Andrew White and Samantha White v Wincott Galliford Limited

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The Judgement concerned a novel issue on Part 36 offers in the detailed assessment proceedings.

The Claimants were successful in a fatal accident case arising out of the Deceased mesothelioma and became entitled to costs. The costs proceeded to a provisional assessment by Deputy Master Friston and the parties agreed the amount provisionally allowed of £28,003.36 plus interest. There was no challenge to the assessed amounts and the only issues outstanding were the costs of assessment.

The Claimants had made a Part 36 offer on 21 November 2007 ("the Offer") solely in respect of hourly rates. Deputy Master Friston allowed the same rates in the provisional assessment so the Claimants had effectively beaten their offer.

The maximum a party could be awarded for the costs of provisional assessment is £1,500 plus VAT and the Court fees (CPR r 47.15(5)). The limit will apply even if the receiving party had beaten their own Part 36 offer (*Lowin v W Portsmouth & Co [2017] EWCA Civ 2172*). The Claimants did however claim a 10% uplift on profit costs due to beating the Offer.

Deputy Master Friston believed that the Offer met all the requirements of a Part 36 Offer and had been beaten. Where an offeror has beaten their offer, unless the Court considers otherwise it would be unjust to make an awarded, the offeror is entitled to the benefits of Part 36. This test, whether it would be unjust to make an award, is often referred to as the 'injustice test'. Deputy Master Friston decided that the Defendant had proved injustice in the case as:

1. The Offer was a restatement of the rates offered in the Claimants' Replies to the Points of Dispute and no different from the pleaded case.
2. The Court must guard against Part 36 being used for mere gamesmanship. The suggestion that a paying party ought to pay an additional amount on the whole of the receiving party's profit costs merely because they did not accept an offer of only one component (namely the rates) is manifestly unfair.
3. Offers of this type would not encourage settlements and detailed and provisional assessments would become unwieldy if the Court were to allow the parties to rely on such offers.
4. If the Offer was accepted it would have had no bearing on the way in which the parties dealt with the matter. It would have saved no costs and almost no court time at all.

For the reasons above, Deputy Master Friston rejected the Claimants' claim for an additional amount. The Judgement is a reminder that Part 36 Offers should be used as a genuine attempt to settle the claim and not as a mere tactic to secure an additional amount.

Will Heritage from DAC Beachcroft acted on behalf of the Defendant.

Our costs team deal with cases like this on a regular basis. For more information or advice, please contact one of our experts.

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