
CASE LAW REVIEW 8

Katie Broomfield & Mitesh Modha

*Yao Essaie Motto & Others v (1) Trafigura Ltd (2) Trafigura
Beheer BV*

29th June 2011, SCCO, Chief Master Hurst

FACTS:

A number of preliminary points were covered by Master Hurst in his previous judgment on this matter. A claim was made on behalf of almost 30,000 litigants. The matter settled and damages were paid in the sum of £30 million. The Tomlin Order provided for Trafigura to pay £30 million on account of costs as well. The Bill of Costs totalled £104,707,772.72 and included 100% success fees in respect of solicitors' and counsels' fees and also a £9 million ATE premium. In light of the judgments in **Gray v Toner** and **Bridle v Ikhlas** (see Case Law Reviews 6 & 7), the Defendant contended that no interest was payable on the costs, this matter having been funded by numerous CFAs.

ISSUES:

1. Were the Claimants entitled to claim interest on their costs and if so from what date?

HELD:

Firstly, he concluded that the incipitur rule still applies and thus the decision in *Hunt v Douglas* was still binding. On this point, Master Hurst disagrees with the approach in *Gray v Toner*.

However, he also confirmed that the court has a discretion pursuant to CPR 40.8(1)(b) to order that interest will run from a date different to the order entitling a party to costs. Master Hurst also agreed with the comments in **Fattal v Walbrook Trustees** that the primary purpose of an award of interest is to compensate the recipient for having been out of pocket.

As to whether any interest belongs to the client or to the legal representatives, Master Hurst quite clearly concludes that it belongs to the client. An attempt was made to argue that a solicitor acting under a CFA and who is thus effectively funding the matter, was in the same position as an insurer in a subrogated claim. This was rejected on the basis that an insurer has a contractual right to step into the shoes of the insured, pursue the claim and recover the accompanying costs.

The paying party also attempted to imply a term into the CFA whereby the client was obliged to account to the legal representatives for any interest recovered. Master Hurst did not agree with the argument and found that the CFA as it stood did not require any further terms to be implied into it. The CFA would arguably have to go one step further in any event and require the client to pay interest on costs, thus creating a primary liability as opposed to a term simply determining who keeps any interest awarded.

Interest was thus deemed to run from the date that an interim or final costs certificate was issued by the court. Master Hurst acknowledged that either party was likely to appeal hence the lengthy judgment. Permission to appeal to the Court of Appeal has been granted.

**LXM (by her litigation friend KLM) v Mid Essex Hospital Services
NHS Trust**
SCCO, [2010] EWHC 90185 (Costs)

FACTS:

This was a claim for clinical negligence arising out of a delay in delivering LXM at birth (11th April 1997) which led to LXM suffering hypoxia and consequently brain damage. During the course of the matter LXM (by her litigation friend) was represented by Leigh Day & Co (LD), Gadsby Wicks (GW) and Irwin Mitchell (IM).

Initially, LD acted under a Legal Aid Certificate granted on 24th July 1997. Expert reports were supportive of breach of duty but not so clear on causation. There was a dispute as to whether the brain damage was caused by the hypoxia or as a result of a diagnosis of cerebral palsy. In 2002 Counsel provided quite a pessimistic advice. It was suggested either they discontinue or wait a couple of years in the hope of better evidence regarding causation emerging. In September 2003, LXM's parents lost confidence in LD.

They approached GW and the Legal Aid Certificate was transferred over on 8th January 2004. A Letter of Claim was served on 19th October 2004 with the Defendant denying liability on 9th May 2005. A positive opinion on causation was obtained in October 2005. Having obtained this evidence, GW now wished to issue the claim but wanted to move LXM onto a CFA. GW considered this was a more efficient way of dealing with the case as they would not have to revert to the LSC at various stages, would not have to draft case plans etc. (the costs of which would be irrecoverable from the Defendant and would therefore come out of any damages) and they would have greater control of the matter.

