IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

[2018] EWHC 2851 (QB)

No. HX12X03805

Royal Courts of Justice

Friday, 27 July 2018

Before:

MRS JUSTICE MAY

B E T W E E N :

JOHN AYTON — Claimant

- and -

RSM BENTLEY JENNISON & Ors. — Defendants

MR B. WILLIAMS QC (instructed by Bolt Burdon Kemp) appeared on behalf of the Claimant.

MR I. CROXFORD QC (instructed by Clyde & Co) appeared on behalf of the Defendants.

J U D G M E N T

MRS JUSTICE MAY:

Introduction

1 This is an appeal brought by the claimant against the costs order dated 9 May 2018 made by Senior Master Fontaine following a trial that had taken place in May 2017.

2 I have been much assisted on this appeal by the able submissions of Mr Williams QC for the claimant and by Mr Croxford QC for the defendants. Mr Williams accepted at the outset that a trial judge's decision on costs engages a wide spectrum of possible outcomes, where the greatest degree of latitude will be accorded to the judges' exercise of their discretion in making costs orders. That is undoubtedly right. Accordingly, I approached this appeal on the basis that unless I was satisfied that Master Fontaine had been led into error in circumstances where that error materially impacted her decision on costs, then the orders she made were unassailable, even if they were not ones that another court may have arrived at.

3 For the reasons I set out in this judgment, however, I am satisfied that the Master's judgment does disclose an error of principle affecting the orders for costs which she made in this case. Before identifying the passages in her judgment which, in my view, reveal an error in her decision-making process, it is necessary first to set out the chronology of material events which form the background to her order.

Chronology of material events

4 In 2009 the claimant advanced £150,000 for a Russian oil investment. He had been advised in that investment by the defendants, a reputable firm of accountants. There was, in the event, no return on his investment and the principal was also lost. He was repaid £50,000 in stages by a third party, leaving £100,000 of his investment unrecovered. In December 2010, the claimant appointed solicitors (BBK) under a CFA to consider how and against whom he might recover the remaining £100,000. They took some time to consider what claim to bring and against whom. On 4 October 2011, a letter of claim was sent to the defendants in accordance with the pre-action protocol (that is to be found at C7A in volume 1 of the **White Book**) claiming £100,025 plus interest and costs. The pre-action protocol at para.6.2 sets out in some detail what such a letter is required to include. The terms of the pre-action protocol for professional negligence does not - unlike, for instance, some clinical negligence protocols - make any provision for costs associated with the investigation and preparation of such a letter. In this case, involving allegations of fraud against a reputable firm of advisers, it is clear that there were likely to be considerable costs involved.

5 There followed several requests for an extension by solicitors for the defendants, Clyde & Co, who ultimately promised a response by 30 April 2012. On 26 April 2012, Clyde & Co sent a cheque for the sum claimed plus interest at 1 per cent. The letter was silent as to costs, so the partner at BBK called the partner at Clyde & Co dealing with the case. I have seen an attendance note of that call date 27 April 2012. BBK were told that the defendants would not pay any costs as there was no obligation on them to do so. The partner at Clyde & Co asserted that there was no mechanism under which the claimant could obtain his costs, on the basis that the Defendants had offered the full amount of the claim. The partner informed BBK that they were taking this stance on leading counsel's advice and that leading counsel was instructed to draft any defence to a claim.

6 The defendants did not provide either a letter of settlement or a letter of response as provided under the pre-action protocol. There was no further activity by either side until, on

14 September 2012, the claimant issued proceedings claiming £100,000 as damages for fraud and/or negligence, plus some £1,500 of consequential loss and expense, together with an additional relatively modest claim in the region of £30,000 for the costs of upgrading his car. The latter has been referred to throughout as the "car claim". The claimant's case was that he had suffered loss through upgrading his Mercedes car in reliance on an expectation of profit from the oil investment.

7 On 20 September 2012, BBK returned the cheque that had earlier been sent. On 31 October 2012, the defendants put in a defence, pleading tender before claim, having paid the sum of £103,576.57 into court (as required a party seeking to rely on tender before action, see CPR r.37.2). On 18 February 2013, the defendant applied to strike out the car claim on the basis that it was hopeless, also the main claim on the basis of tender before action. The allocation questionnaire of the same date put the claimant's base costs at £113,000. On 8 March 2013, the claimant made his first Part 36 offer, in the sum of £105,000, inclusive of interest. Naturally, if accepted, costs would have followed, but it was not accepted. On 26 March 2013, the parties agreed to stay the balance of proceedings pending the outcome of the strikeout application. On 14 May 2013, the defendants made a without prejudice offer (not under Part 36) of £122,000 inclusive of an amount of £15,000 towards costs. On 28 May 2013, the claimant made a second Part 36 offer, in the sum of £105,500, inclusive of interest.

