Case No: SC-2020-BTP-001271

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice, Strand,
London, WC1A 2LL

Date:08/07/2021

Before :

DEPUTY MASTER CAMPBELL

- -

Between :

R (on the Application of TT) **Claimant**

- and –

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

- -
- -

Judgment upon the written Submissions of the Parties

Mr Andrew Tollitt (instructed by **NWL Costs Lawyers**) for the **Claimant**
Mr Patrick Herhily (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 8 July 2021

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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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DEPUTY MASTER CAMPBELL

Deputy Master Campbell, Costs Judge :

1. On 1st July 2021, I completed the detailed assessment of the Claimant's bill of costs payable by the Defendant under the terms of a consent order dated 12 March 2014. By that order, the Defendant had agreed that in judicial review proceedings, the Secretary of State had unlawfully detained the claimant and would pay damages to be assessed plus his costs. At the conclusion of that assessment, it was agreed that either party be at liberty to apply to address the court should any issue remain unresolved in so far as any offers made under CPR 36 were concerned.

2. That eventuality has occurred. It is the Claimant's case that an offer made under the rule which was not accepted by the Defendant, has been bettered at detailed assessment, and that, accordingly, the Claimant is entitled to an additional sum of 10% of the assessed costs under CPR 36.17(4)(d), whereas it is the Defendant's submission that such an award would be unjust. This judgment, which, by agreement is based upon the parties' written submissions, resolves that issue.

3. As I have said, these proceedings were concluded by a consent order dated 12 March 2014. In the normal course of events, the Claimant should have served his bill of costs on the Defendant within 3 months of that date - see CPR 47.7. That did not happen. The reason for that was that the solicitors then on record for the Claimant, Public Interest Lawyers, ran into financial difficulties resulting in the appointment of joint liquidators, and whilst a bill of costs had been served informally on 22nd November 2016, it was not until 9th January 2019 that Defendant was notified that North West Law Services had been instructed by the liquidators to recover all outstanding costs.

4. To that end, on 17 July 2020, detailed assessment proceedings were commenced, with the bill for the Claimant's costs of the proceedings seeking £89,316.12, but as will have been observed, that was six years late. For that reason, the Claimant did not seek interest for the entire period and the parties were able to agree that interest at 8% would run only from 12 March 2014 until 11 June 2014 and thereafter only from 17 July 2020 until payment, credit being given for £49,867 paid on account on 1 December 2020.

5. The relevant chronology was thus as follows:

   12 March 2014 – order by consent: paragraph 7 providing that "The Defendant do make an interim payment on account within 28 days of receipt of the Claimant's bill of costs".

   11 June 2014 - last date for service of the bill to comply with CPR 47.7.

   17 July 2020 - bill served in the sum of £89,316.12.

   10 August 2020 - Defendant's points of dispute.

   17 November 2020 - Claimant's points of reply.

   19 November 2020 – Request for detailed assessment.

   4 February 2021 – Notice of hearing of detailed assessment returnable on 1 July for one day.

   1 July 2021- Hearing of the detailed assessment.

6. Since the work was completed before 7th April 2018, it was not obligatory for the Claimant to use the electronic spreadsheet format compliant with paragraphs 5.A1 to 5.A4 of CPR PD 47.5, that is to say the electronic bill in the form annexed to the Practice Direction to CPR 47.6. Instead, the claim was presented in paper format compliant with paragraphs 5.7 – 5.22 with the result that the detailed assessment could be, and indeed was, completed within two hours, half the time allowed. Credit for that must also be given to Mr Tollitt who appeared for the Claimant and Mr Herhily who represented the Defendant for their submissions and realistic approach to the assessment, one example of these being the agreement reached with regard to the interest payable. In addition, both advocates were able to agree the figures for the assessment, so that the relevant figures for the assessed costs, the interest to be allowed and the costs of assessment are as follows:-

Bill brought in at	£89,316.12
Amount allowed	£70,807.71
Agreed interest	£3,870.31
Costs of Assessment	£8,000,00

7. However, as I have said, an issue has subsequently arisen with regard to an offer made under Part 36 by the Claimant on 1 March 2021. That offer was in the sum of £72,750 and was not accepted by the Defendant, although it represented a reduction to the bill of about 20%. However, upon the addition of the agreed figure for interest, the Claimant's actual recovery has been £74,678.02 meaning that he has beaten his own offer by £1,928, thereby engaging CPR 36.17 which provides that:-

> "(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.

