SCCO Ref: CCD 1705254

SENIOR COURTS COSTS OFFICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/05/19

Before :

DEPUTY MASTER FRISTON

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Between :

ANDREW WHITE and SAMANTHA WHITE (executors of the estate of WILLIAM WHITE, Deceased)	**Claimants**
- and -	
WINCOTT GALLIFORD LIMITED	**Defendant**

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- -

Mr Joel Douglas (instructed by **Irwin Mitchell LLP**)
for the **Claimant**
Mr William Heritage (instructed by **DAC Beachcroft LLP** for the **Defendant**)

- -

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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DEPUTY MASTER FRISTON

Deputy Master Friston:

Introduction

1. This judgment concerns the costs of a provisional assessment. In particular, it deals with the effect of a novel type of Part 36 offer, namely, an offer made by a receiving party that goes solely to the hourly rates that are claimed.

2. The facts of the underlying claim are irrelevant to the matters I have to decide. It is sufficient to say that this was a claim for damages following the death of the Deceased from mesothelioma. The Deceased's family lived in or around Coventry; they instructed a firm of solicitors (Irwin Michell LLP) in Birmingham. The Claimants were ultimately successful and became entitled to costs.

3. I am asked to decide whether the Claimants are to be allowed the benefit of having obtained a result that was at least as advantageous to them as the proposals contained in their Part 36 offer dated 21 November 2017 ('the Offer'); those proposals went solely to the hourly rates. As I will explain below, I ultimately allowed those rates. The Claimants say that they are entitled (pursuant to CPR, r 36.17(4)(d)) to an 'additional amount', and that as such, the hourly rates—and therefore the entirety of their profit costs—ought to be uplifted by 10 percent.

The assessment

4. The assessment proceeded by way of a provisional assessment, that being on 29 May 2018. The hourly rates were one of the more contentious issues. In view of this, I gave a brief reasoned judgment. The rates that I allowed (and that the parties ultimately accepted) were the same as those that had been offered by the Claimants in their Replies. For all practical purposes they were also the same as those that the Claimants had proposed in the Offer.

5. There was no request for a post-provisional hearing; in particular, the parties accepted my provisional assessment of the hourly rates. The net result was that, on the face of it, the Claimants had secured a result that was at least as advantageous to them as that which had been proposed in the Offer. Put otherwise, the Claimants had—to use a useful colloquialism—'beaten' the Offer.

6. I should add that there is a further factor that may have a bearing on the costs of the provisional assessment, namely, the fact that I was not impressed by the Claimants' conduct in relation to proving compliance with the indemnity principle. In this regard, I made the following points in my order of 29 May 2018 (which, I stress, were only provisional):

> '1. The retainer documentation is immaculate and handsomely presented; it has clearly been drafted with the assistance of persons who are not only well able to draft such documentation, but who are experts in the field. In view of this, it ought to have been disclosed without hesitation. I am at a loss to understand why this was not done.

> '2. My mind is open on the point and I make no ruling in this regard, but if the Claimants become entitled to the costs of the assessment, I am likely to reduce those costs by 25 per cent to take account of their refusal to accede to the Defendant's entirely proper and reasonable request for [voluntary] disclosure.'

7. By the beginning of December 2018, the only issues outstanding were the costs of the assessment and the effect, if any, of the Offer. These are the issues that are addressed in this judgment.

The incidence, basis and amount of costs in provisional assessments

8. Where there has been no post-provisional hearing, there are no specific rules governing the incidence or basis of costs of provisional assessments. In view of this, the generally received view (to which I subscribe) is that the provisions of CPR, r 47.20 apply.

9. There are, however, specific restrictive provisions that govern the amount of costs. Those provisions, namely, CPR, r 47.15(5), read as follows:

> '(5) In proceedings which do not go beyond provisional assessment, the maximum amount the court will award to any party as costs of the assessment (other than the costs of drafting the bill of costs) is £1,500 together with any VAT thereon and any court fees paid by that party.'

Thus, unless the matter goes beyond a provisional assessment, the maximum that can be awarded to a party for the costs of the provisional assessment is £1,500, plus VAT and court fees.

