Neutral Citation Number: [2022] EWHC 1668 (QB)

Case No: QB-2022-001276

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

CLINICAL NEGLIGENCE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 July 2022

Before **:**

MASTER THORNETT

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Between :

MRS HALIMA BEGUM **(A PROTECTED PARTY BY HER LITIGATION FRIEND MR FARID AKHTAR)**	**Applicant** **Claimant**
- and -	
BARTS HEALTH NHS TRUST	**Respondent** **Defendant**

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Miss Kate Lumbers (instructed by **Hodge Jones & Allen LLP**) for the **Claimant**

Mr Nicholas Pilsbury (instructed by **Kennedys**) for the **Defendant**

Hearing date: 23 June 2022

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Master Thornett:

1. In her pre-Issue Application dated 8 April 2022, the Claimant Applicant asks the court to order that (i) time for acceptance of the Defendant Respondent's Part 36 offer dated 3 March 2022 is extended to 24 November 2022 and (ii) if the offer is accepted by 24 November 2022, the Defendant will be responsible for the Claimant's costs in accordance with CPR 36.13.

2. The Application raises a significant question whether the court has jurisdiction to make such a direction. The Defendant denies it has. The Claimant argues it does, relying upon comments in *RXL (a protected party by her litigation friend) v Oxford University Hospitals NHS Foundation Trust* [2021] EWHC 1349 (QB) and the power of the court under CPR 3.1(2)(a) to extend or shorten the time for compliance with "any rule, practice direction or court order".

   Owing to the jurisdiction point in *RXL* seeming to have been assumed rather than the subject of express discussion in the judgment, I made clear at the outset of the hearing that I needed to be taken directly to the rule or rules by which the Claimant maintains the jurisdiction exists.

3. <u>Background</u>

   In a Witness Statement dated 8 April 2022 in support of the Application, the Claimant's solicitor, Ms Treloar, provides the factual background to this proposed clinical negligence claim. In short, the Claimant alleges negligently delayed diagnosis in early 2017, in consequence to which certain expert evidence has been commissioned.

   The Claimant's solicitors were instructed in August 2018 but the Letter of Claim was not written until 29 September 2021. In response, in March 2022, the Defendant admitted breach but denied causation, with all aspects of loss and damage being not admitted. On 3 March 2022, the Defendant made a Part 36 offer of £100,000 gross of recoverable benefits. The offer expressly stated that the Defendant would be responsible for the Claimant's costs if accepted within 21 days of service, as calculated to be 24 March 2022; whereas, if accepted after 24 March 2022, "liability for costs must be agreed between the Parties or decided by the Court".

   Ms Treloar comments that she considers it "impossible to quantify this claim without further expert evidence to determine the causation issues and condition and prognosis. The Applicant is a Protected Party and any settlement will need to be approved by the court; I consider it is not possible to advise the court as to the value of the claim and the reasonableness of the offer".

   Accordingly, on the date of expiration of the Part 36 offer on 24 March 2021, the Claimant requested the Defendant to extend time for acceptance to 24 November

2022. The Defendant declined to agree on 31 March 2022 but added that it did not presently have instructions to withdraw the offer either, so the offer has remained open for acceptance. Encapsulating and perhaps anticipating the stance often encountered when a claimant seeks to accept out of time a Part 36 offer but argues that the usual costs order should not be applied, the Defendant's letter remarked how "The Offer was made on a risk basis, based on views of the case as it currently stands. It is true of many cases that causation, condition and prognosis are not definitively known when offers are made and it is for this reason that offers are made on a risk basis. Parties are, of course, entitled to make offers when they wish."

4. In an attempt to amplify and illustrate the evidential predicament relied upon, and hence to urge the court to exercise its discretion on the basis that jurisdiction exists, Ms Treloar remarks at Para 20 how "A confidential advice for the court, not for disclosure to the defendant and for which privilege is not waived, will be forwarded to the Master who will hear this Application ahead of the hearing".

5. Concerned as to the proposal that the court should be invited as part of an ordinary application[1] to read and take into account material going to merits that was not put openly before the court, I did not read the Advice as forwarded to me. I made clear at the commencement of the hearing that I would need to hear argument as to the Claimant's proposal that I read privileged material as part of my decision making. I had also noted that in Mr Pilsbury's skeleton argument on behalf of the Defendant he objected to this course as procedurally unfair.

6. It was agreed at the hearing, therefore, that the primary issue as to jurisdiction should the only issue that should be heard and decided, with the balance of the Application to be revisited following this reserved decision.