(4) Subject to paragraph (7), where paragraph (1)(b) applies, the court must, unless it considers it unjust to do so, order that the claimant is entitled to —

(a) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;

(b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;

(c) interest on those costs at a rate not exceeding 10% above base rate; and

(d) provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below to an amount which is —

(i) the sum awarded to the Claimant by the court; or

(ii) where there is no monetary award, the sum awarded to the Claimant by the court in respect of costs —

Amount awarded by the court	Prescribed percentage
Up to £500,000	10% of the amount awarded
Above £500,000	10% of the first £500,000 and (subject to the limit of £75,000) 5% of any amount above that figure.

(5) In considering whether it would be unjust to make the orders referred to in paragraphs (3) and (4), the court must take into account all the circumstances of the case including —

(a) the terms of any Part 36 offer;

> (b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;
>
> (c) the information available to the parties at the time when the Part 36 offer was made;
>
> (d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and
>
> (e) whether the offer was a genuine attempt to settle the proceedings.
>
> (6) Where the court awards interest under this rule and also awards interest on the same sum and for the same period under any other power, the total rate of interest must not exceed 10% above base rate."

8. Whilst both parties agree that the rule applies and indeed, have resolved the issues of enhanced interest under sub-rule (4) (a) and (b), no such consensus has been reached so far as the additional sum under (d) is concerned. It is the Defendant's case that it would be unjust for the additional sum to be added to the costs due, increasing by £7,0877.71 the amount payable by the Secretary of State.

9. The reasons Mr Herhily has been instructed to advance are these:-

   i) It is only the addition of the interest which has enabled the Claimant to beat his own Part 36 offer. Take out that interest and the offer is short of the sum required to engage CPR 47.17(4)(d).

   ii) It is unjust to take into account the interest because that element has arisen only due to the Claimant's delay in bringing the proceedings for detailed assessment.

   iii) The interest agreed from 17 July 2020 amounts to £2,202.42 up to 6 December 2020 when the Defendant paid £49,867 on account, with a further £948 from that date until the date of assessment making a total figure of £3,150.42. Interest at that level would not have arisen but for the Claimant's delay.

   iv) The additional sum should not be visited on the Defendant bearing in mind that it is a public body and the funds will come out of the public purse.

10. Against that, Mr Tollitt contends that the interest is a legitimate and important part of the costs claim. Not only that, it is one aspect of the matter over which this defendant, and, indeed, any Defendant has control, since they can prevent interest running by making a payment on account.

11. Here, the Defendant made no such payment until 1 December 2020 and when it did so, just £49,867 was paid. For that reason, there is no injustice in the Claimant being able to recover the additional 10% when the Defendant could have mitigated its liability by paying earlier. In that respect, the consent order had provided for a payment on account to be made within 28 days of receipt of the Claimant's bill, that is to say by 14 August

2020, but it had not done so. In any event, it is permissible in principle to take interest into account when working out whether a Claimant's Part 36 offer is at least as advantageous as the figure for the costs assessed – see *JLE (a child by her Mother and Litigation Friend, EH) v Warrington & Halton Hospitals NHS Foundation Trust* [2019] Costs LR 829 in which the Claimant's Part 36 offer had been less than the assessed costs, but when interest had been added, it meant that she had bettered her own offer, thereby entitling her to the additional 10%. Of that fact, at [27] Stewart J had said this:-

> *"… it was said I should not be influenced on the "injustice" point by the fact that it was the award of interest on the bill which had pushed the sum assessed above the level of the Part 36 offer. That was foreseen by the rules. I accept that."*

12. It followed that there was nothing in principle which prevented interest tipping the balance in favour of a Claimant when the court was considering whether CPR 36.17(4) applied.

