Case No: D85YM183

SCCO reference: CL1806507

IN THE SENIOR COURTS COSTS OFFICE
FROM THE COUNTY COURT AT CENTRAL LONDON

Thomas More Building
Royal Courts of Justice
London WC2A 2LL

Date: 23/08/2019

Before :

MASTER LEONARD

- -

Between :

Emery Nema	**Claimant**
- and -	
Andrew Kirkland	**Defendant**

- -
- -

Andrew Hogan (instructed by **Bond Turner**) for the **Claimant**
Matthew Waszak (instructed by **Horwich Farrelly**) for the **Defendant**

Hearing dates: 14 May 2019

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Approved Judgment

As amended (at paragraph 43) on 24 September 2019 under CPR 40.12

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.

.....

MASTER LEONARD

Master Leonard:

1. I am dealing with the Defendant's application to strike out the Claimant's Notice of Commencement of detailed assessment proceedings. The ground for the application is that, this case being subject to the fixed recoverable cost rules under CPR 45 Section IIIA, the Claimant is not entitled to commence detailed assessment proceedings.

2. This is the history. The Claimant and the Defendant were involved in a road traffic accident on 2 June 2017. On 10 October 2017, the Claimant sent a Claim Notification Form (CNF) starting a claim against the Defendant under The Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ("the Protocol"). From that point on, they communicated through their solicitors.

3. The claim exited the Protocol and proceedings were issued. On 5 July 2018, the Defendant made a Part 36 offer of £5,500 in settlement of the claim. The Claimant accepted the Defendant's offer on 25 July 2018.

4. On 30 August 2018 the Claimant sent to the Defendant a schedule of the costs and disbursements sought by the Claimant. The total was £6,160.15, calculated by reference to Section IIIA of CPR 45. The solicitors' costs totalled £4,506, comprising base costs of £2,655, 20% of damages at £1,100, and VAT. Disbursements were, in addition, claimed at the sum of £1,654.15, including an engineer's report fee of £216; an engineer's fee for taking photographs of £42; and counsel's fees for advising and settling particulars of claim, at £276 and £180 respectively.

5. On the same date, the Defendant responded to the effect that the sums sought by the Claimant for counsel's fees and for the engineer's photographs were not agreed. The Defendant offered £150 for the engineer's report and stated that the sum of £5,596.15 had been requested from the Defendant's insurer "in full and final settlement of your costs and disbursements". That sum included all the Claimant's undisputed costs and disbursements and the £150 offered against the engineer's fees, leaving £564 in issue between the parties.

6. On 20 September 2018, the Defendant sent to the Claimant a cheque for £5,596.15. It has not been suggested by the Defendant that that sum was accepted by the Claimant, as offered, in full and final settlement.

7. On 18 September 2018 the Claimant sent to the Defendant Notice of Commencement of detailed assessment proceedings. The notice enclosed a bill of costs totalling £6,431.47. That figure comprised the sums claimed in the Claimant's schedule of 30 August 2018 with an additional £271.32 (including VAT) for drawing up and checking the bill.

8. The Defendant applied to strike out both the Notice of Commencement and the bill of costs.

The Rules

9. The parties' submissions refer extensively to the provisions of the Civil Procedure Rules and Practice Directions. I will summarise the most pertinent provisions.

10. CPR 36.13:

> "(1) Subject 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.
>
> (Rule 36.20 makes provision for the costs consequences of accepting a Part 36 offer in certain personal injury claims where the claim no longer proceeds under the RTA… Protocol.)…
>
> (3) Except where the recoverable costs are fixed by these Rules, costs under paragraphs (1)… are to be assessed on the standard basis if the amount of costs is not agreed…

11. CPR 36.14:

> "(1) If a Part 36 offer is accepted, the claim will be stayed…
>
> (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) Any stay arising under this rule will not affect the power of the court—
>
> (a) to enforce the terms of a Part 36 offer; or
> (b) to deal with any question of costs (including interest on costs) relating to the proceedings…"

12. CPR 36.20:

> **"** (1) This rule applies where… a claim no longer continues under the RTA… Protocol pursuant to rule 45.29A(1)…
>
> (2) Where a Part 36 offer is accepted within the relevant period, the claimant is entitled to the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 for the stage applicable at the date on which notice of acceptance was served on the offeror…
>
> (11) Where the parties do not agree the liability for costs, the court must make an order as to costs.

