

IN THE COUNTY COURT
AT BRISTOL

Case No: E27YJ162

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

Date: Friday 17th December 2021

Before:

DEPUTY DISTRICT JUDGE NAPIER

Between:

PATRICK JOSEPH MORAN

Claimant

- and -

MRS RACHEL SMITH

Defendant

(AS EXECUTOR OF THE ESTATE OF ARTHUR RAYMOND JONES)

PETER RIDDLE for the Claimant
NICHOLAS LEE for the Defendant

JUDGMENT

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DEPUTY DISTRICT JUDGE NAPIER:

1. This is my reserved judgment of the Defendant's application to reconsider my order of 21 September 2021. The Defendant is the Receiving Party and the Claimant the Paying Party.
2. This judgment has been prepared based on the Receiving Party's submissions made in the bundle and orally at the hearing of the application, and also the Paying Party's written submissions which the Court directed to be filed following the hearing as the Paying Party did not have adequate notice of the points the Receiving Party intended to raise.
3. As a reconsideration of an order made without a hearing, I am not limited to a review of my order of 21 September 2021 but a fresh consideration of it. This is not a reconsideration of a provisional assessment – there is no challenge to the Court's decisions it made on 9 February 2021 and subsequently communicated by the Court administration via an order of 9 April 2021. This is an application for reconsideration of the Court's subsequent decisions which were communicated in its order of 21 September which was made without a hearing. As such, and as a party applied for a reconsideration, I reject the submission that there is no right to reconsider.
4. These costs proceedings have a rather unsatisfactory history, the details of which are fully recorded in the recitals to the order of 21 September 2021. I will not repeat them again here, but I do repeat my comment made at the hearing that the Court system is, in part, to blame for how matters proceeded.
5. The order of 21 September 2021 assessed the bill of costs in the sum of £75,685.27. That sum is not under challenge. What is under challenge is the

decision not to award the Receiving Party more than costs of the assessment proceedings limited to the sum of £1,500 plus VAT and court fees.

6. The Receiving Party submits that it should receive the benefit of the following additional sums:
 - i) Interest in the sum of £10,616.67.
 - ii) Costs on the indemnity basis from the expiry of the relevant period
 - iii) A CPR 36.17(4)(d) additional sum of 10%.
7. The Receiving Party made a Part 36 offer on 17 March 2021 in the sum of £75,000. It was not accepted and the sum finally assessed exceeds that figure by £685.27. The Paying Party made no Part 36 offers.
8. The Receiving Party has waived its entitlement to any higher rate of interest on any indemnity costs.
9. The order of 21 September 2021 declined to award any additional sums because, as the recital recorded, the Court considered that CPR 47.15(5) limited the Receiving Party's costs to not more than £1,500. As I indicated at the outset of the reconsideration hearing that was an error of law as the cap only applied to the costs of the detailed assessment proceedings, not interest nor the question of any CPR 36.17(4)(d) additional sum.
10. The Receiving Party submitted that the assessment that was undertaken could never have been a provisional assessment because the bill always exceeded £75,000. It submitted that the Court had undertaken a paper-only detailed

assessment and therefore the costs of these proceedings should not be limited to the cap.

11. I do not accept that analysis for the following reasons:
 - i) The documents returned to the parties following the ‘paper assessment’ hearing on 9 February 2021 bear the words “*Provisionally assessed*” at the top with my court stamp and signature. The parties were provided with a copy of those papers.
 - ii) The parties were instructed by the order of 9 April 2021 to calculate the bill in accordance with the standard order following a provisional assessment. The fact that a provisional assessment had taken place was stated on the order.
 - iii) The Receiving Party itself stated in its submissions: “...*A provisional assessment took place on 9 February 2021. Notice was received by the parties on 13 April 2021... Neither Party has sought to challenge the assessment within 21 days pursuant to CPR 47.15(7). Accordingly the provisional assessment is now binding...*”. The Receiving Party cannot fairly resile from that position now.
12. Therefore what took place on 9 February 2021, rightly or wrongly, was a provisional assessment of the bill. No party sought to set aside or appeal that decision, nor the later order of District Judge Woodburn when he vacated the duplicate detailed assessment hearing and said the provisional assessment order took precedence.

13. I accept the financial limit imposed by CPR 47.15(1) was exceeded by the bill. However, the Court embarked on the provisional assessment procedure and no party sought to challenge or appeal the orders made along the way. The parties have, of course, had the benefit of not incurring the time and expense of a full detailed assessment.
14. Faced with the relatively unusual situation, and bearing in mind the overriding objective and the stated positions of the parties themselves, I find that whilst CPR 47.15 does not apply, the just and proportionate way of dealing with this case is to exercise the Court's discretion to limit the Receiving Party to the costs that it would have been awarded under the provisional assessment procedure. That is within the Court's discretionary powers in relation to costs under CPR 44.2 and generally, and it is consistent with how the case proceeded, how the parties perceived it was proceeding and, indeed, the reality of the Receiving Party's submissions.
15. Ultimately if the Receiving Party wished to depart from the constraints of the provisional assessment costs cap, it should have appealed or applied to set aside the order of 9 April 2021 when it became clear what had happened, or indeed queried why a paper assessment was taking place when it was served with notice of the February hearing.
16. Therefore I maintain my summary assessment of the costs of the detailed assessment proceedings as being £1,500 plus VAT (£1,800) plus any court fees paid (stated as being £1,106) giving a total sum of £2,906.

