

ACL 2021
**PART 36 & the Costs of Detailed
Assessment**

Margaret McDonald



Kenworthy's
Chambers

PART 36 & the Costs of Detailed Assessment



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Are Part 36 enhancements permitted in respect of the costs of Detailed Assessment

- This was considered in **Bourne v. West Middlesex University Hospital NHS Trust SCCO Reference CL1702494 02/10/17** [**'Bourne'**].
- The Costs of Detailed Assessment could not be agreed and were provisionally assessed by Master Leonard. The costs were claimed at **£6,303.82** and were provisionally assessed at **£4,534.08**. The Claimant beat a **Part 36** Offer of **£2,496** & sought **Part 36** enhancements.



Bourne v. West Middlesex University Hospital NHS Trust SCCO

- Master Leonard concluded at Paragraphs [12] – [15] that:
- [12] *‘....there is only one set of detailed assessment proceedings: those authorised by the underlying order for costs. The award and assessment of the costs of assessment, as provided for by **CPR 47.20**, make up a part of those detailed assessment proceedings, no more.*
- [13] *The Claimant’s submissions seem to me to be based upon the erroneous assumption that by filing a separate bill of costs representing the costs of detailed assessment, the Claimant can start a new set of detailed assessment proceedings, make a yet further claim for the costs of those proceedings and make a **Part 36** offer in those proceedings, with the usual costs consequences. I do not agree. There is no authority for a separate assessment, and the costs of detailed assessment proceedings do not generate a further, independent claim for costs.*



Bourne v. West Middlesex University Hospital NHS Trust SCCO

- *[14] CPR Part 36, as modified by CPR 47.20, has applied to detailed assessment proceedings since April 2013. CPR 47.20[7] provides that, for the purposes of rule 36.17, detailed assessment proceedings are to be regarded as an independent claim. That ensures that a party can, in accordance with the rest of the relevant provisions of CPR 47.20, make an effective Part 36 offer in detailed assessment proceedings. CPR 47.20[7] does not, however, provide that the determination of the costs of those detailed assessment proceedings is itself to be regarded as an independent claim.*
- *[15] For those reasons, my conclusion is that the Part 36 offer relied upon by the Claimant is of no effect. I remain of the view that there should be no further award of costs'*



Part 36

- **CPR 36.2[3]** provides: ‘A **Part 36** offer may be made in respect of the whole, or part of, or any issue that arises in—
- *[a] a claim, counterclaim or other additional claim; or*
- *[b] an appeal or cross-appeal from a decision made at a trial.’*
- **CPR 36.13[4]** states
- *‘[b] a **Part 36** offer which relates to the whole of the claim is accepted after expiry of the relevant period’*
- *‘[c] subject to paragraph [2] a **Part 36** offer which does not relate to the whole of the claim is accepted at any time’*



Part 36

- **CPR 36.17[4][1]** provides: ‘.... this rule applies where upon judgment being entered -
- [a] A claimant fails to obtain a judgment more advantageous than a defendant’s **Part 36** offer; or
- [b] Judgment against the defendant is **at least as advantageous to the claimant as the proposals contained in a claimant’s Part 36 offer.**’
- **CPR 36.17[4][4]** provides: ‘....Subject to paragraph [7], where paragraph [1][b] applies, the court must, unless it considers it unjust to do so, order that the claimant is entitled to—
- [a] interest on the whole or part of any sum of money [excluding interest] awarded, at a rate not exceeding **10%** above base rate for some or all of the period starting with the date on which the relevant period expired;
- [b] costs [including any recoverable pre-action costs] on the indemnity basis from the date on which the relevant period expired;
- [c] interest on those costs at a rate not exceeding **10%** above base rate; and



Part 36

- *[d] provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount, which shall not exceed **£75,000**, calculated by applying the prescribed percentage set out below [10%] to an amount which is—*
- *(i) the sum awarded to the claimant by the court....'*
- **CPR 47.20[7]** provides: *'For the purposes of rule 36.17 detailed assessment proceedings are to be regarded as an independent claim'.*



Status of Costs of Detailed Assessment

- In **Bourne** Master Leonard concluded that '**CPR 47.20[7]** does not, however, provide that the determination of the costs of those detailed assessment proceedings is itself to be regarded as an independent claim.'
- The costs of Detailed Assessment are not an 'independent claim' they are an integral part of the Detailed Assessment Proceedings.
- The introduction of the **10%** enhancement in **April 2013** was part of the Jackson reforms and to give Claimant's **Part 36** offers 'teeth'. The **10%** enhancement is a penalty. It is clear in all the **Part 36** authorities that the **10%** enhancement is to penalise the Defendant for not accepting what turned out to be good **Part 36** offers.



