[2019] EWHC 3210 (TCC)

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS AT BRISTOL
TCC (QBD)

Case No: D41BS867

Courtroom No. 14

Bristol Civil and Family Justice Centre
2 Redcliff Street
Bristol
BS1 6GR

Thursday, 31st October 2019

Before:
HIS HONOUR JUDGE RUSSEN QC
(Sitting as a Judge of the High Court)

B E T W E E N:

KIVELLS LIMITED

and

TORRIDGE DISTRICT COUNCIL

MR J DE WAAL QC appeared on behalf of the Applicant
MR R SAHONTE appeared on behalf of the Respondent

JUDGMENT

HHJ RUSSEN QC:

1. Following the handing down of my judgment on the Claim and Counterclaim, and my further decisions today on particular aspects of quantum, I must now address the costs consequences of the claimant having made a Part 36 offer amongst six other contemporaneous offers made on 28 February 2019 and the relevant Part 36 offer being described as offer seven. By that offer the claimant offered to compromise this litigation on terms that the council would pay the claimant the sum of £250,000 in full and final settlement of all remaining claims for damages. The offer was expressed to compromise also the counterclaim of the council and was said to be inclusive of interest. It went on to draw the defendant council's attention to the consequences of non-acceptance of that offer under CPR 36.17.
2. CPR 36.17(4) begins with this language introducing the said consequences, 'Subject to paragraph seven below' - and that is an immaterial paragraph for present purposes, referring to the withdrawal of the offer or the change of it or the shortness of the period for which it was open, so, immaterial for present purposes – 'subject to paragraph seven, where paragraph 1(b) applies, the court must, unless it considers it unjust to do so order that the claimant is entitled to', and there then follow four matters to which I will turn in a moment.
3. Sub-paragraph 1(b), as referred to in sub-paragraph (4), is where the judgment against the defendant is at least as advantageous to the claimant as the proposals contained in the claimant's Part 36 offer. The judgment that I have given in favour of the claimant is easily at least as advantageous as the offer made in February 2019 and further addressing the quantum consequences of it today revealed that it is likely to be in the sum of approximately £458,500, ignoring any further financial consequences arising under CPR 36.17(4).
4. Mr Sahonte, in his helpful written and oral submissions, urges upon me the submission that it would be unjust to visit those consequences upon the defendant council. He makes the point that both before and indeed after the offer was made, the claim at least as a matter of pleading was potentially put as being one in excess of £1 million, whereas it has been established to be worth considerably less than that. He also makes the point that the offer was made at a relatively late stage in the litigation, some four months approximately before the trial.
5. He has also drawn my attention to certain efforts made by the council both before and after the making of the Part 36 offer which involved its own attempt to compromise the proceedings, firstly made in an offer of December 2016, then, again in December 2017, and finally - and this is well after the Part 36 offer - by the council's letter of 11 April 2019.
6. In my judgment, and recognising the guidance in the *White Book* which is to the effect that if the cost consequences under Part 36.17(4) are not to follow, there must be something that takes the case out of the norm, there are no factors here which take the case out of the norm. There are no what I might describe as positive out of the norm matters – to distinguish the type of negative ones which are used as something of a benchmark when considering the trigger for an award of indemnity costs - to which the council can point in saying that it should not suffer those consequences.
7. In my judgment, the point that the offer was made in the context of what the council says was an inflated claim put in the claim form and in certain correspondence written prior to this relevant offer, at over £1 million, is, in fact, a reason that reinforces the impact of the spurned Part 36 offer. In the sense that the offer being made was one quarter of the potential value of the claim and therefore in a sum which should have provided greater impetus for the council to accept it. Hindsight reveals that the defendant council had the

chance to confirm that this was never a £1 million plus claim.

8. Neither do I accept the submission that the timing of the offer was somehow infected by the fact that it would, if accepted, carry with it the costs consequences that the defendant would have to pay the claimant's costs that had been incurred in the context of a '£1 million claim', rather than one with the lesser value vindicated by my judgment.

9. I am not convinced that a significant amount of the claimant's costs down to trial can be attributed to its pursuit of the excess value that has not been vindicated. But, in any event, by the time the offer had been made in February 2019, the costs budgeting exercise had been undertaken by the court in previous CCMC in May 2018 and, from that exercise, the defendant council would have seen that the claimant's costs had been approved in the sum of £231,608 – the global down to and including trial sum - and Mr De Waal, on behalf of the claimant has said that the breakdown of that sum as at the date of the Part 36 offer had enabled the council to realise that the costs exposure of any timely acceptance would have been in the region of about £106,000.