Interest

17. The Receiving Party is entitled to judgment interest on its costs at 8% under section 74 of the County Courts Act 1974. No payment on account has been made. Interest may run from the date of entitlement (the order of 19 August 2020) but the date would ordinarily be postponed until three months after the date of entitlement: Involnert Management Inc v Apilgrange Limited and Others [2015] EWHC 2834 (Comm) per Leggatt J at [24].
18. The Paying Party submits that the interest rate imposed should not be punitive but a reasonable one bearing in mind the chronology of the case.
19. The Receiving Party is entitled to CPR 36.17 additional interest at a rate of up to 10% from the expiry of the relevant period (9 April 2021) unless the Court orders that it is unjust to order such an amount. Here, the Receiving Party has chosen to limit its claim to interest to be a fixed sum of £10,616.67 (being 8% from 20 August 2019 to 21 May 2021).
20. As that sum is less than the sum that would have been ordered based on the judgment interest rate (commencing at 3 months from the date of entitlement to the date of this judgment) plus any additional interest I may have ordered under CPR 36.17, I will order interest in the fixed claimed sum of £10,616.67. I consider that it is reasonable to allow this sum bearing in mind it is the judgment interest that runs pursuant to statute.

CPR 36.17(4): Additional Sum

21. The Receiving Party also seeks the additional 10% sum under CPR 36.17(4)(d) which would be £7,568.53. The ability to award such a sum in

detailed assessment proceedings was confirmed by the High Court in Cashman v Mid Essex Hospital Services NHS Trust [2015] EWHC 1312 (QB). I note the *obiter* comments by Stewart J in JLE v Warrington & Halton Hospitals NHS Foundation Trust [2019] EWHC 1582 (QB) that the sum is an ‘all or nothing’ award and there is no jurisdiction to order a reduced sum.

22. The Paying Party questions in her submission whether the condition in CPR 36.17(4) of “*upon judgment being entered*” has been met in this case. The answer to that is found in CPR 47.20(4)(e) which states: “(4) *The provisions of Part 36 apply to the costs of detailed assessment proceedings with the following modifications ... (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.*”
23. Therefore that condition is met in this case as the Receiving Party has upon completion of the detailed assessment received an assessment more advantageous than its Part 36 offer.
24. In respect of the additional sum, it is relevant to consider the history of the proceedings when deciding whether it is unjust to order payment of it.
25. The Receiving Party made its Part 36 offer on 17 March 2021, which expired on 9 April 2021 - presumably this was made in contemplation of the (duplicate) detailed assessment hearing which had been listed for 4 May 2021. On 13 April 2021, the Court’s order of 9 February 2021 was deemed served on the parties (having only been drawn by the administration on 9 April 2021). This order was the first time the parties were aware of the Court’s decisions on the provisional assessment from February.

26. Based on this, I regard the Part 36 offer as being an attempt to genuinely settle the costs proceedings. She did not know the decisions of the Court at that time and the offer was very close to the Court's assessment. Had the Paying Party accepted the offer, it would have had to pay less in costs than the Court assessed and avoided what has followed.
27. Having received the Court's order, the Paying Party did not agree (nor disagree) with the Receiving Party's re-calculation of the bill as per the order. The Receiving Party has remained out of funds for these costs having first received an entitlement to costs in August 2019, over two years ago.
28. Based on these factors, and bearing in mind it is the deliberate policy of applying Part 36 to cost proceedings to allow a penal additional sum, I consider it is not unjust to order it be paid.

Summary

29. For the reasons above, the Court will make the following order:
 - i) The order of 21 September 2021 is set aside.
 - ii) The Claimant shall pay the Defendant's costs of the main proceedings assessed in the sum of £75,684.17.
 - iii) The Claimant shall pay the Defendant interest in the sum of £10,616.67.
 - iv) The Claimant shall pay the Defendant's costs of the detailed assessment proceedings summarily assessed in the sum of £2,906.

- v) The Claimant shall pay the Defendant an additional sum under CPR 36.17(4)(d) of £7,568.53.
 - vi) The total sum of £96,775.37 shall be paid by 4pm on 7 January 2022.
30. Having communicated this judgment in draft to the parties, I will hand it down at 10.00am on Friday 17 December 2021 and the parties' attendance is excused.
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