The CFA was agreed on 22nd January 2006 with a 100% success fee with the Legal Aid Certificate being discharged the following day. Proceedings were issued on 15th February 2006 with liability being denied in the Defence. A trial on liability was listed for 15th October 2007 with a 6-8 day time estimate. The Defendant admitted liability on 11th October 2007 with damages to be assessed.

The Claimant then approached IM in June 2008 and was put on a CFA with a staged success fee – 50% if the claim was won more than 3 months prior to a listed trial or first day of the trial window, 100% thereafter. The matter settled for £3,700,000 damages plus future payments on 23rd March 2009.

ISSUES:

1. Was it reasonable and proportionate for the Claimant to incur the additional liabilities claimed when she had the benefit of public funding?
2. Were the success fees claimed reasonable?
3. Was the Claimant entitled to interest on the costs of establishing liability?

HELD:

1. The questions to be posed is “*Was the CFA and the attendant ATE policy a reasonable choice for the Claimant at that time having regard to all the circumstances?*” Master Gordon-Saker had reference to the potential liabilities of the Claimant and her litigation friend under the CFA's and under the public funding certificate. Under the certificate, if it was revoked, she would be exposed to costs but this was considered a fanciful risk. If she won, then costs

deemed irrecoverable between the parties would be recovered by way of statutory charge out of the damages. He considered there to be significant risk of exposure to costs from adverse interlocutory orders which would also be recovered by way of the statutory charge. Under the CFA's, if the Claimant terminated, the solicitors could choose whether to seek their base costs and disbursements at that point or seek the base costs and disbursements plus a success fee when she won. Both CFA's also had costs shortfall clauses whereby the solicitors would only seek to recover costs deemed reasonable on assessment. The CFA was considered more advantageous to the Claimant as the only impact on her damages would be in respect of the unrecovered Legal Aid costs in LD's Bill of Costs. Accordingly, the Master could not say it was unreasonable for the Claimant to have incurred the additional liabilities. The base costs for GW and IM had been agreed and Master Gordon Saker stated he would not have considered the base costs to have been disproportionate. Accordingly, he was not inclined to find the additional liabilities disproportionate particularly given that the quantum of the ATE premiums had not been challenged.

2. As to GW's success fee, the Master noted that the Claimant had favourable reports on breach of duty and causation prior to agreeing the CFA. He considered 50% prospects of success to be pessimistic with 60% being more appropriate resulting in a success fee of 67%.

As to IM's success fee, it was noted that this CFA was agreed after the admission of liability. The risk was only in respect of Part 36. He acknowledged that staged fees are more attractive given the decision in *KU v Liverpool City Council* but still considered the prospects of success to be 75% resulting in a 33% success fee. In awarding a success fee greater than in *C v W*, he noted that on larger claims the Part 36 risk was greater.

Counsel was entitled to her 100% success fee as she agreed her CFA only a month before the liability trial was to be heard and matters were still "*very much up in the air*".

3. Master Gordon Saker was not willing to entertain the argument on interest made on the basis that there was no liability on the part of the Claimant to pay costs. ***Gray v Toner/Bridle v Ikhlas*** were not raised. Master Gordon-Saker relied on the judgments in ***Bollito v Arriva London*** [2009] EWHC 90136 and ***Hanley v Smith and the MIB*** [2009] EWHC 90144.

D. Sousa v London Borough of Waltham Forest Council [2011]

EWCA Civ 194

FACTS:

The Claimant suffered subsidence damage to his property caused by the roots of a tree for which the Defendant was responsible. The Claimant claimed for the damage under his buildings insurance with Virgin Insurance. Virgin Insurance settled the claim but then commenced a subrogated claim against the Defendant. Cogent Law LLP were instructed in September 2006. In January 2008, a letter of claim was sent to the Defendant. Thereafter, on 1 February 2008, Virgin Insurance entered into a CCFA with Cogent Law which provided for a success fee of 100%. Liability was not disputed and the claim was settled pre-issue in July 2008 for £6,250.00 plus reasonable costs. Cogent Law submitted a bill for £5,578.20 (£2,629.60 of which was incurred post-CCFA). The costs were agreed in the sum of £3,750.00 and the question for the Judge was whether any success fee was recoverable and if so what percentage uplift should be allowed.