8 On 11 October 2013, Master Eastman heard and dismissed the strikeout application. The claimant's counsel submitted in the course of that hearing as follows:

> "It is a fair inference to say that if the defendants instead of sending their cheque had sent a letter or even picked up the telephone and said, 'We are prepared to pay £100,025, we are prepared to pay you interest and we would like to discuss a rate with you and we're prepared to pay your reasonable costs' it is a fair inference that the additional claims would not have been advanced. The defendants did not do that".

9 Master Eastman dismissed the tender defence and found that the car claim was arguable. He made observations in the course of his judgment about attempts made by the defendants to settle, "Offering things left, right and centre" (of course he did not at this stage know about the Part 36 offers which the claimant had made) but observed that the stumbling block had been costs. Master Eastman ordered costs in the case and gave leave to appeal on the defence of tender. The defendants appealed both his finding on the tender defence and his conclusion that the car claim was arguable. On 13 October 2013, following the hearing before Master Eastman, the claimant made his final Part 36 offer, in the sum of £110,000, inclusive of interest.

10 On 10 December 2013, the defendants offered £103,000 plus costs of £65,000, again not a Part 36 offer. On 6 March 2014, Judge Owen QC, sitting as a Deputy, dismissed the appeal from the judgment of Master Eastman. Judge Owen held there was no defence of tender to an unliquidated claim and that the car claim was arguable. One sees from para.7 of Judge Owen's judgment that Mr Croxford had argued on behalf of the defendants that the whole claim was an abuse, designed to evade the consequences of a defence of tender. The defendants appealed to the Court of Appeal, where they obtained permission on the defence of tender only. On 3 November 2015, the appeal was dismissed: [2015] EWCA Civ 1120. In the course of his judgment, Underhill LJ made comments about the failure to comply with the pre-action protocol in respect of the car claim, and possible costs consequences. He

too, would at this stage have been unaware of the Part 36 offers which the claimant had made.

11 On 19 April 2016, the case was restored for a CMC and in May 2016 an amended defence was served admitting causation, admitting that the claimant had been defrauded of the sum of £100,000 but maintaining allegations of contributory negligence. Para.3(5) of the amended defence asserted as follows:

> "3. The defendants' position in this action, and the issues that remain in dispute herein, may be summarised as follows:
>
> ...
>
> (5) The defendants will contend that the claimant is not entitled to recover legal costs and/or that the amount likely to be sought to be recovered by way of legal costs is unjustified and/or disproportionate."
>
> (emphasis added)

12 I observe that it is relatively unusual to find any positive assertion on the (ir)recoverability of legal costs in a pleading, but especially so where, as appears from the rest of the defence, the majority of the claim (in this case all bar the car claim) is conceded. Nevertheless, that was the position formally adopted by the defendants in their pleading in this case, notwithstanding the earlier decision of the Court of Appeal.

13 On 26 June 2016, the defendants finally abandoned the defence of contributory negligence. At this point it was admitted that the claimant was due compensation of at least £101,602.50, plus interest in principle. There was no amendment at all made to the positive case asserting that no costs would be recoverable at para.3(5) of the defence.

14 On 7 December 2016, there was a trial before the Master, where the principal issues for her determination were the car claim and the proper rate of interest to be applied to the main sum. On 23 May 2017, the Master gave her judgment. She awarded 2 per cent interest and dismissed the car claim. The sum eventually ordered was £119,578.22. She heard submissions on costs at that time.

15 Just under a year later, on 9 May 2018, the Master gave her judgment on costs. She awarded the claimant 70 per cent of his costs up to the CMC in April 2016. Thereafter she made an order that the claimant pay 80 per cent of the defendants' costs up to and including the trial. It is that order which the claimant now seeks to appeal before me, permission having been given by order of Sir Alistair MacDuff (sitting as a Deputy) on 2 July this year.

Arguments on this appeal

16 Mr Williams argued that the Master was wrong to find that the proceedings were an abuse of process. Mr Croxford submitted, and I accept, that the Master only made a finding of abuse in relation to the car claim (see para.67 of her judgment).

17 Mr Williams' contended nevertheless that the Master's decision on costs had been permeated by her acceptance of Mr Croxford's arguments to the effect that the claimant was not entitled to bring proceedings so as to recover his pre-action costs. The Master recorded Mr Croxford's submissions in this respect at various passages of her judgment as follows:

At para.7:

> "The claimant knew before the issue of the claim form that the defendants were not disputing the amount of the entire claim and were willing to pay interest at 1 per cent over base on damages but that they were not offering any contribution towards the claimant's costs. Instead, the claimant chose to issue proceedings in order entirely so that he might assert he had a proper basis to recover costs. It would have been futile to bring a claim simply for costs. Accordingly, this was an entirely unnecessary piece of litigation if it was intended only to recover the claimant's legitimate claims".

