



LEGAL BRIEFING

Brit Inns Ltd and Another -V- BDW Trading Ltd (No 2) [2012] EWHC 2489 (TCC)

This case concerned an exaggerated claim in relation to which the defendant failed to protect its position on costs adequately with an effective Part 36 offer.

The Facts

Following extensive works to a flood damaged restaurant business, a subrogated action was brought by the insurers of Brit Inns Ltd ("Brit Inns") in the sum of around £660,000 in relation to defective restorative fit-out works by BDW Trading Ltd ("BDW Trading"). A further claim was brought by Brit Inns against BDW Trading in relation to their uninsured losses which included a claim for an additional £522,000 in respect of loss of rent and loss of profit. Liability was admitted in each case and only quantum was in issue.

Ultimately, £157,467 was recovered at trial in relation to the insured losses and £16,403 was received in relation to the uninsured losses. The result cost Brit Inns £157,311 in legal costs.

In the course of the without prejudice negotiations leading up to the trial, BDW Trading had taken a much more realistic view of the quantum claimed than Brit Inns and this was reflected in the offers made by BDW Trading. In May 2012, a month before trial, BDW Trading made a 'without prejudice save as to costs' offer of around £267,000 plus costs which was said to be open for acceptance for 14 days and was due to expire on 30 May 2012.

The offer was not however made under Part 36 of the Civil Procedure Rules ("Part 36") and did not attract the costs' protection which accompanies effective Part 36 offers. Under Part 36.14 of the Civil Procedure Rules, where a defendant's Part 36 offer beats the award of damages that the claimant recovers at trial, unless it considers it unjust to do so, the court will award the defendant its costs from the last date on which the defendant's Part 36 offer could have been accepted.

In circumstances where any without prejudice offer is not an effective Part 36 offer, the without prejudice offer is only one factor to which the court will have regard in exercising its wide discretion on costs under Part 44.3 of the Civil Procedure Rules ("Part 44.3").

The Issues

- (i) What is the proper approach to costs in a case where, throughout, the defendant took a much more realistic view of the value of the claim than the claimant and quantum was assessed by reference to the defendant's expert evidence rather than any evidence adduced by the claimant?
- (ii) What is the proper approach to a case in light of the first issue where the defendant failed to protect its position on costs by making a Part 36 offer which the defendant subsequently bettered?

The Decision

Although Brit Inns' claims were clearly exaggerated, they were not found to be deliberately or fraudulently exaggerated and costs were therefore to be assessed on the standard basis as opposed to the indemnity basis.

Brit Inns were awarded 60% of their costs of the subrogated action (excluding their expert evidence costs on the basis their expert evidence was fundamentally flawed) up to 30 May

2012 on which day BDW Trading's offer expired. Given the exaggerated nature of the claim, the court considered it would have been manifestly unjust to have awarded Brit Inns 100% of the costs it claimed up until 30 May 2012. The exaggeration of the claims was one of the main reasons why the matter reached trial.

Had Brit Inns accepted BDW Trading's offer, Brit Inns would have been almost £100,000 better off than going to trial. The court said of the 30 May offer:

"it marked the point where only the claimants' unreasonable conduct and unrealistic expectations could explain their decision to go ahead to a trial; it therefore marked the point, when the offer was not accepted by 30 May 2012, when the claimants became liable to pay the defendant's costs".

In addition to the costs of the subrogated action, Brit Inns were ordered to pay 90% of BDW Trading's costs in the uninsured action on the basis the uninsured losses were claimed separately from the insured losses and were pursued by a separate legal team. This had the effect of duplicating costs unnecessarily.

The court highlighted the following legal principles in support of its decision:

- (i) In commercial cases, the successful party will usually be the party that recovers money from the other;
- (ii) The only certain way for a defendant to shift its potential costs liability is to make a Part 36 offer which it then betters at trial;
- (iii) The pursuit of exaggerated claims may deprive the claimant of some or all of its costs but it is usually only where the exaggeration is deliberate that the claimant has been ordered to pay the defendant's costs.
- (iv) In general terms, for costs to be shifted as a result of conduct, so that the claimant who recovers something at trial still has to pay the defendant's costs, there needs to be (a) more or less total failure on the issues that went to trial or (b) a failure to accept a Part 36 offer that would have put the claimant in a better position than going on.
- (v) The court also referred to the recent decision in *F&C Alternative Investments (Holdings) Ltd v Barthelemy* [2012] EWCA Civ 843 in which the Court of Appeal emphasised the importance of Part 36 offers and said that offers not made under Part 36 should not have the same effect as Part 36 offers.

Comment

Claimants and defendants who make a 'without prejudice save as to costs' offer which does not take effect as a Part 36 offer are treated differently.

Where a claimant does not beat a defendant's Part 36 offer at trial, the usual rule is that the defendant is offered its costs from the last day on which its offer was open for acceptance (as in Brit Inns). The court may also reach this same conclusion under the wide discretion it has as to costs under Part 44.3.

If a claimant makes an effective Part 36 offer, then it will usually be awarded indemnity costs and enhanced interest. In the absence of unreasonable conduct, the court will not generally award indemnity costs or enhanced interest under its general discretion as to costs under Part 44.3.

If Brit Inns' claims had been deliberately and/or fraudulently exaggerated, the result may have been very different. In *Fairclough Homes Ltd v Summers* [2012] UKSC 26, the Supreme Court held that in exceptional circumstances (which would include cases of deliberate and/

or fraudulent exaggeration) the court has jurisdiction under its case management powers to strike the claim out for abuse of process.

Given the claim brought by Brit Inns was not deliberately or fraudulently exaggerated, the court did not take heed of the Court of Appeal's warning in *F&C Alternative Investments* and chose instead to exercise its general discretion as to costs under Part 44.3. The result in practice therefore was exactly the same as it would have been had an effective Part 36 offer been made.

Lisa Kingston
October 2012
