Horwich Farrelly

THE *large & complex injury* SPECIALISTS

Insight

from Horwich Farrelly's Large & Complex Injury Group

Issue #174 | 17 September 2020

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Welcome to Insight

Welcome to this week's edition of Insight in which we report cases relating to:

- Part 36
- Setting aside a default judgment

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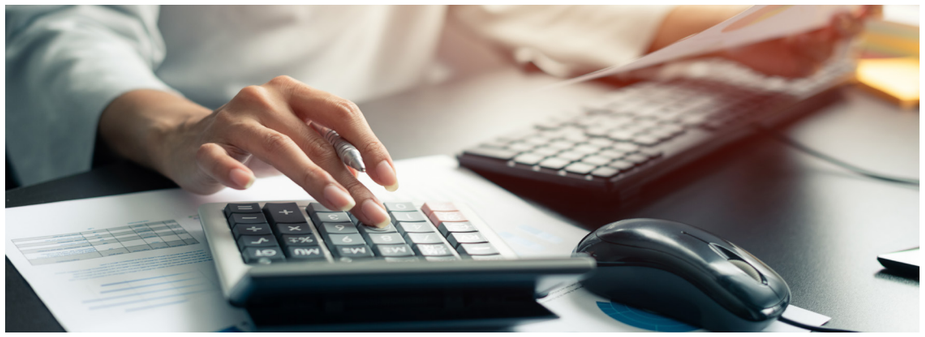

Costs/ part 36

Essex County Council v UBB Waste (Essex) Limited (No 3) 2020 (EWHC) 2387 (TCC)

Following judgment in this commercial action, a number of issues remained to be determined in relation to costs and interest. Among some general points on costs, the judge considered in particular:

1. Did an offer made by the claimant in March 2019 comply with the requirements of Part 36?

2. If not, should the court nevertheless treat the offer as a valid Part 36 offer either on the basis that any non-compliance was de minimis or because the defendant was estopped from challenging the validity of the offer?

The High Court Judge held:

1. Was the offer a compliant Part 36 offer?

CPR 36.5(1)(c) provides that a Part 36 offer must, among other matters, *"specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with rule 36.13 or 36.20 if the offer is accepted."* The claimant's offer in this case was dated 7 March 2019. It stated, in apparent compliance with CPR 36.5(1)(c):

"If the Defendant accepts the offer within 21 days of the date of this letter (the 'Relevant Period'), the Defendant will be liable for the Claimant's costs of the Proceedings (including pre-action costs) up to the date on which written notice of acceptance of this Offer is received by the Claimant, in accordance with CPR 36.13."

The offer was not, however, "made" for the purposes of Part 36 until 8 March 2019. CPR 36.7(2) provides that Part 36 offers are made when they are served. The claimant's offer was sent by email at 4.54pm on 7 March 2019. Given that the email was sent after 4.30pm, it was deemed by CPR 6.26 to have been served on the following day.

'…faced with two reasonable interpretations of the offer, the court should favour the construction that was compliant with Part 36'

The defendant argued that the only proper construction of the letter was that the 21 days ran from 7 March and, because the offer was not made until the following day, the offer therefore failed to specify a relevant period of not less than 21 days. The claimant invited the court to construe the offer such that the 21 days ran from the date of deemed service. Citing C v. D (2011), it was submitted that faced with two reasonable interpretations of the offer, the court should favour the construction that was compliant with Part 36.

The judge declined to construe the offer letter divorced from its proper context. A reasonable person having all the background knowledge available to the parties would know that:

1. The letter was intended to be a Part 36 offer;

2. CPR 36.5(1)(c) requires Part 36 offers to specify a "relevant period" of not less than 21 days (being the period during which the defendant will be liable for the claimant's costs upon acceptance under r.36.13);

3. The statement of time for acceptance in the letter was intended to be the statement of a relevant period in compliance with CPR 36.5(1)(c);

4. CPR 36.7(2) provides that Part 36 offers are made when they are served; and

5. Since this offer was sent by email at 4.54pm on 7 March 2019, it was not "made" for the purposes of Part 36 until 8 March 2019.

Approached in this way, the statement that the relevant period ran for *"21 days of the date of this letter"* could feasibly and reasonably be construed in one of two ways but that to be preferred was that the 21 days ran from the date when the offer was made, i.e. 8 March.

2. The position if the offer was not compliant with Part 36

In view of the finding above, it was not strictly necessary to consider the claimant's fallback arguments that (1) any non-compliance was de minimis and that the court should, in any event, treat the offer as a Part 36 offer; and (2) the defendant was estopped from now relying upon any defect in the offer, because it had not raised the compliance point at the time.

