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BRIGGS v CEF HOLDINGS LTD (2017)

CA (Civ Div) (Gross LJ, Asplin J) 13/07/2017

CIVIL PROCEDURE - COSTS (LTL) - CPR (LTL)

COSTS ORDERS : CPR : PART 36 OFFERS : PERSONAL INJURY CLAIMS : STAY OF PROCEEDINGS : CIVIL PROCEDURE RULES 1998 r.36.13(5), r.36.13(6), r.36.17(5) : CPR

A district judge had been wrong not to make the usual costs order following a personal injury claimant's late acceptance of the defendant's Part 36 offer, namely that the claimant pay the defendant's costs following the expiry of the usual acceptance period. The fact that there had been uncertainty regarding the claimant's prognosis was part of the usual risks of litigation, and the purpose of Part 36 was to shift the risk to the offeree if he did not accept the offer. It was important not to undermine that purpose.

The defendant appealed against a district judge's costs order following the claimant's late acceptance of its Part 36 offer in his personal injury claim.

The claimant had injured his foot in January 2010 in a workplace accident while working for the defendant. He issued proceedings in January 2012, accompanied by an orthopaedic surgeon's report with an unfavourable prognosis. In September 2012 the defendant made a Part 36 offer to settle the whole claim for £50,000. The 21-day period for accepting the offer expired on 9 October 2012. The claimant did not accept or reject the offer. In May 2013 he was granted a stay of proceedings and had foot surgery. The stay was lifted in April 2014, after which the claimant increased his damages claim to £248,000. He then had a new orthopaedic surgeon produce a report in October 2014, which had a slightly better prognosis while remaining unfavourable. However, a subsequent joint experts' report between that surgeon and one hired by the defendant was far more favourable and considered that the claimant would be able to work until retirement age. The matter was listed for trial in early 2015, but the claimant applied to vacate the trial in February 2015 and accepted the September 2012 Part 36 offer on 2 June 2015. He successfully applied for an order under CPR r.36.13(5) that the defendant pay his costs up to 30 October 2014, despite the usual rule that he would have been liable for the defendant's costs after the expiry of the 21-day acceptance period. The judge agreed with his submission that it would be unjust to apply the usual rule because the injury had not been resolved and the prognosis had been uncertain until the October 2014 orthopaedic report.

The defendant submitted that the judge's approach to the concept of injustice under Part 36 had been wrong, and that he should not have concluded that the uncertainty regarding the claimant's prognosis until October 2014 meant that it was unjust under CPR r.36.13(6) and CPR r.36.17(5) to apply the presumption that the claimant should pay the defendant's costs.

HELD: (1) It was important not to undermine the salutary purpose of Part 36 offers. It was equally important that in considering submissions regarding uncertainty, the court did not conduct a microscopic examination of the litigation details. Cases were fact-specific, but the general rule under Part 36 was that if an offer was not accepted in time, the offeree bore the costs of the offeror until the offer was accepted. If the offeree could show that that would cause injustice, that was different; it was up to the offeree to demonstrate it. It was not enough to show that it had been difficult to form a view on the likely outcome. As the helpful general note on r.36.17(5) in The White Book Vol.1 set out, Part 36 shifted the costs risk onto the offeree, and it was important not to undermine that purpose. The decision in SG (A Child) v Hewitt (Costs) [2012] EWCA Civ 1053, where there had been difficulties in forming a prognosis following brain damage to a child, had applied the same principles and was a clear case on the other side of the line from the instant case where, as a contingency of the litigation, it had simply been hard to work out how it might go. That was not an infrequent result, Matthews v Metal Improvements Co Inc [2007] EWCA Civ 215 and SG considered. Part 36 offers were made against that risk.

(2) The court would not go so far as to say that the claimant had exaggerated his injury, but the progress of the litigation had been troubling. There was nothing to distinguish the case from one involving the usual risks of litigation. The claimant's decision to accept the offer had not come following the second medical report or the joint report; he had carried on with the case. The reality was that the joint report had undermined his case. Until then, there had simply been the usual uncertainties and litigation risks. The court was unable to detect anything rendering the usual costs order unjust. The court might have been persuaded that the stay was relevant if it had followed promptly on the Part 36 offer, but it had not; it had come much later. Even without a finding of exaggeration on the claimant's part, there was some force in the submission noting that he had greatly increased the amount claimed following the stay. The fact of the stay did not justify displacing the usual costs rule. While the court always hesitated in overturning a costs decision, the judge's decision could not stand. It had been wrong in principle by failing to give effect to the purpose of Part 36, SG followed. The judge had not identified any injustice warranting a departure from the usual order.

Appeal allowed

Counsel:
For the defendant: Mr Jones
For the claimant: Mr Latham

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