Neutral Citation Number: [2019] EWCA Civ 1764

Case No: A2/2019/0930

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT,
QUEEN'S BENCH DIVISION (Commercial Court)
The Honourable Mr Justice Teare
CL-2018-000153

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/10/2019

Before :

LORD JUSTICE PATTEN
LADY JUSTICE ASPLIN
and
SIR RUPERT JACKSON

- -

Between:

Global Assets Advisory Services Ltd and Another	**Appellants**
- and -	
Grandlane Developments Limited and Others	**Respondents**

- -
- -

Mr Rupert Cohen (instructed by **Stephenson Harwood Llp**) for the **Appellants**
The Respondents were unrepresented

Hearing date: 9 October 2019

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Approved Judgment

Lady Justice Asplin:

1. The principal issue on this appeal is whether there is jurisdiction to order an interim payment on account of costs pursuant to CPR r 44.2(8) where a Part 36 offer has been accepted within the relevant period. In those circumstances, CPR r 36.13(1) provides that the claimant is entitled to the costs of the proceedings (including recoverable pre-action costs) up to the date on which the notice of acceptance is served. Costs are to be assessed on the standard basis if not agreed: CPR r 36.13(3). A costs order to that effect is deemed to have been made: CPR r 44.9.

Background

2. The issue arises in the context of an action in which the Appellants, Global Assets Advisory Services Limited and Ms Baturina, sought a final injunction restraining the Respondents, Mr Deinis and Grandlane Developments Limited and a Ms Lilia Russak, who is not a party to this appeal, from using confidential information contained in two corporate structure charts and requiring them to delete and destroy the charts in their possession. The Appellants also sought an inquiry as to damages for breach of confidence or alternatively, an account of profits made from the use of the confidential information. The proceedings were issued in March 2018 and an interim injunction was granted *ex parte* which was continued over until trial by agreement. A settlement was reached with Ms Russak in August 2018 which included a provision for no order as to costs.

3. On 21 December 2018 the Appellants made the Respondents a Part 36 offer to settle the entire claim on the basis that the Respondents accept the terms of the final injunction which had been sought which restrained them from using the confidential information. The Part 36 offer was accepted on 11 January 2019 which was within the "relevant period" for the purposes of CPR r 36.13 as defined in CPR r 36.3(g). A draft consent order was produced which contained the terms of the injunctive relief endorsed with a penal notice and, amongst other things, contained an order for an interim payment on account of costs. The Respondents objected to the inclusion of both the penal notice and the order for an interim payment.

4. The Appellants issued an application dated 1 February 2019 seeking the relief in the draft consent order including an order for an interim payment on account of costs in the sum of £215,000. It was heard by Teare J on 29 March 2019 in private. By that stage, the only matters in dispute were whether there was jurisdiction to order an interim payment on account of costs and, if so, what the quantum of such a payment should be. The question of whether the order should be endorsed with a penal notice had been conceded in correspondence.

5. By an order sealed on 16 April 2019, Teare J granted the injunctive relief which had been contained in the Appellants' Part 36 offer and amongst other things, dismissed the Appellants' application for an order for payment of costs on account and ordered the Appellants to pay the Respondents' costs of that application on the standard basis summarily assessed in the sum of £22,500.

6. In a short judgment, the citation of which is [2019] EWHC 947 (Comm), the judge noted that the very question of whether there is jurisdiction to make an interim order for the payment of costs when a Part 36 offer has been accepted within the relevant

period had been determined in the negative in *Finnegan v Spiers* [2018] 6 Costs LO 729; [2018] EWHC 3064 (Ch) and that it was the only decision of the High Court on the point. That being so, the judge stated that judicial comity required a subsequent court to follow the earlier decision unless it was convinced that the previous judgment was wrong. He concluded that it was not possible for him to say that he was convinced that Birss J had been wrong and that, in the circumstances, it was his duty to follow the previous decision. He subsequently gave permission to appeal on the basis that the arguments in support of the contrary conclusion are substantial.

