Costs in Focus

Issue 58

Welcome to the 58th 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.

‘Without prejudice’ and costs implications

Costs Lawyer, Steven Leung considers when communications between the parties are admissible on the question of costs in *Sternberg Reed Solicitors v Harrison* [2019] EWHC 2065 (Ch)

The defendant is a retired partner of the claimant law firm. A dispute arose as to the defendant's entitlements under a partnership agreement. The matter went to arbitration.

Following an experts' joint report it was agreed the defendant's share of the partnership was worth £73,922 subject to payment by annual instalments and financial triggers being met. The arbitrator awarded the claimant 70% of their costs up to the date of the expert report and all costs thereafter. The reduction for the earlier period was to reflect late disclosure by the claimant.

The defendant challenged the first costs award, asserting that he had beaten his own settlement offer of £65,000. The arbitrator found he was able to take this offer into account. Applying CPR 44.2(2)(b) the arbitrator found there was no real winner and that neither party had gained from the arbitration process. The arbitrator made a revised costs order that each party bear their own costs and each party pay 50% of the arbitrator fee.

His Honour Judge Hodge QC dismissed the claimant's appeal against the arbitrator’s revised costs award. He held the defendant's email was not expressly marked either 'without prejudice' or as an 'open' offer. The arbitrator was therefore entitled to take the defendant's emailed offer into account and the revised second costs order was within the discretion of the arbitrator.

Comments

Reed Executive Plc v Reed Business Information Ltd [2004] EWCA Civ 887 is Court of Appeal authority that communications expressly marked 'without prejudice' are inadmissible, even for costs arguments. This is distinct from communications marked 'without prejudice save as to costs', which are admissible for costs arguments: *Cutts v Head* [1983] EWCA Civ 8.

The claimant firm attempted to argue it was the common intention of the parties that the first defendant email offer was 'without prejudice'; however, the High Court ruled there was no public policy reason why the court would imply privilege and the arbitrator had made no error in law.

The court also dismissed the claimant's argument the status of the defendant's email was retrospectively converted to 'without prejudice' status merely because later correspondence was headed 'without prejudice'. The court accepted parties may expressly agree to vary the basis of previous communications (*Willers v Joyce* [2019] EWHC 937 (Ch)) but there had been no attempt at express variation in this matter.

Meruit Costs
part of
Lyons Davidson
SOLICITORS

Part 36 offer held valid: breach ‘de minimis’

Law Costs Supervisor, Kate Roach considers the court’s ruling on compliance with CPR Part 36 in *Momonakaya v the Ministry of Defence* [2019] EWHC 480 (QB)

On 30 April 2018 the defendant put forward a Part 36 offer which was accepted by the claimant, outside of the 21 day relevant period, on 8 November 2018.

Three days later the claimant sought to withdraw his acceptance. His Honour Judge Blair QC rejected the claimant’s argument he was acting under duress and held there could be no disagreement as to the terms of what offer was being accepted.

On making the offer, the defendant mistakenly believed an updated CRU certificate of recoverable benefits was outstanding when in fact both parties were already in receipt of the certificate. The Part 36 offer was on terms that clarification of the offer and the amount of any deductible benefits would follow within seven days of receipt of the updated certificate: y r.36.22(7). The defendant did not comply with this rule.

In fact, due to the ‘five-year-rule’ no further deductions are to be made after that time and the CRU deductions did not change.

The defendant argued that the non-compliance was *de minimis* and should not be treated as a breach of “the comprehensive code in Part 36”.

Judge Blair QC agreed with the defendant’s position that the failure to comply with r.36.22(7) was *de minimis* and no prejudice had been suffered. The matter was therefore stayed pursuant to r.36.14(1).

With reference to the factors set out in r.36.17(5), Judge Blair QC concluded on the date of expiry of the defendant’s offer it had not been possible to properly quantify the claim and that this was not possible until a joint expert report had been received. The defendant was therefore directed to pay the claimant’s costs to 21 September 2018 and the claimant to pay the defendant’s costs from 21 September 2018 to 8 November 2018.

Comments

Lord Justice Davis in *F&C Alternative Investment (Holdings) Ltd v Barthelemy (Costs)* [2012] EWCA Civ 843 , referred to in this judgment, commented that “…there can be *de minimis* errors, or obvious slips which mislead no-one: but the general rule, in my opinion, is that for an offer to be a Part 36 offer it must strictly comply with the requirements."

This case demonstrates that despite the strict rules which a Part 36 offer must follow, it is not possible to escape the costs consequences set out in Part 36 due to a mere technical breach. Whilst one must be alive to instances of non-compliance, it does not automatically follow that the costs consequences will cease to apply. Central to this decision was the fact that there was clarity between the parties as to what was being agreed and that no prejudice had been suffered.

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 employees based in Bristol and New Malden with a wealth of experience including Costs Lawyers and members of the ACL.

Key Contacts

Ian Curtis-Nye
Divisional Manager – Editor
Tel No 0208 336 6968
Email icurtis-nye@lyonsdavidson.co.uk

Steven Leung
Associate | Costs Lawyer – Editor
Tel No 0208 436 2058
Email stleung@lyonsdavidson.co.uk

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.

Meruit Costs
part of
Lyons Davidson
SOLICITORS