



Case No: A3/2010/1782 & 2138

Neutral Citation Number: [2011] EWCA Civ 786
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE HIGH COURT OF JUSTICE, CHANCERY DIVISION
SIR JOHN LINDSAY
Case No HC06C04217

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/07/2011

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE THOMAS
and
LORD JUSTICE MOSES

Between:

(1) PAUL JONATHAN HOWELL
(2) ALISON RUTH ROBINSON
(3) JOHN NEAL THOMPSON
(As trustees of the Captain Edward Joicey 1948
Settlement and the Major John Joicey 1968 Settlement)
- and -

Appellants

(1) MARCUS LEES-MILLAIS
(2) LORNA MILNE JOICEY
(3) FIONA ASTRID LEES-MILLAIS
(4) HECTOR FORWOOD
(5) LUCINDA LORAIN NEWALL
(6) ALEXANDER NEWALL

Respondents

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

Mr Gilead Cooper QC and **Mr Andrew Child** (instructed by **Boodle Hatfield**) for the appellants
Mr Alan Steinfeld QC (instructed by **Harcus Sinclair**) for the first and second respondents

Hearing date: 20th June 2011

Judgment
As Approved by the Court

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The Master of the Rolls:

1. This is an application for permission to appeal, ordered to be heard on the basis that the appeal is to follow if the application succeeds. It is brought by the claimants against a costs order made by Sir John Lindsay. The circumstances which gave rise to the order were unusual, complicated and disturbing. Fortunately, only a relatively brief recital of the facts is necessary, from which the unusual nature of the case will be self-evident, its complexities can be largely avoided, and its disturbing aspects may be dealt with shortly.

The original application

2. As indicated, this matter has a long and tangled history (and, I fear, a long and tangled future), but, fortunately, for present purposes, the relevant facts are within a pretty slight compass.
3. The claimants (“the trustees”) are trustees of two settlements (“the 1948 settlement” and “the 1968 settlement”). In December 2006, they issued an application (“the application”) in the Chancery Division seeking the sanction of the court to pursue various claims which, they contended, the two trusts had for breach of trust and other relief. There were originally two beneficiaries who were made defendants to the application, namely Marcus Lees-Millais (“Marcus”) and his grandmother Lorna Joicey (“Lorna”) (together “the respondents”). At a preliminary hearing, another beneficiary, Fiona Lees-Millais (“Fiona”), Marcus’s mother and Lorna’s daughter, was added as third defendant.
4. The trustees’ case was that the court should sanction all the proposed claims. All three defendants contended that none of the proposed claims should be sanctioned, with the exception of a claim for negligence against a firm of solicitors.
5. The application came before Lindsay J (“the Judge”) in May 2008, and lasted eight days. On 10 July 2008, the Judge gave a very full and closely reasoned judgment in which he decided not to sanction any of the proposed claims, save the negligence action against the firm of solicitors. There was no appeal against that decision.
6. A very substantial amount of costs had been incurred on behalf of the trustees (who were represented by leading counsel), Lorna (who was represented by leading and junior counsel), and the defendants (who were each represented by very experienced

junior counsel). The Judge made it clear in the course of his judgment that, in his view, the trustees had acted in an inappropriately partisan way. After judgment was handed down, there was a dispute as to how the costs of the application should be allocated (“the costs dispute”), and this led to directions being given for a costs hearing, which eventually was listed in May 2010, with an estimated hearing time of ten days.

7. Between September 2008 and April 2010, the parties set about preparing for the costs hearing. In that connection, part of the work carried out by and on behalf of the respondents involved seeking to establish that the trustees had been acting in an underhand or improper way. This was hotly denied by the trustees.

