

**JUDGMENT : THE HONOURABLE MR JUSTICE LIGHTMAN : Ch.Div. 7<sup>th</sup> March 2005**

1. The late Dr Balasubramanian ("the Deceased") practised as an optician. He worked extensively as a locum in the health authority areas administered by the statutory predecessors of the claimants. He routinely and systematically claimed from those predecessors payment for sight tests which he did not carry out and duplicated claims for payment in respect of those which he did carry out. He was arrested on the 6<sup>th</sup> November 2000. He then ceased practice. He was formally charged on the 29<sup>th</sup> January 2002. He died on the 24<sup>th</sup> June 2002, and in consequence the prosecution was discontinued.
2. The claimants commenced these proceedings against the estate of the Deceased ("the Estate") on the 15<sup>th</sup> July 2002 and obtained a freezing order. By an order of the Court of Appeal dated the 19<sup>th</sup> February 2004, it was ordered that the claimants were entitled to summary judgment for an account of overpayments made by the claimants' predecessors to the Deceased.
3. I have before me: (1) an appeal (pursuant to permission granted by Lewison J) by the Estate against the judgment ("the Costs Judgment") of Master Bowman dated the 29<sup>th</sup> October 2004 in relation to costs and interest consequent upon the judgment ("the Account Judgment") which he had earlier given on taking accounts and directions pursuant to an order of the Court of Appeal; and (2) a renewed application by the Estate for permission to appeal the Account Judgment, permission to appeal had previously been refused on paper by Lewison J.
4. I can deal with the application for permission to appeal very shortly. The basis of the application is a challenge to the Account Judgment on the ground (in a word) that Master Bowman wrongly accepted the evidence of the claimants' expert Mr Martin Topping of BDO Stoy Hayward and discounted evidence by the Estate's expert Mr George Sim of Sim Kapila. The Master had a full opportunity to form a view of the weight to be attributed to the evidence of each of the experts and, for the cogent reasons which he gave, he clearly preferred the evidence of Mr Topping. Nonetheless on the application for permission the Estate invites this court to allow an appeal against the Master's findings based on the expert evidence. For the court to undertake the exercise of evaluating the Master's judgment on this issue, it is not sufficient for the court to have before it (as it has) merely selective parts of the transcripts of the expert evidence chosen by the Estate. But that is all that the Estate has provided to the court. The critical parts have been omitted. There is a transcript of part only of Mr Sim's evidence and no transcript of the evidence of Mr Topping. The Estate made no effort before their selection to agree with the Claimants what part or parts of transcripts (less than the whole) should be provided.
5. In these circumstances the court is quite unable to undertake the exercise requested by the Estate. The claimants took this point at the forefront of their skeleton argument why permission to appeal should be refused, and I consider that this argument should be upheld. I appreciate that the Estate took this course to limit the expenditure of costs, but no fair hearing can proceed without the full evidence, and plainly the reality is that an application for permission and (if given) a full hearing would not make economic sense for the Estate or anyone else. I should add that I have carefully considered the detailed submissions made by both parties in their skeleton arguments based on the limited evidence before me, and (with respect) I fully agree with the decision of Lewison J that an appeal against the Account Judgment would in any event be bound to fail. I accordingly can confine this judgment to the challenge to the Costs Judgment.
6. Master Bowman held that the overpayments amounted to £390,201.07 and directed payment of £150,666.63 in respect of interest being calculated at the rate of 8% from the date of the overpayments up to the 26<sup>th</sup> November 2004 and payment of the claimants' costs up to the 13<sup>th</sup> August 2003 assessed on the standard basis. No challenge is made to those directions. But the Master went on, pursuant to Part 36.21, to direct payment of interest of £55,822.87 (representing interest at a rate of 10% above the base rate from time to time of Barclays Bank plc) from the 14<sup>th</sup> August 2003 to the 26<sup>th</sup> November 2004 and that the Estate pay the claimants' costs from the 14<sup>th</sup> August 2003 to be assessed on an indemnity basis. By this appeal the Estate seeks to challenge the application of CPR Part 36.2 and in particular the directions for the payment of interest calculated at the significantly higher rate and the direction for

assessment of costs on an indemnity basis instead of on the standard basis in respect of the period from the 14<sup>th</sup> August 2003.