HELD:

Although the proceedings were being conducted at the behest of Virgin Insurance, the Claimant was Mr Sousa. Accordingly, any solicitors instructed in the matter were acting for him and he became liable for their costs (*Thornley v Lang* [2003] EWCA Civ 1484). Nonetheless, Virgin Insurance were controlling the litigation and therefore the real question was whether they were entitled to enter into a CFA and if so whether it was reasonable for them to do so. It was conceded that an insurance company is entitled to enter into a CFA (*Campbell v MGN (No. 2)* [2005] UKHL 61) therefore the question became whether it was reasonable for them to do so. The Court of Appeal held that if CFAs are open to all the Court cannot conclude that they are unreasonable by virtue of the fact that they will also be open to rich and powerful insurance companies.

Julie Natasha Pine v DAS Legal Expenses Insurance Company
Limited
Queens Bench Division, [2011] EWHC 658 (QB)

FACTS:

The Claimant was previously involved in an employment tribunal claim against her former employer. For the purposes of those proceedings she instructed Royds LLP who were now claiming legal fees from her in the sum of £126,000 and had issued a claim for those fees on 31st October 2008.

She was defending the claim on the basis that Royds LLP had conducted the employment proceedings negligently and she also made a counterclaim for damages. In her defence of those proceedings and the bringing of her counterclaim she had instructed Counsel directly via the public access scheme (Mr Hyams). She held a home insurance policy dated 5th June 2006 which provided for legal expenses cover to be provided by DAS. She also had the benefit of legal expenses cover provided by First Assist however the indemnity on that policy had been exceeded. Miss Pine duly made a claim for cover from DAS asking them to cover the costs of Mr Hyams. DAS were prepared to indemnify Miss Pine in respect of Mr Hyams' fees but only if he was instructed via a solicitor. DAS were happy for Miss Pine to choose the appropriate solicitor.

The Claimant was not content with this and sought a declaration that she was entitled "*under the terms of her contract, to choose her own legal representative, namely a public access barrister*".

ISSUES:

1. Was DAS entitled to restrict the manner in which Miss Pine instructed a legal representative of her choosing?

HELD:

According to the terms of the contract, DAS were free to choose an appointed representative except where court proceedings were started or there was a conflict of interest. In the latter two situations the policyholder was free to choose an appointed representative with such choice only being refused by DAS in "*exceptional circumstances*". The insurance policy had to be read in light of *The Insurance Companies (Legal Expenses Insurance) Regulations 1999* which gave effect to *Council Directive 87/344/EEC*. Regulation 6 states:

"(1) Where under a legal expenses insurance contract recourse is had to a lawyer (or other person having such qualification as may be necessary) to defend represent or serve the interest of the insured in any inquiry or proceedings, the insured shall be free to choose that lawyer or other person."

Similar provision is made for free choice of a lawyer whenever there is a conflict of interest. Accordingly, the DAS policy seemed to be compliant apart from the reservation in respect of “*exceptional circumstances*” as no such provision exists in the Regulations. The policy also gave no examples of what might amount to *exceptional circumstances*.

DAS were objecting to the direct instruction of Counsel and maintained that they were not in breach of Regulation 6. They also highlighted the fact that under the Bar Code of Conduct, barristers were not to conduct litigation. DAS expressed concerns that given the Claimant’s diagnosed ME/Chronic Fatigue Syndrome, her inexperience and her lack of expertise she would invariably require assistance from Counsel to conduct the litigation and this would put him in breach of the Bar Code of Conduct. This would put him in breach of Article 4 of the EC Directive which requires lawyers to “*observe the rules of professional conduct of the host Member state*”.