The negotiations about costs

8. Meanwhile there were negotiations, expressed to be “without prejudice save as to costs” or, more accurately, “without prejudice save as to the costs of post-judgment matters”, with a view to settling the costs dispute. Those negotiations were mostly conducted through solicitors, although barristers were also sometimes involved. In that connection, shortly after the Judge had given judgment, the trustees’ then solicitors instructed new leading and junior counsel.
9. Although an earlier offer was made on behalf of the trustees in 2008, the first offer that need be mentioned was contained in three letters dated 9 April 2009.
10. The first letter of 9 April 2009 was to Fiona’s solicitors and offered her nothing. The second letter, which we were not shown, appears to have been sent to Marcus’s solicitors, and offered to limit the costs which the trustees could recover from the 1968 settlement in respect of the application to £211,215.30.
11. The third letter of 9 April 2009 (“the April 2009 letter”) was to the solicitors acting for Lorna. This letter started by stating that it “constitute[d] a Part 36 offer”, and went on to say that:

“This offer is open for acceptance up to and including twenty one days from the date of receipt of this letter. It relates to the whole of the claim advanced by your client for her own costs of the ... application and to [the trustees’ costs]. Naturally in accordance with Rule 36.10 acceptance of this offer will mean that [Lorna] will be entitled to her costs of the disputed costs application up to the date on which acceptance is made.”

12. The April 2009 letter then made the following offer:
 - i) The trustees would pay Lorna either “(a) ... a sum representing 75% of her costs [of the application] to be assessed on an indemnity basis”, or “(b) ... the sum of £354,417.88 (being 75% of [her] payable costs [of the application] assuming 80% recovery”, and
 - ii) The trustees would limit the costs of the application which they could recover to £45,000 from the 1948 settlement, in addition

to the £205,000 from the 1968 settlement as proposed to Marcus.

13. On 24 April 2009, Lorna's solicitors replied to "what [the trustees' solicitors] describe as a 'Part 36 offer'", and raising six questions. Those questions included a challenge to the trustees' failure to offer any sum to Fiona in respect of her costs of the application. That letter was answered four days later by the trustees' solicitors, who replied to all the questions, and reaffirmed their refusal to pay any sum towards Fiona's costs.
14. Negotiations seem to have resumed in September 2009, by which time it appears that Lorna's solicitors were also acting for Marcus. In an email that month to the trustees' solicitors, the respondents' counsel put forward figures which would have cost the trustees more than they had proposed in April 2009, and indicated that although "Fiona's costs will of course have to be paid", the respondents were "prepared to discuss [their costs] separately from [Lorna's]". The proposals in that email relating to Fiona's costs were reiterated in a letter from their solicitors in a letter dated 14 October 2009.
15. Thereafter, the trustees changed their solicitors and their counsel, who then renewed the costs negotiations. During the course of those negotiations, on 11 January 2010, the respondents' solicitors wrote stating that the trustees "have not withdrawn [their] Part 36 offer ...". Further correspondence ensued, but it is not necessary to refer to any letter until that of 26 March 2010 ("the March 2010 letter"), which was sent by the trustees' solicitors to the respondents' solicitors. The March 2010 letter began by referring to the evidence being exchanged in anticipation of the costs hearing, and expressed the view that it was "unlikely" that the Judge "would award costs against the trustees exceeding the Part 36 offers already made", and "confirm[ing]" that "these part 36 offers have not as yet been withdrawn".
16. The March 2010 letter then referred to the fact that the respondents' solicitors had said that, while the respondents had given instructions "to accept a settlement", they had also said that it was likely that Fiona would continue to claim her costs from the trustees. The trustees' solicitors reiterated that the trustees were entitled to refuse to pay Fiona's costs, but then said that "in the hope of achieving an immediate settlement, [the trustees were] willing to make an offer of £100,000 in respect of [Fiona's] costs, if – but only if – [the respondents] are now prepared to accept the Part 36 offers made in April 2009".
17. There then was a "without prejudice" meeting on 19 April 2010, following which, on 21 April 2010, the trustees' solicitors wrote to the respondents' solicitors confirming that there would be no "increase [in] the offer contained in the [9 March 2010] letter", and giving the respondents until close of business on 22 April 2010 to accept, failing which the trustees and their lawyers would prepare for the costs hearing. In a letter dated 22 April 2010, the respondents' solicitors "accept[ed] the offers set out in the [April 2009 letters]", making it clear that Lorna and Marcus were opting for the second option offered, namely the lump sum payment of £354,417.88 to Lorna and £211,235.30 to Marcus. The promised offer to Fiona of £100,000 then followed; it was refused by Fiona, and the trustees eventually agreed to pay her £175,000 in respect of her costs of the application.