On the first point, the judge held that where the non-compliance was a failure to comply with one of the mandatory requirements set out in CPR 36.5, the position was as follows:

a) CPR 36.2(2) was clear and there was no possibility of such an offer being treated as a Part 36 offer.

b)Like any other settlement offer, the non-compliant offer must be taken into account when exercising the general discretion as to costs under CPR 44. In exercising the court's discretion under CPR 44, the court could not treat

an offer that was a "near miss" as if it were a compliant Part 36 offer.

On the second point, having considered the authorities, the defendant would not have been estopped from now taking the point about any defect in the offer.

The judge went on to hold that the judgment was at least as advantageous to the claimant as the Part 36 offer. Here, the offer did not seek any monetary award, but proposed a series of declarations in settlement, including, for example, the right to terminate the contract between the parties. The claimant had done better in that it had obtained a net judgment, after setting off the defendant's modest success on its counterclaim, worth over £8m in monetary terms at the time of the offer.

It had obtained a judgment that was at least as advantageous as its Part 36 offer. As a result, the claimant was entitled to ~all of the benefits under CPR 17.4. As the defendant's conduct was open to considerable criticism, interest on the net damages was recovered at the maximum rate of 10% over base from 29 March 2019 and at the same rate on costs, also from 29 March 2019.

The defendant had brought a counterclaim, which could properly be described as speculative, weak, opportunistic and thin. There were also criticisms of the defendant in relation to disclosure and expert evidence. The proper and fair order for costs in this case was to award the claimant its costs throughout on the indemnity basis.

The claimant had spent some £15m in pursuing this claim and defending itself against the defendant's counterclaims. Such expenditure was enormous, but needed to be seen against the legal and factual complexity of this case and the fact that it concerned fundamental questions as to the future of a 25-year contract valued at some £800 million. The defendant's attempt to build a very substantial counterclaim the way it did was opportunistic.

The judge then considered whether the court should recognise the defendant's partial success on its counterclaim.

The simple fact that the claimant was not successful on every issue did not of itself mean that the court should deprive it of some proportion of its costs. Nevertheless, the issue on which the defendant had succeeded was a discrete issue that involved its own disclosure and a number of witnesses who had no relevant evidence to give in respect of the main issues between the parties.

A fair reduction in the claimant's costs was 5%. The defendant would pay 95% of the Authority's costs incurred to 29 March 2019, such costs to be assessed on the indemnity basis. Thereafter, the claimant would recover its costs on the indemnity basis pursuant to CPR 36.17 without any proportionate deduction.

The claimant was represented by Slaughter and May

The defendant was represented by Norton Rose Fulbright LLP

Comment

The core of this judgment drives home the point that although a court will construe an offer as compliant with Part 36 if it is possible to do so, it will not do so if the offer falls foul of any of the fundamental principles of the rule.

Setting aside a default judgement

Penta Ultimate Holdings Limited and another v Storrier (2020) EWHC 2400 (Ch)

This ruling related to the defendant's applications issued on 11 October 2019 to set aside judgment in default and for specific disclosure. It involved a detailed consideration by a Master of the grounds for setting aside a default judgment.

The claimants' claim was issued on 21 August 2019. It alleged negligence against the defendant. It was accompanied by particulars of claim and initial disclosure. The defendant served an acknowledgment of service indicating an intention to defend part of the claim. He did not file or serve a defence. Default judgment was entered for an amount to be decided on 24 September 2019.

The application to set aside the default judgment was issued on 11 October 2019 and was supported by a lengthy witness statement from the defendant but did not include a draft defence. A second witness statement dated 2 April 2020 engaged more fully with the proposed defence and exhibited a draft defence. This was nearly six-months after the application issued in October 2019 and less than a week before the hearing. The claimants' served a lengthy witness statement in opposition to the application.

The starting point for an application to set aside a judgment was CPR Part 13. Unless the judgment was wrongly entered such that the court must set it aside CPR13.3 provided a discretion to the court to set aside or vary a judgment in default:

"13.3 (1) In any other case, the court may set aside or vary a judgment entered under Part 12 if –

(a) the defendant has a real prospect of successfully defending the claim; or

(b) it appears to the court that there is some other good reason why –

(i) the judgment should be set aside or varied; or

(ii) the defendant should be allowed to defend the claim.

(2) In considering whether to set aside or vary a judgment entered under Part 12, the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly.

