Neutral Citation Number: [2021] EWHC B20 (Costs)

Case No: SC-2020-BTP-001382

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 October 2021

Before :
Costs Judge Brown

- -

Between :

MILBROOKE CONSTRUCTION LIMITED (in liquidation)	**Claimant**
- and -	
TIMOTHY JONES	**Defendant**

- -
- -

Alex Bagnall, costs lawyer, for the **Claimant**
Francis George, solicitor- advocate, for the **Defendant**

Hearing date (on the issue dealt with below): 6 October 2021

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Judgment Approved

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 Brown :

1. These are my further reasons for the decision I made on 6 October 2021 as to the costs of assessment (supplementing those briefly given orally at the hearing). The costs on the Claimant's bill had been allowed at £81,950.00 and my decision on the point in issue was that the Defendant should pay the Claimant's costs but that they should be reduced by 30%. These additional reasons are intended to address the matters of principle raised by Claimant.

2. Whilst the determination of costs of assessment is, of course, entirely commonplace and I would not ordinarily have reserved my decision in respect of such an issue, I felt the need to set out my reasons in writing for reasons which are, hopefully, apparent from below.

3. The amount allowed on the bill was significantly above the offers made by the Defendant. The Claimant had not beaten its own Part 36 offers but had beaten some of its own Calderbank offers made more recently. The detailed assessment has had a long history. It started before District Judge Cope, as she then was, and transferred to me part heard. It is not necessary for me to set out this history in these further reasons, but I have had it fully in mind.

4. The issue arises from an overall reduction of some 39% on the bill of costs and a very substantial reduction in Document time. The claim for time spent on Documents was spread over 33 schedules and collectively 'Document time' was the most substantial category of items; consideration of this claim took a substantial amount of court time and would have taken a substantial amount the parties' time in preparation for the hearings. In essence, albeit not accepting quite the full amount of the deductions proposed by the Defendant in his Points of Dispute, I accepted Mr. George's submissions to the effect that the costs claimed were highly excessive and unreasonable.

5. Mr. George's contention is that this should be reflected in the order as to costs of assessment so that the Defendant should get an order in his favour for costs or there should no order as to costs or, in the further alternative, that the Claimant's costs should be reduced by a percentage (with, possibly, an order for costs in his favour in addition).

6. CPR 47.20 provides, so far as is material:

> *(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.*

…

7. Mr. Bagnall, for the receiving party, relied on the recent decision of Deputy Costs Judge Campbell in *Mullaraj v Secretary of State for the Home Department* [2021] WL 01601117, as I understand it at least initially, in support of the contention that, notwithstanding the terms of r47.20 (3) (b), the amount by which the bill of costs had been reduced in this case could not properly be the basis for any different order from that provided for in CPR 47.20 (1) (that is to say, an order in his favour for the costs of the detailed assessment proceedings).

8. It is clear, as the Deputy Costs Judge noted in *Mullaraj,* that under these provisions the starting point is that the receiving party is entitled to the costs of the assessment unless the court makes some other order having regard to all the circumstances. r47.20 (1) thus creates what is, in effect, a presumption that the receiving party will receive its costs.

9. The Deputy Costs Judge held that in considering whether any 'different' order should be made the first circumstance to consider was whether the receiving party took steps to gain the protection afforded by Part 36; this being the process, he held, by which the paying party can protect itself (in this respect he referred to the guidance is to be found in in *Global Energy Horizons Corporation v Gray* [2021] EWCA Civ 123 which is not necessary for me to set out at this stage). The Deputy Costs Judge appears to have had concerns that the offer made by the paying party in that case was not compliant with Part 36 as it was not expressed as being made under this provision; but in any event the offer had been exceeded. He directed himself, following *JLE v Warrington & Halton NHS Trust Foundation Trust* [2019] Costs LR 829 (at paragraphs 40-44), that a 'near miss' was not enough in respect of Part 36 offers and that such a principle applied also to other relevant offers.

