Neutral Citation Number [2023] EWHC 3050 (SCCO)
Case No: SC-2021-APP-000080

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
Strand, London WC2A 2LL

Date: 28/11/2023

Before :

COSTS JUDGE LEONARD

- -

Between :

REEM ZUHRI	**Claimant**
- and -	
VARDAGS LIMITED	**Defendant**

- -
- -

Shaman Kapoor (instructed by **the Defendant**)
The Claimant not attending

Hearing dates: 18 and July 2023

- -

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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COSTS JUDGE LEONARD

Costs Judge Leonard:

1. This judgment addresses the application of Part 36 of the Civil Procedure Rules ("CPR") to this court's assessment, under section 70 of the Solicitors Act 1974 and rules 46.9 and 46.10 of the CPR, of bills rendered by the Defendant solicitor to its client, the Claimant.

2. The relevant statutory provisions, for the purposes of this judgment, are as follows.

3. Section 70 of the Solicitors Act 1974 empowers the court to order the assessment of a solicitor's bill of costs on the application of a solicitor or a solicitor's client. Section 70, subsections (7), (9) and (10) provide:

> "(7) Every order for the assessment of a bill shall require the costs officer to assess not only the bill but also the costs of the assessment and to certify what is due to or by the solicitor in respect of the bill and in respect of the costs of the assessment...
>
> (9) Unless—
>
> (a) the order for assessment was made on the application of the solicitor and the party chargeable does not attend the assessment, or
>
> (b) the order for assessment or an order under subsection (10) otherwise provides,
>
> the costs of an assessment shall be paid according to the event of the assessment, that is to say, if the amount of the bill is reduced by one fifth, the solicitor shall pay the costs, but otherwise the party chargeable shall pay the costs.
>
> (10) The costs officer may certify to the court any special circumstances relating to a bill or to the assessment of a bill, and the court may make such order as respects the costs of the assessment as it may think fit."

4. CPR 44.1, under the heading "Interpretation and application", reads, insofar as material:

> "(1) In Parts 44 to 47, unless the context otherwise requires…
>
> 'costs' includes fees, charges, disbursements, expenses, remuneration, reimbursement allowed to a litigant in person under rule 46.5 and any fee or reward charged by a lay representative for acting on behalf of a party in proceedings allocated to the small claims track…
>
> 'detailed assessment' means the procedure by which the amount of costs is decided by a costs officer in accordance with Part 47…
>
> 'paying party' means a party liable to pay costs…
>
> 'receiving party' means a party entitled to be paid costs…

(2) The costs to which Parts 44 to 47 apply include –

(a) the following costs where those costs may be assessed by the court-

(i) costs of proceedings before an arbitrator or umpire;

(ii) costs of proceedings before a tribunal or other statutory body; and

(iii) costs payable by a client to their legal representative; and

(b) costs which are payable by one party to another party under the terms of a contract, where the court makes an order for an assessment of those costs…"

5. For the purposes of this judgment I should highlight that Parts 44 to 47 of the CPR do not apply in their entirety to each of the categories of costs referred to at subparagraph (2) of CPR 44.1. For example CPR 46.9 and 46.10, together with part 6 of Practice Direction 46, incorporate specific provisions, both procedural and as to the applicable principles, for assessment between a solicitor and a client which have no application to the any other kind of costs. Similarly, CPR 44.5 incorporates specific provisions for costs payable under a contract, expressly excluding a contract between a solicitor and a client.

6. The application of the provisions of CPR 44-47 (and CPR 47 in particular) to assessments between a solicitor and a client was considered in some detail by Mr Justice Morris in *John Poyser & Co Ltd v Spencer* [2022] EWHC 1678 (QB), discussed below.

7. It is not necessary for present purposes to set out in full the provisions of CPR 46.9 and 46.10, but , as it is referred to in *John Poyser & Co Ltd v Spencer*, I should mention paragraph 6.8 of Practice Direction 46, which reads:

"The provisions relating to default costs certificates (rule 47.11) do not apply to cases to which rule 46.10 applies."

