

Case No: BM70170CH

Neutral Citation Number: [2018] EWHC 3064 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
ON APPEAL FROM THE ORDER OF DISTRICT JUDGE KELLY
SITTING IN THE BIRMINGHAM CIVIL JUSTICE CENTRE
CASE No. CI2Q80Y9

Priory Courts
33 Bull Street
Birmingham
B4 6DS

Wednesday, 27 June 2018

BEFORE:

MR JUSTICE BIRSS

BETWEEN:

J P FINNEGAN

Claimant/Appellant

- and -

FRANK SPIERS t/a FRANK SPIERS LICENSED CONVEYANCERS

Defendant/Respondent

MS PORTIA O'CONNOR (instructed by Pegasus LDP) appeared on behalf of the
Claimant/Appellant

MR RUPERT COHEN (instructed by Freeths LLP) appeared on behalf of the
Defendant/Respondent

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(Official Shorthand Writers to the Court)

JUDGMENT

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1. MR JUSTICE BIRSS: The question is whether the court has power to order a payment on account of costs in a situation in which a Part 36 offer has been accepted under rule 36.31 and so by rule 44.9(1) it is deemed that a costs order has been made on the standard basis. The payment on account provision in the CPR is rule 44.2(8).
2. This question arose before District Judge Kelly and she summarised the facts in paragraphs 4 and 5 of her judgment:

"4. ... The claimant brought this claim against the defendant for damages arising from professional negligence. On 23 March 2017 the claimant accepted a Part 36 offer made by the defendant. Further to the Part 36 offer, on 30 May 2017 the parties executed a settlement agreement. The Settlement Agreement at clause 7 states that 'The defendant shall pay the claimant's reasonable costs on a standard basis to be assessed if not agreed up to 24 March 2017.' There is no specific reference in the Settlement Agreement to an interim payment on account of costs. However, by clause 3.1.2 of the Settlement Agreement, the second of the instalments that the defendant was to pay the claimant was a sum of £45,111.65 which included interest and disbursements. I am told that of the £45,111.65 disbursements were in the region of £30,000. To that extent the payment did include a sum on account of the costs incurred by the claimant.

5. A matter of days after the Settlement Agreement of 30 May 2017, the claimant issued this application seeking an interim payment on account of costs in the sum of £19,000. At that stage the claimant had not yet produced a bill for detailed assessment. CPR 47.7 provides that the time by which the detailed assessment proceedings must be commenced is three months after the date when the right to costs arose on acceptance of the Part 36 offer. I am told that the claimant finally issued detailed assessment proceedings out of time on 8 August 2017. Those detailed assessment proceedings are now under way. Points of dispute and replies to points of dispute have been served, and I am told that the claimant has requested a provisional assessment hearing."

3. The district judge observed that there was no authority on the point she had to decide and expressed surprise about that. She decided that the court had no power to make an order for a payment on account, essentially because Part 36 is a complete code and the

rules make no provision for a payment on account in these circumstances, nor does the rules provide the court with any discretion in these circumstances.

4. The judge was referred to *Lahey v Pirelli Tyres* [2007] EWCA Civ 91 to the effect that the rule 44.3 jurisdiction (that is now rule 44.2) is not available when a deemed costs order is made. The judge also distinguished the decision of Proudman J in *Barnsley v Noble*. There, Proudman J had held that the court could make a payment on account order on a discontinuance, but as DJ Kelly observed, the relevant rule concerning discontinuance preserves the discretion of the court. Rule 38.6 provides that the claimant who discontinues is liable for costs "unless the court otherwise orders". So the district judge held that the fact that a payment on account was available there was due to this discretion and that this did not apply in the case of Part 36.
5. The claimant sought permission to appeal. I gave permission on 13 March 2018 on the "some other compelling" ground that this issue is a potentially significant point of practice.
6. The relevant rules are as follows:

In CPR Part 36:

Costs consequences of acceptance of a Part 36 offer

Rule 36.13

(1) Subject to paragraphs (2) and (4) and to rule 36.20, 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.

