BEATING OWN PART 36 OFFER - 10% ALLOWED

Cashman -v- Mid Essex Hospital Services NHS Trust [2015] EWHC 1312 (QB)

11 May 2015

[2015] EWHC 1312 (QB) deals with the additional sums that a party may have to pay when it fails to beat a Part 36 offer. The judge overturned a decision of the Master who declined to order a defendant pay an additional 10% in costs after a claimant had beaten their own Part 36 offer on an assessment.

"The starting point is that where rule 36.14(1)(b) applies, the court will make an order that the Claimant is entitled to an award under each of the sub-paragraphs of CPR 36.14(3). It is only if the court considers it unjust to do so that such awards will not be made"

THE CASE

The claimant had settled an action for £90,000 for clinical negligence leading to the death his wife. A bill of costs was put in at £262,000. The receiving party (the claimant) made a Part 36 offer to settle in the sum of £152,500. At the detailed assessment the bill was assessed at £173,693.78.

KEY POINTS

- Where a Part 36 offer is effective the court must normally order the paying party to pay all the additional sums under Part 36, "unless it is unjust to do so".
- The size of an initial bill of costs is not, in itself, a reason for declining to make the additional payments.

THE ORDER OF THE MASTER

The Master held that it would be unjust to award the additional 10% in costs. He did, however, order interest on the bill of costs at 10.5%; costs of the detailed assessment on the indemnity basis and interest on the costs of the detailed assessment on the indemnity basis.

"6. I think costs have to be treated slightly differently to judgments. Generally, the only issue on detailed assessment is how much. Had the rule permitted me to allow a figure fixed by applying the prescribed percentage to the difference between the sum which the claimant offered to accept and the sum which was allowed, then I think that may have been a just result, but that is not what the rule anticipates. In circumstances where there has been a significant reduction in the claimant's bill, it seems to me that it would be unjust to reward the claimant with an additional amount prescribed by 36.14(3)(d)."

THE DECISION ON APPEAL

The judge overturned the Master's decision and awarded the 10% additional costs.

Official Transcript.

Neutral Citation Number: [2015] EWHC 1312 (QB)

Case No: QB/2014/0582
Claim No: HQ 12X01395
SCCO Ref: AGS10401110

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM
MASTER GORDON-SAKER, SENIOR COSTS JUDGE

Royal Courts of Justice
Strand, London, WC2A 2LL
11/05/2015

Before:

THE HONOURABLE MRS JUSTICE SLADE DBE
Sitting with
ASSESSOR MASTER CAMPBELL

Between:

MICHAEL RICHARD CASHMAN	**Appellant / Claimant**
- and –	
MID ESSEX HOSPITAL SERVICES NHS TRUST	**Respondent / Defendant**

Miss Lambert (instructed by Gadsby Wicks) for the Appellant / Claimant
Mr Marven (instructed by Acumension) for the Respondent / Defendant

Hearing dates: 20/03/2015

HTML VERSION OF JUDGMENT

Crown Copyright ©

The Honourable Mrs Justice Slade DBE:

1. The Claimant / Receiving Party appeals from the Order of Senior Costs Judge Master Gordon-Saker made on 21 October 2014 refusing to award an additional amount under CPR 36.14(3)(d) on a detailed assessment of costs. The law with which this judgment is concerned is CPR 36 as it was prior to its amendment on 6 April 2015.

2. The claim giving rise to costs proceedings was for clinical negligence arising out of the fatal treatment of the Receiving Party's late wife at Broomfield Hospital in December 2008. The Respondent agreed to pay the Receiving Party the sum of £90,000 and his costs to be assessed on the standard basis if not agreed.

3. The Receiving Party put in a Bill of Costs of about £262,000. Within about five weeks after the paying party served points of dispute and about seven months before the costs assessment hearing the receiving party made a Part 36 offer to settle for £152,500. At a detailed assessment hearing on 21 October 2014 Senior Costs Judge Master Gordon-Saker ordered the paying party to pay the receiving party costs in the sum of £173,693.78. As the costs judgment was more advantageous to the Claimant than the proposal contained in the Part 36 offer, CPR 36.14(3) applied.

4. The Master observed that the application of CPR 36 to detailed assessment proceedings was fairly new. He directed himself that the Court may decline to apply CPR 36.14(3) if it would be unjust to do so. He referred to the previous position under which timely Calderbank offers would be taken into account when deciding what costs order to make. The Master held that in this case it would not be unjust to require the paying party to pay the following:

   i) Under CPR 36.14(3)(a), interest on the Bill of Costs at 10.5%;

   ii) Under CPR 36.14(3)(b), costs of the detailed assessment on the indemnity basis;

   iii) Under CPR 36.14(3)(c) interest on the costs of detailed assessment at 10.5%.

