CA on appeal from High Court of Justice (Mr Justice Etherton) before Mummery LJ; Smith LJ; Toulson LJ. 3rd April 2007

Lord Justice Mummery :

Introduction

1. The appeal is against an order for costs made by Etherton J on 22 June 2006. The judge refused permission to appeal, which was hesitantly granted by Jonathan Parker LJ on 16 October 2006.

2. The point is a short one. It is about the timing of the trial judge's exercise of his discretion on costs in a case where, following an order for a split trial, liability has been established, but quantum has yet to be determined. The Claimants assert that they made a Part 36 offer, which entitled them to an immediate order for indemnity costs of the trial of the liability issues. The trial judge declined to make this order and instead reserved the costs till after the outcome of an account of profits was known. The claimants contend that this was contrary to principle and was plainly a wrong exercise of the trial judge's discretion.

3. Only one claimant is left in the action. Shepherds Investments Limited is the sole appellant following the liquidation of Shepherds (Financial) Limited. It is, however, convenient to refer to the parties to the appeal as Claimants and defendants respectively. As was the case before the judge, Mr Paul Nicholls appears for the Claimants and Mr Iain Quirk for the defendants.

The proceedings

4. After a 7 day trial Etherton J gave judgment on 12 April 2006 on liability. The judge held that the first three individual defendants, who were formerly directors or employees of the claimants, had acted in breach of fiduciary duty and breach of contract in establishing the competing corporate defendants. The judge rejected a claim for misuse of confidential information. He also held that not all the pleaded claims for breach of contract were made out and that the Claimants had failed to establish any loss.

5. The Claimants elected for an account of profits, which was ordered in relation to a period after 12 August 2003. The defendants asserted that there were no relevant profits in the period covered by the limited account.

6. At a later hearing on 22 June 2006 the judge heard arguments on costs. He rejected the Claimants' contention that the defendants should be ordered to pay all the costs of the trial on an indemnity basis. He made an order that- *"Costs of the trial be reserved until after the determination of the account of profits."*

Part 36 offer point

7. Both before the judge and on this appeal the Claimants' principal contention was based on the terms of a letter sent by their solicitors to the defendants' solicitors on 9 March 2005. The letter contained a section headed ***"Part 36 Settlement Offer."*** It stated that the Claimants were prepared to pursue the litigation vigorously, but expressed concern that the defendants did not have sufficient resources to discharge any judgment against them. The letter continued - *"Accordingly, in an attempt to dispose of this dispute, our clients will accept a payment of £1.00 inclusive of interest in full and final settlement of all their claims under claim number HC04C02668. If this offer is accepted our clients will be entitled to their costs to the date of acceptance. Accordingly, the offer is that our clients will settle for £1 plus their costs. In accordance with CPR 36.14, for the purposes of assisting the Defendants in clarifying the basis of our clients' offer, we confirm that our clients' costs to date are £99,230.00 (inclusive of VAT)"*

8. The Claimants argued that this was a valid Part 36 offer and that it was relevant to how the judge should exercise his discretion on costs at the conclusion of the trial on liability. The offer was to settle the action for £1 plus costs. It was not accepted by the defendants. The Claimants submitted that, even if they recover nothing on the account, as the defendants assert will be the case, the offer to settle for nominal sum of £1 was in substance no worse than a failure to recover any profits on the taking of the account. The Claimants succeeded in establishing liability on the part of the defendants and they obtained an order for an account. Whatever the result of the account, their offer to settle for £1 was one that the defendants ought to have accepted. The defendants could not do better than that and should therefore be immediately ordered to pay the costs of the action after 30 March 2005 now rather than await the taking of the account.