The terms of the policy also required regular case reports to be provided so that DAS could monitor the prospects of success and ensure they were still at least 51% which was the threshold for cover to continue. DAS contended that this was again something that Miss Pine would not be able to do from a detached perspective given her personal involvement in the case.

HHJ Seynour QC appreciated the concerns of DAS but felt that everything ultimately turned on the interpretation of the freedom of choice clause and the meaning of “*exceptional circumstances*”. Having heard evidence from Miss Pine, the judge was satisfied that she was capable of conducting the litigation and complying with her contractual duties under the insurance policy. He felt that DAS were in breach of the freedom of choice clause in attempting to force Miss Pine into having solicitors as her “*appointed representative*” who would then instruct Counsel. The judge was not satisfied that the concerns raised by DAS were sufficient to amount to exceptional circumstances as they were factors that might arise in any case where a litigant seeks to instruct Counsel directly. The declaration was duly granted.

A claim for damages was also made however this was refused on the basis of the general principle in breach of contract matters that compensation is only awarded for financial loss arising from the breach. The aim of the insurance contract was not to give pleasure, relaxation or peace of mind as is the case with holiday contracts where such non-financial awards are made.

Eves v Priory Healthcare Limited
Leeds County Court, 26th October 2010, District Judge Hill

FACTS:

The Claimant suffered an accident on 29th March 2002 with a claim being issued on 21st December 2005. Damages were limited to £50,000 in the Claim Form. Liability was admitted in the Defence dated 25th May 2006 with judgment being entered in favour of the Claimant on 31st July 2006. The solicitor’s CFA was agreed on 15th August 2006.

The Defendant had sought disclosure of the pre-CFA private retainer, the CFA of Irwin Mitchell and the CFA’s of both Counsel. District Judge Hill initially considered the Bill and preliminary points on the papers and made no order for disclosure. As the order had been made of the court’s own initiative either party was entitled to apply to vary or set it aside. The Defendant applied and the matter was listed for a preliminary hearing. The Claimant in accordance with CPR 32.5 had only provided a Statement of Reasons and only provided it on the day of the preliminary hearing.

ISSUES:

1. Was the Defendant entitled to disclosure of the CFA's and private retainers

HELD:

Given the fact that the Claimant had been on a private retainer for a considerable period prior to the CFA being agreed and the fact the CFA was agreed only after liability had been admitted and judgment entered, the District Judge felt that there were issues that had not been addressed in the CPD 32.5 statement (i.e. issues as to the level of success fee and why the CFA was agreed at that point). Similarly, he also ordered disclosure of the private retainer adding that there were concerns about discrepancies between the hourly rates in the Bill and those in an estimate provided during the proceedings. Disclosure was also ordered in respect of Counsel's CFAs. He considered the facts of the case to be "*sufficiently unusual*" to justify disclosure. He also relied on upon **Hollins v Russell**, stating that since that case "*it has been the practice to order disclosure and that practice is generally followed throughout the country*".

Abbott v Long

Court of Appeal, [2011] EWCA Civ 874

FACTS:

The matter concerned a claim for damages in respect of a road traffic accident. At trial the Claimant's damages were reduced by 75% on account of contributory negligence. He also made a claim for the credit hire of a substitute motor vehicle. This claim alone amounted to £48,000 and covered a period from June 2008 until December 2009. During the trial the Claimant accepted that he could have financed a substitute vehicle himself. Accordingly this period was reduced to 6 months which reduced this head of claim to £8,600 (a sixth of the original sum).

