A2/2014/1626

**Neutral Citation Number: [2015] EWCA Civ 984**
**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE MANCHESTER DISTRICT REGISTRY**
**QUEEN'S BENCH DIVISION**
(HIS HONOUR JUDGE ARMITAGE QC)

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 16 July 2015

**B e f o r e:**

**LORD JUSTICE LEWISON**

**LORD JUSTICE FLOYD**

**Between:**
**DUTTON & ORS**

**Claimants**

v

**MINARDS & ORS**

**Defendants**

DAR Transcript of the Stenograph Notes of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7404 1424
(Official Shorthand Writers to the Court)

**Mr A Grantham** (instructed by Hill Dickinson) appeared on behalf of the **Claimants**

**Mr E Nourse QC** (instructed by DTM Legal) appeared on behalf of the **Defendants**

J U D G M E N T
(Approved)

1. **LORD JUSTICE LEWISON: 1.** This appeal is an appeal against a costs order made by His Honour Judge Armitage QC on 15 April 2014 following the late acceptance of a Part 36 offer.
2. The underlying dispute arose out a joint venture between the parties for the provision of financial services to clients of a firm of chartered accountants called Allwoods. When Allwoods' business was sold to a purchaser that itself provided financial services, the rationale for the joint venture ceased and the parties agreed to bring it to an end. What was in issue was what commission, if any, the Defendants were liable to pay the Claimants.
3. The Claimants' pleaded case was that there had been an agreement between them and the Defendants for the payment of trail commissions and renewal commissions. That allegation was denied by the Defendants. However, the Defendants had in fact paid some commission to the Claimants and by counterclaim, they claimed repayment. The sum for which they counterclaimed was £44,000 odd.
4. The Claimants began the proceedings by claim form issued on 8 February 2011. In fact, there had been considerable correspondence between the parties before the issue of proceedings. That correspondence included a number of letters relevant to this appeal.
5. In a letter of 15 December 2006 the Defendants' solicitors, DTM Legal, had said that they were instructed to advance a counterclaim for the virtual drying up of referrals in the months leading up to the sale of the business. That counterclaim was not quantified at the time and in any event was not the counterclaim that eventually materialised.
6. The next relevant letter was a letter from DTM Legal dated 30 July 2010. The letter was headed "without prejudice save as to costs". That letter raised the possibility of a different counterclaim based on an allegation that the Claimants had solicited the

business of the clients transferred to the buyer. It concluded:

i. "Our clients offer to pay to your clients the sum of £25,000 plus your clients' reasonable costs. This offer is made pursuant to CPR Part 36. As such, it will remain open for a period of 21 days from the date of receipt by you. The offer is intended to have the consequences of section 1 Part 36 and relates to the whole of your clients' claim and any counterclaim that may be advanced by our client."

7. The Claimants did not accept that offer. There was some inconclusive correspondence about mediation, but nothing came of it.

8. During the course of proceedings, the Claimants made a series of Part 36 offers, each on form N242A. On 23 September 2010 they offered to accept £35,000. The offer of 23 September 2010 was limited to the claim because at that stage there was still no counterclaim to take into account. The remaining offers took the counterclaim into account. On 24 September 2010 DTM proposed instructing a forensic accountant to take an account, although they pointed out that the authority of the purchaser would be needed. That proposal was turned down by the Claimants' solicitors, Hill Dickinson, on the ground that it would not be cost effective while liability remained in dispute.

9. The Claimants made further Part 36 offers. On 8 February 2011 they offered to accept £24,000 and on 21 October 2011 they offered to accept £18,000. It will be noticed that the Claimants' offer of 8 February 2011 was £1,000 less than the Defendants' offer of 30 July 2010. Even that was before the Defendants had actually pleaded the counterclaim which, as I have said, was not the same as the two counterclaims intimated in earlier correspondence.

10. The last of the offers, that is 21 October 2011, said that if the offer were accepted within 21 days of service, the Defendants would be liable for the Claimants' costs in accordance

with Rule 36.10 of the CPR.

11. The Defendants did not accept that offer within the 21-day period. Quite deliberately, they sent a fax accepting the offer one minute after the period of 21 days had expired. The Claimants' counterclaim had therefore been compromised by a stay, but the parties could not agree the incidences of costs. That was left to the judge to decide.

