IN THE TUNBRIDGE WELLS COUNTY COURT

Claim No: 2YK09669 Appeal Ref: 18/13

Merevale House
42-46 London Road
Tunbridge Wells
TN1 1DP

Thursday, 23rd January 2014

BEFORE:

HIS HONOUR JUDGE SIMPKISS
AND
DISTRICT JUDGE LETHEM

ROBERT BROWN

CLAIMANT

-v-

JOSEPH EZEUGWA

DEFENDANT

MISS SHARMA appeared on behalf of the Claimant

MRS ROBSON appeared on behalf of the Defendant

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JUDGMENT RE: COSTS ASSESSMENT

(As Approved)

Thursday, 23rd January 2014

JUDGE SIMPKISS:

1. This is an Appeal against a costs assessment made by Deputy District Judge Omoregie on 4th September 2013. The facts are not in dispute.

2. On 10th October 2011 there was a road traffic accident, and the Claimants instructed solicitors, who corresponded with the Defendant's insurers. At that stage the claim was conducted under a version of the RTA protocol, which existed prior to 1st April 2013.

3. In due course part 7 proceedings were commenced, and before the claim had been allocated the parties agreed an order, which was entered on 12th December 2012 by consent. Paragraph 1: "There be judgment for the Claimant in the sum of £2,998.31 to be paid by the Defendant no later than 21 December 2012; (2) The Defendants do pay the Claimant's costs on the standard basis, to be subject to a detailed assessment in default of agreement."

4. The Claimants put in a bill of costs, and the Defendants instructed different solicitors to respond. Points of dispute were served, and in general point 2 the Defendants said this: "The paying party contends that the receiving party unreasonably withdrew the claim from the pre-action protocol for low personal injury claims arising out of road traffic accidents, and commenced proceedings prematurely."

5. Further: "The receiving party submitted a claim notification form for the MOJ portal on 11th October 2011", and then goes on to the details, and then contended that: "Pursuant to CPR 45.36 the Claimant had acted unreasonably by electing not to continue with the RTA protocol, but issuing proceedings." In those circumstances it was pleaded that the court order the Defendant to pay no more than fixed costs in Rule 45.29, together with the disbursements allowed in accordance with Rule 45.30 and successfully in accordance with Rule 45.313.

6. The Claimants' response was to rely on the fact that the order of 12th December 2012 had specified the standard basis for the assessment of costs, and was a consent order. It was therefore contended that it was not open to the Defendants to seek an assessment under CPR 45.36.

7. The Deputy District Judge heard argument, very briefly, and concluded as follows on page 5 of the transcript of his judgment:

> "In relation to the first issue both parties had already signed the consent order, and that consent order provided that costs be paid on the standard basis, to be subject to detailed assessment if not agreed. Both

parties were clearly aware of what they were binded to when that consent order was signed, and I say that in my judgment that consent order trumps any argument that there should be fixed costs in these proceedings, and therefore it should be subject to detailed assessment if not agreed."

He then went on to consider the assessment, and assess the costs in the normal way.

8. The Defendants appealed, and were granted consent, permission to appeal, and the Appeal has been heard this morning.

9. There are effectively two issues: Firstly, whether on a true construction of CPR 45.36 the paying party can only take a point under that provision at the time that the judgment is given; secondly, whether an order for an assessment of costs on the standard basis precludes an argument under CPR 45.36.

10. To some extent the two points are inter-linked since the construction point would produce a ludicrous result if there was a decision that a standard basis assessment does enable the paying party – to ask the court to apply that provision. However, it may assist in the second issue to decide what in our judgment the answer to the first issue is.

11. CPR 45.36 is in the following terms:

"(1) This Rule applies where the claimant:
(a) does not comply with the process set out in the RTA protocol or
(b) elects not to continue with that process and starts proceedings under part 7;

(2) Where a judgment is given in favour of the Claimant that

(a) the court determines that the Defendant did not proceed with the process set out in the RTA protocol because the Claimant provided insufficient information on the claims notification form;

(b) the court considers that the Claimant acted unreasonably:
(i) by discontinuing the process set out in the RTA protocol and starting proceedings under part 7;
(ii) by valuing the claim at more £10,000 so that the Claimant did not need to comply with the RTA protocol or
(iii) except for paragraph 2(a) in any other way that causes the process in the RTA protocol to be discontinued or

(c) the Claimant did not comply with the RTA protocol at all, despite the claim falling within the RTA protocol, the court may order the Defendant to pay no more than the fixed costs in Rule 45.29, together with the disbursements allowed in accordance with Rule 45.30 and successfully in accordance with Rule 45.313."