8. CPR 47.20 reads as follows:

"(1) The receiving party is entitled to the costs of the detailed assessment proceedings except where –

(a) the provisions of any Act, any of these Rules or any relevant practice direction provide otherwise; or

(b) the court makes some other order in relation to all or part of the costs of the detailed assessment proceedings…

(3) In deciding whether to make some other order, the court must have regard to all the circumstances, including –

(a) the conduct of all the parties;

(b) the amount, if any, by which the bill of costs has been reduced; and

(c) whether it was reasonable for a party to claim the costs of a particular item or to dispute that item.

(4) The provisions of Part 36 apply to the costs of detailed assessment proceedings with the following modifications –

(a) 'claimant' refers to 'receiving party' and 'defendant' refers to 'paying party';

(b) 'trial' refers to 'detailed assessment hearing';

(c) a detailed assessment hearing is "in progress" from the time when it starts until the bill of costs has been assessed or agreed;

(d) for rule 36.14(7) substitute "If such sum is not paid within 14 days of acceptance of the offer, or such other period as has been agreed, the receiving party may apply for a final costs certificate for the unpaid sum.";

(e) a reference to 'judgment being entered' is to the completion of the detailed assessment, and references to a 'judgment' being advantageous or otherwise are to the outcome of the detailed assessment.

(5) The court will usually summarily assess the costs of detailed assessment proceedings at the conclusion of those proceedings.

(6) Unless the court otherwise orders, interest on the costs of detailed assessment proceedings will run from the date of default, interim or final costs certificate, as the case may be.

(7) For the purposes of rule 36.17, detailed assessment proceedings are to be regarded as an independent claim."

9. Part 36 of the CPR provides that offers of settlement which comply with the requirements of Part 36 (a "Part 36 offer") will have specified consequences. The following extracts are relevant.

10. CPR 36.1:

> "This Part contains a self-contained procedural code about offers to settle made pursuant to the procedure set out in this Part ('Part 36 offers').

11. CPR 36.2(3):

> "A Part 36 offer may be made in respect of the whole, or part of, or any issue that arises in… a claim, counterclaim or other additional claim…"

12. CPR 36.6(1):

> "… a Part 36 offer by a defendant to pay a sum of money in settlement of a claim must be an offer to pay a single sum of money."

13. CPR 36.17 sets out the consequences of failing to better an opponent's Part 36 offer. Where a claimant fails to obtain a judgment more advantageous than a defendant's part 36 offer then the court must, unless it considers it unjust to do so, order that the claimant he the defendant's costs from the date of expiry of the offer, with interest.

14. Where a judgment against a defendant is at least as advantageous to a claimant as the proposals contained in that claimant's Part 36 offer, then the court must, unless it considers it unjust to do so, order that the claimant is to receive interest on the whole or part of any sum of money awarded to the claimant at up to 10% above base rate for some or all of the period from the date of expiry of the offer; costs on the indemnity basis from that date; interest on those costs at a rate not exceeding 10% above base rate; and an additional amount added to monies recovered by the claimant from the defendant, variable according to amount and subject to an overall limit, but normally 10%.

John Poyser & Co Ltd v Spencer

15. In *John Poyser & Co Ltd v Spencer* Morris J allowed an appeal against a Costs Judge who had found that CPR 44.11 (under which the court can penalise unreasonable or improper conduct) applied to the assessment of solicitors' bills under CPR 46.9 and 46.10.

16. In finding that it did not, it was necessary for Morris J to consider the extent to which CPR 47, which governs the assessment of costs between parties in civil litigation, can be said to apply to an assessment between solicitor and client. His conclusion was that almost all of it does not.

17. Morris J's key reasoning is set out at paragraphs 79 to 84 of his judgment and it includes two specific conclusions that are particularly pertinent to the issue I have to address. The first is that CPR 47.20 has no application to an assessment under section 70 of the Solicitors Act. The second is that such an assessment is not a "detailed assessment" as defined in CPR 44.1.