Part 36

- In **Bourne** at paragraph 7, the Defendant's argument was that the Claimant had already received the costs of assessment and that to recover more would be a double recovery. That cannot be right as any **10%** award, whether it be on the damages, costs of the claim or costs of assessment would be considered a double recovery. It is clear in all the **Part 36** authorities that the **10%** enhancement is to penalise the Defendant for not accepting what turned out to be good **Part 36** offers.
- This is a valid **Part 36** offer in respect of '*part of or any issue that arises in*' a Detailed Assessment [**CPR 36.2[3]**]. **CPR 36.2[3]** was not considered in **Bourne**. It has been beaten.
- The cumulative impact of **CPR 36.2[3]**, **CPR 36.17[4]** & **CPR 47.20[7]** leads to the inevitable & purposive conclusion that the Claimant can be awarded the additional sum in respect of a **Part 36** offer made in relation to the costs of Detailed Assessment.
- There is a safeguard built into **CPR 36.17[4]** which provides that the Claimant can only recover the additional amount once in any set of proceedings.



Best

- In **Best v. Luton & Bedfordshire** the substantive action was a clinical negligence claim relating to delayed diagnosis of cancer which resulted in the untimely death of the Claimant's Mother.
- The conduct period was from **08/12/11** to **27/10/17** [a period of **70** months]. The case was compromised less than 21 days before Trial by an Order dated **27/10/17** [sealed **01/11/17**] for the sum of **£152,327.05** [inclusive of CRU]
- At the CCMC on **24/11/16** the case was Costs Budgeted & the Claimant's Precedent H Costs Budget was approved in the sum of **£326,526.00**.
- The Bill of Costs claimed **£692,048.06** comprising base costs, a **90%** Success Fee for Solicitor, a **100%** Success Fee for Counsel, ATE & Disbursements.
- On **13 March 2020** the Claimant made a **Part 36** Offer of **£475,000** in respect of the costs of the main action & interest but excluding costs of Detailed Assessment.
- The Detailed Assessment Preliminary Issues Hearing was listed remotely before Master Leonard at the start on lockdown on **14/04/20** and the technical points such as hourly rates & success fee were determined. The Solicitor's Success Fee was allowed at **80%** & Counsel's Success Fee was allowed at **67%**.
- Judgment can be found at <https://www.bailii.org/ew/cases/EWHC/Costs/2021/B2.html>



Best – Costs of Detailed Assessment

- Following the Preliminary Issues Hearing the Defendant accepted the Claimant's **Part 36 Offer of £475,000** in respect of the costs of the main action & interest on **25 August 2020**. The Defendant was allowed to accept this without any **Part 36** penalty save that interest on the substantive costs payable from the expiry of the **Part 36 Offer** was agreed between the parties at **10%**.
- The Claimant's Costs of Detailed Assessment were claimed at **£77,485**.
- On **16 October 2020** the Claimant made a **Part 36 Offer** in the sum of **£52,000**
- The Costs were summarily assessed by Master Leonard in a remote hearing on **10 November 2020** in the sum of **£58,119.80**.
- Due to mis-communication Counsel was not aware of the **Part 36** of **£52,000**
- The case was called back on in the original hearing slot & the Claimant applied for **Part 36** enhancements on the costs of Detailed Assessment under **CPR 36.17[4][d]** of **10%** of the amount awarded [i.e: an additional **£5,812 + VAT**].
- Master Leonard referred to Bourne and Ordered Skeleton Arguments



Best – Reserved Judgment

- Master Leonard then gave a reserved written Judgment having considered the Skeleton Arguments.
- *[36] Thanks to **CPR 47.20(7)**, detailed assessment proceedings are treated as an independent claim. The question I have to decide for present purposes is whether the award and the quantification of the costs of assessment fall, as the Claimant contends, within “any issue that arises in” that independent claim for the purposes of **CPR 36.2(3)**. My conclusion is that it does not, for these reasons.*
- *[37] The first is that before the introduction of the **Part 36** regime to detailed assessment proceedings in **2013**, it was already possible to make an offer in respect of the whole, or part of, any issue that arose in a claim. The relevant wording appeared at wording of **CPR 36.2(2)(d)**. If the issues arising on the detailed assessment of costs were issues in the claim for the purposes of **CPR.2(2)(d)**, it would already have been possible to make a **Part 36** offer in detailed assessment proceedings and it would not have been necessary, in **2013**, to make specific provision to introduce the **Part 36** regime to detailed assessment.*
- *[38] The necessary implication is that the issues referred to, Pre-April **2013**, at **CPR 36.2(2)(d)** were the issues in the claim itself, which had been determined by the time an order for costs was made. Any award and assessment of costs would follow, as a separate process, once those issues had been determined (whether by agreement or judgment).*



