Neutral Citation Number: [2016] EWCA Civ 365

Case No: A2/2015/1317

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LEEDS DISTRICT REGISTRY
HIS HONOUR JUDGE SAFFMAN sitting as a Judge of the High Court
[2015] EWHC 449 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 14th April 2016

Before :

LADY JUSTICE GLOSTER
LORD JUSTICE SIMON
and
SIR STANLEY BURNTON

Between :

Miss Courtney Webb (by her litigation friend Miss Stacey Keira Perkins)	**Appellant/Claimant**
- and -	
Liverpool Women's NHS Foundation Trust	**Respondent/Defendant**

(Transcript of the Handed Down Judgment of
WordWave International Limited
Trading as DTI
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Benjamin Williams QC and **Neil Sheldon** (instructed by **Irwin Mitchell**) for the **Appellant**
Guy Mansfield QC and **Sarah Lambert** (instructed by **Hill Dickinson**) for the **Respondent**

Hearing date: 15 March 2016

Judgment
As Approved by the Court

Sir Stanley Burnton:

Introduction

1. This is an appeal, with permission of the Judge, from the costs order dated 1 April 2015 made by HH Judge Saffman following his trial of the Appellant's medical negligence claim against the Respondent. It raises an important question as to the powers of the trial judge under CPR Part 36. It is a sad fact that the provisions of Part 36, intended to promote the settlement of litigation, and thus to minimise costs, have themselves been productive of numerous appeals to this Court, and in consequence substantial costs in what is effectively satellite litigation. This is presumably because Part 36 is highly prescriptive (so that even experienced lawyers may fail to make a compliant offer) and the financial consequences of the application of the provisions of Part 36, or the failure to comply with the requirements of Part 36, may be substantial.

2. I shall refer to the Appellant as the Claimant and the Respondent as the Defendant.

The litigation and the result of the trial

3. The claim resulted from the Claimant's birth, in the course of which she suffered a Brachial Plexus Injury as a result of shoulder dystocia. She claimed that her injury was the result of the Defendant's negligence. The Claimant's allegations of negligence fell into two main parts:

   (a) That, during the labour of the Claimant's mother the need for a Caesarean section was indicated on 4 occasions, but, negligently, no Caesarean section was performed and instead the Defendant negligently decided that the birth should be allowed to proceed to a vaginal delivery (the first allegation).

   (b) That the vaginal delivery itself was negligently managed because the midwives undertaking it failed to adopt recognised procedures to deal with the shoulder dystocia that the claimant suffered in the course of the vaginal delivery (the second allegation).

4. The Judge upheld the first allegation, but rejected the second allegation. Having succeeded in establishing that her injury was caused by the Defendant's negligence, the Claimant was entitled to full recovery of damages for her injury and loss.

5. On 1 October 2014 the Claimant had made a Part 36 offer to settle liability on the basis that she received 65% of the damages that would accrue on a 100% basis. That was rejected on 9 October. Its effective date ("the effective date") was 23 October 2014.

6. The judgment was clearly more advantageous to the Claimant than the proposal contained in her Part 36 offer. When judgment was handed down, her counsel contended that the consequences of what was then Part 36.14(3) applied and that she should have all her costs on an indemnity basis from the expiry of the relevant period plus interest thereon at the enhanced "Part 36 rate" plus the enhancements specified in Part 36.14(3)(a) and (d).

7. The Defendant contended that the normal consequences of Part 36.14(3) should be disapplied because, by reference to Part 36.14(4), in the circumstances it would be

unjust to apply them. It argued that Part 36 did not prevent the court from making an issues-based or proportionate costs order to reflect the fact that the Claimant failed in respect of the second allegation, which was a discrete and independent allegation. The Claimant should have her costs with the Part 36 enhancements in respect of her costs referable to the first allegation but she should not be awarded costs for the unsuccessful prosecution of the second allegation, much less with any Part 36 enhancements.