The Judge's decision on costs

18. Unfortunately, this did not put an end to the costs dispute or avoid the costs hearing, as the trustees contended that they were entitled to their costs in respect of the period from the beginning of May 2009 (when the 21 days referred to in the April 2009 letter expired), to the 22 April 2010, a contention which was disputed by the respondents. After a hearing, between 18 and 21 May 2010, the Judge (by then Sir John Lindsay, as he had retired), in a judgment given on 30 June, rejected the trustees' case, and accepted the respondents' arguments that there should be no order for costs as between the trustees and the respondents other than what had been agreed in the exchange of letters in March and April 2010.
19. In the course of his judgment, the Judge decided that, when considering whether the trustees should be awarded any costs in respect of the period from May 2009 to April 2010:
 - i) The April 2009 letter was not an offer within CPR Part 36 ("a Part 36 offer"), as (a) it related to a costs issue after the substantive issues had been determined, and (b) it failed to comply with CPR 36.2(c);
 - ii) Whether or not that was right, the April 2009 letter should be taken into account on the issue of costs, but it would be wrong to accord the trustees any costs as:
 - (a) It was not unreasonable for the respondents to have waited a year before accepting the offer contained in that letter;
 - (b) The offer in the March 2010 letter, which was accepted, contained better terms so far as the respondents were concerned;
 - (c) The trustees' change of lawyers would make any assessment of costs very difficult indeed.
20. The trustees applied to the Court of Appeal for permission to appeal, and Arden LJ directed that the application should be heard by a full court on the basis that, if permission was given, the court would immediately hear the appeal. As so often happens when such an order is made, we heard the application and the prospective appeal together.
21. I turn to consider the various issues raised by the challenges which have been made to the Judge's conclusions by Mr Cooper QC on behalf of the trustees.

Was the April 2009 letter a Part 36 offer?

22. Part 36 sets out procedures whereby parties can make offers to settle proceedings, and provides for the costs consequences if such offers are accepted or rejected. The basic requirements of any Part 36 offer are set out in CPR 36.2. CPR 36.9 deals with acceptance of Part 36 offers. CPR 36.10 is concerned with the "costs consequences" of such acceptance, and CPR 36.14 is concerned with the consequences if the case

proceeds to judgment. It is made clear by CPR 36.1(2) that an offer to settle which does not comply with part 36 can nonetheless be taken into account when allocating and assessing costs.

23. The first reason advanced by the Judge for rejecting the contention that the April 2009 letter was a Part 36 offer, was that it was impossible for an offer to be within Part 36 after the action to which it related had concluded and the only issue concerned the costs (i.e. the application had been determined by the Judge, and the only issue was the allocation of costs). I would not necessarily go quite so far, but I would agree that the letter was not a Part 36 offer, because it could not, by its very terms, comply with CPR 36.10(1). That rule states that, subject to certain irrelevant exceptions, “where a Part 36 offer is accepted within the relevant period [i.e. the 21 days referred to in the April 2009 letter] the claimant will be entitled to the costs of the proceedings up to the date on which notice of acceptance was served on the offeror.” The April 2009 letter specifically excluded the offeree from recovering all her costs, as it gave her the option of recovering only a proportion of her costs or a fixed sum in respect of her costs.
24. The Judge’s second reason for holding that the April 2009 letter was not a Part 36 offer was that, in any event, it was expressed in terms which implied that it would be withdrawn after 21 days, which was inconsistent with the requirements of CPR 36.2(c), when read together with CPR 36.10(4) and (5). I do not propose to discuss that point in any detail, because it seems to me that the offer in this case is indistinguishable on this point with the offer in *C v D* [2011] EWCA Civ 646 (a case decided after the decision of the Judge on costs dispute in this case).
25. In this connection, I consider that the effect of that decision, which seems to me to be both sensible and right, was crisply summarised by Stanley Burnton LJ in the following two short paragraphs:

“84. Any ambiguity in an offer purporting to be a Part 36 offer should be construed so far as reasonably possible as complying with Part 36. Once it is accepted that a time-limited offer does not comply with Part 36, one must approach the interpretation of the offer in this case on the basis that the party making the offer, and the party receiving it, appreciated that fact.