7. Having served a detailed bill of costs in relation to the substantive proceedings, on 5 June 2019 the Appellants requested a detailed assessment hearing and subsequently indicated that they intended to apply for an interim costs certificate pursuant to CPR r 47.16. This caused the Respondents to request that the court strike out the appeal on the basis that it was academic and to indicate that they would take no further part in the appeal. The Respondents' strike out application was dismissed by Lewison LJ on 1 July 2019. Thereafter, on 5 August 2019, having heard submissions on behalf of both the Appellants and the Respondents, Master Gordon-Saker made an order that the Appellants are entitled to an interim costs certificate in the sum of £225,000 payable by the Respondents by 4pm on 19 August 2019 and that the Respondents pay the Appellants' costs of the application in any event, to be assessed summarily at the conclusion of the detailed assessment. No payment has been made.

8. Despite having obtained an interim costs certificate, the appeal remains relevant because if it is successful and an order is made under CPR r 44.2(8) for a payment on account of costs, the Appellants will also seek an order that the Respondents pay their costs of this appeal, that they be awarded the costs of the application before the judge and that the sum of £22,500 which they were ordered to pay be repaid to them. The Appellants no longer seek an order that there be a further order for an interim payment on account of costs in respect of the costs of the application before the judge and the costs of this appeal.

Finnegan v Spiers

9. As the judge concluded that he was bound to follow the decision in *Finnegan v Spiers*, the grounds of appeal are focused on the reasoning in that case. It is appropriate, therefore, to turn to it at this stage. It was an appeal from the decision of District Judge Kelly. She had decided that the court had no power to make an order for a payment on account where a Part 36 offer had been accepted within the relevant period, essentially because Part 36 is a complete code and the rules make no provision for a payment on account or provide the court with any discretion in such circumstances. Birss J gave a short judgment in which he agreed with the District Judge. In summary, he held that: (i) CPR Part 36 spells out the consequences of acceptance of a Part 36 offer in that it deals with the incidence of costs and the basis of assessment and accordingly, the majority of CPR r 44.2 was not applicable (paragraph 30); (ii) CPR 44.2(8) applies when a court has ordered a party to pay costs which is not the same as the circumstances in which CPR r 36.13(1) or (2) applies because in those circumstances, there is a deemed order. As a consequence, there is no reason to read r 44.2(8) in such a way as to make it applicable where a Part 36 offer is accepted (see paragraph 31); (iii) although Proudman J's decision in *Barnsley v Noble* [2013] 2 Costs LO 150; [2012] EWHC 3822 (Ch) was that the court had power to order a payment on account where a deemed costs order had been made and was not made on the basis that CPR r38.6 which relates to

discontinuance contains a discretion, that decision applies only where there is a discontinuance (see paragraphs 26 and 31); and (iv) CPR Part 36 is the place to find all the costs consequences where a Part 36 offer is accepted, including the availability of payments on account, whether expressly or as a result of an express discretion in relation to costs. There is no such express provision in relation to CPR 36.13(1) where the offer is accepted within the relevant period (see paragraph 32). He put it in the following way:

> "26. Finally, the *Barnsley* case. There the judge decided that she had power to direct a payment on account after a discontinuance. *Lahey* was not cited to her. The respondents explained the order the judge made on the basis that rule 38.6 contains a discretion and so the court had the power to make a payment on account as a result of that. That is so, but it is fair to say that the judge's reasons in *Barnsley* were not based on that proposition. Her reasoning was not focused on rule 38.6. Her decision was that the court had the power to make a payment on account when a deemed costs order was made under rule 44.9. Thus the reasoning of the judge supports the appellant.
> . . .
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> 30. In my judgment, the right way to look at this is to consider the broad relationship between Part 36 itself and rule 44.2. Given the existence of rule 44.9, it can be said that Part 36 is not an entirely comprehensive code, nevertheless the consequences of acceptance of an offer are spelled out inside Part 36 itself. They have the effect that the majority of rule 44.2 (and other parts of Part 44 as well no doubt) cannot be applicable to such a situation. Part 36 deals with the incidence of costs and the basis of assessment. In my judgment, as the respondent submitted, the purpose of rule 44.9 as it relates to Part 36 is simply to deem a costs order to be made so that the detailed assessment provisions can be triggered. That purpose of the deeming provision is nothing to do with bringing into play any other parts of Part 44 such as rule 44.2.
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> 31. The exercise of considering a payment on account in a Part 36 case is different in kind from the exercise conducted after trial, but that difference alone is not a reason not to do it. What the different does indicate however is that the place to find a provision giving the court the ability to make a payment on account order after acceptance of a Part 36 offer would be in Part 36 itself. It is absent from there. Rule 44.2(8) applies when a court has ordered a party to pay costs. That is not what has happened when a Part 36 offer is accepted under r36.13(1) or (2). There is no reason, in my judgment, to read rule 44.2(8) in such a way as to make it applicable when a Part 36 offer is accepted. So I distinguish *Barnsley*. In my judgment, that case only applies to discontinuances.
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> 32. . . . I believe the correct analysis is that the place to find all the costs consequences of accepting a Part 36 offer is Part 36 and that includes the availability of payments on account, either expressly so or because in some circumstances within Part 36 the rules expressly give a