8. Since the date of the judgment under appeal, there has been a further amendment of Part 36. It does not affect the substance of its provisions so far as applicable to the present appeal, but the numbering of its provisions was altered. References in this judgment are to Part 36 as it was prior to April 2015.

9. It does not appear from the Judge's costs judgment that there was any separate argument as to the Claimant's costs incurred before the effective date of the Part 36 offer. There was such argument before this Court, and I refer to it below.

10. In this judgment, I refer to a claimant who after trial has obtained a judgment at least as advantageous to her as the proposals contained in her Part 36 offer as "a successful claimant".

The Judge's costs judgment

11. In his careful judgment, the Judge held:

    a) Part 36 does not prevent the Court from making an issues-based or proportionate costs order. In other words, the Court has a discretion to make such an order, notwithstanding that the Claimant was a successful claimant.

    b) In the circumstances of this case, it was just to make an issues-based proportionate costs order, under which the Claimant would not recover her costs of the second allegation.

12. The order made by the Judge was that the Claimant should recover her damages to be assessed with the 10 per cent addition required by CPR 36.14(3)(d), plus her costs excluding those referable to the second allegation. The Judge therefore excluded from her recovery the fees of her midwifery expert (whose evidence was confined to the second allegation) and 25 per cent of her solicitors' time costs, being his assessment of the solicitors' costs referable to the second allegation. The Claimant's costs, other than the excluded 25 per cent of her solicitors' time costs, incurred after 22 October 2014 were to be assessed on an indemnity basis pursuant to CPR 36.14(3)(d), and the Defendant was ordered to pay interest on those costs incurred after 22 October 2014.

The issues on this appeal

13. Before us, both parties recognised that there might be different principles applicable to costs incurred before the effective date. Both parties accepted that the Claimant's entitlement to costs before the effective date was to be determined in accordance with the CPR Part 44. In relation to those costs, the Claimant contended that this was not a case in which there was any justification for depriving the successful Claimant of any of her costs. The second allegation had not been made or pursued unreasonably or

irresponsibly. Both allegations concerned a single event, namely her birth and its management. It was common, particularly in a relatively complex personal injuries case, for a claimant to succeed on some allegations of negligence and to fail on others, and the mere fact of her failing on a sensibly pursued allegation of negligence did not justify her being deprived of part of her costs.

14. The Defendant understandably emphasised the advantage of the trial Judge in assessing the conduct of the case, and the well-known authorities stressing that this Court should be reluctant to interfere with the decision of the trial Judge on costs. The appellant in such a case must show that the Judge erred in law or in the application of principle or made an order that, correctly applying the applicable law and principles, he could not have made.

15. The issues in relation to the Claimant's costs incurred after the effective date are more complex. The Claimant submitted:

    a) On the true construction of Part 36, the discretion of the Court under Part 36.14(3) (now 36.17(4)) is restricted to the enhancements to which a successful claimant is normally entitled in respect of damages, costs and interest. For example, the Court may decide that the successful claimant should not recover costs on an indemnity basis, and could restrict her to the standard basis. It would follow that the Court does not have power under Part 36 to deprive a party of part of its costs on the basis that it failed to establish part of its claim. In other words, on its true construction, Part 36 excludes the normal discretion of the Court to make an issues-based or proportionate costs order.

    b) Alternatively, a successful Claimant can only be deprived of her costs if it is shown that it would be unjust for her to recover all her costs.

    c) The Judge erred in law in deciding that he could and should deprive the Claimant of her costs attributable to the second allegation.

16. The Defendant contends:

    a) The judge was entitled, in the exercise of his discretion under Part 44, to deprive the Claimant of her costs incurred prior to the effective date that relate to the second allegation.

    b) In relation to the Claimant's costs incurred after the effective date, on the true construction of Part 36, the costs referred to in 36.14(3)(b) are the costs that are determined on the application of the discretion under Part 44.2. It is only to those costs that the right to their assessment on the indemnity basis applies. It follows that the judge was entitled to restrict the Claimant's recovery to her costs relating to the first allegation, and to have only those costs assessed on the indemnity basis.

    c) In any event, the Judge found that it would be unjust for the Claimant to recover her costs of the second allegation; he was entitled so to find; and accordingly, in the circumstances of this case, he was entitled to make the issues-based or proportionate costs order that he made.

