

ARTICLE ON SUTHERLAND v KHAN

Introduction

On 21 April 2016 District Judge Besford gave judgment in Sutherland -v- Khan.

This judgment dealt with costs following agreement of damages in a personal injury claim brought by the claimant against the defendant.

The Regional Costs Judge dealt, when giving judgment, with the novel, but important, point on how the court should approach the issue of costs, where those costs are potentially restricted by the terms of section IIIA Part 45, following late acceptance by the defendant of a claimant's Part 36 offer.

The judgment also deals with a broader point, of significance to any case in which there is late acceptance of a claimant's Part 36 offer. That is the applicability of the costs and other consequences provided for under the rule, where judgment is obtained in terms at least as advantageous as the claimant's Part 36 offer, on late acceptance by the defendant.

Background

The claimant and defendant were involved in a road traffic accident.

The claimant's claim was dealt with in accordance with the Pre-action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ("The RTA Protocol").

The claim subsequently left the RTA Protocol and Part 7 proceedings were issued.

The claimant made a Part 36 offer to settle the whole claim at £2,475. The defendant accepted that offer but only some 28 days after the relevant period in the offer had expired.

As the parties were unable to agree costs, following acceptance of the offer, the claimant made application. That application sought an order under Part 36.14 (5), that there be an order for costs for the purposes of Part 36.13 and that there be judgment for the claimant, with consequential orders under Part 36.17 (4), alternatively there be an order under Part 45.29J.

CPR

The relevant terms of Part 36.13 provide that:

"(4) Where ...

- (b) a Part 36 offer which relates to the whole of the claim is accepted after expiry of the relevant period ...

- (c) ... the liability for costs must be determined by the court unless the parties have agreed the costs.
- (5) Where paragraph (4)(b) applies but the parties cannot agree the liability for costs, the court must, unless it considers it unjust to do so, order that—
 - (a) the claimant be awarded costs up to the date on which the relevant period expired; and
 - (b) the offeree do pay the offeror's costs for the period from the date of expiry of the relevant period to the date of acceptance.
- (6) In considering whether it would be unjust to make the orders specified in paragraph (5), the court must take into account all the circumstances of the case including the matters listed in rule 36.17(5)."

The relevant terms of Part 36.14 provide that:

- "(5) Any stay arising under this rule will not affect the power of the court.....
 - (b) to deal with any question of costs (including interest on costs) relating to the proceedings..."

The relevant terms of Part 36.17 provide that:

- "(1) Subject to rule 36.21, this rule applies where upon judgment being entered...
 - (b) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer...
- (4) Subject to paragraph (7), where paragraph (1)(b) applies, the court must, unless it considers it unjust to do so, order that the claimant is entitled to—
 - (a) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;
 - (b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;
 - (c) interest on those costs at a rate not exceeding 10% above base rate; and

- (d) provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount, which shall not exceed £75,000 ...
- (5) In considering whether it would be unjust to make the orders referred to in paragraphs (3) and (4), the court must take into account all the circumstances of the case including—
 - (a) the terms of any Part 36 offer;
 - (b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;
 - (c) the information available to the parties at the time when the Part 36 offer was made;
 - (d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and
 - (e) whether the offer was a genuine attempt to settle the proceedings.
- (6) Where the court awards interest under this rule and also awards interest on the same sum and for the same period under any other power, the total rate of interest must not exceed 10% above base rate.
- (7) Paragraphs (3) and (4) do not apply to a Part 36 offer—
 - (a) which has been withdrawn;
 - (b) which has been changed so that its terms are less advantageous to the offeree where the offeree has beaten the less advantageous offer;
 - (c) made less than 21 days before trial, unless the court has abridged the relevant period.
- (8) Paragraph (3) does not apply to a soft tissue injury claim to which rule 36.21 applies.”

The relevant terms of Part 45.29J provide that:

- “(1) If it considers that there are exceptional circumstances making it appropriate to do so, the court will consider a claim for an amount of costs (excluding disbursements) which is greater than the fixed recoverable costs referred to in rules 45.29B to 45.29H.”

Judgment

As the claim had been in the RTA Protocol the claimant's costs, subject to certain exceptions, were limited to fixed costs under section IIIA Part 45.