10. This limit will apply even if the receiving party has beaten his or her own Part 36 offer: see *Lowin v W Portsmouth & Co* [2017] EWCA Civ 2172, at [38] to [44], in which Asplin LJ distinguished the reasoning in *Broadhurst v Tan* [2016] EWCA Civ 94. It should be noted that *Lowin* dealt only with the aforesaid limit as to the amount of costs; it said nothing about whether a receiving party who has beaten a Part 36 offer is entitled to an 'additional amount' pursuant to CPR, r 36.17(4)(d).

The parties' submissions

11. Whilst neither of the parties expressly referred to it, I think it is fair to say that both parties were aware of *Lowin v W Portsmouth & Co*; as such, the Claimants did not seek to exceed the aforesaid £1,500 (plus VAT) cap. The Claimants did, however, claim a 10 percent 'additional amount'; in particular, the Claimants sought to claim this uplift on the whole of the profit costs.

12. The parties sensibly agreed to save court time by making written submissions. Mr William Heritage (a senior costs draftsman) was the first to do so; he did this in his email of 3 December 2018:

> 'Mr Douglas [costs lawyer for the Claimants] has conveyed that a further 10% should be awarded due to the Part 36 offer dated 21 November 2017 … I respectfully disagree with his position.

> The Part 36 offer only relates to the hourly rates and not the Bill of costs in total. In my opinion it is not the spirit or purpose of Part 36.17 of the Civil Procedure Rules for the 10% consequences to come into action for a Part 36 offer that does not offer a figure to represent the whole of the Bill of costs.'

13. Mr Heritage then set out the relevant rule in CPR, Part 36 (which I recite at paragraph 17 below) and went on to say this:

> 'If both parties requested a judgment from the Court, the judgment would state the total figure on the Bill of costs, and not each element of the Bill of costs such as the hourly rates. Therefore the 10% consequence should only come into action in regards to the total assessed Bill of costs figure.
>
> 'If Mr Douglas's position was agreed then future parties would be able to recover a further 10% on any element of the Bill of costs, no matter how small or large the part of the Bill of costs is. For example if Mr Douglas was to offer 24 minutes for the first claimed part of the Bill of costs (claimed at 30 minutes for 12/9/16 for "engaged in initial discussion") in a Part 36 offer, would this mean that a further 10% is awarded as the Defendant was silent to this specific part of the offer? From the above points, I would respectfully disagree.'

14. Mr Joel Douglas responded by way of an e-mailed letter of 5 December 2018, in which he said this:

> 'Part 36.2 (3) clearly states that a Part 36 offer may be made "in respect of the whole, or part of, or any issue that arises ..."
>
> 'The Claimant made a Part 36 offer on individual rates on 21st November 2017 (attached). This offer was ignored by the Defendant. The Claimant has achieved a judgment "at least as advantageous ... as the proposals contained in the Claimant's Part 36 offer" as per CPR 36.17 and should be awarded the 10% uplift as per the same provision.
>
> 'The offer made in respect of hourly rates is therefore valid and the Claimant is entitled to the 10% uplift on the awarded hourly rates. The matter is not dissimilar to a Part 36 offer made in the substantive proceedings in respect of a single head of loss where the Claimant would be entitled to a 10% uplift under that head alone should he beat his own offer.
>
> 'Whilst the Defendant's example of a Part 36 offer in relation to a 30-minute attendance is acknowledged, the Claimant respectfully finds it without merit and not applicable to the current matter.

> 'The hourly rates are clearly a highly significant part of a bill of costs, challenges to which will be seen as "preliminary points" in correctly drafted Points of Dispute. Other examples may include an ATE premium and success fee.
>
> 'The court is being asked to adjudicate on the Part 36 offer of before it [sic] and not hypothetical offers that have not in fact been made. If a Claimant was to make Part 36 offers regarding every item in a bill of costs, the court would undoubtedly exercise its general discretion unfavourably in this regard.
>
> 'In summary on this point, the Claimant made a Part 36 offer in regard to a significant part of proceedings. Had this offer been accepted, the issues would have been narrowed significantly and the parties would have been more likely to settle matters at an earlier stage. This is exactly the spirit in which Part 36 offers and consequences were intended.'