7. The essential reason why the Master made this order was because the claimants had by letter dated the 22<sup>nd</sup> July 2003 ("the Letter") made an offer expressed to be made under Part 36 of the Civil Procedure Rules ("Part 36") to settle their claim (including their claim to interest) in respect of overpayments upon payment of £450,000 plus legal costs. It is common ground that the letter did not comply with the provisions of Part 36.5 because it did not state (as was required), not merely that the offer was to remain open for 21 days from the date on which it was made, but because it did not also provide that after 21 days the Estate might only accept the offer if the parties agreed the liability for costs or the court gave permission.
8. The Estate was legally represented throughout. Six weeks after the Letter a settlement meeting took place at which the Estate's counsel told the claimants' solicitors that the Letter did not comply with the terms of Part 36 but declined to elaborate. In consequence on the 6<sup>th</sup> October 2003 the claimants' solicitors wrote to Messer's S.I. Jaffar, who at the time were instructed as the Estate's solicitors, ("Estate's solicitors") as recounting what had occurred and requesting that, if the Estate wished to persist with this line of defence further, the Estate's solicitors should explain exactly the basis upon which the Letter did not comply. Quite deliberately the Estate's solicitors did not respond. The Claimant's solicitors notified the Estate's solicitors of reliance on the Part 36 offer on the day before the hearing before the Master. The Estate's solicitors first disclosed the non-compliance relied on at the hearing before the Master.
9. Part 36.21 provides that, where a claimant makes a Part 36 offer and obtains judgment more advantageous to the claimant than the proposals contained in the offer, the court may order interest on the whole or part of any sum of money (excluding interest) awarded to the claimant at a rate not exceeding 10% above base rate for some or all of the period starting with the latest date on which the defendant could have accepted the offer without needing the permission of the court and may order the defendant to pay costs assessed on an indemnity basis from the same date, and require the court to make such orders unless it considers it unjust to do so. CPR 36.21.5 provides that in considering whether it would be unjust the court will take into account all the circumstances including the terms of the Part 36 offer, the stage of the proceedings when the offer was made, the information available to the parties at the time and the conduct of the parties. CPR 36.1(2) however provides that if an offer is made which does not comply with requirements specified in Part 36 it will only have the consequence specified in CPR 36.21 if the court so orders. The question before the Master was whether he should so order.
10. The Master held that he should do so. Both parties were represented by lawyers, the error was obvious on the face of the Letter, the Estate's lawyers appreciated it immediately, and no question arose of the omission from the letter misleading the Estate or occasioning any prejudice. The error was a pure technicality and recourse to this technicality should not preclude the entitlement of the claimants to the full benefit of the provisions of CPR 36.21. His decision accords with the judgment of Peter Gibson LJ in the Court of Appeal in **Mitchell v. James** (12<sup>th</sup> July 2002) [2002] EWCA Civ 997 para. 24-25, [2004] 1 W.L.R.158. There is no relevant distinction (as suggested on behalf of the Estate) whether the Part 36 offer is made before or after judgment on liability. He accordingly made the directions which I have set out.
11. In my judgment the view of the Master was plainly correct and most certainly it is not flawed or open to challenge. In view of the submissions made on behalf of the Estate I should add a further reason. The Estate's complaint regarding non-compliance with Part 36.5 should be given no weight for one reason, that the Estate's lawyers deliberately withheld from the claimants' lawyers identification of the non-compliance with CPR 36.5 and accordingly the opportunity to rectify it. The Estate's counsel submitted that it was perfectly proper for the Estate's lawyers to act in this way, to withhold the information and to take advantage of the non-compliance at a later date. He submitted that there was no duty on the part of the Estate's lawyers to enable the Claimant to perfect the defect and rectify the error. That may have been the law prior to the CPR, but it is not the law today. CPR 1.2 provides that

the court must seek to give effect to the overriding objective when exercising any power or interpreting any rule. CPR 1.1 provides that the overriding objective is to enable the court to deal with cases justly, and dealing with cases justly includes saving expense and ensuring that they are dealt with expeditiously and fairly. CPR 1.3 provides that the parties are required to help the court to further the overriding objective. In this context that must include assisting the court to further the objective by cooperating with each other. It is to be noted that CPR 1.4 provides that the court must further the overriding objective by actively case managing cases and active case management includes encouraging the parties to cooperate with each other in the conduct of the proceedings. In my view the Estate was duty bound to cooperate with the Claimants and this duty obliged the Estate to provide the information requested. The Estate should not be entitled to reap any benefit from its breach of this duty and accordingly the failure of the Claimants (on being informed of it) to rectify it by serving a fresh Part 36 offer. I should add that in any event the failure to do so must constitute conduct which can and should be taken into account in exercise of the court's discretion under CPR 44.5 whether to assess costs on an indemnity basis.

12. In my judgment the Master in his full and careful judgment dealt with all the relevant considerations and his decision and reasoning cannot be faulted. Whether or not the Estate could have paid the £450,000 and costs because the Estate was in administration did not render it unjust for the Master to make the order which he did. The Estate could have written stating willingness to pay the sum so far as assets of the Estate were sufficient or to submit to an order for payment. No such statement or offer was ever made. Nor do I think that it was unjust on the suggested ground that the Estate did not have available information necessary for an informed decision. No suggestion was ever made by the Estate that it needed further information and no willingness was expressed to accept the offer even when the Estate was fully prepared for trial. The Estate in argument sought to rely for the first time on the appeal on an offer made to settle all claims (and not merely claims in respect of overpayments). This offer was not referred to before the Master. Its terms were ambiguous and no doubt for good reasons the Estate decided that the offer had no significance. It is not open to the Estate to rely on it on this appeal. There is no basis for the challenge made to the Master's decision and the appeal must accordingly be dismissed.

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