The claimant's application sought exception from fixed costs under Part 45.29J and Part 36. On this point the judge held:

"My view is that part 45.29J is relevant when looking to exceed costs that ordinarily fall within part 45.29. The whole tenor of the claimant's application is that they are seeking an award of costs under part 36, which is a self-contained code. In my view, it would not make sense if, in reality, the claimants were seeking to proceed under 45.29J, an application of general relevance and in respect of which the claimant has to surmount a higher hurdle. I am therefore satisfied that the claimant's application is under part 36 and not under part 45.29J."

The judge observe that Part 36 does not deal expressly, at least in a fixed costs case, with what happens when the defendant accepts a claimant's offer after the relevant period. The judge went on to observe:

"The nearest analogy is part 36.17, but it is accepted that part 36.17 can only apply where a judgment has been entered. That situation is not applicable here."

The defendant argued any order for costs should be on the standard basis and that that would, in any event, mean that Part 45.29B applied, limiting the claimant to fixed costs on the basis that these, under that rule, were "the only costs allowed". The defendant resisted the argument that the claimant should recover indemnity costs by relying on Fitzpatrick Contractors Limited –v- Tyco Fire & Integrated Solutions (UK) Limited (No 3) [2009] EWHC 274 (TCC). Giving judgment in that case Coulson J, on the basis of earlier authorities such as Petrotrade Inc –v- Texaco Limited [2000] All ER (D) 724, held that the claimant, who had been spared the costs, disruption, and stress of trial, should not recover indemnity costs on late acceptance of a Part 36 offer by the defendant.

Here the claimant, however, emphasised the importance of Part 36 in the need to incentivise parties to both make and accept offers, an example cited being Broadhurst –v- Tan [2016] EWCA Civ 94.

District Judge Besford preferred the argument advanced by the claimant and held:

"The interpretation of these cases put forward by Coulson J is not, with respect how I read the more recent cases coming forth from higher courts. My understanding is, as I have alluded to, that there has been a tightening up as to the 'carrot and stick effect' of part 36 offers. To my mind, notwithstanding the comments of Coulson J, if there was no incentive or penalty there would be little point in a defendant accepting offers early doors, as opposed to waiting immediately prior to trial. It also seems to me unsatisfactory that there should be penalties flowing

if you do not beat an offer at trial, whereas if you settle before trial there are none. This position does not sit comfortably with the overriding objective of saving expense. In my view, I think that *Fitzpatrick* is perhaps a statement of the law as it was in 2009, but not necessarily the way the law in respect of part 36 is being interpreted in 2016.”

Consequently, District Judge Besford considered that:

“In conclusion, I do not find that the court has to find that the defendant has, in some way been guilty of inappropriate behaviour or conduct capable of censor before I can consider making an order for costs on an indemnity basis.”

Following this analysis the judge turned to the terms of Part 36, noting that Part 36.13 (6) requires the court, when considering whether it would be unjust to make the usual order on late acceptance specified in Part 36.17 (5), to take account of all the circumstances of the case, but specifically the matters identified in Part 36.17 (5).

On this basis the judge considered Part 36.17 (5) required consideration of whether it would be unjust to make the orders ordinarily flowing under Part 36.17 (4) which included indemnity costs.

On this basis the judge reviewed the circumstances of the case, including the factors expressly referred to in Part 36.17 (5) and noted:

- The terms of the Part 36 offer were clear and unambiguous.
- The offer made at an appropriate stage.
- Both parties had material information to make and consider the offer at the time it was made.
- There was no relevant conduct.
- There was no suggestion the offer was not a “genuine offer to settle” and, in any event, that offer having been accepted suggested it was indeed genuine.

Accordingly, District Judge Besford ruled:

“It follows that for the court to deny the consequences that flow from accepting a part 36 out of time the court has to make pretty exceptional findings and there has to be some very good reason as to why it is unjust not to make the usual order. The very fact that the claimant obtains a ‘windfall’, most certainly does not constitute unjustness, under part 36.17.”

The claimant was, accordingly, awarded costs, to be assessed on the indemnity basis, from the end of the relevant period in the claimant's Part 36 offer.

Practice Points

The decision in this case, by the Regional Costs Judge, deals with the very important point, following the introduction of fixed costs for some personal injury claims in 2013, whether, on late acceptance by the defendant of the claimant's Part 36 offer, the claimant should escape fixed costs (at least from the end of the relevant period in the offer).

