Neutral Citation Number: [2019] EWHC 1545 (Ch)

Case No: D31BS660

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BRISTOL DISTRICT REGISTRY

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 17 June 2019

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

(1) Sarah Knight	**Claimants**
(2) Gordon Gregory	
- and -	
(1) Richard Knight	**Defendants**
(2) Lesley Anne Knight	
(3) Megan Knight	

- -
- -

Richard Dew (instructed by **Samuels**) for the **Claimants**
Alex Troup (instructed by **Beviss & Beckinsale**) for the **Defendants**

Hearing date: 12 June 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ Paul Matthews :

Introduction

1. This is my judgment on costs, following the written judgment (under neutral citation [2019] EWHC 915 (Ch)) which I handed down on 29 April 2019 in the absence of the parties, after the trial which took place in March 2019. The trial was essentially of the issue of the beneficial ownership of the proceeds of sale of a property known as Close Court, Eddys Lane, Newport, Barnstaple, Devon. Those proceeds were held after the sale in the client account of conveyancing solicitors who had received them from the purchasers, pending the resolution of the question to whom they belonged. The rival claimants to those proceeds were the administrators of the estate of Ralph Stephen Knight, who in fact brought the claim and were therefore the claimants, and his brother and sister-in-law, who defended it. In my judgment I held that the claim brought by the claimants for a declaration that those proceeds were held on trust for them succeeded. At the hearing to decide questions of costs both the claimants and the first and second defendants were represented before me. The third defendant (joined so that she was bound by the result) took no part in the trial and was not represented at the costs hearing.

2. In his skeleton argument, Mr Troup, for the first and second defendants (whom I shall refer to hereafter simply as "the defendants"), says that his clients accept that they have lost, and that they do not seek to appeal. Moreover, they accept that in principle they should pay the claimants' costs of the action, and also that they should make a payment on account of those costs, which has now been agreed between the parties in the sum of £72,321.98, payable by 4 pm on 9 July 2019. The issues which still divide the parties are (i) whether an offer contained in a letter from the claimant's solicitors to the defendant's solicitors dated 27 July 2017 amounts to an offer within CPR Part 36, (ii) if so, what the consequences of that are, and (iii) if not, whether there is any other basis for the costs to be assessed on the indemnity rather than standard basis.

The offer

3. The letter of 27 July 2017 is headed "Part 36 Offer: Without Prejudice Save As to Costs". The substance of the letter reads as follows:

> "Following Monday's failed mediation (in respect of which privilege is not waived) we are instructed to make the following offer.
>
> The offer is made pursuant to CPR Part 36. As such, if it is not accepted within the relevant period (see below) but is (without having been withdrawn) later accepted then your client will be liable to our clients' costs. If Administrators succeed in obtaining a greater sum at trial then your clients will be liable to our clients costs on the indemnity basis and with interest thereon at a rate not exceeding 10% above base rate together with the additional sum set out in CPR 36.17(4)(d).
>
> The offer is to pay, from the net proceeds of sale of Close Court, the sum of £35,000. This sum is inclusive of your clients' costs, which we understand to be under £20,000. The offer also excludes any payment by your client of our clients' costs, which as you also know are around £30,000.

> The remainder of the net proceeds will be paid to our client as the administrators of Steven Knight's estate.
>
> Pursuant to CPR Part 36:
>
> - The relevant period means a period of not less than 21 days from the date of this offer.
>
> - The offer is made in respect of the whole claim over the net proceeds of Close Court
>
> This offer will remain open until it is expressly withdrawn but the court's permission will be required to accept it where any of 36.11(3) applies."