13. As to the public purse point, Mr Tollitt was unaware of any authority which supported the Defendant's contention on this point. Indeed, had the offer been accepted as it should have been, the public purse would have been spared the time and expense involved in having the matter resolved at detailed assessment.

14. Having given full consideration to these submissions, I prefer those advanced by Mr Tollitt for the following reasons.

15. First, like Mr Tolllitt, I am unaware of an authority which binds the court that it would be unjust to order payment of the Part 36.17(4)(d) additional sum where the public purse is paying as opposed to the situation which pertains where the paying party is an individual, a company or an insurer, so that point fails.

16. Second, the Defendant could and should have mitigated its liability to pay interest by making a payment on account. Whilst it is right that there was no obligation to do so until 28 days after service of the bill, paragraph 7 of the consent order took effect on 14 August 2020 but no payment was made until 1 December 2020. Had the payment been made on time, the interest saved would have been about £1,160. Omitting to do so and failing to comply with an order to which the Defendant had itself given its consent, is not a promising start when it comes to seeking a discretionary remedy, as here. Nor is the fact that the Defendant made no attempt to mitigate its liability for interest by making a payment earlier than the date it did, albeit that there is no obligation to do so: it just makes commercial sense that it should be done, irrespective of any delay by a receiving party in serving their bill.

17. Finally, I also agree with Mr Tollitt that it is permissible to take interest into account when working out whether a Part 36 offer has been beaten. In *JLE,* the figures were more striking that they are here. The Master's allowance was £421,089.16 against the Claimant's offer to accept £425,000. However, the addition of interest meant that the Claimant beat her own offer by £6,813 and in those circumstances, Stewart J was satisfied that there was no injustice in the defendant, a "public purse" body, having to meet the additional sum of £42,089.16. In the present case, I am not persuaded, either, that there would be any injustice in the Defendant being required to pay the extra 10%, mindful as I am, of the guidance given by the court in *JLE*.

18. So far as the public purse argument is concerned, I would add this. Having carried out numerous provisional and detailed assessments involving paying parties where payment of the costs is coming out of public funds, and which have concerned predominantly, claims for judicial review such as the case here and clinical negligence involving NHS Trusts, it is dispiriting how much public money is expended unnecessarily in arguing about those costs at assessment. Many such matters will have been capable of settlement much earlier, either through effective Part 36 offers being made at an early stage or through a costs mediation before the fee for the assessment has been incurred.

19. Of course, there are occasions when that is not possible such as where there are points of principle involved in a group action, but in the present case, the public purse was put to unnecessary expense by the Defendant's failure to make a Part 36 offer at a level sufficient to give it costs protection had it been rejected, and in a sufficient sum so as to be attractive to the Claimant and thus to make it acceptable. Not only that, but here, the Defendant's shortcomings were compounded by the fact that a realistic Part 36 offer was turned down, comprising, as it did, interest to date, as well as the amount which the Claimant was willing to accept for his costs - see CPR 36.5(5). Had it not been for Mr Herhily's realistic approach at the detailed assessment to see an end to the matter once and for all (and I should add that it was not he who had drafted the points of dispute, having come into the case late), still more expenses would have been incurred.

20. It is a pity , therefore, in this case in advancing its "public purse" argument, that the Defendant appears to have overlooked the guidance given by Peter Smith J in *Wills v Crown Estate Commissioners* [2003] 4 Costs LR 581 at [33] when considering the position where one party is liable to pay the other party's costs of assessment, (the reference to CPR 47.19, now being embodied in CPR 47.20. which provides for Part 36 to apply in detailed assessment proceedings):

> *"This appeal emphasises the need for paying parties who wish to protect themselves against the costs consequences of CPR 47.19 to make realistic settlement offers at the beginning of the detailed assessment proceedings and not at the end. The court is bedevilled with late settlements. The procedures in CPR 47.19 are designed to promote early reasonable offers and parties should bear this in mind in the future".*

21. For these reasons, I am not persuaded that it would be unjust for CPR 47.17(4)(d) to apply and the Defendant must therefore pay an additional £7,080.77 to the claimant.