(12) Where the court makes an order for costs in favour of the defendant—

(a) the court must have regard to; and

(b) the amount of costs ordered must not exceed,

the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 applicable at the date of acceptance, less the fixed costs to which the claimant is entitled under paragraph (4) or (5).

(13) The parties are entitled to disbursements allowed in accordance with rule 45.29I incurred in any period for which costs are payable to them."

13. CPR 44.1(1):

"In Parts 44 to 47, unless the context otherwise requires …

… 'costs' includes fees, charges, disbursements, expenses, remuneration, reimbursement allowed to a litigant in person under rule 46.5 and any fee or reward charged by a lay representative for acting on behalf of a party in proceedings allocated to the small claims track…

… 'fixed costs' means costs the amounts of which are fixed by these rules whether or not the court has a discretion to allow some other or no amount…"

14. CPR 44.6:

"(1) Where the court orders a party to pay costs to another party (other than fixed costs) it may either –

(a) make a summary assessment of the costs; or
(b) order detailed assessment of the costs by a costs officer,
unless any rule, practice direction or other enactment provides otherwise.

(Practice Direction 44 – General rules about costs sets out the factors which will affect the court's decision under paragraph (1).)

(2) A party may recover the fixed costs specified in Part 45 in accordance with that Part."

15. CPR 44.9:

"(1) Subject to paragraph (2), where a right to costs arises under… rule 36.13(1)… (claimant's entitlement to costs where a Part 36 offer is accepted)…

… a costs order will be deemed to have been made on the standard basis.

(2) Paragraph 1(b) does not apply where a Part 36 offer is accepted before the commencement of proceedings."

16. Practice Direction 44:

"8.3… Where a party is entitled to costs some of which are fixed costs and some of which are not, the court will assess those costs which are not fixed… The decision whether such assessment should be summary or detailed will be made in accordance with paragraphs 9.1 to 9.10 of this Practice Direction…

"9.1…Whenever a court makes an order about costs which does not provide only for fixed costs to be paid the court should consider whether to make a summary assessment of costs…

9.2… The general rule is that the court should make a summary assessment of the costs –

(a) at the conclusion of the trial of a case which has been dealt with on the fast track, in which case the order will deal with the costs of the whole claim; and
(b) at the conclusion of any other hearing, which has lasted not more than one day, in which case the order will deal with the costs of the application or matter to which the hearing related. If this hearing disposes of the claim, the order may deal with the costs of the whole claim,

unless there is good reason not to do so...

9.7…The court awarding costs cannot make an order for a summary assessment of costs by a costs officer. If a summary assessment of costs is appropriate but the court awarding costs is unable to do so on the day, the court may give directions as to a further hearing before the same judge."

17. CPR 45.29A-45.29C:

"45.29A… this section applies… to a claim started under… the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ('the RTA Protocol')…

where such a claim no longer continues under the relevant Protocol…

45.29B… if, in a claim started under the RTA Protocol, the Claim Notification Form is submitted on or after 31st July 2013, the only costs allowed are—
(a) the fixed costs in rule 45.29C;
(b) disbursements in accordance with rule 45.29I.

45.29C… the amount of fixed costs is set out in Table 6B… Where appropriate, VAT may be recovered in addition to the amount of fixed

> recoverable costs and any reference in this Section to fixed costs is a reference to those costs net of VAT…"

18. The tables referred to set amounts of fixed costs, depending upon the stage at which the case concludes, from pre-issue settlement to trial.

