Legal Briefing

Phi Group Ltd v Robert West Consulting
[2012] EWCA Civ 588

In this case, the Court of Appeal considered the requirements of Part 36 offers and overturned a costs decision in the Technology & Construction Court ('TCC').

The Facts

M40 Trains Limited engaged Carillion JM Ltd ('Carillion') to design and build a train servicing deport to the west of Wembley Football Stadium. Carillion engaged Phi Group Ltd ('Phi') as its specialist design and build contractor for what is known as the "soil nailing work" and Robert West Consulting Ltd ('RWC') as its consulting engineer and lead consultant for the overall works.

In 2009 Carillion commenced proceedings against Phi for damages due to the instability and slips in the London Clay. The proceedings against Phi were settled - Phi paid Carillion £3.45 million plus costs. However, the proceedings Carillion commenced in 2010 against RWC and the Part 20 proceedings (contribution proceedings) between Phi and RWC remained unresolved. In June 2011, Mr Justice Akenhead in the TCC found that RWC had been negligent and that Carillion's overall loss was some £6.7 million. He ordered RWC to pay Carillion £3.23 million. He also found that Phi was 60% responsible and RWC 40% responsible for the negligence and accordingly ordered Phi to pay RWC approximately £570,000 so as bear 60% of the responsibility.

An order for costs had been agreed by consent between Carillion and RWC. The Judge ordered Phi to pay 20% of Carillion's costs which RWC had been ordered to pay. He also ordered Phi to pay 30% of RWC's costs of the contribution proceedings against it and made no order as to costs of the Phi's contribution proceedings. Phi appealed seeking an order that RWC should pay Phi's costs of both sets of contribution proceedings and that RWC should bear its own costs of both those proceedings.

The basis of Phi's appeal was that its solicitor's letter sent in February 2010 constituted a Part 36 offer or, in the alternative, even if it was not a Part 36 offer, then even so it was a better offer for RWC than the result they achieved, and accordingly it should have all or most of the consequences of a Part 36 offer. Mr Justice Akenhead held that the February 2010 offer was not a Part 36 offer and rejected Phi's argument for at least two reasons:

(i) The February 2010 offer had been withdrawn implicitly, by subsequent November 2010 offers; and

(ii) The February 2010 offer only related to liability in the 2009 claim which concerned Carillion against Phi, and not the subsequent claim in 2010 against RWC.

The Judge refused permission to appeal. However, Lord Justice Tomlinson subsequently granted permission.

The Issues

(i) Was Phi's offer of February 2010 a Part 36 offer?

(ii) If it was not a Part 36 offer, should the offer be given much the same effect as if it had been?

(iii) Did the first instance Judge in the TCC misdirect himself as to the exercise of his discretion under the general rules as to costs?

The Decision

The Court of Appeal overturned Mr Justice Akenhead's decision on costs.

The court held that whilst he had correctly ruled that Phi's offer in February 2010 did not constitute a Part 36 offer, as it did not specify a period of not less than 21 days, or any period, as required by Part 36.2(2)(c)), he had not then correctly exercised his general discretion as to costs. If an offer is not a Part 36 offer, Rule 44.3 still requires the court to consider any offer to settle that does not have the costs consequences Part 36 sets out (CPR 36.1(2)).

With regard to the February 2010 offer, as it was not a Part 36 offer, it took effect as a contractual offer which could be withdrawn at any time before acceptance. The Court of Appeal held that the further offers Phi made in November 2010 were inconsistent with the February 2010 offer – to the extent that RWC would not have known that the February 2010 was no longer open for acceptance. Accordingly, having not withdrawn it, Phi's February offer was still open at the time of trial. The Court of Appeal stated:

> "*There is no inherent reason why a party should not make two different offers to the opposing party to settle litigation, either of them being capable of acceptance, though not both. It is not uncommon to see a party put forward alternative offers in the same letter of offer, as between which the opponent may choose which to accept*…"

Accordingly, the Court of Appeal disagreed with Mr Justice Akenhead's decision that the February 2010 was no longer open for acceptance after the November offers had been made. In addition, the court disagreed that the February 2010 offer only concerned Carillion's 2009 claim and not any subsequent issues of contribution.

Ultimately, the Court of Appeal overturned Mr Justice Akenhead's decision as it considered that Phi had made an offer to RWC which was more favourable to RWC than the result it had achieved. They held that RWC should pay Phi's costs of the contribution proceedings and should bear all of its own costs.

Commentary

This Court of Appeal decision is an important reminder that an offer to settle must comply strictly with CPR Part 36 if it is to be considered a "Part 36 offer" and obtain the benefits and consequences this brings. In this case, the February 2010 offer fell foul of the requirements as it did not specify a period of not less than 21 days, but rather, merely stated that they required a response to the offer within seven days. That said, should the offer not comply with the rules of Part 36, then the court may still exercise its general discretion under CPR 44.3 when deciding on costs (*Huntley v Simmonds* [2009] EWHC 406).

Furthermore, it is also important to remember that Part 36 offers must be withdrawn expressly in writing (CPR 36.3(7)). Without a compelling reason, the court will not consider that a Part 36 offer has been withdrawn by implication.

Stacy Sinclair
May 2012