Case No: SC-2020-BTP-000767

IN THE CENTRAL LONDON COUNTRY COURT
SENIOR COURTS COSTS OFFICE

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

Date: 22 April 2021

Before :

DEPUTY COSTS JUDGE CAMPBELL

- -

Between :

Sillvana Mullaraj **Claimant**

- and –

Secretary of State for the Home Department **Defendant**

Duncan Lewis Solicitors for the **Claimant**
Government Legal Department for the **Defendant**

- -

Approved Judgment

Deputy Costs Judge Campbell:

1. This judgment addresses the application of the defendant ("SSHD") for an order which replaces the order I made for the costs of the provisional assessment I carried out on 27 November 2020 (namely that these should be the Claimant's costs, assessed in the sum of £1,500 plus the court fee under CPR 47.20). Whilst it is the SSHD's case that there should be a "different" order, it has not been explained in the written materials which have been submitted what that order should be, the application having been undertaken on the papers without oral submissions. That said, it is to be inferred that the replacement order should be "no order as to costs" or that the Claimant pay the SSHD's costs of the provisional assessment to be summarily assesed.

The background

2. This can be stated shortly. The Claimant, an Albanian national, was due to be removed from England and Wales on 5 March 2015. She had entered this country by

lorry on 5 December 2014 and been detained by Thames Valley Police. She claimed asylum but was refused. On the day before her planned removal, Duncan Lewis Solicitors obtained state funded legal assistance which in due course was extended for the issue of proceedings against the SSHD for unlawful detention. As a result, the removal was stayed. The proceedings then took their course in the Central London County Court, until, on 4 October 2019, a settlement was reached under which the SSHD agreed to pay damages of £12,500 plus costs on the standard basis, to be assessed if not agreed.

3. On 28 April 2020, the Claimant served her bill. It sought profit costs of £54,290.00, £18,633.16 for disbursements (of which £14,000 was for counsel) making a total of £74,060.46 as between the parties. As the bill did not exceed £75,000, it was referred for provisional assessment under CPR 47.15, and, as I have said, I carried out that assessment on 27 November 2020.

4. It is agreed that the bill was allowed in the sum of £41,436.66 inclusive of disbursements. In addition, also by agreement, there is interest payable to 5 January 2021 in the sum of £2,924.41, together with the costs of provisional assessment of £1,500 and the court fee of £1,106. No request was made for an oral hearing to review the provisional assessment under CPR 47.15(7). It follows that subject to the SSHD's application that I should make a different order for the assessment costs, the matter has been completed and a final costs certificate can be issued.

The materials before the court

5. In support of its application, SSHD has filed the following:-

- written submissions;
- bundle of correspondence;
- reply to the Claimant's written submissions;
- a costs schedule for this application in the sum of £684.

6. The Claimant has filed the following:-

- reply to SSHD's written submissions;
- a costs schedule for this application of £1,518.

The Law

7. The relevant Civil Procedure Rule is this:-

> *"Liability for costs of detailed assessment proceedings*
>
> ***47.20***
>
> *(1) The receiving party is entitled to the costs of the detailed assessment proceedings except where –"*

(a) the provisions of any Act, any of these Rules or any relevant practice direction provide otherwise; or

(b) the court makes some other order in relation to all or part of the costs of the detailed assessment proceedings.

(2) Paragraph (1) does not apply where the receiving party has pro bono representation in the detailed assessment proceedings but that party may apply for an order in respect of that representation under section 194(3) of the 2007 Act.

(3) In deciding whether to make some other order, the court must have regard to all the circumstances, including –

(a) the conduct of all the parties;

(b) the amount, if any, by which the bill of costs has been reduced; and

(c) whether it was reasonable for a party to claim the costs of a particular item or to dispute that item.

(4) The provisions of Part 36 apply to the costs of detailed assessment proceedings with the following modifications –

(a) 'claimant' refers to 'receiving party' and 'defendant' refers to 'paying party';

(b) 'trial' refers to 'detailed assessment hearing';

(c) a detailed assessment hearing is "in progress" from the time when it starts until the bill of costs has been assessed or agreed."

8. Also relevant is CPR 47.9:-

"Points of dispute and consequence of not serving

47.9

(1) The paying party and any other party to the detailed assessment proceedings may dispute any item in the bill of costs by serving points of dispute on –

(a) the receiving party; and

(b) every other party to the detailed assessment proceedings.

(2) The period for serving points of dispute is 21 days after the date of service of the notice of commencement."

