Case No: K04MA298

IN THE COUNTY COURT AT MANCHESTER

Before HHJ Sephton KC

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Between :

Asmat Bi — Claimant

- and –

Tesco Underwriting Limited — Defendant

- -

- -

Mr John Meehan instructed by Jefferson & Bond for the Claimants

Mr Andrew Hogan instructed by DWF Costs Limited for the Defendant

Judgment

1. On 1 October 2023 ("the Commencement Date"), the Civil Procedure (Amendment No 2) Rules 2023 [2023] No 572 ("the Amendment Rules") came into force. This case concerns the effect of the transitional provisions of the Amendment Rules upon the costs of a claim settled under Part 36 of the Civil Procedure Rules prior to the Commencement Date.

Background

2. The claimant was involved in a road traffic accident on 19 August 2022. Fortunately, she was not injured, but damage was occasioned to her car. By letter of claim dated 6 September 2022, a significant claim was advanced on her behalf in relation to the damage to her car and for hire charges.

3. By letter dated 5 April 2023, the defendant made a Part 36 offer ("the Part 36 offer"), as follows:

> "Inclusive of general and special damages and net of liability, we formally offer to your Client the gross sum of £3,555.36 in full and final settlement of the hire, storage and recovery elements of the claim…
>
> The offer is made pursuant to Part 36 r 36.5(1) of the CPR. If the offer is accepted within 21 days of the date of this letter, we will be liable for the Claimant's costs in accordance with Rule 36.13 or 36.20 of the CPR…"
>
> …

4. By email dated 11 April 2023, a solicitor on behalf of the claimant wrote,

> "We would like to confirm that your Part 36 offer made on 05/04/2023 for hire, storage and recovery in the sum of £3,555.36 is accepted."

The email said nothing about costs.

5. For reasons that were not explained to me, it was not until 10 October 2023 that the claimant's solicitors informally served a Bill of Costs which sought costs on the standard basis. The claimant issued Part 8 costs-only proceedings on 27 November 2023. The defendant served an Acknowledgement of Service that confirmed that it did not contest the making of an order for costs. On 23 December 2023, DDJ Isles made an order that the defendant pay the claimant's costs to be the subject of detailed assessment on the standard basis if not agreed.

6. This was the hearing of the defendant's application to set aside the order of DDJ Isles and for a Circuit Judge to determine the incidence of costs.

Legal framework

7. Before the Commencement Date, the costs consequences of the acceptance of a Part 36 offer were set out in CPR 36.13 and 36.20. CPR 36.13 provided, so far as relevant:

> "(1) … where a Part 36 offer is accepted within the relevant period the claimant will be entitled to the costs of the proceedings (including their recoverable pre-action costs) up to the date on which notice of acceptance was served on the offeror.
> …
> (3) Except where the recoverable costs are fixed by these Rules, costs under paragraphs (1) and (2) are to be assessed on the standard basis if the amount of costs is not agreed."

CPR 36.20 applied only to cases where Section IIIA of Part 45 applied (claims under the protocols for low-value personal injury claims).

8. Rule 46.14 provided (and still provides), so far as relevant:

> "(1) This rule applies where—
> (a) the parties to a dispute have reached an agreement on all issues (including which party is to pay the costs) which is made or confirmed in writing; but
> (b) they have failed to agree the amount of those costs; and
> (c) no proceedings have been started.
> …
> (2) Where this rule applies, the procedure set out in this rule must be followed.
> (3) Proceedings under this rule are commenced by issuing a claim form in accordance with Part 8.
> …
> (5) In proceedings to which this rule applies the court may make an order for the payment of costs the amount of which is to be determined by assessment and/or, where appropriate, for the payment of fixed costs.
> …
> (7) Rule 44.5 (amount of costs where costs are payable pursuant to a contract) does not apply to claims started under the procedure in this rule."

9. The Amendment Rules enacted a considerable extension to the fixed costs regime previously in force. Part 45 (which deals with fixed cost) is now considerably expanded and contains, for material purposes, Parts VI, VII and VIII which relate to the fast track, the intermediate track and noise-induced hearing loss claims respectively. It is common ground that the current claim would normally be allocated to the fast track and that the effect of CPR 45.43 and Table 12 is that the recoverable costs, if this case were dealt with under the amended rules, are nil.

