Case No: HQ15P04032
SC-2019-BTP-000246

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
Strand, London WC2A 2LL

Date: 29/01/2021

Before:

COSTS JUDGE LEONARD

- -

Between:

Natalie Best (Administratrix Of the Estate of Phyllis Stuck Deceased)	**Claimant**
- and -	
Luton & Dunstable Hospital NHS Foundation Trust	**Defendant**

- -
- -

Margaret McDonald (instructed by **Penningtons Manches Cooper**) for the **Claimant**
Eric Clegg (Acumension) for the **Defendant**

Hearing date: 10 November 2020

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Approved Judgment

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

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COSTS JUDGE LEONARD

COSTS JUDGE LEONARD:

1. The detailed assessment of the Claimant's costs of this Clinical Negligence claim was listed for 10 and 11 November 2020 with a time estimate of two days. On about 10 September 2020, the Defendant accepted, out of time, a part 36 offer from the Claimant in settlement of the bill and interest to the date of expiry of the offer. The balance of interest was agreed, and the only matter remaining was the quantification of the Claimant's costs of assessment, to be paid by the Defendant. The hearing was relisted for two hours on 10 November for the summary assessment of those costs in accordance with CPR 47.20(5).

2. The hearing on 10 November was a videoconferencing hearing, held via Microsoft Teams. The summary assessment of the Claimant's costs of assessment was completed and the parties agreed the resulting figure at £58,119.80. The parties agreed that this and the agreed balance of interest should be recorded in an order, to be drawn up by counsel for the Claimant.

3. Shortly after the hearing I received an email message to the effect that another issue had come up. I re-entered the meeting to find that the Defendant's representative at the hearing, Mr Stott was not present. Counsel for the claimant, Ms McDonald, explained to me that she had attempted to contact Mr Stott and that the issue she needed to raise was that the Claimant wished to claim the benefits of a successful part 36 offer in relation to the costs of assessment. I left it to the Claimant's representatives to contact Mr Stott so that the hearing could be restarted with everyone present.

4. We reconvened shortly afterwards, with all representatives present. Mr Stott objected to a new issue being raised after the conclusion of the hearing, and I drew the parties' attention to a judgment I had previously given in *Bourne v West Middlesex University Hospital NHS Trust* (SCCO reference CL1702494, 2 October 2017) in which I had concluded that a Part 36 offer could not be made in relation to the costs of detailed assessment proceedings. Arrangements were made, accordingly, for both issues to be addressed in written submissions. These are my conclusions.

Whether the Claimant Should be Allowed to Raise the Issue Post-Hearing

5. Some of the Defendant's submissions query why the part 36 issue was not raised during the hearing, rather than after its conclusion. In fact Ms McDonald did explain in the reconvened hearing that she had omitted to address the point. With hindsight I realise that the fact that this was a simple oversight may not have been as clear to Mr Stott as it was to me, because he had not been present when Ms McDonald initially explained to me why she was requesting that we reconvene, but that was the essence of what she was saying.

6. Mr Clegg for the Defendant suggests that the Claimant should have filed a formal application to raise a new issue after the conclusion of the hearing. He refers to *Re L and B (Children)* [2013] UKSC 8, in which the Supreme Court considered the appropriate exercise of a judge's power to change a decision at any time before the relevant order is perfected, and *Vringo Infrastructure Inc v ZTE (UK) Ltd* [2015] EWHC 214 (Pat), in which Mr Justice Birss (applying the principles of *Re L and B* and *Ladd v Marshall* [1954] 1 WLR 1489, [1954] 3 All ER 745 , CA) refused a

defendant's application, after judgment had been given but before an order was sealed, to amend its pleading, rely on new evidence and reopen the trial.

7. Mr Clegg argues that the principles applied by Birrs J, as is evident from his judgment, apply equally to the introduction of a new argument. The Part 36 argument could have been raised, with reasonable diligence, during the hearing. It is also disproportionate to raise the issue post-hearing, given that the value of the new argument in financial terms is (assuming that the Claimant seeks only a 10% uplift on the costs awarded, pursuant to CPR 36.17(4))) around £5,800. The consequence of this is he says that the Defendant did not achieve the final resolution of the case which it had a right to anticipate, but had to put up with the delay and additional cost necessarily attendant on written submissions and a written decision.