9. The Practice Direction to CPR 47.9 says this:-

"Points of dispute and consequences of not serving: rule 47.9"

8.3 The paying party must state in an open letter accompanying the points of dispute what sum, if any, that party offers to pay in settlement of the total costs claimed. The paying party may also make an offer under Part 36"

10. Also relevant, since the SSHD has raised it, is CPR 36. This provides:-

*"**36.5***

(1) A Part 36 offer must —

(a) be in writing;

(b) make clear that it is made pursuant to Part 36;

(c) specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with rule 36.13 or 36.20 if the offer is accepted;

(d) state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and if so to which part or issue; and

(e) state whether it takes into account any counterclaim.

(Rule 36.7 makes provision for when a Part 36 offer is made).

(2) Paragraph (1)(c) does not apply if the offer is made less than 21 days before the start of a trial.

(3) In appropriate cases, a Part 36 offer must contain such further information as is required by rule 36.18 (personal injury claims for future pecuniary loss), rule 36.19 (offer to settle a claim for provisional damages), and rule 36.22 (deduction of benefits).

(4) 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".

*"**Part 36 offers – defendant's offer***

36.6

(1) Subject to rules 36.18(3) and 36.19(1), a Part 36 offer by a defendant to pay a sum of money in settlement of a claim must be an offer to pay a single sum of money.

(2) A defendant's offer that includes an offer to pay all or part of the sum at a date later than 14 days following the date of acceptance will not be treated as a Part 36 offer unless the offeree accepts the offer".

*"**Costs consequences following judgment***

36.17

(1) Subject to rule 36.21, this rule applies where upon judgment being entered —

(a) a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer; or

(b) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer.

(Rule 36.21 makes provision for the costs consequences following judgment in certain personal injury claims where the claim no longer proceeds under the RTA or EL/PL Protocol.)

(2) For the purposes of paragraph (1), in relation to any money claim or money element of a claim, "more advantageous" means better in money terms by any amount, however small, and "at least as advantageous" shall be construed accordingly.

(3) Subject to paragraphs (7) and (8), where paragraph (1)(a) applies, the court must, unless it considers it unjust to do so, order that the defendant is entitled to —

(a) costs (including any recoverable pre-action costs) from the date on which the relevant period expired; and

(b) interest on those costs

36.3(g) "the relevant period" means –

(i) in the case of an offer made not less than 2 days before a trial, the period specified under rule 36.5(1)(c) or such longer period as the parties agree

(ii) otherwise, the period up to the end of such trial".

The submissions for SSHD

11. The SSHD contends that I should make a "different order" but does not say what this should be. I infer, therefore, that what is required is either "no order as to costs" or the reversal of the existing order, so that the Claimant pays the SSHD's costs, to be assessed summarily if not agreed.

12. The SSHD puts its case in this way. On 30 July 2020, the SSHD offered to settle the costs for £40,000. Its legal representative's letter said this:-

> ***"Subject: RE: Mullaraj v SSHD***
>
> *Without Prejudice Save As To Costs*
>
> *Dear Tatjana,*
>
> *I hope you are well.*
>
> *I am writing further to our email below and points of dispute. I have instructions to offer £40,000.00 in full and final settlement of your costs.*
>
> *I look forward to hearing from you in due course.*
>
> *Kind regards,"*

13. No response was received and chasing letters were sent on 6, 13 and 20 August 2020 and on 1 September 2020 to find out if the offer, made in good faith, would be accepted. Only on 1 September had the Claimant replied rejecting the offer, without making a counter-offer.

14. The following day, 2 September, and again on 9 and 16 September 2020, the SSHD had written again and asked for a counter offer, but no response had been received. That conduct had been unreasonable which warranted an order that penalised the Claimant in costs.

15. Next there was the reduction to the bill. The sum of £32,623.80 had been taken off, representing a 44.05% disallowance. This was not a case where the reduction had been due to a significant downward adjustment to the hourly expense rate. On the contrary, it had been because swathes of the bill had been disallowed as it had been littered with completely unreasonable items. Both these factors supported the SSHD's case that the default costs order under CPR 47.20 should be altered and a different order made under CPR 47.20(3)(b).

16. Finally, there was the point about whether the SSHD could have protected itself with a better Part 36 offer. Whilst that was a matter which doubtless the Claimant would deploy in her favour, that should not be seen as a licence for a receiving party to ignore reasonable attempts at Alternative Dispute Resolution ("ADR"), and most certainly not when the costs had been reduced by over 40%. Should the consequence of a paying party's failure to beat a Part 36 offer always be that the receiving party recovered the costs of assessment regardless of any other circumstances, there would be no point in having rule 47.20(1)(b).

