Case No: L05LV217

IN THE COUNTY COURT AT LIVERPOOL

35 Vernon Street
Liverpool
L2 2BX

Date: 25 November 2025

Before:

HER HONOUOR JUDGE O'BRIEN

- -

Between:

KAREN DYER

Appellant

- and -

SELCO TRADE CENTRE LIMITED

Respondent

- -
- -

MR JAMES MILLER (instructed by **Kennedys Law**) for the **Appellant**
MR PETER HARTHAN (instructed by Bakers **Solicitors**) for the **Respondent**

- -

APPROVED JUDGMENT

Digital Transcription by Marten Walsh Cherer Ltd
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP
Tel No: 020 7067 2900. DX: 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

HER HONOUR JUDGE O'BRIEN:

1. This is my decision in the appeal of Karen Dyer v Selco Trade Centre Limited. I remind myself of the relevant principles.

2. Pursuant to CPR 52.21(1) every appeal is limited to a review of the decision of the lower court, save in two very particular situations, neither of which apply here.

3. Pursuant to 52.21(3) an appeal court may only allow an appeal where the decision of the lower court was (a) wrong; or (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

4. There is an issue about whether a respondent's notice should have been served in this case. Pursuant to CPR 52.13(2)(b) a respondent who wishes to ask the appeal court to uphold the decision of the lower court for reasons different from or additional to those given by the lower court, must file a respondent's notice.

5. In this case no respondent's notice has been filed. What the appellant says is that that stops the respondent being able to argue about concessions made during the hearing (as set out in the respondent's skeleton argument) because the respondent is in fact asking the court to uphold the decision of Deputy District Judge Kube for a reason different to that which he gave in the hearing.

6. As I said at the outset, it is slightly tricky here because Deputy District Judge Kube did not really give any reasons for the decision he made that the defendant's Part 36 offer did not bite because the claimant had beaten it. In essence, what the respondent is saying in the skeleton argument is that, during the hearing, the point was conceded and that is why the Deputy District Judge proceeded as he did. I have read the transcript in full. I cannot see in the transcript that it was any part of the reasoning of Deputy District Judge Kube that the defendant had conceded the point in the hearing. So, I do think that the respondent is seeking to raise a new point here by saying that this decision was based on a concession. But I have considered the point anyway and, in my view, the point the respondent seeks to raise does not have any merit.

7. There is no concession made by the defendant at the hearing that its Part 36 offer does not bite. The defendant twice makes the point that the claimant has failed to beat the defendant's Part 36 offer. The Deputy District Judge opens the envelope containing the Part 36 offer and looks at that offer. He then effectively disregards it for reasons that are unclear. He states that he prefers to concentrate on the costs of the hearing and the paper assessment. That is his decision. It is not based on any concession by Miss Youshani, who represented the defendant at the hearing below. Indeed, she said: "...I raise it, but leave it as a matter for you, Judge. I have made the…" There is a gap in the transcript but one can assess it as likely: "I have made the point." The fact that she then cooperates with the judge in calculating other aspects and in the consequences of his earlier decision is not a concession. That is what the court would expect, for example someone who loses a trial dealing with the assessment of costs at the end of a trial. You would not expect them to refuse to cooperate in determining the costs because they do not agree with the substantive decision.

8. What is important in this case is the chronology that was known to Deputy District Judge Kube at the time of the hearing. From the file he knew that the claimant issued a Part 8 claim for her costs on 2 July 2024. He knew from opening the envelope that the defendant

made a Part 36 offer of £4,614.00 in respect of the claimant's costs on 19 July 2024. He knew that the claimant had not accepted that offer. He also knew that, on 4 September 2024, the court drew the order of District Judge Baker, dated 27 August 2024, and sent it to the parties, stating that the defendant was to pay the claimant's costs of the original claim and that such costs were to be assessed by way of detailed assessment if not agreed. He also knew, because it is in the documents provided for the provisional assessment and the hearing, that as a result of that order the claimant issued a notice of commencement of assessment of a bill of costs on 11 November 2024. That notice, which is signed by the claimant's solicitor, said: "Following a court order dated 27 August 2024, I have prepared by bill of costs for assessment." Accordingly, it is clear from the face of the documents that the bill of costs was prepared in response to the order of 27 August 2024. It will come as no surprise to anyone that the bill therefore came after the offer of 19 July 2024 and indeed, after the expiry of that offer.

9. The case proceeded to a provisional assessment where Deputy District Judge Kube provisionally assessed the costs on the papers. The parties' right to challenge that assessment was set out in the order following that provisional assessment. I have seen the correspondence between the parties arising out of that order. The defendant wrote to the claimant pointing out that the claimant had failed to beat the Part 36 offer and, later, in another email, said that in the absence of a response they would have to contact the court to provide written submissions.

10. In response, the claimant said that they were seeking an oral review of the decision in relation to two items of expert evidence. The defendant did not write to the court. The respondent to this appeal says that the fact that the defendant did not comply with paragraph 5 of the order arising from the provisional assessment, which is at page 95 of the appeal bundle, means that the sanction at paragraph 6 of the order bites. However, it would have been entirely inappropriate, and in fact in breach of CPR 36.16(2), once the defendant knew that the claimant was challenging the provisional assessment, for the defendant to make submissions based on the Part 36 offer prior to the costs being finally determined at the oral hearing. It was only if no oral hearing was requested that the defendant would have been in a position and entitled to write to the court and say: "Open the envelope." No party should be referring to Part 36 offers until the substantive matters have been finally resolved. They had not been because the claimant had asked for an oral hearing.

11. The hearing before the Deputy District Judge dealt with the claimant's submissions on the expert evidence and the claimant's costs were finally assessed at the oral hearing at £4,979.28. But that of course included the costs of drafting and checking the bill at £485.28. The respondent says that the defendant could not ask the Deputy District Judge to revisit his assessment of other parts of the bill, but, in my view, he was not being asked to revisit his assessment of other parts of the bill. He was being asked to consider what the consequences of the Part 36 offer were. He was being asked to consider that at the appropriate point - when he had come to a final view of the about the costs. He should have done that and he did not. Instead, he put it to one side.

12. So, what were the consequences? The claimant had failed to beat the defendant's Part 36 offer on costs. Considering the principles that can be derived from *Forward v Burton* and *Crosbie v Munro*, the offer made after commencement and before the order of District Judge Baker (i.e. before the bill was prepared, because that was prepared in response to the order of District Judge Baker) should have been accepted and the costs of the bill should not have been incurred.

13. It seems to me from reading the transcript of the hearing that Deputy District Judge Kube put himself under far too much pressure in this hearing. There are numerous references to time, other matters in the list and the necessity for the matter to go off for written submissions. As a result, he failed to properly address his mind to: (a) the fact that the claimant had failed to beat the defendant's Part 36 offer on costs; and (b) the consequences that should flow from that.

14. The appeal is allowed because I have taken the view that the decision of Deputy District Judge Kube was wrong.

15. In terms of what happens next, it seems to me that I am in the position to substitute my own decision in place of that of Deputy District Judge Kube because this is a simple order that follows from the failure of the claimant to beat the Part 36 offer on costs. I therefore make the order at page 15 of the appeal bundle.

- - - - - - - - - -

(This Judgment has been approved by HHJ O'Brien.)