15. As to my provisional view that the Claimants should be penalised in costs for not having disclosed the contract of retainer (see paragraph 6 above), Mr Douglas had this to say:

> 'The Claimant submits that it should not be subject to a 25% reduction regarding the non-disclosure of the CFA. The Defendant did not show any good reason to challenge the validity of the retainer and, the Claimant submits, was simply fishing. The Claimant should not be put to task of redacting and disclosing a document containing commercially sensitive information merely to indulge a challenge without merit. When considering the amount of litigation which Irwin Mitchell [the Claimant's solicitors] carries out, this task would be more onerous than may first appear.
>
> 'In accordance with the above and the Claimant's attempt to narrow the issues by way of Part 36 as discussed above, the Claimant submits it would be unjust to penalise the Claimant with a deduction to costs which are already capped to £1,500.00.'

16. Thus, there are two issues I must decide; firstly, there is the question of whether the Claimants should be entitled to the benefit of having beaten the Offer (and in particular, whether they should be entitled to an 'additional amount'), and secondly, there is the question of whether it would be appropriate to visit any form of penalty on the Claimants for having not given voluntary disclosure of the conditional fee agreement. I deal with each in turn, but first I set out the relevant law relating to Part 36 offers in detailed assessment proceedings.

The law relating to the form and content of Part 36 offers in detailed assessments

17. The form and content of Part 36 offers in detailed assessments is governed by CPR, r 36.5 as modified by CPR, r 47.20(4). When the requisite modifications are made, CPR, r 36.5 reads as follows:

'36.5 (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 [paying party] will be liable for the [receiving party'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.

(Rule 36.7 makes provision for when a Part 36 offer is made.)

(2) Paragraph (1)(c) does not apply if the offer is made less than 21 days before the start of a [detailed assessment hearing].

[…]

(4) A Part 36 offer which offers to pay or offers to accept a sum of money will be treated as inclusive of all interest until—

(a) the date on which the period specified under rule 36.5(1)(c) expires; or

(b) if rule 36.5(2) applies, a date 21 days after the date the offer was made.'

18. Where the offer is made by a paying party, the following provisions apply: '[A] Part 36 offer by a [paying party] to pay a sum of money in settlement of a claim must be an offer to pay a single sum of money' (see CPR, r 36.6, as modified by CPR, r 47.20(4)). This, however, does not apply in this case as the Offer was made by the receiving party. In any event, it was not an offer to settle: it was merely an offer in respect of an issue.

The law relating the 'injustice test' in the context of receiving parties' Part 36 offers

19. Where a receiving party has beaten his or her offer, then unless the court considers that it would be unjust to make such an award, he or she will be entitled to the benefits of Part 36 (see CPR, r 36.17(4)). This test—namely, whether it would be unjust to make an award—is often referred to as the 'injustice test'.

20. I summarise my understanding of the law relating to the injustice test in detailed assessment proceedings in the following way (and in doing so, I refer to authorities concerning Part 36 offers made in other types of proceedings):

i) ***The burden is on the party seeking to rely on injustice***: I note that both Andrew Baker J and Warby J have explained that the burden is on the party who seeks to persuade the court that an award would be unjust (see *Tiuta Plc v Rawlinson*

& Hunter (a firm) [2016] EWHC 3480 (QB), at [14] and *Optical Express v Associated Newspapers (Costs)* [2017] EWHC 2707 (QB), at [11] respectively). For the reasons set out immediately below, that burden is a heavy one.

ii) ***'Formidable obstacle':*** Briggs J has said that 'the burden … to show injustice is a formidable obstacle' (see *Smith v Trafford Housing Trust* [2012] EWHC 3320, at [13(d)]. This was cited with approval by Gross LJ in *Briggs v CEF Holdings Ltd* [2017] EWCA Civ 2363, at [20]) and was also adopted by Eder J (see *Ted Baker plc v AXA Insurance UK plc* [2014] EWHC 4178 (Comm), at [16], [17] and [23]).

iii) ***Specific factors to be taken into account:*** CPR, r 36.17(5) gives specific guidance as to the factors that the court ought to take into account. Those factors are:

a) the terms of any Part 36 offer;

b) the stage in the proceedings at which any Part 36 offer was made, including, in particular, how long before the assessment 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.

