VALIDITY OF PART 36 OFFER

Shaw v Merthyr Tydfil County Borough
Court of Appeal (Civil Division)
24 June 2014

The appellant (S) appealed against a decision that she had not made a CPR Pt 36 offer to the respondent local authority. S had tripped in the local authority's borough. She had sought to settle her personal injury claim before issuing proceedings by sending a letter to the local authority. The letter was headed "Part 36 Offer" and said that she would accept £2,000 in full and final settlement of the claim. It also said that the offer would remain open for 21 days from its receipt, after which time it could only be accepted if the parties agreed their liability in respect of costs, or if the court permitted late acceptance. S issued proceedings when the letter failed to produce a settlement. After the proceedings had concluded, the county court judge considered costs. He concluded reluctantly that he was bound to follow Thewlis v Groupama Insurance Co Ltd [2012] EWHC 3 (TCC), [2012] B.L.R. 259, and therefore that S's letter was not a Pt 36 offer.

Appeal dismissed. Rule 36.2(2) was expressed in mandatory language. Its requirements were mandatory, including that the offer had to state on its face that it was intended to have the consequences of r.36.1, Carillion JM Ltd v PHI Group Ltd [2012] EWCA Civ 588, [2012] C.P. Rep. 37 applied. S's letter, whilst headed "Part 36 Offer", did not state that it was intended to have such consequences. It was inherent in the Pt 36 regime that an offer could only be withdrawn even after the time specified pursuant to r.36.2(2)(c) if the withdrawal complied with r.36.3(5), r.36.3(6) and r.36.3(7). However, the part of S's letter which limited the circumstances in which the offer might be accepted after 21 days was inconsistent with Pt 36, Thewlis applied. Accordingly, as a matter of form, S's offer did not satisfy the mandatory requirements of Pt 36. It was therefore not a Pt 36 offer, albeit that the letter described it as such (see paras 14-17 of judgment). (2) The judge's reluctance to follow Thewlis was misplaced. The analysis contained in Thewlis was correct, Thewlis approved, C v D [2011] EWCA Civ 646, [2012] 1 W.L.R. 1962 distinguished (paras 18-19).

Official Transcript

Shaw v Merthyr Tydfil County Borough

B3/2014/0507
Supreme Court of Judicature Court of Appeal (Civil Division)
24 June 2014
[2014] EWCA Civ 1678
2014 WL 7253736

Before: The Vice-President of the Court of Appeal (Lord Justice Maurice Kay) Lord Justice Elias Lord Justice Pitchford
Tuesday, 24th June 2014

On Appeal from Cardiff County Court
(District Judge Jenkins)

Representation

- Mr Rivers (instructed by Hugh James Solicitors) appeared on behalf of the Applicant.
- Mr John (instructed by Dolmans Solicitors) appeared on behalf of the Respondent.

Judgment

Lord Justice Maurice Kay:

1 Part 36 of the Civil Procedure Rules ("CPR") provides a procedure which is designed to facilitate the settlement of civil cases. It encourages the making of offers and counter offers and contains an approach to costs which will apply when an offer is accepted or when it is rejected but the offeror obtains an outcome at trial which is at least advantageous to him as his earlier Part 36 offer.

2 Not all settlements are engineered through the Part 36 process. It remains possible to negotiate and conclude a settlement outside its parameters, in which case the costs implications are less prescriptive. Part 36 only applies where the offer in question is properly categorised as a Part 36 offer. What is or is not a Part 36 offer has produced a degree of controversy ever since 1998 when the process was introduced by the CPR .

3 Subsequent amendments have served to intensify that controversy. So, for example, a claimant who succeeds at trial in securing an outcome which is at least as advantageous as his rejected Part 36 offer to settle may in some circumstances recover indemnity costs for the post offer period, together with significantly enhanced interest — see rule 36.4 .

4 This appeal arises out of a fully contested tripping case. The claim pursuant to the Highways Act was relatively modest. However, litigation costs have reached a high level in proportion to the value of the claim, not least because the claimant was initially unsuccessful following a fast track trial before a district judge and only succeeded in obtaining judgment following an appeal to a circuit judge. The eventual damages award totalled £6,510.

