Case 43
JLE (a Child By Her Mother and Litigation Friend, ELH)

v

Warrington & Halton Hospitals NHS Trust Foundation Trust

[2019] Costs LR 829

Neutral Citation Number: [2019] EWHC 1582 (QB)
High Court of Justice, Queen's Bench Division
24 June 2019

Before:
Stewart J

Keywords:
discretion, Part 36 offers additional benefits under CPR 36.17(4) on beating own offer

Headnote

An offer made by the receiving party to settle the costs of the action under Part 36 in the sum of £425,000, which had been beaten by £6,813 in a bill brought in at £615,751, conferred the benefits payable under CPR 36.17(4)(a) to (d) in full, notwithstanding the small margin by which it had been beaten. It was not open to the court to take into account, in the exercise of its discretion, the amount by which a Part 36 offer had been beaten. To do so would risk re-introducing *Carver* (see *Carver* v *BAA* [2008] 5 Costs LR

From Costs Law Reports 2019/3, published by Class Legal
www.classlegal.com

779) and the adverse consequences which it had brought in its wake. The amount by which the bill had been reduced was not a valid reason either for making it unjust to make an award under CPR 17(4)(a)–(c) (indemnity basis costs and enhanced interest) but not under (d) (the additional award of 10% of the assessed costs). There had been nothing about the circumstances of the case which made it unjust under the rule to withhold the additional award, which was not a bonus but a penalty. Holding that the case overcame the high threshold of proving injustice thereby depriving the receiving party of the extra 10%, would be a green light to similar arguments in other detailed assessments and would be a serious disincentive to encouraging good practice and incentivising parties to make and accept appropriate offers. Order, accordingly, that the defendant pay the additional sum of £42,500 to the claimant.

"Other matters". The fact that the offer had only been beaten because of interest was a neutral point and simply a consequence of the rules. The fact that the offer had been made to expire on the last working day before the detailed assessment was not of material assistance to the defendant: an argument that a paying party would have no idea whether the time claimed was excessive or justified until the detailed assessment had commenced was simply wrong, because there was no evidence that the Part 36 regime was not working satisfactorily in detailed assessment proceedings.

Obiter: the additional amount was "all or nothing". No power is conferred on the court to allow less than 10% (or more than £75,000) unless it is unjust to do so.

Cases Cited

AEI Rediffusion Music Ltd v *Phonographic Performance Ltd* [1991] 1 WLR 1507

Ayton v *RSM Bentley Jennison and Others* [2018] 5 Costs LR 915; [2018] EWHC 2851 (QB)

Bataillion v *Shone* [2015] EWHC 3177 (QB)

From Costs Law Reports 2019/3, published by Class Legal
www.classlegal.com

Carver v *BAA* [2008] 5 Costs LR 779; [2008] EWCA Civ 412
Cashman v *Mid Essex Hospital Services NHS Trust* [2015] 3 Costs LO 411; [2015] EWHC 1312 (QB)
Davison v *Leitch* [2013] EWHC 3092 (QB)
Downing v *Peterborough & Stanford Hospitals NHS Foundation Trust* [2014] EWHC 4216 (QB)
Fox v *Foundation Piling Ltd* [2011] 6 Costs LR 961; [2011] EWCA Civ 790
G v *G* [1985] 1 WLR 647
Gibbon v *Manchester City Council*; *LG Blower Specialist Bricklayer Ltd* v *Reeves* [2010] 5 Costs LR 828; [2010] EWCA Civ 726
Lilleyman v *Lilleyman and Another* [2013] 1 Costs LR 25; [2012] EWHC 1056 (Ch)
McPhilemy v *Times Newspapers Ltd and Others* [2001] 2 Costs LR 295; [2001] EWCA Civ 933
OMV Petrom SA v *Glencore International AG* [2017] 2 Costs LR 287; [2017] EWCA Civ 195
SCT Finance v *Bolton* [2002] EWCA Civ 56
Smith v *Trafford Housing Trust* [2012] EWHC 3320 (Ch)
Thinc Group Ltd v *Kingdom* [2013] EWCA Civ 1306
Webb v *Liverpool Women's NHS Foundation Trust* [2016] 2 Costs LR 411; [2016] EWCA Civ 365
White v *Wincott Galliford Ltd* (SCCO Reference CCD 1705254 – 28 May 2019, Deputy Master Friston)

Judgment

1. **Stewart J:** The claimant seeks to appeal an order made by Master McCloud sitting in the Senior Court Costs Office. The order was made on 20 December 2018. It was sealed on 25 January 2019.

2. There was a detailed assessment hearing before Master McCloud on 16–18 July 2018 and a further telephone hearing on 7 September 2018. The relevant part of the recital states:

"AND UPON The court determining that the claimant (having beaten

her own Part 36 offer dated 21 June 2018) should be awarded the sums provided for in CPR rule 36.17(4)(a), (b) and (c) but that it would be unjust to award the claimant the sum set out in CPR rule 36.17(4)(d) …"

This was then reflected in para 3 of the order which provides:

"There shall be no order in respect of CPR 36.17(4)(d)."

3. The appellant's notice makes it clear that this is the only part of the order sought to be appealed.

4. The appeal file was placed before William Davis J who made an order on 26 March 2019. He ordered the appellant's application for permission to bring the appeal out of time and, subject to such permission being granted, for permission to appeal, with the hearing of the appeal (subject to permission) to follow.

5. I would like to say that I am very grateful to both counsel in this case for their command of the issues and the assistance they gave me.

