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The penalties under Part 36.17(4) come as a package

Telefonica UK Limited v The Office of Communications (2020) EWCA Civ 1374

The issue in this case was whether, following the claimant's successful Part 36 offer, the trial judge had been entitled to award the claimant indemnity costs and the maximum additional sum of £75,000 but not enhanced interest on damages and costs.

In so far as is relevant to this summary, Part 36.17(4) states:

'… the court must, unless it considers it unjust to do so, order that the claimant is entitled to—

(a) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;

(b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;

(c) interest on those costs at a rate not exceeding 10% above base rate; and

IN BRIEF

This case is relevant where a defendant fails, at trial to 'beat' a claimant's Part 36 offer.

Once the judge finds that the penalties flowing from Part 36.17(4) should apply, all four penalties must be applied. The only discretion the judge has is as to the rate pf penalty interest.

(d) provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount, which shall not exceed £75,000…'

Awards had therefore been made under sub-paragraphs (b) and (d) but not (a) or (c).

Although the trial judge recognised the heavy burden on a defendant seeking to avoid orders in favour of a claimant under CPR 36.17(4) on the grounds of injustice, he went on to identify a series of factors he considered to be relevant in the present case.

First was the fact that the question at issue in the proceedings was "a binary one, to which there was only one answer rather than some answer meeting in the middle" which may have rendered settlement "an unlikely prospect and may have rendered any decision to that effect an understandable one".

Secondly, the judge did not consider there was anything unreasonable in the defendant's decision to take the case to trial or in its conduct of the litigation, but again recognised that that was not determinative, albeit relevant. Thirdly, he did not accept that the defendant had behaved unreasonably in failing to engage in the without prejudice process.

Fourthly, the judge considered "the nature of the offers in play" and whether the offers made by the claimant here were genuine attempts to settle the proceedings, although he did not make any finding against the claimant on this point.

The Court of Appeal held that once the judge had decided that the claimant was entitled to some of the benefits flowing to it under the rule, he was obliged to award all of them. Any discretion was limited to setting the rate of enhanced interest.

In relation to enhanced interest on the principal award (CPR 36.17(4)(a)), the judge's reasoning was that such an award would have been "disproportionate" given the "very high nature of the offers" and the other benefits he was awarding. That reasoning did not bear scrutiny.

It was difficult to see the relevance of the level of the offers given that the key factor was that the defendant could have avoided the need for the proceedings (or most of the proceedings) by accepting one of the offers, and been in as good a position as it was after the trial. Once the judge had accepted that the offers were genuine attempts at settlement the level of the offers could not, in itself, form the basis of an assessment of the "proportionality" of enhanced interest, let alone a finding that any enhanced interest would be unjust.

In addition, since the court had a wide discretion as to the rate of enhanced interest to award, there was limited (if any) scope for consideration of disproportionality in deciding whether it is unjust to make any such award.

There was no justification for the judge's approach of treating the award of the additional amount of £75,000 and of indemnity costs as factors rendering it unjust also to award enhanced interest on the principal sum, whether as a matter of "proportionality" or otherwise. The rule provided for the successful claimant to receive each of the four enhancements and there was no suggestion that the award of one in any way undermined or lessened entitlement to the others.

The judge considered it unjust to award an uplift of interest on costs because the case was not conducted by the defendant in an unreasonable way and so costs were not enlarged by such

conduct. However, the key question was which party was responsible for costs being incurred when they should not have been. The costs were incurred because the defendant could have, but did not, accept the claimant's offers, deciding instead to fight the case but failing to do better than the offers.

A defendant's conduct of proceedings after rejection of the claimant's offer might be a major factor in increasing or decreasing the level of interest awarded. But, reasonable conduct on the part of the defendant was not sufficient, in itself, to render it unjust to make an award at all.

As a consequence of these findings, the Court pf Appeal awarded an additional 1.5% per annum (equating to about £900,000), making the total interest payable 3.5% above base rate, on both principal and costs, from the relevant date.

Matthew Hoe of the FOIL Costs SFT comments: 'The judgment appears to be final confirmation that Part 36 consequences are a package deal. Persuading the court there should be some damage limitation on interest seems more likely to succeed than persuading the court that awarding the package would be unjust. It adds yet more pressure to evaluating a claimant's Part 36 offer. Spotting a well-pitched offer is one thing, but it deepens the quandary about whether to accept a Part 36 offer where outcomes above and below the offer are equally likely. As asking the court for relief from Part 36 consequences is unlikely to succeed, tactical use of Part 36 offers in response seems the best way of putting pressure back on to claimants.'