10. The bill in *Mullaraj* had been reduced by 44.05% following provisional assessment under CPR 47.15. The Deputy Costs acknowledged that this reduction was a factor under CPR 47.20(3)(b) to take into account when considering whether to make any 'different order' as to costs. He also recognised that the reduction was by a large amount, but he rejected the paying party's contention that as a consequence there should be a different order from that provided for under r47.20 (1). To make a different order, he held, would be to penalise the receiving party (para. 18) and he rejected the contention of the receiving party that he should make any reduction from the costs of the detailed assessment in consequence of the reduction on the bill. His reasons were:

> *25. First, I do not find it persuasive that a paying party who makes no offer at all, should be in a better position than a paying party who does make an offer but one which is just short. That would place a non-offering paying party at an advantage over a paying party who has tried to settle the costs, but whose offer has not been quite enough. It would provide a potential reward for a paying party, who sits back, having deliberately made no offer, to rest secure in the knowledge that a successful challenge can always be advanced later under CPR 47.20(1)(b) if the bill is reduced by a significant amount after a good day in court. In circumstances such as these, Rule CPR 47.20(1)(b) and (3)(b) could simply be argued in every case where the bill has been reduced without an offer made, in disregard of the Court of Appeal's guidance in Global , that a party who is vulnerable for a smaller sum than the amount claimed, should use Part*

> *36 to protect their position. Moreover, what tariff should be used to decide whether enough has come off to reverse CPR 47.20 : 25%, 30%, 50%, more? There is simply no guidance upon which to draw.*
>
> *26. Second, whilst rule 47.20(3)(b) indeed requires the court when considering whether to make a different order, to take into account the amount by which the bill has been reduced, I am puzzled (with one exception) how a circumstance could ever arise in which a paying party who has made an offer to settle which has been short (in addition to those who have deliberately made no offer) could successfully deploy that rule. The exception is where a paying party would have no way of knowing whether there has been fraud or other skulduggery by a receiving party, such as claiming costs where it was known that there had been a failure to comply with the indemnity principle. Such a situation would arise where the receiving party had made a bargain with his solicitor not to be liable for any costs so by operation of the indemnity principle, nothing would be recoverable from the paying party. These would be matters to which only the Costs Judge would be privy, since a retainer letter, which would provide the answer, is a privileged document only available for the court to read upon receipt of the receiving party's papers lodged for assessment under CPR 47.19 PD 3.12. Other than that, I cannot think of a circumstance where a paying party whose without prejudice offers have been too low, could successfully argue that the receiving party should be deprived of the costs of assessment. That is particularly the case here where the SSHD's open offer under PD paragraph 8.3 to CPR 47.9 was also way off the mark, with nil having been offered, a deficiency of over £41,000.*

11. As Mr. Bagnall acknowledged I am not bound by this decision. I accept however, unhesitatingly, the importance in the determination of the costs of assessment of considering whether a Part 36 offer or other relevant offer has been made and beaten. I suspect that in most cases this will be determinative of the issue as to costs of assessment. There are obviously very good reasons why this should be so, not least of which are the pressures on the resources of courts which require that parties take reasonable steps to resolve their dispute. But as I think r47.20 makes clear this is not the sole factor and I do not think that it is open to me to dismiss the factor set out in r47.20 (3) (b) or to limit its effect in the way suggested.

12. The terms of r47.20 appear to me to be clear. In the circumstances which arise here the court is required to have regard to the amount, if any, by which the bill of costs has been reduced in deciding whether to make any other order. The words are "must have regard…" (my emphasis). Since the court is required to consider the matter when considering whether to make a different order then it follows, it seems to me, that the reduction on the bill may, when considering all the circumstances, be a basis for a 'different order'. Needless perhaps to say, that does not mean that it must impose a different order; the court must always have regard to all the circumstances of the case. Small reductions in circumstances where sums are reasonably claimed are not likely to be enough. But it does seem to be that it is not open to a court simply to disregard the reduction in the bill as a factor in determining costs without more.

