IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
[2019] EWHC 480 (QB)

No. TLQ18/0079

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 5 February 2019

Before:

HIS HONOUR JUDGE BLAIR QC

B E T W E E N :

INOKE MOMONAKAYA — Claimant

- and -

THE MINISTRY OF DEFENCE — Defendant

MR AL-NAHHAS (solicitor, of Bolt Burdon Kemp) appeared on behalf of the Claimant

MISS N. GREANEY appeared on behalf of the Defendant

J U D G M E N T

(Transcript prepared without access to documentation)

THE JUDGE:

1 On 11 January this year, the defendant in this claim - the Ministry of Defence, filed an application for a costs order and to vacate the trial date of 4 February 2019. That trial date was yesterday and so the application to vacate the trial is now academic, the case having already been taken out of the lists. It is the defendant's case that this claim has been settled under the comprehensive code provided by Part 36 of the Civil Procedure Rules and they say it has been automatically stayed pursuant to r.36.14(1) upon the terms of that offer under r.36.14(2).

2 The defendant has not paid the claimant the sum of money that would follow that alleged resolution, as required by r.36.14(6)(a) within fourteen days of the date of acceptance. The costs of the case have not been agreed between the parties and, if the defendant is correct, these must be determined by the court pursuant to r.36.13(4)(b), (5), (6) and r.36.17(5).

3 There is no real dispute that a Part 36 offer was made in this case on 30 April 2018. That Part 36 offer is clearly stated to be such in the opening paragraph of a letter of that date and there is a Form N242A which was provided with it. The analysis of the offer is not perhaps as clear cut as it might have been, but the circumstances were complex and, after various explanations of the gross amount of the offer that was being made and the various deductions that would have to come from it, essentially the defendant was making a lump sum offer (after deductions) of £63,000, but still to be subject of compensation recovery unit deductions (CRU) under the Social Security (Recovery of Benefits) Act 1997.

4 The letter indicated that the last CRU figure that they were aware of was £22,000 (or a little over that) as at 19 December 2015, but also indicated that clarification of the offer would follow within seven days of receipt of the CRU certificate of benefits. There was then a paragraph or two about the consequences of failing to accept the offer and what the cost effects would be. Curiously (and not really answered during this morning's hearing before me) it would appear that both the defendant's solicitors and the claimant's solicitors had been sent a certificate of the recoverable amount on 5 April 2018.

5 Although that certificate says it was issued on that date (and in fact I'm told the deductible amounts are £21,660.39 according to that certificate - so slightly less than the figure in the Part 36 letter of 30 April) it seems that the parties had not realised that they already had that material. It has confusing contents because it says within the certificate that it is valid until 25 July, but I suppose that is because it was able to look ahead and predict the position.

6 In fact the deductible CRU amount did not change because there is a rule (referred to as the 'five-year-rule') which means after that period of time no additional deductions have to be made. Therefore, it is argued on behalf of the defendant, the solicitors instructed by the claimant would have had as much understanding and knowledge and ability to appreciate the position as the defendant themselves in terms of such deductions.

7 That offer, being made as it was on 30 April 2018, gave the claimant until 21 May under the rules for its acceptance, i.e. within the twenty-one days provided by Part 36. It was not accepted within those twenty-one days, but it was not withdrawn by the defendant either. The proceedings continued to be worked upon by the defendant's solicitors, the defendant

itself, and the claimant's solicitors. A number of further actions were undertaken: the exchange of witness statements and a jointly agreed medical report from a specialist general practitioner (and the like) in the weeks and months that followed.

8 There came a time, and this gives rise to the difficulties which brings the matter before me today, when the claimant's solicitors came off the record, which was on 12 September 2018. A few days thereafter a form was submitted indicating the claimant was thereafter representing himself. It is important that I make mention of the fact that I have a statement from the claimant which is in the bundle for today's hearing at pages A51-A55, supplemented by Mr Momonakaya making submissions orally before me himself, to explain that he has suffered from post-traumatic stress disorder since being a soldier. That was the reason for his medical discharge from the Army.

9 It is a condition that can be exacerbated and triggered by further stresses and difficulties. He explained to me that he had some very significant problems as the autumn of last year unfolded. He says that he felt let down by his solicitors who, some five months perhaps before the trial date, were saying that the relationship between him and them had broken down and they were withdrawing from representing him. He then had a period of a couple of months where he had some very difficult and trying life experiences; which brings me to early November 2018.