10. CPR 36.13(3) now provides:

> "Except where recoverable costs are fixed by these Rules, costs under paragraphs (1) and (2) are to be assessed on the standard basis if the amount of costs is not agreed."

CPR 36.23 provides:

> "(1) Where a Part 36 offer is accepted within the relevant period, the claimant is entitled to—
>
> (a) the fixed costs in Table 12, Table 14 or Table 15 in Practice Direction 45 for the stage applicable at the date on which notice of acceptance was served on the offeror; …"

11. Rule 2 of the Amendment Rules ("the Transitional Provisions") makes transitional provisions. Rule 2(1) states, so far as relevant:

> "… in so far as any amendment made by these Rules applies to
>
> …
>
> (d) costs
>
> those amendments apply to a claim where proceedings are issued on or after 1st October 2023"

The parties' cases

12. The defendant's case is that the costs of the claim fall to be determined under the amended rules and should be assessed at nil. Mr Hogan submitted that the claimant's claim was a demand for damages and costs (the claim for costs forming an integral part of the claim). The part of the claim that had not yet been resolved (i.e. the claim for costs) was the subject of the proceedings commenced on 27 November 2023 and is therefore subject to the new rules. The costs claimed in the proceedings were "costs" which are subject to the Amendment Rules. Mr Hogan submitted that the transitional provisions contained in Rule 2 of the Amendment Rules, being a procedural rule, should be construed as having retrospective effect. He submitted that the purpose of the transitional provision was to provide a bright line determining which cases should be dealt with under the old rules and which under the new.

13. The claimant's case is that the defendant should pay the claimant's costs to be assessed on the standard basis. Mr Meehan submitted that the claimant obtained accrued rights under the agreement made by acceptance of the Part 36 offer; such rights should not be removed by the retrospective operation of the transitional provisions of the Amendment Rules. The Amendment Rules were not merely procedural, but were substantive because they affect the rights of litigants; accordingly the rule applies that legislative provisions generally should not have retrospective effect. He submitted that the parties made an express agreement that the costs would be paid in accordance with CPR 36.13 in its pre-amendment form. Alternatively, he submitted that the Amendment Rules do not apply to the underlying claim but only to the costs of that claim. He submitted that the "underlying claim" was the claim for costs and that on a true construction of Rule 2

of the Amendment Rules, the new rules about costs apply only to the costs relating to the Part 8 claim and not to the claim itself.

Discussion

14. I deal first with the construction of the Part 36 offer.

15. In my judgment, the Part 36 offer was an offer to settle the claimant's claim for £3,555.36, as stated in the first paragraph of the letter dated 5 April 2023.

16. In my view. the second paragraph of the letter is intended to comply with CPR 36.5(1)(c); it uses, word for word, the phrase from CPR 36.5(1)(c) "will be liable for the claimant's costs in accordance with rule 36.13 or 36.20". I do not consider it to be a promise to pay costs on any particular basis: it merely explains the consequences that follow if the offer is accepted. The fact that the defendant was not making any hard and fast offer to pay costs on a particular basis is underlined by the fact that it referred to a liability under "Rule 36.13 *or* 36.20 of the CPR (my emphasis)." In my judgment, the defendant was not committing itself to the payment of costs in a particular amount or upon a particular basis; on the contrary, it made clear that its liability to costs would be dealt with in accordance with the (then relevant) rules and made clear that the consequences of accepting the offer would generate an entitlement to costs to be quantified by a mechanism set out in the Rules. Put another way, the defendant's obligation to pay costs stemmed not from a promise to pay but as a consequence of the Rules.

17. I am fortified in my conclusion that no contractual promise about costs was made by the observation that the claimant's acceptance of the defendant's Part 36 offer makes no mention of costs.

18. Further support for my view is provided by the authorities that establish that an offer that contains terms as to costs departing from the provisions of CPR Part 36 cannot be a Part 36 offer: see *Mitchell v James* [2002] EWCA Civ 997 and *James v James* [2018] EWHC 242 (Ch), cited with approval in *Ho v Adelekun* [2019] EWCA Civ 1988 at [17]. Since the defendant's offer was plainly intended to represent a Part 36 offer, it should be construed in a way that achieves that end; that is, in a way that ensures that the Part 36 rules determine liability for costs.

