Case No: F04LV884

IN THE COUNTY COURT
SITTING AT LIVERPOOL

35 Vernon Street
Liverpool
L2 2BX

Hearing Date: 16th December 2019

Before:

DISTRICT JUDGE BALDWIN

(sitting as a Regional Costs Judge)

- -

Between:

CAROLINE TURNER **Claimant**

-and-

P COLE

Defendant

- -
- -

Mr Andrew Roy (instructed by Simpkins & Co) for the Claimant
Mrs Sarah Robson (instructed by Horwich Farrelly) for the Defendant

JUDGMENT (Approved)

Introduction and background – preliminary issue in costs only proceedings

1. These are costs only proceedings issued by means of a Part 8 claim form issued on 11th April 2019. I have already given permission for the Claimant to amend paragraph 10 of the Details of Claim to substitute reference to the relevant offer of settlement, namely a non-part 36 compliant time-limited net offer of £60,000, to which I will refer in due course, with formal amendment being dispensed with.

2. The Acknowledgment of Service was filed dated 24th of April 2019, indicating an intention to contest the amount of costs claimed but not the making of an order for costs and was accompanied by a letter same date from the Defendant's solicitors setting out the Defendant's position as the applicability of fixed costs, rather than costs to be assessed on the standard basis ("conventional costs"), the latter being the position contended for by the Claimant.

3. By Order of 17th June 2019, Deputy District Judge Hornby made a standard Part 8 costs only order. However, for present purposes the hearing has proceeded, on the basis of an amended consent order dated 12th July 2019, by way of an attended hearing, in which I received oral submissions from counsel, having the benefit of their skeleton arguments, together with a bundle of correspondence and authorities referred to.

4. The original claim arose out of a road traffic accident on 14th June 2015. Pursuant to the Pre-action Protocol for Low Value Personal Injury Claims in RTAs, the claim commenced in the Portal, but at some stage dropped out. It became accepted that the value of the claim was likely to be in excess of £25,000 and, ultimately, by means of an email dated 26 June 2017 the Defendant's insurers' underwriter department wrote to the Claimant's solicitors making two offers of settlement in the alternative.

5. The first offer was made pursuant to Part 36 of the Civil Procedure Rules in the sum of £55,000 inclusive of interest but gross of deductible benefits (nil in any event) and an interim payment of £2,000, making an in-hand sum of £53,000.

6. The second and directly relevant offer is that to which I have referred above, namely a time-limited offer of £60,000 net of CRU and interim payments, said to be open for 14 days and specifically then stand withdrawn, if not accepted by 5pm on 10th July 2017. The email concluded,

> "*In addition we will pay your reasonable costs, to be assessed if these cannot be agreed.*"

7. The Claimant, through her their solicitors, responded in time by way of letter dated 4th July 2017 in this fashion,

> "… *we have instructions to accept the time-limited offer indicated within your correspondence of the 26th June 2017.*
>
> *Acceptance of the offer is strictly predicated on the basis as follows:*
>
> 1. *The Claimant does accept the offer of being paid £60,000 net of CRU and interim payments and this payment will be made within 21 days in relation to her claim for personal injury and loss.*
> 2. *In addition, the Defendants will pay the Claimant's legal costs to be* (sic) *detailed assessment if not agreed on the standard basis (and it is strictly accepted by the Defendants that costs will be paid on the standard basis and not in accordance with any portal, fixed costs or predictive costs basis). In terms of costs it is also requested that in* (sic) *interim payment on account of costs be made for the sum of £40,000 ...*
>
> *On the basis that the terms indicated within this correspondence are agreed we look forward* (sic) *hearing from you as a matter of urgency.*"

8. The Defendant's insurer file handler responded by email of 6th July 2017 in this fashion,

> "*Thank you for your letter indicating acceptance, I confirm I will forward a cheque for £60,000 payable to your client immediately.*
>
> *With regard to your costs, in view of the amount of the interim request, I will be instructing costs draughtsmen* (sic) - *I would suspect they would want more detail and I will leave the question of any payments on account of costs to them. If you send me details and I will instruct them at that point.*"

9. Further correspondence was received from the costs draftsman dated 14th September 2017, following receipt of the informal costs schedule and bill of costs. This letter contended for fixed costs pursuant to Section IIIA of Part 45 of the Civil Procedure Rules and contained the following,

> "*Tesco did not subsequently agree any other costs basis being applied, they simply advised that they would be instructing cost draftsmen with regard to the Claimant's costs.*"

10. Thereafter, argument as to the basis of the costs claim has persisted and therefore the issue for my determination today is whether Section IIIA fixed costs or conventional costs apply.

