Neutral Citation Number: [2015] EWCA Civ 1292

Case No: A3/2015/2140

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
Mr Justice Mann
EWHC 1816 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/12/2015

Before:

LADY JUSTICE ARDEN
LADY JUSTICE RAFFERTY
and
LORD JUSTICE KITCHIN

- -

Between:

Alan Yentob	**Respondent**
- and -	
MGN Limited	**Appellant**

- -
- -

Lord Pannick QC and Matthew Nicklin QC (instructed by **RPC**) for the **Appellant**
Simon Browne QC and Jeremy Reed (instructed by **Atkins Thomson** as Lead Solicitors for **Steel & Shamash**) appeared on behalf of the **Respondent**

Hearing date: 21 October 2015

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Approved Judgment

LADY JUSTICE ARDEN:

Issue: was the judge wrong to hold that Mr Yentob should not suffer the normal consequences of not accepting a Part 36 offer?

1. This is a renewed application by MGN for permission to appeal against part of Mann J's costs order against MGN dated 11 June 2015. It concerns MGN's offer ("the Offer") under CPR 36 to compromise Mr Yentob's claim. The proceedings have been fully described in my judgment ("my main judgment") on the appeal by MGN against the judge's awards in favour of nine individuals, including Mr Yentob, in these proceedings for misuse of their private information by "hacking" and other wrongful activities, as explained in that judgment. I should state at the outset that the existence of this or any other offer plays no part in the reasoning in my main judgment.

2. MGN made an offer which complied with CPR 36 ("the Offer"). At trial, the judge awarded Mr Yentob £85,000 as damages for misuse of his private information and it is not now in issue that even so he failed to beat the terms of the Offer (which this Court has not seen). The normal consequences ("the Normal Consequences") of this event under CPR 36 would have been that Mr Yentob would be ordered to pay MGN's costs with interest from the last date for acceptance of the Offer, which was 13 January 2015 ("the usual Order"). However, the judge could use the exceptional power in CPR 36 to make another form of order if he was satisfied that it was "unjust" that Mr Yentob should pay any of MGN's costs. He used that power to make no order as to costs. MGN contends that the judge was wrong so to order because (1) he made no finding that the usual Order would be "unjust" and instead applied a flawed test of a balance of justice, and (2) took into account MGN's failure to make admissions and other matters which he should have excluded from his consideration of whether the Normal Consequences were unjust.

3. In my judgment, for the reasons given below, I would grant permission to appeal but dismiss the appeal. The judge applied the right test and the factors which he took into account were circumstances to which he was bound to have regard.

4. The argument turns on CPR 36.17, the relevant parts of which provide:

> **(1) Subject to rule 36.21, this rule applies where upon judgment being entered-**
>
> > **(a) a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer; or**
> >
> > **…**
> >
> > **(3) Subject to paragraphs (7) and (8) [which do not apply], where paragraph (1)(a) applies, the court must, unless it considers it unjust to do so, order that the defendant is entitled to-**

> **(a) costs (including any recoverable pre-action costs) from the date on which the relevant period expired; and**
>
> **(b) interest on those costs.**
>
> **…**
>
> **(5) In considering whether it would be unjust to make the orders referred to in paragraphs (3) and (4), the court must take into account all the circumstances of the case including-**
>
> **(a) the terms of any Part 36 offer;**
> **(b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;**
> **(c) the information available to the parties at the time when the Part 36 offer was made;**
> **(d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and**
> **(e) whether the offer was a genuine attempt to settle the proceedings.**

5. The judge's chain of reasoning is complex. He had first to decide a threshold issue ("the threshold issue") of whether Mr Yentob had obtained a judgment that was more advantageous than MGN's Part 36 offer. The judge held that, despite the fact that he had obtained a judgment which found that MGN's wrongdoing was far more extensive than it had been prepared to admit, he had not beaten the award by obtaining an award of £85,000.

6. So Mr Jeremy Reed, for Mr Yentob, urged on the judge that it was not just that the Normal Consequences should apply.

7. On this second question, the judge held that the relevant circumstances for the purposes of CPR36.17(5) could include a comparison between the terms of the Offer and the terms of the judgment, and, importantly, that there might be cases where a party was justified in continuing to trial even though he had received a favourable offer (Judgment, para 38). MGN had admitted hacking Mr Yentob's voice mailbox for only half the period of hacking for which he (the judge) had found hacking had taken place. Mr Yentob was entitled to argue that he could properly proceed to trial in those circumstances (Judgment, para 39).

