Case No: K08LV035

IN THE COUNTY COURT AT LIVERPOOL

35 Vernon Street
Liverpool
L2 2BX

Date of hearing: 19th December 2024

Before:

DISTRICT JUDGE BALDWIN

(sitting as a Regional Costs Judge)

Between:

SOKAR BEK

-and- **Claimant**

ALI SIMSEK

Defendant

Mr Ben Williams KC (instructed by Bond Turner) for the Claimant (receiving party)
Miss Sophia Ashraf (instructed by DWF LLP) for the Defendant (paying party)

JUDGMENT

(Approved)

Introduction and background – oral review of a decision on provisional assessment that Fixed Recoverable Costs ("FRC") apply to a non personal injury claim which settled without proceedings by way of Part 36 before 1st October 2023, where costs-only proceedings were issued after 30th September 2023

1. The Claimant requested, pursuant to CPR rr. 47.15(7) – (10), this oral hearing on my "on paper" decision on the "Point of Principle: Application of Fixed Costs" in the Points of Dispute in this costs assessment arising out of the Part 36 settlement of a claim for damages, not including a claim for personal injuries ("PI"), occasioned by the Defendant reversing into the Claimant's parked car on 22nd November 2022.

2. By way of the briefest summary, it is the Claimant's contention that FRC do not apply, as the case was settled by way of Part 36 acceptance prior to 1st October 2023 without need for "proceedings" on the substantive claim, and therefore that the Claimant's costs are to be assessed on the standard basis, whereas the Defendant argues that "proceedings" were issued post-30th September 2023 by way of costs-only proceedings and therefore that the FRC provisions bite.

3. I have benefited from the hearing bundle filed by the Claimant, Mr Williams' skeleton argument and oral submissions from both Counsel, for which I am grateful.

4. My (hopefully uncontroversial) approach to such a hearing is to consider matters afresh and not to examine matters in the context of whether my original decision was reasonably reached.

Chronology and context

5. The following important dates are noted:-

22/11/22	The Claimant's car is damaged by the Defendant, but there are no PI occasioned
16/8/23	Defendant's Part 36 offer pre-proceedings in the sum of £6,893 to settle the claim, in full and final settlement after taking into account an earlier interim payment of £23,119.20. The Defendant utilised Court Form N242A, specifying that if the offer was accepted within 21 days of service, the Defendant would "be liable for the Claimant's costs in accordance with r. 36.13"
23/8/23	Claimant by letter accepted the offer in the context of an effective global settlement of £30,012.20 "in addition to costs and disbursements." An interim payment of £2,000 was requested to be set off against "any future assessment/agreement in respect of…costs", which interim payment was not in fact paid by way of response
1/10/23	The Civil Procedure (Amendment No.2) Rules 2023 ("the 2023 SI") come into force ("the commencement date")
18/12/23	Quantification of costs has not been agreed, so Claimant commences Part 8 "costs-only" proceedings, seeking a standard basis assessment and including the above letter seeking an interim payment to evidence settlement, albeit not formally seeking an order for an interim payment in the proceedings
3/1/24	Defendant by way of Acknowledgment of Service indicates no contest to the making of a costs order, but contest to quantification
18/1/24	DDJ Heseltine makes a costs order in the Claimant's favour together with authority to assess and orders the Defendant to pay £2,000 by way of interim payment

31/1/24	N252 commencement of assessment process – bill of costs totalling £6,539.26 inclusive of VAT, before the Court Fee on assessment
15/4/24	N258 request for detailed assessment hearing
11/9/24	After two adjournments due to incomplete documentation on file, provisional assessment by DJ Baldwin

Applicable Rules

6. The relevant transitional provisions provided by the 2023 SI are as follows:

"**Transitional provisions**

2.—(1) Subject to paragraphs (2) and (3), in so far as any amendment made by these Rules applies to—

(a) allocation;

(b) assignment to a complexity band;

(c) directions in the fast track or the intermediate track; or

(d) costs,

those amendments only apply to a claim where proceedings are issued on or after 1st October 2023.