13. More pertinently perhaps, there is, in my view, no warrant for reading this provision with the limitation that it applies only where there has been some fraud or some other misconduct (or 'skulduggery' as it was put by the Deputy Costs Judge). The terms of the provision carry no such limitation. Moreover, Parliament cannot, in

my view, be taken to have intended that such a limitation should be read into the provision. It is notable in this regard that r47.20 (3) (c) provides that another factor in determining whether a 'different' order should be made is whether it was reasonable for a party to claim the costs of a particular item or to dispute that item; that implies an objective standard and not one based on deliberate or even reckless misleading of the court or of an opponent. Had it been intended that the bar should be set at this level it seems to me, read in context, that the rules would have said so expressly. It is notable that in *Gempride v Bamrah* [2018] EWCA Civ 1367 para. 26, the Court of Appeal made it clear that conduct which was unreasonable and improper (these not being self-contained concepts) but which did not involve dishonesty could justify a finding of misconduct under the provisions of r44.(11) and thus a substantial deduction from the costs claimed in the bill (not merely some other order as to the costs of assessment). It is, of course, not necessary for a party to have acted unreasonably or improperly before he can be required to pay the costs of the other party of a particular issue on which that party has failed in ordinary litigation (see CPR 44.2 generally and *Summit Property Limited v Pitmans [2001] EWCA Civ 2020*, Longmore LJ, at para. 16 and 17). In these circumstances I have difficulty seeing why in considering the costs of the assessment the bar should be set so high that it requires what is essentially a finding of misconduct. I would add that the time and costs of investigating and considering allegations of misconduct are typically substantial and it is not at all clear that ordinally such issues could properly be accommodated at the conclusion of an assessment when costs of assessment are normally dealt with.

14. Importantly there are, it seems to me, good reasons why a claim for costs which is overstated, such that the bill has been reduced substantially, is in itself a circumstance that Parliament intended could result in a 'different' order as to costs even assuming no misconduct. As Lord Woolf MR made clear in in his well-known judgment in *AEI Rediffusion Music Limited v Phonographic Performance Limited [1999] 1 WLR 1507* (in particular pages 1522 to 1523) the Civil Procedure Rules were intended to impose a higher discipline on parties in their conduct of ordinary litigation than had been the case; and it was in these circumstances that the principle of costs 'following the event' was described a starting point from which a court could more readily depart (see too CPR 44.2 (4) and (5). There seems to me to be no good reason why there should not be the same or similar expectations in respect of claims for costs; and, moreover, that such a discipline should be encouraged by costs incentives under the rules. Claims for costs generally require certification by the senior fee earner of a law firm, and are often prepared by or on behalf of solicitors for their benefit (albeit bills are, of course, brought by direct access barristers and litigants in person). Solicitors are officers of the court and there does not seem to be any good reason why they and other legal representatives should be treated any differently from, and in effect, more indulgently than, ordinary litigants. I note that in a different context (namely an attended solicitor/client assessment) under the '1/5th rule' in section 70 (9) of the Solicitors Act 1974 solicitors are, absent special circumstances, required to pay the costs of the assessment if their bills are reduced by 1/5th or more; such a provision might be said to reflect this very concern. Given the antiquity of this rule (the 1974 Act is a consolidating Act), it is difficult to see that concerns about overstated claims for costs are new, and it seems to me that the basis for such concerns could not be said to have diminished.

15. I would also not accept the characterisation of a 'different' order as a penalty. I think there is a legitimate concern that an overstated claim makes it more difficult for a receiving party to take a view as to the reasonableness of the costs claimed. Unlike normal litigation, a receiving party does not see all the underlying documents upon which a claim is determined; it must rely to a significant extent upon the description in the bill in making an offer. To my mind a significant overstatement in a bill is also liable to reduce the prospect of settlement of a claim for costs and to make achieving a settlement more difficult. It can also significantly increase the length of the detailed assessment so that greater costs are incurred in the assessment hearing by both sides than would have been incurred had a more reasonable claim been advanced; there can be also substantially increased costs in preparing Points of Dispute and in preparing for the assessment. In some cases (although not here) the overstatement may take the claim over £75,000 so that the provisional assessment procedure under 47.15 is no longer available with marked effects for the incurring of costs for both sides in the assessment. To make a 'different' order can simply be a reflection of the fact that a substantial proportion of costs incurred by the parties in the assessment have been incurred as a result of the claim being overstated and thus any 'different' order might be regarded as compensatory in nature.