8. Mr Matthew Nicklin, for MGN, then argued that if Mr Yentob wanted vindication in this way, he should have sought a statement in open court, for which the CPR provided. However, MGN did not offer such a statement. Mr Reed submitted that it was unlikely to have agreed to make such a statement (Judgment, para 40).

9. The judge said that he found the point a difficult one (Judgment, para 41). His conclusion was that in the unusual circumstances of this case, where MGN had made limited admissions and had until shortly before the trial denied any liability, Mr

Yentob had "some form of justification for pursuing the matter to trial" (Judgment, para 42). The judge explained in his main judgment at trial that the formal admissions were made as late as November and December 2013. I need not set out the detail of those admissions. The admissions were extensive but limited because, as the judge explained:

> **25. … these admissions … do not amount to any admission as to the scope of unlawful activities beyond the use of the word "substantial".**

10. The judge accepted that it was not enough that Mr Yentob wanted to find out what had happened to him as many claimants would want to do that (Judgment, para. 43). The case was exceptional because, until the trial took place, Mr Yentob would not know how badly he had in fact been hacked, it was unlikely that MGN would have agreed to make a statement which matched the findings made at trial and because it was not apparent until trial that he could never get disclosure of the full extent of the hacking (Judgment, para 44). He could not recover his costs from MGN but justice did not, in those circumstances, require him to pay MGN's costs: the outcome could be marked simply by making no order as to costs (Judgment, para. 45).

11. In the judge's own words:

> 43 In what I might call a more normal case, it seems to me that the desire to have a trial in order to have a finding of a judge in public as to what happened is unlikely to be a legitimate objective in Part 36 terms so as to justify a claimant refusing to accept a Part 36 offer and insisting on going to trial. As Mr. Nicklin correctly pointed out, there may well be a lot of victims of personal injury incidents who would wish, for reasons which are entirely understandable in human terms, to have a trial so that it can be made plain what happened to them and how monstrous the behaviour was. As Mr. Nicklin points out, that is not a justification for not accepting a Part 36 offer which is greater than an amount which the claimant is ultimately awarded.
>
> 44 However, I do not think this case falls quite into that category. Looking at the way the case was conducted as regards Mr. Yentob and in particular the refusal to acknowledge the extent of hacking, even in final submission, I think it is more probable than not that had Mr. Yentob asked for an agreed statement in court which made the position clear, that it would not have been forthcoming in terms which would have matched the sort of findings which Mr. Yentob has now got in his favour. I also think it is of some significance that it will not have been wholly apparent until the trial itself that the material was not going to be available to enable Mr. Yentob to have his clear statement of how

> badly he had been hacked and what information had been obtained from and about him.
>
> 45 In the circumstances, I consider that the justice of the case does involve a departure from the normal rule which would otherwise entitle the defendant to their costs from the 21-day period applicable to the offer, but not to the extent of entitling Mr. Yentob to his costs throughout. Mr. Yentob did have, but did not take, an opportunity to clarify the position in response to the offer in the last sentence of MGN's Part 36 offer letter, and so did not take the opportunity to avoid having this debate or perhaps the whole action. In my view, *the justice of the case is met* not by simply imagining Part 36 offer had never been made, but by acknowledging that in financial terms Mr. Yentob ought to have accepted that offer but has lost an opportunity perhaps to have avoided the action completely, with a serious question mark as to whether the defendants would have taken it, and to say that from the date of the expiry of the relevant period under that offer (which is, I think, the wording in the rule), there should be no order as to the costs of Mr. Yentob's action. Each side will bear their own costs. That will be my order. (Italics added)

MGN's arguments and my reasons for rejecting them

12. Lord Pannick, for MGN, submits that the judge made errors of principle. He does not seek to challenge the exercise by the judge of his discretion. There are, submits Lord Pannick, two errors of law which vitiate his decision.