(Rule 3.1(3) provides that the court may attach conditions when it makes an order)"

The defendant therefore first needed to overcome the threshold test set out in CPR 13.3(1)(a) and (b), that there was a real prospect of successfully defending the claim or there was some other good reason why a judgment, validly obtained, should be set aside. Further pursuant to CPR 13.3.2 the court must have regard to whether the application was made promptly.

The test to be applied in respect of CPR13.3(1)(a) was broadly the same as the test for summary judgment save that the burden of proof reversed. Thus, in considering the application for summary judgment the court must consider whether the defendant had a real prospect as opposed to a fanciful prospect of defending the claim. A realistic defence was one which carried some degree of conviction that is it was more than merely arguable.

CPR13.3(1)(b) was a free-standing alternative ground for setting aside a default judgment. It had been held to be a broad test. An application to set aside a default judgment was recognised to be an application for relief from sanctions and so also engaged the three-stage test in Denton (2014).

On the evidence, the Master held that the defendant had been dilatory in engaging with this dispute. He had put his head in the sand and failed to grasp the seriousness of it. His conduct in failing to engage with the letter of claim, the notification of his insurers and then the proceedings when issued meant he was seeking the indulgence of the court on an application to set aside a properly obtained default judgment.

However, the question of promptness for the purposes of the issuing of the application to set aside the default judgment was considered not by reference to pre-issue conduct. Such pre-issue conduct came back into consideration as part of the overall consideration of all the circumstances when considering relief from sanctions.

In considering the question of promptness a period of just over two-weeks to issue a substantive application was to be viewed as prompt in the context of the complex claim being raised against the defendant and sufficiently prompt to meet the requirements of CPR 13.3(2).

If the application was made promptly the court needed to consider whether the defendant had a real prospect of defending the claim for the purposes of the threshold test.

The claim against the defendant was a substantial claim involving serious allegations. At present there was a default judgment on liability with causation and loss still to be determined. Albeit belatedly the defendant had now provided a draft defence. In that defence and in his witness evidence he raised a number of defences to the claims against him. The defence overcame the threshold test for setting aside default judgment under CPR13.3(1)(a) in relation to both parts of the claim. It was clear that there were serious issues to be determined on liability.

The defendant argued that in any event there was some other good reason to allow him to defend on liability. The Master dealt with this when considering the third step in the Denton test.

'…a failure to serve a defence, particularly where it resulted in default judgment, was serious and significant'

In considering the discretion under Denton, the Master held that a failure to serve a defence, particularly where it resulted in default judgment, was serious and significant. There was no good reason for failing to file a defence on the facts of this case. The defendant had simply buried his head in the sand.

It was at the third stage of the Denton exercise that all the other factors were taken into account. This included consideration of the overriding objective and the need to manage cases efficiently, fairly and at proportionate cost having regard to the complexity, importance, and value of the case. There were a number of competing factors to consider at this stage of the exercise.

However, this was a negligence claim against a professional man and the issues of causation and loss would not be simple or straightforward. The fact that the court would have to engage with the evidence necessary for the claimants to meet the challenge of proving causation and loss was an important factor in this application and in the consideration of the exercise of discretion. Further, the fact that the

defendant had not had access to documents in the possession of the claimants impacted adversely on the defendant's ability fully to plead to the allegations against him. When considering all the circumstances and the overriding objective as a matter of discretion the judgment in default should be set aside and the defendant should be allowed to defend liability as well as causation and loss. The liability issues in this case could not be said to be so distinct from causation that it would provide any significant advantage in terms of saving costs or time to maintain the judgment in default.

Whilst an absence of access to documents of itself was not, on the facts of this case a good reason to set aside under CPR13.3(1)(b), the court should factor into both consideration of all the circumstances and the consideration of a good reason under CPR 13.3(1)(b) the fact that there would be a substantial trial in this case on causation and loss involving substantial disclosure and witness evidence and potentially expert evidence. The trial would need to consider substantially the same factual issues as would need to be considered to determine liability.

The defendant's application for specific disclosure was dismissed. Whilst it seemed that the claimants' initial disclosure was not adequate, they had since provided additional documents. That selection of documents was by its very nature self-serving given its purposes, however, what it demonstrated was that the extent of the documents that might be available was likely to be significant and substantially more than would have fallen to be disclosed within the scope of initial disclosure on any basis.

The claimants were represented DaySparkes Limited

The defendant was represented by Reynolds Porter Chamberlain LLP

Comment

As can be seen from this case summary, defendants seeking to set aside a default judgment must not only show that there is a defence with reasonable prospects of success, but also that the three-stage test in Denton can be satisfied.

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