85. I agree that the normal effect of the phrase ‘the offer will be open for 21 days’ is that the offer is not open for acceptance after 21 days. However, the use of that phrase is consistent with a warning that the offer will be withdrawn after 21 days. Given the clear express intention of the respondent to make an offer complying with Part 36, it should be so construed.”

In my judgment, that reasoning is inconsistent with the Judge’s second reason for concluding that the April 2009 letter could not be a Part 36 offer.

26. In the present case, the justness of the conclusion that the letter should, if possible, be treated as a Part 36 offer is supported by the fact that, through their respective solicitors, both the trustees and the respondents (a) treated the offers contained in the two letters sent in April 2009 as having been made under Part 36, and (b) said in

terms that those offers were still in force well after the 21 days therein referred to had passed.

27. The fact that the April 2009 letter is nonetheless not an offer which is within the confines of Part 36 for the reason given in para 23 above takes the respondents' case very little further forward. As Thomas LJ said during argument, the overriding objective, and indeed common sense, suggest that, particularly where, as here, the facts are as described in para 26 above and the offerors could not have framed their offer so as to fall within the ambit of Part 36, an offer which is expressed to be a Part 36 offer and otherwise appears to comply with the requirements of Part 36, should, in the absence of good reason to the contrary, be given substantially the same effect as a Part 36 offer, when it comes to deciding costs issues.
28. In that connection, it is to be noted that, where a Part 36 offer is accepted "after the expiry of the relevant period", the costs, "unless the court orders otherwise", should be paid by the offeror up to the expiry date of the relevant period, and by the offeree from that date until the date of acceptance – see CPR 36(4)(b) and (5). Accordingly, as I see it, the proper approach for the Judge to adopt was to consider whether the offer which the respondents accepted in April 2010 was the same (or worse) than the offer which they had been made in the April 2009 letter, and (a) if it was the same or worse, whether there was any good reason for depriving the trustees of their costs incurred between May 2009 and April 2010, and (b) if it was not the same or worse, what the correct order for costs should be in respect of that period.

Comparing the April 2009 offer and what was accepted in April 2010

29. The only difference between what the trustees offered in the April 2009 letter, and their renewed offer in the March 2010 letter was the addition of the proposal that, if the offer was accepted by the respondents, the trustees would offer Fiona £100,000 towards her costs. Indeed, in the March 2010 letter, this was expressed not only as an offer, but as one which was conditional on the respondents accepting the terms proposed in the April 2009 letter.
30. In my view, that fact rendered the offer contained in the March 2010 letter different from, and more attractive to the respondents, than the offer contained in the April 2009 letter. As a matter of common sense and as a matter of elementary contract law, an offer by A simply to pay £X to B is not the same as an offer by A to pay £X to B on terms that if B accepts the offer, A will offer to pay the sum of £Y to C. Further, it is inherent in the latter offer that A regards it as being more attractive to B than the former offer, as otherwise the promise to make an offer to C could scarcely be expressed as conditional on B accepting A's offer. The point is reinforced by comparing the two offers from the viewpoint of the offeror.
31. I do not rest my reasoning on the fact that the offer to pay £100,000 was to a person who was the mother of one of the respondents and the daughter of the other respondent. Relationships between members of different families can vary enormously, and it would be wrong both in principle and in practice to base any conclusion as to whether the March 2010 offer was better because of the proposal relating to Fiona by considering the closeness of the relationship which either or both of the respondents had with her. At least in the absence of special factors, where the court has to consider, for the purpose of determining liability for costs, whether a later

offer was better from the offeree's viewpoint than an earlier offer, the court should, I think, simply take each of the two offers at its respective face. If one does that in this case, the conclusion is clear.