(2) The amendments referred to in paragraph (1) only apply—

(a) to a claim which includes a claim for personal injuries, other than a disease claim, where the cause of action accrues on or after 1st October 2023; or

(b) to a claim for personal injuries, which includes a disease claim, in respect of which no letter of claim has been sent before 1st October 2023…"

7. The 2023 SI goes on to introduce FRC for the Fast Track and for a new Intermediate Track, by way of a totally revised Part 45 of the CPR together with the Tables of Fixed Costs to be found at PD45. Thus, by way of application of r. 2(1)(d) of the 2023 SI, it can be seen that the catalyst for the application of FRC to "costs" of relevant claims not including PI is that proceedings must have been issued on or after 1st October 2023.

8. Prior to the commencement date, r. 36.13 relevantly provided:-

"(1) …where a Part 36 offer is accepted within the relevant period the claimant will be entitled to the costs of the proceedings (including their recoverable pre-action costs) up to the date on which notice of acceptance was served on the offeror…

(3) Except where the recoverable costs are fixed by these Rules, costs under paragraphs (1) and (2) are to be assessed on the standard basis if the amount of costs is not agreed."

9. Costs-only proceedings are provided for by r. 46.14:-

"46.14

(1) This rule applies where –

(a) the parties to a dispute have reached an agreement on all issues (including which party is to pay the costs) which is made or confirmed in writing; but

(b) they have failed to agree the amount of those costs; and

(c) no proceedings have been started…

(2) Where this rule applies, the procedure set out in this rule must be followed.

(3) Proceedings under this rule are commenced by issuing a claim form in accordance with Part 8.

(4) The claim form must contain or be accompanied by the agreement or confirmation.

(5) In proceedings to which this rule applies the court may make an order for the payment of costs to be assessed and/or, where appropriate, may determine the fixed costs…"

and by PD46 para. 9:-

"Costs-only proceedings: rule 46.14

9.1 A claim form under rule 46.14 should not be issued in the High Court unless the dispute to which the agreement relates was of such a value or type that proceedings would have been commenced in the High Court.

9.2 A claim form which is to be issued in the High Court at the Royal Courts of Justice will be issued in the Costs Office.

9.3 Attention is drawn to rule 8.2 (in particular to paragraph (b)(ii)) and to rule 46.14(3). The claim form must –

(a) identify the claim or dispute to which the agreement relates;

(b) state the date and terms of the agreement on which the claimant relies;

(c) set out or attach a draft of the order which the claimant seeks;

(d) state the amount of the costs claimed.

9.4 Unless the court orders otherwise or Part 45 applies the costs will be treated as being claimed on the standard basis.

9.5 The evidence required under rule 8.5 includes copies of the documents on which the claimant relies to prove the defendant's agreement to pay costs.

9.6 A costs judge or a district judge has jurisdiction to hear and decide any issue which may arise in a claim issued under this rule irrespective of the amount of the costs claimed or of the value of the claim to which the agreement to pay costs relates. The court may make an order by consent under paragraph 9.8, or an order dismissing a claim under paragraph 9.10 below.

9.7 When the time for filing the defendant's acknowledgement of service has expired, the claimant may request in writing that the court make an order in the terms of the claim, unless the defendant has filed an acknowledgement of service stating the intention to contest the claim or to seek a different order.

9.8 Rule 40.6 applies where an order is to be made by consent. An order may be made by consent in terms which differ from those set out in the claim form.

9.9 Where costs are ordered to be assessed, the general rule is that this should be by detailed assessment. However when an order is made under this rule following a hearing and the court is in a position to summarily assess costs it should generally do so.

9.10 If the defendant opposes the claim the defendant must file a witness statement in accordance with rule 8.5(3). The court will then give directions including, if appropriate, a direction that the claim shall continue as if it were a Part 7 claim. A claim is not treated as opposed merely because the defendant disputes the amount of the claim for costs.

9.11 A claim issued under this rule may be dealt with without being allocated to a track. Rule 8.9 does not apply to claims issued under this rule.