Permission to Appeal Out of Time

6. In section 11 of the appellant's notice Ms Sarah Campbell of the claimant's solicitors filed evidence in support. What she said is:

- The Master's judgment was handed down in the absence of the parties on Thursday 20 December 2018. The parties had already been able to agree an order on the basis of the draft judgment. That was sent to the court on 18 December 2018.
- Christmas and New Year intervened. She attempted to file an appellant's notice with Grounds of Appeal and other documents on Thursday 10 January 2019. This was the last date within the 21 days provided for in CPR rule 52.12(2)(b). However, she did not have the sealed order. Enquiries of the Master subsequently confirmed that the order had not been sealed. The court office refused to accept the appellant's notice because they were not able to provide a sealed order. Her trainee was informed (erroneously) that the last date for filing the appellant's notice would be 21 days from the date of the sealed order.
- A sealed order was received on Friday 25 January 2019.
- The appellant's notice was filed and sealed on Monday 28 January 2019.
- There is no prejudice to the defendant if an extension is granted.

The defendant's representatives have been aware since 4 January 2019 that the claimant intended to appeal.

7. The respondent does not oppose the extension of time.

8. CPR rule 52.12(2)(b) requires the appellant to file the appellant's notice at the appeal court within 21 days after the date of the decision of the lower court which the appellant wishes to appeal. Although the court appreciates that it is particularly important that time limits in respect of appeals are observed, in the above circumstances I have no hesitation in granting permission to appeal out of time.

9. It will also become apparent that permission to appeal must be granted in this case.

Background

10. Leigh Day Solicitors were instructed on behalf of the claimant in 2006. Proceedings were issued in June 2015. The court approved settlement on 31 March 2017. In outline, the defendant paid a lump sum of £2,500,000 and periodical payments for care and case management of £260,000 per annum are payable until the claimant is aged 19, and thereafter at £312,000 per annum for life. The basis of the claim was for clinical negligence occurring shortly after the claimant's birth on 3 December 2004.

11. In November 2017 the claimant's solicitors served a Bill of Costs totalling £615,751.51. On 21 June 2018 the claimant made a Part 36 offer in the sum of £425,000.00, inclusive of interest, in respect of the Bill of Costs. That offer accordingly expired on Friday 13 July 2018, i.e. the last working day before the hearing commenced. The Master assessed the bill inclusive of interest in the sum of £431,813.05, i.e. £421,089.16 plus £10,723.89 interest. The claimant therefore beat her Part 36 offer by just under £7,000.

12. The Master ordered the defendant to pay the claimant's costs of the detailed assessment and summarily assessed those in the sum of £44,745.16 plus indemnity interest of £10. She made orders in respect of CPR rule 36.17(4)(a)–(c) – these being minimal and not opposed – but no order in respect of CPR rule 36.17(4)(d).

The Relevant Rules

13. In respect of costs of detailed assessment proceedings CPR rule 47.20(4) applies Part 36 to the costs of detailed assessment proceedings with terminological modifications only. These

modifications will be incorporated into the citation of the material parts of rule 36.17 set out below. The only sub-paragraph which needs full citation from rule 47.20 is rule 47.20(4)(e) which provides:

> "a reference to 'judgment being entered' is to the completion of the detailed assessment, and references to a 'judgment' being advantageous or otherwise are to the outcome of the detailed assessment."

14. CPR rule 36.17, as modified by rule 47.20(4) says, so far as material:

> "**Costs consequences following judgment**
>
> 36.17 –
>
> (1) … this rule applies where upon judgment being entered –
>
> (a) …
>
> (b) judgment against the [paying party] is at least as advantageous to the [receiving party] as the proposals contained in a [receiving party's] Part 36 offer. …
>
> (2) For the purposes of para (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. …
>
> (4) … where para (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 paras (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 …"

The Master's Judgment

15. At [2] the Master set out the question for her to determine as follows:

> "whether the court has the power to award some, but not all of the consequences set out in CPR rule 36.17(4) where the claimant has achieved an award more advantageous that its own Part 36 offer, and if the court does have that power, whether that power should be exercised so as to allow the consequences at sub-paragraphs (a), (b) and (c) of the Rule, but not that at (d)."

From Costs Law Reports 2019/3, published by Class Legal
www.classlegal.com

16. At [5] the Master noted that "having beaten its own offer by £7,000 on a bill of over £615,000, the consequence of allowing the extra 10% on the bill as assessed would be significant, i.e. over £40,000".

17. The rival contentions as to the construction of rule 36.17(4) are set out at [8]:

> "8. It was the defendant's contention that the court in giving effect to rule 36.17(4) must approach the question whether it is 'unjust' to make an order, separately for each of the types of consequences (a)–(d), i.e. the court must decide whether it is just to award all, some, or none of the consequences set out in the Rule. The claimant's contention is that the test of whether the consequences would be unjust if imposed is a gateway criterion which once overcome triggers all of the consequences (a)–(d) with no discretion on the part of the court to depart from their provisions so as to omit one of them (in this case (d))."

18. At [10]–[26] the Master reviewed the following authorities:

- *Thinc Group Ltd* v *Kingdom* [2013] EWCA Civ 1306
- *Davison* v *Leitch* [2013] EWHC 3092 (QB); and
- *Bataillion* v *Shone* [2015] EWHC 3177 (QB)
- *Gibbon* v *Manchester* CC [2010] EWCA Civ 726
- *Fox* v *Foundation Piling Ltd* [2011] EWCA Civ 790
- *Smith* v *Trafford Housing Trust* [2012] EWHC 3320 (Ch)
- *Ayton* v *Jennison* [2018] EWHC 2851 (QB).

19. Her conclusions on the authorities are set out at [25]–[26] as follows:

(i) "I therefore consider that whilst not strictly bound by precedent, it is the preferable construction for me consistent with judicial comity and consistency of approach generally (in what by now seems to be a reasonably 'embedded' approach to this rule) to hold that it is open to the court to apply 36.17(4)(d), or not, or to the extent considered just, in any case independently of parts (a)–(c) of that sub-rule. In other words with some reluctance, since given an entirely clear field devoid of examples from case law I might reach a different conclusion, I hold that the penalties are indeed severable and such has become the practical interpretation of the rules."