4. On 9 August 2017 the defendant's solicitors responded to that letter in a letter also headed "Without prejudice save as to costs". They acknowledged receipt of the letter of 27 July 2017, but commented that it did not indicate whether the offer was intended to be a claimants' Part 36 offer or a defendants' Part 36 offer. They also said that the offer

> "does not make sense in accordance with Part 36, as it refers to the sum of £35,000 being inclusive of our clients' costs…"

5. Those letters were written some months before proceedings were issued. So when they were written it was not yet known what would be the form of the future proceedings (if any). For example, it could have been a stakeholder claim under CPR Part 86, brought by the conveyancing solicitors in whose client account the funds were still sitting, against the various claimants to the fund, or it could have been (as in the result it was) a claim brought by one set of claimants to the fund against the other. If the form of the proceedings was the latter (as it turned out), then it was not at that time certain who would be claimants and who defendants.

CPR Part 36 or not?

Terms as to costs

6. Mr Troup, on behalf of the defendants, submits that the letter of 27 July 2017 does not amount to a Part 36 offer, because it contains terms as to costs. He relies on the decisions of the Court of Appeal in *Mitchell v James* [2004] 1 WLR 158, and in *French v Groupama Insurance Co Ltd* [2011] 4 Costs LO 547, [2012] CP Rep 2. In the former case, the claimants having brought an action against the defendants thereafter sent the defendants an offer to settle the proceedings, on terms, *inter alia*, for each party to bear its own costs. Peter Gibson LJ (with whom Potter LJ and Sir Murray Stuart Smith agreed) held that, for four separate reasons which I do not need to rehearse, the draughtsman of CPR Part 36 did not intend terms as to costs to be included in a Part 36 offer. Accordingly, the offer made in that case was not a Part 36 offer.

7. In the latter case, the claimant had issued her claim (for breach of contract) in March 2009. After judgment had been handed down, the defendant relied on offers made in December 2006 and February 2007 (*ie* before proceedings were issued) of a sum to

cover the entirety of the claimant's claims, "inclusive of interest and costs". Rix LJ (with whom Lloyd and Toulson LJJ agreed) said:

> "[39] … the offers were all embracing, so that to that extent they were clear, or at any rate the February offer was so; but, although Mr Brown on behalf of Groupama submitted, and the judge accepted, that it was inclusive of everything, including costs, it is not entirely clear to me that costs were included. However, if it was, and Mr Brown has on this appeal continued to submit then it was, then it was not to that extent a quasi Part 36 offer, for such an offer must not include an offer as to costs: see *Mitchell v James*…"

8. Mr Dew, on behalf of of the claimants, says that, notwithstanding these authorities, it is open to an offeror to include terms in the offer which limit payment of its own costs by the offeree. He relies on the decision of Hildyard J in *Proctor & Gamble Co v Svenska Celluslosa AB SCA* [2013] 1 WLR 1464. In that case the claimant had sold part of its business to the defendants pursuant to an agreement providing for an adjustment of the purchase price in certain circumstances. A dispute arose as to the amount of that adjustment. The claimant said it was zero, whereas the defendants said it was £19 million. The claimant sought declarations and other relief in legal proceedings. It also made an offer, expressed to have Part 36 consequences, to settle its claim on the basis that the adjustment due to the defendants was £3 million and (critically) that *the claimant would be liable for the defendants' costs up to the date of acceptance*. The offer was not accepted, but at trial the claimant obtained two of the three declarations it sought, and the adjustment due to the defendants was held to be less than £3 million.

9. The claimant sought its costs on the basis that it had made a Part 36 offer, and that the statutory consequences should follow. The judge first held that overall the claimant had been the successful party. He also held that, even though the claimant had sought declaratory relief about the extent of its liability to the defendants, formally it was nonetheless the claimant for the purposes of Part 36. Finally, the judge held that it was open to a claimant making a Part 36 offer to agree to forsake its entitlement to costs on acceptance of the offer and instead to pay the defendant his costs, and therefore the claimant's offer was compliant with Part 36.

