MILLS & REEVE

briefing

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When is a Part 36 offer not a Part 36 offer?

PHI Group Limited v Robert West Consulting Limited clarifies the costs consequences of offers which fall outside the Part 36 costs regime.

The case

The appeal concerned the effect of a claimant's offer to settle made in contribution proceedings. It was made in February 2010 and claimed to be a Part 36 offer. The claimant, PHI, subsequently made two Calderbank offers in November 2010. The defendant to the contribution proceedings, RWC, did not accept any of the offers. At trial both PHI and RWC were held liable to the claimant in the main action. The apportionment of liability between them in the February 2010 offer was more favourable to RWC than the outcome at trial.

PHI argued that RWC should pay the costs of the contribution proceedings because RWC had failed to better the February 2010 offer. The judge refused to give any effect to the offer, on the ground that it was not a Part 36 offer and had been withdrawn "in effect and by conduct" by the November 2010 offers.

The offer in question

The offer in question stated that it was intended to have the consequences of Part 36, but it did not specify a period of at least 21 days as required by CPR 36.2(2)(c) (the "relevant period"). It continued "notwithstanding … our client would be grateful if your client's response to this offer could be provided within the next 7 days". It also incorrectly, but not significantly, referred to CPR 36.14(2) which deals with the costs consequences of defendants' offers. The rule concerning claimants' offers is CPR 36.14(3).

Was it a Part 36 offer?

The Court of Appeal upheld the decision below that it was not a Part 36 offer. The failure to specify the "relevant period" in compliance with CPR 36.2(2)(c) was fatal. This distinguished it from the offers in previous cases such as *Onay v Brown* and *C v D* where a period was specified, but there was a failure to state that it was the period "within which the defendant will be liable for the claimant's costs in accordance with rule 36.10 if the offer is accepted". Nothing in the offer letter could be read as satisfying this requirement.

Was the offer withdrawn by the subsequent Calderbank offers?

The Court of Appeal disagreed with the judge below on this issue. It concluded, the February 2010 offer remained open for acceptance up until the trial and had not been implicitly withdrawn by the November 2010 offers. Parties can make successive and inconsistent offers which remain on the table, whether they are made under Part 36 or not.

What were the costs consequences of the offer?

As with any Calderbank offer, withdrawn Part 36 offer or technically deficient Part 36 offer, the court had to take the February 2010 offer into account in exercising its discretion on costs under CPR 44.3(4)(c). PHI did not ask for indemnity costs and enhanced interest, accepting that these automatic costs consequences under CPR 36.14(3) were not available if the offer could not be classed as a Part 36 offer. The Court of Appeal agreed with this approach, referring to comments made recently by it to this effect in *French v Groupama Insurance Co Ltd*. However, it was fair to order RWC to pay to PHI the costs of the contribution proceedings and to bear its own costs since it would have been significantly better off had it accepted the offer.

Comment

Despite the efforts of the Court of Appeal in *Onay v Brown* and *C v D* to try to stem the flow of cases arguing about the validity of offers which claim to be Part 36 offers, but which fail to comply with CPR 36.2, there are some cases where the defect is too fundamental to be overlooked. The relevant period under CPR 36.2(2)(c) has been the culprit in almost all of these cases. It is still the case, however, that where an offer is stated to be a Part 36 offer and there is wording which can be interpreted so as to comply with CPR 36.2(2)(c), it will be interpreted as complying with Part 36 if reasonably possible.

The Court of Appeal offered guidance on some other possible permutations. For example, if the offer refers to 21 days as the “relevant period”, that is likely to be sufficient to comply with Part 36.2(2)(c). This must be right since reference to the “relevant acceptance period” was enough to make the offer a Part 36 offer in *Onay*. However, if the offer identifies a 21-day period for acceptance and says nothing more, that probably isn’t good enough. It wasn’t good enough in *Thewlis v Groupama* (discussed in our January 2012 Litigation Update), where the offer included the pre-April 2007 wording in Part 36 about the 21-day period for acceptance.

As for the costs consequences, it must be right that a claimant shouldn’t be entitled to the extra benefits conferred by CPR 36.14(3) where the offer is not a Part 36 offer, or is a Part 36 offer which has been withdrawn. Indemnity costs could be ordered in such a case where the defendant’s conduct justifies an order for indemnity costs under the general principles developed by the courts, and interest on costs might also be ordered under CPR 44.3(6)(g), but not at base rate plus ten per cent. Similarly, where the offer is not a Part 36 offer, a defendant should not be entitled to interest on its costs, as is presumed under CPR 36.14(2), but such an order could be made under CPR 44.3(6)(g) where appropriate. The good news for those who get their Part 36 offers wrong, or who choose to make a Calderbank offer, is that full costs protection can be obtained by such an offer.

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