7. <u>The Claimant's draft Order</u>

   The Order sought refers to extending the "The expiry of the Respondent / Defendant's Part 36 offer…".

   This wording is not technically accurate because the Defendant had not made a time-limited Part 36 offer which would result in it being automatically withdrawn upon expiration (CPR 36.9(4)(b)). The offer as made has no "expiry" date, as was clear from the Defendant's letter dated 31 March 2022. However, the hearing proceeded, and it is accepted by all, that the essence of the Application is that the Claimant seeks to extend the "relevant period" defined in CPR 36.3(g) until 24 November 2022, such that (i) during this period the Defendant cannot withdraw the offer and (ii) if accepted, the Claimant will be protected on costs.

[1] By this I contemplate an exception in the case of approval hearings under CPR 21

8. Part 36 and "relevant period"

8.1 CPR 36.3(g) provides the following definition of "relevant period":

> "(g) "the relevant period" means—
> (i) in the case of an offer made not less than 21 days before trial, the period stated under rule 36.5(1)(c) or such longer period as the parties agree;
> (ii) otherwise, the period up to end of such trial.

Rule 36.5(1) stipulates the form and content of a Part 36 offer and, at sub-para (c), that the period for acceptance of the offer, within which the defendant will be liable for the claimant's costs, should be "not less than 21 days". Providing it is in compliance with the requirements of r.36.5(1), it is therefore up to the Offeror to set the period for acceptance.

8.2 An offer is either made more than 21 days before trial or less than 21 days ["otherwise"]. An offer made more than 21 days before trial will feature the period stated under r.36.5(1)(c) [i.e. a minimum 21 days or such longer period as the offeror decides]. However, there could be a longer period for acceptance if the parties agree following service of the offer[2].

8.3 It seems implicit that the parties would be similarly open to agree a different period in the case of an offer made less than 21 days before trial. The circumstances in which this might occur are various. An example that regularly occurs in the specialist Asbestos List in this Division is in living mesothelioma claims where, owing to limited life expectancy, the speed and pressure of time in which the parties work invites agreement that the time for acceptance of any Part 36 offer (i.e. irrespective of when made) should be abridged. Equally, however, one could envisage a longer agreed period for acceptance in the case of an offer made less than 21 days before a significantly long trial.

8.4 The potential for agreeing a different period to that expressed in the Part 36 offer facilitates variation to an offer that will otherwise (at least one assumes) have followed the required provisions of r.36.5(1). Subject to an express rule or authority to the contrary, parties are always open to agree to terms of settlement (or potential settlement) and it would be contrary to the spirit of encouraging settlement and ADR if the court were to seem to restrict or interfere with this.

8.5 However, no such agreement applies in this case.

8.6 In the absence of agreement and in the face of this current wording of Part 36, there is no express power of the court to intervene and rewrite the terms of a Part 36 offer a defendant has chosen to make. In defining "relevant period", r.36.(3)(g) instead simply delineates between offers made either more or less than 21 days before trial.

8.7 The need for clarity and objectivity in any rule hardly can be doubted but perhaps even more so concerning a part of the CPR that, as is well known, constitutes "a

[2] Or, theoretically, a period the parties have agreed in advance should apply in the event of a Part 36 offer being made.

self-contained procedural code about offers to settle made pursuant to the procedure set out in this Part ("Part 36 offers"): CPR 36.1(1)).

8.8 Miss Lumbers on behalf of the Claimant acknowledged that there was no express provision for the court to vary but submitted that the court had jurisdiction because the rules provided no express prohibition against the court so doing. I reject that submission, principally because the opening emphasis at r.36.1(1) precludes it. A procedural code intended to be "self-contained" should be taken as procedurally finite, at least for the purposes of assessing what procedurally might be possible within it. This observation is distinct from where, say, the court is asked as a separate consideration to assess the meaning or status of an offer. Further, I reject this submission because the absence of prohibition in the CPR cannot automatically incorporate or assume facility to otherwise do something. There still has to be a procedurally recognised basis for doing something, hence the wide provision and drafting in CPR 3 of the court's Case Management powers.

8.9 I referred at sub-para 8.7 above to the "current wording" in consequence to the observations of Mr Pilsbury how the words "or otherwise" had been incorporated into a longer rule in previous versions of Part 36 before it was substantially overhauled by the Civil Procedure (Amendment No. 8) Rules 2014 (SI 2014 / 3299). Before those significant amendments came into force in April 2015, sub-para (ii) of the definition referred to "otherwise, the period up to end of the trial *or such other period as the court has determined* [my emphasis]."