discretion about costs, for example when there has been a late acceptance of a Part 36 offer. But they do not apply in this case."

Grounds of appeal

10. It is said that the judge was wrong to conclude that he was not convinced that Birss J had been wrong and accordingly, to follow the decision in the *Finnegan* case because that decision was wrong for four reasons. First, it is said that for the purposes of the court's jurisdiction to make an order for payment of costs on account pursuant to CPR r 44.2(8), there is no difference between a deemed costs order arising under CPR r 44.9 and any other order for costs made pursuant to CPR r 44. Secondly, it is said that Birss J made an error of law in trying to identify the source of the Court's jurisdiction to make an order for a payment on account of costs in CPR Part 36. The source is section 51(1) of the Senior Courts Act 1981 and CPR r 44.2(8). Thirdly, Birss J was wrong to decide that because CPR r 36.13 provides for the incidence of costs and the basis of assessment where a Part 36 offer has been accepted before the expiry of the relevant period, all other provisions contained in CPR 44.2 cannot be applicable to such a situation and fourthly, that Birss J was wrong to distinguish the *Barnsley v Noble* case.

Relevant provisions

11. Section 51, Senior Courts Act 1981, creates a broad statutory discretion of the court in relation to the costs of and incidental to all proceedings in the High Court. It is made expressly subject to the rules of court.

12. CPR Part 36 is described at CPR r 36.1(1) as a "self-contained procedural code about offers to settle made pursuant to the procedure set out in this Part. . ." It contains detailed provisions about the form and content of such offers and the consequences both if they are accepted or rejected. CPR r 36.7 provides that such offers may be made at any time, including before the commencement of the proceedings to which they relate.

13. CPR r36.13 is concerned with the consequences of acceptance of a Part 36 offer. It covers circumstances in which the offer is accepted both within the relevant period and after it has expired. As some of the discussion both in the *Finnegan* case and in *Barnsley v Noble* turns on the precise wording of CPR r 36.13 in the differing circumstances, it is important to set out the relevant provisions:

> **"Costs consequences of acceptance of a Part 36 offer**
> **Rule 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.
> . . .
> (2) Where -
> (a) a defendant's Part 36 offer relates to part only of the claim; and
> (b) at the time of serving notice of acceptance within the relevant period the claimant abandons the balance of the claim, the claimant

> will only be entitled to the costs of such part of the claim unless the court orders otherwise.
>
> (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.
>
> (Rule 44.3(2) explains the standard basis for the assessment of costs.)
>
> (Rule 44.9 contains provisions about when a costs order is deemed to have been made and applying for an order under section 194(3) of the Legal Services Act 2007.)
>
> (Part 45 provides for fixed costs in certain classes of case.)
>
> (4) Where -
>
> (a) a Part 36 offer which was made less than 21 days before the start of a trial is accepted; or
>
> (b) a Part 36 offer which relates to the whole of the claim is accepted after expiry of the relevant period; or
>
> (c) subject to paragraph (2), a Part 36 offer which does not relate to the whole of the claim is accepted at any time,
>
> the liability for costs must be determined by the court unless the parties have agreed the costs.
>
> (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.
>
> . . ."

CPR r 36.13(1) applied in this case because the Part 36 offer was accepted within the relevant period (as defined in CPR r 36.3(g)) and related to the whole claim. Neither sub-rules (2) nor (4), nor r36.20 applied.