19. CPR 45.29H:

> "(1) Where the court makes an order for costs of an interim application to be paid by one party in a case to which this Section applies, the order shall be for a sum equivalent to one half of the applicable Type A and Type B costs in Table 6 or 6A…
>
> (4) Where appropriate, VAT may be recovered in addition to the amount of any costs allowable under this rule."

20. CPR 45.29I:

> (1) … the court—
>
> (a) may allow a claim for a disbursement of a type mentioned in paragraphs (2) or (3); but
>
> (b) will not allow a claim for any other type of disbursement.."
>
> (2) In a claim started under the RTA Protocol… the disbursements referred to in paragraph (1) are—
>
> (a) the cost of obtaining medical records and expert medical reports as provided for in the relevant Protocol;
>
> (b) the cost of any non-medical expert reports as provided for in the relevant Protocol;
>
> (c) the cost of any advice from a specialist solicitor or counsel as provided for in the relevant Protocol;
>
> (d) court fees;
>
> (e) any expert's fee for attending the trial where the court has given permission for the expert to attend;
>
> (f) expenses which a party or witness has reasonably incurred in travelling to and from a hearing or in staying away from home for the purposes of attending a hearing;
>
> (g) a sum not exceeding the amount specified in Practice Direction 45 for any loss of earnings or loss of leave by a party or witness… and

> (h) any other disbursement reasonably incurred due to a particular feature of the dispute…
>
> (3) In a claim started under the RTA Protocol only, the disbursements referred to in paragraph (1) are also the cost of—
>
> (a) an engineer's report..."

21. CPR 45.29I, paragraph 2A fixes or caps the amount recoverable for various disbursements in soft tissue injury claims started under the RTA Protocol.

22. CPR 45.29J:

> "(1) If it considers that there are exceptional circumstances making it appropriate to do so, the court will consider a claim for an amount of costs (excluding disbursements) which is greater than the fixed recoverable costs referred to in rules 45.29B to 45.29H.

The Defendant's Submissions

23. Mr Waszak for the Defendant submits that the Claimant should not have started detailed assessment proceedings.

24. Upon accepting the Defendant's Part 36 offer, the Claimant became, under CPR 36.20, entitled to the appropriate stage of fixed recoverable costs under CPR 45, Section IIIA (CPR 36.20(2)) and to disbursements in accordance with CPR45.29I (CPR 36.20(13)).

25. The extent of the costs dispute between the parties in this case is the sum of £564 for disbursements. Those disbursements do not fall within CPR 45.29I(2)(a)-(g). With the exception of the engineer's report (which is provided for by CPR 45.29I(3)(a)) the only option for the recovery is under CPR 45.29I(h), as "… any other disbursements reasonably incurred due to a particular feature of the dispute". The issue of the extent to which such disbursements can be recovered under CPR 45.29I should be resolved by an application to the court under CPR 36.20(11).

26. CPR 36.20 was introduced (as CPR 36.10A) by the same statutory instrument (SI 2013/1695) that created CPR 45 Section IIIA. It is materially different to CPR 36.13, which sets out a claimant's entitlement to costs (on acceptance of a Part 36 offer within the relevant period) in a case to which CPR 45, Section IIIA does not apply. CPR 36.13(3) envisages that, where recoverable costs are not fixed, they will be subject to assessment in the ordinary way if not agreed. CPR 36.20 provides for a different procedure where recoverable costs are fixed.

27. Section IIIA of CPR 45 does not, as this case illustrates, eliminate the possibility of disagreement. In that situation, the clear mechanism provided by CPR 36.20(11) is that the court must make an order as to costs. That requirement is not met by commencing detailed assessment proceedings under CPR 47. An application must be made to the court for an order. The court will then make an order for costs, applying the fixed recoverable cost rules and so eliminating the need for detailed assessment proceedings.