10. In so deciding, the judge considered the decision of the Court of Appeal in *F & C Alternative Investments (Holdings) Ltd v Barthelemy (No 3)* [2013] 1 WLR 548. That was a case in which an offer to settle had been made, but deliberately and expressly "outside the terms of Part 36". It was nonetheless sought to apply Part 36 by analogy. However, the Court of Appeal held that there was no reason or justification for extending Part 36 beyond its expressed ambit. Davis LJ (with whom both Arden and Tomlinson LJJ agreed) said:

> "[63] … in my view it is not permissible wholly to discount a number of failures to comply with the requirements of CPR Part 36 as the merest technicality. Perhaps there can be *de minimis* errors or obvious slips which mislead no one: but the general rule, in my opinion, is that for an offer to be a Part 36 offer it must strictly comply with the requirements."

It is, however, to be noted that *Mitchell v James* was not cited to the Court of Appeal in *F & C Alternative Investments* nor to Hildyard J in *Proctor & Gamble*. On the

other hand, *French v Groupama* was briefly discussed, albeit in a different connection, by Davis LJ (at [65]) in the Court of Appeal in *F & C Alternative Investments* (but was not cited to Hildyard J in *Proctor & Gamble*).

11. Nevertheless, Hildyard J said this:

> "47. In my view, the issue in the *F & C* case was really whether an offer accepted not to be within Part 36 could be given, by analogy, the same consequences as would have followed if it had been compliant and intended to be so. Here, the issue is whether CPR 36.2(2), and thus the gateway to CPR 36.10 and 36.14, is to be so strictly construed that it requires (by rule 36.2(2)(c)) the offer made to provide for the defendant to be liable for the claimant's costs even if the claimant expresses his offer to be a Part 36 offer, but as part of that offer, agrees to forsake that entitlement and instead pay the defendant his costs. Put another way, I do not accept that it is impossible for a claimant to comply with Part 36 unless he requires to be paid his costs and such payment to be made within a period of not less than 21 days.
>
> 48. As it seems to me, such a strict construction would tend to undermine a central objective of Part 36, identified by Davis LJ himself as being to encourage claimants to make sensible offers and provide an inducement to defendants to accept them lest otherwise they be exposed to the consequences provided. That objective would be advanced, not undermined, by reading CPR36.2(2)(c) as requiring a claimant who seeks his costs to specify a period of not less than 21 days within which the defendant will be liable to pay them, but not as mandating that the claimant must seek costs and make payment of them a condition of his offer.
>
> 49. I do not myself see why such a purposive approach to construction should not be available in the context of Part 36, as it is in the context of statutes and contracts and other instruments (subject, of course, to well-known limitations). Nor do I see that such an approach is precluded by the judgment of Davis LJ in *F & C*: this is not a matter of applying Part 36 by analogy; and the strict compliance required is of the statutory provision properly, and, if appropriate, purposively, construed."

(It should be borne in mind that this case was decided on the old version of Part 36, before the reforms made in 2014, which *inter alia* changed the numbering of the rules.)

12. I therefore understand Hildyard J to be saying that it is still possible to comply with Part 36 by including in the offer a term as to costs, provided that the term concerned *reduces* the burden on the offeree that would otherwise be imposed as a consequence of accepting the offer, rather than *increases* it. As it seems to me, that is strictly inconsistent with the decisions in *Mitchell v James* and *French v Groupama*, that no term as to costs should be included in a Part 36 offer. The first of these decisions concerned an offer which would have altered the cost consequences otherwise flowing from a Part 36 offer. The second of them concerned the offer of a sum to cover the entirety of the claimant's claims, "inclusive of interest and costs". That is very similar to the wording of the offer in the present case, which (so far as material) reads "to pay [to the offerees] … the sum of £35,000 … inclusive of your clients'

costs…" It might have been argued that all that means is that the total sum to be paid is £X, and it will not be increased to take account of any offerees' costs already incurred. Yet the Court of Appeal held that the similar wording used in that case introduced a term as to costs and therefore could not amount to a Part 36 offer.