The submissions for the Claimant

17. The Claimant accepts that the SSHD made an offer of £40,000 on 30 July 2020. However, that had been fully inclusive of interest and costs to the date that it had been made. It was right that the bill had been substantially reduced, but the SSHD had not obtained a more advantageous judgment at the provisional assessment. On the contrary, the SSHD had done worse than the offer and the Claimant had achieved more by going to provisional assessment. Disregarding interest and the costs of assessment, the Claimant had bettered the offer by £1,436.66. When both those sums were taken into account, the amount by which the SSHD had failed to achieve a more advantageous outcome was even more striking. It meant that the offer had been beaten by £7,267 equating to an additional 18% of what the SSHD had offered. It followed that the court had been right to implement the default costs rule under CPR 47.20 and there should be no further departure from that.

My decision

18. I recognise that the bill has been reduced by a large amount, but I reject the SSHD's contention that as a consequence, the Claimant should be penalised in costs by making a "different order". These are my reasons.

19. The starting point is CPR 47.20. The Claimant is entitled to the costs of the assessment unless the court makes some other order, having regard to all the circumstances.

20. The first such circumstance, in my view, is to ask whether the SSHD took steps to gain the protection afforded by Part 36. In this respect, guidance is to be found in in *Global Energy Horizons Corporation v Gray* [2021] EWCA Civ 123 at paragraph 8:-

> *"Where a defendant is faced with an exorbitant claim which he wishes to defend vigorously but where he is vulnerable to a finding that he is liable for a much smaller amount, there is a clear process provided by CPR Part 36 which he can follow to protect his position. Mr Levey submitted that there was nothing that Mr Gray could have done to stop the juggernaut of GEHC's attack on him. We do not accept that a trial of the complexity of the Enquiry Hearing was inevitable, but in any event, if Mr Gray had made an early payment into court of a proportion of the management fees and the Klamath Falls settlement monies he would be in a much stronger position now to dispute his liability [Emphasis added] to pay GEHC's costs."*

21. Here, it is accepted by the SSHD that it was going to be liable for some of the costs, but on its case, nothing like the figure which was being sought. In these circumstances, Part 36 provides the process by which such a party can protect itself - see *Global* above. However, it is by no means clear to me that the SSHD ever made a Part 36 offer, even though the Claimant may have believed that it did - see submissions at paragraph 12. The letter of 30 July 2020 is not expressed as such and therefore does not comply with CPR 36.5 so as to confer the automatic consequences of the rule under CPR 36.7 where it is not beaten. It follows that the SSHD did not

put itself in the "*stronger position*" referred to in *Global* that would have enhanced its prospects of now successfully disputing its liability to pay the Claimant's assessment costs. Moreover, even if the offer had been Part 36 compliant, it is clear that the Claimant gained more through rejecting it. Accordingly, the Claimant has not failed to obtain a judgment more advantageous to her that the offer, so CPR 36.17(1) and (3) giving SSHD costs after the relevant period had expired, would not have applied in any event.

22. That said, it is uncontroversial that the offer was an offer to settle which would have resolved the costs had it been accepted and, accordingly, is a matter which the court must take into account when having regard to all the circumstances. Here, the offer was £40,000 "all-in", whereas the Claimant recovered £41,436.66 before considering interest and the costs of assessment to the date of the offer. It is trite law that a "near miss" is not good enough - see judgment of Stewart J in *JLE v Warrington & Halton NHS Trust Foundation Trust* [2019] Costs LR 829 at paragraphs 40-44, and in a Part 36 context at least, it is not open to judges to take into account the amount by which an offer has been beaten. I see no reason why the position should be different here, where the Claimant has gained a more advantageous result by going to assessment, with the margin of the win not being a matter which the court can take into account. Put differently, I do not consider that I should give more weight to an offer, which was an offer but not one that complied with Part 36, than I would have done had it been compliant. It follows that in so far as a "near miss" argument is relied upon, it must fail.

23. The next circumstance is the fact that 44.05 % came off the bill. It is right that this is a factor under CPR 47.20(3)(b) to take into account in deciding whether to make a different order as to costs. The SSHD advances the question rhetorically, that if the consequence of a paying party's failure to beat a Part 36 offer were always to be that the receiving party recovered the costs of assessment regardless of any other circumstances, there would be no point in having a rule 47.20(1)(b).

24. There are at least two answers to this.

25. First, I do not find it persuasive that a paying party who makes no offer at all, should be in a better position than a paying party who does make an offer but one which is just short. That would place a non-offering paying party at an advantage over a paying party who has tried to settle the costs, but whose offer has not been quite enough. It would provide a potential reward for a paying party, who sits back, having deliberately made no offer, to rest secure in the knowledge that a successful challenge can always be advanced later under CPR 47.20(1)(b) if the bill is reduced by a significant amount after a good day in court. In circumstances such as these, Rule CPR 47.20(1)(b) and (3)(b) could simply be argued in every case where the bill has been reduced without an offer made, in disregard of the Court of Appeal's guidance in *Global*, that a party who is vulnerable for a smaller sum than the amount claimed, should use Part 36 to protect their position. Moreover, what tariff should be used to decide whether enough has come off to reverse CPR 47.20: 25%, 30%, 50%, more? There is simply no guidance upon which to draw.