At para.28:

> "(ii) The claim was pursued for the purpose only of costs".

At para.33:

> "The claimant simply chose to ignore the expectations in the pre-action protocols, rules, Practice Directions and the QB Guide, once his lawyers had appreciated that the defendants were not proposing to fight any claim that the claimant reasonably advanced, and thus any costs said to be incurred pre-action were not recoverable".

(It is the "and thus" in this part of the Master's judgment which conveys the thrust of the submission that once the claim itself had been conceded, pre-action costs were not recoverable in law).

Then at para.39 she records Mr Croxford's submission that

> "The claimant must have appreciated that when the defendants had tendered the sum demanded, plus interest at the conventional rate, the claimant knew that further pre-action negotiation was not likely to bring an approved offer as to costs".

And later at para.62(iii)

> "The very low figures sought in the claimant's offers were pitched at a level which recognised that it was always highly unlikely that they would be disputed and had they been made before the issue of the claim would in all probability have been paid out or offered to be paid out. The Part 36 offers should not, therefore, be viewed in isolation from the controversial and primary relief being pursued, namely that of a costs order".

18 At para.63 of her judgment the Master notes Mr Croxford's argument that

> "The appropriate course for the court is to mark its disapproval of the tactical approach adopted by the claimant in ignoring and evading his pre obligation (sic) to seek to avoid litigation and seek settlement and recognised that this was done not in order to obtain compensation for the claimant, or better compensation than that already offered by the defendants, but tactically in order to permit the claimant's lawyers to evade longstanding and well-known rules which they had either overlooked or did not like."

19 These submissions were a plain attempt by Mr Croxford, Mr Williams submitted, to revert to the position which the defendants had adopted before the Court of Appeal turned down their argument on tender before action, namely that, the full amount of the damages having

been offered, no claim could be made and thus no pre-action costs could be recovered absent agreement (which the defendants had refused to give). Mr Williams argued that the reference to "longstanding and well-known rules" was a re-statement of Mr Croxford's submissions that proceedings could not be issued, where damages were no longer in issue, for the sole purpose of obtaining a costs order in respect of pre-action costs. But that was not and is not the law, Mr Williams pointed out. He submitted that it is routine for preparatory costs to be paid, as well as damages, where claims settle under pre-action protocols but that if no offer to pay such costs is made, a claimant will have no option but to issue proceedings to get an order. He referred me to the case of *Birmingham City Council v Lee* [2008] EWCA Civ 891, a case concerning the housing disrepair claims (PAP), where the Court of Appeal stated, at para.33:

> "... the object of the protocol is to achieve settlement ... Its object is very clearly that, provided the claim was justified, it ought to be settled on terms which include the payment of ... reasonable costs ...".

and at para.34:

> "... quite independently of the possibility of any such deliberate manipulation of the process by a landlord, such an order [for costs] is necessary if the protocol is not to operate as a means of preventing recovery of reasonably incurred costs. The tenant who has a justifiable claim for disrepair needs legal assistance in advancing it. He must initiate it in accordance with the protocol. If the effect of the claim is to get the work done, then providing that the landlord was liable for the disrepair the tenant ought to recover the reasonable costs of achieving that result."

20 Mr Williams submitted that the position was *a fortiori* in this case, where the costs of instructing solicitors to investigate a claim in fraud and/or negligence against a highly reputable firm of accountants will be of a different order to those incurred in pursuing a housing disrepair claim. I agree. Some PAPs, for example the one dealing with claims for personal injury, fix bands of costs. The professional negligence PAP does not. For the costs incurred in connection with PAPs which do not fix costs, CPR r.46.14 contains a specific procedure to facilitate the assessment of the costs of claims which settle before action. However, that procedure is dependent upon the parties having agreed that costs should be paid, which was not the case here. In the absence of any agreement, a party can only obtain an order for their pre-action costs in proceedings, when such costs may be recovered as costs incidental to the claim (see *In re: Gibson's Settlement Trusts* [1981] Ch 179 and *McGlinn v. Waltham Contractors* [2005] EWHC 1419).

21 Mr Croxford stressed that although he had made the submissions to the Master recorded above, she had not accepted them. He had argued that the claimant should recover no costs at all and yet the Master had awarded the claimant his costs, albeit at 70 per cent and up to the date of the CMC only. Mr Williams, however, pointed to the Master's decision to grant the claimant some of his costs as indicative of confusion engendered by, on the one hand, the view, promoted by Mr Croxford, that the claimant was not justified in having brought proceedings when the whole amount of his claim had been offered, on the other, an appreciation that it was unfair not to be entitled to recover pre-action costs. Mr Williams pointed to the Master's reasoning at para.67 of her judgment:

> "However, the other factors, which I am now aware of, put a different complexion on the claim. I have therefore concluded that it was not a genuine claim and that it was brought in the way in which it was without the usual pre-action correspondence

> and adherence to protocols because the claimant sought to recover his pre-action costs and his legal advisers could see no other obvious route to do so. The consequence, in my judgment, is that the pursuance of the car claim to trial, at wholly disproportionate expense and unnecessary use of judicial resources, was an abuse of process."