13. In these circumstances, I do not think that I am free simply to follow the decision of Hildyard J, even if it applied on the facts. The decisions of the Court of Appeal in *Mitchell v James* and *French v Groupama*, binding on me, that no term as to costs should be included in a Part 36 offer, were not cited to him, and so I do not know how he would have dealt with them. Moreover, the offer made in the present case is materially indistinguishable from the offer made in the latter of the two cases. Accordingly, I hold that this offer is not a Part 36 offer, and therefore does not have the costs consequences of such an offer.

Claimant's and defendant's offers

14. Mr Troup also argued that the letter of 27 July 2017 could not amount to a Part 36 offer for a different reason. This was not the case of a conventional money claim by one party against another. It was a dispute about the beneficial ownership of a sum of money held by a third party. The claimants and the defendants each claimed that sum. The third party was merely a nominal holder for one or other of the two sides. As I have already said (see at [5] above), at least three forms of proceeding could be envisaged. But at the time of the offer no proceedings had been issued at all, and therefore it could not be known for certain whether the offerors would be claimants or defendants. Moreover, the offer was not stated to be either a claimant's or a defendant's offer. Accordingly, said Mr Troup, it could not properly be categorised as a claimant's or a defendant's offer. Since this categorisation is important for Part 36 purposes, as it regulates the consequences of different kinds of offer (see *eg* rule 36.17(1)(a), (b)), it simply could not be a Part 36 offer.

15. In the circumstances it is not strictly necessary for me to deal with this argument, but in my judgment it fails. On the facts, the terms of the offer suggest that the offerors were likely to be the claimants. It is the sort of offer that a claimant might make. And, in fact, the offerors did formally become the claimants in the action. I can see no good reason for ignoring their formal status. As Hildyard J said in *Proctor & Gamble*, where the putative debtor took the initiative to seek declaratory relief,

> "[55] I do not think it is either required or permissible to go behind the formal status of the parties for the purposes of determining compliance with CPR Pt 36 and the *prima facie* effect of a compliant offer: it seems to me that for those purposes the description in the record is conclusive."

I accept, of course, that in that case the offer was made after the proceedings had commenced, but I do not think that that matters. If no proceedings had ever been issued, the offers would not have had any consequences under Part 36 anyway. If the *defendants* had issued the proceedings, the now claimants would formally have been the defendants, and their offer would have been a defendant's offer.

Costs consequences under CPR rule 36.17

16. My conclusion on the status of the offer letter means that strictly I do not have to consider what would be the costs consequences for the parties under CPR rule 36.17. But the matter was argued before me, and therefore, in case this matter goes further, I briefly indicate my views. First of all, it is clear, in the light of my earlier judgment on the substantive issues in the litigation, and my view that the offer was a claimant's offer, that CPR rule 36.17(1)(b) would be satisfied, in that the judgment which the claimants have obtained against the defendants is more advantageous to the claimants that the proposals contained in their offer.

Sum awarded

17. The question would then arise as to whether my decision that the sum of £204,000, being the net proceeds of sale of Close Court held by the conveyancing solicitors, belongs beneficially to the claimants rather than to the defendants, would mean that that sum fell within the expression "any sum of money awarded" in CPR rule 36.17(4)(a) and the expression "the sum awarded to the claimant by the court" in CPR rule 36.17(4)(d). Mr Troup says that I have not awarded a sum of money to the claimants. Instead, I have decided that they are beneficially entitled to the particular proceeds of sale of a property. Mr Troup says that this is not a debt or damages claim, where a money sum would or might be awarded, but a property or trust claim. Mr Dew accepts that if the property remained unsold, and I had decided that it belonged beneficially to the claimants, it would not fall within the expression "sum of money awarded" or "sum awarded". But he says that, given that those expressions do not apply to all cases, but they must apply to some, I should construe rule 36.17(4) as applying to as many cases as it reasonably can. He says it does not torture the language to say that I have awarded the sum of £204,000 to the claimants.

18. Neither counsel was able to find any authority on this point. I was referred to the decisions of Edward Pepperall QC (as he then was) in *Mohammed v The Home Office* [2017] EWHC 3051 (QB) and of Cutts J in *FZO v Adams* [2019] EWHC 1286 (QB). But both of these were cases where damages were awarded in tort (false imprisonment and sexual abuse respectively). Neither deals with a case such as the present.