It is surely right the claimant should escape fixed costs in these circumstances, otherwise a claimant would not have the necessary incentive to make, nor the defendant to promptly accept, a reasonable offer. Moreover, in a fixed costs regime a claimant would be significantly prejudiced if, having made a reasonable offer, the defendant effectively generated further costs, unnecessarily, by continuing to litigate without having the potential responsibility for such costs.

That seems exactly what the CPRC intended by the, logical, omission from Part 36.20 of any express provision applying fixed costs where, in a case otherwise subject to section IIIA Part 45, the defendant accepts the claimant's Part 36 offer after the relevant period.

This mirrors the corresponding provisions, namely Part 36.17 and Part 36.21, where the claimant obtains judgment which is at least as advantageous as the claimant's own Part 36 offer in a fixed costs case.

In Broadhurst –v- Tan [2016] EWCA Civ 94 the Court of Appeal confirmed that the structure of these rules meant that, in the absence of any express provision in Part 36 limiting the claimant to fixed costs in those circumstances, the more general provision found in Part 36.17 (4) would continue to apply, giving the claimant enhanced interest, the additional amount and indemnity costs.

In Broadhurst the Court of Appeal emphasised the difference between assessed costs, whatever the basis of assessment, and fixed costs. At paragraph 30 of his judgment the Master of the Rolls said:

“The starting point is that fixed costs and assessed costs are conceptually different. Fixed costs are awarded whether or not they were incurred, and whether or not they represent reasonable or proportionate compensation for the effort actually expended. On the other hand, assessed costs reflect the work actually done. The court examines whether the costs were incurred, and then asks whether they were incurred reasonably and (on the standard basis) proportionately.”

The judgment in this case effectively adopts the approach in Broadhurst and applies it to the corresponding provisions concerning late acceptance of a claimant's Part 36 offer by the defendant in a fixed costs case. Taking the analogy with Broadhurst a step further would suggest that, where this happens,

the claimant will recover fixed costs up to the staging post reached when the relevant period in the offer expired and costs assessed, on the indemnity basis, thereafter.

The arguments advanced by the defendant appear to ignore the important observation in Broadhurst about the conceptual difference between fixed costs and assessed costs. The distinction is not just between indemnity costs and fixed costs but between fixed costs and any assessed costs. That is important because it means that if the court directs assessment under Part 36.13 those costs, whether assessed on the standard or the indemnity basis, will not be fixed costs. There is not the circularity, suggested by the defendant in this case, which would mean that costs assessed on the standard basis were inevitably the fixed costs provided for under section IIIA Part 45.

The key point is that when either Part 36.20 or Part 36.21 applies the claimant will be limited to fixed costs under Part 45, but if Part 36.13, on acceptance, or Part 36.17 (4), on judgment, applies then costs will be assessed.

Although, for these reasons, it is not crucial for the claimant to obtain an order that costs be assessed on the indemnity basis in order to escape fixed costs this is, clearly, advantageous, particularly if the proportionality may be an issue, and, in any event, seems just as it is a benefit specifically provided for under the terms of Part 36 to reward a claimant.

The courts are, increasingly, willing, on late acceptance, to take the view that the offeree should pay costs incurred after the end of the relevant period on an indemnity basis. ABC –v- Barts Health NHS Trust [2016] EWHC 500 (QB) is an example of the claimant having to pay costs on the indemnity basis following late acceptance of a Part 36 offer. This case is an example of the defendant paying indemnity costs in similar circumstances.

The defendant, unsurprisingly, sought to rely on the judgment in Fitzpatrick Contractors Limited –v- Tyco Fire & Integrated Solutions (UK) Limited (No 3) [2009] EWHC 274 (TCC). That has always been a rather dubious authority because, throughout the judgment, the judge referred to the benefits conferred on the claimant after trial. That overlooked the important amendment to Part 36, in 2007, which confirmed the claimant acquired the benefits then found in Part 36.14 where there was a judgment which, of course, may occur without there being, necessarily, a trial. This change in the rule was not just a matter of semantics. Indeed, the observations of Coulson J confirmed the significance, in his thinking, of there being a trial as a trigger for the claimant's entitlement to indemnity costs. That was because the judge considered that the claimant would be spared the "costs, disruption and stress of the trial" if, in the event, an offer was accepted prior to trial. Yet the rule no longer required a trial to generate these consequences so that, logically, the absence of a trial should not deprive a claimant of those consequences.