   The Master observed:

   > "4. The Defendant's failure to accept the Claimant's offer has led to a delay in payment to the Claimant's solicitors, and has led to the costs of detailed assessment proceedings in terms of the preparation for and attendance at this hearing."

5. However, Master Gordon-Saker declined to order the paying party to pay the additional amount under CPR 36.14(3)(d). He held:

"5. However, in my judgment it would be unjust to require the defendant to pay an additional amount, which in this case would be 10% of the costs which have been allowed, so a figure of about £17,000."

The Master observed:

"6. I think costs have to be treated slightly differently to judgments. Generally, the only issue on detailed assessment is how much. Had the rule permitted me to allow a figure fixed by applying the prescribed percentage to the difference between the sum which the claimant offered to accept and the sum which was allowed, then I think that may have been a just result, but that is not what the rule anticipates. In circumstances where there has been a significant reduction in the claimant's bill, it seems to me that it would be unjust to reward the claimant with an additional amount prescribed by 36.14(3)(d)."

6. CPR47.20 provides:

"(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';

...

(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."

CPR 36.14 provides:

"(1) Subject to rule 36.14A, this rule applies where upon judgment being entered –

(a) a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer; or

(b) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer.

(1A) For the purposes of paragraph (1), in relation to any money claim or money element of a claim, 'more advantageous' means better in money terms by any amount, however small, and 'at least as advantageous' shall be construed accordingly.

In addition to the sums awarded under 36.14(3)(a),(b) and (c), CPR36.14(3) provides that:

"(3) Subject to paragraph (6), where rule 36.14(1)(b) applies, the court will, unless it considers it unjust to do so, order that the claimant is entitled to –

... (d) an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below to an amount which is –

(i) where the claim is or includes a money claim, the sum awarded to the claimant by the court; or

(ii) where the claim is only a non-monetary claim, 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;

(4) In considering whether it would be unjust to make the orders referred to in paragraphs (2) and (3) above, the court will 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; and

(d) the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer to be made or evaluated."

7. I accept the submission by Miss Lambert, counsel for the Claimant, that CPR 36.14(3)(d) represents a significant change from the previous costs regime. The rule was introduced not only to provide an incentive to a claimant to make a timely realistic Part 36 offer but also to penalise a defendant for not accepting such an offer. As Miss Lambert pointed out, in the Court of Appeal in **McPhilmey v Times Newspapers Ltd and others** [2001] EWCA Civ 933 Chadwick LJ held that under the previous costs regime, 'old' CPR36.21, a defendant who refused a Part 36 offer made by a claimant and who failed to beat that offer at trial was at risk of being ordered to pay more than he would have been ordered to pay if the offer had not been made. However Chadwick LJ held at paragraph 19 that the incentives to accept an offer are "not to be regarded as producing penal consequences."

8. Lord Justice Jackson in his "Review of Civil Litigation Costs: Final Report" of December 2009 considered at paragraph 3.9 that "the claimant was insufficiently rewarded and the defendant insufficiently penalised when the claimant has made an adequate offer." To remedy this defect Lord Justice Jackson proposed an addition to CPR 36.14(3) of a new sub-paragraph (d). The proposed rule was enacted with some refinements but with the same purpose as that in the draft. When outlining in paragraph 3.15 the benefits of the proposed reform, Lord Justice Jackson considered that the third benefit of the proposed new rules would be that "in those cases which do go to trial, despite the claimant having made an adequate offer, the claimant will recover a significantly larger sum."

9. Mr Marven, counsel for the Defendant, rightly acknowledged that the additional amount awarded under CPR 36.14(3)(d) is penal. The policy reasons for introducing the change brought about by CPR 36.14(3)(d) are set out in Lord Justice Jackson's report.

10. Mr Marven contended that the Master did not err in holding that costs have to be treated slightly differently from the damages when considering CPR 36.14(3)(d). He pointed out that in a case such as this before the change in the CFA rules, the claimant would retain the additional amount as success fees would be recovered from the paying party. I recognise that claimants whose costs fall to be dealt with on the pre change CFA rules will benefit more than those to whom the new CFA rules apply. In paragraph 3.16 of his Report Lord Justice Jackson observed that the gains which a claimant would make under the amended CPR 36.14(3) should enable them to pay the success fee which would not be recoverable from the paying party under the new CFA regime. I agree with Miss Lambert's contention that if CPR 36.14(3)(d) were not to apply in cases in which success fees are recoverable from the defendant, the rule could have so provided.

11. Mr Marven further contended that costs are to be treated differently from damages for the purposes of CPR 36.14(3)(d) as the reasonableness of a costs offer is more difficult for a defendant to assess than an offer to settle a damages claim. There is disclosure in claims for damages which enables a defendant to make an informed assessment of an offer to settle a damages claim. There is no such disclosure in costs proceedings. What is expected is a realistic claim. Mr Marven did not accept the proposition advanced by Miss Lambert that costs claims are frequently reduced by a third on assessment.