(ii) "even if one were to adopt the alternative construction proposed by

> the claimant (and the one to my mind which is closer to the wording of the rule were I not properly required to respect and to take into account other decisions applying the rule), the court would still have to consider *in the round* the overall effect of applying *all* of the penalties in sub-rules (a)–(d) and hence there would be cases where the effect of one of the cost penalties (such as the 10% provision in (d)) would tip the court's decision over the threshold of 'injustice' set by the rule even when approaching the rule on a non-severable basis as the claimant contends I should. In that event, if the claimant's preferred construction were to be adopted, the receiving party would then gain none of the benefits of (a) to (d), which seems counterintuitive. Perhaps that is a point in favour of the construction applied by the authorities which I have referred to above and which are consistent with the defendant's 'severed' approach."

20. At [27]–[42] the Master considered the exercise of her discretion. The following are helpful extracts:

> "27. … 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 as assessed which had pushed the sum assessed above the level of the Part 36 offer. That was foreseen by the rules. I accept that.
>
> [At [28] she referred to the matters in rule 36.17(5)] …
>
> 30. I do not think that in most cases the extent to which an offer has been beaten is a very material factor since the rules provide a clear definition of 'more advantageous'. In this case the offer was beaten by just short of £7,000 which is 'more advantageous' but it is nonetheless a very small percentage of a bill which had been greatly reduced. Given that the court is … empowered to apply the 'injustice' test on the basis of each cost consequence *separately* then in my mind considerations such as proportionality of the cost penalty must be applied separately for each of the sub-rules in 3.17(4).
>
> 31. I thus do have to consider whether the large sum by way of penalty (10% of a bill assessed at over £400,000) compared with the very small percentage margin by which the offer was beaten, in an assessment where the bill was significantly reduced on assessment, would amount to a disproportionate windfall leading to injustice rather than just a

windfall for the recipient which is consistent with the objective of the rules.

32. Equally I should bear in mind that if the court does not adopt a high bar for the exercise of its discretion (and here I refer to the description of the 'injustice' test as being a formidable hurdle in, e.g., *Ayton*), the purpose of the cost penalty rules could be weakened or defeated.

33. In my judgment it is only where the cost penalty created by the 10% rule would be clearly disproportionate that one would incline to exercise the discretion to waive it. But, that said, if the court was unduly unwilling to exercise its discretion on facts such as these – for example requiring something akin to 'exceptional circumstances' then a party in the position of the defendant might be discouraged from taking the risk of legitimately going as far as assessment at all, despite having various meritorious objections to the Bill as drawn and which have (in this case) been shown in many instances to be correct. …

38. The defendant argued that it would be grossly unjust to order the additional 10% in this case and that it would be a significant windfall (given the size of the assessed bill, especially relative to the extent by which the offer was beaten). I take on board and accept the point made by the claimant that Part 36's additional sum provisions are not intended to be compensatory: they are intended to be an incentive to settle and will be ineffective if they do not operate, so that the fact that the penalty appears more generous than a purely compensatory approach would warrant is not of great assistance. See *McPhilemy* v *The Times Newspapers Ltd (No. 2)* [2001] EWCA Civ 933 … *OMV Petrom SA* v *Glencore International AG* [2017] EWCA Civ 195. On the other hand, the rules do provide a discretion according to the 'unjust' test, by which the consequences can be disapplied so it cannot have been the rule-makers' intention that a consideration of disapplying the consequences provided for in the rules is a process meant to disregard situations where a large non-compensatory penalty has arisen. …

Conclusion

40. Taken together in my mind the most significant factors are (1) the very small margin by which the offer was beaten relative to the much greater size of the bill (2) the fact that where a bill is reduced (and seems to have been expected to be reduced) significantly, it will on the whole generally be very difficult for a party to know precisely or even

From Costs Law Reports 2019/3, published by Class Legal
www.classlegal.com

approximately to within a few percent, where to pitch an offer such that even a competent costs lawyer would operate close to chance level as to whether an offer is likely to be 'over' or 'under' at the end of the hearing, and (3) the large size of the 10% 'bonus' award relative to the margin by which the offer was beaten.

41. In all the circumstances in my judgment the 'bonus' of 10% in this case would be a clearly disproportionate sum and it would be unjust to award it. That is also the case when one looks at the overall effect in the round of what would be the cumulative penalties in sub-rules (a)–(c) added to (d) …"

The Grounds of Appeal

21. The Grounds of Appeal run to thirteen paragraphs. I will refer to some of the details in the grounds in this judgment but in essence there are two grounds, namely:

(i) The master was wrong to conclude that the test of unjustness should be applied separately in respect of rule 36.17(4)(d). There is a single test of injustice so that all or none of the normal consequences in rule 36.17(4) supply.

(ii) Alternatively, even if the test of injustice can as a matter of the court's jurisdiction be applied separately to each sub-paragraph in rule 36.17(4), a correct approach to the rule will yield the same result in respect of each sub-paragraph, either always or in all but the most exceptional cases of which this is not one. The Master was wrong (which is to say made an error in principle which was wrong in law and/or was outside the scope of her discretion) to conclude that it was unjust for the "additional amount" to be awarded to the claimant.

The First Ground of Appeal

22. The appellant submits that there is a single test of unjustness so that all or none of the normal consequences in rule 36.17(4) apply. It is said that there is nothing in the wording of the Rule to suggest that the test of whether the costs consequences in rule 36.17(4) would be "unjust" should be applied separately for each of the sub-paragraphs (a)–(d).

23. In the absence of authority my conclusions on this point would be as follows:

(i) Albeit that there is nothing in the wording of rule 36.17 to suggest that the test should be applied separately for each of sub-paragraphs (a)–(d), there is nothing in the wording to suggest that it should not be applied separately for each of those sub-paragraphs.
(ii) In deciding whether it would be unjust to make the order in sub-paragraph (4), sub-paragraph (5) requires the court to "take into account all the circumstances of the case including" the matters specifically referred to in (a)–(e).
(iii) Unless a rule, on its true construction, makes it clear that the exception of injustice is to be applied in every case across the board, then the court does have jurisdiction to consider it unjust to award some, but not necessarily all the orders in sub-paragraph (4).
(iv) That said, it would perhaps be an unusual case where the circumstances of the case, including those particularised in sub-paragraph (5), yield a different result for only some of the orders envisaged in sub-paragraph (4).