9.12 Where there are other issues nothing in rule 46.14 prevents a person from issuing a claim form under Part 7 or Part 8 to sue on an agreement made in settlement of a dispute where that agreement makes provision for costs, nor from claiming in that case an order for costs or a specified sum in respect of

costs but the 'costs only' procedure in rule 46.14 must be used where the sole issue is the amount of costs."

10. In cases which are allocated to the fast track where FRC apply, r. 26.15 provides:

"Assignment within the fast track

26.15. Unless the claim is one for noise induced hearing loss (in respect of which Sections I and IV of Part 28 and Section VIII of Part 45 make provision), the complexity band to which a claim will normally be assigned in the fast track is set out in Table 1.

Table 1

Complexity band 1	Complexity band 2	Complexity band 3	Complexity band 4
(a) road traffic accident related, non-personal injury claims; and	(a) road traffic accident related, personal injury claims which are or should have been started under the RTA Protocol; and	(a) road traffic accident related, personal injury claims to which the RTA Protocol does not apply;	(a) employer's liability disease claims (other than a claim for noise induced hearing loss);
(b) defended debt claims	(b) personal injury claims to which the Pre-action Protocol for Resolution of Package Travel Claims apply	(b) employer's liability (accident) and public liability personal injury claims;	(b) complex possession and housing disrepair claims;
		(c) possession claims;	(c) property and building disputes;
		(d) housing disrepair claims; and	(d) professional negligence claims; and
		(e) other claims for a sum of money, whether the sum is specified or unspecified, except claims that fall under complexity band 1(b)	(e) any claim which would normally be allocated to the fast track, but is nonetheless complex"

albeit that housing disrepair claims are currently out of scope in any event, pursuant to r. 45.1(4).

11. In cases which are or would normally be allocated to the fast track, r. 45.44 provides:-

"Amount of fixed costs

45.44. For so long as the claim is allocated neither to the small claims track, the intermediate track or the multi-track, the only costs allowed in any claim which would normally be or is allocated to the fast track are

(a)the fixed costs in Table 12; and

(b)the disbursements as set out in Section IX of this Part."

and r. 45.45 is a further aid to applying Table 12.

12. Table 12 itself provides as to stage A.:-

TABLE 12: rule 45.44 – amount of fixed costs in the fast track

	Complexity Band 1	**Complexity Band** 2	**Complexity Band** 3	**Complexity Band** 4
A. If Parties reach a settlement prior to the claimant issuing proceedings under Part 7				
(1) Where damages are not more than £5,000	£ Nil	The greater of £681 or £124 + an amount equivalent to 20% of the damages	£1,136 + an amount equivalent to 17.5% of the damages	In each case— £2,684 + an amount equivalent to 15% of the damages + £526 per extra defendant
(2) Where damages are more than £5,000, but not more than £10,000	£ Nil	£1,342 + an amount equivalent to 15% of damages over £5,000	£2,271 + an amount equivalent to 12.5% of damages over £5,000	
(3) Where damages are more than £10,000	£599	£2,374 + an amount equivalent to 10% of damages over £10,000	£3,097 + an amount equivalent to 10% of damages over £10,000	

13. The Intermediate Track is treated sufficiently similarly for me not to need to replicate the same here.

14. The scope of Part 45 generally, including the ability to contract out is set out in r. 45.1:

"Scope of this Part

45.1.—(1) This Part sets out the amounts to be allowed for costs in the categories of claim to which it applies.

(2) In the categories of claim to which this Part applies, the court has a discretion as to—

(a)whether costs are payable by one party to another;

(b)when they are to be paid; and

(c)whether to make an order in the form contemplated by rule 44.2(6)(a).

(3) Where—

(a)a claim is one to which Section IV, Section VI, Section VII or Section VIII of this Part applies; and

(b)the parties agree or the court orders that a party is entitled to costs,

subject to rule 44.5 and to the application of any rule in those Sections or this Section by which costs are to be allowed, disallowed, increased or reduced, the court may only award costs in an amount that is neither more nor less than the fixed costs allowed by the applicable Section and set out in the relevant table in Practice Direction 45, unless the paying party and the receiving party have each expressly agreed that this Part should not apply."