22 As I read this passage, the implication to be derived from the evident disapproval conveyed by the highlighted section is that the Master believed issuing proceedings to recover pre-action costs to be impermissible once damages were no longer at large. That is supported by her observations in the following paragraph, para.68, in particular the final sentence,

> "I am not without sympathy for the claimant's position. In a case of professional negligence and fraud against a well-known firm of accountants, he was obviously well advised to consult experienced solicitors, and indeed it would have been foolhardy not to do so. They no doubt incurred a significant amount of costs in investigating the claim, and it seems unfair that a litigant in that position should be disadvantaged by being out of pocket for his necessary legal expenditure. However, that is the law at present and his solicitors no doubt advised him of that."

23 Mr Croxford suggested that the Master was simply referring here to the fact that a party is unable to recover pre-action costs incurred in complying with the PAP other than by agreement or an order of the court, but I do not read the highlighted passage as restricted in this way. The Master was here setting out the reasons for her conclusion that the claimant had been unjustified in issuing proceedings and taking them to trial in circumstances where the full amount of the claim had been offered, rendering the circumstances of the case so unjust as to disapply the provisions of Part 36.

24 Mr Williams submits, and I accept, that these paragraphs reveal the Master to have been led from the correct starting point, that a party cannot obtain an order for costs, absent the other side's agreement, without issuing proceedings to the erroneous view that if damages are no longer at large, a party is not entitled to issue proceedings to get a costs order. This, says Mr Williams, is exactly what the application to strike and the ensuing appeals to His Honour Judge Owen and then to the Court of Appeal were all about; successive appeal courts decided that Mr Croxford's argument was wrong. Yet despite those decisions, Mr Croxford had still run a variant of the argument before the Master and, as revealed by these passages in her judgment and by the decisions which she made following on from these paragraphs, she appeared to have accepted it.

25 This error, argued Mr Williams, led the Master to make three further erroneous decisions:

(i) to dismiss the consequences which would otherwise have followed a Part 36 offer bettered at trial, set out under Part 36.17;

(ii) to find that the claimant had distorted due process by being responsible for a stalemate and then seeking to rack up costs to no purpose;

(iii) to conclude that the car claim was an improper tactic to bolster a claim for costs to which the claimant was not otherwise entitled.

Displacement of normal consequences of beating a Part 36 offer

26 It was not in dispute that the amount awarded to the claimant following the trial was more than any of his Part 36 offers. The usual consequences of beating a Part 36 offer at trial are

set out at Part 36.17, the provisions of which apply unless the court considers it unjust to do so: see r.36.17(4).

27 The party at risk is required to establish the grounds which make it unjust. Notes in the **White Book** at 36.17.5 refer to the observations of Sir David Eady in the case of *Downing v Peterborough and Stamford Hospitals NHS Foundation Trust* [2014] EWHC 4216 at para.61:

> "It is elementary that a judge who is asked to depart from the norm, on the ground that it would be 'unjust' not to do so, should not be tempted to make an exception merely because he or she thinks the regime itself harsh or unjust. There must be something about the particular circumstances of the case which takes it out of the norm."

28 The court's discretion under Part 36.17 is much more circumscribed than its broad discretion under Part 44. In the case of *Smith v Trafford* [2012] EWHC 3320 at para.13, Briggs J (as he then was) summarised the principles, and added:

> "The burden on a claimant who has failed to beat [the other side'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."

29 In the case of *Webb v Liverpool Women's NHS Foundation Trust* [2016] 1 WLR 3899, Sir Stanley Burnton, giving the judgment of the Court of Appeal in that case, said this, at para.38:

> "... a successful claimant is to be deprived of all or part of her costs only if the court considers that [it] would be unjust for her to be awarded all or that part of her costs. That decision falls to be made having regard to 'all the circumstances of the case'. In exercising its discretion, the Court must take into account that the unsuccessful defendant could have avoided the costs of the trial if it had accepted the claimant's Part 36 offer, as it could and should have done."

30 I was referred by Mr Williams to the case of *Tuson v Murphy* [2018] EWCA Civ 1461, where even in the face of a finding of dishonesty, the Court of Appeal found that it was not unjust to apply the ordinary consequences of Part 36. *Tuson* concerned a personal injury claim in which the claimant had very considerably over-exaggerated the extent of her loss and had withheld information about her health from her own advisers and the court. The judge described her conduct as dishonest and misleading. The defendant's insurers subsequently made a Part 36 offer and, when it was accepted, argued that the ordinary costs consequences would be unjust. The judge at first instance held that it would and made a different order. The Court of Appeal reversed that decision.