5 The claimant's solicitors had sought to settle her claim even before the issue of proceedings. On 16 October 2009 they wrote a letter which has become central to this appeal. It was headed " Part 36 Offer". Its terms were as follows:

"Our client offers to accept the sum of £2,000 in full and final settlement for the claim for general and special damages, such sums to be inclusive of interest together with payment her reasonable costs to be detailed assessed in default of agreement. This offer remains open for a period of 21 days from the date of receipt of the offer, after which time the offer may only be accepted if the parties agree their liability in respect of costs or the court provides its permission for late acceptance."

6 When that letter did not produce a settlement, proceedings were issued on 23 February 2001. The fast track trial took place on 20 September 2012. Almost immediately after that the claimant was granted permission to appeal to a circuit judge. At that point a further offer to settle was made on her behalf on 12 November 2012, this time in the sum of £5,000.

That, it seems, was indisputably in the correct form. When that was not accepted she made a yet further offer to settle — this time for £32,000 inclusive of costs. This again fell on stony ground. Her successful appeal on the issue of liability was heard on 7 December 2012. After that the defendant immediately sought to accept the original offer of 16 October 2009 to settle for £2,000. Two days later, on 9 December 2012, the claimant withdrew the £5,000 offer and on 11 December 2012 a new offer was made on her behalf for settlement in the sum of £7,250. When the damages were assessed on 16 May 2013 she failed to attain that sum.

The Judgment on Costs

7 The above chronology gave rise to a polarised dispute in relation to costs which came before District Judge Morgan Jenkins on 17 July 2013. The primary submission to the District Judge on behalf of the claimant was that she was entitled to costs by reference to Part 36 on the basis that she has significantly beaten her offer of 16th October 2009. Her alternative case was that, if that offer was not a proper Part 36 offer, she should still be awarded indemnity costs pursuant to the general provisions of rule 44.2 , on the basis that the defendant's conduct should count against it, much as it would do under Part 36 if that were applicable.

8 The case for the defendant was that the letter of 16 October 2009 did not constitute a Part 36 offer. The costs fell to be considered simply by reference to rule 44 , and that, having regard to the partial rejection of the claimant's special damages claim, the appropriate award to her would be 60% of her costs on the standard basis.

9 The District Judge found that the letter of 16 October 2009 was not a Part 36 offer. He came to this conclusion reluctantly because he felt bound to follow Thewlis v Groupama Insurance Company Ltd [2012] EWHC 3 TCC, which it is agreed is factually indistinguishable from the present case.

10 Applying general principles pursuant to rule 44 , he awarded the claimant her costs on the standard basis save in relation to the hearing of 17 July 2013, in respect of which she was ordered to pay the defendant's costs on the standard basis.

11 Thereafter the claimant sought permission to appeal. On the 15 January 2014 His Honour Judge Seys-Llewellyn QC granted permission and transferred the case to the Court of Appeal because of the High Court authority of Thewlis , for which he and apparently some commentators have little affection.

The Provisions of Part 36

12 Rule 36.1 provides:

"(1) This Part contains rules about –
(a) offers to settle; and

(b) the consequences where an offer to settle is made in accordance with this Part.

(2) Nothing in this Section prevents a party making an offer to settle in whatever way he chooses, but if the offer is not made in accordance with rule 36.2, it will not have the consequences specified in rules 36.10, 36.11 and 36.14."

Rule 36.2 then provides:

"1) An offer to settle which is made in accordance with this rule is called a Part 36 offer.
(2) A Part 36 offer must –
(a) be in writing;

(b) state on its face that it is intended to have the consequences of Section I of Part 36;

(c) specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with rule 36.10 if the offer is accepted;

(d) state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and if so to which part or issue; and

(e) state whether it takes into account any counterclaim ... "

Rule 36.3 includes the following provisions:

"2) A Part 36 offer –
(a) may be made at any time, including before the commencement of proceedings ...

(3) A Part 36 offer which offers to pay or offers to accept a sum of money will be treated as inclusive of all interest until –
(a) the date on which the period stated under rule 36.2(2)(c) expires; or

(b) if rule 36.2(3) applies, a date 21 days after the date the offer was made ...