18. I have set out below an extract from Morris J's judgment, in which I have highlighted the most pertinent passages for present purposes:

> 79. … the master relied upon CPR r 44.1(2) , stating that: "The costs to which Parts 44 to 47 apply include … (iii) costs payable by a client to their legal representative." However, properly interpreted, those words do not mean that each and every provision in each of CPR Pts 44 to 47 inclusive applies to each of the different types of costs enumerated in CPR r 44.1(2)(a)(i) to (iii) and (b). Rather the effect of that provision is to identify the different types of costs to which some or all of the provisions of CPR Pts 44 to 47 might apply. CPR Pts 44 to 47 covers a number of different costs regimes, with differing provisions and rules. It is not, and cannot be, the case that all the provisions in those four parts apply to each and every type of assessment identified in CPR r 44.1(2). It is clear that some provisions of these rules apply only to some of the particular types of assessment (and in particular to party and party assessments).

> 80. Secondly, the master relied upon the proposition that CPR Pt 47 applies to CPR rr 46.9 and 46.10… CPR rr 46.9 and 46.10 , and in particular, 46PD.6 set out a detailed and comprehensive procedure and rules for a Solicitor/Client Assessment. The sole reference in 46PD.6 to CPR Pt 47 is in paragraph 6.8 of 46PD.6. The master placed reliance upon paragraph 6.8. However it does not follow from the fact that, pursuant to one specific provision of 46PD.6, one particular provision in CPR Pt 47 does not apply to a Solicitor/Client Assessment under CPR r 46.10 , all other provisions of CPR Pt 47 do apply to a CPR r 46.10 assessment.
>
> 81. In the course of argument, counsel for the Claimant took the court through each of the provisions of CPR rr 47.1 to 47.20 . The vast majority of those provisions can have no possible application to a Solicitor/Client Assessment; for example, CPR r 47.4 as to venue cannot apply because CPR r 67.3 makes express provision for the venue of a Solicitor/Client Assessment; CPR rr 47.5 to 47.10 apply only to costs payable by one party to another or payable to a charity; CPR rr 47.11 to 47.15 also apply only to costs payable by one party to another (and in any event the subject matter of CPR rr 47.13 and 47.14 is covered by CPR r 46.10 and 46PD .6). **CPR r 47.20 can have no application to Solicitor/Client Assessment, in the face of the 1/5th rule in section 70(9) of the Solicitors Act. The only provisions which might apply to a Solicitor/Client Assessment are those relating to interim and final certificates in CPR rr 47.16 and 47.17.**
>
> 82. … I drew to the attention of counsel for the Claimant to the judgment of Asplin LJ in *Ainsworth v Stewarts Law LLP* [2020] 1 WLR 2664 , a Solicitor/Client Assessment case… Where there is nothing in 46PD.6 or there is a gap, it is permissible to consider CPR Pt 47 , but that is not the same thing as saying that the whole of Part 47 applies to Solicitor/Client Assessment or that the latter constitutes a "detailed assessment" within Part 47 .
>
> 84. In these circumstances, it is not possible to say either specifically that a Solicitor/Client Assessment can proceed "in accordance with Part 47 "—(**it follows that such an assessment is not a "detailed assessment" within the definition in CPR r 44.1(1))**; nor that, more generally, CPR Pt 47 applies to CPR rr 46.9 and 46.10.

The Part 36 Offer

19. This case has a long history. The Defendant, in December 2020, issued CPR Part 7 proceedings against the Claimant (QB-2020-004337) for the outstanding balance of unpaid bills. The Claimant, in February 2021, applied under CPR Part 8 for an order under section 70 of the Solicitors Act 1974 that the Defendant's bills be assessed.

20. Over a period of time the parties agreed that the Part 7 proceedings be stayed pending the outcome of the Claimant's application for a Solicitors Act assessment; that the Solicitors Act assessment should proceed; and to a stay of the Solicitors Act assessment so that the parties could engage in Alternative Dispute Resolution.

21. On 4 October 2022, the Defendant gave notice to the Claimant of its intention to apply to restore the Solicitors Act assessment and made a Part 36 offer, inclusive of interest to date, at a figure lower than the amount at which the bill was subsequently assessed. The offer referred to both the Part 7 proceedings and the Solicitors Act assessment, and made it clear that if the offer were not accepted and the Defendant (the claimant in the Part 7 proceedings) were to obtain judgment at least as advantageous as the offer, then the Defendant would seek against the Claimant the consequences attendant upon a defendant's failure to beat a claimant's Part 36 offer.

