

Neutral Citation Number: [2017] EWHC 1738 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Thursday, 13th June 2017

BEFORE:

MR JUSTICE MORGAN

BETWEEN:

HOUGHTON (STANLEY)

Claimant

- and -

P.B. DONOGHUE (HAULAGE & PLANT HIRE LTD & ORS)

Defendant

MR NIGEL HOOD (instructed by Geoffrey Leaver Solicitors LLP) appeared on behalf of the Claimant

MR SIMON MILLS (instructed by BP Collins LLP) appeared on behalf of the Defendant

JUDGMENT
(As Approved)

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1. MR JUSTICE MORGAN: The application before me is by a claimant in current litigation, which is the subject of a trial in progress. The application is for the court's permission to allow the claimant to accept a part 36 offer that was made some months ago, which had not been accepted at an earlier point.
2. As to the nature of the underlying litigation, I have the witness statement of Mr Williams, and between paragraphs 7 and 13 he describes the broad nature of the claims. The parties have made offers to each other during the course of that litigation. Mr Williams describes the offers from paragraph 14 to paragraph 16. The part 36 offer in question was made on 16 December 2016 by the defendant to pay to the claimant the sum of £330,000, and that offer was not accepted, although it was not withdrawn.
3. I am told something about the events at the trial which is currently in progress. I am told a great deal about the trial between paragraphs 18 to 36 of Mr Williams' statement. The time at which this application has been made to the court has not really permitted the claimant to put in a witness statement in answer, and so whilst I do not doubt that Mr Williams is trying his best to give me a reliable and fair assessment, I will not base my decision on the more specific matters which are described in those paragraphs.
4. I think what I can take from the unchallengeable facts is that this offer was made in December 2016. It was not accepted before the trial. There were then two days of effective trial, Thursday and Friday of last week, and by early Saturday morning the claimant had formed an assessment which differed from his earlier assessment of his position, and he wished to accept the offer which had been made.
5. I have considered the relevant rules in part 36. I have considered the general way in which part 36 operates. The requirement for permission is stated at 36.11(3)(d). The consequences of an acceptance, if permission were given, with regard to costs are stated in 36.13. Suffice to say that it is possible in a case like the present for the court to make an order as to costs, which the court is satisfied is just as between the parties. So if I do give permission I know that I can rely upon the court, either myself or the trial judge, to produce a just order as to costs. But what the court cannot do is it cannot take from the claimant £330,000 which has been offered.

6. I have been shown a number of authorities which are said to bear on the approach I should adopt. The three authorities are Capital Bank Plc v Stickland [2005] 1 WLR 3914, Sampla and others v Rushmoor Borough Council and another [2008] EWHC 2616 (TCC), and Nulty v Milton Keynes BC [2012] EWHC 730 (QB). It is right that the rules under part 36 were different at the time of those cases. Version 1 was considered in the Capital Bank case; version 2 was considered in the two TCC cases; and now we have version 3, which came in I think in 2015.
7. I am particularly struck by the approach and the comments of the judges in the two TCC cases. They indicated in strong and, I have to say, persuasive terms that if an offeree, when he sees the way the wind is blowing in the trial, changes his attitude and wants to accept an offer that he previously did not want to accept, that is a change of circumstances which means that it may no longer be appropriate to allow the offeree to accept the offer which is still on the table subject to the court's permission.
8. I bear in mind in particular what is said in the first of the TCC cases from 45 to 55 and in the second of the two TCC cases at paragraphs 16 and 17. Nonetheless, there are arguments in favour of the court giving permission. If the court gives permission then there is a settlement; the court's time is saved; but, as was said in the Capital Bank case, the party who wants to accept the offer and save the court's time has left it to a very late stage; not the last possible moment, because that would be the moment before judgment, but a very late stage mid-trial.
9. Effectively, what I am asked to do is to impose upon the defendant a liability to pay £330,000, which it is no longer willing to do because it has asked the court to refuse permission. The defendant now wishes to take its chances with the trial continuing, so the court is imposing a result, imposing a settlement which is not a voluntary settlement any longer.
10. I think that the philosophy exists that where a claimant decides to take his chances with the trial and then repents of his earlier decision to turn down the offer of settlement because the trial, he thinks, is going less well or more badly than predicted, that the court will often take the view that it is not right to give permission to impose a settlement on the reluctant defendant.

11. Taking that approach does not mean that permission will never be given. In the course of argument, examples were given of when permission would be appropriate, but those examples do not apply to this case. Having endeavoured to assess the points in play, my overall conclusion is that the just result here is to refuse permission to the claimant to accept the part 36 offer.

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