Part 36

17. The crucial provision is now CPR Part 36.17. At the times applicable to this case, it was Part 36.14, but there is no material difference between them.

> "36.14 **Costs consequences following judgment**
>
> (1) Subject to rule 36.14A, 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.
>
> (1A) For the purposes of paragraph (1), in relation to any money claim or money element of a claim, "more advantageous" means better in money terms by any amount, however small, and "at least as advantageous" shall be construed accordingly.
>
> (2) Subject to paragraph (6), where rule 36.14 (1)(a) applies, the court will, unless it considers it unjust to do so, order that the defendant is entitled to-
>
> (a) costs from the date on which the relevant period expired; and
>
> (b) interest on those costs.
>
> (3) Subject to paragraph (6), where rule 36.14 (1)(b) applies, the court will, 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 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
>
> (d) an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below to an amount which is-

(i) where the claim is or includes a money claim, the sum awarded to the claimant by the court; or

(ii) where the claim is only a non-monetary claim, the sum awarded to the claimant by the court in respect of costs-

[Amount awarded by the court: Up to £500,000

Prescribed percentage: 10% of the amount awarded

Amount awarded by the court: above £500,000 up to £1,000,000.

Prescribed percentage: 10% of the first £500,000 and 5% of any amount above that figure].

(4) In considering whether it would be unjust to make the orders referred to in paragraphs (2) and (3) above, the court will take into account all the circumstances of the case including-

(a) the terms of any Part 36 offer;

(b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;

(c) the information available to the parties at the time when the Part 36 offer was made;

(d) the conduct of the parties with regard to the giving of or refusing to give information for the purposes of enabling the offer to be made or evaluated.

(5) Where the court awards interest under this rule and also awards interest on the same sum and for the same period under any other power, the total rate of interest may not exceed 10% above base rate.

(6) Paragraphs (2) and (3) of this rule do not apply to a Part 36 offer-

(a) that has been withdrawn;

(b) that has been changed so that its terms are less advantageous to the offeree, and the offeree has beaten the less advantageous offer;

(c) made less than 21 days before trial, unless the court has abridged the relevant period.

(Rule 44.2 requires the court to consider an offer to settle that does not have the costs consequences set out in this Section in deciding what order to make about costs.)

The judge's judgment

18. The judge did not address separately costs incurred before and after the effective date, as I think he should have done. He first addressed the question whether, absent the Part 36 offer, he would have made an issue-based or proportionate costs order:

> "32. It is clear, and it is a point conceded by Mr Sheldon, that at all times the Second Limb claim was decidedly weaker than the First Limb claim. Yet it was pursued as a separate, stand alone claim.
>
> 33. It is of course easy to bring hindsight to bear. The Second Limb issue was essentially an issue of fact. In those circumstances a party may well feel that it is right to let the court decide the disputed facts but on the claimant's mother's written evidence and that of the rest of the family present at the birth the claim in respect of the delivery was far from strong even though I accept that I found at paragraph 256 that the excessive traction point was more difficult to resolve than the other 2 complaints centred on the delivery.
>
> 34. It is also right to recognise that the allegations went to the professional competence of 2 or 3 midwives still actively practicing midwifery. It is not surprising that, the allegation having been put, they would wish to defend the claim and seek to achieve some vindication and absolution from the charge that they were responsible for a serious birth defect that will affect the claimant throughout her life. In my view these are factors that go to the reasonableness of taking the failed point.
>
> 35. As to the principle enunciated in paragraph 23 (c) above, it seems to me that Mr Martin embraces this point by the concession referred to in paragraph 19 above. The point he makes is that the Second Limb allegation is a cause of action based on a factual matrix that is entirely different from the First Limb claim – all that they really have in common is that they are both allegations of negligence against the defendant hospital arising out of the birth of the claimant.
>
> ….
>
> 39. Having considered all these matters I am bound to say, taking matters in the round and having regard to the principles in *Multiplex* and the observations I make above that, albeit an issues based or a proportionate order is a departure from the general principle, nevertheless, in the absence of a Part 36 offer, I would have been disposed to exercise my discretion to