Master's reasons for displacing the normal consequences in this case

31 The Master's reasons for finding that it would be unjust to apply the normal consequences of Part 36 in this case are to be found at para.69 of her judgment. She gave as the primary reason her conclusion that it was an abuse of process to bring the car claim, "Which I have concluded was not genuinely believed to be due to the defendants' negligence and/or alleged fraud". Mr Williams contended that this was not a conclusion to which the Master could properly arrive, having found at trial (as she records at para.66 of her judgment) that the

claim was not an unreasonable one to bring. Mr Williams pointed out that her finding in this respect accorded with the conclusions of both Master Eastman and His Honour Judge Owen that the car claim was properly made and properly arguable.

32 In any event, Mr Williams submitted, the matters relied upon by the Master at para.66 of her judgment as driving her to the conclusion that the car claim was not a genuine one should not, have affected her judgment as they did. The first three matters, set out at para.66(1) to (3) of her judgment, were ones of which she was already aware. The claimant had never shied from its position, as explained to Master Eastman, that the car claim was an arguable additional claim made to support an action necessary for the recovery of pre-action costs to which the defendants had maintained they had a complete defence. Even after the Court of Appeal's decision, the defendants maintained their position on costs as pleaded at para 3(5) of their amended defence (see above). In the event of the defendants succeeding in their defence of tender Mr Williams pointed out, the claimant needed to have a claim to which an order for his reasonable pre-action costs might attach. The car claim was thus the belt, the braces were the Part 36 offers.

33 There were three further matters relied on by the Master, namely the terms of the Part 36 offers, the failure of the claimant to respond to the defendants' "without prejudice save as to costs" letters and the attendance note of 27 April 2012 (see para.66(4) to (6) of her judgment).

34 Each of the Part 36 offers represented the main claim of £100,000 plus interest. The implication of the Master's reference to these offers as driving her to the conclusion that the car claim was never genuine is that the omission from the offers of any amount representing the car claim must be taken as an indication that the claim was never a good one or recognised as such. In my view, however, the terms of the Part 36 offers cannot bear such an implication. Offers made under Part 36 may well represent less than the full amount of a claim. It cannot follow from such an offer that the balance of the claim is an abuse. In this case, the car claim had survived a strike out application before a Master and again on appeal. Each time, the court had found it arguable.

35 As to the failure to respond to the defendants' offers, Mr Williams contended that the reason the defendants' offers were refused or ignored was because they failed each time properly to recognise a liability for costs. Where offers of sums in respect of costs were finally made, they were insufficient. In the meantime there were the claimant's Part 36 offers, available for acceptance, which the defendants never accepted because they maintained, and continued to maintain through their formal defence, that no costs were in principle payable.

36 Mr Williams pointed out finally that the attendance note had been available at the time of the hearing before Master Eastman and could have been deployed at trial but it was not, presumably because it was not thought sufficiently relevant.

37 In my view, the criticisms made by Mr Williams were well founded. In my judgment the Master's evaluation of the claimant's actions was coloured by an erroneous belief that once the full amount of the fraud/negligence claim had been offered, it was impermissible for the claimant to issue proceedings in order to obtain its pre-action costs. Had the Master not been persuaded by the view she took of the matters she sets out at para.66 of her judgment, her original view - that the car claim was not unreasonable - must have remained.

38 The other factors relied upon by the Master, at para.69(1) to (3) of her judgment, are likewise incapable of justifying a departure from Part 36.17 on a proper view of the reason

for issuing proceedings in the first place. As to (1), the failure to send a PAP letter in respect of the additional very small claims for consequential loss and expense and the car claim, the Master said this,

> "This [the failure to send a PAP letter setting out the additional claims] left the defendants without an opportunity to respond in pre-action correspondence to such claims and enter into negotiation and at that early stage it may have been possible to reach an agreement on a sum which could have included an increased rate of interest and a contribution to costs before the additional costs of the litigation were incurred ... However, this default by the claimant was the starting point of the impasse between the parties which has led to the possibility of settlement proceeding as costs rose and an expensive trial on a claim worth only £38,400, with actual costs incurred on both sides being wholly disproportionate to the sum in issue".

