much as a claimant could take advantage by making its Part 36 offer when it was more profitable to do so, at the beginning of the next stage.

36. The decision of the Court of Appeal in **Petrotrade** was easily distinguishable and in any event CPR 36.17 had been amended to remove any reference to trial, but to refer to "judgment". In that case, the analogy, says Mr Marven, is between succeeding at trial, and succeeding at summary judgment. In the **Fitzpatrick** case, upon which he places significant reliance, it is submitted that all the relevant authorities were before the judge. This case is on all fours with **Fitzpatrick**, although obviously not concerned with standard basis as opposed to indemnity costs.

37. Mr Marven submits that Part 36 is a self-contained code, which makes specific reference to those cases were fixed recoverable costs apply. Insofar as any tension was identified in **Broadhurst v Tan**, in the present case the court is not concerned with any conflicting rules.

Discussion

38. It is a valid observation by Mr Williams QC that if Deputy District Judge Haisley was correct in his determination, Part 36 offers in cases to which the fixed costs regime applies and which do not proceed to trial, carry little benefit for claimants. The normal advantages of late acceptance, being the payment of incurred costs albeit on a standard assessed basis would not apply, and the only parallel benefit would be the additional fixed cost payment for proceeding to the next staging post (as happened here) if acceptance is notified beyond the 21 days. Insofar as the Part 36 procedure was designed to incentivise settlement in the majority of fixed costs cases the tangible benefits would now only materialise at trial, assuming the offer was bettered by the award. In the light of the decision in **Broadhurst v Tan**, the benefit, amongst others, would be an entitlement to the assessment of costs on a conventional indemnity basis, thus qualifying CPR 45.29B and the applicability of the fixed costs regime.

39. The question which this court must address is whether the clear policy of incentive to settle and early resolution of disputes encouraged by the civil justice reforms and the Jackson ethos and endorsed by the Court of Appeal in **Broadhurst**, enables a discretionary power to award indemnity costs for late acceptance to be implied, notwithstanding the absence of any express provision within the Civil Procedure Rules. This is the import of Mr Williams' submission that indemnity costs can be awarded by "analogy".

40. The fact that Mr Williams QC does not draw directly upon the broader discretion available in CPR 44.2 to award indemnity costs on a conduct basis (although there is indirect reliance upon CPR 44.2 (4)(c) and the reference to admissible offers outside the costs consequences of Part 36), or to invoke the exceptional circumstances qualification to the limits of fixed recoverable costs pursuant to CPR 45.29J, creates a steeper hill for him to climb.

41. The starting point, in the judgment of this court, must be to consider whether the power to award indemnity costs by analogy for late acceptance when the court is determining a costs liability under CPR 36.13 (4) is either supported by the authorities relied upon or otherwise justified in a conventional costs case, before deciding whether or not the fact that the case falls within the fixed costs regime makes any difference.

42. In the case of **Petrotrade**, the Court of Appeal was identifying a very real unfairness which arose because of an apparent anomaly or lacuna in CPR 36.21 (now 36.17) which did not apply to summary judgment cases. It was considered that the power to award indemnity costs (which was not part of an inherent jurisdiction so much as derived from CPR 44) was appropriate to address such unfairness, but significantly, in my judgment, the unfairness arose from the process by which the defendant involved the claimant in court proceedings, but did not do better than the offer which had been rejected at an earlier stage. There was no question of a late acceptance of a Part 36 offer, or the consequences which are now derived from CPR 36.13 (4)(b). The ratio, of the case, as I take it to be, was that a judge in such circumstances of unfairness did have a discretion (his power being derived from the indemnity cost provision in CPR 44) and although the decision to refuse indemnity costs was not interfered with, the comments of their Lordships were, as is acknowledged, obiter.

43. **Petrotrade** was in fact referred to before Coulson J in the **Fitzpatrick** case, and although this was a court of inferior jurisdiction it was plainly dealing with a situation which was far more akin to the present case. Although on its face, the argument of Mr Williams QC does not seek to impute a presumption similar to that advanced by counsel in the **Fitzpatrick** case, it seems to me that his submission amounts to virtually the same. There is nothing peculiar about the facts of the present case to distinguish it from any claim where there has been late acceptance of the Part 36 offer under the fixed costs regime, (or indeed any assessed costs case) and his process of reasoning, to the effect that the Defendant's initial refusal of the offer followed by late acceptance takes the case out of the norm, implicitly suggests that there should be a presumption in such circumstances. This argument was soundly rejected by Coulson J, who not only disavowed any construction of CPR 36.10 (now 36.13) to enable an indemnity costs entitlement to be implied outwith the analysis under CPR 44.3 (as it then stood), but also commented that an indemnity costs risk in such circumstances would be counter-productive to late settlements, because it would discourage out of time acceptance of offers, and give a reason for an offeree to push a matter on to trial.