Preliminary concession

15. Mr Williams conceded from the outset that he could not sustain any argument flagged up in his skeleton that there was already a deemed costs order at the date of settlement in this case, due to the effect of r. 44.9(2), namely that deemed costs orders upon acceptance of a Part 36 offer only result when proceedings have already been issued, which was not the case here.

Claimant's arguments

16. Mr Williams' main point is that FRC do not and, indeed, never apply to non-PI claims which settle without recourse to substantive proceedings. There is, he suggests, a settled expectation in both PI claims and, exceptionally, housing disrepair claims, that pre-proceedings costs will be paid in cases which settle

without troubling the Court, but not otherwise in non-PI claims. This, he suggests, explains why PI and housing disrepair are treated differently by the transitional provisions and the changes to Part 45.

17. He asks the Court to focus on the use of the word "claim" in "a claim where proceedings are issued" in r. 2(1) of the 2023 SI. The only claim which can be being referred to here, it is said, is the claim for substantive relief upon which no proceedings have been issued. Costs-only proceedings are only issued when the claim has settled and cost-only proceedings are themselves not referred to in the rules as a "claim" other than by reference to the use of a Part 8 claim form. The sole purpose of the costs-only procedure is to avoid having to sue on the compromise, see PD45 para. 9.12.

18. Mr Williams prays in aid, as persuasive, the editors' answer to Q6 in the "Fixed Costs; Indemnity Costs; Litigants in Person" chapter of the 10th ed. of the adjunct to the White Book, "Costs & Funding following the Civil Justice Reforms: Questions & Answers":

"Q6. - The notes to the new rules deal with transitional arrangements, and at para.10, state that "The new FRC will apply to claims where proceedings are issued on or after 1st October 2023, save for personal injury". The question arises as to what happens to non-PI claims that settle prior to issue, both for claims that begin before and after 1 October 2023. In the first instance there will be claims which began before 1 October 2023, but settle after that date without the necessity of issuing proceedings. Is it the case that the FRC will not apply to these claims? Going forward, there will be matters which begin after 1 October 2023, but again settle without the need to issue proceedings. On the strict reading of the rules, these claims will not fall within the FRC as proceedings were not issued after 1 October 2023. Is this correct and if not, where in the rules does it state how these costs are brought within the FRC regime? If it is intended only for matters which begin after 1 October 2023 but settle without proceedings to be within the regime, what is the cut off point for such matters to be included? We foresee satellite litigation as to whether work was commenced on or before 1 October 2023…

(Answer:)

7-124
Non-PI claims which have not been issued at all will not be caught by the post-30 September 2023 regime… The trigger is the issue of the claim. …

Simply put: not issued and not a PI claim, then the post-30 September 2023 regime does not apply."

19. As such, Mr Williams submits that the language of the 2023 SI is very clear on a natural reading and that it would have been very easy to say that fixed costs would apply to unissued non-PI claims, if that had been intended.

20. Mr Williams then moves to the undesirability of retrospectivity. He brings this into sharp focus, in the context of any suggestion that the mischief in this case could have been avoided simply by issuing the cost-only proceedings before the commencement date, by giving an example of a case which settled in the same manner, but late on 30th September 2023. In such a case, it would seem, on the Defendant's argument, that in default of agreeing costs, "proceedings" by way of costs-only proceedings would have to be issued, thereby resulting in FRC becoming inevitably applicable. This would surely have required a saving provision, he postulates. Alternatively, if the Defendant's position were correct, the CPRC should have spelled this out.