> make a costs order that required the defendant to pay only a proportion of the claimant's costs to recognise the failure of the claimant to establish her Second Limb claim.
>
> 40. In reaching that conclusion I have not overlooked the claimant's complaint that the defendant's approach to settlement was inflexible and their offer to settle at 30% of total damages was overly parsimonious. The answer to that is to do precisely what the claimant did here, namely make a Part 36 offer which has the effect of exposing the inflexible party to the possibility of the full rigours of the Part 36 consequences being visited upon them. The defendant's conduct therefore, while a matter to go into the balance, does not swing the scales against a proportionate order in my judgment. The question now is how my decision that a proportionate order would have been appropriate absent a Part 36 offer is affected by the actual Part 36 offer."

19. I do not read the last sentence of paragraph 34 of the judgment as a finding that the Claimant had unreasonably pursued the second allegation. If the Judge did make that finding, I see nothing in his substantive judgment that would have justified his doing so, and his exercise of his discretion would fall to be impugned on that ground alone.

20. The Judge considered the effect of the Part 36 offer:

> "52. I am satisfied that the fact that there was a successful Part 36 offer does not mean that the court is unable to make an issues based or proportionate costs order. I accept that Part 36 is a self contained regime and that the Rule itself makes no reference to such orders - in distinction to Part 44.2. Nevertheless in so far as such an order is necessary to avoid injustice it is in my view permissible for the court to make it.
>
> 53. In short I do not accept that the existence of a Part 36 offer in principle insulates the offeror from such an order. That protection does not appear to be consistent with the approach adopted in *Thinc* or *Davison*. Perhaps even more importantly it would prevent the court from making an order that would not be unjust in circumstances where the Rule specifically states that the Rule can be disapplied if its application leads to injustice. I have already found that in the absence of a Part 36 offer I would have made a proportionate costs order. I do not accept that such an order ought not to be made simply because there has been a Part 36 offer. In reaching that conclusion of course I have in mind all the factors that led to my conclusion at paragraph 39 above."

21. I take paragraph 53 of the judgment as his determination that it would be unjust for the Claimant to recover all her costs.

Discussion

22. Mr Williams accepted that he had to surmount a high hurdle on his appeal against the Judge's costs order. The principles are helpfully set out in the judgment of Potter LJ in *Fleming v Chief Constable of Sussex* [2004] EWCA Civ 643 [2005] 1 Costs LR 1:

> "32. It is complained that the judge failed properly to exercise his discretion in the light of the mandatory provisions of CPR Rule 44.3. It has been acknowledged by Mr Bishop for the appellant that, in seeking to overturn the discretion of the judge as to costs, it is incumbent upon him to satisfy the test stated by Chadwick LJ in *Johnsey Estates (1990) Ltd v Secretary of State for the Environment* [2001] EWCA Civ 6535, namely that the judge "erred in principle, took into account matters which should have been left out of account, left out of account matters which should have been taken into account; or reached a conclusion which is so plainly wrong that it can be described as perverse." See also *Summit Property Ltd v Pitmans (A Firm)* [2001] EWCA Civ 2020 (an appeal on costs) per Longmore LJ at paragraphs 16-17 and per Chadwick LJ at paragraphs 26-29. In both cases, this court made clear that the Court of Appeal must exercise self-restraint in substituting its views for the views of the judge who has the feel of the case he has tried, as well as knowledge of its progress and nuances of detail which are not suitable for investigation on an appeal concerning costs."