14. The costs consequences of discontinuing an action are set out at CPR r 38.6(1). Unless the court orders otherwise, a claimant who discontinues is liable for the costs which the defendant has incurred on or before the date on which the notice of discontinuance was served. Reference is made in parenthesis to CPR r 44.9 which is described as providing the basis for the assessment of costs in such circumstances and the provisions about when a costs order is deemed to have been made. CPR r 44.9 to which express reference is also made in parenthesis in CPR r 36.13, is headed "Cases where costs orders deemed to have been made". It provides where relevant that:

> "(1) Subject to paragraph (2), where a right to costs arises under –
>
> . . .

> (b) rule 36.13(1) or (2) (claimant's entitlement to costs where a Part 36 offer is accepted); or
>
> (c) rule 38.6 (defendant's right to costs where claimant discontinues),
>
> a costs order will be deemed to have been made on the standard basis."

Prior to 1 April 2013, a provision in substantially the same form was contained in CPR r 44.12.

15. In this case, therefore, a costs order was deemed to have been made which entitled the Appellants to their costs of the substantive proceedings up to 11 January 2019 which was the date on which notice of acceptance of the Part 36 offer was served on them, to be assessed on the standard basis.

16. The rules in relation to the Court's discretion as to costs are contained in CPR Part 44. The provision in relation to an interim payment on account of costs is at CPR r 44.2(8) and is as follows:

> ". . .
>
> (8) Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so."

Prior to 1 April 2013 the provision in relation to interim payments was contained in CPR r 44.3(8) and was in a slightly different form. Rather than providing that the court "will" order a payment on account of costs unless there is good reason not to do so, it stated that the court "may" order an amount to be paid on account where the court has ordered a party to pay costs.

Deemed costs order

17. First, Mr Cohen, on behalf of the Appellants, submits that the decision in the *Finnegan* case is wrong and, in particular, Birss J's reasoning at paragraph 31 of his judgment is wrong because the jurisdiction to order a payment on account of costs pursuant to CPR r 44.2(8) applies whether the underlying costs order is made pursuant to the general discretion of the court expressed in CPR r 44.2 or, as in this case, is an order for costs which is deemed to have been made pursuant to CPR r 44.9. I agree. I can see no reason why the power to make an order under CPR r 44.2(8) should be restricted to circumstances in which the court has physically made the order as opposed to circumstances in which an order of the court is deemed to have been made. In both circumstances, it is the court which has ordered the party to pay the costs and accordingly, it seems to me that the circumstances fall within the wording of CPR r 44.2(8). A deemed order is no less an order of the court. It is made in order to enable the matter to be progressed in a fair and proportionate way without further need for costs to be expended and court time and resources wasted. It would be perverse if, as a result, the successful party was at a disadvantage because an interim payment on account of those costs could only be made where the original order for costs had been made following a hearing or by consent.

18. Furthermore, the rationale for ordering a payment on account of costs is the same whether or not the order for costs is an order which is deemed to have been made. As observed in the Notes to the White Book at paragraph 44.2.12, the object of CPR r 44.2(8) is to enable a receiving party to recover part of his expenditure on costs before the possibly protracted process of carrying out a detailed assessment: *Days Healthcare UK Ltd v Pihsiang Machinery Manufacturing Co Ltd* [2006] EWHC 1444 (QB). Furthermore, the making of such an order may reduce the points of dispute in the detailed assessment and discourage the paying party from prolonging the assessment itself: *Mars UK Ltd v Teknowledge Ltd* [2000] FSR 138. A person entitled to costs should not be kept out of the portion of those costs to which he is plainly entitled, pending a detailed assessment. Those policy reasons remain the same whether or not the order is deemed to have been made. In both circumstances something should be paid without delay.