(2) Where -

(a) a defendant's Part 36 offer relates to part only of the claim; and

(b) at the time of serving notice of acceptance within the relevant period the claimant abandons the balance of the claim,

the claimant will only be entitled to the costs of such part of the claim unless the court orders otherwise.

(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.

(4) Where -

(a) a Part 36 offer which was made less than 21 days before the start of a trial is accepted; or

(b) a Part 36 offer which relates to the whole of the claim is accepted after expiry of the relevant period; or

(c) subject to paragraph (2), a Part 36 offer which does not relate to the whole of the claim is accepted at any time,

the liability for costs must be determined by the court unless the parties have agreed the costs.

(5) Where paragraph (4)(b) applies but the parties cannot agree the liability for costs, the court must, unless it considers it unjust to do so, order that -

(a) the claimant be awarded costs up to the date on which the relevant period expired; and

(b) the offeree do pay the offeror's costs for the period from the date of expiry of the relevant period to the date of acceptance.

(6) In considering whether it would be unjust to make the orders specified in paragraph (5), the court must take into account all the circumstances of the case including the matters listed in rule 36.17(5).

(7) The claimant's costs include any costs incurred in dealing with the defendant's counterclaim if the Part 36 offer states that it takes it into account.

...

In CPR Part 38

Liability for Costs

Rule 38.6

(1) Unless the court orders otherwise, a claimant who discontinues is liable for the costs which a defendant against whom the claimant discontinues incurred on or before the date on which notice of discontinuance was served on the defendant.

(2) If proceedings are only partly discontinued -

(a) the claimant is liable under paragraph (1) for costs relating only to the part of the proceedings which he is discontinuing; and

(b) unless the court orders otherwise, the costs which the claimant is liable to pay must not be assessed until the conclusion of the rest of the proceedings.

(3) This rule does not apply to claims allocated to the small claims track.

...

In CPR Part 44

Court's discretion as to costs

Rule 44.2

- (1) The court has discretion as to -
 - (a) whether costs are payable by one party to another;
 - (b) the amount of those costs; and
 - (c) when they are to be paid.
- (2) If the court decides to make an order about costs -
 - (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
 - (b) the court may make a different order.
- (3) The general rule does not apply to the following proceedings -
 - (a) proceedings in the Court of Appeal on an application or appeal made in connection with proceedings in the Family Division; or
 - (b) proceedings in the Court of Appeal from a judgment, direction, decision or order given or made in probate proceedings or family proceedings.
- (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) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;
 - (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and

(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.

(6) The orders which the court may make under this rule include an order that a party must pay -

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date, including a date before judgment.

(7) Before the court considers making an order under paragraph (6)(f), it will consider whether it is practicable to make an order under paragraph (6)(a) or (c) instead.

(8) Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so.

...

Cases where costs orders deemed to be made

44.9

(1) Subject to paragraph (2), where a right to costs arises under -

(a) rule 3.7 or 3.7A1 (defendant's right to costs where claim is struck out for non-payment of fees);

(a1) rule 3.7B (sanctions for dishonouring cheque);

(b) rule 36.13(1) or (2) (claimant's entitlement to costs where a Part 36 offer is accepted); or

(c) rule 38.6 (defendant's right to costs where claimant discontinues),

a costs order will be deemed to have been made on the standard basis."

7. Also relevant to see is rule 44.3(8) in the form it was before the rule changes in April 2013:

"Where the court has ordered a party to pay costs, it may order an amount to be paid on account before the costs are assessed."