The trial judge, HHJ Marshall QC, made no order as to costs in light of what she considered to be a grossly exaggerated claim by the hire company which, in her opinion, was also driving the litigation. She felt that the hire company had run the claim as a commercial enterprise, saw "*the conduct of litigation as a revenue earning exercise*", had failed to take a "*dispassionate and responsible attitude to the principles of the correct conduct of litigation*" and had failed to mitigate the losses supposedly accruing to the Claimant. She also had regard to the fact that the Defendant had had a significant measure of success whereby the Claimant was vulnerable to a potential cross-claim (albeit one had not been pursued). She noted that the matter would have had to proceed to trial in any event given the failure of the Defendant to make any offers but maintained her order.

ISSUES:

1. Was the trial judge justified in making no order as to costs?

HELD:

At the outset the Court of Appeal noted the limit of its jurisdiction on costs appeals. With reference to the case of *SCT Finance v Bolton*, it was noted that the trial judge's discretion on costs was to be given a wide interpretation to discourage parties from incurring costs to argue about costs. The judgment of Walker LJ was also quoted from **Straker v Turner Rose** where he states that "*the judge must have gone seriously wrong if this court is to interfere*".

The Court of Appeal was prepared to accept the Appellant's submissions that the contributory negligence issue had "caused no distinct costs and that any reduction there would have been of the most minimal kind on account of contributory negligence".

However, the court noted that the main reason for the costs order was the reduction in the hire charges element of the claim. Accordingly with reference to the case of *Widlake v BAA Limited* the court addressed its mind to how reprehensible the conduct was. The conduct of the hirer was not deemed to be dishonest but was considered to be blameworthy and capable of being found to be reprehensible. Further, although the Court of Appeal acknowledged that any costs sanction had to be proportionate it was not satisfied that the trial judge was not entitled to reach her conclusion having reference to her detailed and carefully reasoned judgment. The appeal was dismissed and the costs order stood.

*Medway Primary Care Trust & Dr Ashiq Hussain v Sebastian
Marcus [2011] EWCA Civ 750*

FACTS:

The Claimant commenced proceedings against the First and Second Defendants claiming that in April 2005 he was diagnosed with ischaemia but that the Defendants failed to take adequate steps in respect of treatment and as a result of their negligence his leg had to be amputated. There was no opportunity for the Claimant to send a letter of claim because, as a result of delays in obtaining medical records and tracing the Second Defendant, the limitation period was about to expire. Proceedings were therefore issued and in their Defences the First Defendant denied breach of duty and the Second Defendant admitted breach of duty but denied that the breach of duty had caused the Claimant's loss. Shortly before trial, the First Defendant admitted breach of duty but denied that the breach of duty had caused the Claimant's loss. Quantum was agreed in the sum of £525,000.00. Therefore the only issue was causation. Both sides called expert evidence and the conclusion was that the Judge decided in favour of the Defendants and found that even if the Defendants had not been in breach of duty the amputation could not have been avoided. Nonetheless, the Claimant was awarded £2,000.00 for the additional time during which he had suffered pain by reason of the ischaemia without receiving proper treatment.

ISSUE:

1. Who should be awarded the costs of the proceedings?

AT FIRST INSTANCE:

The Deputy Judge awarded the Claimant 50% of his costs. He took the view that the fact that the Claimant had been awarded damages that were modest, but not nominal, entitled the Claimant to his costs and that although he had lost on causation he had proceeded reasonably on the basis of expert opinion. He also took into account the fact that the First Defendant did not admit breach until very late in the day and that both Defendants denied that any loss at all was caused. However, in reducing those costs by 50% he took into account the fact that the Defendants had succeeded on the most important issue on the case, that the damages although not nominal were very small and that no rational person would have issued proceedings in a case of this kind if the recovery was only £2,000.00 and that no reasonable person would contest such proceedings if they were issued. Nonetheless, he concluded that at no stage had the Defendants made an admissible offer to settle the Claimant's claim nor any Part 36 offer and therefore they could not complain that a costs order against them was unjust.