23. I bear these principles in mind.

(a) Costs before the effective date

24. This is a relatively straightforward issue. I have not found it easy, but have been persuaded that the judge could not properly have deprived the Claimant of her costs relating to the second allegation, essentially for the reasons put forward by the Claimant. Although the two allegations related to separate parts of the Claimant's mother's labour, they were part of one event, namely the Claimant's birth. Her injuries were such as would not in general be caused without negligence in the care of her birth.

25. There were 3 particulars of negligence in relation to the second allegation. Two of these had been added to the Particulars of Claim by amendment on the first day of the trial, although they arose from the experts' reports and had been adumbrated earlier, which enabled the Defendant to consent to the amendment. They were rejected by the Judge relatively briefly, in paragraphs 249 to 255 of his substantive judgment, and there could not have been much in the way of costs attributable to them. The judge considered the third particular, that the midwives had exerted excessive traction in the vaginal delivery, at length.

26. It could not be said, and Mr Mansfield did not suggest, that it had been unreasonable for the Claimant to make and to pursue the second allegation, which was supported by her expert evidence. Although it is not necessary for the conduct of a party to be

castigated as unreasonable in order for her to be deprived of all or part of her costs, it is significant that Part 44.2 provided:

> "(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
>
> (a) the conduct of all the parties;
>
> (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
>
> (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.
>
> (5) The conduct of the parties includes –
>
> (a) …
>
> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

27. It is not unusual for a claimant to succeed on some, but not all, allegations, particularly in a personal injury case such as the present. In *HLB Kidsons v Lloyds Underwriters* 2007 EWHC 2699 (Comm), Gloster J, as she then was, said:

> "11. There is no automatic rule requiring reduction of a successful party's costs if he loses on one or more issues. In any litigation, especially complex litigation such as the present case, any winning party is likely to fail on one or more issues in the case. As Simon Brown LJ said in *Budgen v Andrew Gardner Partnership* [2002] EWCA Civ 1125 at paragraph 35: 'the court can properly have regard to the fact that in almost every case even the winner is likely to fail on some issues.' Likewise in *Travellers' Casualty* [2006] EWHC 2885 (Comm), Clarke J said at paragraph 12:
>
> > 'If the successful Claimant has lost out on a number of issues it may be inappropriate to make separate orders for costs in respect of issues upon which he has failed, unless the points were unreasonably taken. It is a fortunate litigant who wins on every point.'"

28. In *Fox v Foundation Piling* [2011] EWCA Civ 790 [2011] 6 Costs LR 961, Jackson LJ said, in a judgment with which the other members of the Court agreed:

> "48. In a personal injury action the fact that the claimant has won on some issues and lost on other issues along the way is not normally a reason for depriving the claimant of part of his costs: see *Goodwin v Bennett UK Limited* [2008] EWCA Civ 1658. For example, the claimant may succeed on some of the pleaded particulars of negligence, but not on others. Indeed the

> fact that the claimant has deliberately exaggerated his claim may in certain instances not be a good reason for depriving him of part of his costs: see *Morgan v UPS* [2008] EWCA Civ 1476. …"

29. I see nothing in this case to take it out of the ordinary or to justify the Claimant being deprived of part of her costs.

(b) Costs after the effective date

30. The first question is one of the construction of Part 36: to what does the word "costs" refer in 36.14(3)(b)? In the version of Part 36 immediately before that current in April 2015, the words were:

> "(b) his costs on the indemnity basis from the date on which the relevant period expired; …"

I think that the meaning of this paragraph was clear: "his costs" meant "all his costs". The masculine possessive pronoun was deleted when the CPR was made gender neutral, but this could not have been intended to alter the effect of the paragraph or the costs denoted by the word "costs". On this basis, a successful claimant is entitled to all her costs on an indemnity basis, unless it would be unjust (as provided in 36.14(3)) for her to be awarded those costs.