I pause here to note that that these factors relate either to the terms and content of the offer in question, or to the circumstances in which it was made and considered. They make no mention of the factors extraneous to the offer.

iv) ***The requirement to look at the terms of the offer:*** In a similar vein, I note that in *Cashman v Mid Essex Hospital Services NHS Trust* [2015] EWHC 1312 (QB) at [24] Slade J has explained that when applying the injustice test, it is the terms of the offer that are relevant, not the level of the costs claimed or the amount disallowed on assessment.

v) ***Harshness of results:*** Eady J has explained that while a judge may consider the effect of CPR Part 36 to be harsh, that fact would not be a reason for denying the offeror the benefits of having made the offer (*Downing v Peterborough & Stamford Hospitals NHS Foundation Trust* [2014] EWHC Civ 4216 (QB), at [61] *et seq*, *per* Eady J).

vi) ***The need to take into account all the relevant factors:*** Black LJ has said that the 'factors specifically identified [in CPR, r 36.17(5)] as relevant cast quite a wide net on their own but they are not the only matters that fall for consideration and [that] anything else which is relevant must be considered as well' (see *SG v Hewitt* [2012] EWCA Civ 1053, at [29]). Indeed, Vos C has explained that the

court is required to take into account all of the relevant circumstances: see *OMV Petrom SA v Glencore International AG* [2017] EWCA Civ 195, at [25].

vii) ***Disaggregation:*** I note that both Vos C and Slade J have explained that the factors that the court may take into account will not necessarily be the same for each of the benefits under CPR 36.17(4): see *OMV Petrom SA v Glencore International AG* [2017] EWCA Civ 195, at [25] and *Cashman* at [19]. Indeed, Sir Colin Mackay has explained that the injustice test is to be (or at least may be) applied individually to each of those benefits rather than globally; this means that it is open to the court to allow the offeror the advantage of as many or as few of those benefits as would be appropriate on the facts of the case in hand: see *RXDX v Northampton Borough Council* [2015] EWHC 2938 (QB) at [8] and [9].

21. In summary, when applying the injustice test in a detailed assessment in which a party has 'beaten' a Part 36 offer, the following principles will apply: the court must recognise that the offeree must shift a 'formidable obstacle' in order to satisfy the injustice test; the court should take into account all the relevant circumstances, but its principal focus should be on the terms and content of the offer (and the circumstances in it was made and considered) rather than the outcome of the assessment; and, where appropriate, when applying the injustice test to each of the benefits in CPR, r 36.17(4), the court may take into account factors specific to each of those benefits.

The nature of the 'additional amount'

22. Given the nature of the Offer, I must form a view as to whether the court has jurisdiction to allow only a part of the benefit under CPR, r 36.17(4)(d), namely, the 'additional amount'. Put otherwise, I must decide whether the court is able to make an award that is not the full 'additional amount' if the injustice test has been met.

23. CPR, r 36.17 reads as follows:

> (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—
>
> (a) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;
>
> (b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;
>
> (c) interest on those costs at a rate not exceeding 10% above base rate; and
>
> (d) provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount, which shall not exceed £75,000, calculated by

> applying the prescribed percentage set out below to 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—
>
> | *Amount awarded by the court* | *Prescribed percentage* |
> |---|---|
> | Up to £500,000 | 10% of the amount awarded |
> | Above £500,000 | 10% of the first £500,000 and (subject to the limit of £75,000) 5% of any amount above that figure. |

24. There can be no doubt that the court has a degree of discretion in relation the benefits under CPR, r 36.17(a) and (c), this being because the rules expressly provide for this (see the reference to 'on the whole or part' sub-rule (a) and 'not exceeding' in sub-rule (c)). Sub-rule (d), on the other hand, contains no such references. Indeed, it is couched in seemingly mandatory terms and refers to '*the* prescribed percentage' (my emphasis). This invites the question of whether the 'additional amount' is an all-or-nothing affair.

25. I have to confess that I have found this to be a difficult point. I have been assisted by the careful analysis of a similar issue by Master McCloud in *JLE v Warrington & Halton* Hospitals *NHS Foundation Trust* [2018] EWHC B18 (Costs). I have taken into account all of the authorities referred to in Master McCloud's judgment, but I note that Master McCloud appears not to have been referred to *Cashman* (this being I case a deal with at paragraph 27 below).

26. The authors of *Cook on Costs 2019* have this to say on the topic (at [20.18]):

> '[T]he "additional amount" is an all or nothing sum, but … the court must not refuse to order it simply because it believes that some of the "additional amount" is merited, but not all of it. The claimant is either entitled to the additional amount or not, and if he is, it has to be the full amount.'

