Legal Briefing

Jockey Club Racecourse Limited v Willmott Dixon Construction Limited

[2016] EWHC 167 (TCC) Mr Justice Edwards-Stuart

The Facts

During 2007 Jockey Club Racecourse Limited ('the Racecourse') engaged Willmott Dixon Construction Limited ('Willmott Dixon') to design and construct a new grandstand at the Epsom Race Course. The new grandstand was completed in 2009 but the roof was damaged by high winds in January 2012. The Racecourse commenced proceedings in September 2013 claiming around £400,000. During October 2013 the roof of the new grandstand suffered further damage, again owing to high winds, and in September 2014 the Racecourse notified Wilmott Dixon that the whole roof would have to be replaced.

On 30 January 2015 the Racecourse made a Part 36 offer to settle "*the issue of liability for losses arising out of the defects in the roof…*" on the basis that Willmott Dixon would accept liability to pay 95% of the claim for damages, to be assessed. At the same time, the Racecourse sent Willmott Dixon a draft of their Amended Particulars of Claim which included total roof replacement cost of £850,000. Willmott Dixon did not respond. The Racecourse served the Amended Particulars of Claim on 30 March 2015, claiming in excess of £5 million for the total replacement of the roof.

Willmott Dixon subsequently conceded full liability. The Racecourse then contended that in accordance with Part 36 it was entitled to indemnity costs having bettered its own Part 36 offer. Willmott Dixon disagreed on three grounds:

(i) first that the Racecourse did not make a valid Part 36 offer
(ii) second that the offer was made before the Racecourse's claim had been fully pleaded;
(iii) and third that as the offer was for 95% liability, the Racecourse would only beat the offer if at least 95% of the roof required replacement.

The issue

Was the Racecourse entitled to costs on an indemnity basis and if so, from what date?

The Decision

Regarding the second ground the Judge found that since the offer related to liability, not quantum, the fact that quantum had not been fully pleaded at the time of the offer did not impugn the validity of the Part 36 offer. The Judge considered that third ground was misconceived: whether the costs of repair concerned only half the roof or the whole roof this was simply an issue of quantum, not liability.

On the first ground, whilst it was correct that the result in the litigation could only be success or failure for either party meaning that a finding of 95% liability was not a possible outcome, the Judge concluded that the 30 January 2015 offer was a valid Part 36 offer. Following the Court of Appeal's decision in *Huck v Robson* (2003), the Judge found that the 30 January 2015 offer was not merely a tactical step but was a genuine attempt to settle the claim. Even though the discount was modest, in the context of the original claim of £400,000 it still amounted to £20,000 which could not be described as "*derisory*". In addition, whilst the Racecourse's offer was hardly generous, it was not "*all take and no give*". Thus the 30 January 2015 offer did not contradict the concept of settlement.

Given that as at 30 January 2015 Willmott Dixon had only just been made aware for the first time that the claim had increased to about £850,000, the Judge considered that it would be unjust to award indemnity costs from 21 days after the date of the offer. However, he found that Willmott Dixon could have put itself in a position to make an informed assessment of the strength of the Racecourse's claim on liability within four months thereafter. Accordingly, the Judge awarded the Racecourse its costs on the standard basis up to 29 May 2015 and thereafter on an indemnity basis.

Commentary

This case highlights the importance of making sure that a Part 36 offer does amount to a genuine offer to settle, irrespective of the relative strengths of the parties' positions in the litigation.

As Lord Justice Tuckey noted in *Huck v Robson,* the Court is not required to measure the offer against the likely outcome. In this case the outcome envisaged by the Racecourse's 30 January offer would not have been available to the Court but even so, a 5% discount for settlement was sufficient to persuade the Judge that this was a genuine attempt to settle. Claimants should note that if the Court concludes that an offer was made on a tactical basis with the primary aim of securing the benefit of the incentives included within Part 36, the Court will have a discretion to refuse indemnity costs.

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