28. Mr Waszak refers to the words of Dyson MR in *Broadhurst v Tan* [2016] EWCA Civ 94 at paragraph 8:

> "The 2013 Amendment Rules… introduced changes to Part 36 to take account of Section IIIA. A new rule 36.10A legislated for the treatment of costs in Section IIIA where a defendant's Part 36 offer was accepted by the claimant. The effect of this provision was that the claimant would receive the fixed costs provided for by Section IIIA. This disapplied the usual rule, contained in the pre-existing rule 36.10 , that where a Part 36 offer is accepted, the claimant is entitled to costs assessed on the standard basis to the point of acceptance.."

29. By unambiguously limiting a claimant to fixed recoverable costs and permitted disbursements, CPR 36.20 is intended to eliminate the need for detailed assessment proceedings. The language of the rules indicates that cases subject to fixed recoverable costs fall within self-contained provisions of CPR 45 and generally outside the scope of detailed assessment.

30. In support Mr Waszak cites, by way of example, the wording of CPR 44.6(2) and the reference to "the only costs allowed" at CPR 45.29B. That wording, he submits, removes the scope for any potential detailed assessment, with its attendant cost. That was one of the critical motives for implementing fixed recoverable costs. The costs of any necessary application for an order under CPR 36.20(11) are, consistently with CPR 45.29B, provided for by CPR 45.29H (interim applications).

31. The only conceivable situation in which it would be appropriate for a claimant to commence detailed assessment proceedings following the acceptance of a defendant's Part 36 offer in a case to which CPR 45, Section IIIA applies, would be where a claimant seeks costs exceeding fixed recoverable costs under CPR 45.29J. It is not suggested by either party that this is such a case.

32. Mr Waszak refers me to the judgment of Master Haworth in *Mughal v Samuel Higgs & EUI Limited* (SCCO unreported, 6 October 2017) in which the Master struck out a Notice of Commencement served by a claimant entitled to fixed costs in accordance with CPR 45 Section IIIA.

33. It was not contended (paragraph 4 of Master Haworth's judgment) that there was a case for recovery of additional costs under CPR 45.29J. Master Haworth found (paragraph 9) that the whole purpose of the fixed costs regime was to avoid the necessity of either summary or detailed assessment. It was not open to the claimant to draft a bill of costs and use the detailed assessment procedure, so increasing costs in proceedings where fixed costs were meant to apply (paragraph 10). In his view (paragraph 6) CPR 36.14(5) empowered the court to deal with issues of costs and the appropriate course, in fixed costs cases, was for an application to be made to the court.

34. Mr Waszak argues that, properly construed, disbursements falling within CPR 45.29I should properly be regarded as fixed costs. Not every item of fixed costs crystallises automatically. For example, claimant solicitors' costs are quantified by reference to the amount of damages received.

The Claimant's Submissions

35. Mr Hogan for the Claimant says that at the heart of this application lies the recoverable cost of determining the Claimant's right to the disputed disbursements. A provisional assessment under CPR 47.15 will permit the Claimant to recover costs of up to £1,500 plus VAT. An application under CPR 20(11) would allow the Claimant to recover a fee of £250 plus VAT.

36. CPR 36.13(3) provides for assessment on the standard basis "Except where the recoverable costs are fixed by these Rules…" but the question is whether the recoverable disbursements in issue in this case are fixed costs.

37. The definition of "costs" at CPR 44.1 expressly includes disbursements, whereas the definition of "fixed costs" refers only to costs the amount of which is fixed by the rules. It follows that even in cases governed by Section IIIA of CPR 45, disbursements the amount of which is not fixed are not "fixed costs".

38. As the right to costs arises under CPR 36.13(1), the Claimant has the benefit of a deemed costs order under CPR 44.9(1)(b). That is the authority for assessment on the standard basis under CPR 36.13(3). CPR 36.20 sets out the parameters of the costs to be recovered on the basis of that authority, including reasonable disbursements in accordance with CPR 45.29I.

39. Properly construed, says Mr Hogan, CPR 36.13 and CPR 36.20 provide, where costs are fixed but disbursements are not, for an assessment in which fixed costs will be allowed for solicitors' fees and disbursements assessed on the standard basis. There is no authority or logical basis for treating non-fixed disbursements as fixed costs.

