

Welcome to the 60th issue of Costs in Focus. This edition is going to consider a number of recent developments in costs law and the impact they will have on Cost Drafters and Practitioners.

Part 36 offers must include interest

Costs Lawyer, Steven Leung considers the Court of Appeal's findings about Part 36 and interest in *King v City of London Corporation* [2019] EWCA Civ 2266

The Court of Appeal has held that a Part 36 offer that is exclusive of interest is not a valid Part 36 offer.

It is well established that Part 36 is a self-contained procedural code (Gibbon v Manchester City Council [2010] EWCA Civ 726). CPR 36.5 provides:

“(1) A Part 36 offer must—

- (a) be in writing;
- (b) make clear that it is made pursuant to Part 36;
- (c) specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with rule 36.13 or 36.20 if the offer is accepted;
- (d) state whether it relates to the whole

of the claim or to part of it or to an issue that arises in it and if so to which part or issue; and

(e) state whether it takes into account any counterclaim.”

CPR 36.5(4) states that a Part 36 offer is treated as inclusive of all interest. Part 36 offers have applied to detailed assessment of costs proceedings since April 2013: CPR 47.20(4). The guidance at Practice Direction 47 Paragraph 19 states:

“Where an offer to settle is made, whether under Part 36 or otherwise, it should specify whether or not it is intended to be inclusive of the cost of preparation of the bill, interest and VAT.

Unless the offer states otherwise it will be treated as being inclusive of these.”

Parties in assessment proceedings accordingly have looked to make Part 36 costs offers exclusive of interest to avoid PD47 Paragraph 19. In this appeal the claimant / receiving party made a Part 36 costs offer of £50,000 exclusive of interest. The claimant's bill of costs was assessed at £52,470 excluding interest. The Deputy Master at first instance concluded the claimant's offer was not a valid Part 36 offer and so CPR 36.17 did not apply.

The Court of Appeal agreed that an offer exclusive of interest cannot be a valid Part 36 offer.

Comments

The Court of Appeal rejected that Practice Direction 47 Paragraph 19 modified Part 36 and nor did the Court of Appeal identify anything in CPR 47.20 that dis-applied CPR 36.5(4) in detailed assessment proceedings.

The Court of Appeal suggested the Rules Committee may wish to examine

permitting Part 36 offers exclusive of interest in assessment proceedings, but at the very least PD47 Paragraph 19 should be revised.

A number of lower court decisions have reached different conclusions on this issue. Consequently it has been the policy of Meruit Costs for several years

to make Part 36 costs offers inclusive of interest in order to avoid technical challenges in assessment proceedings. This Court of Appeal ruling now brings clarity and certainty.

Parties should be clear on the costs terms

Costs Lawyer, Richard McCarthy considers the Court of Appeal's findings about contracting out of fixed costs in *Siu Lai Ho v Adelekun* [2019] EWCA Civ 1988

This judgment arose from an appeal against a decision in the County Court at Central London, in which the costs arising from a road traffic accident had been held at first instance to be fixed recoverable costs by Deputy District Judge Harvey, but on appeal heard by His Honour Judge Wulwik were held to be assessed on a conventional hourly rate basis (Issue 54).

The claimant's previous appeal had been successful because the first instance judge was held to have been wrong to vary a consent order in which it was agreed that costs were, "to be subject to detailed assessment if not agreed". This was found to be an

agreement by the parties to contract out of fixed costs. This was also consistent with an application agreed by the parties to re-allocate the matter from the fast track to the multi-track, which was vacated following the settlement of the claim.

The defendant appealed to the Court of Appeal. It was held that the consent order did not provide for conventional hourly rates costs. The assessment to which the consent order referred was actually that of the fixed costs regime and the reference to, "detailed assessment", did not mean that the defendant paying party had intended that the fixed costs regime be displaced

because, "there are other indications that that was not intended." In respect of re-allocation the Court of Appeal agreed with Judge Wulwik that the prospective agreement that the claim should be re-allocated to the multi-track did not retrospectively dis-apply the fixed costs regime.

Comments

The claimant failed because the words of the offer and acceptance were not sufficiently clear to demonstrate an intention to depart from the fixed costs regime. Lord Justice Newey said it was, "inherently improbable", that the defendant could have intended to pay conventional rather than fixed costs. Further, "a defendant wishing to make a part 36 offer on the basis that the fixed costs regime will apply would, of

course, be well-advised to refer in the offer to CPR 36.20, and not CPR 36.13, and to omit any reference to the costs being 'assessed'."

The Appeal court's judgment is consistent with previous case law, which affirms that a receiving party cannot necessarily rely on the words, "detailed assessment", to exclude or escape from fixed costs. As was

acknowledged by Judge Wulwik, a consent order which clearly and expressly confirmed an intention for conventional costs to apply would have been unarguable and would have provided sufficient clarity; by contrast parties ought also to be specific in recording an agreement to pay fixed costs when that is the intention of the paying party.

Services we provide

We deal with all aspects of costs including the preparation of Bills of Costs, Schedule of Costs, Points of Dispute, Points in Reply, negotiating settlement, solicitor own client disputes, auditing, providing estimates, costs budgeting and costs advocacy.

Our dedicated costs team is made up of employees based in Bristol and New Malden with a wealth of experience including Costs Lawyers and members of the ACL

Key Contacts



Ian Curtis-Nye
Divisional Manager - Editor
Tel No 0208 336 6968
Email icurtis-nye@lyonsdavidson.co.uk



Steven Leung
Associate | Costs Lawyer - Editor
Tel No 0208 436 2058
Email stleung@lyonsdavidson.co.uk

The purpose of this newsletter is to highlight some of the recent developments and changes in costs law. It should not be taken as legal advice and should not be relied upon as such.