8. The claimant/appellant's arguments are as follows. First, that there is no authority on rule 44.2(8). Second, that *Lahey* is not a binding authority on this issue and can be distinguished. The problem in that case was that after a deemed costs order had been made, the paying party sought to change it from an order requiring payment of 100 per cent of the assessed costs to payment of only 25 per cent of the assessed costs. The fact the court held it had no power to do that is different from this case. Third, that the decision in *Barnsley* should be followed. The reasoning applies to this case because it applies to any deemed costs order under rule 44.9 irrespective of what has triggered the costs order. The various triggers can be seen in the quote from rule 44.9 above. The core of Proudman J's reasoning was that, when a deemed costs order was made, the court can order a payment on account. The decisive factor was not the existence of the discretion under rule 38.6 which might allow for a different order.
9. Fourth, the appellant referred to the judgment of Coulson J (as he then was) in a Part 36 case called *Fitzpatrick Contractors Limited v Tyco Fire and Integrated Solutions (UK) Limited (formerly Wormald Ansul (UK) Limited) (No.3)* [2009] EWHC 274 (TCC) at paragraph 54, where he said as follows:

"Pursuant to CPR 44.3(8), a claimant in the position of Fitzpatrick is entitled to seek an interim payment in respect of costs. The general rule is that, unless there is a good reason why not, the court will order such an interim payment."
10. Fifth, there is no reason to limit the application of the rules in the manner contended for by the respondents and thereby frustrate the effect of the deemed order and, for that matter, rule 44.2(8).
11. The respondent's contentions in summary are these. First, Part 36 is a complete code and the source of the entitlement to costs in this case arises from acceptance of a Part 36 offer. Rule 36.13 deals with the consequences. Provisions about payment on account are simply not there and one should not import things into Part 36 from the general law. If authority for that was required, counsel cited the decision in *Gibbon v Manchester City Council* [2010] EWCA Civ 726.
12. Second, *Fitzpatrick* was a very different case because in that case there was a residual discretion available to the court to make a payment on account because the matter was governed by rule 36.13(4)(b), in other words because acceptance had come after the relevant date under Part 36.
13. Third, when a Part 36 offer has been accepted within the relevant period rule 36.13 deals with the incidence of costs and with the basis of assessment. The provision at rule 44.9 provides for a deemed costs order in those circumstances, but in those

circumstances no discretion about costs arises. Part 36 and rule 44.2 are mutually exclusive. Support for that can be seen in rule 44.2(4)(c) which refers to factors which clearly could not have anything to do with a decision about making a costs order under Part 36.

14. Fourth, considering rule 44.2(8), the change in language from its predecessor position in rule 44.3(8) is relevant. Beforehand, the court's power was consequent on a costs order and arose, in effect, after it, whereas under rule 44.2(8), the rule is written in such a way that temporally the payment on account order is to be made at the same time as the costs order. That difference has been noted in the question and answer booklet published at the same time as the White Book, and in particular paragraphs 8.14 and 8.52, and it also explains a decision of Master Matthews in *Ashman v Thomas* [2016] EWHC 1810 (Ch) (addressed below).
15. Fifth, it is submitted that there is a difference between a case to which 44.2(8) applies and the present case because, in a case to which 44.2(8) applies, the judge making the payment on account will be the judge who had heard the trial, or whatever matter it was, and will be in a position to make an informed judgment about reasonable costs. Whereas, where a Part 36 offer has been accepted, no judge will be in a position to have done anything of that kind.
16. Sixth, it is submitted that what in fact is going on in this case is that the appellant is seeking to vary a deemed order and the court has no power to do that. That is the core point made by the Court of Appeal in the *Lahey* case. It is authority for the point that, when a deemed order is made, the court has no power to vary it. So if, as the respondent submits is right, a payment on account in this case would amount to varying a costs order, then the court has no power to make the order.
17. Seventh, the *Barnsley* case should be distinguished because it is concerned with a different situation and, due to the presence of rule 38.6, the court had a discretion in that case which would not exist in this case. Also, it is submitted that Proudman J there observed that she had not had full authority cited before her, in particular, for example, *Lahey* was not cited.
18. The respondents also served a respondent's notice on the footing that, if the court does have the power to make the order, on the facts of this case, it should not order a payment on account for various reasons.