12. The Respondent argues that the reference to the judgment in 45.36.2 means that such an application can only be made at the time the judgment is entered. Miss Sharma referred us to a practice note in the *White Book*, at C13A 007 at page 2754, which is as follows:

> "If a Claimant has wrongly failed to comply with the protocol and/or has inappropriately exited the scheme the sanction is costs. (See Rule 45.36) It is not appropriate for an insurer to seek to have the part 7 claim struck out for non compliance with the protocol. However, when filing the allocation questionnaire it would be appropriate to alert to the court to the fact that Defendant intends to argue that the Claim has been issued inappropriately, and, for example, if it can be found that the Claimant has not complied with the pre-action protocol for low value personal injury claims in road traffic accidents the Defendant's liability for costs, if any, should be limited in accordance with Rule 45.36, and the issue of whether the extra costs incurred by the Defendant should be paid by the Claimant is reserved to the trial judge."

13. Of course, if an order is going to be made against the Claimant to pay part of the Defendant's costs then that is a matter which would have to be dealt with by the trial judge, or in the order putting an end to the proceedings, but it does not in my judgment shed any light on the construction of part 45.36 as to when the application should be made. Nor is there anything in that Rule to restrict the time when the order should be made.

14. The judge making an order at the end of a trial, or at the end of a case, exercises his power under CPR 44.3, and there are powers to restrict the amount of costs that may be recovered and to take into account conduct of the party claiming costs.

15. Under 44.4 the assessing judge is directed to assess the costs on two bases: either the standard basis, or the indemnity basis, and that is qualified by a direction that the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount. I shall return to that in a minute, but it seems to us that while the trial judge may given an indication or deal as to his… or direction in relation to part 45.36 when making a final order, his role is either to direct standard basis costs or indemnity costs, and exercise his powers under 44.3.

16. If he were to go further then he would have to spell out in the order that there had been an application under 45.36 and either say that it had been rejected, or give some other direction.

17. The use of the word "judgment" should not in our view be construed so narrowly as to restrict it to the order terminating the proceedings. This was touched on by Mr Record Morgan in Patel v Fortis Insurance Limited, a judgment handed down in the Leicester County Court on 5th December 2011. In that case the parties had agreed quantum and did not ask the court to enter a judgment, but asked the judge to decide the costs order, and that is what the judge decided to do, but in doing so he had to consider whether he was barred from deciding costs unless he had given a judgment, and he decided at paragraph 57 that he was not debarred from exercising his powers under CPR 45.36.2 simply because he was not being asked to enter into a judgment, the parties having agreed that the damages would be paid without the need to record judgment.

18. The other way, similarly, in our view the use of the first three words at the beginning of sub-rule 2 should not be given a narrow interpretation. They could equally mean where a judgment has been given, or where an order has been made. What this does in our judgment is to direct the assessing judge to give him the power to exercise his discretion under this part, where a judgment or order has been given, and if the Rules Committee had intended that the power should only be exercised at the stage when a costs order was made then it is surprising that this provision is not included in part 44.

19. Therefore, we are satisfied that the first issue of construction should be decided on the basis that it is open to the assessing judge to exercise powers under part 45.36. Whether or not it is also open to the trial judge does not in our judgment specifically arise for decision, although this may be one of those areas where there is a concurrent power.

20. The main issue in our judgment is what does the order made on 12th December 2012 mean? Miss Sharma in the skeleton argument on behalf of the Respondent relies on the fact that it was a consent order, and that the parties should have been on notice that part 45.36 was still in play, she relying on the practice notice, which I have already read out. She says that the Defendant ought to have alerted the Claimant to this possibility at a much earlier stage.

21. That may or may not be the case, and if, as a result of that, there is some prejudice or some matter which is relevant to the exercise of any judicial discretion then I cannot see why that could not be taken into account when the court exercised its power under 45.36. There is no reason why it would need to be taken into account at the time of making the order, particularly a consent order, which was made without a hearing, on paper, and the first opportunity for any hearing was the assessment.

22. The issue is whether or not the standard based costs order, or, indeed, indemnity basis costs order, would preclude CPR 45.36. The Respondent has relied on the Court of Appeal decision in O'Beirne v Hudson [2010] 1 WLR 1717 2010 EWCA Civ 52. In that case the costs judge decided that

the terms of the consent order precluded him from applying any fixed costs regime. The circuit judge allowed the appeal on the basis that there was nothing in the order precluding the costs being assessed by reference to the small claims track.

23. At paragraph 19 Lord Justice Waller said this:

> "I also accept that, as Judge Stewart QC noted, a costs judge has no power to order the order for costs made by a judge, and thus make a direction from the outset, where costs have been awarded on the standard basis, that costs would be assessed on a small track basis."

24. Then he goes on to say:

> "There is a real distinction between directing at the outset that nothing but small claims costs will be awarded and giving items on a bill very anxious scrutiny to see whether costs were necessary or reasonably incurred, and thus whether it is reasonable for the paying party to pay more than would have been recoverable in a case that should have been allocated to the small claims track."