Contracting out of fixed costs

11. It seems to me that this is the first issue sensibly to be decided. The Defendant, through Mrs Robson, contends that the court can (and no doubt should) find that it is not open to the parties to contract out of fixed costs, escaping from the fixed costs regime being highly exceptional. To allow contracting out, therefore, it is argued, would be contrary to the ethos behind the application of fixed costs to these claims and further would be to ignore the wording of the rules, for example at r. 45.29B that, in a claim in scope, "the only costs allowed are" the specified fixed costs and permitted disbursements.

12. She criticises the Claimant's reliance on the case of *Solomon v Cromwell* [2011] EWCA Civ 1584 @ para. 22 as being more applicable to the fixed costs regime under section II of Part 45 as it then was, section IIIA not then being in existence.

13. The Defendant, through Mr Roy, maintains reliance on *Solomon* and the judgment of Moore-Bick LJ,

> " *There is nothing in the Rules to prevent parties to a dispute settling it on whatever terms they please, including as to costs. Section II of Part 45 is concerned with proceedings under rule 44.12A and prescribes what the receiving party is to be allowed by way of costs in such proceedings. I do not think that it is open to the parties by their agreement to expand or limit the court's powers and if the Claimant chooses to proceed under rule 44.12A he will be unable to recover more than the amount for which Section II of Part 45 provides. However, there is no reason in principle why, if parties choose to agree different terms, the agreement should not be enforceable by ordinary process.*"

14. Any suggestion that *Solomon* is to be treated with caution in that regard is put to bed, the Claimant suggests, by its approval in the recent case of *Ho v Adelekun* [2019] EWCA Civ 1988 per Newey LJ @ para. 12,

> "*On the other hand, there is no bar on contracting out of the fixed costs regime. In* Solomon v Cromwell Group plc, *Moore-Bick LJ spoke at paragraph 21 of parties being unable to recover more or less by way of costs than is provided for under the fixed costs regime "subject to any agreement between the parties to the contrary".*"

15. In my judgment, despite the undoubted intentions lying behind fixed costs regimes over time in terms of certainty, I am left in no doubt, in particular as a result of the remarks of the Newey LJ in *Ho*, fortified by those of Males LJ, with which The Chancellor agreed, at paragraph 43,

> "*Mr Mallalieu advanced a powerful argument that… the offer letter indicated an intention to depart from the fixed costs regime. In the end I have concluded, in agreement with Newey LJ, the taking the letter as a whole those words are not sufficiently clear to demonstrate such an intention and are outweighed by other considerations.*"

that it is open to parties to contract out of fixed costs by reaching agreement in that regard. By implication, Males LJ was also, in my view, clearly accepting that departing from or contracting out of fixed costs is permissible and can be found in appropriate cases of sufficient clarity.

16. In addition, I reject Mrs Robson's submissions as to any potential for a material differential between Section II of Part 45 in 2011 and Section IIIA in 2019, as the phrases "the only costs which are to be allowed are" (2011) and "the only costs allowed are" (2019) are materially indistinguishable, in my view. I find that the approach in *Solomon* accordingly holds good and is capable of being applied to these facts.

Supplementary witness evidence

17. The Defendant has filed a witness statement from the Defendant's insurer file handler, namely the author of the correspondence referred to above, Elizabeth Harris, dated 2nd December 2019. In the witness statement she attempts to explain her thinking and actions at the material time.

18. The Claimant, through Mr Roy, has objected to me taking the contents of the witness statement into account, referring the court to *Arnold v Britton* [2015] UKSC 36 @ para. 15, wherein Lord Neuberger quoted Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd,*

> "*When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been*

available to the parties would have understood them to be using the language in the contract to mean",

and indicated, at factor (vi) following, that subjective evidence of any party's intentions ought to be disregarded.

19. Once again, although Mrs Robson suggests that I might derive some assistance from the witness statement insofar as it does not specifically represent Ms Harris's intentions, as I indicated in the course of the hearing, insofar as anything may be discerned within the witness statement as attempting to give evidence of intention, I find that it is appropriate to disregard the same.

The agreement between the parties

20. Mr Roy asks me to accept that it is not open to me to make a finding that there was no agreement between the parties such as to vitiate the settlement entirely. Mrs Robson disagrees and says that this is not akin to a detailed assessment situation wherein a party might be restricted to that which is contained within the points of dispute. However, in my view, in that the Defendant has conceded by means of the Acknowledgement of Service that a costs order should be made, only disputing the amount, it must follow that I am only concerned with what agreement was made as to the basis of costs to be ordered, or more specifically, whether I should and can be satisfied that there was an agreement to contract out of fixed costs and I accept that I should not import other issues not properly reserved by the Defendant.