16. I fully acknowledge the importance of Part 36 offers and other admissible offers in considering the assessment of costs. The parties can be expected to have made substantial efforts to settle a claim for costs and thus avoid the very substantial costs which are often incurred in resolving arguments about costs. I also have fully in mind the guidance in *Global Energy* cited by the Deputy Costs Judge to the effect that where a party is faced with an exorbitant claim which he wishes to defend vigorously but is vulnerable to a finding that he is liable for a much smaller amount, Part 36 provides a clear process to protect his position. A paying party cannot simply sit back and hope for a good day in court; and if it were to do so, it might be difficult to see how, all other things being equal, it should recover its own costs even in the case of very dramatic reductions. But it seems to me that it follows from the terms of r47.20 (3) that Part 36 offers or other admissible offers are not the only factors to which the court should have regard.

17. I would add that I do not accept that the fact there is room for debate as to a percentage of any deduction from costs in proportional costs orders should prevent a court doing its best to reach a just result. Such orders are regularly made on applications and at hearings where neither party is the outright winner (and indeed are perhaps envisaged by the terms of section 70 of the 1974 Act in a Solicitors Act assessment). For my own part, I do not see any difficulty with making such orders: they seem to me an entirely natural, if not indeed normal, product of the exercise of the court's discretion when dealing with costs in accordance with the relevant provisions.

18. A substantial part of a day was spent dealing with the time spent on Documents (on the same day we also dealt with routine communications). This was, as I have said, the main category of costs and the main battleground between the parties. On this matter the Defendant was were clearly largely successful; the reductions were over 50%, which is a large reduction. Although some matters were conceded following challenge in the Points of Dispute (including as I understand some of the claims for considering incoming correspondence –time not generally claimable) there

remained a substantial dispute between the parties on the time that should be allowed and substantial further reductions of time were made. The time spent in challenging and preparing for the hearing in respect of the Documents time alone was likely to have been substantial. To my mind it is difficult to see why the costs of resisting what to my mind was a clearly a claim that was unreasonable in amount should not, in some way, be reflected in a 'different' order.

19. I do not however accept that the Defendant should receive any order for costs in his favour, or that no order for costs is appropriate. No order for costs might have been appropriate if the extent of the recovery or success on the claim was very modest so that recovery overall was limited to substantially less than 50% of the costs claimed, in particular in cases of really dramatic or exceptional overall reductions in a bill of the order of 75% or 2/3rd where it might be difficult to say that the receiving party is the overall 'winner'. That is not the case here. It seems to me clear, notwithstanding the large deductions made, that in all the circumstances including in particular the offers made, the Claimant achieved substantial success.

20. The parties advanced different mathematical bases for particular proposed reductions, referencing the time spent on various issues. It seems to me however, standing back and having regard to all the circumstances of the case - including in particular, the offers made, a deduction of 30% best reflects the justice of the situation.

21. The issues raised by the decision in *Mullaraj* are, as I understand it, the subject of appeal from a decision of my own (as I pointed out in the hearing) and at the outset of the consideration of this issue I indicated that I would be open to granting permission to appeal a decision on the issue of principle arising. In the event Mr. Bagnall indicated that he would not be seeking permission and indeed, as I understand it, accepted, or at least did not substantially dispute, that the matters arising fell within my discretion.

22. Nothing that I have said above is intended to be a criticism of either advocate. Indeed I am grateful, as I have said before, to both advocates for their very considerable and able assistance in dealing with the issues arising in this assessment.