26. Second, whilst rule 47.20(3)(b) indeed requires the court when considering whether to make a different order, to take into account the amount by which the bill has been reduced, I am puzzled (with one exception) how a circumstance could ever arise in

which a paying party who has made an offer to settle which has been short (in addition to those who have deliberately made no offer) could successfully deploy that rule. The exception is where a paying party would have no way of knowing whether there has been fraud or other skulduggery by a receiving party, such as claiming costs where it was known that there had been a failure to comply with the indemnity principle. Such a situation would arise where the receiving party had made a bargain with his solicitor not to be liable for any costs so by operation of the indemnity principle, nothing would be recoverable from the paying party. These would be matters to which only the Costs Judge would be privy, since a retainer letter, which would provide the answer, is a privileged document only available for the court to read upon receipt of the receiving party's papers lodged for assessment under CPR 47.19 PD 3.12. Other than that, I cannot think of a circumstance where a paying party whose without prejudice offers have been too low, could successfully argue that the receiving party should be deprived of the costs of assessment. That is particularly the case here where the SSHD's open offer under PD paragraph 8.3 to CPR 47.9 was also way off the mark, with nil having been offered, a deficiency of over £41,000.

27. Even if I am wrong about that, there are sound explanations here why the costs were reduced substantially. Part One of the bill was disallowed completely for want of a retainer before legal aid was granted, the Claimant went to counsel far too often and every e mail appeared to have been charged for. None of these matters, however, in my judgment, would justify any adjustment under which the SSHD should benefit from a different costs order.

28. The next circumstance to consider is SSHD's contention that the Claimant did not reply promptly to the offer and made no counter offer.

29. It is correct that the Claimant took 32 days to reply to the offer and that no counter offer was made. Given, however, that an offeree under Part 36 (where that applies) has 21 days for consideration, the Claimant cannot be seriously be criticised for taking an extra week to give her opinion on it.

30. There is nothing, either, in the ADR point. ADR is defined in the glossary to the CPR as:-

> *"A collective description of methods of resolving disputes, otherwise than through the normal trial process."*

Here, there was no ADR proposed by the SSHD such as a costs mediation and the point fails for that reason.

31. As to the counter-offer, there is no obligation under the rules to which I have been referred which mandates that an offeree *must* make a counter-offer. It might be said that a receiving party will be unwise not to do so, since, absent a counter-offer under Part 36, the special benefits conferred by CPR 36.17(4) will be unavailable. In the present case, had the Claimant made an offer under Part 36 of £41,000 which the SSHD had rejected, a further £4,136.66 would have been payable under CPR 47.20(4)(d) as an additional sum unless it was unjust to make that order. In this respect, it is useful to observe that in *JLE* Stewart J held that it was not unjust for the rule to apply (including an additional sum of £42,000 in that case), where the bill had been reduced by £206,000, or 31% of the total, and the Claimant had beaten her Part

36 offer only when interest had been added to the amount payable. He did not consider that there should be a "different order" in that case. On that basis, in this case, neither do I.

Result

32. The application is dismissed with costs which I summarily assess at £1,000 on the basis that the time spent on documents is too high and there is no VAT as the Claimant is an Albanian national. However, the application has raised an interesting point upon which I am aware decisions have gone both ways at Costs Judges' level.

33. The conclusion I have reached is that having failed to protect itself by making an effective offer under CPR 36 or by a "without prejudice save as to costs" offer, or through its open offer, the SSHD cannot succeed on a *"Let's see by how much the bill has been reduced*" argument and then deploy CPR 47.20(1)(b). To permit that would be to discourage the making of offers, and enable paying parties who advance no offers, to be in a better position to argue for a "different order", than those who make offers in a genuine attempt to settle the costs. However, as I have said, I am aware that there is no consistency on the Costs Judges' corridor on this point. For that reason, I consider a definitive view at a higher level would assist parties in understanding where they stand, when they make a Part 36 offer which is too low, or no offer at all, but then argue that they can rely on CPR 47.20(1)(b) to their advantage, depending upon how good a day they have had in court. If asked, I would give permission to appeal and in that eventuality, invite the parties to transfer the case to the High Court so that the appeal is dealt with by a High Court Judge whose decision will be binding.