PREVIOUS DECISIONS:

Oksuzoglu v Kay [1998] 2 All ER 361

Widlake v BAA Ltd [2009] EWCA Civ 1256

HELD:

MAJORITY JUDGMENT:

President of the Queens Bench Division & Lord Justice Tomlinson

Appeal allowed.

The President of the QBD and Tomlinson LJ held that the Defendants were successful and should be awarded the costs of the proceedings. In reaching this decision they considered that the award of £2,000.00 was insignificant in the context of the claim and was a *last minute attempt* to salvage something (0.25%) from an action which the Claimant lost. £2,000.00 was no compensation for the loss of a leg. They took into account that the causation issue was squarely advanced in the original Defences and it carried the day and held that it was unreasonable to have expected the Defendants to make a Part 36 offer of £2,000.00 to £3,000.00 in respect of the element of the claim that succeeded because of the costs consequences which would have been disproportionate.

Nonetheless the President and Tomlinson LJ found that there should be a reduction to the costs awarded to take into account the fact that the respondent did succeed to a very small extent and the fact that the First Defendant did not concede liability until a very late stage.

The President considered that the Defendants might have written a *Calderbank* letter offering proportionate costs. However, he did not consider that this detracted from the main point which was that the Defendant was successful.

DISSENTING JUDGMENT:

Lord Justice Jackson

Appeal dismissed.

Jackson LJ considered that in this case there was always the fall back claim for PSLA which would have succeeded if liability was proven. He held that, in those circumstances, the Defendants ought to have protected themselves by making a Part 36 offer. He rejected the submission that that was not practical stating that the Claimant would have been able to recover only those costs that were reasonable. He found that in the absence of a Part 36 offer the only way the Claimant could recover the £2,000.00 was to issue proceedings and pressing on until the defendants agreed or were compelled to pay damages and costs assessed on the standard basis.

Jackson LJ held that in a personal injury case where (a) the Claimant had pursued his claim in a reasonable manner, (b) the Claimant recovered damages (other than nominal damages) and (c) there was no or no sufficient Part 36 offer, the starting point should be that the claimant recovers his costs. Since the Defendants did not make any Part 36 offers at all, their costs position should not be any better than it would have been if they had made an inadequate Part 36 offer.

FACTS:

The Claimant was injured in a road traffic accident and issued a claim to recover damages for personal injury. The Defendant made a pre-issue offer in the sum of £1,475.00 on the basis of a 50:50 split in respect of liability. The Claimant's solicitors wrote to the Defendant confirming their client's acceptance of the offer which would mean he would receive £737.50 "provided, of course, that [their] costs and disbursements [were] met in addition, such costs to be assessed in default of agreement".

The Claimant's solicitor calculated their costs pursuant to Section II of Part 45 CPR in the sum of £2,015.58. The Defendant contended that the costs should be limited to small claims fixed costs of £280.00 as the Claimant had recovered less than £1,000.00. Accordingly, the Claimant commenced costs-only proceedings and an order was made for the Claimant to recover his costs "to be subject to detailed assessment if not agreed".

ISSUE:

1. Whether the Claimant was entitled to fixed recoverable costs under Section II CPR Part 45; or
2. Whether he was entitled to the fixed costs recoverable in small claims track cases only.

PREVIOUS DECISIONS:

Parveen v Farooq (30 June 2009, Liverpool Crown Court, unrep.) (followed)

CIVIL PROCEDURE RULES:

- Section II of CPR Part 45 applies to disputes where the total value of the agreed damages does not exceed £10,000.00 and if a claim had been issued for the amount of the agreed damages the small claims track would not have been the normal track for that claim;
- The small claims track is the normal track for any claim for personal injuries where the value of the claim is not more than £5,000.00 and the value of the claim for damages for personal injuries is not more than £1,000.00;
- It is for the court to assess the financial value of a claim and in doing so it will disregard any contributory negligence.