21. Mr Roy asks the court to apply the "reasonable person" test and refers the court to the first four of the seven factors as set out in paragraphs 16 to 20 of *Arnold*. From these, I derive the following propositions:-

    (i) The importance of the language used is paramount, particularly not to be devalued by applying commercial common sense;

(ii) Natural meaning can sensibly be departed from where there is a lack of clarity in wording but the clearer the wording, the more persuasive is the reason required for any temptation to so depart;

(iii) Any application of commercial common sense cannot be retrospective;

(iv) Imprudence or the wisdom of hindsight should not easily displace natural meaning and the court should not impose a meaning which it feels the parties should have applied, rather than any reality, however ill-advised any such resulting construed agreement might appear to have been.

22. Mrs Robson asks the court to interpret the correspondence as follows:-

(i) an alternative offer was made by the Defendant on 26th June 2017 in the net sum of £60,000 together with reasonable costs within the parameters of the fixed costs regime;

(ii) an acceptance of that offer was effected by the first substantive paragraph of the Claimant's letter of 4 July 2017;

(iii) a subsequent attempt was made to vary or impose further terms upon the concluded agreement by means of suggestions as to costs in the following paragraph of that letter, which attempt should be seen as without effect given the already concluded agreement.

23. Mr Roy in effect accepts the proposition at paragraph 22(i) above, but asks the court to read the letter of the 4th July 2017 as a whole, as opposed to hiving off certain parts and asks the court to conclude, in terms of the use of the phrase "strictly predicated", that the effect of this letter was not to accept the Defendant's alternative offer without more, but rather to make a counter-offer based upon the premise of accepting £60,000 in damages. He then continues, that the only reasonable construction to be placed upon the Defendant's reply of 6th July 2017 is that that counter-offer was accepted, with only issues as to the quantification of conventional costs outwith the fixed costs regime, including issues as to interim payments, left to be dealt with by the costs draftsman.

24. In fact, suggests Mr Roy, although at first blush any acceptance of conventional, as opposed to fixed costs, might appear to lack commercial sense or be imprudent (which he argues should be ignored in terms of any relevance as to construction in any event), in fact, the certainty achieved by arriving at a settlement at an early stage i.e. "the closing of the book" was a materially discernible benefit to the Defendant in any event, as opposed to proceeding towards a litigated claim which may or may not ultimately be exposed to a higher level of conventional costs as a result of allocation to the multi track.

25. I find myself entirely unable to accept that a reasonable person with all the relevant background knowledge at the time of entering into the contract would be likely to reach the conclusion contended for by Mrs Robson. In my judgment it is abundantly plain or perfectly clear that the purpose of the letter from the Claimant of 4th July 2017 was to convey a willingness to accept the damages figure of £60,000, strictly conditional, however, upon an agreement by the Defendant to pay conventional as opposed to fixed costs, the same amounting to a counter-offer in so far as conventional costs were not already being offered.

26. Thereafter, the only reasonable construction to be placed upon the reply of 6th July 2017, in my view, is that the confirmation that £60,000 in terms of a cheque would be forwarded forthwith was an acceptance of the entirety of the terms set out in the 4th July letter, the use of the phrase "strictly predicated on" leaving me entirely satisfied that the situation under examination is that of an entire and not a divisible contract.

27. Further, it seems to me in any event that Ms Harris was at all times representing that she had authority to make and/or accept offers in terms of the principle and basis of costs, and that the role of the costs draftsman was to be limited to any question of payment on account, which question could only conceivably arise in the context of an agreement to pay conventional costs. In my view, there is nothing whatsoever in the email of 6th July 2017 which raises any concern as to the condition of acceptance, namely conventional costs, accompanied, as I find, by an additional, but not conditional, request for an interim payment. Had any such concern been present, I would have expected to have seen language to the

effect of a rejection in its entirety of any reference by the Claimant to anything other than portal, fixed or predictive costs, as the case may be. The absence of a response of this type is entirely instructive as to a meeting of minds as to conventional costs, in my judgment.

Conclusion

28. I therefore have no hesitation in concluding, applying the test in and propositions derived from *Arnold* that the parties have, by concluded agreement, contracted out of the fixed costs regime by the effect of the correspondence between them between 26th June 2017 and 6th July 2017 and therefore that the Claimant is entitled to her costs of the original claim to be determined by detailed assessment on the standard basis, in default of agreement.

29. It also seems to me that the costs of this hearing are already compromised in principle and to a certain extent in amount by paragraph 5 of the consent order of 6th September 2019, subject to any further submissions which might sensibly be entertained.

John Baldwin

Regional Costs Judge

19th December 2019