10. Therefore, says Mr De Waal, the financial price of acceptance would have been the £250,000-odd offered in full and final settlement of the claim and the counterclaim plus, approximately £106,000 worth of costs; that latter figure guided by the breakdown in the by then approved budget.

11. In my judgment, that really meets the point relied upon by Mr Sahonte as to the timing and context of the Part 36 offer and reinforces that earlier observation I made: that the incentive to accept it in the face of a £1 million claim, at its highest, accompanied by approved budgeted costs down to and including trial of potentially £231,000-odd made the offer really very attractive indeed.

12. I am not, therefore, persuaded to disapply CPR 36.17(4) by reference to any factor that would support the conclusion that recognition of the claimant's presumptive entitlement under the rule would produce injustice. The result is that there are four consequences of it not being disapplied.

13. The first is under sub-paragraph (a), that interest on the whole or any part of the sum of money awarded can be awarded at a rate not exceeding 10% above base rate for some or all of the period starting with the date upon which the relevant period expired. The relevant period expired under this Part 36 offer on 4 April 2019. The second consequence in sub-paragraph 4(b) is that costs including any recoverable pre-action costs are payable on the indemnity basis – again, from that expiry date of 4 April 2019. The third consequence is that interest on those costs may be awarded at a rate not exceeding 10% above base rate and then the fourth consequence – that last was paragraph (c) - under paragraph (d) is that there be paid an additional amount, not to exceed £75,000 which is calculated by applying a prescribed percentage on the amount which is awarded to the claimant by the court. That being the amount awarded without regard to Part 36 consequences.

14. It appears to be the case here given the £458,000-odd figure that I have referred to that the relevant rate under (d) will be 10% without any further need to consider a drop down to 5% for any award above half a million pounds.

15. Reading through those four consequences, it is apparent that the court, once it has decided it is not unjust that they should follow, only has a discretion on two matters, or perhaps one matter to be applied twice, and that is the rate of interest to be applied both on the judgment sum and the indemnity costs element in respect of the period from 4 April 2019.

16. Mr De Waal submits that first and foremost that the costs consequence should be the full 10% over base that is permitted under the relevant rule. He says that it really was unreasonable for the council not to engage and accept this attractive offer. Against that, Mr Sahonte says that the rate should be no more than 5% or possibly 6%. The notes in the

White Book contain reference to one decision where the 10% was awarded in relation to a case where the paying party had not only not accepted the Part 36 offer but had failed to do so in the context of advancing a dishonest and unreasonable case.

17. That does not mean that 10% cannot be awarded where those factors are absent but I am persuaded by Mr Sahonte that this is not a maximum 10% case. However, I am not persuaded either by his rival other figure of no more than 6%.

18. In my judgment the appropriate rate of interest 8% which matches the judgment rate of interest. To the extent one can apply analysis and logic to a discretionary figure, I am influenced in coming to this conclusion by the thought that the claimant should be entitled to be treated as if it had been in the position of a judgment creditor now that it has more than vindicated itself by the recovery under my judgment when compared to what was advantageously offered to the defendant by the Part 36 offer.

19. The essential thrust of CPR 36.17(4), in such circumstances and assuming normality prevails, is to put the rejected offeror into a different, superior class of judgment creditor in relation to the period beginning with the expiry of his offer. And the essential basis for that can be said to be the reflection, in hindsight, that the litigation should by then have been concluded with recognition of his entitlement. It is clear that the claimant may be awarded interest at a rate which proves to be more than compensatory. In modern times it might be said that judgment rate of 8% produces, at least in some cases, an element of over-compensation. Whether or not that is so, I have concluded in this case that it is right to award that rate to the claimant for the period of its superior entitlement as if it was then entitled under a judgment rather than simply looking to the court's discretion for the recovery of a less generous commercial or compensatory rate over the pre-judgment period. Therefore, Mr De Waal, I am going to say it is interest at the rate of 8% per annum both under (a) and (c).

End of Judgment

Transcript from a recording by Ubiqus
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This transcript has been approved by the judge.