HELD:

The term agreed damages is not defined in the rules. It must therefore be given its natural meaning which cannot be interpreted to mean "the value of the claim before deduction for contributory negligence". Had a claim been issued for £737.50 it would have been allocated to the small claims track and the Claimant is entitled to recover small claims fixed costs of £280.00. The fact that this may lead to an inconsistency that the claim would have been allocated to the fast track if issued but only small claims track costs are recoverable is unfortunate but it would be more unfortunate if solicitors were driven to issue claims which need not be issued simply to make them cost-bearing claims.

Patrick Udogaranya v Kenneth Nwagw [2010] EWHC 90186
(Costs)

FACTS:

The Claimant was injured in a road traffic accident and claimed damages for personal injury against the Defendant. The Claimant made a pre-issue to settle the Claimant's claim. The offer was made in writing, headed "Part 36 Offer. Without Prejudice save as to costs" and stated:

"The defendant hereby makes a Part 36 offer in the sum of £4,100. This offer (1) is to settle the whole of your client's claim; (2) is intended to have the consequences of Part 36; (3) has a relevant period of 21 days during which the defendant will be liable for the claimant's costs in accordance with CPR 36.10 if the offer is accepted within that period; (4) is inclusive of interest until the expiry of the relevant period; (5) is made on the basis that there are currently no repayable benefits and the certificate of repayable benefits is valid throughout the relevant period; (6) does not take into account any counterclaim."

The Claimant replied:

"We write further to your Part 36 offer dated 3 February 2009 in the sum of £4,100, which we confirm is accepted. Please make the cheque payable to MTA Solicitors. We also attach a report of Mr Ernschaw, dated 7 January 2009, for your file. Acceptance is subject to payment of our reasonable costs and disbursements, to be assessed if not agreed. Acceptance specifically excludes any credit hire or credit repair claim which could be pursued separately on behalf of our client."

Thereafter the Defendant argued that the Claimant was limited to fixed costs pursuant to CPR 45.7 . The Claimant claimed to be entitled to costs to be assessed on the standard basis pursuant to CPR 36.10 and alternatively claimed to be entitled to costs greater than the fixed recoverable costs on the basis of exceptional circumstances pursuant to CPR 45.12.

ISSUES:

1. What are the costs consequences of accepting a Part 36 offer pre-issue?
2. What amounts to exceptional circumstances pursuant to CPR 45.12?

PREVIOUS DECISIONS:

Gibbons v Manchester City Council [2010] EWCA Civ 726

HELD:

Master Haworth held that the Claimant's offer was a valid Part 36 offer pursuant to rule 36.2. However, he held that rule 36.10 was not engaged. He said that the reason it was not engaged was that it would entitle the Claimant to the costs of the proceedings. However, as proceedings had not been issued the question of pre-issue proceedings was not relevant. Had the Defendant's offer contained the words "that the Defendant would be liable for the Claimant's costs, including the costs pre-issue of proceedings in accordance with CPR 36.10" then in that case the Claimant would have been entitled to his costs to be assessed on the standard basis. Pursuant to the decision in **Gibbons**

Master Haworth held that the rules of Part 36 must be complied with to the letter for the costs consequences of Part 36.10 to be engaged.

He then went on to consider the meaning of “exceptional circumstances” within rule 45.12. He acknowledged that there are no authorities on this point and said that each case would have to be considered on its merits. He found that this particular case was not a run-of-the-mill case in that the Defendant had given the Claimant the run around. The Master pointed to the fact that causation and liability was disputed on one of two grounds - either there was no impact or there was a low velocity impact - and found that the Claimant had been put to considerably more work than would otherwise be the case in this type of claim. He therefore found that there were exceptional circumstances, that the Claimant was not limited to fixed costs and made an order for the costs to be assessed.