12. At the relevant time, CPR Part 36.10 provided, so far as material, as follows:

    i. "(1)... Where a Part 36 offer is accepted within the relevant period the claimant will be entitled to the costs of the proceedings up to the date on which notice of acceptance was served on the offeror.

    ii. (2)...

    iii. (3) Costs under paragraphs (1) and (2) of this rule will be assessed on the standard basis if the amount of costs is not agreed...

    iv. (4) Where -
    v. (a)... or
    vi. (b) a Part 36 offer is accepted after expiry of the relevant period, if the parties do not agree the liability for costs, the court will make an order as to costs.

    vii. (5) Where paragraph (4)(b) applies, unless the court orders otherwise -

    b. the Claimant will be entitled to the costs of the proceedings up the date on which the relevant period expired; and
    c. the offeree will be liable for the offeror's costs for the period from the date of expiry of the relevant period to the date of acceptance."

13. The relevant period in this case was 21 days. If, therefore, the Defendants had accepted the Claimants' Part 36 offer within the period of 21 days, the Claimants would have been entitled to their costs in accordance with CPR Part 36.10 (1). As it was, however, the case fell within Part 36.10(4)(b). Since the parties could not agree liability for costs, that took the case into Part 36.10(5).

14. It is clear from Part 36.10(5) that the starting point is that the Claimants would be entitled

to their costs up to the expiry of the 21-day period and that the offeree, here the Defendants, would be liable for the Claimants' costs up to the time of acceptance. In short therefore, the starting point was that the Defendants would pay the Claimants' costs of the proceedings.

15. That starting point is, however, subject to the important qualification "unless the court orders otherwise". Although CPR Part 36.10(5) itself gives no guidance about the circumstances in which the court should order otherwise, it was common ground that the test applied by this court in SG v Hewitt [2012] EWCA Civ 1953, [2013] 1 All ER 1118 was applicable.

16. In that case, this court said, by analogy with CPR Part 36.14 which concerns costs after judgment, the court should make the order envisaged by Part 36.10(5) unless it considers it unjust to do so. In considering whether or not it is unjust to make that order. The court should take into account all the circumstances of the case, including:

    i. "(a) the terms of any Part 36 offer;
    b. the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;
    c. the information available to the parties at the time when the Part 36 offer was made; and
    d. the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer to be made or evaluated."

17. The essence of the Defendants' argument before the judge was that he should “order otherwise” because the Claimants should have accepted the Defendants' offer of £25,000 plus their reasonable costs. Instead, the Claimants had pursued the litigation at considerable additional cost and had ended up with a lower principal sum. It would not be fair or just, in those circumstances, for the Defendants to have to bear those additional costs. Instead, it was argued that the Claimants should be ordered to pay the Defendants'

costs incurred after 23 August 2010, which was the date 21 days after the making of the offer of 30 July. That argument, with a little elaboration, was repeated on appeal.

18. The judge recounted the procedural history and the various offers that had been made by each side. He noted that there had been an order for a trial on liability only and that the Claimants' application for disclosure relating to quantum had been refused in July 2011 as being premature. He noted the argument advanced by each side that the other side was guilty of tactical manoeuvring, but said that was a factor which should not weigh heavily with him.

19. The Claimants argued that the Defendants' offer of 30 July 2010 was not in fact a Part 36 offer, even though it purported to be, for two reasons. First, it was time limited and second, it contained its own proposal about costs, whereas the question of costs fell to be decided only in accordance with Part 36. The judge rejected that argument, which was revived before us by a Respondent's notice.

20. The judge referred to a number of cases and said at paragraph 21:

    i. "It seems to me on the authorities cited that the rule itself provides an outcome which should be just in most cases and the court may order otherwise where the facts show that application of the rule will cause injustice."

21. The Defendants do not, I think, criticise that self direction.

22. The first point that the judge made was that in accepting the Claimants' Part 36 offer, the Defendants achieved a reduction of the judgment sum minus the increase in costs in July 2010 and also avoided the risk of a greater judgment sum being entered against them if the action went to trial. It was pointed out that the Defendants had chosen to accept the Claimants' offer rather than remind the Claimants of their own unwithdrawn offer of 2010 or to renew it to avoid misunderstanding.

23. The nub of his judgment is at paragraph 25, which reads:

    i. "My judgment is that the decisive factor in this case is the uncertainty of the net value of the claim. The Defendants' discernible position has always been that a net sum would be recovered by the Claimants. A significant part of the uncertainty was the Defendants' unwillingness to reveal the strengths or weakness of their case, augmented by the splitting of the trial which almost always hampers financial evaluation of a case where both liability and quantum are in issue."

24. He said that the case contained a similar factor to SG v Hewitt and continued:

    i. "The purpose of Part 36 code is to promote economical settlement of claims in order to compromise. Ideally, the parties need to know the strengths and weaknesses of their cases on liability and the range of values of the Claimants' counterclaim in order to produce a risk valuation. That does not prevent an early offer based on sheer guesswork or a nuisance value offer based on say the irrecoverable costs of successfully defending a claim or any other basis, but the modern cards on the table approach to civil litigation suggests at least that the decision should be informed so far as possible."