21. Mr Williams cautions strongly against the propriety of any analysis which alters entitlements retrospectively. Where the Defendant seeks to rely upon the post-commencement date minutes of the Civil Procedure Rules Committee which appear supportive of the Defendant's position, this is not permissible, he urges. He notes that, although some external aids to construction might be permissible, especially where formal in nature, the ex post facto views of those responsible for drafting the 2023 SI are to be accorded no weight, see Lord Phillips CJ in *R v Abu Hamza* [2007] QB 659 @ 34,

> "The statement of a parliamentary draftsman as to the meaning words were intended to bear is not a legitimate aid to construction…"

22. The Defendant's interpretation, continues Mr Williams is a retrospective attempt to alter the Claimant's accrued substantive rights as to non-fixed costs via Part 36, as disapproved of by Willes J in *Phillips v Eyre* (1870) LR QB 1, 12, but also would seem to be contrary to the Claimant's "ECHR" rights, pursuant to Article 1 to the First Protocol,

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law…"

23. The Court, says Mr Williams, should rightly be sympathetic to the Claimant's position, as flagged up by the Defendant in the Point of Dispute, due to the unfairness which clearly arises by way of significant costs reduction, which no-one was anticipating could only be solved by hundreds of Part 8 cost-only cases being issued towards the end of September 2023.

24. Further, Mr Williams criticises HHJ Sephton in *Bi v Tesco Underwriting* (28/8/24 unreported), a first instance decision on this point, for treating the retrospectivity issue as unobjectionable due to its procedural nature, suggesting that this is clearly wrong due to the impact of the Defendant's stance upon the Claimant's existing rights.

25. Clarity, says Mr Williams, is only to be found by adopting the Claimant's interpretation, the Defendant's position being a mostly unlikely interpretation until the CPRC minute was published. He sets out a comprehensive set of points as to why "proceedings" should be confined to mean "the substantive claim" in paragraph 25 of his skeleton argument.

26. Finally on his main point, Mr Williams tackles any suggestion that there is legitimate evidence of an intention to apply fixed costs to unissued non-PI cases (see r. 26.15 Table 1 Complexity band 1). He argues that PI claims may exist in all four complexity bands and in any event that a PD should not be used to construe the 2023 SI, referencing the subordinacy of a Practice Direction, see *Leigh v Michelin Tyre* [2004] 1 WLR 846 (CA) @ 19 – 20.

27. By way of alternative submission, Mr Williams contends that the parties in any event have contracted out on the basis that, as at the acceptance of the Part 36 offer, fixed costs did not apply therefore the parties must be taken to have agreed upon an entitlement to assessed costs, which cannot be altered retrospectively.

28. Finally, if all else fails, Mr Williams invokes the exceptionality jurisdiction provided for by r. 45.9,

Defendant's arguments

29. For the Defendant, Miss Ashraf focussed on the transitional provisions which make specific reference to amendments applying to costs. There is no further

guidance to be drawn as to the meaning of "proceedings", she noted, but she argued that a claim includes a claim for costs and that costs may be pursued by way of proceedings, if not agreed. The issuing of the Part 8 claim here, she urged, was the issuing of proceedings within the meaning of the 2023 SI, which was intended to introduce a "bright line" to divide the old from the new, as argued in *Asmat* and accepted by HHJ Sephton. If such a cut-off point results in some tough outcomes, that is simply an inevitability of the bright line approach and not an indication that it was not intended. Similarly to *Asmat*, in this case, also, the Claimant in fact had ample time to bring costs-only proceedings prior to the cut-off date.

30. Insofar as the CPRC minute is concerned, Miss Ashraf contended that it is at least as, if not more authoritative than the Editorial views relied upon by Mr Williams, being "out of the horse's mouth".

31. An element of retrospectivity was in any event clearly designed, said Miss Ashraf, as any non-PI claim where work was done before 1st October 2023 but which was not issued until after 30th September 2023 will capture that work within FRC, whereas previously whenever r. 36.13 was engaged, assessed costs would have followed.

32. The analysis for the Court, it is said, is as simple as determining that "proceedings" must mean the issue of any sort of proceedings referable to a claim. No distinction should be drawn between proceedings on the substance of a claim and proceedings as to costs, after all costs-only proceedings would not exist if there was no original "claim".

33. In response to my question as to whether any other example might exist as to fairness or unfairness resulting from a degree of retrospectivity being introduced, Miss Ashraf suggested that the introduction of QOCS might have had a similar effect.