32. I do not see how that conclusion can be affected by the fact, relied on by Mr Cooper, that, at one point in the negotiations after April 2009, the respondents indicated that they were prepared to negotiate a settlement of their costs independently of Fiona. That was not a consistent position, and in any event it does not meet the point that the offer which was accepted was more attractive to the respondents. In any event, the settlement terms did mean that the respondents were bound irrespective of whether there was also a settlement with Fiona, as is graphically illustrated by the fact that Fiona refused the offer of £100,000.
33. Accordingly, I am of the view that the March 2010 offer, which was accepted by the respondents, was more attractive to them than the April 2009 offer.

The exercise of discretion with regard to the costs between May 2009 and April 2010

34. Given that the offer which was accepted in March 2010 was a better offer from the respondents' viewpoint than the previous offer contained in the April 2009 letter, the allocation of liability for costs for the period from May 2009 was, subject to one argument, plainly a matter for the Judge's discretion, without the presumption in favour of the trustees inherent in CPR 36.10(4) and (5).
35. The one argument to the contrary is that, by treating the April 2009 letter as a Part 36 offer which was still open for acceptance in March 2010, the parties were impliedly agreeing or assuming that, if the offer in the March 2010 letter was accepted, the respondents would be accepting a Part 36 offer made a year earlier, with the consequence that CPR 36.10(4) and (5) would in fact apply. I do not consider that argument gets the trustees anywhere. Even assuming that the parties can agree that a later and different offer is to be treated as a continuation of an earlier offer (which would probably require clearer words than those used in the March 2010 letter), CPR 36.10(5) gives the court a discretion as to the allocation of costs following the expiry of the "relevant period", and in this case the court would be bound to have regard to the fact that the respondents did better by not accepting the April 2009 offer until it was (on this hypothesis) renewed in March 2010.
36. The Judge rightly rejected the argument raised by the trustees that the benefit to the respondents of the addition to the April 2009 offer of the proposed offer to Fiona was insignificant. The sum proposed was substantial, both in itself (£100,000) and relative to the sums to be paid to the respondents and to be recoverable by the trustees (over one-quarter, and about two-fifths respectively). The importance to the respondents of the proposed offer is a matter of speculation, but, consistently with what I have already said, it seems to me that, unless the value to the respondents of the proposed offer was self-evidently trivial or slight, it would be wrong to treat it as such.
37. Once one accepts that the respondents were better off by refusing the April 2009 offer and accepting the March 2010 offer, it seems to me that, in the absence of any other factor, the right order to make in respect of the costs from May 2009 was that the respondents and the trustees should each pay their own respective costs. The respondents had each accepted the trustees' proposals which fixed the sums which

they each could recover (£211,235.30 for Marcus, £354,417.88 for Lorna from the trustees), so there was no basis on which they could recover more. Further, unless the trustees could identify some special reason for doing so, there would seem to be no basis for requiring the respondents to pay the trustees' costs from May 2009, as they had held out for better terms than those offered in April 2009, until they were forthcoming in March 2010.

38. The Judge said that he “did not find [the respondents] to have been unreasonable or intransigent” in connection with the negotiations over the costs dispute. That appears to have been advanced as another reason for not ordering the respondents to pay costs from May 2009, but in my view it was not a valid reason. If the trustees had merely reiterated the April 2009 offer in the March 2010 letter, without the addition of the proposed offer to Fiona, then, by not having accepted that offer until April 2010, the respondents would have been prima facie liable for the costs since May 2009, and I do not consider that the finding of no unreasonableness in their conduct would have been a proper reason for deciding that they should be excused such liability.
39. Mr Steinfeld QC suggested that it was reasonable for the respondents to have wanted to investigate, during 2009, whether the trustees had acted improperly for the purpose of assisting the respondents' case at the costs hearing. That is a pretty unattractive submission, given that there had already been an 8-day hearing of the application during which the trustees' conduct had been the subject of some scrutiny, and the costs hearing was only concerned about the costs of that application. However, even more fundamentally, as Thomas LJ pointed out in argument, it is normally quite inappropriate for a court, when assessing who should pay the costs of a dispute that has settled, to consider the underlying merits of the dispute. The main point of settling a dispute is to avoid the court having to decide those merits.
40. The Judge also considered that it would in any event be inappropriate to award the trustees their costs from May 2009, as it would be wrong if those costs had included any sum attributable to what he called the “disarray” arising from the two changes in legal advisers which the trustees undertook between 2008 and 2010. I do not consider that that would have been an appropriate reason for depriving the trustees of their costs if they would otherwise have been entitled to them. The costs judge could have been instructed to deprive the trustees of any costs attributable to the so-called disarray, and, if appropriate, in any case of doubt, to err in favour of the respondents.