19. I was referred to the decision of the Court of Appeal in *Ho v Adelekun* [2019] EWCA Civ 1988. That was a case in which the defendant made a Part 36 Offer in relation to a

case that had exited the RTA Protocol (and to which, accordingly, Part IIIA of CPR Part 45 and (old) CPR 36.20 applied). The offer letter stated:

> "…The terms of the offer are as follows:
>
> …
>
> 3. If the offer is accepted within 21 days, our client will pay your client's legal costs in accordance with Part 36 Rule 13 of the Civil Procedure Rules such costs to be subject to detailed assessment if not agreed."

The Court of Appeal held that even though the offer referred to "detailed assessment" (which was not appropriate to costs under CPR Part 45 Part IIIA), the offer had not been one which had offered to pay costs outside the fixed costs regime. In my view, *Ho* is a stronger case than the present. The provision about costs in *Ho* was an explicit numbered term of the offer whereas it seems to me that the paragraph about costs in the present case is not clearly part of the offer. Furthermore, the words in *Ho* were much more clearly a reference to an assessment rather than fixed costs ("in accordance with Part 36 Rule 13" and "subject to detailed assessment"). In my judgment, the view that I take is supported by the decision in *Ho.*

20. It follows that I reject the submission that the defendant promised to pay costs assessed on a standard basis or that the parties have "contracted out" of the Rules. The parties' agreement entailed no more and no less than an assessment of costs in accordance with the Rules.

21. I accept that at the time at which the claimant accepted the offer, it was open to the claimant to commence costs-only proceedings under CPR 46.14 at any time. Had she done so before1 October 2023, the costs would have been assessed on the standard basis: see (old) CPR 36.13(3) (there being no fixed costs regime that then applied to the claimant's claim). I reject Mr Meehan's submission that the claimant had an "accrued right" to the costs as they would have been assessed if costs-only proceedings had been commenced before the Commencement Date: on my analysis, the claimant had an inchoate right to costs which only crystallised after they had been assessed, allowed or agreed.

22. I turn to consider the construction of the Transitional Provisions. It is necessary to give the Transitional Provisions careful thought because I have concluded that the defendant's obligation to pay costs arose as a consequence of the Rules. The rules by which the defendant's liability is assessed have been changed by the Amendment

Rules; specifically by the introduction of CPR 36.23, CPR 45.43 and Table 12. The effect of the new rules introduced by the Amendment Rules would be to deprive the claimant of her claim to costs if I were to conclude that the amended provisions should apply to it.

23. Both parties relied upon the principles of statutory interpretation expressed in *Bennion, Bailey and Norbury on Statutory Interpretation 8th ed.* I was referred to the following passages (amongst others):

(a) Section 7.13(1) "It is a principle of legal policy that, except in relation to procedural matters, changes in law should not take effect retrospectively."

(b) Section 7.15 "There is a general presumption that changes to procedure apply to pending as well as future proceedings." The commentary states that "this is because a procedural change is expected to improve matters for everyone concerned (or at least to improve matters for some, without inflicting detriment on anyone else who uses ordinary care, diligence and promptness." The commentary in the section points out that the court needs to consider whether legislation is procedural or substantive and cites authority on the issue.

(c) Section 11.1(1) "The primary indication of legislative intent is the legislative text, read in context and having regard to its purpose."

24. The relevant features of the context in which the Amendment Rules were made appear to me to be as follows:

(a) The Amendment Rules effected a radical change from the previous practice.

(b) The professions and the public have been on notice of the proposed extension of fixed costs for a long time. Sir Rupert Jackson's Supplemental Report which suggested a wide extension of the fixed costs regime was published as long ago as July 2017. On 28 March 2019, the Ministry of Justice published a consultation paper (*Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson's Proposals*). The Government's response to the consultation was published in September 2021. The Civil Rules Procedure Committee ("CPRC") published draft rules on 20 April 2023 and the Amendment Rules were laid before Parliament on 24 May 2023.