34. Insofar as the Claimant's reference to the ECHR is concerned, Miss Ashraf pointed out that any interpretation would be subject to "any laws enacted by a State" which she said was a complete answer, any alleged deprivation not being "unlawful".

35. As to the Part 36 acceptance, Miss Ashraf contends that it was no more than an offer and acceptance pursuant under r. 36.13 and no further meeting of minds beyond that. Miss Ashraf drew specifically upon the judgment of HHJ Sephton in *Asmat* at paras 16 ff. If it was intended to do more in terms of contracting out of any fixed costs risks, then the acceptance should have spelled that out, which it did not do and the Claimant has therefore been caught by his own inaction, both in terms of the content of the acceptance and the failure to issue cost-only proceedings until after 30th September 2023. If rights at the time of settlement had been intended to be safeguarded, then something would have been said to the effect. The lack of any such safeguard supports the Defendant's position.

Discussion

36. After careful consideration and despite the initially attractive submissions of Mr Williams, I have come to the conclusion that FRC do apply to the assessment of the costs of the original claim.

37. I find myself in disagreement with the proposition that rule 2 of the 2023 SI is drafted as it is, solely or even predominantly to take into account the long-standing prior position of no basic recognition of pre-proceedings recoverable costs in most non-PI cases, to be contrasted with the accepted opposite position in claims for PI and, as contended for, with the proposition that this is thereby intended to be continued into the FRC regime from 1st October 2023 onwards.

38. Firstly, if that were the case, there would have been no need to differentiate between sub-paras (2)(a) and (2)(b) of the rule. This differentiation suggests to me that the primary consideration in the provision of these transitional provisions was to permit more time for PI practioners, including a nuanced approach to disease claims, to adjust to the impact of the new FRC regime, not least in terms of the new intermediate track, where costs previously would have been at large upon allocation to the lower end of the multi-track.

39. Secondly, I reject Mr Williams' contention that the new FRC regime continues to recognise that fixed costs should not be applied to non-PI cases which settle without recourse to proceedings on the substantive claim. As he acknowledges

himself at paragraph 30 of his skeleton, this appears to be given the lie by the very wording of Table 12 section A,

> "If Parties reach settlement prior to the Claimant issuing proceedings under Part 7"

which, in complexity band 1, would result in the recovery of £599 in fixed costs. His answer, that the reference to settling prior to the issuing of proceedings is only there because of PI claims, is unsustainable by reference to the applicability of complexity band 1 in Table 1 to r. 26.15, namely it is said to apply to:

> "(a) road traffic accident related **non-personal injury** (my emphasis) claims; and
>
> (b) defended debt claims"

both of which are non-PI situations. Further, his assertion that PI claims may exist in all 4 bands is certainly not supported by the wording of Table 1, where PI claims are only referenced in bands 2 – 4 and are seemingly consequentially excluded from band 1.

40. Thirdly, I am also unpersuaded that the above analysis is an impermissible use of a Practice Direction in order to construe the 2023 SI, as cautioned against in *Leigh v Michelin Tyre*, which I find to be distinguishable in these circumstances. Table 12, I am satisfied, is far from being an independent matter not referred to in the rules, as the 'costs estimates' under consideration in *Leigh* were found to be. These Tables are directly referenced in the rules, see e.g. rr. 45.44 and 45.45, and are inextricably linked with the process of determining the very fixed costs provided for by the rules, for which the transitional provisions are required. The mere fact that the vehicle chosen for the provision of the level of costs is a Practice Direction should not, in my judgment, detract from the fact that the Court must sensibly look at the whole FRC package, in order properly to construe the 2023 SI.

41. It therefore also follows from my above analysis that it is useful to note the reference to "issuing proceedings under Part 7" in Table 12 section A.

Reference to Part 7 proceedings could easily have been made in the 2023 SI but was noticeably not so done. Alternatively, rule 2(1) could have said,

> "...those amendments only apply to a claim [~~*where proceedings are*~~] issued on or after 1st October 2023."

but it noticeably does not do so.

