England and Wales Court of Appeal (Civil Division) Decisions

Neutral Citation Number: [2011] EWCA Civ 1584
Case Nos: A2/2010/2172 & A2/2010/2483

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM MANCHESTER COUNTY COURT
His Honour Judge Platts
District Judge Wheeler & District Judge Smith
9MA20271 & 6MA23097

Royal Courts of Justice
Strand, London, WC2A 2LL
19/12/2011

Before:

LORD JUSTICE PILL
LORD JUSTICE MOORE-BICK
and
LORD JUSTICE AIKENS
sitting with
SENIOR COSTS JUDGE HURST as Assessor

Between:

SANDRA SOLOMON — **Claimant/ Appellant**

- and -

CROMWELL GROUP PLC — **Defendant/Respondent**

and between:

DONNA OLIVER — **Claimant/ Appellant**

-and-

SANDRA DOUGHTY **Defendant/ Respondent**

Mr. Alexander Hutton (instructed by MTA Solicitors) for the appellants
Mr. Jeremy Morgan Q.C. for the respondent Cromwell Group PLC (instructed by Taylor Rose Law LLP) and for the respondent Sandra Doughty (instructed by Keelys LLP)
Hearing date : 19th October 2011

HTML VERSION OF JUDGMENT

Lord Justice Moore-Bick :

1. These two appeals have been heard together because they raise common issues relating to the construction of Part 36 of the Civil Procedure Rules and its inter-action with Part 44, which contains general rules about costs, and Section II of Part 45, which contains rules about costs in certain kinds of road traffic accident claims.

2. Each of these cases concerns a claim for damages suffered as a result of a road traffic accident and in each case the parties were able to reach agreement as a result of the defendant's making one or more Part 36 offers in sums totalling less than £10,000. In each case the defendant agreed to pay the claimant's costs, but in each case the parties were unable to agree on the amount of the costs and so the claimant started proceedings under rule 44.12A to have the costs assessed.

3. The claimant in each case asked the court to make an order for costs to be assessed on the standard basis, relying on rules 36.10(1) and (3) which provide as follows:

> "(1) . . . where a Part 36 offer is accepted within the relevant period the claimant will be entitled to the costs of the proceedings up to the date on which notice of acceptance was served on the offeror.
>
> . . .
>
> (3) Costs under paragraphs (1) and (2) of this rule will be assessed on the standard basis if the amount of costs is not agreed."

4. The respondents argued that costs should be awarded in accordance with the provisions of Section II of Part 45, which provides for what are sometimes described for convenience (though inaccurately) as "fixed costs" in "costs-only" proceedings arising out of road traffic accident cases in which the agreed damages include damages in respect of personal injury and do not exceed in total £10,000. In such cases rule 45.8 provides that the only costs to be allowed are those prescribed in rules 45.9 to 45.11, unless the court is satisfied that there are exceptional circumstances making it appropriate to award a greater amount (rule 45.12). In *Lamont v Burton* [2007] EWCA Civ 429, [2007] 1 W.L.R. 2814 Dyson L.J. explained that the origin of these provisions lay in

> "a series of negotiations which were conducted under the auspices of the Civil

Justice Council. The parties to the negotiations were some liability insurers who promoted the interests of defendants, and a combination of claimants' solicitors (represented by Association of Personal Injury Lawyers and the Motor Accident Solicitors Society) and legal expenses' insurers who promoted the interests of claimants."

The court considered that the purpose of the new rules had been correctly summarised by Simon J. in *Nizami v Butt* [2006] EWHC 159 (QB), [2006] 2 All ER 140 as being to provide an agreed scheme of recovery which was certain and easily calculated by providing fixed levels of remuneration which might over-reward in some cases and under-reward in others, but which were regarded as fair when taken as a whole. It follows that in any individual case the sum awarded may be larger or smaller than that which would have been awarded following a detailed assessment on the standard basis.

5. In *Solomon v Cromwell* District Judge Wheeler held that on the acceptance of the defendant's offer rule 36.10 came into operation and that by virtue of rule 44.12(1)(b) an order for costs on the standard basis was deemed to have been made. As a result, Section II of Part 45 did not apply, but on a detailed assessment it would be open to the costs judge to have regard to the costs that would have been recoverable under that Section.

6. On appeal Judge Platts reached a different conclusion. He held that rule 36.10 applies only to the costs "of the proceedings" and since no proceedings had been started in relation to the substantive claim, it had no application. It followed that rule 36.10(3) had no application either and that no order for costs was deemed to have been made under rule 44.12. The case therefore fell squarely within Section II of Part 45. In addition, he held that since the claimant had invoked the court's jurisdiction under rule 44.12A, it was bound by rule 44.12A(4A) to assess costs in accordance with Section II of Part 45.