39 It had been made clear to the Master in submissions by Mr Croxford (see above, recorded at para.39 of her judgment) that there was no prospect at all of the defendants reaching any settlement which included costs. More significantly, however, the highlighted passage can only be based on the Master's belief that issuing proceedings to obtain costs was an illegitimate course for the claimant to have adopted, otherwise she must have recognised that the impasse had started with the defendants' refusal to pay any pre-action costs, combined with its assertion that the claimant would have no justiciable claim to which a costs order might attach, by reason of its defence of tender. This view is further supported by the Master's reasoning in para.69(2), where she says this,

> "I have concluded that the claimant's Part 36 offers were made cynically in order to achieve pre-action costs for which there would otherwise be no entitlement. The litigating of a claim which is not genuinely believed to be in consequence of the allegations made in order to avoid the position in law which is to the claimant's disadvantage is an improper use of the court's resources." (emphasis added)

40 The highlighted passages can only be understood as emanating from a belief on the part of the Master that it was not legitimate to issue proceedings in order to recover pre-action costs once the full amount of the claim had been offered. Once it is appreciated that it was legitimate to do so, given that that was the only way of recovering costs that the defendants had refused to pay, there is no basis for a finding that the Part 36 offers were "made cynically". They were not inflated, there was no additional sum claimed. Indeed, the amount claimed for interest was less than that finally awarded at trial. No sum at all was included for the car claim. The Master appears to have relied on this aspect of the offers as indicating no real belief in the genuineness of that claim. However, this gives rise to a no-win situation for the claimant. As Mr Williams pointed out, the claimant was damned if he did make a reasonable offer, also if he did not. I agree.

41 Mr Croxford took me to a letter from the claimant's solicitors dated 28 May 2013 which he had also shown to the Master (she refers to it at para.54 of her judgment), in which BBK stated that their client had nothing to lose (being protected by the terms of his CFA) and pointed out that the defendants were at risk of huge costs by reason of the uplift attaching to the CFA. At first blush, it is an unattractive letter and could be interpreted as a threat by the claimant, and in particular his solicitors, to pursue a claim in order to ramp up costs to an inflated level, but when one reads it against the understanding that it was the defendants' position on costs that had necessitated the issuing of proceedings in the first place, and that the Part 36 offers were entirely reasonable assessments of the value of the claim, the contents of the letter assume a very different complexion.

42 The third additional factor which the Master took into account is at para.69(3) of her judgment, referring to what she describes as the failure of the claimant to engage on the question of interest, "Which could, and should, have been the subject of negotiation and settlement". With great respect to the Master, it is hard to see how a failure to negotiate over interest rates, where there were Part 36 offers which applied a rate lower than the one she eventually allowed, could rightly form a basis for a finding that applying the Part 36 regime would be unjust in this case.

The defendants' position on this appeal

43 Before me, Mr Croxford did not seek to pursue the arguments which he made before the Master as to the propriety of issuing proceedings when an offer of the full amount of the claim had been made. I asked him, therefore, as a way of testing his position that it would have been unjust to apply the consequences of Part 36, why his clients had not accepted any of the offers? His response was that accepting the Part 36 offers would (a) have involved the defendants, a reputable and regulated firm of accountants and investment advisers, in effectively admitting allegations of fraud and negligence, with all the potential regulatory consequences flowing from that, and (b) would have deprived his client from making the argument that the claimant's costs should have been curbed to reflect his failure to engage with the pre-action protocol.

44 Mr Williams pointed out that the first of these points was not taken before the Master, nor had there been a respondent's notice seeking to uphold her judgment for this additional reason. There is no evidence or information on the point, he submitted, accordingly I should disregard it.

45 I pressed Mr Croxford to identify precisely what it was he said the claimant should have done under the pre-action protocol. He pointed to the absence of a written response to the tender of the full sum. The claimant should have responded, he said, setting out why he contended that the defence of tender would not work, detailing the level of interest to which the claimant claimed to be entitled - his clients would have paid 2 per cent, Mr Croxford maintained - and setting out the car claim. There might then have been an ADR process at which a sensible mediator might have been able to broker a deal including some costs, all of which might have prevented proceedings from ever having to be issued; in short, he says, the claimant was just too quick to issue.

46 This was an extraordinary situation, Mr Croxford submitted. In my view, it was extraordinary, but for a rather different reason. Most parties who capitulate will bow to the inevitable and offer to pay the other side's reasonable costs. There was no such offer in this case, nor any encouragement to negotiate. The attendance note of 27 April 2012 made it quite plain that the defendants, on leading counsel's advice, were refusing to pay costs at all. The response to the claim, when it came, was a defence rejecting any liability for costs accompanied by an application to strikeout. It was only after that, and well after the first Part 36 offer made by the claimant, that the defendants made any concession on costs, and then in a fixed sum of £15,000, rather than any agreement to pay the claimant's reasonable costs on a standard basis.

47 The PAP makes it clear that the onus is not just on a claimant to avoid proceedings. Once the process has started, by the issuing of a letter of claim, it is for both parties to seek to resolve their disagreements. What the defendants did at the pre-action phase in this case was to offer an *ex gratia* payment, with no admission of liability, of the full amount of the damages claimed plus interest at 1 per cent. There was no offer to pay costs, and when the

claimant enquired about costs, it was clear that the defendants were adopting a position (of refusing to pay) which they intended to maintain and to fight, as they did, all the way to the Court of Appeal.