19. Such an approach is consistent with the reasoning in *Barnsley v Noble*. That decision was concerned with costs and case management issues arising from interim applications. The relevant issue for these purposes was whether an order for a payment on account of costs could be made in favour of parties against which the claims had been wholly discontinued. It was argued that there was no jurisdiction to make such an order without any order for costs on discontinuance having been applied for and made by the court. Where CPR r 38.6 applies, however, a costs order is deemed to have been made on the standard basis pursuant to CPR r 44.9(1)(c) (formerly CPR 44.12(1)(d)). It was said therefore that there was no power to order an interim payment under CPR r 44.3(8) because the jurisdiction only applied where "the court has ordered a party to pay costs" (emphasis added). As I have already mentioned, the relevant provision is now contained in CPR r 44.2(8) and is couched in the present tense as follows: "Where the court orders a party to pay cost . . .".

20. Proudman J held that she had jurisdiction to order a payment on account of costs despite the fact that a discontinuance pursuant to CPR r 38.6 gave rise to a deemed rather than an actual costs order. She held that ". . .CPR 44.12 [CPR r 44.9] is clear in its terms and the mischief which a costs order on account seeks to redress (namely that the person entitled to costs should not be kept out of the portion of costs to which he is plainly entitled pending detailed assessment) is the same whether there is a deemed order following discontinuance or an actual order following trial. . . ." See paragraph 26 of her judgment. I will return to consider Birss J's treatment of the *Barnsley* case below.

21. Furthermore, the reservations expressed by Laddie J in *Dyson Ltd v Hoover Ltd (No 4)* [2004] 1 WLR 1264 do not undermine the rationale. That was a case in which the claimant having succeeded on liability in its claim against the defendant for patent infringement, elected for an inquiry as to damages. The parties settled the inquiry when the claimant accepted a payment in of £4m which was considerably lower than the amount of £21m originally sought. The court ordered the defendant to pay the costs of the inquiry to be assessed on the standard basis if not agreed and the claimant submitted a bill of costs for £2.5m. Before an assessment had taken place, the claimant applied for an interim payment on account under what was then CPR r 44.3(8). The application came before Laddie J who had not heard the trial or inquiry. He dismissed the application and held that whilst an interim payment should generally be ordered in favour of a successful party where there had been a full trial, that was not necessarily the case where the judge had not heard the whole trial or inquiry as to damages.

22. The judge in that case was concerned with the previous version of CPR r 44.2(8) contained in r 44.3(8) which was couched in terms of a general discretion to order a payment on account. It is clear from paragraph 16 of his judgment that Laddie J was addressing the question of whether that discretion should be exercised where the judge has not had the benefit of hearing the whole trial. He was neither addressing the present provision which is in materially different form, nor was he considering the question of whether there was jurisdiction to make a payment on account at all, in circumstances where the judge had not heard the trial.

23. As I have already mentioned, the present provision contained in CPR r44.2(8) is substantially different from CPR r 44.3(8) with which Laddie J was concerned. It now provides that the court "will" make an order for an interim payment of account of costs "unless there is a good reason not to do so." It seems to me that the current wording cannot form the basis for a distinction between cases in which the application for an interim payment is heard by the trial judge and those in which it is not. It seems to me that it applies whether or not the trial judge hears the application for an interim payment. If the judge hearing the application considers that there is good reason not to make the order, the terms of CPR r 44.2(8) enable him to decline to do so.

24. Furthermore, since Laddie J considered the application in the *Dyson* case, costs budgeting has become the norm. Accordingly, as a matter of practicality, there is no need for the "stab in the dark" which Laddie J was reluctant to make. In any event, it is also possible to adopt the "rule of thumb" approach favoured by Coulson J (as he then was) in *Fitzpatrick Contractors Ltd v Tyco Fire and Integrated Solutions (UK) Ltd* [2010] 2 Costs LR 115; [2009] EWHC 274 (TCC). In that case there was no trial. A Part 36 offer had been accepted after the expiry of the relevant period and Coulson J made an order for a payment on account pursuant to the discretion contained in the previous form of CPR 44.2(8), contained in CPR 44.3(8). He took 50% of the costs figure and multiplied it by 75% in order to arrive at the amount to order by way of an interim payment on account of costs. See paragraph 69 of his judgment.

