

Welcome to the 62nd 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 Cost Drafters and Practitioners.

Part 36 genuine attempt to settle

Costs Drafter, Hana Ghanty considers the decision of the High Court on the correct approach to determine whether a Part 36 offer is a 'genuine attempt to settle the proceedings' in *Rawbank S.A. v Travelex Banknotes Limited* [2020] EWHC 1619 (Ch)

The claimant was a bank in the DRC which had ordered bank notes from the defendant. Due to travel restrictions brought about by the Coronavirus pandemic, delivery of these notes were delayed. Eventually the defendant encountered financial difficulties and advised the claimant that the notes would not be delivered nor would a refund take place.

The claimant issued proceedings for breach of contract and or misrepresentation. On the same day the claimant made a Part 36 offer to the defendant.

No defence was filed and on 15 June 2020 the Defendant wrote to the Claimant agreeing for judgement to be entered against them for the contractual claim.. The court considered whether to grant an order giving effect to the consequences set out in CPR 36.17(4). The claimant submitted they had achieved an outcome that was at least as advantageous as the proposals contained in its Part 36 offer.

The Part 36 offer made by the claimant was for £48,290,000. After interest, the discount against the Claim Form was £158,059, or

0.3% of the total amount claimed.

The defendant submitted this was not a genuine offer to settle: CPR 36.17(4)(e). The court rejected this argument.

The court held that since there was no defence, in the claimant's view there was no realistic possibility of failure. In other words, a discount of any amount would involve the claimant giving up something which they had a near-certainty of obtaining.

Comments

Mr Justice Zacaroli in the High Court held that "the critical question is not a mathematical one – the proportion of the discount – but whether it is possible to infer from the size of the discount that there is no genuine attempt to settle the proceedings" (paragraph 29).

In deciding whether it would be unjust to impose the consequences of CPR36.17(4) the court must consider the circumstances in CPR 36.17(5)(a) to (e), including (e): whether an offer is a "a genuine attempt to

settle":.

The court held where no defence had been filed, there were only two possible outcomes, being either, complete success or total failure. In the claimant's view there were no prospects of the claim failing and any discount would therefore amount to a genuine attempt to settle.

It was noted that while the discount was low, it would have been higher than the interest that would have accrued or the

costs incurred by the claimant for bringing the claim.

The court also ruled the defendant's insolvency and inability to pay did not make it unjust for the 36.17(4) consequences to apply. The defendant could have accepted judgment on an earlier date in order to save legal costs. Mr Justice Zacaroli concluded the defendant's insolvency and desire to pursue restructuring should not prevent the 36.17(4) consequences applying.

Counsel advice fee in Protocol exit claim

Costs Lawyer, Steven Leung considers the High Court's decision to allow a fee for counsel to value a claim that has fallen out of the MOJ Protocol in *Finsbury Food Group PLC v Scott Dover* [2020] EWHC 2176 (QB)

The claimant suffered injury to his right middle and index fingers during the course of his employment by the defendant. Following multiple surgical procedures and a three-month absence from work, the claimant was left with a permanently damaged middle finger.

Initially, the claim was valued at less than £25,000 and therefore fell within the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims.

The CNF was submitted on 23 July 2015. The defendant failed to provide a response within the required 30 days and the matter exit-

ed the Protocol on 15 September 2015 in accordance with paragraph 6.13 of the Protocol.

The defendant's insurers requested on two occasions that the claim be resubmitted to the Protocol, which was declined by the claimant. Liability was admitted on 29 February 2016 subject to causation. Counsel was instructed to advise on the value of the claim in conference on 22 March 2017. The matter eventually settled for £70,000 on 19 December 2017.

Counsel's fee for advice in conference was claimed in the sum of £650 plus VAT. The

Points of Dispute argued counsel's fee was not recoverable under the relevant provisions in a claim that had exited the Protocol.

Alternatively, counsel's fee should be limited to £150 plus VAT under Table 6A "Fixed Costs in relation to the EL/PL Protocol".

Master Brown of the Senior Courts Costs Office rejected the defendant's arguments but assessed counsel's fee down from £650 plus VAT to £500 plus VAT. The defendant appealed. Mr Justice Lambert sitting in the High Court dismissed the defendant's appeal.

Comments

CPR 45.29(2)(c) states the court may allow "the cost of any advice from a specialist solicitor or counsel as provided for in the relevant Protocol". Mr Justice Lambert held this provision is referring to the type of disbursements the court may allow; not to the cost of the disbursement.

The defendant's alternative submission counsel's fee should be limited to £150 plus VAT is derived from paragraph 7.44 of the

Protocol, which states the defendant must pay:

"where an additional advice on quantum of damages is justified under paragraph 7.8, a sum equal to the Type C fixed costs to cover the cost of that advice..."

Mr Justice Lambert held this is concerned with claims that settle within Stage 2 of the Protocol. There was no provision under CPR

45 Section III fixing the cost of advice for claims which have fallen out of the Protocol.

In all the circumstances it was held counsel's advice for valuing a claim which has fallen out of the Protocol is unfixed and is subject to conventional assessment.

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

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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.