*Katie Thompson & Sophie Thompson (by their Father and
Litigation Friend Christopher Thompson & Maureen Williams
(Joint Administrators of the Estate of Tracy Ann Williams
(Deceased)) v Dr Susan Bruce [2011] EWHC 2228 (QB)*

FACTS:

The Claimants sued the Defendant for negligence following the death of their mother from breast cancer. At the same time as the letter of response was served the Defendant made a Part 36 offer in the sum of £190,000.00 which was accepted and the Claimants issued Part 8 proceedings pursuant to CPR rule 21.10(2).

The Defendants letter offering £190,000.00 stated:

“This is a Part 36 Offer. This offer is intended to have the consequences of a Part 36 offer. The Defendant’s offer is open for acceptance for 21 days from the date you are served with this letter, which we calculate to be until 4pm on 18th June 2010. This offer can only be withdrawn or altered to be less advantageous to the Claimant before 18 June 2010 with the permission of the Court.”

The Defendant also agreed to:

“Pay the Claimant’s reasonable costs up until 18th June 2010 or the date of acceptance of the Defendant’s offer, whichever is the earlier, such costs to be agreed or assessed on a standard basis in accordance with CPR 36.10”

The final paragraph said :

“For the avoidance of doubt if the Claimant fails to obtain a Judgment more advantageous than the offer made in this letter, then the Defendant will seek an Order that the Claimant should pay both Parties’ costs from 18th June 2010”

The offer was not accepted until 21 October 2010 subject to the payment of the Claimants’ costs up to an including the infant settlement hearing.

At the infant approval hearing, the Claimants sought to argue that rule 36.10 did not apply and that this rule applies only when proceedings have been issued.

HELD

It was accepted by both parties that the offer made by the Defendant was a valid Part 36 offer. The question for the court was, as in *Udogaranya v Nwagw*, whether rule 36.10 applied where the case settled pre-issue. In this case, the Judge considered the wording of rule 36 and noted that rule 36.10 is headed "Costs consequences of acceptance of a Part 36 offer, rule 36.14 is headed "Costs consequences following judgment". There is no intervening rule headed "Costs consequences following the issue of proceedings", which one might reasonably expect to have been drafted if a distinction was to be drawn between pre-issue and post-issue but pre-judgment costs. He said that he could not think it was Parliament's intention for there to be such a distinction. Accordingly, he held Part 36 is not confined to costs incurred post-issue and that the word proceedings in Part 36.10 should be defined to include steps taken prior to issue which would ordinarily be compensatable in costs on formal assessment.

Thereafter, the Judge was required to consider whether or not to exercise his discretion pursuant to CPR 36.10(5). He found that because approval was necessary, that the claim had not been fully valued and that the Defendant's arguments about breach of duty and causation needed to be considered with the Claimants' experts it would have been impossible for the Claimants to decide whether or not to accept the offer within 21 days and the Defendant would have realised this. He rejected the suggestion that the Claimants should have quantified their claim before serving the letter of claim was rejected on the basis that this was not required by the pre-action protocol. He also took into account that it took the Defendant 14 months to reply to the letter of claim and that the longer the case dragged on the more stale the case became and the more it would need to be revisited when the letter of response arrived. The Judge further noted that dealings between the parties were extremely friendly with request for extensions of time for limitation being requested and granted. He said that the Claimants' formal response to the Part 36 offer should have been to seek an extension of the offer but that they had failed to do so. He said that he was satisfied that this was an oversight and that it was likely that the Claimants' solicitors assumed that the friendliness was continuing. He took into account the fact that throughout the exchange of communication between the date of the Part 36 offer and the date when the offer was accepted there was no reference to the costs consequences of failure to accept the offer. He also considered that the wording of the offer and the reference to "judgment" was consistent with the Claimants' contention that the offer was intended to have the costs consequences contended for by the Defendant if the offer was not beaten post-judgment.

Taking into account the various factors the Judge found that this was a case where it was appropriate to make an order other than that provided for expressly in CPR 36.10(5).