Best – Reserved Judgment

- *[39] The same must be true of **CPR 36.2(2)(d)**. **CPR 47.20(7)** allowed these detailed assessment proceedings to be treated as an independent claim. The issues in that claim were set out in the bill of costs, points of dispute and replies. They were resolved on the Defendant's acceptance of the **Part 36** offer. The award and quantification of the costs of assessment followed, but they were not issues in the deemed independent claim, all of which had already been resolved.*
- *[40] This conclusion seems to me to be supported by the wording of **CPR 36.17(4)** itself. The provisions of **CPR 36.17(4)** are prescriptive. The court must, unless it considers it unjust to do so, order that a claimant (in detailed assessment proceedings, the receiving party) receive all of the listed awards including indemnity basis costs and additional interest on those costs. That envisages a claim, or part of a claim or an issue in a claim, which is in itself capable of conferring an entitlement to costs. In short, it would be what is described at **CPR 47.20(7)** as an independent claim. The costs of detailed assessment proceedings do not carry their own costs and do not meet that criterion.*



Best – Reserved Judgment

- *[41] That takes me to what seems to me to be a decisive obstacle for the interpretation of the rules contended for by the Claimant. If the Claimant is right then any **Part 36** offer made as to the costs of assessment would, on acceptance, result in a further deemed order for costs under **CPR 44.9(1)(b)**. By virtue of **Practice Direction 44 paragraph 8.2**, that deemed order would be an authority for detailed assessment.*
- *[42] The receiving party would, accordingly, be entitled to draw up another bill to cover its costs of working on the costs of the detailed assessment, and to start a new set of proceedings for the detailed assessment of those costs. To avoid a Default Costs Certificate, the paying party would have to file Points of Dispute. The receiving party could then apply for detailed assessment and, pursuant to **CPR 47.20**, seek not only “the costs of the costs” claimed in its bill, but the additional costs of the new set of detailed assessment proceedings.*
- *[43] The receiving party could also make yet another **Part 36** offer as to the costs of the new detailed assessment proceedings. If the paying party were to refuse to accept that offer, it would be at risk of incurring the additional penalties provided for by **CPR 36.17**. If it did accept the offer, then the receiving party could start again with another bill claiming “the costs of the costs of the costs”*



Best – Reserved Judgment

- [44] As Mr Clegg for the Defendant points out, there is at least the potential for an indefinite cycle of **Part 36** offers and new detailed assessment proceedings, each parasitic upon the last. Even one such parasitic set of detailed assessment proceedings would be disproportionate, duplicative and unfair to the paying party. That is not consistent with the overriding objective.
- [45] In summary my conclusion is that the costs of the detailed assessment proceedings do not, for the purposes of **CPR 36.17(4)**, fall within “any issue that arises in the claim”. The Claimant’s submission that it does seems to me to be inconsistent with the way in which **CPR 36** has been interpreted since well before **2013**. It is also, in my view, inconsistent with the full provisions of **CPR 36.17**. To accept it would be to override my obligation to interpret the Civil Procedure Rules in accordance with the overriding objective.



The Costs of the Costs of the Costs

- The Claimant sought to distinguish **Best** from **Bourne** by arguing there was "*no question of double recovery*". As provided for in **CPR 36.17(4)** the Claimant could recover an additional **10%** only once in the course of detailed assessment proceedings.
- Just like 'It's a Knockout' you can only play your joker once.



The Costs of the Costs of the Costs

- Master Leonard decided not to depart from his previous decision in **Bourne**
- His decision does not address **CPR 36.2[3]**
- This would have been an interesting case to appeal
- However, it was decided that it was not proportionate to appeal the **10%** uplift on the costs of Detailed Assessment [**£5,811.98**]
- Further there could be a purposive interpretation that the Defendant had already agreed to pay enhanced interest at **10%** on the **£475,000** substantive costs



Further Amendment to Part 36

- The **Civil Procedure [Amendment] Rules 2021** which come into effect from the **6 April 2021** amend **Part 36** with a new rule **36.5[5]** which says that **Part 36** offers can include provision for interest to accrue after the expiry of the relevant period for acceptance [usually **21 days**]. Silence as to interest means it will be treated as inclusive of interest up to the date of acceptance if later accepted.
- *" Rule 36.5[5] A Part 36 offer to accept a sum of money may make provision for accrual of interest on such sum after the date specified in paragraph [4]. If such an offer does not make any such provision, it shall be treated as inclusive of all interest up to the date of acceptance if it is later accepted."*
- The Explanatory Notes that go with the Amendment specify that this rule change has been brought about as a result of the case of **King v City of London [2019] EWCA Civ 2266**. This case clarified that a valid **Part 36** offer could not excluded interest.
- Claimants are likely now to add wording to **Part 36** offers to include provision for interest to accrue after the period for acceptance has expired. So if a **Part 36** offer in such terms is accepted there will be an increase on the basic sum of the accrued interest until the acceptance date, which could be substantial.



Questions



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