10 On 8 November 2018 at 10.13 a.m. an email was sent to the defendant's solicitors, by Mr Ahmed Al-Nahhas of the firm Bolt Burden and Kemp Solicitors, in which he communicated this: "I have been instructed to act again in this case by Mr Momonakaya." It explains that he was serving a copy of a letter on the court notifying them of the change of representation. He goes on, "He instructs me to accept your client's Part 36 offer dated 30 April 2018. I attach a copy of that offer for the avoidance of doubt." Then he asks for a moment to have a discussion over the telephone so that they can seek to agree terms of the order and the logistics, saying, "There are a number of issues we'll need to deal with, and we'll save some time to discuss these in the first instance."

11 There seems to be a further email some six hours and a minute later, in the same direction which I have in my bundle, saying:

> "I refer to our call earlier today. Thank you for acknowledging my client's acceptance of your client's Part 36 offer. As requested, I would like us to file an order at court dealing provisionally with the issue of costs and other matters. I attach a draft order for your client's kind approval, the terms of which I hope are not contentious, I'm seeking my own client's approval of the terms. You said you'd kindly apply for an urgent and up-to-date CRU certificate so we can complete the order and agree the final net sum. Once we've agreed terms of order I can have this lodged at court and will request the trial be vacated. Look forward to hearing from you."

12 In the later part of the bundle prepared for today such a draft order appears at p.480. It is in almost identical terms to the draft order that the defendant submits to me today.

13 On the face of it that seems clearly an acceptance of a Part 36 offer. The only small difference, identified by the defendant's solicitors before me today, is that in the code provided by r.36, at r.36.22(7), it indicates that if at the time the offeror makes the Part 36 offer the offeror has applied for but not received a certificate (this is concerning CRU), the offeror must clarify the offer by stating the matters referred to in the preceding subparagraph

not more than seven days after receipt of the certificate. It is conceded that that appears not to have been done.

14 It is argued on behalf of the defendant that the purpose of that rule in the scheme of things seems pretty clearly to be directed at assisting a court in determining whether, after a judgment following trial, the claimant has recovered more than a Part 36 offer, and the importance therefore of everyone being able to be clear what CRU deductions there may be for the period of time after the Part 36 offer was made and before the judgment. But according to the wording of the rules it is correct to make the concession which the defendant did today as to that non-compliance.

15 In the Civil Procedure Rules (the **White Book** 2019**)** at p.1176, para.36.2.4, there is commentary about formal or technical defects. In the second paragraph of that commentary it reads:

> "In spite of the wording of rule 36.2.2 it has been held that if there are formal or technical defects to a Part 36 offer, provided they cause no real uncertainty or other prejudice to the offeree, the court may order that the usual Part 36 cost consequences will follow." Some case law is then quoted, but then Lord Justice Davis's views in the case of *F&C Alternative Investment (Holdings) Ltd v Barthelemy (Costs)* in 2012 are given, "It is not permissible wholly to discount a number of failures to comply with the requirements of Part 36 as the merest technicality. Perhaps there can be *de minimis* errors, or obvious slips, which mislead no-one, but the general rule is that for an offer to be a Part 36 offer it must strictly comply with the requirements."

16 Miss Greaney, for the defendant, essentially invites me to conclude that this is no more than a *de minimis* error which misled no-one and, therefore, non-compliance with Part 36.22(7) (when everyone knew that the deductions were to be made) was a mere matter of arithmetic. The figures not having changed, it should be treated *de minimis* and not regarded as a breach of the comprehensive code in Part 36.

17 The defendant's alternative argument is (if they are wrong about that) nevertheless the 30 April 2018 offer letter is the equivalent of a *Calderbank* letter. For those who aren't lawyers in this courtroom, that is the name of a case which established a mechanism whereby offers could be made to try and settle litigation and, if accepted, could lead to a binding compromise of the litigation. It is argued on behalf of the defendant that there could be no serious dispute in concluding that if Part 36 has not been adequately strictly complied with there is a contractually concluded agreement between the parties. There may be different nuances to how costs would then be resolved in relation to the case, but nevertheless the litigation would have been settled.