31. In *Kastor Navigation Co Ltd v Axa Global Risks (UK) Ltd* [2004] EWCA Civ 277, the Court of Appeal came to a different view as to the meaning of Part 36 as it then was. The trial judge, Tomlinson J (as he then was) had held that it was necessary first to determine, on the application of Part 44, to what costs the successful claimant was entitled, and then to order the defendant to pay those costs on an indemnity basis unless it was unjust to do so. Rix LJ gave the only substantive judgment. He said:

> "134. The relevant part of CPR 36 .21 says:
>
> '36.21. (1) This rule applies where at trial –
>
> (a) a defendant is held liable for more; …
>
> than the proposals contained in a claimant's Part 36 offer.
>
> …….
>
> (3) The court may … order that the claimant is entitled to –
>
> (a) his costs on the indemnity basis from the latest date when the defendant could have accepted the offer…
>
> (4) Where this rule applies, the court will make the order referred to in paragraph … (3) unless it considers it unjust to do so…'

> 135. The owners submitted that 'his costs' in CPR 36.21 (3)(a) meant 'all his costs'. If they were right about this it would not be unjust to give effect to the rule because if the insurers had accepted the offer there would have been no trial.
>
> 136. In dealing with the point of construction the judge said:
>
> > '… the rule is concerned with the basis of assessment of such costs as are ordered to be paid not with the basic incidence of costs. It would be surprising if a rule drafted in terms which appeared to focus on the basis of assessment should have been intended to bring about a rebuttable presumption as to the incidence of all costs incurred after a certain date, irrespective of the issue upon which they had been expended and of the relative success of the parties on that issue.'
>
> He went on to say that if he was wrong, he would have decided that it was unjust to award the owners all their costs on an indemnity basis from 1 July 2002.
>
> 137. The owners submit that the judge's construction of the rule was wrong. The rule does not say 'such costs as he is awarded' and to restrict the meaning of the rule in this way is to emasculate the beneficial Part 36 regime.
>
> 138. We think the judge's construction of the rule was right for the reason he gave.
>
> 139. The judge's discretion had therefore to be exercised in accordance with the provisions of CPR 44.3."

32. It is right that the matters specifically mentioned in CPR 36.14(4) all concern the Part 36 offer. However, they are under the rubric stating:

> "(4) In considering whether it would be unjust to make the orders referred to in paragraphs (2) and (3) above, the court will take into account all the circumstances of the case including – "

The words "all the circumstances of the case" could not be wider, and I do not think it possible to restrict them to the circumstances surrounding the Part 36 offer.

33. We are of course bound by the *ratio* of *Kastor*, unless it is distinguishable. In my judgment it is distinguishable. It was based on provisions of Part 36 and Part 44 that were materially different from the present provisions. There was then an express reference to Part 36 in Part 44, which provided:

> "(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including –
>
> (a) the conduct of all of the parties;

(b) whether a party has succeeded on part of his case, even if he has not been wholly successful;

(c) any admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36)… "

34. Thus the exercise of the discretion under Part 44 took into account the Part 36 offer at that stage. That provision is to be contrasted with the present wording of Part 44, which I have set out above, and which expressly excludes from the court's consideration any offer to which the costs consequences of Part 36 apply.

35. The relevant provision of Part 36 was also different. It provided (as set out in the judgment of Rix LJ in *Kastor*):

"36.21. (1) This rule applies where at trial –

(a) a defendant is held liable for more; …

than the proposals contained in a claimant's Part 36 offer.

…….

(3) The court may … order that the claimant is entitled to –

(a) his costs on the indemnity basis from the latest date when the defendant could have accepted the offer…

(4) Where this rule applies, the court will make the order referred to in paragraph … (3) unless it considers it unjust to do so…."

Thus there was no reference to "all the circumstances of the case".