44. The other cases referred to by Mr Williams QC do not, in my judgment, provide any assistance, other than by way of confirmation of general undisputed principles.

45. Accordingly, as a matter of construction of CPR 36, in my judgment, in those cases where costs fall to be assessed conventionally, that is either on a standard or indemnity basis, absent any issue of conduct entitling a claimant to invoke CPR 44.2, the only power to award

indemnity costs is after judgment under CPR 36.17 (and indeed this is a *right* of the claimant unless the court considers it unjust).

46. The only question which then arises is whether the fact that the present claim exists within the fixed cost regime where there cannot be a conventional distinction between standard and indemnity costs and where there is an apparent restriction in recovery under 45.29B, allows for a different approach.

47. Whilst there is a perception in some quarters that the introduction of the fixed costs regime significantly curtailed profit cost recovery in low value cases and that the system of rewarding work carried out up to defined staging posts on a predetermined basis was inherently disadvantageous, there is little doubt that that the rough and ready approach which provides a level of certainty as to costs will in many instances provide a real benefit. The position was summarised by Briggs LJ in the case of **Sharp v Leeds City Council** [**2017 EWCA Civ 33**] (which dealt with a pre-action disclosure application):

> "The fixed costs regime inevitably contains swings and roundabouts, and lawyers who assist claimants by participating in it are accustomed to taking the rough with the smooth, in pursuing legal business which is profitable overall."

48. It is relevant, in my judgment, that Part 36 in its current incarnation makes specific reference to fixed costs cases (CPR 36.13 (1) and (3)), and in one respect devotes two entire rules to such cases, when addressing the consequences of accepting a Part 36 offer (CPR 20) and following judgment (CPR 36.21) for a claimant who fails to beat a defendant's Part 36 offer. It is axiomatic that in both rules the draftsman has referred specifically to defendant Part 36 offers and not those made by claimants. They could be two reasons for this. Either it was an oversight and there is a lacuna in the rules; or alternatively it was within the specific contemplation of those drafting that CPR Part 45 contained a sufficiently clear and concise matrix of applicable costs to enable the claimant, whose claim was brought to an end by the defendant's acceptance (whenever that might be) to determine easily the costs entitlement under the appropriate tables. It seems to me that the latter is far more likely. It would have been open to the rules committee to have provided a similar provision for late acceptance specifically directed to fixed costs cases as that contained in CPR 36.20 (4)(b) addressing a defendant's liability for additional accrued costs in such cases.

49. Thus, there is no provision for moving from fixed costs to assessed standard basis costs as a consequence of late acceptance, where the fixed costs regime applies. In this regard I find myself in respectful disagreement with my brother judge His Honour Judge Gosnell, in the unreported case of **Richardson and Wakefield Council** which was brought to the attention of this court briefly at the end of the hearing. Judge Gosnell appears to have arrived at the conclusion that the absence of any variation of CPR 36.17 (5) in the new rule 36.20, save in relation to defendants' offers, and the ratio of the Court of Appeal in **Broadhurst v**

Tan that CPR 36.17 trumped CPR 45, so to speak, whereby the claimant was entitled to an assessment of costs by the court rather than to fixed costs where there had been late acceptance of an offer by a defendant. He proceeded to uphold the decision of the first instance judge that these were properly assessed on a standard basis. In other words, Judge Gosnell has arrived at something of a halfway house between the position adopted by District Judge Besford in **Sutherland** and the deputy district judge the present case.

50. Both counsel rely on the decision in **Richardson** which was referred to briefly at the close of submissions, to the extent that any support for their respective positions can be derived, but acknowledge that it is not binding on this court. Mr Williams QC has refrained from supporting the decision of District Judge Besford in **Sutherland**, which he acknowledged was based upon a strained interpretation, although he reserved his position were this matter to be referred to a higher court. It seems to me that whilst there is a specific reference to the "matters listed" in CPR 36.17 (5) for the purposes of determining how the court should determine liability for costs in the period following late acceptance (by either claimant or defendant) this is clearly intended to circumscribe the discretion of the court in considering whether it is *unjust* to make a particular order, and could not be interpreted as introducing the benefits in CPR 36 17 (4) which are clearly intended to apply only after judgment is entered. For what it is worth, in my judgment there is no substance to the first ground of appeal which has been sensibly sidelined by Mr Williams QC in his submissions. In these circumstances, if there is no justification for assessed standard basis costs taking a matter out of the fixed costs regime, it becomes a quantum leap to entitle a claimant, albeit by discretionary exercise of a more general power, to indemnity costs.