18 Mr Momonakaya has, for someone who is not a lawyer, done his best to explain to me his significant disagreement with the defendant's position and has sought to argue that, for a number of reasons, it would be wrong to conclude that this case has been settled by either a Part 36 acceptance of an offer or by a compromise evidenced through the correspondence. He points to the fact that within three days of his then instructing solicitors' emails of 8 November, he made very clear that he had had a change of heart in an email sent at 5.26 p.m. to his solicitor and to the defendant's solicitor. He heads it: "Cancel Part 36 offer. Can you please cancel that Part 36 offer?" And he goes on a little later to say, "I have second thoughts about accepting the offer from the MoD" and explains his reasoning for that.

19 He goes on to say, "I know that you won't be happy with this but I've come to the conclusion that I have nothing to lose" and he says he can ask the High Court for his claim hearing to be adjourned to a later date and seek another solicitor to represent him. He refers to approaching the ombudsman (I suspect he means the Legal Services Ombudsman) to complain about how he has been advised by his solicitor and makes some further comments about his situation and his claim. The correspondence continued later from Mr Momonakaya himself reasserting or asserting the sort of level of settlement that he required. He argued that the offer that had been made to him was unjust and he made the assertion that he was under duress.

20 Miss Greaney, for the Ministry of Defence, has sought to address each of those points in a skeleton argument presented to me today. She explained during oral submissions that it is too late for him to change his mind; once acceptance has been given it has been given; that his counter offer, again, came after the acceptance of the defendant's offer; claims about the lack of justice of the figure that was offered in settlement is neither here nor there; if it has been accepted it has been accepted; if he didn't want to accept it he shouldn't have accepted it - he had a trial date in February ahead of him. In relation to 'duress' she makes some reference to **Foskett on Compromise** and how a very high hurdle would have to be overcome to satisfy the court that an acceptance had been made under duress.

21 I have heard Mr Momonakaya on this topic. Whilst I appreciate the points that he made very clearly: as to the pressures that were upon him and how he felt cornered; being pushed into a situation where he felt he had little alternative at the time; nevertheless, his complaints (if there are any that are justifiable) I regret to have to say must be directed at those who were then advising him. I have no hesitation in concluding that the solicitor who was communicating with the defendant's solicitor on 8 November last year did so whilst on the record and instructed by Mr Momonakaya and in the clearest of terms. This does not permit of any disagreement concerning what was being accepted and the pressures that Mr Momonakaya may have been feeling are not ones that could possibly, or even arguably, reach the very high hurdle that has to be established for any argument of acting under duress.

22 Therefore, I turn to the question of whether this is simply a common-law 'offer and acceptance' compromise, or whether Part 36 was fulfilled in the offer and the acceptance of it. I have made reference to the rules, to the commentary upon it and, in my view, the failure to comply with that one sub-rule in r.36.22(7) is *de minimis*. It is not of any lasting consequence; no prejudice has been suffered. There was clarity between all parties as to what was being agreed and therefore I have come to the conclusion that Part 36 does apply so as to stay these proceedings.

23 If I am wrong about that, I would in any event have come to the conclusion that the matter has been compromised by way of 'offer and acceptance' in the same way outside Part 36 but, as I have said, with a possible nuanced alternative approach to the assessment of costs. That is a matter that remains to be determined and I will hear from the advocate for the defendant and Mr Momonakaya himself, and his former solicitor, who has helpfully attended court today on the question of costs, to see where the consequences of my rulings take us.

(Discussions re costs and final orders)

24 I am asked now to address the question of costs and final orders that need to reflect the position that has been reached. I have given a ruling already that a Part 36 offer was

accepted and the usual rule is under Part 36.13(5) that the court must, unless it considers it unjust to do so, (a) order the claimant be awarded costs up to the date on which the relevant period expired, which is 21 May 2018, and (b) the offeree, that is the claimant, pay the defendant's costs for the period from the date of expiry of the relevant period (21 May), to the date of acceptance. The rules provide for any consideration of that phrase in sub-paragraph 5: "unless it considers it unjust to do so" to be done by looking at the matters set out in Part 36 r.17(5).

25 I have been addressed on each of those on both sides of this case. Sub-paragraphs (a) and (b) of r.36.17(5) really don't help me very much. The terms of the Part 36 offer were clear and the stage in the proceedings was many months before trial. Sub-paragraph (c) refers to the information available to the parties at the time when the Part 36 offer was made, and (d) to 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. Sub-paragraph (e) is not relevant in this case.