25. It seems to me, therefore, that there can be no reason to conclude that the power contained in CPR r 44.2(8) can or should only be exercised by the judge who has heard the substantive proceedings. My conclusion is also consistent with a number of further cases to which we were referred. Mr Cohen pointed out that an order for an interim payment on account was made in *Beach v Smirnov* [2007] EWHC 3499 (QB), despite the fact that the judge had little or no knowledge of the issues in the claim. In that case, Ouseley J approved a settlement on behalf of a protected party in a personal injuries action. He also made an order for the payment of costs on account, both liability and quantum having been agreed, costs in relation to liability having been dealt with and provision having been made in the approved order for the payment of costs to be the subject of a detailed assessment on the standard basis, if not agreed. Equally, in *Culliford v Thorpe* [2018] 5 Costs LR; [2018] EWHC 252 (Ch) although the order was made by the judge who had heard the trial, the payment on account was ordered after a costs order had already been made and sealed, the judge having overlooked CPR r 44.2(8) on the first occasion.

26. Furthermore, the distinctions which arise as a consequence of restricting the jurisdiction to make orders under CPR r 44.2(8) to circumstances in which the costs order has been made by a judge rather than having been deemed to have been made pursuant to CPR r 44.9 illustrate the perversity of such a restriction. If that were the case, as Birss J

accepted at paragraph 32 of his judgment in the *Finnegan* case, it would be possible to make an order for a payment on account if a Part 36 offer were accepted after the expiry of the relevant period because CPR r 36.13(4)(b) provides that the liability for costs must be determined by the court if the parties have not agreed it, but not if the offer is accepted within the relevant period in the circumstances with which CPR r 36.13(1) is concerned.

27. There would be a number of additional anomalies. Where a Part 36 offer is made before the action is commenced and is accepted within the relevant period, it is necessary to commence Part 8 proceedings pursuant to CPR r 46.14 in order to recover the costs to which a party is entitled. In those circumstances, therefore, it would be possible to make an order pursuant to CPR r 44.2(8). The same would be true in the circumstances set out in CPR r 36.14(4) or where the Part 36 offer relates only to part of the claim and the claimant abandons the balance of the claim within the relevant period because CPR r 36.13(2) contains a discretion as to costs.

28. Not only does such a distinction create perverse results, it would also enable the party accepting the Part 36 offer to determine whether it could be liable for a payment on account by choosing to accept a Part 36 offer immediately before the expiry of the relevant period rather than a day afterwards. That cannot be correct.

29. It seems to me that it is equally unjustifiable to seek to distinguish the circumstances in which a deemed order arises on a discontinuance, as Birss J did in relation to *Barnsley v Noble*. Such a distinction requires one to accept that if a deemed costs order is made pursuant to CPR r 44.9(1)(c) on discontinuance pursuant to CPR 38.6, the court retains jurisdiction to make an order for a payment on account of costs, but where a Part 36 offer in relation to the whole claim is accepted within the relevant period pursuant to CPR 36.13(1) and a deemed order arises under CPR r 44.9(1)(b) it does not. In my judgment, that cannot be correct.

30. In addition, in my view there is nothing in the point that the court is precluded from making an order for payment on account of costs where CPR r 44.9(1)(b) applies because the court cannot vary a deemed order pursuant to its case management powers under CPR r 3.1(7): *Lahey v Pirelli Tyres Ltd* [2007] 1 WLR 998; [2007] EWCA Civ 91. As Birss J noted at paragraph 25 of his judgment in the *Finnegan* case, the Court of Appeal was concerned with an application to vary a deemed order by substituting an order requiring the payment of 100% of the assessed costs with one requiring the payment of only 25% of those costs. In this case, the Appellants were not seeking to vary a deemed order. They are seeking relief which is distinct from and in addition to the relief contained in it.

Source of the jurisdiction and interaction with CPR 44

31. In any event, do the terms of CPR Part 36 and CPR r 36.13, in particular, preclude one from reliance upon CPR r 44.2(8)? In other words, was Birss J right to conclude that (i) all of the costs consequences of accepting a Part 36 offer are to be found in CPR Part 36, (ii) there is no reference to the jurisdiction to make a payment on account within Part 36 and (iii) there is no reason to read CPR r 44.2(8) in such a way as to make it applicable when a Part 36 offer is accepted?