24. I now turn to the authorities cited before the Master and myself.

25. In *Thinc*, the judge, for reasons specific to that case, made an order that from the date of the claimant's Part 36 offer the defendant was to pay 20% of the claimant's costs on an indemnity basis. The argument put by the defendant, having regard to the terms of the then CPR rule 36.14(2) and (3), was that the judge's:

> "discretion as to costs at this stage was fettered by bi-polar evaluation of 'unjust' to mean that the successful party receives their costs on an indemnity basis or not and thereby fell into error by apportioning costs in percentage terms and on an indemnity basis for the relevant period."

The Court of Appeal rejected that argument, saying at [22]:

> "the phrase 'unless it considers it unjust to do so' … bear[s] the obvious interpretation of 'unless and to the extent of'. The imposition of an indemnity basis to the award of costs gives credence to the significance of the effect of the Part 36 offer and is not a value judgment of the whole of the appellant's litigation conduct in the lower court."

26. In *Ayton* the primary reason for the Master's finding that it would be unjust to apply the normal consequences of Part 36 was "her

conclusion that it was an abuse of process to bring the car claim" [31]. The judge's decision at [57] was "it would not be unjust, in general, for the consequences set out under Part 36.17 to apply". She invited further submissions as to the proper form of order to be made in writing if the terms could not be agreed. She dealt with those at [58]–[59]. At [58] she considered four matters, namely:

(i) The date from which indemnity costs should run.
(ii) The interest rate on damages under Part 36.17(4)(a).
(iii) The interest rate on costs under Part 36.17(4)(c).

Therefore in respect of (a) and (c) the learned judge was considering the discretions as to rate of interest which are inherent in those sub-paragraphs. She then continued:

> "(iv) Payment of an additional amount pursuant to Part 36.17(4)(d). Mr Croxford has not specifically addressed this in his written submissions, from which I infer that the defendant does not seek to argue that it would be unjust to order that an additional amount should be payable. In the absence of any submissions on the point from Mr Croxford I propose to order that this additional amount will attract interest of 2% over base …"

Although it might appear that the judge was considering the possibility of not awarding the additional amount under (d), she expressly says that there was no argument upon this. There is therefore nothing in the judgment which contains any authoritative statement on the matter which I have to decide.

27. *Davison* was a decision of Andrews J. She considered the terms of the then Part 36.14. She awarded the full additional sum of £75,000 under (d) but said at [73]:

> "I consider it would not be unfair to the defendant for some of the consequences of Part 36.14 to be visited on him but that it probably would be unfair for all of them to apply … I consider it would be unfair to award an uplift of interest on the damages as well, and therefore no award is made under (a)."

28. There is no suggestion that the judge was addressed on whether it was permissible to find it unjust to award some but not all sub-paragraph (4) orders. Clearly her instincts were to that effect. There is no reference to any authorities having been cited to the judge in

relation to costs. Her decision on costs was at the end of a full trial. She did not have the benefit of detailed argument on principle which I have had.

29. In *Bataillion* the judge gave an extempore judgment in the Mercantile court dealing with an application to adjourn and for summary judgment. He dealt with costs in the last two paragraphs. At [21] the judge said that he had the jurisdiction to make an order under CPR 36.17.4(d), but made it in a lesser sum than 10%. It is fair to say that there appears to have been little argument before the judge and no authorities cited. There was no consideration of the words "unless it considers it unjust to do so" whether in relation to sub-paragraph (4) as a whole or in relation to sub-paragraph (4)(d).

30. In *OMV* at [23] the Chancellor said:

> "It does not seem to me to be inevitable that the relevant 'circumstances' will necessarily be identical for each of the four orders that the court will make, unless it would be unjust to do so."

This is an obiter dictum in relation to the present case, since the issue in *OMV* was a challenge to the levels of interest under 36.17(4)(a) and (c) rather than a decision to award enhanced rates of interest (or indemnity costs/additional sum) at all – see the judgment at [24].

31. In my judgment there is nothing in the authorities which would be binding on this court in relation to whether the words "unless it considers it unjust to do so" have to apply to all of the four awards under sub-paragraph (4), or may apply to only some of them. Although Andrews J's decision in *Davison* is consistent with the court being able to find injustice in some but not all elements, I do not regard it as of any authoritative weight since the point was not argued.

32. In those circumstances my interpretation of rule 36.17(4) as set out above stands and I so rule on this point. I am reinforced in this conclusion by the remarks of the Court of Appeal in *OMV*. I will return in a different context to the words of the Court of Appeal in *Thinc*.

33. Although the claimant referred before the Master to *Gibbon* at [4] and [6] and *Fox* at [44], the statements of the Court of Appeal in those paragraphs have no real relevance to deciding the first ground of appeal.

From Costs Law Reports 2019/3, published by Class Legal
www.classlegal.com

The Second Ground

34. In *Smith*, Briggs J as he then was, said that ([13]):

> "I was not referred to any authority on the application of the injustice test under Part 36.14. For present purposes, the principles which I derive from the authorities are as follows:
>
> (a) The question is not whether it was reasonable for the claimant to refuse the offer. Rather, the question is whether, having regard to all the circumstances and looking at the matter as it affects both parties, an order that the claimant should pay the costs would be unjust …
>
> (b) Each case will turn on its own circumstances, but the court should be trying to assess 'who in reality is the unsuccessful party and who has been responsible for the fact that costs have been incurred which should not have been'. …
>
> (c) The court is not constrained by the list of potentially relevant factors in Part 36.14(4) to have regard only to the circumstances of the making of the offer or the provision or otherwise of relevant information in relation to it. There is no limit to the types of circumstances which may, in a particular case, make it unjust that the ordinary consequences set out in Part 36.14 should follow: see *Lilleyman* v *Lilleyman (Judgment on Costs)* [2012] EWHC 1056 (Ch) at para 16.
>
> (d) Nonetheless, the court does not have an unfettered discretion to depart from the ordinary cost consequences set out in Part 36.14. The burden on a claimant who has failed to beat the defendant's Part 36 offer to show injustice is a formidable obstacle to the obtaining of a different costs order. If that were not so, then the salutary purpose of Part 36, in promoting compromise and the avoidance of unnecessary expenditure of costs and court time, would be undermined."

