Costs Effects of Settlement Offers: Did I Win Yet?

The Court of Appeal in Coward v Phaestos Limited and Others has provided a useful review of the law in relation to different types of without prejudice settlement offer.

It might be considered odd to have spent £13 million in costs, achieved a broadly favourable judgment, but still not know whether you have ‘won’ or not for the purposes of a costs award. However, in disputes where a party has made a without prejudice settlement offer for cost protection, particularly of a non-monetary nature, this can be the reality. Coward v Phaestos was a complex (and acrimonious) intellectual property dispute, during which the Claimant made a number of non-monetary ‘Calderbank’ offers. The Court of Appeal was called upon to determine the cost consequences of these offers, as the Claimant argued that the first instance judge had erred in the application of costs principles.

The decision

In very simple terms, the judge at first instance held that, overall, the Defendants had been the successful party and had materially ‘bettered’ the Claimant’s Calderbank offers. Therefore, the Claimant was ordered to pay the Defendants’ costs (claimed at c£13 million) with a discount of 15% to reflect the fact that the Defendants’ counterclaim had not succeeded in full.

An appellate court may only interfere in a costs decision if it is wrong in principle, took into account matters that should not have been or if it was plainly unsustainable. The Claimant’s appeal in this matter raised the following central argument:

1) The Claimant’s Calderbank offers had only been bettered to a very limited extent, insufficient to justify the first instance costs order that the Claimant pay 85% of the Defendants’ recoverable costs. The judge had failed to stand back and compare the result of the costs order with the overall result of the case.

To read the decision on the BAILII website please click on the following link.
The Court of Appeal rejected this and held on the facts that the first instance judgement did in fact represent a ‘significant improvement’ on the terms of the Calderbank offers. That being the case, the Court of Appeal would not seek to interfere with the costs discretion of the first instance judge.

However, the Court of Appeal went on to provide useful general guidance in relation to the application of costs principles in respect of both Calderbank and Part 36 settlement offers. It addressed the Claimant’s assertion that the judge had incorrectly applied an ‘all or nothing’ approach to the Calderbank offers by holding that because the offer was bettered, no matter by how small a degree, the Defendants were *prima facie* entitled to recover their costs.

**Part 36 /Calderbank offer costs distinctions**

A Part 36 settlement offer is one made without prejudice save as to costs expressly in compliance with the provisions of CPR Part 36.

A Calderbank offer is an offer made without prejudice save as to costs (outwith CPR Part 36), with a view to achieving costs protection.

The Defendants’ argued that the effect of a Calderbank offer is to be assessed by analogy with the terms of CPR 36.14(1A), which states that a “more advantageous” result means “better in money terms by any amount, however small”. The Court of Appeal did not agree with this particular aspect of the Defendants’ case. It emphasised that CPR Part 36 is a separate and self-contained code, highly prescriptive in its terms and highly restrictive of exercise by the Court of any discretion on costs.

If, for example, a Claimant is awarded at trial £500 less than a Defendant’s Part 36 offer, that will ordinarily mean that the Claimant pays the Defendant’s costs from (21 days after) the date of the Part 36 offer by virtue of CPR 36.14(1A). The small margin is irrelevant and the Part 36 costs consequences apply strictly.

In contrast, a Calderbank offer is governed by the general costs provisions of CPR Part 44. This confers on the court a wide discretion quite different from the narrow CPR Part 36 rules. By virtue of CPR 44.2(2), the general rule is that the unsuccessful party will be ordered to pay costs, though the Court may make a different order. Under CPR 44 the court will “have regard to all the circumstances” when making the costs order.
As such, the court has greater scope to interpret whether a Calderbank offer has been materially bettered by the other side. Taking the previous example, a Claimant that is awarded at trial £500 less than a Defendant’s Calderbank offer may, at the Court’s discretion, be relieved from having to pay all of the Defendant’s costs from the point of the offer, depending on all the circumstances of the case.

Therefore, when considering a Calderbank offer and in applying its general discretion under CPR 44, the court will stand back and compare the overall result of the case with the costs order. Moreover, expressly stating in the wording of a Calderbank offer that it is intended to have the consequences of a Part 36 offer, will not be effective in bringing the offer under the strict costs consequences of CPR Part 36.

Lessons

From a Claimant or Defendant perspective, there is a clear advantage in making a CPR Part 36 compliant settlement offer, because the cost consequences are as good as set in stone. There will be certainty that costs are protected to the (monetary) level of the offer in the event it is not beaten, by however small an amount. Of course, it is extremely important that Part 36 offers are drafted in full compliance with the prescriptive CPR Part 36 requirements in order to secure this costs protection.

Calderbank offers still have a significant role to play in litigation, particularly because non-monetary offers cannot be made under the Part 36 regime. However, they do not trigger automatic costs consequences. They fall within the Court’s broad discretion on costs. Indeed, under no circumstances can a Calderbank offer be brought within the strict costs consequences of the Part 36 regime, no matter what form of words is used in an attempt to do so.

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