8. For the Claimant Ms McDonald relies upon the "slip rule" at CPR 40.12. She argues that the omission to raise the Part 36 offer was quickly identified and the matter brought back to a hearing within the original allocated time. It is not uncommon for parties to leave the courtroom, notice an error or omission, and go back to the court for the error or omission to be rectified. There is no real prejudice to the Defendant, in drawing the court's attention to the fact that the Claimant had beaten her own Part 36 offer.

9. The first point to make is that I do not believe that I am being asked to change my mind about a decision I have already made. The summary assessment of the Claimant's costs is undisturbed at £58,119.80. In the reconvened hearing I was asked only to address the consequences of that assessment in the light of the Claimant's Part 36 offer, a point that had not previously been put to me.

10. Given that Ms McDonald was able to raise her point within the time originally allocated for the hearing, I think it is fair to approach the issue on the basis that she did in fact do so before the hearing ended. In other words, the hearing had not quite ended when we thought it had, because not all the issues had been addressed. As Ms McDonald says, the situation is really not very different to the parties, having left for a short period, re-entering the courtroom within the time allocated for the hearing to pick up a point that had been overlooked.

11. If I am wrong about that, however, I am sure that the Claimant should be able to raise the Part 36 point, for these reasons.

12. On the basis that the hearing had ended, I am not sure that either *Re L and B (Children)* or *Vringo Infrastructure* are entirely on point. Like Birrs J in *Vringo Infrastructure*, I am asked to consider something new, but the Claimant is not in this case seeking to amend her case or introduce new evidence. She is simply asking me to entertain a point that she should have raised, but omitted to raise, before the hearing was over.

13. For that reason, I do not think that the principles set out in *Ladd v Marshall*, which have to do with the admission of new evidence on appeal, have any real bearing. I am however assisted, as was Birrs J, by the principles identified by the Supreme Court in *Re L and B (Children)*. In essence I must apply the overriding objective to deal with the case justly, considering relevant factors such as whether any party had, in

consequence of the Claimant's omission, acted to that party's detriment or otherwise been prejudiced.

14. It seems to me that the simple answer to that is "no". As Ms McDonald says, the oversight was spotted promptly and the hearing was reconvened within its original time slot. The reason that the point went to written submissions, rather than been dealt with on the spot, was that I thought that in order to present their case properly both parties needed an opportunity to understand and respond to the logic of my unreported decision in *Bourne*, and time did not allow for that. That would have happened even if Ms McDonald had raised the point immediately following the summary assessment.

15. In fact the only material difference caused by the Claimant's omission is that the Defendant has been given an opportunity to argue, albeit unsuccessfully, that the Claimant should not now be able to raise the point. There is no prejudice to the Defendant in that. It seems to me that in all the circumstances, the application of the overriding objective requires that the Claimant be allowed to raise the matter of her Part 36 offer.

16. As a footnote I would add that I do not think, strictly speaking, that CPR 40.12 has any application, because that rule is designed to correct errors in orders and judgements that have already been perfected. I did however find it instructive, on reviewing the notes in CPR 40.12 in the White Book, to follow their reference to the observations of Rix LJ and Lewison LJ in *Tibbles v SIG plc* [2012] EWCA Civ 518, on the subject of the court's power to change a perfected order, whether under CPR 40.12 or CPR 3.1(7), to remedy an accidental omission of counsel or solicitor to ask for something which ought to have been provided for.

17. Evidently both R LJ and Lewison LJ thought that it could be appropriate to do so provided that an application to do so was made promptly, for example by the following day. If that is right where a hearing has concluded and an order has been perfected, it must be right where a hearing has concluded but the order has not been perfected.

Whether the Claimant Can Rely Upon a Part 36 Offer as to the Costs of Detailed Assessment

18. These are the pertinent provisions, for present purposes, of the Civil Procedure Rules. CPR47.20(1):

> '(1) The receiving party is entitled to the costs of the detailed assessment proceedings except where –
>
> (a) the provisions of any Act, any of these Rules or any relevant practice direction provide otherwise; or
>
> (b) the court makes some other order in relation to all or part of the costs of the detailed assessment proceedings…'

19. CPR47.20(4):

> 'The provisions of Part 36 apply to the costs of detailed assessment proceedings with the following modifications –
>
> (a) 'claimant' refers to 'receiving party' and 'defendant' refers to 'paying party';
>
> (b) 'trial' refers to 'detailed assessment hearing';
>
> (c) a detailed assessment hearing is "in progress" from the time when it starts until the bill of costs has been assessed or agreed;
>
> (d) for rule 36.14(7) substitute "If such sum is not paid within 14 days of acceptance of the offer, or such other period as has been agreed, the receiving party may apply for a final costs certificate for the unpaid sum.";
>
> (e) a reference to 'judgment being entered' is to the completion of the detailed assessment, and references to a 'judgment' being advantageous or otherwise are to the outcome of the detailed assessment.'