35. What Briggs J said in *Smith* was approved by the Court of Appeal in *Webb* v *Liverpool Women's NHS Foundation Trust* [2016] EWCA Civ 365.

36. As the Master summarised at [40] the most significant factors which she took into account in refusing to award the additional amount were:

(1) The very small margin by which the offer was beaten relative to the much greater size of the bill.
(2) Where a bill is reduced significantly, it will on the whole generally be very difficult for a party to know precisely or even approximately where to pitch an offer.
(3) The large size of the 10% "bonus" award relative to the margin by which the offer was beaten.

37. In *AEI Rediffusion Music Ltd* v *Phonographic Performance Ltd* [1991] 1 WLR 1507 at 1523 Lord Woolf MR said:

> "Before the court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale."

38. As to the last part of that quotation, it is clear that an appellate court should only interfere where a first instance judge "has exceeded the generous ambits within which reasonable disagreement is possible" – see *G* v *G* [1985] 1 WLR 647 at 652. Further, in respect of costs cases, the court has to recall, as was said by Wilson J (as he then was) in *SCT Finance* v *Bolton* [2002] EWCA Civ 56 at [2] in relation to cost bills, that they are:

> "overcast, from start to finish, by the heavy burden faced by any appellant in establishing that the judge's decision falls outside the discretion in relation to costs … For reasons of general policy, namely that it is undesirable for further costs to be incurred in arguing about costs, this court discourages such appeals by interpreting such discretion very widely."

39. However, the main focus of the appeal is on the earlier part of the quotation from the *Phonographic Performance* case. What the appellant says is that none of the factors relied upon by the Master should have been taken into account, such that she erred in principle. (For a challenge on this type of basis see *SG* v *Hewitt* [2012] EWCA Civ 1053 at [50]. The case of *SG* has other relevance as set out later.) I shall deal with each of these three points in turn.

Small Margin By Which the Offer Was Beaten Relative to the Greater Size of the Bill

40. This was described by the Master at [30] as not "a very material factor". Nevertheless, she considered that the proportionality of the costs penalty must be applied separately for each of the sub-rules in 36.17(4).

41. The Master referred [30] to the definition of "more advantageous" in rule 36.17(2). In fact the provision which governed this case was 36.17(1)(b). In any event, it is important to recall that that sub-rule emphasises that better in money terms means "better in money terms by any amount, *however small*, and 'at least advantageous' shall be construed accordingly". (My underlining [*here, italics*]). By 36.17(1)(b) if, in accordance with this definition, judgment against the paying party is at least as advantageous to the receiving party as the proposals contained in the claimant's Part 36 offer, then the consequences set out in 36.17(4) must be applied unless the court "considers it unjust to do so".

42. The history of the rule has real relevance. In the old rule 36.14(1) there was no definition of "more advantageous" or "at least as advantageous". In *Carver* v *BAA plc* [2008] EWCA Civ 412 the claimant beat the defendant's Part 36 offer by £51. The Court of Appeal said that: "more advantageous was an open-textured phrase" and upheld the trial judge's finding that it could not be said that the final outcome was "more advantageous" than accepting the defendant's offer. In the Review of Civil Litigation Costs: Final Report December 2009 Chapter 41 ("the Jackson Report") Jackson LJ reviewed the *Carver* decision and said:

> "2.9 *Conclusion*
>
> I confirm my provisional view expressed in the Preliminary Report that *Carver* introduces an unwelcome degree of uncertainty into the Part 36 regime and also that it tends to depress the level of settlements. I recommend that the effect of *Carver* should be reversed either judicially … or by rule change. It should be made clear that in any purely monetary case 'more advantageous' in rule 36.14(1)(a) means better in financial terms by any amount, however small."

43. Among the views incorporated in the report was that from a large firm of solicitors who wrote (report para 2.5):

> "We agree that *BAA* v *Carver* … should be reversed. We can understand the judiciary's desire for as much discretion as possible in order to enable them to do what they consider to be the right thing in each case. However, discretion inevitably creates uncertainty and, as a result, offers parties issues about which to argue thereby generating satellite litigation and further costs. A black letter rule has many virtues."

In para 2.8 Jackson LJ said that no convincing arguments had been advanced to rebut the arguments set out in the preceding four paragraphs. Those paragraphs included the above extract.

44. In describing at [40] the very small margin by which the offer was beaten relative to the much greater size of the bill as a significant factor, the Master erred in principle. Given the points I have mentioned above, it is not open to judges to take into account in the exercise of the discretion the amount by which a Part 36 offer has been beaten. To do so risks re-introducing *Carver* and the adverse consequences which it brought in its wake, and which the Rule Committee reversed on the recommendation of Jackson LJ.

The Effect of a Significant Reduction in the Bill

45. The decision of Slade J in *Cashman* v *Mid Essex Hospital Services NHS Trust* [2015] EWHC 1312 (QB) is not referred to in the Master's judgment. In that case the receiving party put in a bill of costs of £262,000. The receiving party made a Part 36 offer to settle for £152,500. At a detailed assessment hearing the Senior Costs Judge made an order of £173,693. He did not make the award of the additional amount under 36.14(3)(d) on the basis that it would be unjust to require the defendant to pay an additional amount of £17,000.

