CAN'T ACCEPT A PRE-PA PART 36 OFFER AFTER AFTER THE PA.

IN THE MOLD COUNTY COURT

No. 2YM27853

Wrexham Law Courts
Bodhyfryhd
Wrexham

Before:

28th January 2015

HIS HONOUR JUDGE SEYS LLEWELLYN QC

Y LLYS SIROL · THE COUNTY COURT ·

Between:

CLAIRE SHEPHERD

Applicant

and

KATHY HUGHES

First Respondent

and

QBE

Second Respondent

MR. EDMUNDSON appeared on behalf of the Applicant.

MR. MCGEE appeared on behalf of the Respondents.

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JUDGMENT

(Made available to me for approval 13 April 2015
Approved 17 April 2015)

JUDGMENT

1. JUDGE SEYS LLEWELLYN: *(Recording on)* [This is,] in formal terms, an application that the Court should recognise that there has been a compromised agreement by acceptance of a Part 36 offer.

2. In short, by the Rules at CPR 36.3, Paragraph 2, a Part 36 offer may be made at any time. By 36.9(2), "Subject to Rule 36.9 Paragraph 3, a Part 36 offer may be accepted at any time, unless the offeror serves notice of withdrawal on the offeree".

3. In turn, by 36.9(3), "The Court's permission is required to accept a Part 36 offer where: ...(d), the trial has started". By reason of the provisions of 47.20(4)(b), 'The provisions of Part 36 apply to the costs of detailed assessment proceedings with the following modifications....'trial' refers to "detailed assessment hearing'"; and by 47.20(4)(c), "In rule 36.9(5) at the end insert "or where the Part 36 offer is made in respect of the detailed assessment proceedings after the commencement of the detailed assessment hearing".

4. This turns narrowly on a simple point. Is the present one a case one where the Court's permission is required to accept a Part 36 offer, on the basis that the detailed assessment hearing has started?

5. What happened was that in November 2013 there was an offer in respect of costs. There was then, since this was a sum of costs less than £75,000, entry upon the procedure for a provisional assessment. On the 20th November 2014, District Judge Humphreys provisionally assessed costs in the sum of £13,489.69, and if nothing else had happened, and there was no request for an oral hearing, then that would have become binding by reason of the provisions of CPR 47.15, in

particular 47.15(7): "Where a provisional assessment has been carried out, the Court will send the copy of the bill as provisionally assessed to each party with a notice stating that any party who wishes to challenge any aspect of the provisional assessment must, within 21 days of the receipt of the notice, file and serve on all other parties a written request from the oral hearing. If no such request is filed and served within that period, the provisional assessment shall be binding upon the parties, save in exceptional circumstances".

6. However Mr. Edmundson says there was a Part 36 offer; it was not withdrawn; therefore, by the express terms of Part 36, it may be accepted at any time, and it was accepted. Unless excluded by being made subject to the permission of the Court under CPR Part 36.9(3), (on the basis that the detailed assessment hearing has started), then the Part 36 offer was capable of being accepted.

7. At one point prior to the helpful submissions of Mr. McGee, it seemed to me that there might be argument for the Defendant in respect of the express provisions of 47.15(7). However, I am satisfied, by Mr. McGee's simple analysis, that all that does is take one back to whether or not there was a valid compromise of the case, in which case there is little further role for the Court; in turn that depends on whether there has been offer and acceptance, and that in turn depends on whether the offer was open to the Claimant in this case to accept.

8. So it is the narrowest of points in this case, is it to be construed that the detailed assessment hearing has started, by reason that there was a provisional assessment, or not?

9. The effect of Mr. Edmundson's argument, I confess, is in itself unattractive. It means that for practical purposes, in a costs case where a Part 36 offer is made in

respect of the costs payable to a party, the person who makes the Part 36 offer cannot ever enjoy the fruits of that offer. If it is in these circumstances open to the offeree to accept even after the provisional assessment of costs, then in order to protect his position the offer must, at the conclusion of the provisional hearing, be withdrawn. But if the offeror withdraws the offer he will not enjoy the fruits which were intended to attach to a Part 36 offer.