32. First, it seems to me that Birss J was wrong to conclude that one can only look to the terms of CPR Part 36 itself to find the jurisdiction to order an interim payment of costs. Although CPR Part 36 is described as a "self-contained procedural code about offers to settle made pursuant to the procedure" there is nothing in the terms of CPR Part 36 which suggests that it is entirely freestanding and that all costs consequences of the acceptance of a Part 36 offer are to be found within the four corners of CPR Part 36 itself. On the contrary, express reference is made in CPR r 36.13, for example, to CPR r 44.3(2) which it is stated, "explains the standard basis for the assessment of costs" and to CPR r 44.9 which provides for the deemed costs orders which are required to give effect to the terms of CPR r 36.13. Furthermore, the provisions which apply in relation to detailed assessment proceedings, including the point at which the assessment is commenced are contained in CPR Part 47. In addition, CPR r 46.14 provides for the costs only proceedings which are necessary to give rise to a costs order required for an assessment of costs following the acceptance of a Part 36 offer before the action is commenced.

33. Once one has concluded that the terms of CPR Part 36 itself do not form an exclusive code as to the costs consequences of offers to settle which comply with Part 36, it is necessary to determine whether there is a tension or conflict between CPR r 36.13 and CPR r 44.2(8) which must be resolved. In this regard, Mr Cohen referred us to *Lowin v W Portsmouth & Co Ltd* [2017] EWCA Civ 2172; [2018] 1 WLR 1890, *Broadhurst v Tan* [2016] 1 WLR 1928, *Solomon v Cromwell Group plc* [2012] 1 WRL 1048; [2011] EWCA Civ 1584 and *Hislop v Perde* [2019] 1 WLR 201. In each of those cases there was an apparent tension or conflict between two provisions of the CPR and it was necessary to determine first whether there was an actual tension which needed to be resolved and if so, which provision must prevail.

34. In this case, once one has concluded that it is possible to look outside CPR Part 36 itself, it seems to me that there is no conflict or tension between CPR r 36.13(1) and CPR r 44.2(8) at all. It is not necessary to determine which provision must prevail. The former entitles a party to its costs of the proceedings on a particular basis and is complemented or supplemented by the latter which creates the jurisdiction to order a payment on account of those costs. CPR r 44.2(8) does not undermine or conflict with CPR r 36.13(1) at all. I should add that although Mr Cohen made reference to the very wide statutory jurisdiction as to costs contained in section 51(1) of the Senior Courts Act 1981 and suggested that Birss J was wrong not to identify it as the source of the court's jurisdiction to make an order for a payment on account, it seems to me that it does not take the matter any further. Section 51 provides expressly that it is subject to the Rules of court and as a result one is driven back to determine the relationship between CPR r 36.13 and CPR r 44.2(8).

The Barnsley decision

35. It will be apparent from everything that has gone before that I consider *Barnsley v Noble* to have been rightly decided. It also follows that, in my judgment, Birss J was wrong to distinguish the *Barnsley* case in the way he did at paragraph 32 of his judgment in the *Finnegan* case, particularly in the light of the fact that he himself accepted at paragraph 26 of his judgment that Proudman J's reasoning was based upon the nature of a deemed order pursuant to CPR r 44.9 rather than the existence of a discretion in CPR r 38.6. It seems to me that there is no logical distinction to be made between the circumstances in which a deemed order is made on discontinuance under CPR r

44.9(1)(c) and where a deemed order is made following the acceptance of a Part 36 offer within CPR r 36.13(1), pursuant to CPR r 44.9(1)(b).

Conclusion

36. As I consider there is a jurisdiction to make an order for an interim payment on account of costs in this case, it leaves me to consider whether to exercise the jurisdiction in relation to the costs in the substantive action and to determine the level of such a payment. I can see no good reason why the jurisdiction should not be exercised. Furthermore, in the light of Master Gordon-Saker's order for a costs certificate in the sum of £225,000, it seems to me that it is not necessary to consider the details of the costs schedules in this matter or to restrict the payment to the sum of £215,000 which was sought originally. The Master considered all of the relevant details and arrived at the figure of £225,000. It seems to me to be appropriate, therefore, that the order for an interim payment should be for the same amount.

37. For all the reasons set out above, I would allow the appeal.

Sir Rupert Jackson:

38. I agree.

Lord Justice Patten:

39. I also agree.