48 The only option left to a claimant in circumstances where a pre-action offer is made to pay damages but there is a persistent refusal to cover legal costs is to issue proceedings. In practice, the first Part 36 offer in this case came very early on in the process. As Mr Williams pointed out, even if there had been some costs attributable to the inclusion of the car claim at that stage, such costs would have been very low indeed compared to the cost of investigating and preparing the letter of claim in respect of the allegations of fraud/negligence.

49 Mr Croxford took me to the claimant's allocation questionnaire which indicated that as at 18 February 2012 (a month prior to the first Part 36 offer), the claimant's base costs were £113,000. I agree with Mr Croxford that these seem very high, but the correct approach would have been to challenge them as unreasonable through assessment, not to ignore the Part 36 offer altogether.

50 Mr Williams described Mr Croxford's explanation given now for the defendants not accepting the Part 36 offers as "re-writing history". The reason that the defendants had not accepted any of the Part 36 offers, he said, was because they had consistently taken the position that no legal costs at all were payable. In any event, he pointed out, the provisions of Part 36 itself permit a court to disapply the full consequences of a late acceptance if unjust to do so under Part 36.13(4)(b) and (5); moreover the provisions for assessment of costs under Part 44.4(3)(a) explicitly permit the costs judge to penalise for a failure to comply with the requirements of any relevant pre-action protocol. Accordingly, Mr Croxford's argument about a failure to engage with the pre-action protocol, if it had merit, was one that he would not have been precluded from airing, despite accepting a Part 36 offer. These were all good and persuasive points.

51 I should deal finally with Mr Croxford's submission that the claimant is to be criticised for not having sought judgment on admissions once the amended defence had been served. Had the claimant obtained such a judgment, he pointed out, the arguments about costs could have happened then and all of the costs up to trial of the car claim would have been avoided. Had the claimant not made any Part 36 offers, then there may have been some merit in Mr Croxford's point, but the claimant had made three such offers, all of which the defendants ignored. The defendants could have put a stop to proceedings at any time by accepting one of the offers; the costs position would have crystallised at that point and the arguments on assessment could have happened then.

Conclusion

52 In his closing remarks on this appeal, Mr Williams submitted that one side or the other has been looking down the wrong end of the telescope: the Master looked through it one way, but when it is appreciated that she was led to do so from an erroneous belief that the claimant was not justified in starting proceedings to recover his pre-action costs, the telescope reverses. I have concluded that Mr Williams is right and that the Master's decision to disapply the Part 36 regime in this case cannot stand. There was no proper basis for her finding that the defendants had surmounted the "formidable obstacle" of establishing that it would be unjust for the consequences of Part 36 to apply, founded as it was upon her apparent acceptance of Mr Croxford's submissions that the claimant had not been justified in issuing proceedings to obtain his pre-action costs in circumstances where an offer of the

full amount of the claim had been made. Her order must therefore be set aside and I must apply the Part 36 discretion afresh.

53 In my view, this whole unfortunate train of events was unnecessary from the outset. The defendants acted unfairly in adopting the position of refusing to pay the claimant any of his pre-action costs. It must have been obvious to the defendants that a proper investigation would have been required before allegations of fraud and negligence were to be advanced against a reputable, professional firm and that such an investigation would incur significant costs.

54 The claimant was a private individual, wealthy but not, in Mr Williams' words, super-abundantly so. Why should he, or his solicitors, depending on the terms of the CFA, be left out of pocket when the defendants had effectively conceded the claim? It was open to the defendants, of course, to choose to run the technical, tactical course that they did, seeking to rely upon the wording of the CPR in relation to a tender before claim, but in the circumstances which I have set out, where costs must necessarily have been incurred in complying with the PAP, the defendants must have realised that the risk in adopting this course was that interest and costs would mount whilst they maintained that denial.

55 Happily, the parties were at least able to agree a stay pending the decision on the defence of tender. But even when the Court of Appeal had decided finally that the defence of tender before action was not open to them, the defendants continued to maintain on their pleadings that no costs at all were payable. Mr Croxford persisted in a variant of this argument before Master Fontaine two years later, submitting that it was wrong in law for the claimant to have issued a claim just to recover his costs. I agree that it was wrong, but not for the reasons Mr Croxford gave to the Master. It was wrong that a claim had had to be issued at all. It would not have had to have been if the defendants had made an offer to settle the claimant's reasonable costs at the same time as (effectively) conceding his claim.