27. This appears not to be the authors expressing their own views, but to be their interpretation of Slade J's judgment in *Cashman*. In particular, it is—I believe—their interpretation of the following paragraph (namely, [25]):

> 'The making of an order of the level required by CPR 36.14(3)(d) was decided as a matter of policy as explained in the *Jackson Report*. Under the previous regime it was considered that a Claimant was insufficiently rewarded and the Defendant insufficiently penalised when the Claimant has made an adequate Pt 36 offer. In my judgment the Master fell into the

> temptation referred to by Sir David Eady in para 61 of *Downing* of making an exception by not making an award under CPR 36.14(3)(d) not because he considered the making of such an award unjust but because he thought it unjust to make an award of the required amount, 10% of the assessed costs. The Master considered it would not have been unjust to award an additional amount based on the difference between the Pt 36 offer and the sum of costs allowed on assessment. However this is not the regime specified in CPR 36.14(3)(d).'

28. My reading of this paragraph (and of *Cashman* as a whole) is that Slade J found that it would not be appropriate to reduce or adjust the 'additional amount' on the grounds that the prescribed percentage and method appears overly generous to the receiving party. This is consistent with the principle referred in paragraph 20.v) above. In my view, Slade J's comments say little about whether the court is able to allow a reduced 'additional amount' for other reasons (such as the nature of the offer).

29. I note that in *Thinc Group Ltd v Jeremy Kingdom* [2013] EWCA Civ 1306, Macur LJ had this to say (at [22]):

> 'There is no merit in [counsel's] argument that the judge should have regarded the terms of CPR 36.14 (2) and (3) [the then equivalents of CPR, rr 36.17(3) and (4)] to mean that he must consider that his discretion as to costs at this stage was fettered by a bi-polar evaluation of "unjust" to mean that the successful party receives their costs on an indemnity basis or not and thereby fell into error by apportioning costs in percentage terms and on an indemnity basis for the relevant period. The phrase "unless it considers it unjust to do so" in CPR 36.14 (2) and (3) bear the obvious interpretation of "unless and to the extent of".'

30. I take the view that Macur LJ's comments are binding upon me in the sense that I must read the phrase 'unless it considers it unjust to do so' in CPR, r 36.17(4) as bearing the interpretation of 'unless and to the extent of'. I bear in mind that Macur LJ was dealing with a benefit that was not the modern-day 'additional amount'; indeed, the-then iteration of the Part 36 did not provide for any 'additional amount' at all. That may be so, but the CPR are delegated legislation, and Parliament is ordinarily presumed to legislate in the knowledge of, and having regard to, relevant judicial decisions (see, for example, *Lachaux v Independent Print Ltd* [2015] EWHC 2242 (QB)). Put otherwise, previous judicial authority forms part of the background context against which any new legislation is made (see *Barras v Aberdeen Steam Trawling and Fishing Co Ltd* [1933] AC 402 at 411).

31. I am not able to discern anything in the present iteration of CPR Part 36 to suggest that Macur LJ's interpretation is any less obvious. In view of the above, I take the view that correct interpretation of the words 'unless it considers it unjust to do so' continues to be that it bears the interpretation of 'unless and to the extent of'.

32. In view of the above, I conclude that the court does have the power to allow only a part of the 'additional amount', but that it may not do so simply because it regards the prescribed amount to be excessive. One only has to state that conclusion to realise that,

in practice, the latter principle will tend to diminish (if not negate) the former. There may be circumstances, however, where the nature of the offer itself or the circumstances in which it was made would make it unjust to award the full amount; where this is so, it would (in theory at least) be open to the court to make a partial award.

33. That may be so, but I very much bear in mind the policy referred to by Slade J in *Cashman* (see paragraph 27 above). If I am correct in saying that the court has the power to allow partial awards, I take the view that that power should be exercised in a way that enhances rather than detracts from the effectiveness of the offer in question. Put another way, if—by reason of the nature of the offer or the circumstances in which it was made or considered—the court believes it would be unjust to award the 'additional amount' in full, it would be open to the court to consider making a lesser award. It would not, however, be appropriate to reduce the 'additional amount' simply because it appears to be overly generous to the receiving party.

34. On the unusual facts of this case (where the only benefit that that Claimants seek is the 'additional amount'), I take the view that if I conclude that the injustice test has been met, I ought to consider whether I should allow a lesser amount. This is because the Claimants would otherwise necessarily be deprived of the entirety of the benefit of having made the Offer.