Two additional points

41. There are two other points which should be mentioned.
42. First, the history of this application (even as briefly summarised above), the costs incurred in connection with it (as may be inferred from the sums negotiated in March and April 2010), the court time this whole application has taken (eight days plus four days on costs, not to mention interim hearings and this appeal), and the duration of the application (which started over fifty months ago) are all unquestionably inappropriate, and appear to be little short of scandalous.
43. In *Re Beddoe, Downes v Cottam* [1893] 1 Ch 547, a trustee was refused permission to take his costs out of the trust in relation to certain proceedings in which he had taken part on behalf of the trust and had been unsuccessful. In justifying that refusal,

Lindley LJ referred at [1893] 1 Ch 547, 558 to “the ease and comparatively small expense with which trustees can obtain the opinion of a Judge of the Chancery Division on the question of whether an action should be brought or defended at the expense of the trust estate”. To the same effect, Bowen LJ mentioned at [1893] 1 Ch 547, 562 the “inexpensive method” available to a trustee who “is doubtful as to the wisdom of pursuing or defending a lawsuit”.

44. The possibility that an application of that type would involve well over twelve days of court time, would require more than 3,000 pages of evidence, would take some five years (or more than eighteen months if one ignores the costs issue) to resolve, and would incur the parties in costs exceeding the equivalent of £1m in present day value, would have seemed inconceivable to those two experienced judges. This should never happen again. In expressing this view, I am not seeking to suggest any particular person is to blame. The Judge may have thought that the trustees carried a large proportion of the blame, but it would be unfair and inappropriate for us to express any view on the point.
45. The second point concerns open justice. The Judge’s two judgments to which I have referred have not been placed in the public domain, as applications for directions by a trustee are normally held in private. That is particularly appropriate for applications for directions in connection with projected litigation, as it would be unfair and potentially embarrassing if opinions given to the trustee, and indeed the Judge’s views, were known by any potential adversary of the trustee in the litigation concerned, as Moses LJ pointed out. It may also be inappropriate for publicity to be given to the private affairs of individuals simply because they are the subject of trusts whose trustees need directions.
46. Whatever may be the justification for the original application and the subsequent dispute as to costs having been heard and determined in private, it seems hard to justify the present appeal being heard and determined in private, or even this judgment being anonymised, as has been asked for by the trustees. This view is reinforced by the fact that the trustees are professional people who have been paid for their services. Accordingly, despite the trustees’ argument to the contrary, we heard this appeal in open court, and this is an open and unanonymised judgment in the normal way.
47. Having said that, I can understand that the trustees (and possibly also the respondents) would feel it to be unfair if, as a result of this appeal, the two judgments below, or any evidence given at the two hearings I have referred to, moved into the public domain. For that reason, we have already ordered that the fact that any document (including the two judgments of the Judge) was referred to on this appeal or in this judgment does not mean that the document can be seen, referred to, or quoted from. If, for any reason, anyone wishes to take such a course, it should not be taken without first obtaining the permission of the court.

Conclusion

48. For completeness, I should mention that there was an application by the trustees to adduce evidence in the form of a note of a “without prejudice” meeting between the parties’ legal representatives. Even assuming that the contents of the note were

admissible, we did not find it helpful in resolving the issues we have to determine on this appeal.

49. For the reasons given above, I consider that we should allow the trustees' application for permission to appeal against the Judge's decision that there should be no order in respect of the costs incurred from the beginning of May 2009 in respect of the costs dispute between the trustees and the respondents, but that the appeal should be dismissed.

Thomas LJ:

50. I agree.

Moses LJ:

51. I also agree.