22. In November 2022, no settlement having been achieved, the Defendant applied to restore the detailed assessment proceedings.

23. When the Claimant applied for a Solicitors Act assessment, she was represented by Payne Hicks Beach, solicitors. By 4 October 2022, judging from the correspondence, the Claimant would seem to have been acting in person. On 23 November 2022, she filed notice to that effect.

24. A hearing for directions was listed for 11 January 2023. The Defendant sent an email to the court asking for the hearing to be relisted on one of three specified dates between 24 February and 20 April 2023. Unsurprisingly, the Defendant did not agree. The hearing remained listed for 11 January 2023, on which date the court made an order providing for the detailed assessment of the Defendant's bills and setting a timetable for points of dispute by 4 March, replies by 29 March and the filing of a request for a detailed assessment hearing, for which dates were reserved on 18 and 19 July.

25. The Claimant did not comply with the timetable set by the court. She would appear to have instructed legal advisers about the beginning of March 2023, and on 14 March Kain Knight, Costs Lawyers, filed a notice of acting for the Claimant. On 4 April 2023, on the Claimant's application, the court made an order amending the timetable to provide for inspection by Kain Knight of the Claimant's files, following which points of dispute and replies were to be (and were) served.

26. On 1 June 2023 the Defendant (rather than the Claimant, as one might expect given that she had applied for a Solicitors Act assessment) filed a formal request for a detailed assessment hearing, which was confirmed for the July dates.

27. On 13 July, three working days before the hearing, Kain Knight applied to be removed from the record for the Claimant. An order was made to that effect which provided for the Claimant, in accordance with CPR 6.23, to file with the court an address for service within the United Kingdom, pending which she was to be served by email. The Claimant did not file (and has still not filed) such an address for service and the assessment proceeded in the absence of the Claimant or any legal representative. The Defendant's bills were assessed at £173,627.42. That is 98.6% of the amount billed. The costs of the detailed assessment proceedings were awarded to the Defendant and assessed summarily at £23,538.50.

28. At the conclusion of the detailed assessment, the Defendant raised the matter of the Part 36 offer and I queried its application to a Solicitors Act assessment. I gave directions for the parties to file and serve submissions on the point, the Defendant first. The Defendant filed submissions: the Claimant did not.

29. At the time of preparing this judgment, the court has received from the Claimant emails indicating an intention to apply to set aside the orders made by the court in July 2023.

The Defendant's Submissions

30. Mr Kapoor for the Defendant submits, by reference to CPR 36.6(1), *AF v BG* [2009] EWCA Civ 757 and *Huntsworth Wine Co Ltd v London City Bond Ltd* [2022] EWHC 97 (Comm), that the Defendant's offer of 4 October 2022, in the context of this Solicitors Act assessment, is properly to be regarded as a claimant's Part 36 offer. Further, notwithstanding *John Poyser & Co Ltd v Spencer*, the Defendant is he submits entitled to the benefits conferred by CPR 36 upon a claimant which has bettered its own Part 36 offer.

31. As to the application of CPR 36 the Defendant's argument, as I understand it, is this. This court has, by virtue of section 70(10) of the Solicitors Act, a discretion to depart from the "one-fifth rule" embodied in section 70(9) if special circumstances exist. The conduct of the Claimant, who has largely failed so cooperate with the assessment process which she herself requested, justifies a finding of special circumstances. Even if it does not, the Defendant's Part 36 offer does.

32. Given that special circumstances exist, the court is not bound by the "one-fifth rule" at section 70(9) of the Solicitors Act. CPR 36 then can, and should, engage as a wholly procedural operation, not a contractual one (CPR36.6(1) and *Gibbon v Manchester City Council* [2010] EWCA Civ 726). Even a direct conflict with statute would and should not defeat the operation of Part 36 (*Orton v Collins* [2007] EWHC 803 (Ch).

33. The ethos of the CPR and the Jackson Reforms introduced in 2013 support the application of Part 36 to Solicitors Act assessments. An editorial note in the *White Book* (2023 edition, at 36.2.3.2) acknowledges the stated intention of the Rule Committee to the effect that all parties in litigation would be able to use Part 36 to make settlement offers. Where a party makes an offer that is intended to be a Part 36 offer but a point arises as to its construction, the court should prefer the construction, if possible, that would give effect to its stated intention and allow the offer to be effective: *C v D* [2011] EWCA Civ 646.