20. CPR47.20(7):

> '(7) For the purposes of rule 36.17, detailed assessment proceedings are to be regarded as an independent claim.'

21. CPR 36.2(3):

> '(3) A Part 36 offer may be made in respect of the whole, or part of, or any issue that arises in—
>
> (a) a claim, counterclaim or other additional claim…
>
> (Rules 20.2 and 20.3 provide that counterclaims and other additional claims are treated as claims and that references to a claimant or a defendant include a party bringing or defending an additional claim.)'

22. CPR 36.17:

> '(1) Subject to rule 36.21, this rule applies where upon judgment being entered… (b) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer…
>
> (4) …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 that figure….' |

The Claimant's Part 36 Offers

23. The Part 36 offer ultimately accepted by the Defendant against the Claimant's bill of costs had been made by the Claimant on 13 March 2020. The amount was £475,000.

24. The Claimant's Part 36 offer in relation to the costs of assessment was made on 16 October 2020. The amount was £52,000. That is £6,119.80 less than the assessed figure, so the Claimant has bettered her offer.

Bourne

25. In *Bourne* I found it necessary, in explaining my reasoning, to set out some established principles of detailed assessment. I shall revisit some of them now, for ease of reference.

26. There can be no detailed assessment proceedings without an authority for assessment. As between parties, that will be either an order for the payment of costs by the paying party to the receiving party or a deemed order to that effect. One example of a deemed order is CPR 44.9(1)(b), which creates a deemed order for costs in favour of a claimant up to the point of acceptance of a Part 36 offer.

27. The court's jurisdiction to undertake a detailed assessment of costs rests upon that underlying authority. CPR 47.20 further empowers the assessing court to make an order as to the costs of the detailed assessment proceedings themselves. Those costs are normally summarily assessed at the conclusion of the detailed assessment proceedings (CPR 47.20(5)).

28. Where, as here, the authority for assessment is an order made in an underlying claim (in this case, as in *Bourne*, for damages for negligence), the detailed assessment proceedings remain part of that action. The receiving party's claim for costs is not an independent claim: it is made under the order for costs made on the conclusion of the underlying claim.

29. CPR Part 36, as modified by CPR 47.20, has applied to detailed assessment proceedings since April 2013. CPR 47.20(7) makes an exception to the general principle by providing that, for the purposes of rule 36.17, detailed assessment proceedings are to be regarded as an independent claim. That ensures that a party can make an effective Part 36 offer in detailed assessment proceedings.

30. The problem in *Bourne* was that, the parties having agreed the amount to be paid in relation to the receiving party's bill, the receiving party drew up a separate bill for the costs of the assessment and proceeded in all respects as if that justified a separate set of detailed assessment proceedings. Taking that approach, the claimant made a Part 36 offer and, on the basis that he had bettered his own offer, then claimed the usual consequences under CPR 36.17: (a) interest on the assessed amount at 10% above base rate from the date of expiry of the offer; (b) costs of the "new" assessment on the indemnity basis from the date of expiry: (c) interest at 10% above base rate on those costs; and (d) an additional 10% of the assessed amount.

31. I found that there was one authority for assessment, which was the order for costs in the underlying clinical negligence proceedings; that, in consequence, there could be only one set of detailed assessment proceedings; and that the determination of the costs of assessment was only a part of that process. Given that CPR 47.20(7) does not provide that the determination of the costs of detailed assessment proceedings is itself to be regarded as an independent claim I concluded that Part 36 had no application and that the claimant was not entitled to the additional sums sought.

The Claimant's Submissions

32. Ms McDonald argues that the purpose of the Part 36 provisions relied upon by the Claimant is to allow a receiving party to make an effective part 36 offer and to levy an appropriate penalty where a good part 36 offer is not accepted. It was introduced to costs proceedings in 2013 for that purpose, as part of a programme of reforms.

33. Part 36 applies to detailed assessment proceedings by virtue of CPR 47.20, which provides for the detailed assessment proceedings to be treated as an independent claim. Within those proceedings a Part 36 offer can be made, as provided for at CPR 36.2(3), in respect of the whole, or part of, or any issue that arises in the claim. That must, she submits, include the costs of the detailed assessment proceedings.