19. I do however note that rule 36.17(4)(d) is partly expressed in a binary form as follows:

> "… an amount which is
> (i) the sum awarded to the claimant by the court; or
> (ii) where there is no monetary award, the sum awarded to the claimant by the court in respect of costs…"

20. So it is clear that in this context the reference to a "sum awarded" is a reference to a *monetary award*. It is true that the subject matter of the present claim can be expressed in money terms. It is also true that one sum of £204,000 is much like another sum of £204,000. And it was in effect the sum in dispute in this case. But this was a claim, not that there was a relation of debtor and creditor for £204,000 between the claimants and the solicitors, but that there was one of trustee and beneficiary in respect of the solicitors' claim on their bank for £204,000. A statement that you own a particular credit is different from the statement that someone owes you a debt. If your debtor becomes bankrupt, you may not recover all you are due. If your trustee

becomes bankrupt, the creditors will have no claim on trust assets. In some contexts, the word "money" bears a narrow meaning, such as physical currency, banknotes and coins. In others it may be expanded beyond this to include, for example, debts owed by others. And there are rare cases where the meaning is expanded further to include other rights as well, including personal property (see *eg Perrin v Morgan* [1943] AC 399, in the context of a will gift of "moneys").

21. In my judgment, a decision that a particular asset (here an intangible credit in the conveyancing solicitors' client account) belongs beneficially to a particular claimant is not a "monetary award". It is instead a decision awarding the ownership of the asset to a particular person. Accordingly, in my judgment there is no justification in rule 36.17 for expanding the meaning of the phrase "sum awarded" beyond the case of a money remedy awarded in a claim for debt or damages, to the case of the award of beneficial ownership of a debt owned by the defendant but owed to the defendant by a third party. The consequence would be that, if rule 36.17 had applied at all, paragraph (4)(a) would not apply at all, and the additional amount under paragraph (4)(d) would be calculated by reference to the costs awarded to the claimants.

Unjust to apply the rule?

22. Mr Troup also argued that, if rule 36.17 applied, it was nevertheless "unjust" to apply the consequences, within rule 36.17(5). This picks up on the opening words of rule 36.17(3), (4), as follows (emphasis supplied in each case):

> "(3) Subject to paragraphs (7) and (8), where paragraph (1)(a) applies, the court must, *unless it considers it unjust to do so*, order that the defendant is entitled to … "
>
> "(4) Subject to paragraph (7), where paragraph (1)(b) applies, the court must, *unless it considers it unjust to do so*, order that the claimant is entitled to … "

23. Then rule 36.17(5) provides:

> "(5) In considering whether it would be unjust to make the orders referred to in paragraphs (3) and (4), the court must take into account all the circumstances of the case including –
>
> (a) the terms of any Part 36 offer;
>
> (b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;
>
> (c) the information available to the parties at the time when the Part 36 offer was made;
>
> (d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and
>
> (e) whether the offer was a genuine attempt to settle the proceedings."

24. Mr Troup relied on the decision in *Proctor & Gamble*, where Hildyard J had held (at [55]) that:

> "the substance of the claim, and which of the parties is seeking to establish liability and which to oppose it, is one of the circumstances to be considered by the court in determining whether it would be unjust to make orders for indemnity costs and interest on costs for the purposes of CPR rule 36.14(3)."

25. The judge then went on to say that:

> "[57] In such circumstances, it does seem to me that there is force in the argument that in substance P & G was really in the position of the defendant; and that, further or alternatively, the rationale in CPR Part 36 4 giving a special incentive to claimants to put forward offers to settle is not easily applicable to this case. Is it in such circumstances 'unjust' to visit on SCA [the formal defendant] the consequences prescribed by CPR rule 36.14(3) [now 36.17]?"

