

# Costs in Focus

## Issue 50

Welcome to the 50th issue of Costs in Focus. This edition is going to consider a number of recent developments in costs law and the impact they will have on Costs Drafters and Practitioners.

## Taking chances with Part 36

Rachel Dunn considers *Houghton (Stanley) v PB Donoghue (Haulage & Plant Hire Ltd & Ors)* [2017] EWHC 1738 (Ch), in which the claimant sought permission to accept the defendant's previous Part 36 offer midway through the trial

In the High Court on 13 June 2017, Mr Justice Morgan rejected an application by the claimant to accept a Part 36 offer out of time and while the trial was in progress.

The defendant made the Part 36 offer of £330,000 on 16 December 2016. The offer was not accepted and nor was it withdrawn. On the third day of the trial, the claimant made an application to accept the offer, after the defendant had refused permission for the claimant to accept their offer.

At the application hearing, the judge considered CPR 36.11(3)(d), which gives the court power to grant permission to accept a Part 36 offer where a trial is in progress.

The judge cited persuasive case law that it would not be appropriate to grant permission to the claimant to accept the offer after they saw "the way the wind is blowing in the trial". In conclusion, the judge explained that what he was effectively being asked to do was to impose on the

defendant a liability to pay £330,000, which they were no longer willing to pay as they had asked the court to refuse the claimant's application.

"The Defendant now wishes to take its chances with the trial continuing, so the Court is imposing a result, imposing a settlement which is not a voluntary settlement any longer."

### Comments

Having failed to accept the £330,000 Part 36 offer and being refused permission by the court to accept the offer during the trial, the claimant went on to lose at the conclusion of the seven-day trial. The claimant was therefore left with an expensive liability for costs to the defendant.

Under CPR 36.11(3)(d), the court's permission is required to accept a Part 36 offer when a trial is in progress. In this matter, the claimant

was refused permission to accept the Part 36 offer and the judge ruled in the defendant's favour.

The benefits of making and beating a Part 36 offer at trial can be very significant because of the prospects of obtaining a costs order.

Part 36 offers can be a tactical tool, either to force settlement or to provide costs protection. If offers are not accepted, it is important to keep

Part 36 offers under review because circumstances can change. Part 36 offers made and received should be reviewed again following key procedural steps, such as disclosure, service of expert evidence and exchange of witness evidence, because a Part 36 offer may need to be withdrawn or accepted if the evidence changes.

# New proportionality test appeal

Carys James considers the application of the new proportionality test in CPR Part 44.3(5) in the appeal of *May v Wavell Group Limited*, Case no A02CL398, (County Court at Central London)

Further clarification has been provided in the courts' attempts to ensure legal costs are proportionate in the appeal decision of *May v Wavell Group Plc*.

The matter at first instance was considered in Issue 45 of *Costs in Focus*. The claimant had sued for damages in nuisance caused by noise and dust generated by building work being undertaken on the defendant's property, which was adjacent to the claimant's house. Proceedings were issued but the matter settled by way of a Part 36 Offer of £25,000 before a defence was filed. The costs claimed were £208,236.54 and, on a line-by-line assessment, Master Rowley

reduced these to £99,655.74. He then made a further global reduction to reflect proportionality, as he concluded that this figure was still disproportionate for a claim that settled pre-trial for £25,000 and so reduced it further to £35,000 plus VAT.

While there was no challenge to the finding that the reasonable costs were £99,655.74, the figure considered to be proportionate was appealed. His Honour Judge Dight, sitting with Master Whalan, held that Master Rowley had misinterpreted and misapplied the new proportionality test, and concluded the proportionate figure to allow was £75,000 plus VAT.

The key reason the appeal was successful was His Honour Judge Dight's finding that the new proportionality test is not "a blunt instrument" that can be used to make a substantial reduction in the reasonable costs, bringing them down to a "rough and ready but proportionate amount". It was held that "whether the relationship between the costs and the relevant factors is reasonable requires an objective assessment and an objective balance to be undertaken in respect of them, with a view to achieving the policy objectives or compensating the receiving party for his expenditure but not requiring the paying party to pay more than the litigation warranted."

## Comments

This is a significant decision, as it is perhaps the most detailed consideration yet of how the post-April 2013 proportionality test should be applied. It emphasises the importance of taking into account all the factors under CPR Part 44.3(5) and a straight costs-to-damages comparison is not always sufficient.

Consideration of the complex issues of the litigation and the other relevant factors under CPR Part 44.3(5) were found not to have been given sufficient weight. This was seen to be a matter of judgment rather than discretion, with the appeal therefore allowed.

The case also set out how the court can apply proportionality as either assessing the reasonable costs and then the proportionate costs (as in this matter) or by combining this into one assessment and then applying proportionality at the end, by means of a cross-checking exercise.

## Services we provide

We deal with all aspects of costs including the preparation of Bills of Costs, Schedule of Costs, Points of Dispute, Points in Reply, negotiating settlement, solicitor own client disputes, auditing, providing estimates, costs budgeting and costs advocacy.

Our dedicated costs team is made up of 50 employees based in Bristol and New Malden with a wealth of experience including Costs Lawyers, Solicitors and members of the ACL.

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The purpose of this newsletter is to highlight some of the recent developments and changes in costs law. It should not be taken as legal advice and should not be relied upon as such.