Conclusions

34. Mr Kapoor has referred me to commentary in *Friston on Costs* (fourth edition, at 36.80) and in the ninth edition of Practical Law's *Costs & Funding following the Civil Justice Reforms*: (page 698, paragraph 9-23). The author of *Friston on Costs* doubts that a Part 36 offer made in the course of a Solicitors Act assessment would have the consequences specified by CPR 36:

> "..because s 70 of the Solicitors Act 1974 provides its own checks and balances, and is, in many ways, its own self-contained code; one could easily argue that it would subvert the intention of Parliament, as expressed in s 70, to add an adjective or gloss that either diluted or bolstered the one-fifth rule. In any event, there would be serious practical problems with applying CPR, Part 36: who, for example, would be regarded as the

> claimant? Would it be the solicitor (who claims the costs) or the client (it claims a reduction in those costs)? If the client were the claimant, then how would the court calculate the 'additional amount'?... "

35. The author of paragraph 9-23 in *Costs & Funding following the Civil Justice Reforms* has this to say:

> "There is a lack of clarity in this regard. There is a primary statutory provision dealing with the incidence of costs at the conclusion of a statutory assessment of solicitor-client costs, namely s.70(9) of the Solicitors Act 1974.
>
> This provision cannot be, and has not been, displaced by CPR Pt 36 and continues to apply. However, that provision is subject to s. 70(10), whereby the court can depart from the otherwise mandated outcome if there are "special circumstances"… It seems to be increasingly accepted that the making of effective offers by the parties to the assessment is capable in principle, dependent upon the particular facts, of amounting to a special circumstance, and this would appear to fit with the ethos of both the CPR generally and the Jackson reforms in encouraging the making of offers to compromise disputes at an early and less costly stage.
>
> Accordingly, the making of a Part 36 offer may, on the facts of a case, be capable of amounting to a special circumstance, but the automatic provisions of CPR rr 36… do not appear to apply because they conflict with s. 70(9), which is the primary statutory provision of express application.
>
> Whether a successful Part 36 offer therefore attracts any greater benefit than a Calderbank offer is open to argument. Given that the full rubric of Pt 36 cannot reply, and Pt 36 is intended to be a complete and self-contained code, it seems more likely that a successful Part 36 offer should be treated as an admissible offer under the court's general discretion… assuming that the automatic consequences under s. 70(9) do not apply."

36. I agree with the commentary quoted above.

37. CPR 47.20, as a part of the 2013 reforms, applied CPR part 36 to detailed assessments between parties to litigation, as conducted under CPR 47. Given the findings of Morris J in *John Poyser & Co Ltd v Spencer*, it cannot be said that it also imported those provisions into Solicitors Act assessments between solicitors and their clients, as conducted under CPR 46.9 and 46.10.

38. Mr Kapoor suggests that the court's conclusions in *John Poyser & Co Ltd v Spencer* are not consistent with the provision at CPR 44.1(2), that CPR 44 to 47 apply to costs payable by a client to a legal representative. I am unable to accept that. Morris J was careful to explain the proper interpretation of that provision, with which I respectfully agree.

39. Mr Kapoor also invites me to distinguish this case from *John Poyser & Co Ltd v Spencer* on a number of grounds, none of which appear to me to be material other than that the focus of Morris J's judgment was on the applicability of CPR 44.11,

rather than CPR 36, and that it was not, on the facts of that case, incumbent upon the court to consider the issue of "special circumstances".

40. The point determined in *John Poyser & Co Ltd v Spencer* was indeed that CPR 44.11 has no application to Solicitors Act assessments, but Morris J's conclusions to the effect that a Solicitors Act assessment is not a "detailed assessment" as defined by CPR 44.1, and that CPR 47.20 has no application to Solicitors Act assessments, seem to me to be an inextricable part of the logic that led into his primary conclusion. Even assuming that it is open to me to disagree with Morris J, I do not.