25. The small claims regime under part 27 has specific provisions for costs under part 27 has specific provisions for costs under 27.14, and limits the power of the court to make costs orders, and therefore it would be quite impossible, having made a standard basis costs order, for the assessing judge to vary that to a small claim order, but what the Court of Appeal says he could do was to take into account the level of claim when assessing costs, and the costs that might have been recovered had the claim been allocated as a small claim.

26. The matter was considered further by the Court of Appeal in Smith v Wyatt; Rennie v Logistic Management Services Limited [2011] EWCA Civ 941 on appeal from His Honour Judge Moloney QC on facts very similar to the present. Lord Justice Moore-Bick considered O'Beirne and the other relevant authorities and poses the question identified by the first instance judge: "How is a costs judge to deal with a case which on its face falls within a more generous costs regime but which in his judgment ought to have fallen within a less generous one", and Lord Justice Moore-Bick said this:

> "The judge held that the authorities in this court supported the conclusion that the answer to this question has two aspects, one procedural and one substantive. The procedural aspect requires the costs judge to carry out a detailed assessment. He cannot simply award costs on a basis different from that for which the order for costs provides. However, the substantive aspect requires him to consider to what extent costs have been necessarily and reasonably incurred, and that, in turn, entitles him to consider the manner in which the litigation is being conducted." That is what O'Beirne says.

27. Then, at paragraph 11:

> "The question whether a defendant can agree to pay reasonable costs to be assessed by way of a detailed assessment, and then invite the court to assess costs by reference to a more restrictive regime is not in my view an important point of principle of the kind contemplated by Rule 52.13. If the defendant settles a claim on terms that he will pay the claimant's reasonable costs to be assessed it would be a matter of construction of the agreement whether he is agreeing to submit to a detailed assessment in which the costs judge is to have power to make an assessment by considering all the circumstances, or whether he is agreeing that the costs judge is to ignore the possibility that the proceedings might have been conducted in a more economical way. That might vary from case to case, although speaking for myself I should have thought that a defendant is unlikely to be taken to have given up a valuable argument unless it is clear that he has done so."

28. That in our judgment is the nub of the matter, the construction of what was agreed. The issues in relation to costs fall into three stages. Stage 1 is the award of costs. Stage 2 is the decision by the assessing judge of what the order for costs means, and stage 3 is the quantification on that basis.

29. In this case stage 1 was consented to in the order of 12th December 2012. The Defendant was to pay the Claimant's costs, and the basis of costs was to be the standard basis. Stage 2 was, not surprisingly and not unusually, elided into stage 3, but the deputy district judge did set about the assessment on the basis of a standard basis assessment.

30. Where, in our judgment, he went wrong was not to apply his mind to the distinction between the award of costs and the direction as to the basis that the assessment should take place with the quantification or assessment process itself. CPR 44.3 and 4 are concerned with the award and the basis of assessment. CPR 45, albeit relating to fixed costs, is one of the provisions that deals with the quantification of those costs, and therefore in our judgment there is no reason why the assessing judge cannot exercise the powers under 45.36 in carrying out that assessment.

31. It is not necessary for him to change the basis upon which the costs are to be assessed, and while the parties might have agreed on certain matters prior to the assessment at the time they entered into the judgment in this case there is no evidence that they did, and if they did it is not recorded in the consent order. Therefore, what the judge is faced with is simply the standard basis assessment, which, as I have said, brings in the ability to apply for 45.36.

32. We were referred to a decision of Master Simon's in the High Court of Justice Senior Courts Costs Office, handed down on 30th October 2013, in which he deals with a similar issue and the interaction of a standard basis assessment with CPR 45.36. Similar submissions were made as to those in the present case, and he sets out his conclusions starting at paragraph 45.

He does not give a lot of explanation in paragraph 26, but he includes that having agreed the basis of costs the defendant cannot rely on CPR 45.36 because in his judgment it is implicit from the wording of the Rule that the (two or three inaudible words) restrict the costs is to be exercised when the judgment is given in favour of the claimants.

33. He then goes on to say that if the paying party had wished to seek an order under CPR 45.36 that that should have been dealt with as part of the terms of settlement, but he did not explain why he reached that decision. In our judgment we respectfully disagree with this conclusion, and, as I have indicated, consider that on analysis there is no reason why this is precluded, and it does not address the distinction between the primary role of the judge making an order at the end of a trial and the role of a costs judge in assessing and quantifying those costs.

34. He then goes on to deal with the matter on the standard basis assessment, applying Smith v Wyatt in practice, taking into account the fact that the paying party had withdrawn from the protocol and reached a similar result to that which would have been reached had CPR 45.36 been applied. It is not necessary for us to go down that route for the reasons that we have given, and in these circumstances I allow the Appeal and remit the assessment to a costs judge, who will be available to deal with the assessment in a few minutes.