26 It is observed on behalf of the claimant that at the time the Part 36 offer was made there were very radically different positions as to the quantification of the claimant's loss, and one of the things that was of enormous significance in resolving that issue was the provision of a joint expert's report from a specialist general practitioner in this field - Dr Justin Hammond, whose report appears in today's bundle at pp.255-265. It is said on behalf of the claimant that it wasn't until that report was obtained that it was really possible to begin to assess and give clear advice as to the level of quantum that was appropriate for the claimant.

27 It is also relevant to make the observation that there was some correspondence in the middle of May from the claimant's solicitors, in 'without prejudice' correspondence, saying that it wasn't possible without more clarification to assess the offer that had been made. Counsel really couldn't consider the matter without seeing the witness evidence and, in order to have a 'cards face-up' discussion about this matter, it was important to clarify the issues and get a much better conception as to where the evidence lay for each party.

28 On behalf of the defendant, Miss Greaney essentially concedes that this an area where I have jurisdiction to intervene in coming to a conclusion other than the usual order, if I do consider that it is unjust for the usual Part 36 rule to apply. I have come to the conclusion that it would be unjust for that rule to apply in the circumstances of this case, because the information necessary for enabling the offer to be properly evaluated by the parties was not available in the twenty-one-day time window provided by the Part 36 offer. I have come to the conclusion that Dr Hammond's report was very significant in being able to evaluate the position properly and it was part of the court's case management directions that a joint expert's report had been ordered for this purpose.

29 I have come to the conclusion that a reasonable period for the claimant to evaluate the offer on the table under Part 36, for the purposes of determining when the costs should become payable by the claimant ought to be extended from 21 May 2018 to 21 September 2018, which is twenty-one days after Dr Hammond's report was provided. Therefore, at paragraph 3 of the Order I shall direct that the defendant shall pay the claimant's costs up until 21 September 2018, to be subject to detailed assessment if not agreed.

30 At paragraph 4 I direct that the claimant shall pay the defendant's costs from 21 September 2018 to 8 November 2018 to be offset against the claimant's damages, and to be subject to detailed assessment if not agreed. I will just come back to that in a moment, because I will be directing that there be a payment subject to a deduction on account of costs. Paragraph 5,

will read that the defendant shall pay the claimant's solicitors the sum of £100,000 on account of costs by 4.00 p.m. on Friday 22 February, which is about eighteen days' time.

31 Turning to the schedule, which sets out at paragraphs 1 and 2 the various calculations and deductions and then the CRU figure in paragraph 3, I don't see any need for any changes to any of that. In relation to paragraph 4, it is my view that a sum of £2,500 will also be deducted on account of the defendant's costs pending agreement or assessment of those costs in accordance with paragraph 4 of the Order. Paragraph 5 should read, the total net figure of £38,839.61 should be paid to the claimant's solicitors by 4.00pm on 22 February 2019. So that is what my conclusions on that are and I suppose that brings us to today's costs.

(Further discussion re costs)

32 I shall summarily assess the costs of today's hearing. I mentioned in my earlier ruling that if the defendant was being consistent in following the code in Part 36 they should have paid the claimant the settlement figure sometime in January, that is, probably fourteen days after they had the final CRU certificate on 17 December. They did not do that but, in fairness to them, they would have had to make the application which I have been dealing with today on the question of costs. If they had made the payment in January, as they should under the rules, Mr Momonakaya would no doubt be pursuing an application today arguing that there had not been a concluded settlement and/or agreement under Part 36. If it had been dealt with that way the Ministry of Defence would have had to argue the point and would have won on that matter and been awarded their costs.

33 So, in very substantial part, this hearing was going to be necessary whichever route was taken and it was necessary, in any event, to resolve the dispute as to what costs orders should be made. Mr Momonakaya has been partially successful in his arguments made through his solicitor advocate about the date after which the costs should shift from one party to the other in the light of the Part 36 offer. It is not without some little significance that he has succeeded in that argument today.

34 I will apply what seems to me to be the fair approach to those respective successes in argument and in examining the statement of costs that the defendant has put forward for today. I have to say some aspects of the defendant's costs I don't consider are entirely proportionate. For example, five hours putting together the court bundle and drafting its index, collating it and printing it, seems to me excessive. Given the respective levels of success in the outcome, a proportionate and appropriate summary assessment is that, rather than the £3,898 sought against the claimant in costs for today's hearing, I should make an order that he pay £2,500 to the defendant in respect of today's hearing to reflect those points that I've just summarised. That will be a stand-alone separate order from the ones that I've already announced and it will be a stand-alone costs order without a set-off provision.

CERTIFICATE

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