Insight 198

from Horwich Farrelly's Large & Complex Injury Group

WELCOME TO INSIGHT

Welcome to this week's edition of Insight in which we report on a recent decision on Part 36 where the Court of Appeal found both of the claimant's offers to be ineffective.

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What do you mean?

Seabrook v Adam [2021] EWCA Civ 382

Background

In this case, the Court of Appeal, comprising Lord Justice Lewison, Lady Justice Asplin and Lord Justice Males, were asked to consider Part 36 offers in the context of a disputed costs award.

The original claim brought by the appellant was for low value personal injury following an RTA, where "primary liability" and a breach of duty of care had been admitted by the respondent, but causation for both of the separate injuries claimed for was in dispute.

It was alleged that the appellant had suffered a whiplash injury to his neck and a back injury. Approximately £10,000 was claimed in total.

Following a fast-track hearing before Deputy District Judge Buss, judgment was entered in the sum of £1,574 for the whiplash injury only. Causation was not proved in respect of the back injury.

Part 36 reminder

Part 36 is a self-contained procedural code. An offer must satisfy rule 36.5 if it is to attract the consequences specified in Section 1 of the Part: CPR 36.2(2). CPR 36.5(1) provides as follows:

"**36.5.— Form and content of a Part 36 offer**

(1) A Part 36 offer must—

(a) Be in writing;

(b) Make clear that it is made pursuant to Part 36;

(c) 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;

(d) State whether it relates to the whole of the claim or to part of it or to an issue that arises in it and if so to which part or issue; and

(e) State whether it takes into account any counterclaim."

One of the effects of accepting a Part 36 offer is that if the offer relates to the whole claim it will be stayed and if it relates to part only, the claim will be stayed as to that part: CPR 36.14(2) and (3). CPR 36.14 does not make express mention of offers relating to an issue arising in a claim.

The consequences of having made a Part 36 offer, following judgment, are set out at CPR 36.17, the relevant parts follow:

"**36.17. Costs consequences following judgment**

(1) Subject to rule 36.21, this rule applies where upon judgment being entered—

(a) a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer; or

(b) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer.

. . .

(2) For the purposes of paragraph (1), in relation to any money claim or money element of a claim, "more advantageous" means better in money terms by any amount, however small, and "at least as advantageous" shall be construed accordingly.

. . .

(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; [and]

(c) interest on those costs at a rate not exceeding 10% above base rate; …"

Part 36 offers made

The appellant had made two Part 36 offers as follows (called First offer and Second offer for ease):

First offer: "To accept on condition that liability is admitted by the offeree, 90% of the claim for damages and interest, to be assessed."

Second offer: "To agree the issue of liability on the basis that the claimant will accept 90% of the claim for damages and interest, to be assessed."

First instance decision and initial appeal

The appellant claimed that he had bettered the offers because he had obtained 100% of the damages awarded despite the fact that the respondent was not found liable in respect of the back injury.

The appellant submitted that the offers were genuine offers to settle. He argued that the effect of the offers was, in return for an admission that some damage had been caused by the breach of duty, the respondent would benefit by receiving a 10% discount on the damages payable.

The district judge dealing with the award of costs, Reeves DJ, concluded that the offers were not genuine offers to settle and awarded costs without taking them into account.

The matter was appealed and in an ex tempore judgment given on 6 November 2019, the appeal was dismissed by Her Honour Judge Walden-Smith.

In summary, she held that it was the respondent who had bettered the Part 36 offers because liability was limited to damages for only one of the two alleged injuries.

The crux was:

"Had the Defendant accepted the offer and accepted liability, then that would have meant that it was admitting liability for the injuries that the Claimant alleged it sustained in this road accident; that is, both a neck and back injury."

Court of Appeal

The appeal was dismissed, the unanimous judgment given by Lady Justice Asplin.

The court confirmed that offers had to be interpreted in the light of the pleadings and reasoned as follows:

The respondent had admitted a breach of duty but had disputed causation in relation to both heads of damage. In that context, the reasonable reader would have understood both offers to be addressing liability and causation and to relate to both heads of damage.

It would make no sense if the references to liability were construed to mean just liability, in the sense of a breach of a duty of care, rather than liability and causation. A breach of duty of care had already been conceded. If the offers were concerned only with liability, they could not have been genuine attempts to settle.

Both offers were framed in terms of a discount on the "claim for damages and interest, to be assessed".

They contained no reference to the separate heads of damage in relation to the two injuries.

The reasonable reader, taking into account the relevant context, would construe the reference to "the claim for damages" to mean the entire claim and to construe the offers as a whole to mean that a concession as to liability and causation was required in relation to both injuries. That was the natural meaning of the words and was what the respondent was being asked to concede.

It was clear that, although the second offer was confined to the "issue of liability", the reasonable reader would have understood the first offer to be addressing the entire claim. It was an offer to accept 90% of the claim on condition that liability was conceded. It left no room for any argument about whether the respondent's breach of duty had caused a particular head of loss. It was plainly concerned with the damages claimed in relation to both injuries and the claim as a whole.

In that context, the ordinary and natural meaning of "liability" inevitably included causation. Otherwise, the first offer would be self-contradictory and meaningless.

It was not therefore open to the appellant to now suggest that the respondent was only being asked to accept that "some damage" had been caused.

It was also not right to say that there was room to accept either offer but still dispute causation in relation to either or both of the alleged injuries.

The deputy district judge's conclusion was therefore correct. Had the respondent accepted either of the offers, it would have meant that he had admitted liability for both injuries and would not have been able to argue that he had not caused the back injury.

It followed that, as he was only found liable in relation to the neck injury, the respondent had bettered both Part 36 offers.

The natural meaning of the words “the claim for damages” in the offers meant the entire claim and the offers therefore required a concession as to liability and causation in relation to both injuries.

As the damages award made to the claimant related to only one of the injuries suffered, the respondent had bettered the offers made.

Lady Justice Asplin concluded:

“Cases of this kind turn, inevitably, on the precise wording of the pleadings and the particular terms of the Part 36 offer. In order to avoid the kind of dispute which has arisen here, especially in a low value claim, it is important to make express reference in the Part 36 offer to whether the offer relates to the whole claim or part of it and/or the precise issue to which it relates, in accordance with CPR 36.5(1)(d).

In particular, if the issue to be settled is “liability”, it would be sensible to make clear whether the defendant is being invited only to admit a breach of duty, or if the admission is intended to go further, what damage the defendant is being invited to accept was caused by the breach of duty.”

Commentary:

This case turned on the precise wordings of the pleadings and the terms of the offer.

The express reference to whether the offer related to the whole claim or part of it and/or the precise issue to which it related was vital.

This case serves as a useful reminder that a Part 36 offer is only a useful weapon where it has been properly worded to reflect the context of the issues as actually pleaded.

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