9. The judge rejected the Claimants' submissions and agreed with the defendants that the letter of 9 March 2005 was not a valid Part 36 offer, as it included a term as to costs: see ***Mitchell v. James*** [2004] 1WLR 158 at paragraphs 29 to 34. If the terms of the offer were ambiguous, they should be interpreted against the Claimants who made the offer. The better interpretation was that it was an offer to settle for payment of £1 in respect of liability and £99,230 inclusive of VAT in respect of their costs. There was no reference to an assessment of costs. On the reasoning of the decision in ***Mitchell v. James*** the Claimants' offer fell outside the scope of Part 36 because it included a term as to costs.

10. There were subsequent offers made without prejudice save as to costs, but no further Part 36 offer was made.

Discretion point

11. The judge then considered the exercise of his discretion on the basis that his interpretation of the letter might be wrong. He said-

"13. Even if I am wrong, however, on that point of interpretation, I take the view that, since the court retains, notwithstanding a Part 36 offer by a claimant, a general discretion, which is more particularly contained in CPR 36.21(4) [sic], it would be unwise and precipitate in the present case to make an order for costs against [the three individual defendants] at this stage. I cannot be certain that the Claimants will recover even £1 in view of the evidence of Mr Walters ….that [the relevant corporate defendant] had not made a profit…

14. In all those circumstances, I take the view that the proper course to take is to decline to make any order for costs as between the Claimants and [the individual defendants] at this stage, reserving any decision as to their costs thus far until after the taking of the account of profits.

15. That course is supported by the following considerations. First, if at the end of the day, the Claimants recover either no profit or negligible profit from the Defendants pursuant to the account, that is plainly a matter that may affect the decision as to costs. Second, as I have already said, there have been a series of without prejudice offers in different terms prior to and indeed right up to the trial itself. Again the outcome of the account of profits will inform the court as to the manner in which and the extent to which those offers should be taken into account. The court is bound to take those offers into account pursuant to the terms of CPR 44.3(4)(c)."

12. The judge's citation of CPR 36.21(4) was an error: he obviously meant to cite CPR 44. This incorrect citation does not vitiate the exercise of his discretion, which was not based on the provisions of CPR 36.21, but on factors relevant to the overall exercise of the court's discretion under Part 44.3. The judge's approach, as indicated in the reasons he gave for refusing permission to appeal, was that the outcome of the account would, or might be, relevant to the issue of who should bear the costs of the action and that was a matter for his discretion.

Claimants' submissions on appeal

13. Mr Nicholls submitted that the judge erred in the exercise of his discretion in not making an immediate order for indemnity costs (with interest) against the defendants. The order reserving the costs should be set aside. This court should re-exercise the discretion by making an order for the costs of the trial in the Claimants' favour. The existence of the other without prejudice offers save as to costs was not relevant, he said, to the exercise of the discretion to make an immediate order to pay the costs of the trial of the liability issues.

14. At the forefront of his case was the point that the judge misconstrued the offer to settle in the letter of 9 March 2005 and that this undermined the exercise of his discretion, to which it was linked.

15. He submitted that the letter was clearly an offer to settle in accordance with the provisions of Part 36. It was in terms an offer to settle for £1 plus costs. It recorded the effect of Part 36. If the offer was accepted, there would be an assessment of the costs and the defendants would liable for the assessed costs. The mention of the sum of £99,230 at the end of the paragraph was only an indication by the Claimants of what their costs then were. It was not a term of the offer that the defendants pay that sum nor was it a demand for payment of the sum as costs. The final sentence clarified the Part 36 offer which was made earlier in the same paragraph.

Defendants submissions and conclusions on discretion

16. Mr Quirk contended that the judge properly exercised his discretion to reserve the costs until after the quantum hearing. The discretion could not sensibly be exercised until the outcome of the account was known. It was sensible and reasonable to defer his decision on costs. There had not been a clear cut outcome of the liability issues in favour of the Claimants. They had not succeeded on all the claims against the individual defendants and they had failed in their claims against the corporate defendants. Postponement would not prejudice the Claimants and it would enable the court to make an informed decision at the conclusion of the proceedings based on all the relevant factors then known.