7. In *Oliver v Doughty* District Judge Smith held that the effect of Section II of Part 45 is to establish the reasonable and proportionate costs of the various items to which it relates for the purpose of the assessment of recoverable costs in cases of the kind to which it refers. He therefore reached the same conclusion, albeit by a different route.

8. In each case the claimant appeals against the judgment below refusing to award costs on the standard basis. It is said that the terms of Part 36 create a right to have costs assessed on the standard basis which cannot be overridden by Section II of Part 45. In *Oliver v Doughty* it is said in addition that the terms on which the parties settled the dispute provide for costs to be paid on the standard basis, whatever might otherwise be the effect of the rules. It will be necessary, therefore, to examine in greater detail the terms of the correspondence between the parties in that case. It is convenient to begin, however, by examining the Rules themselves in order to ascertain their effect aside from any agreement to the contrary.

9. The Civil Procedure Rules have been subject to continuous development since their introduction in April 1999. Part 36 was the successor to R.S.C. Ord. 22 (payment into court) and was intended to encourage parties to compromise proceedings by providing protection against liability for costs similar to that previously available under R.S.C. Ord. 22, as well as other incentives that had not previously been offered. It is not surprising, therefore, that in its original form Part 36 did not extend to offers to settle made before proceedings had been commenced, although provision was made for the court to take such offers into account when making an order as to costs. From the outset, however, one consequence of accepting a Part 36 offer was a right to recover costs in respect of the period up to the date of acceptance of the offer and by virtue of rule 44.12 an order for costs on the standard basis is deemed to have been made.

10. A desire to encourage parties to settle disputes before proceedings had been commenced led in

October 2000 to the introduction of "costs-only" proceedings. A new rule, rule 44.12A, was introduced to enable parties who had reached agreement on all issues before the commencement of proceedings, including which of them should bear the costs, but who could not agree on the amount of costs to be paid, to start proceedings to have the amount of costs determined by the court. Before the introduction of that procedure the receiving party would have had to issue fresh proceedings to recover his costs under the settlement agreement.

11. The next development relevant to the present appeal came in October 2003 with the introduction of Section II of Part 45, to which I referred earlier. It was widely welcomed as a breakthrough in the search for a means of controlling the costs of low-value road traffic accident claims and provides an important part of the context in which the rules were amended in April 2007 to enable a Part 36 offer to be made before the commencement of proceedings. Rule 36.3(2) now provides:

> "A Part 36 offer—
>
> (a) may be made at any time, including before the commencement of proceedings;"

12. Both Mr. Hutton and Mr. Morgan contended for rather different reasons that there is no conflict between rule 36.10(1) and Section II of Part 45. Mr. Hutton submitted that Judge Platts was wrong in holding that rule 36.10(1) does not apply in the present cases because the word "proceedings" must be given a broad meaning and was clearly intended to encompass cases falling within the scope of rule 36.3(2)(a). Rule 44.12 provides that where a right to costs arises under rule 36.10(1) a costs order will be deemed to have been made on the standard basis. The combined effect of rule 36.10(1) and rule 44.12, he submitted, is that on the acceptance of the offer the claimant is deemed to be holding an order for costs on the standard basis and therefore does not need to obtain any further order from the court in order to commence proceedings for a detailed assessment. He may simply issue a notice of commencement and does not need to start proceedings, either under rule 44.12A or by way of a separate action. He can therefore bypass Section II of Part 45 altogether.

13. Mr. Morgan, on the other hand, submitted that the provisions of Section II of Part 45 amount to a special procedure for assessing costs in cases to which it relates. It assumes that the parties have reached agreement on the amount of damages to be paid and also that, because the amount of costs has not been agreed, one or other party will bring proceedings under rule 44.12A. The detailed assessment for which paragraphs (4)(a)(1) and (4A) of that rule provide will be conducted in accordance with Section II of Part 45.

14. Our attention was drawn to the decision of Mr. John Leighton Williams Q.C. sitting as a Deputy Judge of the High Court in *Thompson v Bruce* [2011] EWHC 2228 (QB). The proceedings were brought to obtain the court's approval for the acceptance of an offer made under Part 36 to settle a claim before proceedings had been commenced. The question arose whether rule 36.10(1) applied. Counsel for the claimant argued that it did not and referred the judge to the decision of Judge Platts in *Solomon v Cromwell* whose reasoning he adopted. The Deputy Judge rejected the submission and held that "proceedings" should be given a purposive construction to include steps taken before proceedings are commenced of a kind that would ordinarily be allowed in costs on a detailed assessment.