41. It seems to me that (apart from the practical difficulties identified in *Friston on Costs*) one possible reason why CPR 36 has been imported into CPR 47, but not into the provisions for Solicitors Act assessments at CPR 46, is that it is not possible to reconcile the provisions of CPR 36 with subsections 70(9) and 70(10) of the 1974 Act.

42. Self-evidently, the "one-fifth" rule at subsection 70(9) is entirely inconsistent with the application of CPR 36. Whilst I agree that the making of a Part 36 offer (or, for that matter, a Calderbank offer) could justify a finding of special circumstances that would allow the court, pursuant to subsection 70(10) to disapply the "one-fifth" rule, it is quite another matter to make the leap to concluding that CPR 36 must then apply.

43. Where CPR 36 applies, the court's jurisdiction to depart from its prescribed consequences is limited to cases in which that would be unjust. That seems to me to be wholly inconsistent with the power conferred upon the court by subsection 70(10), in special circumstances, to "… make such order as respects the costs of the assessment as it may think fit".

44. I am unable to accept that *Orton v Collins* furnishes authority for the proposition that CPR 36 applies regardless of any conflict with primary legislation. The difficulty addressed by the court in *Orton v Collins* was that a Part 36 offer made by a claimant and accepted by a defendant did not comply with the formal requirements of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 for a valid contract for the sale or other disposition of an interest in land, in that not all the agreed terms were set out in a single document. The claimant sought to escape from his Part 36 offer on that basis.

45. The defendants, in seeking to hold the claimant to his offer, expressly disclaimed the proposition that Part 36 could override section 2 of the 1989 Act (paragraph 44 of the judgment of Peter Prescott KC refers). Their case was that Part 36 could create substantive obligations independently of the law of contract.

46. At paragraphs 51 to 53 of his judgment Peter Prescott KC expressed as conclusions in this way:

> "In my judgment, if parties who are before the court choose to employ machinery prescribed by the court's rules in order to settle their dispute, they must be taken to submit to the consequences. Namely, that if the offer is accepted the court may enforce it. A party who makes a valid Part 36 offer, or one who accepts it, must be taken to be binding himself to submit to those consequences…

> As to those consequences, I interpret Part 36 in the light of the overriding objective (CPR r 1): the object is to deal with cases justly which includes saving expense, proportionality, expedition, fairness and saving court time. I therefore hold that it need not be a contract that is being enforced and that the regime of Part 36 , while it may well give rise to a contract under the general law touching offer and acceptance, does not depend upon contract law… Infringement of human rights there is none. Nobody is forcing a party to make or accept a Part 36 offer. The obligation that arises is not primarily contractual. It is sui generis. It is part of the court's inherent jurisdiction, now regulated and clarified in Part 36 , "to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner". The administration of justice includes addressing the settlement of disputes.
>
> It follows that, subject to the separate point about mistake, rectification or rescission, which is to be decided elsewhere, the claimant and the defendants arrived at an enforceable settlement. The court has power to order the parties to sign a single document incorporating the terms of the settlement."

47. In short, it was open to the court to order that the parties, having reached a settlement under CPR 36, make that settlement effective by complying with the requirements of the primary legislation. There was no question of Part 36 negating or superseding those requirements. Secondary legislation such as the CPR cannot overwrite primary legislation.

48. Nor, I would add, can it be said in this case that both parties "chose to employ" Part 36 to resolve their dispute: the Defendant's Part 36 offer was not accepted by the Claimant.

49. Nor does *C v D* seem to me to assist the Defendant. *C v D* furnishes authority to the effect that an offer which was expressed to be a Part 36 offer should be construed so far as reasonably possible as complying with Part 36, so that it will be effective rather than ineffective. It does not furnish authority for applying Part 36 where Part 36 (given the provisions of the primary legislation) can have no application.

50. For those reasons, my finding is that the Defendant's Part 36 offer cannot have the consequences sought by the Defendant. Had the "one-fifth rule" operated against the Defendant in this case, the offer could have offered a sound ground for making a finding of special circumstances and awarding the costs of the assessment process to the Defendant, but the rule has operated in favour of the Defendant, which has already been awarded those costs.

51. It occurs to me that it might still be open to the Defendant to revive the Part 7 proceedings, and to take advantage of its Part 36 offer in the context of those proceedings, but that is not a matter for me.