46. At [22] the judge said:

> "22. It appears that the low level of the claimant's offer compared with the high level of the bill and with the costs assessed was considered to be in the claimant's favour in deciding whether it would be unjust to make awards under CPR 36.14(3)(a) to (c) but a point rendering it unjust to do so in relation to CPR 36.14(3)(d). Master Gordon-Saker held:
>
> > 'In circumstances where there has been a significant reduction in the claimant's bill, it seems to me that it would be unjust to reward the claimant with the additional amount prescribed by 36.14(3)(d).'

> Whilst a particular factor under CPR 36.14(4) may carry more weight when considering whether it would be unjust to make an award under the different sub-paragraphs of CPR 36.14(3), in this case no reason was given why a factor rendering it not unjust to make an award under 36.14(3)(a) to (c) should be the factor rendering an award under CPR 36.14(3)(d) unjust. In my judgment the Master erred in relying on the degree of reduction made on assessment to the costs claimed as rendering it unjust to make such an award in circumstances in which the Part 36 offer was lower than the sum at which the costs were assessed."

47. In the present case as in *Cashman* that the degree of reduction in the bill was no reason why a factor rendering it not unjust to make an award under 36.17(4)(a) to (c) should be the factor rendering an award under CPR 36.14(4)(d) unjust.

48. It was conceded in *Cashman* [18] that it could not be said that a high bill which is much reduced on assessment is not a valid reason for refusing to make an additional award. The judge added:

> "In circumstances in which the inflated level of costs claimed leads the defendant to incur expense in investigating the claim before the Part 36 offer was made it may be unjust to make such an award."

There was no finding of that nature by the Master in the present case.

49. The Master said [40] that the reason for the exercise of her discretion on this ground was the difficulty in a party knowing precisely or even approximately where to pitch an offer. Mr Marven, who appeared for the defendant in *Cashman*, there made a number of submissions in similar vein. Unsurprisingly he did not reassert those submissions in the present case. The effect of those submissions was that costs are to be treated differently from damages for the purposes of Part 36 rule[s], as the reasonableness of a costs offer is more difficult for a defendant to assess than an offer to settle a damages claim. He said there is disclosure in a claim for damages which enables a defendant to make an informed assessment of an offer to settle a damages claim. There is no such disclosure in cost proceedings. What is expected is a realistic claim. See *Cashman* at [11] and [17].

50. The concession made by Miss Lambert (as she then was) and adopted by the court is, I believe, correct. There may possibly be circumstances where a high bill much reduced on assessment is a valid reason for refusing to make an additional award. Slade J gave an

From Costs Law Reports 2019/3, published by Class Legal
www.classlegal.com

example. Nevertheless, it must always be remembered from *Smith* that the burden on the claimant to show injustice is a formidable obstacle to the obtaining of a different order.

51. Further, I disagree with the submissions made by Mr Marven in the *Cashman* case. The lack of a system of disclosure should not be a matter which distinguishes costs cases from damages cases. If it had been, this could have been written into the rules. Instead the costs rules mirror precisely the rules for judgments in damages (and other) judgments.

52. On many occasions Part 36 offers in damages cases are made prior to any significant disclosure, or at least before the value of the case can be accurately assessed. The system encourages parties to "take a view" depending on experience and such information as they have, so as to encourage settlement as soon as practicable. A damages case where the normal rule was departed from was *SG*. There a child of six years sustained a brain injury in an accident in 2003. Medical and other experts felt unable to predict the prognosis until the claimant matured. In 2009 the defendant made a pre-action Part 36 offer in the sum of £500,000. This offer was ultimately accepted in 2011. In those circumstances the court held that it was unjust to visit adverse costs consequences on the claimant. Detailed reasons were given, specific to the facts of the case. One of the factors was that the claimant was lacking essential information. That brought into play (what is now) rule 36.17(5)(c). That and other reasons are set out more fully at [68]–[72], [77] and [93]–[94]. However, even in those circumstances, the Court of Appeal felt it appropriate to give "some words of caution" at [73] as to the particularly fact sensitive nature of the decision. The tenor of *SG*, coupled with the comments of Briggs J in *Smith*, decided a few months later, runs directly contrary to it being an injustice that it is difficult for a paying party to respond to a Part 36 offer in detailed assessment proceedings, merely because the bill has been substantially reduced. Again, to permit this would cause a real risk of burgeoning satellite litigation.

53. Rule 36.17(5)(c) requires the court to take into account "the information available to the parties at the time when the Part 36 offer was made". What the Master said about this was [35]:

> "the offer was made at a time when sufficient information was known for the recipient to take an informed view as to acceptance. Indeed the

> defendant made its own offers which fell somewhat short (by about £7000 inclusive of interest on the bill) …"

She then continued:

> "Nonetheless where a bill is reduced by a large figure, and it appears to be known to both sides that a large reduction is on the cards as it were, the 'pitching' of an offer becomes a more and more uncertain exercise and the merits or demerits of acceptance or rejection become far harder to judge."

54. In my judgment the Master erred in principle in essentially deciding that some difficulty in assessing an offer because the bill was reduced by some 30% could be a reason to find it unjust to make the additional award. Further, although in principle the four awards under 36.17(4) can be separated in terms of whether it is unjust to make an award, I do not accept that in these circumstances it is open to the court to say that it would be unjust to make an award under (d) but not under (a)–(c). The perceived injustice would then be based on the prescribed amount of the award, which is an impermissible basis. I will later in this judgment conclude that the award under (d) has to be "all or nothing". This is contrary to some decisions (*Bataillion*, where the point was not argued and *White* – see below – where it was). The Master seems to have accepted (correctly) that the additional amount was "all or nothing" and (incorrectly) that it was a disproportionate bonus. However that factor, to which I now turn, erroneously, influenced – and was influenced by – the reduction in the size of the bill.