12. By CPR 47.20(4), Part 36 applies to the costs of detailed assessment proceedings with specified modifications. CPR 36.14(3)(d) clearly applies to costs proceedings. In the absence of any provision excluding pre CFA amendment cases, the rule applies to cases under the old CFA regime such as the case under appeal.

13. Miss Lambert contended that Master Gordon-Saker failed to consider the circumstances required to be taken into account by CPR 36.14(4) when deciding whether it was unjust to make the orders under CPR 36.14(3). The answers to all the factors required to be taken into account favoured the Claimant: the Claimant's Part 36 offer was lower than the assessed costs; the Part 36 offer was made some seven months before the assessment hearing and about five weeks after the Defendant lodged points of dispute; no complaint had been made of failure by the Claimant to give information to enable the Defendant to assess the reasonableness of the offer.

14. Sir David Eady in **Downing v Peterborough & Stanford Hospitals NHS Foundation Trust** [2014] EWHC 4216(QB) observed at paragraph 62 in respect of indemnity costs under CPR 36.14(3)(b) that:

> "One could imagine that a court might well think it 'unjust' to order indemnity costs if the individual defendant had rejected a Part 36 offer on the basis of inaccurate information through no fault of his own and, especially, where he has been misled by the claimant or his advisors through (say) non-disclosure of a material fact of document."

There is no suggestion that this occurred in this case.

15. Miss Lambert contended that this case was unlike that of **Thinc Group Limited v Jeremy Kingdom** [2013] EWCA Civ 1306 in which Macur LJ held at paragraph 20 that there was "a lack of clarification of costs." In **Thinc**, the same day as receiving the Part 36 offer, the Appellant's solicitors reasonably asked the Claimant "please confirm what your costs are in order that we may properly consider the offer made." There was no response to the request.

16. Counsel for the Claimant submitted that the solicitors for the Defendant were experienced litigators. As observed in **Bent v Highways and Utilities Construction and another** [2011] EWCA Civ 1539 at paragraph 2, this could be taken into account. The Defendant's solicitors had the experience which enabled them to evaluate the Part 36 offer.

17. Mr Marven accepted that the Master does not have an unfettered discretion to refuse to award the additional amount under CPR 36.14(3)(d) where the Claimant's Part 36 offer was lower than the sum of costs assessed. However the fact that there is no mechanism for disclosure in costs proceedings is to be taken into account. This makes it more difficult for an accurate assessment of a Part 36 costs offer to be made. In this case the reason the Master considered that it would be unjust to award the additional amount was the size and proportion of the reduction made on assessment to the costs claimed. This is perhaps supported by Miss Lambert's contention that it is not unusual for costs claimed to be reduced on assessment by about a third.

18. Miss Lambert rightly accepted that it could not be said that a high bill which is much reduced on assessment is not a valid reason for refusing to make an additional award under CPR 36.14(3)(d). In circumstances in which the inflated level of costs claimed leads the Defendant to incur expense in investigating the claim before the Part 36 costs offer was made it may be unjust to make such an award.

19. Where judgment against a defendant is at least as advantageous to the claimant as the proposals in the claimant's Part 36 offer, the claimant is entitled to an award under each of the provisions in CPR 36.14(3) unless it is unjust to do so. CPR 36.14(4) requires all the circumstances of the case to be taken into account including those set out in (a) to (d). Sir David Eady held in **Downing** at paragraph 61:

> "It is elementary that a judge who is asked to depart from the norm, on the ground that it would be 'unjust' not to do so, should not be tempted to make an exception merely because he or she thinks the regime itself harsh or unjust. There must be something about the particular circumstances of the case which takes it out of the norm. Naturally one cannot define exhaustively what those circumstances might be. Each case will turn on its own facts."

The starting point is that where rule 36.14(1)(b) applies, the court will make an order that the Claimant is entitled to an award under each of the sub-paragraphs of CPR 36.14(3). It is only if the court considers it unjust to do so that such awards will not be made. Whilst the pre-condition of CPR 36.14(1)(b) for entitlement applies so that if it is met, an entitlement to an order under all sub-paragraphs will be triggered, the

disentitlement condition is, in my judgment, to be considered in relation to the payments under each of the sub-paragraphs, (a), (b), (c) and (d).

20. Mr Marven rightly recognised that the court does not have an unfettered discretion to decide that a Claimant is not entitled to payments under CPR 36.14(3). Miss Lambert's criticism of the approach of the Master to the question of whether it would be unjust to make an award under, in this case, CPR 36.14(3)(d) is well founded.