25. Thus, the judge concluded that "on the facts" the application at Part 36.10(5) was not unjust. It seems to me to be clear that the judge posed himself the right question, namely: was the application of the default position under Part 36.10(5) unjust? That was also the question that he answered.

26. Whether a particular outcome is unjust is essentially a value judgment, which is for the first instance judge to make. In addition, the making of a costs order that is not positively required by the Rules is an exercise of judicial discretion. Thus, the judge must first decide whether or not applying the presumption of a default position in Part 36.10(5) would be unjust. If he decides that it would be, then he must go on to decide what other order to make.

27. There is, therefore, a formidable hurdle to overcome on appeal because the question is

not whether we would have made the order that the judge made, but whether the conditions exist for an appeal court to interfere with the value judgment of and exercise of discretion by the lower court.

28. One issue with which it is convenient to deal at the outset is whether the judge was right to hold that the offer of 30 July 2010 was a Part 36 offer, as it purported to be. This issue is, as I have said, raised by the Respondent's notice. Mr Andrew Grantham for the Claimants argues that it was not because it contains its own terms about costs.

29. The approach to the interpretation of an offer that purports to be a Part 36 offer is laid down by this court in C v D [2011] EWCA Civ 646, [2012] 1 WLR 1962. If an offer is expressed to be a Part 36 offer, it should be interpreted if possible to make it effective as what it purports to be, rather than ineffective. This general principle of interpretation (validate if possible) was relied on by Rix LJ at paragraph 55, Rimer LJ at paragraph 75 and Stanley Burnton LJ at paragraph 84.

30. It was in the light of that decision that the judge held that the fact that the offer was said to be "open for a period of 21 days" did not invalidate it as a Part 36 offer and his conclusion on that point is no longer challenged. In Mitchell v James [2002] EWCA Civ 997, [2004] 1 WLR 158, an offer purporting to be Part 36 offer offered to settle a claim by accepting a payment of a certain amount. One of the terms of the offer was that each party would bear its own costs. This court held that because the offer contained a term about costs, it could not have been a Part 36 offer. In French v Groupama Insurance Company Ltd [2011] EWCA Civ 1119, [2012] CP Rep 2, this court suggested that an offer to pay a global sum inclusive of costs could not have been a Part 36 offer for much the same reason.

31. In both those cases, however, the proposed costs regime was incompatible with the costs

regime laid down by Part 36. In my judgment, applying the principle validate if possible, the question of when the offer was made in the present case does no more than replicate that costs regime. That was approach of this court in Neave v Neave [2003] EWCA Civ 325.

32. To return to the words of the offer, it said:
    i. "Our clients offer to pay to your clients... your clients' reasonable costs. This offer is made pursuant to CPR Part 36."

33. As I have said, if the Claimants had accepted the offer, then they would have been entitled to their costs under CPR Part 36.10(1) and under Part 36.10(3) those costs would have been assessed on the standard basis, if not agreed. The standard basis of assessment would have allowed the Claimants their costs reasonably and proportionally incurred.

34. Unlike the offers contained in Mitchell v James and French v Groupama, the proposal was not, in my judgment, inconsistent with Part 36. Although the offer did not explicitly refer to the proportionality of the costs that the Defendants offered to pay, in my judgment, in the context of an offer purporting to be a Part 36 offer, the reasonable reader of the letter would have understood it as referring to the basis of costs contained in Part 36 itself. This was, in essence, the judge's reasoning at paragraph 16 and I agree with it.

35. Mr Grantham also argues that if he is wrong in his primary contention that the offer was not a Part 36 offer, the parties proceeded on the basis that it had lapsed and that the Defendants are, in consequence, estopped from relying on it. The judge did not deal with this argument in terms. However, the materials said to support the estoppel are exiguous and I do not consider that they support the allegation. All that happened was that the Claimants asserted that the offer of 30 July 2010 was not a valid Part 36 offer and their

assertion was not contradicted. Nevertheless, in the state of the authorities at the time when the offer was made and in particular the first instance decision in C v D, which was later reversed by this court, it was not an unreasonable view to take that the offer had, in fact, lapsed.

36. Accordingly, in my judgment, the judge was right to consider the question of costs on the basis that there had been a valid Part 36 offer made by the Defendants but to concentrate on the period during which it was stated to be open for acceptance.