10. In part, Mr. Edmundson accepts that this may seem unattractive in itself, but he says the rules are what the rules are. It would have been open to the Rules Committee to adopt express provision for this circumstance. He also says that there may be unattractive consequences if a contrary construction is accepted, as proposed by Mr. McGee, namely that the Court's permission is required to accept a Part 36 offer where the provisional assessment has been made, because he says that that would exclude the possibility in the period after the provisional assessment, of a Part 36 offer being made, because it is in general terms stated that the Court's permission is required to accept a Part 36 offer where the, if it is to be so construed, detailed assessment hearing has started.

11. Mr. McGee says that the Rules are unequivocal that a Part 36 offer may be made at any time and that must mean that it may be made after the provisional assessment has been carried out by the Judge. He says that in practical terms, it is either inconceivable or highly unlikely that any difficulty will arise, because if a Part 36 offer is accepted by the offeree and the Court is then so informed, the Court will be only too happy to accept that the matter has been compromised in exactly the same way that the Court would be happy to accept, if informed by the

parties that having considered the provisional assessment, they have struck a figure which is acceptable to them both.

12. In practical terms that seems to me correct. One is driven back to whether one can properly say that the detailed assessment hearing has started where there has only been a provisional assessment.

13. Mr. McGee accepts that this involves some sort of gloss, but invites the Court to accept this construction purposively on the basis that the result of the contrary and more restricted construction is very unattractive in its consequence. It seemed to me at one point that he might argue that the provisions of CPR 47.15(7) are some indication that those who have drafted the Rules considered that in the ordinary circumstances, unless there was request for an oral hearing after a provisional assessment within 21 days of receipt of the notice, matters are to be binding; but he disclaims such an argument and on reflection I agree.

14. The strongest point, it seems to me, for Mr. Edmundson is that it would have been possible in these circumstances to use other words, namely that for the words "the trial" there should be substituted the words "The detailed assessment hearing or a provisional assessment"; and that if one goes to CPR 47.14 and 47.15, there are very expressly different provisions, under the titles "Detailed assessment hearing" (47.14); and "Provisional assessment" (47.15).

15. I do not hesitate to say that if it is open to me to adopt a purposive construction which would resist the notion that the Part 36 offer can be accepted without the Court's permission, in circumstances such as these, it should be adopted.

16. In the end, it seems to me, first, that I must go by the code set out in the CPR, be that in CPR Part 36 or CPR Part 47, as drafted; and second, having myself during argument introduced reference to the observations of the Court of Appeal in *Gibbon -v- Manchester City Council*, that Part 36 itself is a self-contained code and not to be artificially altered or re-interpreted according to common law notions.

17. However, it seems to me that the heart of the answer to this case lies in 47.15(1).

18. Under the rubric "Provisional assessment", 47.15(1) provides: "This Rule applies to any detailed assessment proceedings commenced in the High Court of the County Court". CPR 37.15(2)provides, "In proceedings to which this Rule applies, the parties must comply with the procedure set out in Part 47 as modified by paragraph 14, Practice Direction 47". CPR 47.15(3) provides that "The Court will undertake a provisional assessment of the receiving party's costs", (and it identified the relevant form and the relevant supporting documents which are required).CPR 47.15(4) provides, "The provisional assessment will be based on the information contained in the bill and supporting papers". CPR 47.15(7) provides that "On completion of the provisional assessment, if no request for an oral hearing is filed and served within 21 days of the provisional assessment ", "the provisional assessment shall be binding upon the parties save in exceptional circumstances".

19. Thus, all of those provisions are subject to the introduction that this Rule, 47.15, "*applies to any detailed assessment proceedings*" (my emphasis). Thus, it seems, that enables and informs me to construe the reference in CPR 36.9(3) to a detailed assessment hearing as including the provisional assessment which is intrinsically a

part of the structure which may lead to a detailed assessment hearing; and thus requiring that the court's permission is required to accept a part offer where the provisional assessment has been made.

20. For those reasons, slightly more extensive but only fractionally so beyond those advanced by Mr. McGee, I rule in favour of his submissions, not the submissions of Mr. Edmundson.