40. As for the assessment procedure, there is no provision in the Civil Procedure Rules for the assessment of costs under CPR 36.13(3) to be carried out on a summary basis. The power to make a summary assessment only arises when the court makes a costs order. Even then, the court's discretion to make a summary assessment of costs is limited by the provisions of CPR 44.6 and Practice Direction 44 (including paragraph 8.3 which provides, where a party is entitled to costs, some of which are fixed and some which are not, for the court to assess the non-fixed costs on the standard basis). It does not arise at all where there is a deemed order under CPR 44.9(1)(b).

41. Paragraph 9.7 of Practice Direction 44 is particularly germane, providing as it does that only the judge who has heard a case can summarily assess the costs. On settlement following a Part 36 offer, there will have been no hearing at all.

42. CPR 36.14(5) has no application. That power arises where the liability for costs must be determined by the court. There is no basis for suggesting that it creates a self-contained regime for applications for the summary assessment of disbursements in fixed costs cases.

43. Nor is it appropriate to treat an application for an order under CPR 36.20(11) as an "interim application". An interim application may, for example, be for pre-action

disclosure, but it does not apply to the quantification of costs. For that we have the provisions of the Civil Procedure Rules for summary and detailed assessment.

44. Mr Hogan suggests that *Mughal v Samuel Higgs & EUI Limited* was decided per incuriam. Master Haworth's attention was not drawn to the relevant rules, or to two important cases decided by the Court of Appeal. The first of these is *Mahmood v Penrose* [2002] EWCA Civ 457, in which the Court of Appeal found, by reference to what was then section 13.8 of the Costs Practice direction (the predecessor of Practice Direction 47, paragraph 9.7), that a judge who had not conducted the relevant hearing could not carry out a summary assessment of costs.

45. The second is *Thenga v Quinn* [2009] EWCA Civ 151, a decision on permission to appeal, in which Wilson LJ (as he then was) observed that an apparent local practice of having summary assessment undertaken by district judges who had not heard the relevant case, was on the face of it irregular (albeit something to which he might turn a blind eye).

46. Mr Hogan also warns me off from any attempt to use case management powers in an attempt to override the rules and practice directions: the judgment of the Court of Appeal in *Bovale Ltd v Secretary of State for Communities and Local Government* [2009] EWCA Civ 171 makes it clear that that is not an option.

Conclusions

47. I bear in mind that under CPR 1.2(b) I have a duty, when interpreting the Civil Procedure Rules, to seek to give effect to the overriding objective, which requires that cases be dealt with justly and at proportionate cost.

48. I cannot accept Mr Waszak's submission that non-fixed disbursements are nonetheless to be regarded as "fixed costs". I am however equally unable to accept the Claimant's submissions, which seem to me to be based upon the premise that, by virtue of CPR 44.1(1), the word "costs" must always be read to include disbursements. In fact, the rule makes it clear that such is only the case unless the context otherwise requires.

49. CPR 45 (not just in Section IIIA, but throughout) distinguishes clearly between fixed costs and disbursements and makes separate provision for each. It would follow that where other provisions of the Civil Procedure Rules cross-refer to fixed costs under CPR 45, they do not refer to disbursements.

50. Even in isolation, the context clearly requires that the words "Except where the recoverable costs are fixed by these Rules…" in CPR 36.13(3) do not require that disbursements must also be fixed. A much more appropriate and workable interpretation, consistent with the overriding objective, is that the wording does not refer to disbursements at all. It simply confirms, as one would expect, that cases in which the recoverable costs are fixed are not subject to the general rule that following acceptance of a Part 36 offer, a claimant's costs are to be assessed on the standard basis.