(5) Before expiry of the relevant period, a Part 36 offer may be withdrawn or its terms changed to be less advantageous to the offeree, only if the court gives permission.
(6) After expiry of the relevant period and provided that the offeree has not previously served notice of acceptance, the offeror may withdraw the offer or change its terms to be less advantageous to the offeree without the permission of the court.
(7) The offeror does so by serving written notice of the withdrawal or change of terms on the offeree."

Rule 36.9 under the heading "Acceptance of a Part 36 Offer" provides:

"(1) A Part 36 offer is accepted by serving written notice of the acceptance on the offeror.
(2) ...a Part 36 offer may be accepted at any time (whether or not the offeree has subsequently made a different offer) unless the offeror serves notice of withdrawal on the offeree."

Rule 36.10 under the heading "Costs consequences of acceptance of a Part 36 offer" provides:

(1) Subject to ... paragraphs (2) and (4)(a) of this rule, where a Part 36 offer is accepted within the relevant period the claimant will be entitled to the costs of the proceedings up to the date on which notice of acceptance was served on the offeror ...
(3) Costs under paragraphs (1) and (2) of this rule will be assessed on the standard basis if the amount of costs is not agreed."

13 As I have indicated rule 36.14 contains the detailed provisions in relation to indemnity costs and enhanced interest when that situation arises.

Discussion and Conclusion

14 In my judgment there is a short answer to this appeal. Part 36 provides that it is not the only way of encouraging or facilitating a consensual resolution of civil litigation. When it is invoked the parties become subjected to what Moore-Bick LJ described in Gibbon v Manchester City Council [2010] EWCA Civ 726 as "a self-contained code" — see paragraph 5. It is instructive to set out a further extract from his judgment. In paragraph 4 he described Part 36 as a whole as containing:
"... a carefully structured and highly prescriptive set of rules dealing with formal offers to settle proceedings which have specific consequences in relation to costs in those cases where the offer is not accepted and the offeree fails to do better after a trial."

He later said at paragraph 6:
"Basic concepts of offer and acceptance clearly underpin Part 36, but that is inevitable given that it contains a voluntary procedure under which either party may take the initiative to bring about a consensual resolution of the dispute. Such concepts are part of the landscape in which everyone conducts their daily life. It does not follow, however, that Part 36 should be understood as incorporating all the rules of law governing the formation of contracts, some of which are quite technical in nature. Indeed, it is not desirable that it should do so. Certainty is as much to be commended in procedural as in substantive law, especially, perhaps, in a procedural code which must be understood and followed by ordinary citizens who wish to conduct their own litigation. In my view, Part 36 was drafted with these considerations in mind and is to be read and understood according to its terms without importing other rules derived from the general law, save where that was clearly intended."

15 Rule 36.10 and 11 stipulate the costs consequences which follow from a prompt or delayed acceptance of a Part 36 offer and the consequences which will normally follow after obtaining a judgment which is at least as advantageous to the offer or as the terms of his rejected Part 36 offer. However, all this is predicated upon the offer having been compliant with the

requirements of Part 36 . Rule 36.2(2) is expressed in mandatory language and its requirements have been held to be mandatory — see PHI Group Ltd v Robert West Consulting Ltd [2012] EWCA Civ 588 , especially at paragraph 25, per Lloyd LJ. Five mandatory requirements are set out including (b) that the offer states on its face that it is intended to have the consequences of section 1 of Part 36 , namely the provisions which I set out earlier.
16 The letter in the present case, whilst headed " Part 36 Offer", did not so state. Moreover, it is inherent in the Part 36 regime that, once made, an offer can only be withdrawn even after the time specified pursuant to rule 36.2(2)(c) if the withdrawal complies with rule 36.3(5) to (7) . Here the letter stated that the offer:
"remains open for acceptance for a period of 21 days from your receipt of this offer letter, thereafter it can only be accepted if we agree the liability for the costs or the court gives permission."