55. In this respect it is also interesting to note what the Master said at [34], namely:

> "it was an offer fairly close to final hearing and hence at a time when sufficient information was known for either party to take advice as to whether to accept."

56. In all the circumstances, on this point, if I had not found that the Master erred in principle, I would have found, for the same reasons, that she had exceeded the very generous ambit of her discretion.

From Costs Law Reports 2019/3, published by Class Legal
www.classlegal.com

Large Size of the 10% "Bonus" Relative to the Margin By Which the Offer Was Beaten

57. This reason is very similar to the reason given by Master Gordon-Saker in *Cashman*. As Slade J said, and I agree:

> "24. … Whilst all the relevant circumstances are to be considered in deciding whether it would be unjust to make an award under any of the paragraphs of CPR 36.14(3), it was not suggested that there was any particular feature or consequence of the bill of costs other than its size which would render the making of an order under CPR 36.14(3)(d) unjust.
>
> 25. The making of an order of the level required by CPR 36.14(3)(d) was decided as a matter of policy as explained in the Jackson Report. Under the previous regime it was considered that a claimant was insufficiently rewarded and the defendant insufficiently penalised when the claimant has made an adequate Part 36 offer. In my judgment the Master fell into the temptation referred to by Sir David Eady in para 61 of *Downing* of making an exception by not making an award under CPR 36.14(3)(d) not because he considered the making of such an award unjust but because he thought it unjust to make an award of the required amount, 10% of the assessed costs …"

58. The additional award should not be characterised as a "bonus". It is not meant to be compensatory. As the Jackson Report said, there is a penal element when the claimant has made an adequate offer. There were detailed policy considerations in the Report giving rise to the assessment of the appropriate additional award. See in particular in this regard, *OMV* at [32]–[37].

59. Therefore, in my judgment all three reasons given by the Master were inadmissible reasons for finding it to be unjust to make the additional award. There was nothing unjust about the circumstances of this case. Indeed there was nothing unusual about the circumstances so that the high threshold of proving injustice could be properly regarded as met. That is important because if this case qualifies for withholding the additional award, that would be a green light to similar arguments in many, many other detailed assessments. It would also be a serious disincentive to encouraging good practice and incentivising parties to make and accept appropriate offers – cf. *OMV* at [32].

From Costs Law Reports 2019/3, published by Class Legal
www.classlegal.com

Other Matters

60. The defendant made a number of further submissions based on 36.17(5). There was no respondent's notice, which would have been required. Nevertheless I will deal with them briefly.

61. Under 36.17(5)(a) it was said that the claimant only beat the offer because of interest and that this marginally militates against the suggestion that all possible consequences follow. The Master rejected this point at [29]. She said: "it seems to be essentially a neutral point on its own … the fact that it included interest is simply a consequence of the rules". I agree with the Master.

62. Under 36.17(5)(b) it is said that this offer was made at the eleventh hour, expiring on the last working day before the detailed assessment. The Master said at [34]:

> "I do not consider that the fact that the offer was made (fairly close to the detailed assessment hearing) is of assistance materially to the defendant … it was an offer … at a time when sufficient information was known for either party to take advice as to whether to accept."

I agree. The defendant submitted that it must logically follow from 36.17(5)(b) that the later an offer is made the less weight should be afforded to it when considering whether it is just to visit all the sub-paragraph (4) consequences on the defendant. I do not accept this. There is a 21-day period for acceptance. That was available in this case. The Master found in this case that it meant that the defendant had sufficient information. This sub-paragraph is entirely open in its construction, including the words "in particular how long before the trial started the offer was made". It is left open to a court to decide whether the stage of proceedings at which the offer is made is such that it is unjust to make the otherwise mandatory orders, subject always to the high hurdle for the paying party to show injustice.

63. Under 36.17(5)(c) the defendant repeats and argues the point about costs proceedings being different from substantive proceedings because of lack of disclosure. I have already dealt with this argument above and rejected it. It was argued:

> "Until the detailed assessment commences, it is impossible for the defendant to have any idea whether the time claimed in the bill is excessive or justified given the quality of attendance notes on the file."

In addition to what I said above, I would say: (i) if this was a valid

point it could arise in most if not all detailed assessments; it would suggest that rule 36.17(4) in general and (4)(b) in particular should be never, or hardly ever, awarded. That must be wrong; (ii) it takes no account of the expectation, and the reality, that experienced practitioners can and do make their own sensible assessment in advance of detailed assessment hearings. There is no evidence that the Part 36 regime is not working satisfactorily in such proceedings. If there was, the way forward would be by seeking a rule change. Indeed, as mentioned above, the Master referred ([35]) to the fact that the defendant had made its own offers which fell short by only some £7,000.

64. The defendant sought to argue conduct points under 36.17(5)(d). Not only was there no respondent's notice on this point, the Master specifically recorded at [36]: "No conduct points appear to arise in this case against the claimant and none were taken by the defendant." The respondent said the points were put before the Master. In the absence of a respondent's notice, it would be wrong to allow this point to be taken in the appeal. In any event, the argument was based on the sequence of offers and counter-offers prior to the material Part 36 offer. On this basis it is submitted that throughout the litigation the respondent took a far more reasonable approach to negotiation. However, the rule refers specifically to "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". There is no information relevant to this.

65. It is accepted that nothing turns on 36.17(5)(e).

66. As to "all the circumstances of the case", apart from relying on the points made by the Master, which I have ruled erroneous, the only other factor put forward is that the defendant is funded by the public purse and has a duty to test claims for costs which appear substantially in excess of what one might expect to pay for the work performed. It is said that this vigilance largely paid off and nearly £200,000 was disallowed from the bill. There is no merit in this since: (a) the fact that the defendant is funded by the public purse does not put it in any different situation from any other litigant, (b) the vigilance would have paid off even more had the claimant's offer been accepted, since another £7,000 would have been saved, along with the hearing costs and the consequences which flow under rule 36.17(4), it not being unjust that any of those consequences do flow.