Assessment of the appeal

19. I accept the submission that Part 36 is meant to be a complete code. Rule 36.1(1) says so and this is supported by the authorities. However, as Ms O'Connor submits, the case could be said not to be about Part 36 but about the effect of a deemed order under rule 44.9 and the interaction with rule 44.2(8). So it is not so clear whether the fact that Part 36 is a complete code necessarily assists.
20. Turning to consider rule 44.9(1), this provision deems a costs order to be made in certain circumstances. There are various triggers. It is notable, it seems to me, that

those circumstances vary. When a discontinuance triggers r44.9(1), the provision in rule 38.6 provides that the claimant will be liable "unless the court orders otherwise". There is no reference there to the basis of assessment. That is provided by the provisions of rule 44.9(1). On the other hand when r44.9(1) is triggered by acceptance of a Part 36 offer, the defendant's liability for costs is not qualified by the same "unless otherwise ordered" language which is applied in a discontinuance by r38.6. Furthermore, again unlike the situation with discontinuance, Part 36 itself expressly specifies the basis of assessment. So, to that extent, parts of rule 44.9(1) are redundant when they apply to Part 36.

21. I conclude from that analysis that it is not straightforward to reason from the relationship between one trigger of the deemed costs order and the terms of rule 44.9(1) to the relationship between another different trigger and that rule.
22. Looking at rule 44.2(8) as a matter of language, it does have the temporal quality identified by the respondent. It provides that "where" the court makes an order for costs "it will" order a payment on account of a reasonable amount unless there is good reason not to.
23. That temporal aspect may explain the decision in *Ashman*. What happened in that case was that after a costs order has been made at a hearing but before the order was drawn up and sealed, the Master was asked to make a payment on account. The Master noted the terms of rule 44.2(8) and held that the right way to look at the matter was that he had already made a costs order at the hearing but that he was being asked to alter the order under the *Re Barrel Enterprises* [1973] 1 WLR 19 CA and *Re L (Children)*[2013] 1 WLR 634 jurisdiction. He decided to do so and to make the payment on account order. The point is that the analysis that the Master conducted in that case was that in order to make a payment on account order, it was necessary that the costs order which he had already made was altered. That logic does support the respondent's case that to make a payment on account order after a costs order had been deemed to be made, would require a variation or alteration in that order.
24. Considering *Fitzpatrick*, I note that it was based on the previous language in rule 44.3(8). Paragraph 54 of Coulson J's judgment makes that clear. It seems likely that the change from rule 44.3(8) to rule 44.2(8) was intended to put into effect what is said by the judge in paragraph 54 itself. The language is strikingly similar. *Fitzpatrick* also emphasises that there are good reasons why payments on account can and should be made if they are appropriate.
25. Turning to *Lahey*, the appellant is right that *Lahey* was about the application to vary a deemed order to substitute an order requiring payment of 100 per cent of the assessed costs to make it into an order requiring payment of only 25 per cent of the assessed costs, see paragraphs 20 and 21 of the judgment of Dyson LJ giving the judgment of the court. That is a different circumstance from the present one. Nevertheless, the reasoning of the court in *Lahey* is clear, that the court has no power to vary a deemed costs order. I refer to paragraphs 19 and 23 of that decision. On way of approaching this appeal is to ask whether that is what the appellant before me is trying to do.