42. Whilst Mr Williams' overall point as to the objectionable nature of retrospectivity is a good one, I am content, as subsequently appears, that the impact in this case of the acceptance of the Defendant's construction of the 2023 SI is not really one of retrospective application at all.

43. Mr Williams accepted, as he had to do, that this case was not one where there was a deemed costs order. He notes that the crystallising of the costs entitlement upon acceptance of the Part 36 offer is a crystallisation of an entitlement to costs pursuant to r. 36.13, to include FRC where applicable (r. 36.13(3)). It is instructive to be precise, however, in observing that r. 36.13(1) does not actually say, "the Claimant **is** (my emphasis) entitled to the costs", but rather says, "the Claimant **will be** (again, my emphasis) entitled to the costs". This, to my mind, is no accident, as it has to reflect the differing situations, dependent upon whether there is a deemed costs order or not. In a r. 44.9(1)(b) situation, a costs order will be deemed to have been made, upon a right to costs arising upon a Part 36 acceptance, without more, when substantive proceedings are already issued, giving rise to an immediate crystallised entitlement to costs pursuant to that order. The corollary of that, in my judgment, is that in a situation where substantive proceedings are not already issued and a Part 36 offer is accepted, where no full agreement is reached, the right to costs or strict entitlement will only be crystallised by way of a Court order for costs in favour of the Claimant upon the Part 8 costs-only order being issued. A paying party might, for example, successfully contest the Part 8 proceedings by means as envisaged by PD46 paras 9.7 and 9.10. It is of course open to the parties to acknowledge any inevitable right or entitlement and to reach overall agreement set against that background without the need of recourse to costs-only proceedings, but this is not, in my view, at a point where entitlement has technically crystallised in fact. Therefore, in my judgment, the strict entitlement to costs in this case only crystallised within the meaning of r. 36.13

on 18th December 2023 and thus not retrospectively insofar as the application of r. 36.13(3) is concerned.

44. Further, in my judgment, Mr Williams derives no assistance from the editorial observations referred to at paragraph 18 above, as his argument there is somewhat circular, namely he relies upon the editorial phrase "claims which have not been issued **at all** (my emphasis)", which simply leads back to the question, "does this include the issuing of costs-only proceedings or not?" Also, as Ms Ashraf notes, these are themselves, axiomatically, only editorial observations, to which I would add, made at a time prior to the testing of this issue, due to its novelty.

45. Next, I reject Mr Williams' reliance upon the nature of costs-only proceedings as supportive of his position. His submission, in particular, that costs-only proceedings should not be regarded as a relevant claim having been issued because, barring the claim form, they are not referred to as a "claim" per se is very difficult to sustain upon close examination of PD46 para. 9, where paras 9.6, 9.7, 9.10 and 9.11 all refer either to "the claim" or "a claim". It seems to me, also, that it is simply unarguable that a Part 8 claim is anything other than "a claim". In any event, the proper emphasis, in my view, is not whether these are circumstances where the claim before the Court is the material claim, but rather whether the "proceedings" which have been issued are material to finalising the underlying claim. If so, then the substantive claim can properly be described, in my judgment, as a claim where proceedings have been issued. In other words, as here, where proceedings have been required in order to avoid the impasse reached between the parties whereby the Claimant was being prevented from moving to having his costs assessed, agreement not being capable of being reached, the claim becomes "a claim where proceedings (of a Part 8 costs-only nature) are issued" in order that the costs of the original claim can be resolved.

46. There can be no issue, for clarity (although not relied upon by Mr Williams), in my judgment, that the 2023 SI should be construed in this situation as only referring to the costs of the costs-only proceedings themselves. This is clearly wrong, as Part 8 costs-only proceedings are never, in my experience, allocated to track and PD46 para. 9.11 refers. They are outwith FRC in my view.