15. I agree with Mr. Leighton Williams. In my view Judge Platts was wrong to hold that rule 36.10(1) does not apply in a case where a Part 36 offer is made and accepted before proceedings are issued. It is quite true that the word "proceedings" normally refers to proceedings already pending and Part 36 as a whole is primarily directed to that situation. In that context the extension of the Rules to enable Part 36 offers to be made before proceedings have been started might be considered to be somewhat anomalous, but the terms of Part 36 as a whole make it quite clear, in my view, that steps taken in contemplation of proceedings are to be regarded as

"proceedings" for the purpose of rule 36.10(1). That is the natural meaning of the language used and if it were not so the rules would be silent on the consequences of accepting a Part 36 offer made before proceedings had been issued. I think it unlikely that the Rule Committee simply overlooked that. It is far more likely that it intended the word "proceedings" in rule 36.10(1) to be construed in the way I have indicated. I am fortified in that conclusion by the fact that a similarly broad approach to the construction of the word "proceedings" was taken, albeit in another context, in *Crosbie v Munro* [2003] EWCA Civ 350, [2003] 2 All E.R. 856, paragraphs 26-33, citing *Callery v Gray (No.1)* [2001] EWCA 1117, [2001] 1 W.L.R. 2112. The effect of accepting a Part 36 offer made before a claim has been issued, therefore, is that the claimant is entitled to recover costs he has incurred in contemplation of the proceedings up to the date of acceptance insofar as they would have formed part of his recoverable costs if proceedings had already been issued.

16. The question then arises how rule 36.10(1) is to be read in conjunction with rule 44.12 and Part II of Part 45. Mr. Hutton submitted that a deemed order for costs provides a sufficient basis for commencing a detailed assessment and that may be right in cases where proceedings have been commenced. Paragraph 40.4(c) of the Costs Practice Direction refers specifically to the requirement to lodge the notice of acceptance of a Part 36 offer where that is relied on as giving a right to detailed assessment and on the filing of a request for detailed assessment in accordance with rule 47.14 and section 40 of the Costs Practice Direction the costs officer can carry out the assessment and make an order in the proceedings for the sum allowed on assessment. In a case such as the present, however, there are by definition no proceedings in which an order can be made, unless and until the receiving party issues a claim under Part 7 or one of the parties issues Part 8 proceedings under rule 44.12A. In my view rule 44.12 must be read and understood in that context. An order for costs cannot exist in a vacuum divorced from any substantive proceedings and accordingly an order for costs cannot be deemed to have been made under rule 44.12(1)(b) if a Part 36 offer is made and accepted before any proceedings have been commenced. In our view the contrary opinion expressed by Master O'Hare in *Alison Jones v Alcom UK Ltd* (unreported, 24th February 2011), to which our attention was drawn, is not correct.

17. Rule 44.12A provides a simplified procedure by which an order for costs can be obtained in a case where the dispute is settled before proceedings have been issued. It provides as follows:

> "(1) This rule sets out a procedure which may be followed where –
>
> (a) the parties to a dispute have reached an agreement on all issues (including which party is to pay the costs) which is made or confirmed in writing; but
>
> (b) they have failed to agree the amount of those costs; and
>
> (c) no proceedings have been started.",

but the court's powers are limited to making an order for costs to be determined by detailed assessment or dismissing the claim. As Section 17 of the Costs Practice Direction makes clear, if the court makes an order for assessment, that order will give the claimant his costs of the substantive claim and direct that they be assessed on the standard basis.

18. On the face of it, the procedure in rule 44.12A is apt to refer to cases that fall within Part 36.10(1) as well as to those that do not and in addition two other points should be noted. The first is that the procedure is simply a mechanism for producing an order for costs to be the subject of a detailed assessment where the parties agree that should happen. The second is that it provides for Section II of Part 45 to take precedence in cases to which it applies: see rule 44.12A(4A). In my view the mechanism provided by rule 44.12A is intended to apply both to

cases settled through the operation of Part 36 and to those settled without recourse to it.

19. Section II of Part 45 is intended to provide a consistent outcome that is fair across a broad range of cases and obviously does not necessarily lead to an outcome in every individual case equivalent to that which would result from a detailed assessment on the standard basis. I think it is inescapable, therefore, that there is a degree of conflict between rule 36.10(3) and the fixed costs regime for which it provides. Although I accept that that regime does involve an assessment of some kind (particularly in relation to disbursements and cases where the court is satisfied that exceptional circumstances exist), I do not think that one can properly regard it as representing an assessment on the standard basis in those cases to which it applies.