That reflected language of rule 36.5(6) before it was amended with effect from 6th April 2007. It is inconsistent with the language and approach of the amended Part 36 , which was in force at the relevant time in this case.
17 In these circumstances, as a matter of form, the offer did not satisfy the mandatory requirements of Part 36 . Accordingly it was not a Part 36 offer, even though the letter described it as one. This case is indistinguishable from Thewlis which the judge followed with manifest reluctance.
18 In my view, that reluctance was misplaced. The judgment of His Honour Judge Behrens (sitting as a Deputy High Court) in Thewlis contains the correct analysis. Rule 36.2(2)(b) was not complied with and, as Judge Behrens said of the same wording in the offer letter in Thewlis , the sentence in the letter limiting the circumstances in which the offer might be accepted after 21 days "is inconsistent with Part 36 " (paragraph 28).
19 Mr Rivers attempts to circumvent this analysis by invoking modern principles of contractual construction as propounded in such cases as Investors Compensation Scheme v West Bromwich Building Society [1998] 1 All ER 98 , Mannai Investment Co Ltd v Eagle Star Assurance Ltd [1997] 3 All ER 2052 and Rainy Sky v Kookmin Bank [2011] UKSC 50 . However, the present case is not concerned with construction of a contract. It is true that in C v D [2011] EWCA Civ 646 , this Court resorted to contractual principles when considering whether an apparent Part 36 offer was in fact time limited and so, by definition, not a Part 36 offer. However, in that case there was no formal noncompliance with rule 36.2(2) . There the offer letter had stated in terms that it was "intended to have the consequences set out in Part 36 ". There was "an entirely feasible and reasonable construction of [it] which avoids it being construed as a time limited offer" (paragraph 53 per Rix LJ).
20 In these circumstances the case of C v D is plainly distinguishable. Here the offer was not a Part 36 offer because it failed to comply with the mandatory and highly prescriptive requirements of the current "self-contained code". In these circumstances it is not necessary to engage in the construction, exercise invited by Mr Rivers. No process of construction, however liberal, can bring about satisfaction of procedural requirements which were not fulfilled.
21 For these reasons I would dismiss this appeal.
Lord Justice Elias:
22 I agree. In this case the alleged Part 36 offer did not include the mandatory requirement set out in rule 36.2(2)(b) . It was a time limited offer open for only 21 days which is not in accordance with rule 36 — see the case of C v D [2011] EWCA Civ 606 — and it can only thereafter be accepted if there was either an agreement on costs or with the consent of the court. Notwithstanding that, Mr Rivers submitted that the offer, reasonably construed, was a Part 36 offer under the current rules. This, he submits, is how a reasonable solicitor in receipt of the offer would have interpreted it.
23 Having adopted that analysis, he then submits that the court should deem the mandatory requirement in 36.2(2)(b) as though it had been complied with notwithstanding that this involves treating the time limited offer as though it were open-ended and treating the conditions under which the offer could be accepted after 21 days as though they did not exist.

24 In my judgment, that is an impossible submission. There is no justification for treating an offer whose terms are wholly inconsistent with a Part 36 offer as though it were consistent with that provision and it is fanciful, in my judgment, to say that a mandatory requirement is satisfied when no reference is made to it at all. I see no basis at all for assuming that a reasonable solicitor would have understood the offer as being intended to comply with Part 36 when its detailed terms are at odds with that provision.
25 I think that a solicitor in receipt of this offer would be wholly confused as to precisely what was intended. That is not a proper basis for treating it as a Part 36 offer, given the very serious consequences which flow from such an offer if it is not accepted and ultimately the recipient receives less than has been offered to him under that arrangement. So I too would dismiss the appeal.
Lord Justice Pitchford:
26 I also agree. The premise to the appellant's argument is Thewlis v Groupama Insurance Company [2012] EWHC 3 (TCC) was wrongly decided since His Honour Judge Behrens had failed to follow the approach to interpretation adopted by this court in C v D [2011] EWCA Civ 646 . On the contrary, as it seems to me, Judge Behrens analysed the judgments of the court in C v D for their full effect and correctly distinguished the case on its facts.
27 In the present case we are not concerned with a Part 36 offer presented as such and "otherwise complying with its form"(see the judgment of Rix LJ at paragraph 68). We are concerned with an offer that purports to be made under Part 36 , but whose terms are completely inconsistent with Part 36 and that fails otherwise to comply with its form.