Here, on a rather broader basis, the judge distinguished Fitzpatrick Contractors Limited, rightly emphasising the need for Part 36 to have "teeth" and to "incentivise". The approach adopted ensures a degree of parity between the

benefits conferred on a late accepting claimant and a late accepting defendant which seems entirely just.

The route taken by the judge, to order that costs payable by the defendant after expiry of the relevant period be assessed on the indemnity basis, was to follow the reference in Part 36.13 (6) to Part 36.17 (5) which, in turn, refers to the orders identified in Part 36.17 (4). That rule, amongst other matters, provides for the claimant to have indemnity costs from the end of the relevant period.

- That is certainly a way of justifying the claimant receiving indemnity costs following late acceptance, by the defendant, of a claimant's Part 36 offer. Strictly, however, the reference to Part 36.17 (5) in Part 36.13 (6) is to help explain the circumstances in which it would be "unjust" to make the usual order found in Part 36.13 (5). Nevertheless, read in this way, the rules do ensure that the claimant does not lose out on the benefits which ought to follow from a good Part 36 offer.
- .A more direct way of dealing with this point might just be to enter judgment for the claimant, because then, unless unjust, it is quite clear the benefits conferred by Part 36.17 (4) will apply. The court, when hearing an application of this kind, can make an order reflecting the terms already agreed between the parties by acceptance of an offer, as happened in Ontulmus –v- Collett [2014] EWHC 4117 (QB). In these circumstances such an order ought to be regarded as synonymous with a judgment, for the reasons explained by Cox J in Vanden Recycling Limited –v- Tumulty [2015] EWHC 3616

Whichever route is taken to allow the claimant indemnity costs that inevitably raises the issue of the further benefits conferred by Part 36.17 (4), namely enhanced interest and the additional amount. The judgment is, curiously, silent on these matters but, on the judge's reasoning, it follows that if it was not unjust to award indemnity costs, by reaching Part 36.17 (4) from Part 31.16 (6) via Part 36.17 (5), then it could not have been unjust for the other benefits to follow. There may be situations in which some of the benefits conferred by Part 36.17 (4) will be unjust and others will not but when this happens the judge must explain the reasoning, see Cashman –v- Mid Essex Hospitals Services NHS Hospital Trust [2015] EWHC 1312 (QB). In this case enhanced interest and the additional amount would have been very modest sums but in a case of more substantial value those might be of greater benefit to the claimant than an award of indemnity costs.

Summary

Where does the judgment in this case leave the law on the costs implications of late acceptance, by the defendant, of a claimant's Part 36 offer?

- Where the defendant accepts a claimant's Part 36 offer after the relevant period the claimant will, unless this is unjust, be entitled to costs from the end of the relevant period and has a very strong argument that those costs

should be assessed on the indemnity basis, whether or not the claim is a fixed costs case.

- This general approach applies equally to a claim potentially subject to section IIIA Part 45. That is because the terms on fixed costs imported into Part 36, on acceptance, by Part 36.20 do not apply on late acceptance by the defendant of a claimant's Part 36 offer, that rule being silent about this situation. Consequently, on late acceptance of a claimant's Part 36 offer the court needs to make an order under Part 36.13. Under that rule all the costs might be assessed although if the court applied, by analogy, the approach in Broadburst that would mean:
 - The claimant recovering fixed costs up to the last "staging post" reached when the relevant period expired; and
 - The claimant receiving, thereafter, costs to be assessed, with such assessment to take place on the indemnity basis.
- Whether that be by the route taken by District Judge Besford in this case or the, perhaps more straightforward, approach of entering judgment, in the sense of making an order to reflect the terms agreed, the claimant should also, unless that would be unjust, receive enhanced interest and an additional amount.
- It is also worth observing that, for the purposes of the post-relevant period costs, then this must mean all costs (subject to assessment) rather than any issue-based or percentage costs order, for the reasons explained in Webb -v- Liverpool Women's NHS Foundation Trust [2015] EWHC 449 (QB).
- The claimant should not need to have recourse to the terms of Part 45.29J, and the need to argue exceptionality, to recover costs incurred, unnecessarily, after the expiry of the relevant period which, under a fixed costs regime, might otherwise not be recoverable.

The judgment in this case is, accordingly, of potential significance for any case in which the defendant accepts a Part 36 offer made by the claimant after the relevant period has expired.