After discussing the matter further, the judge concluded that in the particular circumstances of the case it would not be just to make the order required by rule 36.17, but that he would make a different order.

26. The position in the present case however is, as it seems to me, different. In the present case both claimants and defendants claimed the beneficial ownership of the proceeds of sale. Each side was seeking to establish that the assets belonged to it. There was no role reversal or declaration of non-liability of the kind found or sought in the *Proctor & Gamble* case. And I agree with Mr Dew that the factors set out in rule 36.17(5), so far as they apply at all, are largely in favour of the claimants. So, had it been necessary to decide the point, I would not have thought it "unjust" to apply the consequences set out in rule 36.17(4).

Indemnity costs

27. Given that I have held that Part 36 does not apply to the offer made in the present case, the question then is whether I should for some other reason order the defendants to pay the claimants' costs on the indemnity basis. Mr Dew says that I should, for two reasons. The first reason is that, if this is not a Part 36 offer (as I have held), the defendants have no incentive to accept it. The only way to give them an incentive to accept it is to put them in a worse position if they do not, by ordering them to pay the claimant's costs on the indemnity basis. One problem with this argument is that when the court is dealing with relatively modest amounts of costs, as here, the difference between standard and indemnity basis costs is likely to be very small, and therefore not much of an incentive anyway.

28. But in any event I am not persuaded that the argument is sound. If the defendants had accepted the (non-Part 36) offer, they would have received £35,000 out of the proceeds of sale and paid nothing of the claimants' costs. On the other hand, if the defendants did not accept the offer and fought the case, then in line with my judgment they would have received nothing and were likely as the unsuccessful party to be ordered to pay the claimants costs on the standard basis (as indeed they have agreed to do). To my mind, those are significant incentives to accept the offer. So I reject the first point.

29. The second point is that the defendants behaved unreasonably in refusing to accept the offer made, and that unreasonable conduct takes the case out of the norm, and

justifies an award of indemnity costs. Thus, in *F & C Alternative Investments*, Davis LJ said:

> "[70] There may be special cases where refusal to accept reasonable offers of settlement is capable of justifying an award of indemnity costs: see *Epsom College v Pierce Contracting Southern Ltd* [2012] 3 Costs LR 351. But, as Rix LJ there emphasised, the failure to accept such offers, or to accede to an approach for settlement, must be unreasonable: see paragraphs 71 and 72 of his judgment …"

30. However, Davis LJ went on to quote from the judgment of Simon Brown LJ (with whom Waller and Sedley LJ J agreed) in *Kiam v MGN Ltd (No 2)* [2002] 1 WLR 2810:

> "[12] I for my part, understand the court there to have been deciding no more than that conduct, albeit falling short of misconduct deserving of moral condemnation, can be so unreasonable as to justify an order for indemnity costs. With that I respectfully agree. To my mind, however, such conduct would need to be unreasonable to a high degree; unreasonable in this context certainly does not mean merely wrong or misguided in hindsight. …
>
> [13] It follows from all this that in my judgment it will be a rare case indeed where the refusal of a settlement offer will attract under Part 44 not merely an adverse order for costs, but an order on an indemnity rather than standard basis …"

31. I respectfully agree with what Simon Brown LJ said. A mere failure to accept a reasonable offer is not enough. That happens every day of the week, with both parties acting reasonably and in accordance with the advice that they are receiving from their professional advisers. So if the matter is to be taken "out of the norm" there must be something more, something which prompts the court to visit the paying party with a special mark of condemnation. I see nothing of that kind here. In my judgment it is appropriate to order the defendants to pay the claimant's costs on the standard basis.

Conclusion

32. In the result, therefore, I hold that the offer in this case was not a Part 36 offer, and that the cost consequences are that the defendants will pay the claimants' costs, to be assessed on the standard basis if not agreed, and will make a payment on account in the sum of £72,321.98, by 4 pm on 9 July 2019. I hope that counsel will now be able to agree a form of order to give effect to this supplemental judgment and submit it to me for my approval.