In the face of this pre-2015 wording, there might have been greater room for submission that the court has a discretion to intervene, albeit subject first to argument whether such discretion arose only in respect of an offer made 21 days before trial or (alternatively) any offer where the parties had not been able to agree a relevant period beyond that stated in the offer.

However, I agree with Mr Pilsbury that such discussion is now academic. The omission of the previous wording by the Rules Committee obviously removes room for such argument and, as I find, leaves remaining binary definitions of "relevant period" depending upon whether the offer was made either more or less than 21 days before trial.

9. *RXL (a protected party by her litigation friend) v Oxford University Hospitals NHS Foundation Trust*

9.1 This was a decision where the Claimant, a Protected Party, had accepted a Part 36 offer after the relevant period but sought to persuade the court that it should exercise its discretion pursuant to CPR 36.13(4)-(6) and depart from the usual order that the Claimant should pay the Defendant's costs from the expiry of the relevant period.

9.2 David Pittaway QC, sitting as a High Court judge, refused the Claimant's application. He considered that at the time of the Part 36 offer the Claimant had

sufficient information in order to advise the Claimant as to the reasonableness of the offer. At para 29, the judge recorded how the Defendant's counsel had suggested that "an application could have been made to the court for an extension of time which the Claimant's solicitors decided not to do".

9.3 Following his decision that it would not be unjust to make the usual costs order and that the Claimant had had sufficient information to decide upon acceptance, the judge continued:

> 33. If I am wrong about whether the Claimant was not able to evaluate the CPR Part 36 offer, I have reached the conclusion that the Claimant's solicitors went about remedying the situation in the wrong way. Except for the letter of 17 December 2020 in which it was suggested that the offer should remain open for 21 days after the information had been provided, there was no request for an extension of time in which to consider the offer. In my view, the Claimant's solicitors should have written again to the Defendant's solicitors formally requesting an extension, and if that was refused or not replied to, then, an application should have been made to the Court for such an extension.
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> 34. The consequences of CPR Part 36.13 (4) to (6) and 36.17 (5) are clear. The rules provide a framework for what will happen in the event that an offer is accepted after the period for acceptance has expired. The Claimant will pay the costs for the period from when that date expired unless it is unjust to do so. The Claimant, who had the benefit of experienced counsel and clinical negligence solicitors, would have appreciated the risk if they did not formally seek an extension, or if necessary, made an application to the court. No satisfactory explanation was given to me as to why they did not do so and Ms Davies's witness statement is silent on this point.

9.4 It is unfortunate that the decision so clearly contemplates the facility of an application to vary the terms of a Part 36 offer and yet does not identify its procedural mechanism. It is tempting to speculate that counsel and the court might have had the pre-2015 wording in mind. Either way, such assumption is curious given neither counsel in this Application was able to refer me to any other decided authority in support of the jurisdiction relied upon by the Claimant.

9.5 An impression that such assumption is *per incuriam* need not, however, be approached because, I am satisfied, the comments in the judgment in *RXL* are entirely *obiter dicta*. It is clear from the opening of the judgment that the decision was pursuant to the discretion at CPR 36.13 and that, in considering whether to exercise that discretion, the court had regard to a variety of past events and factors of which the assumption that [albeit as procedurally undefined] "an application" might have been made was but only one of those factors.

9.6 It is pertinent to note that in other cases concerning the exercise of the discretion under r.36.13, the issue of what steps might have been open to the claimant do not refer to applying to the court for additional time beyond the 21-day period, as distinct from requesting it from the defendant.

9.7 The Court of Appeal in *Matthews v Metal Improvements* [2007] EWCA Civ 215 [2007] CP Rep 27 referred at Para 36 to the possibility of asking the defendant for an extension of time for acceptance and, at Para 37, suggested that in the face of refusal for an extension an application might have been for a stay (in that case, to facilitate receipt of critical biopsy results). There is no mention, however, of a facility to apply to the court to vary the terms of the actual offer.

9.8 The decision in *Matthews* was noted in the subsequent case of *Briggs v CEF Holdings* [2018] 1 Costs LO 23, where Gross LJ noted [Para 34] the reference in *Matthews* to the provision to apply for a stay. In relation to that, Gross LJ suggested at Para 39 that the fact there had been a request for a stay could have been persuasive in reaching a different costs order, if the facts of the case had been different. As with *Matthews*, however, at no point was it suggested that it would have been also open to the claimant to apply to the court to extend the relevant period for acceptance.