20. Despite the unqualified terms of rule 36.10(3), however, I find it difficult to believe that the Rule Committee can have intended that a claimant in a low-value road traffic accident claim who accepts a Part 36 offer before proceedings have been commenced should be entitled to recover costs assessed on the standard basis, whereas a claimant who accepts an offer to settle made otherwise than under Part 36 should be limited to the costs prescribed by Section II of Part 45, insofar as they might be different. Nor is it easy to see why a claimant who proceeds under the simplified procedure in rule 44.12A should be subject to a more restrictive costs regime than one who starts proceedings to under Part 7 recover his costs. The whole purpose of introducing Section II of Part 45 was to impose a somewhat rough and ready system in a limited class of cases because the commercial interests behind the parties, who bear the burden of large numbers of such cases, considered that, taken overall, it was fair and saved both time and money. If the appellants' argument were correct, the acceptance of a Part 36 offer would always result in an order for costs on the standard basis in low-value road traffic accident cases. That would undermine the fixed costs regime and provide a powerful incentive for defendants not to make Part 36 offers in such cases. Moreover, rules 45.7 and 45.8 make it quite clear that the costs to be allowed in proceedings under rule 44.12A such as the present are those prescribed in Section II of Part 45, so if either party (perhaps the defendant) begins costs-only proceedings, there is no escape from the provisions of that Section. None of these consequences fits well with the broader scheme of the Rules which seeks to encourage settlement by the use of Part 36 and to control the costs of low-value road traffic accident claims in the manner described.

21. In my view the Rules must be read in accordance with the established principle that where an instrument contains both general and specific provisions, some of which are in conflict, the general are intended to give way to the specific. Rule 36.10 contains rules of general application, whereas Section II of Part 45 contains rules specifically directed to a narrow class of cases. Reading the Rules as a whole, I have no doubt that the intention is that Section II of Part 45 should govern the cases to which it applies to the exclusion of other rules that make different provision for the general run of cases. It is true that the procedure in rule 44.12A is not exclusive and that a claimant may start proceedings under Part 7 or Part 8 to recover costs under the terms of a settlement agreement; paragraph 17.11 of the Costs Practice Direction makes that clear. However, it is very doubtful whether he could recover more than the fixed costs for which Section II of Part 45 provides. It is unnecessary to decide that question in the present case, however, because both claimants issued proceedings under rule 44.12A. Accordingly, subject to any agreement between the parties to the contrary, neither can recover more or less by way of costs than is provided for under the fixed costs regime.

Terms of settlement

22. Having identified the ordinary consequences of settling under Part 36 a claim to which Section II of Part 45 applies, it is necessary to consider whether the particular terms of settlement provided for a different result. Mr. Morgan submitted that it is not possible for parties to contract out of the fixed costs regime, but in my view that is true only in part. There is nothing in the Rules to prevent parties to a dispute settling it on whatever terms they please, including as to costs. Section II of Part 45 is concerned with proceedings under rule 44.12A and prescribes

what the receiving party is to be allowed by way of costs in such proceedings. I do not think that it is open to the parties by their agreement to expand or limit the court's powers and if a claimant chooses to proceed under rule 44.12A he will be unable to recover more than the amount for which Section II of Part 45 provides. However, there is no reason in principle why, if parties choose to agree different terms, the agreement should not be enforceable by ordinary process.

23. In *Solomon v Cromwell* both offers that finally resulted in the settlement of the claim were expressed to be made by reference to Part 36. Nothing further was said about the consequences of acceptance, apart from a willingness on the part of the defendant to pay the claimant's "reasonable costs" to be assessed if not agreed. There was nothing in either offer to suggest that the defendant was willing to incur a liability in costs beyond that for which the Rules provide.

24. The offer that led to the settlement in *Oliver v Doughty* was made by the defendant's insurers to the claimant's solicitors in a letter dated 1st September 2009. The material part was couched in the following terms:

> "Pursuant to Part 36 of the Civil Procedure Rules ("CPR"), we offer to settle the remaining aspects of your client's claim in the sum of £5,250.
>
> This offer is to settle the whole of the remaining aspects of your client's claim for general and special damages and is intended to have the consequences of Part 36 of the CPR.
>
> . . . We will be liable for your client's reasonable costs in accordance with CPR 36.10 . . . "

25. Mr. Hutton submitted that the express offer to pay the claimant's costs in accordance with rule 36.10 gave rise on acceptance to a contract to pay costs on the standard basis, but in my view that is not how the letter is to be understood. Taken as a whole, I think that the letter was intended to contain a Part 36 offer carrying the consequences for which the Rules provide, hence the use of the expression " . . . is intended to have the consequences of Part 36 of the CPR". I do not think that the reference to rule 36.10 can properly be read as anything more than an offer to pay costs on the usual basis, certainly not an offer to pay costs on a basis more or less generous than that set out in the Rules. There is no reason to think that the issue that has now arisen was present to either party's mind at the time and it is difficult to see why the defendant's insurers should be understood to have offered something for which the Rules do not provide. I do not think that the parties agreed to depart from the consequences for which the Rules provide. All this only goes to show, however, that parties should do their best to avoid any ambiguity about costs when making offers to settle.

26. For these reasons I do not think that either claimant can recover more by way of costs than the amount prescribed in Section II of Part 45. Accordingly, I would dismiss both appeals.

Lord Justice Aikens :

27. I agree.

Lord Justice Pill :

28. I also agree.