Legal Briefing

Rolf v De Guerin
[2011] EWCA Civ 78

The Facts

Mrs Rolf entered into a contract with Mr Guerin to build a garage for £34,000 and a loft for £18,000. It was agreed that 25% would be paid in advance and the rest in weekly instalments. The building works did not go smoothly, primarily due to the tendency of Mrs Rolf's husband to interfere with the works. This, together with the eventual cessation of weekly payments, resulted in a repudiation of the contract by Mrs Rolf in August 2007. At the time of this repudiation, the garage had been substantially constructed but the loft had barely been started. Following the breakdown of the contract, Mrs Rolf instructed other builders to finish the garage and claimed she had spent some £20,000 completing it.

Mrs Rolf claimed for damages. The value of her claim varied prior to trial between £44,435.90 at its lowest and £92,515.90 at its highest. By the time of the trial, however, the claim was for around £70,000.

Prior to trial, Mrs Rolf's solicitors made a Part 36 offer to settle her claim for £14,000 plus her costs stating that the offer was open for 21 days. No response was received from Mr Guerin. After the expiry of the offer, they chased and, at the same time, offered to mediate. Again Mr Guerin did not respond. Just prior to the trial, following a change of solicitors, Mr Guerin wrote out of the blue and offered to settle the claim for £14,000 plus reasonable costs payable in monthly instalments over 36 months. The next day, Mrs Rolf's solicitors amended her Part 36 offer to accept £21,000 plus reasonable costs (reflecting a recent re-pleading of her case) in settlement. Again they emphasised a willingness to mediate or discuss settlement. Mr Guerin then offered £14,000 over 3 years as his best offer emphasising his financial difficulties. The offer stated he was prepared to agree to mediation or settlement meeting but none occurred.

Mrs Rolf was awarded just £2,500 by the Judge who held that there should be no order to costs between the parties until three weeks from the date Mrs Rolf's first Part 36 offer expired. From that date Mrs Rolf was to pay Mr Guerin's costs. This was on the grounds that Mrs Rolf had made an offer which was too high and Mr Guerin was therefore right to reject that offer and proceed to trial. Mrs Rolf appealed the costs decision.

The Issue

What was the appropriate order as to costs?

The Decision

The Court of Appeal held that the Judge at first instance had erred fundamentally in his appreciation of the significance of Mrs Rolf's Part 36 offer. The Part 36 mechanism provides a formal, regulated procedure for a party, including a claimant, to express a willingness to accept something less than total success in his open position in litigation. If the offer is not accepted, and the offeror does better than the final result, then he is entitled to indemnity costs from the expiry of the relevant period (i.e. the end of the three weeks unless the period was extended) plus interest at 10% above the base rate unless the Court considers this unjust. There is nothing in the Part 36 procedure which penalises the offeror for expressing a willingness to settle for less than his open position as this would make the procedure "*a most dangerous one to use*".

Nevertheless taking into account all the circumstances, and exercising the overall discretion of the Court under CPR 44.3, the Court of Appeal considered that the right order was the one the Judge had awarded up to the date the Part 36 offer expired i.e. there should be no order as to costs. This was for the following reasons:

(i) Mrs Rolf was the overall winner, but only just having obtained a mere £2,500 out of a claim which was £92,515.90 at it highest;
(ii) Mrs Rolf failed on the issue of repudiation and on two out of the three main allegations of breach. She only succeeded on the issue of who was the contract partner, which took half a day out of the four day trial;
(iii) The ground on which Mr Guerin prevailed (i.e. that the contract had been repudiated as Mr Mislati had interfered so much as to remove all control over the contract from Mr Guerin) had not been pleaded. The pleaded ground, (Mrs Rolf's failure to pay outstanding instalments) would not have succeeded on its own;
(iv) Mrs Rolf was willing to settle but this was spurned by Mr Guerin until too late and by then his offer to settle, mediate or meet for discussions was undermined by his difficult financial situation.

Finally it was noted that, under CPR 44(4), the Court must have to have regard, as part of "all the circumstances", to the conduct of the parties. This included the reasonableness of the parties' response to call for mediation. In this case, Mrs Rolf's offer of round-table discussions was spurned. The reasons advanced by Mr Guerin at the appeal were, in the opinion of the Court of Appeal, unreasonable including as they did a desire to have his 'day in court'. As such, they ought to bear materially on the outcome of the Court's discretion.

Comment

This case illustrates once again the Courts' desire to encourage parties to mediate especially where the costs of resolving the dispute are likely to be disproportionate to the amounts at stake. Small building disputes in particular have been identified as being particularly suitable for mediation. A party refusing to mediate such a dispute should do so in the knowledge that they are very likely to walk away shouldering a larger percentage of the costs than they otherwise would have done even when they were otherwise victorious.

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