51. As Mr Waszak says, CPR 36.13 and CPR 36.20 between them provide (absent agreement) for two alternative, mutually exclusive methods of determining the

amount of costs and disbursements recoverable by a claimant following acceptance of a Part 36 offer. One is detailed assessment on the standard basis under CPR 36.13(3), a potentially expensive procedure quite unsuitable where CPR 45 Section IIIA applies. The alternative, suitable and specifically designed for such cases, is recovery of fixed costs and permitted disbursements under CPR 36.20.

52. It also seems to me that, where following acceptance of a Part 36 offer, fixed costs are recoverable under CPR 45 Section IIIA, there can be no deemed order for costs under CPR 44.9. CPR 44.9 applies where a right to costs arises under CPR 36.13(1), but CPR 36.13(1) is expressly subject to CPR 36.20. CPR 36.20 provides that a claimant's entitlement to costs and disbursements, following acceptance of a Part 36 offer, is dictated by Section IIIA of Part 45. That is quite inconsistent with the existence of a deemed order for costs on the standard basis, as is the requirement that any dispute be resolved by an order under CPR 36.20(11). The logical conclusion is that where CPR 36.20 applies, CPR 36.13(1) is disapplied.

53. As for the procedure to be followed under CPR 36.20(11), although CPR 36.20(12) refers expressly to costs payable to a defendant it is evident from that provision that the court is under CPR 36.20(11) required to make an order which determines the amount of costs due, whether to a claimant or a defendant. That is neither summary assessment nor detailed assessment. It is a different, self-contained procedure. CPR 44.6 (which excludes orders for fixed costs and is subject to "any rule, practice direction or other enactment") and the provisions of Practice Direction 44, addressing the choice between summary and detailed assessment, have no application. Any issues will be limited, as will the amount in issue. There is no need for a judge who has dealt with the case to deal with the costs dispute: as Mr Hogan says, where settlement has taken place under Part 36, it is unlikely that a judge will have dealt with the case.

54. I think that Mr Waszak must be right in saying that, given that CPR 36.20 and Section IIIA of CPR 45 between them provide comprehensive, self-contained provisions for the recovery of the costs to which they apply, that an application for an order under CPR 36.20(11) should be treated as an interim application under CPR 45.29H. The application costs awarded on that basis would be modest and proportionate. I see no reason to apply the narrow interpretation of "interim application" urged on me by Mr Hogan. It seems to me that an interim application can be made at any stage before every aspect of a case is finally resolved, including on costs matters.

55. I would add that the interpretation of the rules contended for by the Claimant is likely to lead to a number of undesirable consequences. I share Master Haworth's concern about proportionality. The Claimant's interpretation does not meet that concern, adding as it does a significant layer of potential additional cost, in this case to a dispute over £564.

56. It has already cost over half the amount in issue just to prepare a bill which includes (as it must, if detailed assessment is the right procedure) the fixed costs which comprise by far the greatest part of the Claimant's bill and yet are not the subject of any dispute. The Claimant further asserts the right to recover additional costs of provisional assessment up to £1,500 plus VAT, and in principle there would be nothing to stop either party going to a further oral hearing under CPR 47.15(7)-(9) at yet more cost.

57. Mr Hogan argues that the court has the power to limit the costs of detailed assessment to a proportionate figure, but the point seems to me to be that the entire detailed assessment procedure is disproportionate where costs under Section IIIA of CPR 45 are concerned. It is not an answer to that to say that the parties are obliged to take that route, notwithstanding the risk that the court may have to disallow a large part, if not most, of their costs.

58. Proportionality is not the only concern. Given that disputes are more likely to arise in relation to non-fixed disbursements than fixed costs, the Claimant's interpretation of the rules could render CPR 36.20 largely redundant. It could also lead to inconsistency. For example, where all disbursements are fixed (as, for example, under CPR 45.29I, paragraph 2A) any dispute would be resolved under the CPR 36.20 procedure, whereas if even one disbursement, however small, is not fixed and not agreed, the case would have to go to full detailed assessment.

59. For those reasons, the Defendant's application succeeds. The Claimant's Notice of Commencement and bill of costs shall be struck out.