

Interim payments and Part 36

- CPR 44.2(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.

But...

- *Finnegan v Spiers* [2018] EWHC 3064 (Ch)
 - Birss J on appeal from DJ Kelly
 - What's the problem
 - C accepts Part 36 offer on 23 March 2017
 - Parties execute a settlement agreement (why?)

Finnegan v Spiers

- Settlement Agreement of 30 May 2017 provides *'The defendant shall pay the claimant's reasonable costs on a standard basis to be assessed if not agreed up to 24 March 2017'*
- Clause 3.1.2 of the Settlement Agreement provides that the defendant was to pay the claimant a sum of £45,111.65 which included interest and disbursements
- No express provision for payment on a/c profit costs

Finnegan

- Dibs were about £30,000 so ‘to that extent’ there was some allowance for profit costs
- 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, before bill and no Notice of Commencement
- DA started 8 August 2017
- By the time of hearing of IP application before DJ, PoD and Replies had been served and C had requested provisional assessment

Finnegan

- DJ decided court had no power to make an order for a payment on account: Part 36 is a complete code and the rules make no provision for a payment on account in these circumstances, nor do the rules provide the court with any discretion in these circumstances

Finnegan

- CPR 36.13(1) applied: C accepted offer within 21 days
- So there is a deemed order for costs under CPR 44.9(1)
- CPR 44.9(1): ... where a right to costs arises under rule 36.13(1) a costs order will be deemed to have been made on the standard basis.

Finnegan

- *Lahey v Pirelli Tyres* is clear that the court has no power to vary a deemed costs order.
- *‘One way of approaching this appeal is to ask whether that is what the appellant before me is trying to do.’*
- Not what the appellant is trying to do, but...

Finnegan

- [‘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 [rule 36.13\(1\) 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.’
- 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.

Comment

- Hmm. Does CPR 36 (where an offer is accepted within 21 days) really oust Court's jurisdiction to make orders for payments on account ?
- CPR 44.2 not in play – always a problem anyway going back after the CPR 44.2 jurisdiction spent but see...

Culliford v Thorpe

- *Culliford and Anor v Thorpe* [2018] EWHC 2532 (Ch) per HHJ Matthews sitting as HCt J:
 - *“it is not the law that, once an order for costs has been made, drawn up and sealed, no further application can be made to the court for an order for a payment of a sum on account of those costs. There is nothing in the rules which so requires, and there may be good reason why payment of the sum on account is not considered at the time the order was made.”*
 - and
 - *“I see no justification in the rules or authorities for the Claimants’ view that, if an application is not made at the time, the next opportunity arises only after detailed assessment proceedings have been commenced.”*

Hmm

- If *Culliford* is right, and there is jurisdiction to go back to court after a costs order has been made, why was that not possible in *Finnegan* – just because a deemed costs order?
- *Blakemore v Cummings* (Practice Note) [2009] EWCA Civ 1276
 - receiving party, who had delayed in making an application for detailed assessment, applied for a further payment on account, under CPR 44.3(8) as it then was (DA had been started, but RP did not ask for interim certificate)
 - No suggestion that no jurisdiction, though not exercised.

Where does *Finnegan* end?

- *Finnegan* does not apply in discontinuance cases, Birss J distinguished *Barnsley v Noble* [2012] EWHC 3822: there is a residual discretion under CPR 38.6, a claimant who discontinues is liable for costs “unless the court orders otherwise”.
- Ratio probably only applies where P36 offer accepted within 21 days because otherwise there is a discretion as to costs under r36.13 (probably not a good reason to wait until day 22...)
- This is daft but helpful if you want an interim payment...

What to do?

- Ask for an IP if there is a settlement agreement (but why was there one): why reach agreement and apply days later?
- Wait until DA and then ask, when there is clear jurisdiction under CPR 47.16
- This was a provisional assessment – by the time of the IP hearing the PA can't have been far away, all a waste of costs...

What to do?

- *Warren v Hill Dickinson* [2019] 1 WLUK 182, Master Leonard
 - application for an Interim Costs Certificate can be made before the detailed assessment hearing has been requested, as long as the request has been made by the time the application is heard.

Questions?

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