47. Overall, therefore, in my judgment and in the light of my above analysis, the 2023 SI can safely and should be plainly read as meaning that if proceedings of any sort are required to conclude a claim, to include obtaining an order for the costs of that claim, then if those proceedings are or were issued after 30th September 2023, FRC apply, if otherwise applicable.

48. I accept from Mr Williams that it would not be appropriate, in reaching this decision, to place material reliance upon the minute of the CPRC for the reasons advanced by him and I am careful not to do so accordingly.

49. On the other hand, I reject his contention that the balance of the 2023 SI is of assistance in construing para. 2(1): "costs" in general are singled out in r. 2(1)(d) and thus there is no cogent reason why the reference at sub-paras (a) – (c) to other matters which are clearly only applicable to Part 7 proceedings should directly influence the proper interpretation of matters flowing from sub-para. (d), in my view. Similarly, as Mr Williams argues fundamentally for r. 2(1) to be seen as treating claims differently from r. 2(2), it is difficult to accept that the interpretation of the word "claim" in r. 2(1) is persuasively to be derived from its clear usage in r. 2(2).

50. The monetary impact of my decision is no doubt significant compared to the prospect of an award of assessed costs. This may be seen as hard upon the receiving party, particularly if the situation in issue was not generally or largely foreseen (or foreseen as potentially problematic), but historically it has been accepted that the introduction of fixed costs other costs measures such as QOCS can have "swings and roundabouts" type results. This does not mean that provisions should always be interpreted to avoid painful impacts, if a proper construction leads to that result. As noted by HHJ Sephton is *Asmat* and in the instant case also, the Claimant had ample opportunity to issue protective costs-only proceedings in the lead up to the commencement date, which would have avoided this particular painful outcome.

51. I should also recognise that there is also an important longer-lasting strategic impact of this decision, which can be seen in this way. Going forward, anyone looking to settle a non-PI claim which would normally be allocated to the fast or intermediate track by way of Part 36 acceptance would find themselves seemingly in general inevitably having to accept FRC in principle, whether

proceedings are issued or not, because the paying party can force the issue by refusing to agree anything else, thereby making proceedings, and FRC as a consequence, nearly always inevitable in any event. Again, however, this does not seem to be inimical to a regime which itself provides a framework of FRC which actually anticipates such cases settling without Part 7 proceedings being required.

52. Further, it would be open to a claimant to contract out of FRC by reaching an agreement to that effect, now enshrined in r. 45.1(3)(b) and previously acknowledged by the Court of Appeal in *Ho v Adelekun* (No. 1) [2019] Costs L.R. 1963. This, in itself, it seems to me, would be a sufficient answer to Mr Williams' scenario of settlement late in the day on 30th September 2023. Any such settlement would have had to have and could have included within it clear wording amounting to contracting out and, if this issue was as unforeseen as contended for, such agreement should not, at the material time, have been unduly difficult to obtain from a Defendant expecting to pay assessed costs anyway.

53. Turning, thus, to Mr Williams' first fall-back position, I am not persuaded that there was a meeting of minds by way of a concluded agreement to contract out, agreeing with Ms Ashraf on this point. All that was offered by the Defendant was to pay the Claimant's costs pursuant to r. 36.13 generally, to include fixed costs if applicable. The references in the Claimant's letter in response of 23rd August 2023 to "interim payment" and "future assessment", coming as they do after an unequivocal unconditional acceptance of the Part 36 offer at the start of that letter "in addition to costs and disbursements", cannot in any way assist in construing any agreement as including an exclusion of fixed costs, where otherwise applicable. There would have had to have been a clear counter-offer in that regard from the Claimant, thereafter accepted by the Defendant, which is not anyone's case here.

54. Finally, I also reject that it would be appropriate to find any element of exceptionality here, which would be a high bar in any event. Mr Williams himself conceded that there might have had to have been hundreds of sets of protective Part 8 proceedings required to head off this issue, upon the Defendant's construction. I can find nothing exceptional in the circumstances of this case.

Conclusion

55. The decision as to the Point of Principle on provisional assessment stands, albeit that the decision is reached for different reasons.

District Judge John Baldwin

23rd January 2025