21. In considering whether it would be unjust to make an award under each of the sub-paragraphs the court is required to take into account each of the factors set out in CPR 36.14(4). On a fair reading of the judgment, the Master referred to and took into account the amount of the offer, (CPR 35.14(4)(a)), and the stage of the proceedings at which the offer was made, (CPR 36.14(4)(b)). The factors in CPR 36.14(4)(c) and (d), were not referred to.

22. It appears that the low level of the Claimant's offer compared with the high level of the bill and with the costs assessed was considered to be in the Claimant's favour in deciding whether it would be unjust to make awards under CPR 36.14(3)(a) to (c) but a point rendering it unjust to do so in relation to CPR 36.14(3)(d). Master Gordon-Saker held:

> "In circumstances where there has been a significant reduction in the claimant's bill, it seems to me that it would be unjust to reward the claimant with the additional amount prescribed by 36.14(3)(d)."

Whilst a particular factor under CPR 36.14(4) may carry more weight when considering whether it would be unjust to make an award under the different sub-paragraphs of CPR 36.14(3), in this case no reason was given why a factor rendering it not unjust to make an award under 36.14(3)(a) to (c) should be the factor rendering an award under CPR 36.14(3)(d) unjust. In my judgment the Master erred in relying on the degree of reduction made on assessment to the costs claimed as rendering it unjust to make such an award in circumstances in which the Part 36 offer was lower than the sum at which the costs were assessed.

23. If the precondition for entitlement to payments under CPR 36.14(3) is triggered by judgment being entered for a claimant which is at least as advantageous as their Part 36 offer, unless the court considers it unjust to do so, having taken into account all the relevant circumstances including those set out in CPR 36.14(4), there is no discretion as to whether an order for payment under each of the sub-paragraphs is to be made. There is only a discretion as to the percentage interest to be awarded under CPR 36.14(3)(a) and (c). There may be circumstances in which it would be unjust to make an award under CPR 36.14(3)(d) where it is not unjust to do so under the other sub-paragraphs. It could be said that the provision of interest under CPR 36(3)(a) and (c) is primarily compensatory although the possibility of an award of a higher rate than would be available in the market introduces a penal element. However as is rightly recognised by Mr Marven, the purpose of CPR 36.14(3)(d) is penal.

24. The reason given by the Master for holding that it would be unjust to 'reward' the Claimant with the additional amount prescribed by CPR 36.14(3)(d) was the size of the additional award. The Master considered that had the rule permitted him to award

a figure fixed by applying the prescribed percentage to the difference between the sum which the Claimant offered to accept and the sum which was allowed on assessment, that may have been a just result. The reason the Master held it to be unjust to make the additional award was because there was a significant reduction to the Claimant's bill of costs. The approach adopted by the Master penalises the Claimant for making what turned out to be a reasonable Part 36 offer. It is the terms of the Part 36 offer not the level of the sums claimed in the bill of costs which are to be considered under CPR 36.14(4). Whilst all the relevant circumstances are to be considered in deciding whether it would be unjust to make an award under any of the paragraphs of CPR 36.14(3), it was not suggested that there was any particular feature or consequence of the bill of costs other than its size which would render the making of an order under CPR 36.14(3)(d) unjust.

25. The making of an order of the level required by CPR 36.14(3)(d) was decided as a matter of policy as explained in the Jackson Report. Under the previous regime it was considered that a claimant was insufficiently rewarded and the defendant insufficiently penalised when the claimant has made an adequate part 36 offer. In my judgment the Master fell into the temptation referred to by Sir David Eady in paragraph 61 of **Downing** of making an exception by not making an award under CPR 36.14(3)(d) not because he considered the making of such an award unjust but because he thought it unjust to make an award of the required amount, 10% of the assessed costs. The Master considered it would not have been unjust to award an additional amount based on the difference between the Part 36 offer and the sum of costs allowed on assessment. However this is not the regime specified in CPR 36.14(3)(d). In this case it is the Claimant who has been penalised for making a reasonable Part 36 offer rather than the Defendant for not accepting it. In my judgment that approach is contrary to the intent and effect of CPR 36.14(3)(d).

26. As he stated, Master Gordon-Saker was dealing with fairly new provisions in CPR 36. His judgment was given extempore. However, whilst recognising his expertise in matters of costs I have concluded that he erred and the appeal is allowed.

27. At the conclusion of the appeal Counsel were asked for their submissions on the consequence if such a conclusion were reached. Mr Marven was asked whether but for the high level of the bill of costs it would have been unjust for an order for an additional amount to have been awarded under CPR 36.14(3)(d). Mr Marven replied that there was none that he could see. In those circumstances, properly directing himself, in my judgment the Master could only have concluded that it was not unjust to make an order under CPR 36.14(3)(d). Accordingly this court orders that the Claimant is entitled to an additional award calculated in accordance with that sub-paragraph.

28. I have benefited from the practical experience of the Assessor, Master Campbell, for which I am grateful, but this judgment is mine alone.