9.9 In the very recent decision of Master McCloud in *MRA v The Education Fellowship Ltd* [2022] EWHC 1069, in which both sides were represented by leading counsel, *Matthews* and *Briggs* were considered along with other authorities in the context of late acceptance and costs. In this case too there appears no suggestion that the claimant had available to them, and so might have utilised, a right to apply to the court to oblige a longer period of acceptance.

10. I am not satisfied there is any inherent provision in Part 36 for the court to vary or rewrite the period for acceptance of a Part 36 offer. If there is no such procedure, it follows that neither (at least within Part 36) can there be provision for the court to direct in advance the costs consequences of accepting an offer as rewritten by it.

11. <u>Power otherwise in the CPR for the court to oblige a longer period of acceptance for a Part 36 Offer</u>

11.1 CPR 3.1(2)(a) provides:

> "Except where these rules provide otherwise the court may – (a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired")"

11.2 As an alternative to her primary submission that the court had jurisdiction under Part 36 to vary the terms of the offer, Miss Lumbers submitted that power do so existed by way of r.3.1(2)(a). No case law was produced by either party in support of the proposition that r.3.1(2)(a) could apply to this type of Application. Miss Lumbers submits that the rule is self-evident in its potential application.

11.3 I accept here the Defendant's submissions that this rule is not apt for application to Part 36, as being (to repeat) a "self-contained code about offers". Rule 3.1(2)(a) refers to the power to adjust the time for compliance, not to adjust periods of time otherwise featured in rules.

11.4 The starting point is that there is no obligation upon a defendant to make any offer of settlement, by way of Part 36 or otherwise, and so the making of an offer cannot reasonably be said to be "in compliance with any rule, practice direction or court order". An offeror has an absolute discretion when to make an offer and, if it does so, it does so entirely voluntarily. There is no "compliance" in deciding to make an offer and neither, it follows, does the court have any jurisdiction to direct the making of such an offer "in compliance with any rule, practice direction or court order". The court can, of course, facilitate ADR and settlement discussions by, for example, incorporating reference to the same in its directions or, if appropriate, ordering a stay. I agree with the Defendant's submission, however, that the court cannot require a party to settle a case if the party does not want to; or to dictate the terms on which a party makes an offer.

11.5 It is correct that r.36.5(1), in prescribing the form and content of a Part 36 offer, therefore engages questions of compliance. However, one cannot conflate compliance with rules going to form and content with compliance with the "time" for doing something. Not least because this concerns different parties in differing events of compliance : a defendant in the formulation of the offer and claimant in accepting an offer within the relevant period. Further, whilst the form and content of the offer are subject to rules, there is no rule as to when an offer should be accepted, only rules going to the consequences of not doing so.

Further, I am satisfied that the operative phrase in r.3.1(2)(a) is "time for compliance" and without division. It is artificial to extrapolate the word "compliance" in isolation and then seek to apply it in the wider context of how an offer is drafted. The rule is there fairly to regulate time periods for compliance but not override time periods as are the sole prerogative of a party to decide when drafting an offer of settlement.

12 <u>General observation</u>

There already exists provision at CPR 36.12(4) for the court to decide costs upon the acceptance of an offer after expiration of the "relevant period", as the above cases illustrate. The Claimant's proposition that there exists an additional facility for the court to make a similar decision but on a pre-emptive basis is, at face value, a surprising and seemingly unfair one. Unfair because it precludes full consideration of all facts that might be relevant at the point of acceptance, rather than at an earlier stage. Further, if granted, it would fetter the offeror's right freely to withdraw a Part 36 offer after the relevant period but without the permission of the court. It increases a defendant's costs exposure in a way that emasculates the

costs effectiveness and hence significance of the making of a Part 36 offer. I note the Defendant's submission that, at least in the case of commercial claims where interest on the claim can be considerable, an extension by the court of the relevant period could quickly distort the precision of an interest inclusive offer to the point of it having little if any effect at a subsequent date.

The notion that there exists a residual discretion of the court, either as argued by the Claimant in this Application or otherwise, is not easy to follow against the intended strict application of the provisions of Part 36.

13 Conclusion

For the reasons stated, I dismiss the Application on the ground that the court has no jurisdiction to make the Order requested or any similar such order.

This judgment will be formally handed down on the date directed, by which date I hope the parties will have had chance to discuss and hopefully agree any costs issues arising from it.

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