51. A further argument pursued on behalf of the claimant, which is relevant to this question as to whether an interpretation of CPR 36.13 allows the application of other than fixed costs in a case to which CPR 45.29 lies, namely that the terminology "*date of expiry*" and "*date of acceptance*" suggests a conventional work done assessment as opposed to the simple application of fixed costs, is in my judgment without substance. This rule is intended to apply to both fixed and non-fixed costs cases, and insofar as special provision is made elsewhere (as I have indicated above) for consequences in fixed costs cases, it seems to me that if it was intended by these words that CPR Part 45 was to be disregarded in the particular situation of late acceptance, the rule would have specifically stated this. Furthermore, it is known that there can be different consequences for a claimant in terms of fixed costs (as indeed happened here) if the date of acceptance has taken his claim the past the next staging post to bring to bear a higher fixed costs entitlement.

52. Insofar as **Broadhurst v Tan** provides support for the policy underpinning CPR Part 36 of providing claimants with generous incentives to make offers, and defendants' with countervailing incentives to accept them, this was clearly within the context of post judgment consequences. The clear ratio of the case was concerned with construction of the rules, and competing tensions between CPR Part 45 and the restricted recoverability of costs in fixed costs cases, and CPR Part 36.14 (now 36.17) and identified that there was a specific route to

the recovery of indemnity costs in the post judgment scenario which was not limited to non-fixed costs cases. No question of construction of the rules arises in the present case.

53. In any event, in my judgment there are several reasons why the incentive to make a Part 36 offer is not significantly undermined in a fixed costs case by denying the claimant the benefit of assessed costs (whether on a standard or indemnity basis).

54. First of all, as I have indicated above, the fixed cost entitlement falls to be determined by reference to the appropriate staging post. A defendant who delays accepting a reasonable proposal of compromise runs the risk of tipping the case into the next stage which in most situations will have the effect of doubling the costs liability.

55. Second, in the light of the decision of the Court of Appeal in **Broadhurst**, the 36.17 post judgment costs benefits are available to the claimant. In the majority of cases, it is likely that a claimant, by his legal representatives, will have an eye to securing a favourable position if the offer is bettered following a trial. It is the experience of this court that offers are not always pitched at a level which is attractive and likely to cause early resolution, but nevertheless realistic enough be bettered by judicial determination at trial, especially on the part of those solicitors who know the tribunals before which the hearing will take place.

56. Third, the court retains the power, pursuant to CPR 45.29J to award costs in excess of fixed recoverable costs in "*exceptional circumstances*". It is open to a claimant who has been disadvantaged by a deliberate or tactical delay in accepting a reasonable offer of compromise to apply under this rule. An obvious example might be the situation where the Part 36 offer is accepted "close to the wire", so to speak, between the staging post which arises after allocation and before listing, during which period a claimant has incurred the cost of preparing the case, documents, statements, medical reports etc and yet does not have the advantage of the higher rate payable. Conversely there is a real benefit, as here, if the case slips into the next stage, say, because proceedings have just been issued. It would be inappropriate to circumscribe any particular situation in which "exceptional circumstances" might be said to exist, as every case will be fact specific.

57. Fourth, the rough and ready nature of the fixed costs regime cannot be ignored. There will be swings and roundabouts, but the experienced claimant solicitors will be able to maximise the extent of their recoverable costs by identifying the most appropriate time at which to make offers. In other words, the system can work just as much in favour of claimant, as the defendant.

58. Finally, where any issue of conduct arises, the discretionary power to award costs, including indemnity costs, is exercisable pursuant to CPR 44.2, even if such cases are likely

to be few and far between. This would also be relevant to the situation described at paragraph 56 above.

59. For all these reasons I have come to the conclusion that the decision of the deputy district judge should be upheld. His approach to the interpretation of Part 36 in the context of the fixed cost regime cannot be impugned. If there are to be any additional and beneficial consequences to a claimant arising from late acceptance in a fixed costs case, in my judgment these will have to be affirmed on a policy basis either by a higher court, or by reconsideration on the part of the rules committee. For now, it may well be that precise fairness as to costs in individual cases is sacrificed on the altar of certainty which Part 45 has introduced.

60. I invite the parties to agree any consequential orders.

HH Judge Graham Wood QC