Analysis: the effect of the Offer

35. In my judgment, the Offer met all the requirements of it being a Part 36 offer; I also take the view that it was in respect of an 'issue that arises' (within the meaning of CPR, r 36.5(1)(d)). As such, the Offer was a Part 36 offer.

36. This then invites the question of whether it has been 'beaten'. I note that PD 47, para 19 gives the following guidance:

> '19 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.'

37. I take the view that this guidance is of little relevance on the facts of this matter. Firstly, the Offer was not 'an offer to settle'; it was merely and offer in respect of 'an issue that arises'. And secondly, it was—in my judgment—obvious that the offer was not intended to be inclusive of any of the monies referred to in PD 47, para 19. It would have been otiose for this to have been expressly stated.

38. For all these reasons, I believe that the Offer was a Part 36 offer and that it has been 'beaten'. This then invites the question of whether the Claimants are entitled to any of the benefits of having made the Offer, and in particular, whether the Claimants are entitled to an 'additional amount' within the meaning of CPR, r 36.17(4)(d). In this regard, I apply the principles as set out in paragraphs 19 to 34 above.

39. I find that the Defendant has easily shifted the 'formidable obstacle' of proving injustice in this case. This is for the following reasons:

i) Firstly, whilst I recognise that Part 36 is—by its very nature—adjectival law that is intended to be used in such a way as to allow an offeror to garner tactical advantage, the court must guard against it being used for the purposes of mere gamesmanship. An offer in respect of 'an issue that arises' may well allow an offeror to obtain certain benefits (such as an award of costs in respect on that issue on the indemnity basis), but those benefits could not, in my view, be allowed to propagate so as to extend well beyond the issue that is the subject of the offer. The suggestion that a paying party ought to pay an 'additional amount' on the *whole* of a receiving party's profit costs merely because he or she did not accept an offer in respect of only one component of those costs (namely, the hourly rates) is, in my view, unreal. It would be unjust to do what the Claimants ask.

ii) Secondly, the court has to take into account its own resources. I cannot for one moment believe that offers of this type would genuinely encourage settlements; it is far more likely that they would lead to unprepossessing and time-consuming disputes about what effect they ought to have. Detailed assessments (and provisional assessments in particular) would become unwieldy if the court were routinely to allow parties to rely on offers such as the Offer.

iii) Thirdly, if the Offer had been accepted, it would have had almost no bearing on the way in which the parties dealt with the matter. Given the fact that the Offer was made after Points of Dispute and Replies had been drafted, the only effect that acceptance would have had would have been to cause the court to record the agreed hourly rates rather than to adjudicate upon them; in the context of a provisional assessment, this would have saved almost no court time at all, nor would it have prevented the parties from incurring costs of any significant amount.

40. Having reached this conclusion, I need to consider whether I should allow an 'additional amount' that is only part of the full award (this being for the reasons referred to in paragraphs 20.vii) and 22 to 34 above). I have no hesitation in saying that even if I am right in saying that the court has a jurisdiction to make a partial award, I should decline to do so, this being for the reasons set out in paragraph 39 above.

41. I would like to add, for the sake of completeness, that I have taken into account the fact that the hourly rates were one of the more contentious issues in this case. This was not a case, however, in which that was the only issue between the parties (or even the only significant issue). As such, I do not believe that that is a factor that carries much weight.

42. For all these reasons, I reject the Claimants' claim for an 'additional amount'.

Analysis: the costs in general

43. On reflection, I believe that the Claimants are right to say that it would be wrong to visit a not insubstantial costs penalty on them for having declined to give voluntary disclosure of their conditional fee agreement. This is because this was a provisional assessment, and whilst the Claimants' decision meant that the court had to spend—or, some would say, waste—time adjudicating on an issue that ought never to have been contentious, it was, for all practical purposes, costs neutral from the perspective of the

parties. This is because on the facts of this case the costs associated with that issue are likely to have been very modest.

44. I remain critical of the Claimants, however. I am unpersuaded by the notion that the conditional fee agreement contained 'commercially sensitive information'; it contained nothing of the sort.

45. The court provides a valuable service by carrying out provisional assessments, yet it does so with only limited and stretched resources; parties ought to recognise this and cooperate with each other in order to minimise the burden that they place upon the court. I remain of the view that the Claimants have failed to do so in this case.

Conclusion

46. In view of the above, I allow costs of £1,500 (plus VAT and the court fee of £743). I decline to award the Claimants any additional amount pursuant to CPR, r 36.17(4)(d).