17. I agree with Mr Quirk that this is not a proper case in which to disturb the judge's discretion. The width of the discretion conferred by Part 44 entitles a judge to make a variety of orders where there is a split trial. After the trial on liability is over the judge will often make an immediate order that the party who has lost the issues on liability should pay all or part of the costs of the liability trial, order an inquiry as to damages or account of profits and reserve the costs of the inquiry or account.

18. The judge is not, however, required by the CPR to make an immediate decision on costs at that stage. He has a discretion to put it off until quantum has been finally determined. There may be circumstances in which it is premature to make an order for costs ahead of the findings on an inquiry on damages or an account of profits.

19. The authorities recognise that there are circumstances in which it is proper to exercise of judicial discretion by reserving or adjourning the question of costs pending the final resolution of all the outstanding issues, including quantum of damages or an account of profits: ***JJ Harrison (Properties) Limited v. Harrison*** (Lawtel: 7 December 2000) at pages 7 and 9-10; ***Weill v. Mean Fiddler Holdings Limited*** [2003] EWCA Civ 1058 at paragraphs 31 to 33 (where it was uncertain after the trial on liability whether the claimant would recover more than nominal damages); ***HSS Hire Services Group plc v. BMB Builders Merchants Limited*** [2005] 3 All ER 486; and ***Intense Investments Limited v. Development Ventures Limited*** [2006] EWHC 1628 (TCC) at paragraphs 3 to 6 and 23 to 28.

20. As for the construction of the offer to settle, it is, in my judgment, unnecessary for this court to decide the point on this appeal. It was not necessary for the judge to decide the point for the purposes of exercising his discretion to postpone his decision on costs. The construction point was not determinative of the question as to when the judge should exercise his discretion. It is relevant as to who should pay the costs when the judge decides to exercise his discretion.

21. In my view it is preferable for the letter of 9 March 2005 to be construed by the judge who decides the costs after the result of the account is known. It is reasonably arguable that, contrary to the view expressed by the judge, the letter was, as the Claimants contend, a valid Part 36 offer to settle the case. The offer was to settle for £1 plus costs. It is reasonably arguable that the reference to the sum of £99,230 was not a term of the offer, but

was rather an item of additional information supplied by the Claimants' solicitors to the defendants' solicitors for the purposes of assisting decision by the defendants whether they or not they would accept the offer.

22. The judge who decides who should pay the costs will be in a better position than this court is to construe the letter with the benefit of full knowledge of the surrounding circumstances in which it was written.

23. Mr Nicholls stated his concern that the judge deciding costs, whether or not it is Etherton J (who has since taken up his duties as chairman of the Law Commission), would either be bound by, or would regard himself as bound by, the construction adopted in the judgment of 22 June 2006. I indicated that the decision on construction was obiter and not binding, as it was not necessary for the exercise of Etherton J's discretion to reserve costs. The judge said that, even if he was wrong on the construction of the offer, he would not order them in the Claimants' favour at that stage, but would reserve them for the reasons he gave.

24. In the light of the indication from the court on the construction point, Mr Quirk agreed that this point should be left open by us for the judge who would deal with the matter de novo when he exercises the discretion on the costs of the action. Mr Nicholls made it clear that, for his part, this court should resolve the construction point and decide whether it was a Part 36 offer rather than leave it to the judge after the account was taken.

The result

25. The parties were informed at the end of the hearing of the court's decision to dismiss the appeal. The court heard arguments on costs and decided to order the Claimants to pay the costs of the appeal which, after submissions on the defendants' bill of costs, were summarily assessed at £13,000 plus VAT to be paid within 14 days.

Lady Justice Smith:

26. I agree.

Lord Justice Toulson:

27. I also agree.

Mr Paul Nicholls (instructed by Dechert LLP) for the Appellant.
Mr Iain Quirk (instructed by Messrs Eversheds) for the Respondents.