37. Mr Edmund Nourse QC on behalf of the Defendants argues that the judge took into account the wrong matters and that his decision was so plainly wrong as to be perverse. Mr Nourse suggested that the judge appreciated that the just starting point was that the Claimants should not have their costs after the offer of 30 July 2010 "given that they had failed to beat it and it was a Part 36 offer", as he put it in his skeleton argument.

38. I do not, however, think that this was the judge's starting point and if it had been, it would have been wrong. In the first place, the usual circumstance in which it is said that a Claimant has failed to beat a Part 36 offer is where he fails to obtain a judgment that is more advantageous than the offer. There was no such judgment in the present case which was concerned with the costs consequences of accepting a Part 36 offer.

39. The purpose of making a Part 36 offer is, as Arden LJ said in SG v Hewitt, to throw the risk of paying costs on the offeree if he fails to accept the offer within the 21-day period or to beat it at trial.

40. Second, in a sense, the Claimants had beaten the offer of 30 July because the costs consequences for them, at any rate if the default position in Part 36.10(5) applied, were much to their financial advantage, which, after all, is why this appeal is being brought at all.

41. Third, the starting point must be what the rule itself provides, which is that the persuasive burden lies on the party contending that the court should “order otherwise” because it would be unjust not to do so.

42. Moreover, I agree with the submission of Mr Grantham that the primary focus of Part 36.10(5) insofar as it enables a court to disapply the presumption is the costs incurred since the expiry of the relevant period. That is certainly how the point has arisen in previous cases. Here, by contrast, the Defendants seek to obtain advantage from the late acceptance of the Part 36 offer and, moreover, an advantage that relates to a period before the relevant period even began.

43. The grounds of appeal allege that having correctly held that the Defendants' offer of 30 July 2010 was a Part 36 offer, the judge then ignored it. Since the main part of the judge's reasoning turned on whether the Claimants should have accepted that offer, I find it impossible to say that he simply ignored it.

44. As noted, the judge regarded the decisive factor as being the uncertainty about the net value of the claim. It is to be noted particularly that the judge used the phrase "the net value". That means the value of the claim after taking into account the value of the counterclaim. But at the date of the offer, no counterclaim had been formulated. Two different forms of counterclaim had been mooted, but neither was, in the event, pursued.

45. In my judgment, therefore, the judge was entitled to find that at the date when the Defendants' offer was made and in the period for accepting it, the Claimants were not able to evaluate it realistically. It is one thing to say that the evaluation of one's own claim is part of the exigencies of litigation. It is quite another to say that one should evaluate a counterclaim that has not yet been brought.

46. In addition, the nature of the claim itself was a relevant factor for the judge. It was not a

case where the Claimants were asserting their own loss. What they were claiming was an account which was dependent on the extent of commissions received by the Defendants.

47. In my judgment therefore, Mr Grantham is also right to say there was an imbalance of information. Although it may be the case, as Mr Nourse submitted, that the information was no longer in the Defendants' possession, that does not detract from the basic point that even the quantum of the claim itself was not something that the Claimants could assess independently.

48. Mr Nourse argued that the counterclaim was quantified when it was served in March 2011, but the judge still allowed the Claimants to recover their costs thereafter. One potential problem with this submission was that it was not advanced before the judge and consequently, he was never asked to consider it.

49. It is difficult to criticise a judge's exercise of discretion in not having made an order that he was not asked to make: see Allen v Bloomsbury Publishing Ltd [2011] EWCA Civ 943. However, it is one of the grounds of appeal and Christopher Clarke LJ has given permission for it to be advanced.

50. It will be recalled that by March 2011 the Claimants had made their own Part 36 offer, taking into account what they then knew of the counterclaim, in the sum of £24,000; £9,000 less than the Defendants' offer. If the Claimants are to be criticised for not having accepted the Defendants' offer in March 2011, it seems to me that there is equal criticism in the Defendants not having accepted the Claimants' offer of 8 February 2011.

51. The judge also carefully considered the balance of risk to the Defendants in accepting the Claimants' offer on the one hand and pushing on to trial on the other. As he also pointed out, they chose to accept the Claimants' Part 36 offer rather than pointing to their own offer of 30 July 2010.

52. In addition, as Mr Grantham submitted, the Defendants could have made a new offer which fell outside the terms of Part 36, in which event the judge would have had a much wider discretion to exercise.

53. I readily accept that some judges might have formed a different value judgment on the overall justice of the result and other judges might have made a different order. In essence, other judges might have given more weight to the Defendants' Part 36 offer of 30 July 2010. But questions of weight are matters for the decision maker, here the first instance judge.

54. In my judgment, the order that the judge made in the present case was within the ambit of his discretion. I would, therefore, dismiss the appeal.

55. **LORD JUSTICE FLOYD:** I agree.