36. These differences in my judgment require this Court to consider the meaning and effect of Part 36.14 untrammelled by the decision in *Kastor*. My view as to the meaning of Part 36.14 is supported by the substantial line of authority to the effect that Part 36 is now a self-contained code, see, e.g., Ward LJ in *Shovelar v Lane* [2011] EWCA Civ 802 [2012] 1 WLR 637 at paragraph 52:

"52. … Part 36 is a separate, self-contained code. It must be applied as such. If the offer is one to which the costs consequences under Part 36 apply, then it cannot be taken into account under Part 44 because, although CPR 44.3(4)(c) requires the court to have regard to "any payment into court or admissible offer to settle", those words are qualified by the words which follow namely 'which is not an offer to which costs consequences under Part 36 apply'. Part 36 trumps Part 44."

37. In deciding what costs order to make under 36.14, the Court does not first exercise its discretion under Part 44. Its only discretion is that conferred by Part 36 itself. The alternative construction requires the Court first to exercise its discretion under Part 44,

on the basis of all the circumstances of the case, and then to exercise its discretion under Part 36, again having regard to all the circumstances of the case. This makes no sense.

38. It follows from the above, and in particular that Part 36 is a self-contained code, that the discretion under 36.14 relates not only to the basis of assessment of costs, but also to the determination of what costs are to be assessed. I agree with the Judge that Part 36 does not preclude the making of an issue-based or proportionate costs order. However, a successful claimant is to be deprived of all or part of her costs only if the court considers that would be unjust for her to be awarded all or that part of her costs. That decision falls to be made having regard to "all the circumstances of the case". In exercising its discretion, the Court must take into account that the unsuccessful defendant could have avoided the costs of the trial if it had accepted the claimant's Part 36 offer, as it could and should have done. The principles were aptly summarised by Briggs J (as he then was) in *Smith v Trafford Housing Trust* [2012] EWHC 3320 (Ch):

> "13. … For present purposes, the principles which I derive from the authorities are as follows:
>
> a) The question is not whether it was reasonable for the claimant to refuse the offer. Rather, the question is whether, having regard to all the circumstances and looking at the matter as it affects both parties, an order that the claimant should pay the costs would be unjust: see *Matthews v Metal Improvements Co. Inc* [2007] EWCA Civ 215, per Stanley Burnton J (sitting as an additional judge of the Court of Appeal) at paragraph 32.
>
> b) Each case will turn on its own circumstances, but the court should be trying to assess "who in reality is the unsuccessful party and who has been responsible for the fact that costs have been incurred which should not have been." : see *Factortame v Secretary of State* [2002] EWCA Civ 22, per Walker LJ at paragraph 27.
>
> c) The court is not constrained by the list of potentially relevant factors in Part 36.14(4) to have regard only to the circumstances of the making of the offer or the provision or otherwise of relevant information in relation to it. There is no limit to the types of circumstances which may, in a particular case, make it unjust that the ordinary consequences set out in Part 36.14 should follow: see *Lilleyman v Lilleyman* (judgment on costs) [2012] EWHC 1056 (Ch) at paragraph 16.
>
> d) Nonetheless, the court does not have an unfettered discretion to depart from the ordinary cost consequences set out in Part 36.14. The burden on a claimant who has failed to beat the defendant's Part 36 offer to show injustice is a formidable obstacle to the obtaining of a different costs

> order. If that were not so, then the salutary purpose of Part 36, in promoting compromise and the avoidance of unnecessary expenditure of costs and court time, would be undermined."

39. I am clear that, for the reasons I have given in relation to the Claimant's costs before the effective date, it cannot be said that it would be unjust for her to be awarded all her costs. Furthermore, in making his determination, the Judge did not take into account, as he should have, the fact that the Defendant could have avoided all the costs of the trial by accepting the Claimant's favourable Part 36 offer. The considerations to which I referred apply even more strongly in relation to her costs after the effective date, when the question is not whether it is just for her to be awarded all her costs, but whether it would be unjust for that award to be made.

Conclusion

40. For the reasons I have given, I would allow the appeal; I would set aside the material parts of the Judge's costs order and order the Defendant to pay all of the Claimant's costs, such costs to be on the indemnity basis from the effective date.

Lord Justice Simon

41. I agree.

Lady Justice Gloster:

42. I also agree.