34. In *Bourne* the defendant complained that the claimant was seeking a double recovery of costs. There is no question of double recovery here. CPR 36.17(4) provides that the Claimant can recover an additional 10% only once in the course of the detailed assessment proceedings.

Conclusions

35. I am called upon to interpret the Civil Procedure Rules, and in doing so I am required by CPR 1.2 to give effect to the overriding objective of dealing with cases justly and at proportionate cost.

36. Thanks to CPR 47.20(7), detailed assessment proceedings are treated as an independent claim. The question I have to decide for present purposes is whether the award and the quantification of the costs of assessment fall, as the Claimant contends,

within "any issue that arises in" that independent claim for the purposes of CPR 36.2(3). My conclusion is that it does not, for these reasons.

37. The first is that before the introduction of the Part 36 regime to detailed assessment proceedings in 2013, it was already possible to make an offer in respect of the whole, or part of, any issue that arose in a claim. The relevant wording appeared at wording of CPR 36.2(2)(d). If the issues arising on the detailed assessment of costs were issues in the claim for the purposes of CPR.2(2)(d), it would already have been possible to make a Part 36 offer in detailed assessment proceedings and it would not have been necessary, in 2013, to make specific provision to introduce the Part 36 regime to detailed assessment.

38. The necessary implication is that the issues referred to, Pre-April 2013, at CPR 36.2(2)(d) were the issues in the claim itself, which had been determined by the time an order for costs was made. Any award and assessment of costs would follow, as a separate process, once those issues had been determined (whether by agreement or judgment).

39. The same must be true of CPR 36.2(2)(d). CPR 47.20(7) allowed these detailed assessment proceedings to be treated as an independent claim. The issues in that claim were set out in the bill of costs, points of dispute and replies. They were resolved on the Defendant's acceptance of the Part 36 offer. The award and quantification of the costs of assessment followed, but they were not issues in the deemed independent claim, all of which had already been resolved.

40. This conclusion seems to me to be supported by the wording of CPR 36.17(4) itself. The provisions of CPR 36.17(4) are prescriptive. The court must, unless it considers it unjust to do so, order that a claimant (in detailed assessment proceedings, the receiving party) receive all of the listed awards including indemnity basis costs and additional interest on those costs. That envisages a claim, or part of a claim or an issue in a claim, which is in itself capable of conferring an entitlement to costs. In short, it would be what is described at CPR 47.20(7) as an independent claim. The costs of detailed assessment proceedings do not carry their own costs and do not meet that criterion.

41. That takes me to what seems to me to be a decisive obstacle for the interpretation of the rules contended for by the Claimant. If the Claimant is right then any Part 36 offer made as to the costs of assessment would, on acceptance, result in a further deemed order for costs under CPR 44.9(1)(b). By virtue of Practice Direction 44 paragraph 8.2, that deemed order would be an authority for detailed assessment.

42. The receiving party would, accordingly, be entitled to draw up another bill to cover its costs of working on the costs of the detailed assessment, and to start a new set of proceedings for the detailed assessment of those costs. To avoid a Default Costs Certificate, the paying party would have to file Points of Dispute. The receiving party could then apply for detailed assessment and, pursuant to CPR 47.20, seek not only "the costs of the costs" claimed in its bill, but the additional costs of the new set of detailed assessment proceedings.

43. The receiving party could also make yet another Part 36 offer as to the costs of the new detailed assessment proceedings. If the paying party were to refuse to accept that

offer, it would be at risk of incurring the additional penalties provided for by CPR 36.17. If it did accept the offer, then the receiving party could start again with another bill claiming "the costs of the costs of the costs".

44. As Mr Clegg for the Defendant points out, there is at least the potential for an indefinite cycle of Part 36 offers and new detailed assessment proceedings, each parasitic upon the last. Even one such parasitic set of detailed assessment proceedings would be disproportionate, duplicative and unfair to the paying party. That is not consistent with the overriding objective.

45. In summary my conclusion is that the costs of the detailed assessment proceedings do not, for the purposes of CPR 36.17(4), fall within "any issue that arises in the claim". The Claimant's submission that it does seems to me to be inconsistent with the way in which CPR 36 has been interpreted since well before 2013. It is also, in my view, inconsistent with the full provisions of CPR 36.17. To accept it would be to override my obligation to interpret the Civil procedure rules in accordance with the overriding objective.