26. Finally, the *Barnsley* case. There the judge decided that she had power to direct a payment on account after a discontinuance. *Lahey* was not cited to her. The respondents explained the order the judge made on the basis that rule 38.6 contains a discretion and so the court had the power to make a payment on account as a result of that. That is so, but it is fair to say that the judge's reasons in *Barnsley* were not based on that proposition. Her reasoning was not focused on rule 38.6. Her decision was that the court had the power to make a payment on account when a deemed costs order was made under rule 44.9. Thus the reasoning of the judge supports the appellant.
27. However a relevant factor when considering *Barnsley* is that it was decided when the payment on account provisions were those in rule 44.3(8) and not rule 44.2(8). Those provisions do differ. The earlier provision can be read as setting the existence of a costs order as a precondition and then providing for the exercise of a discretion by using the word "may", whereas the current rule reads differently. The current provision uses the word "will", subject to a good reason not to make the order. It reads as though the payment on account will be made where the costs order is being made, in other words at the same time. However, as I shall explain I do not believe it is necessary to decide that issue, which could have wider ramifications. I will not decide this case on the basis that rule 44.2(8) in its current form demands that a payment on account order must be made at precisely the same moment that the court makes a costs order.
28. If the application for a payment on account is a variation of any sort of costs order (a deemed costs order or anything else) then in this case it would be precluded by *Lahey* and the broad reasoning of *Barnsley* would be wrong. Nevertheless, as I have said already, *Barnsley* may still be supportable on the ground of rule 38.6 in the specific circumstances that were before the court there relating to discontinuances.
29. I cannot read rule 44.3(8) (that is the previous provision) as a provision which would require variation of existing costs orders before a payment on account was made. If that is what current rule 44.2(8) means, I will be happier about the respondent's case if I thought that the change in language could have been intended to have had that effect. That the change had that effect is suggested by *Ashman*. However I very much doubt it was intended to do that. I say that because of the way Coulson J put it in *Fitzpatrick*. I believe *Fitzpatrick* is the origin of the change in language. I cannot read the judgment as indicating that the court had such an effect in mind. The point was a different one – the change was intended to emphasise that such orders should be made (and so “will” be made).
30. In my judgment, the right way to look at this is to consider the broad relationship between Part 36 itself and rule 44.2. Given the existence of rule 44.9, it can be said that Part 36 is not an entirely comprehensive code, nevertheless the consequences of acceptance of an offer are spelled out inside Part 36 itself. They have the effect that the majority of rule 44.2 (and other parts of Part 44 as well no doubt) cannot be applicable to such a situation. Part 36 deals with the incidence of costs and the basis of assessment. In my judgment, as the respondent submitted, the purpose of rule 44.9 as it relates to Part 36 is simply to deem a costs order to be made so that the detailed assessment provisions can be triggered. That purpose of the deeming provision is nothing to do with bringing into play any other parts of Part 44 such as rule 44.2.

31. The exercise of considering a payment on account in a Part 36 case is different in kind from the exercise conducted after trial, but that difference alone is not a reason not to do it. What the difference does indicate however is that the place to find a provision giving the court the ability to make a payment on account order after acceptance of a Part 36 offer would be in Part 36 itself. It is absent from there. Rule 44.2(8) applies when a court has ordered a party to pay costs. That is not what has happened when a Part 36 offer is accepted under r36.13(1) or (2). There is no reason, in my judgment, to read rule 44.2(8) in such a way as to make it applicable when a Part 36 offer is accepted. So I distinguish *Barnsley*. In my judgment, that case only applies to discontinuances.
32. I would not say that *Lahey* precludes the order that the appellant seeks because I am not convinced that the correct way of looking at this case is as if it is seeking a variation of a deemed order. I believe the correct analysis is that the place to find all the costs consequences of accepting a Part 36 offer is Part 36 and that includes the availability of payments on account, either expressly so or because in some circumstances within Part 36 the rules expressly give a discretion about costs, for example when there has been a late acceptance of a Part 36 offer. But they do not apply in this case.
33. Accordingly, DJ Kelly was right. To the extent that my reasons differ from hers, I have heard much fuller argument on it than she did on the issue and there is no need to consider the respondent's notice.
34. Finally, I wish to take the trouble to commend both counsel for their arguments and skeletons in this case. It was presented with economy and precision and I am grateful to both of them.
35. The appeal will be dismissed.

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This transcript has been approved by the Judge