(c) The aim of the changes was identified in several of the documents to which I have just referred. The Government's response of September 2021underlines the benefits perceived to come from fixed recoverable costs, namely, that they should be predictable and proportionate. Other perceived benefits were that fixed costs are "allowed" and not "assessed," so that in fixed costs cases, the resources of the Court and of the parties will be not be expended on assessments. The benefits that the Amendment Rules were designed to confer were identified in the material published before the Rules were made. Those benefits were designed to serve the public interest.

25. In my judgment, the natural meaning of the Transitional Provisions is that the Amendment Rules apply to the claimant's claim for costs because:

(a) This was a claim where proceedings were issued after 1st October 2023.

(b) The claimant's claim could only be determined by reference to the applicable Rules.

(c) The rules by which the defendant's liability for costs were to be assessed were amended by the Amendment Rules.

(d) The relevant rules relate to costs.

26. In my opinion, the context in which the Amendment Rules were made is consistent with the construction I favour. Because significant changes were made to the costs regime, it was necessary to identify a date from which the changes took effect – what Mr Hogan identified as a "bright line" beyond which the new fixed costs regime applied. Such a line provides clarity and certainty, which was one of the aims of the Amendment Rules. It was not unfair to those who used ordinary care, diligence and promptness to change the rules in this abrupt fashion; the prudent litigant who might be adversely affected by the changes in the rules could issue proceedings before the 1 October 2023. The Amendment Rules were intended to benefit everyone concerned by introducing a certain and proportionate costs regime.

27. Mr Meehan was unable to formulate a convincing construction of the Transitional Provisions to a different effect. He accepted that the general rule is that procedural rules can have retrospective effect, but he submitted that the Amendment Rules affected the claimant's substantive rights and therefore should be construed consistently with the usual rule against retrospectivity. I reject this submission for two reasons:

(a) I consider the Amendment Rules to be archetypal procedural rules. They were designed to improve matters for everyone concerned. The real reason that the claimant is prejudiced by the Amendment Rules is that she failed timeously to commence costs-only proceedings so as to avoid the consequences of the new rules.

(b) On my construction of the Part 36 offer, the claimant's right was not to costs assessed on the standard basis, but costs determined in accordance with the Rules. Her right to have the costs determined in accordance with the Rules was not affected. The end result of the determination changed because the Rules changed.

28. Mr Meehan sought to persuade me that the "costs" referred to in the Transitional Provisions meant only the costs of the Part 8 proceedings; he submitted that the subject matter of the proceedings (i.e. the claim for the costs of the claim) was not affected by the Amendment Rules. I reject this submission for the following reasons:

(a) Nothing in the wording of the Transitional Provisions suggests that "costs" should be confined to the costs of the proceedings.

(b) As explained above, the claimant did not have a right to costs assessed on the standard basis; rather, she had a right to costs determined in accordance with the Rules. The only way of determining the claimant's entitlement to costs is by reference to the Rules.

29. For the reasons I have explained, I have not been persuaded that the Transitional Provisions should be given a construction that is different from the natural meaning I have identified in paragraph 25 above.

30. I was shown the minutes of a meeting of the CPRC that took place by video link on 3 November 2023. The CPRC expressed the view that

> "… where proceedings have not already been issued on or after 1 October and the parties do not expressly agree to costs on a non-FRC basis, but they agree on the incidence, but not the amount, of the costs, then they may issue costs only proceedings for the determination of those costs…
> If those proceedings are issued on or after 1st October, [fixed costs] would apply to all costs in respect of that claim, irrespective of whether they were incurred before or after 1st October."

In my view, I am not entitled to rely upon this opinion in construing the Amendment Rules. It is merely an opinion about the meaning of a statutory provision that was already in force, though made by the authors of the rules under consideration. It is,

however, gratifying that my view of the matter coincides with that of the eminent members of the CPRC.

Conclusion

31. I conclude that the Part 36 offer did not prescribe the basis upon which costs were to be paid. The offer was made and accepted on the basis that the costs would be determined in accordance with the Rules. The Rules were changed in order to implement an extension of the fixed recoverable costs regime. Because the claimant did not issue her costs-only proceedings until after the amendments to the rules came into force, the costs of her claim for damages fall to be determined under the amended Rules.

32. It follows that I consider that the order made by DDJ Isles should set aside. It appears that the parties agree that, upon the view I have taken, the fixed costs allowed should be nil.