56 I have considered whether the enquiries about interest rate, the (belated) offers to pay costs, the efforts "left, right and centre"(to use Master Eastman's phrase) made by the defendants to settle, make a difference, but have decided that they do not. The defendants could at any time have accepted the claimant's Part 36 offers, all of which were in a lesser sum than he eventually received at trial. That, it seems to me, is the answer to the points advanced now about whether it was reasonable of the claimant to pursue the car claim to trial or to have refused the defendants' offers made "without prejudice save as to costs". As the Court of Appeal emphasised in *Webb v. Liverpool Women's NHST* [2016] 1 WLR 3899 at [38] it is relevant to the exercise of a courts discretion whether to deprive a claimant of all or part of their costs that the unsuccessful defendants could have avoided the costs of the trial if they had accepted the claimant's Part 36 offer. The defendants may be right to have had misgivings about the extent of the uplift under the CFA, and the steep upward spiral of costs to an apparently unreasonable level totally out of kilter with the modest amount of the remaining car claim, but the position could have been crystallised and their concerns addressed at any time simply by accepting the Part 36 offer or making one of their own. But doing so would have involved submitting to a costs order against them which they were determined, it seems, not to countenance. Concerns about the extent of the uplift, the rates charged, the amount of hours claimed, and the failure to engage with the PAP, could all have been challenged or dealt with on assessment and were not a proper reason for holding back.

57 I conclude that it would not be unjust, in general, for the consequences set out under Part 36.17 to apply. I invited further submissions as to the proper form of order to be made in writing, if the terms could not be agreed.

Addendum following written submissions on the form of order.

58 Since the handing down of my (extempore) judgment on 27 July 2018 I have received written submissions on the form of order which I should now make applying the provisions of Part 36.17. I have reached the following conclusions:

(i) The date from which indemnity costs should run. There is no dispute but that Part 36.17(4)(b) applies. Although the two competing forms of order submitted by the parties set out different start dates, the point was not addressed as an issue in Mr Croxford's submissions. I have inferred that the defendants do not seek to argue, or at any rate argue strongly, that indemnity costs should run from the later date in November 2014. I would in any event have decided that indemnity costs should run 21 days from the date of the first Part 36 offer, ie from 30 March 2013.

(ii) Enhanced rate of interest on damages under Part 36.17(4)(a). I have had careful regard to the observations of the Chancellor in *OMV Petrom SA v. Glencore International AG* [2017] EWCA Civ 195 at [38]. The present case comes nowhere near the egregious conduct of litigation adopted by the defendant in that case. Mr Croxford's clients were entitled to take and fight the point of principle on tender before claim. They did so having offered the full amount of damages, indeed having paid that sum into court. There was some residual dispute about the proper calculation of interest but the reality is that the Claimant always knew that his claim (though not the pre-action costs of preparing it) would be paid. I bear in mind also the order for an additional amount, to which Mr Croxford has addressed no submissions, which I am going to make in accordance with Part 36.17(4)(d), see para (iv) below. In all these circumstances I think that it would be unjust to order an enhanced rate of interest on damages here. The Master investigated at trial the ways in which the Claimant might otherwise have employed the funds and arrived at a conclusion on interest (2% above base) which has not been disputed. I am satisfied on the very particular circumstances of this case that it would cross the line into "penal", as that term was applied by the Chancellor in *OMV Petrom*, to order that the rate be enhanced. The key issues in dispute in this case were always about costs, not about the amount of the damages.

(iii) Enhanced rate of interest on costs pursuant to Part 36.17(c). It is surprising, perhaps, that having lost the tender point before the Court of Appeal Mr Croxford's clients continued to maintain that no costs were payable thereafter. With that in mind, I am quite satisfied that it would not be unjust to make an order under CPR 36.17(4)(c) for an enhanced rate of interest on costs. However, I cannot find that the Defendants' stance was so unreasonable as to justify the maximum level of enhanced interest contended for by Mr Williams. This case is wholly different to the improper conduct of the defendant in *OMV Petrom*. Bearing in mind that consequential orders made under Part 36(4) are not intended to be penal, but are not merely compensatory either, the appropriate level of interest on costs is in my view 4% above base rate, to run until the date of my order made on this appeal.

(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 from 10 May 2018 and at Judgement Acts rate from the date of my order until payment.

59 I deal finally with the amount which is to be paid by way of interim payment on costs. Mr Croxford submitted that there has been a very great deal of unreasonable expenditure on the part of the Claimant's representatives in this case, and that the real prospect of a significant reduction on taxation should be reflected in the amount of the interim payment which I order. I have some sympathy with his position, some of the costs do seem high, as I have noted in my judgment above. On the other hand, the vast majority of the costs must now be assessed on an indemnity basis, moreover the attachments to Mr Croxford's submissions, whilst addressing the detail of the claimant's bills of costs, do not include any reference to the current level of the defendants' costs, by way of comparison. In my view, an assessment at 60% of the total bill (excluding the success fee and ATE premium elements, to which 40% only has been applied) adequately allows for the prospect of a significant reduction on taxation, accordingly I propose to make the order in the amount suggested by the Claimant, of £430,000.

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