From Costs Law Reports 2019/3, published by Class Legal
www.classlegal.com

Fresh Exercise of Discretion

67. In the present case Master McCloud appears to have considered that the award of 10% additional amount in 36.17(4)(d) was an all or nothing amount. However, in exercising my discretion afresh, the respondent sought to argue before me that there is power to award a lesser percentage and that I should award a lower percentage. The appellant objected on the basis that this was not argued in the court below and had not been raised until the day of the hearing of the appeal. I heard full argument on the principle of whether awarding less than the prescribed additional amount is permissible, but in the end my decision is that it is too late to raise this point. Nevertheless, having heard full argument, I wish to make certain observations. Though they are strictly obiter, they may assist in future cases.

68. In *Bataillion* and in the recent case of *White* v *Wincott Galliford Ltd*, SCCO Reference CCD 1705254 – 28 May 2019, a decision of Deputy Master Friston, the court ruled that there was power to allow only part of the additional amount under CPR rule 36.17(d). There was full argument in *White*, though not in *Bataillion*.

69. It is important to focus on the terminology of rule 36.17(4). The opening, governing words require the awards under (a)–(d) to be made unless it is considered unjust to do so. Discretions as to amount are expressly contained in (a) and (c) by the use of the phrase "at a rate not exceeding 10% above base rate". However, in sharp contradistinction, the words in (d) are expressly prescriptive, i.e. "calculated by applying the prescribed percentage set out below" and then the subheading "Prescribed percentage".

70. In Chapter 41 of the Jackson report at [3.13] to [3.14] it states:

> "3.13 *Draft Rule* I therefore propose that there should be added to rule 36.14(3) the following sub-paragraph:
>
> (d) an additional sum comprising 10% of (i) the damages or other sum awarded and (ii) the financial value, as summarily assessed by the court on the basis of the evidence given at trial, of any non-monetary relief awarded.
>
> 3.14 If thought appropriate, provision could be added for scaling down the uplift in respect of higher value cases. The rule should, in any event, enable the court to award less than 10% uplift in cases where there are good reasons to take this course."

From Costs Law Reports 2019/3, published by Class Legal
www.classlegal.com

71. It will be noted:

(i) the suggestion of scaling down the uplift was adopted;
(ii) the wording of the then rule 36.14(3) was not changed so far as material to this point, save by the addition of the new sub-paragraph (d);
(iii) the new sub-paragraph (d) did not incorporate any "good reasons" type of exception. Not only that, the proposed sub-paragraph (d) was not adopted and, as explained above, the wording of the new sub-paragraph (d) is expressly prescriptive.

72. One can see a very good policy reason for the present rule, as I interpret it, namely to discourage further satellite litigation on the appropriate extent of the additional award. Further, there would be no points of orientation as to what would be a proper amount of reduction. It is of interest that in *OMV* the Chancellor said that the additional award under (d) was a "penal award of up to £75,000 as an additional sum calculated on the basis of the amount of the court's award" [37]. The Chancellor's words "up to" merely refer, I believe, to the fact that there is a cap at £75,000. They do not import any suggestion of a discretion to make a lesser award than that prescribed.

73. In contradistinction, the interest provision in 36.17(4)(a), where there is a discretion expressly inherent in the wording, gives the court "a discretion to include a non-compensatory element to the award … but the level of interest awarded must be proportionate to the circumstances of the case" – *OMV* at [38].

74. In *White* Deputy Master Friston relied on *Thinc* at [22] as cited previously in this judgment, and considered it binding upon him. This is perfectly understandable and I can of course see the argument that in considering rule 36.17(4)(b), the Court of Appeal in *Thinc* at [22] said that the governing words in 36.17(4) "unless it considers it unjust to do so" bear the obvious interpretation of "unless and to the extent". This interpretation taken at face value does cause a real problem. If it was right for each and every one of (a)–(d), there would be no need for the express inherent discretions in (a) and (c).

75. In *Thinc*, with reference to 36.17(4)(b), the judge had found, at [21], that it was unjust for the claimant to recover all of his costs because of the particular circumstances of the case. It was the defendant who then sought to argue that he had then to deprive the claimant of all its costs. The Court of Appeal rejected this submission.

It may be said, in distinguishing this case from an additional amount case, that in having decided it was unjust to award all costs, the judge had the usual inherent costs discretion to award a lesser percentage, albeit on the indemnity basis. There is nothing in the wording of 36.17(4)(b) which prescribes that if a case reaches the high threshold of unjustness, then that inherent discretion is removed. That is a very different situation from the entirely new construct of the additional amount in 36.17(4)(d), with its expressly prescriptive terminology.

76. Further and most importantly, *Thinc* does not consider the particular terminology of sub-paragraph (d), which sits very uneasily with any discretion as to amount. As Deputy Master Friston noted in *White* at [30], the additional liability at (d) had not yet been added at the time of the Rules in force at the time of the first-instance decision in *Thinc*. In fact the chronology is that the new Rules with the additional liability at (d) came into force on 1 April 2013, therefore before *Thinc* in the Court of Appeal. *Thinc* was decided on 29 October 2013, with no reference to the effect of the new amendments.

77. Deputy Master Friston appreciated that his interpretation appeared inconsistent with that of Slade J in *Cashman* at [25].

78. In short, if I had to, I would find that the 10% in sub-paragraph (d) is all or nothing. It must be awarded in full unless it is unjust to do so. However, for the reasons given, it does not arise on this appeal.

79. Having been through the reasons the Master gave, in addition to the further reasons put forward by the defendant at this hearing, I find that there was nothing unjust about awarding the additional amount in the present case. The appeal is allowed and the additional amount of 10% will be awarded.

Robert Marven QC (instructed by Leigh Day) appeared for the appellant.

Kevin Latham (instructed by Hill Dickinson LLP) appeared for the respondent.

From Costs Law Reports 2019/3, published by Class Legal
www.classlegal.com