Case No: JR 1703935

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 30/11/2018

Before:

MASTER ROWLEY

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Between:

Guy Bertin Tchiffomi Ngassa	**Claimant**
- and -	
(1) The Home Office	
(2) Secretary of State for the Home Department	**Defendants**

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- -

Approved Judgment

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

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MASTER ROWLEY

Master Rowley:

1. I have already assessed the claimant's bill of costs in so far as it relates to the costs to be paid by the defendants. I found the sum of £52,190.78 to be both reasonable and proportionate. Subject to relevant offers I allowed the claimant's solicitors £1,500 plus vat and the court fee as the costs of the provisional assessment. The decision to be addressed in this judgment is whether or not there is a relevant offer which alters that provisional allowance. I have been provided with helpful submissions by both parties and both have requested that I deal with this decision on paper.

2. On 6 November 2017, the claimant served upon the defendant an offer using form N242A. The intention clearly was to make an offer within the terms of Part 36 so as to claim the benefit of the sanctions levied by Part 36 upon a party who failed to accept a relevant offer.

3. The offer made by the claimant was to accept that the "Defendants pay £45,000 exclusive of VAT and interest." The offer was to settle the whole claim rather than a part of it or a certain issue within it. The offer does not state whether it took into account all or part of a counterclaim but that does not have any particular bearing in this case.

4. Part 36 is imported into consideration of the costs of detailed assessment proceedings by rule 47.20(4). It also deals with the transposing of the terminology of Part 36 into the terminology used in detailed assessment proceedings. There is also a single paragraph in the Practice Direction to Part 47 regarding Part 36 offers which states, under the heading "Costs of detailed assessment proceedings – rule 47.20: offers to settle under Part 36 or otherwise":

> "19 Where an offer to settle is made, whether under Part 36 or otherwise, it should specify whether or not it is intended to be inclusive of the cost of preparation of the bill, interest and VAT. Unless the offer states otherwise it will be treated as being inclusive of these."

5. It is trite to say that Part 36 is a self-contained procedural code. Only an offer which complies with that code will have the consequences set out in Part 36 in various circumstances. That does not prevent the party making an offer which is not a Part 36 offer but such offer will not have the same consequences if, for example, it is not accepted by the paying party. In essence, the offer can be considered by the court under rule 44.2 when exercising its general discretion as to costs.

6. A Part 36 offer may be made in respect of the whole or part of any issue that arises in a claim (or counterclaim et cetera). An offer must be in writing; make it clear that it is made pursuant to Part 36; and specify a period of at least 21 days for acceptance. Rule 36.5(4) is relied upon by the defendants in their submissions. That subparagraph is in the following terms:

> "A Part 36 offer which offers to pay or offers to accept a sum of money will be treated as inclusive of all interest until –

> (a) the date on which the period specified under rule 36.5(1)(c) expires; or
>
> (b) if rule 36.5(2) applies, a date 21 days after the date the offer was made."

7. This is not a case where rule 36.5(2) applies and so the defendants rely upon the first limb of this subparagraph. The defendants' argument is a very simple one. The offer set out on the form N242A is expressly exclusive of interest and costs. The requirement of rule 36.5(4) is that a Part 36 offer must offer to pay, or accept, a sum of money which is inclusive of interest up to the end of the 21 day period for acceptance of the offer as of right.

8. In support of that argument, the defendant relies upon the decision of HHJ Robert Owen QC sitting in the County Court at Nottingham on 7 October 2016 in the case of Lydia Potter v Sally Montague Hair and Spa. In that case the issue was limited to "whether as a matter of law the claimant's offer to settle costs in the course of detailed assessment proceedings under CPR Part 47, stated to be made under Part 36, constituted a valid and effective Part 36 offer."

9. At paragraph 23 of his judgment, the judge says:

> "The starting point is rule 47.20(4). This rule clearly provides that the provisions of Part 36 do apply to the costs of detailed assessment proceedings subject only to the express modifications provided for within the rule itself, at rule 47.2(4) and; specifically, as set out at (a) to (e). It was open to the Rule Committee to add to or extend such express modifications, for example, to modify, for the purposes of detailed assessment proceedings, rule 36.5(4) to permit a Part 36 offer to be treated as exclusive of all interest paid. No such additional modification has been made. Part 36 is a self-contained code applicable in detailed assessment proceedings subject only to express modifications within rule 47.20(4). It is not permissible to interpret that rule, or section VII generally, so as to imply an additional modification on the basis of such implied modification being consistent with or explained by paragraph 19 of PD 47. Indeed, to do so would be to offend, rather than apply the purposive interpretation of the rule."

10. The judge then goes on to reject the claimant's submission that there is in fact no ambiguity between paragraph 19 of PD 47 and rule 36.5. Instead he preferred a more restrictive interpretation of Part 36 so as to encourage certainty through making offers compliant with that Part.

11. In the claimant's submissions in this case, it is said that the case of Potter does not assist the defendants on two grounds. One is that Potter was concerned with offers which were inconsistent with CPR 36.13 rather than CPR 36.5(4). It does not seem to me that that argument gets off the ground. The quotation that I have set out and the précis of the subsequent paragraphs of the judge's reasoning are clearly entirely consistent with the tension between paragraph 19 of PD 47 and rule 36.5(4).

12. The second argument is that the court in Potter was not addressed upon the wording of CPR 36.2(3) and as such did not consider its relevance. I have paraphrased that rule at the beginning of paragraph 6 of this judgment. It is the provision which says that the offer can be in respect of the whole of the claim, part of it or simply an issue within the claim. I have also recorded at paragraph 3 of this judgment that the offer in this case was for the whole claim. This is demonstrated by a cross being entered into the relevant box on form N242A.

13. The submission of the claimant is that his intention was to seek to agree a costs figure leaving the interest figure to be resolved at a later date. On this basis, the offer was in fact for only part of the claim and not the whole of it. Where the claim is divided between costs and interest, it cannot be the case that the claimant's Part 36 offer could say anything other than that it was an offer to accept a sum for costs which was exclusive of all interest.

14. I do not think that this is an attractive argument. First, it runs flat against the express wording of rule 36.5(4). That says that an offer "will" be treated as including interest up to the last date for acceptance of the offer as of right. To describe the rule as not expressly prohibiting an offer being made which is exclusive of interest seems to me to ignore the plain words of the rule.

15. Secondly, it runs against the intention of the rule to provide clarity as to what is being accepted. It ought to be possible for a party to accept a single sum of money in the knowledge that it incorporates all the damages and interest that is outstanding. It brings matters to a head. If the interest is excluded in the manner the claimant has attempted here, it simply leads to further litigation as to the extent of that interest.

16. If it was the claimant's intention to seek to argue for some unusual order in respect of interest i.e. something other than interest up to the end of the 21 days for acceptance of his offer, then the claimant's option was to make an offer outside the strict provisions of Part 36. It is analogous to the situation where a defendant, who wishes to argue about the extent of the claimant's costs, has to make a Calderbank type offer to avoid the automatic consequences of Part 36 i.e. paying the claimant's costs on the standard basis. Here, the claimant wished to seek to improve upon the entitlement under Part 36 and therefore, to use the words of HHJ Owen, the claimant was seeking both to have his cake and to eat it.

17. Consequently, I find that the offer made on 6 November 2017 is not a Part 36 offer and that as such there are no sums which may be recoverable under rule 36.17(4).