13. First, the judge made no finding, as required by CPR 36.17(3), that it would be "unjust" for the Normal Consequences to apply. All the judge found was that the justice of the case would be met by some other course: see the opening sentence of paragraph 45 of his judgment. That is not the same as a finding that it would be unjust for the Normal Consequences to apply. The judge merely struck a balance between the parties' responsibility for the costs of the trial. The requirements of CPR 36.17(3) are explicit: they are not met by a conclusion that a party had reasonable grounds for not accepting an offer: see the decision of this Court in *Matthews v Metal Improvements Ltd* [2007] CP Rep 27 at [32].

14. Mr Simon Browne QC, for Mr Yentob, submits that the judgment has to be read as a whole. From that, he submits, it is clear that, when the judge concluded that the justice of the case involved a departure from that rule, he had come to the conclusion that it would be unjust to make an order that the Normal Consequences should follow.

15. I agree with Mr Browne's submission. I accept that the wording of the relevant sentence in the judge's judgment is elliptical. It reads:

> **Mr. Yentob ought to have accepted that offer but has lost an opportunity perhaps to have avoided the action completely, with a serious question mark as to whether the defendants would have taken it,…**

16. What I take the judge to mean by that sentence, read in the context of his judgment, is that, by not accepting the offer, Mr Yentob lost the opportunity to avoid the costly trial but that (as the argument before him had shown) he would have been entitled to ask for a joint statement in open court and it was doubtful whether MGN would have agreed to this.

17. Essentially Lord Pannick is suggesting that an experienced judge, having set out the relevant rule verbatim, would then go on to make a decision on the basis of a misreading of a rule. That seems to me improbable. The judge distinguished the situation where a party rejects a Part 36 offer because he reasonably wants to have the facts investigated at trial and said that that did not normally make it "unjust" for the Normal Consequences to follow, a point which Mr Browne accepts and which is clearly correct. The judge's treatment of this point confirms that he recognised that there had to be some further element, implicitly unjustness, in the application of the Normal Consequences.

18. Second, submits Lord Pannick, the judge was not entitled to rely on the factors he did – the limited admissions, the likelihood that MGN would not make a statement in open court and the fact that it was not apparent until trial that Mr Yentob could never get disclosure of the full extent of the hacking – because he had already decided on the threshold issue in favour of MGN. The award to Mr Yentob at trial was not "more advantageous" than the Offer. The terms of, and circumstances surrounding, the Offer therefore had to be left out of any consideration under CPR 36.17(5). Accordingly, the judge misdirected himself when he held that there might be cases where a party was justified in continuing to trial even though he had received a favourable offer. The object of CPR 36.17 is to provide an incentive to parties to make offers and to settle cases, and the judge's interpretation of the rule is inconsistent with that object.

19. Mr Browne's submissions are largely directed to the question of discretion. He emphasises the procedural history and submits that Mr Yentob was justified in pursuing his claim. For example, MGN had admitted that hacking took place over a 2 ½ year period as opposed to the period of 7 years found by the judge. Moreover it only emerged during the trial, from, we are told, the judge's own questions to a former employee of MGN, Mr Evans (the claimants' witness), that vital documents, such as private investigator faxes and journalists' notebooks, had been destroyed. Only then did it become clear that Mr Yentob would not be able to have a clear statement of the extent of the hacking he had suffered or obtain an order for post-trial disclosure. On Mr Browne's submission, the judge was entitled to look at these circumstances in deciding whether it was unjust to order the Normal Consequences to follow.

20. As to the question of law, in my judgment, the judge was correct for two reasons. My first answer is that the submission elides two separate questions: (a) the sub-rule (1) question: was the offer more advantageous than the award at trial? and (b) the sub-

rule (5) question: is it unjust for the Normal Consequences to apply? These are separate inquiries and there is no logical reason why the same material should not be relevant to both. My second answer is a textual one based on CPR 36.17(5). This expressly requires the judge to look at "all the circumstances". The judge cannot put some factors on one side, unless of course they provide no assistance in determining whether the Normal Consequences would be unjust.

21. If it had been intended that the judge should leave out of account circumstances so obvious as the terms and circumstances of the relevant offer, the rule would have said so. It would have to be a mandatory exclusion in view of the mandatory obligation to take account of all the circumstances. Nor would it make any sense to exclude the terms and circumstances of the offer. Suppose that a person to whom a Part 36 offer had been made had asked for clarification or more relevant information and been refused it or the answer misrepresented the position. If that information was material and might reasonably have altered his view on whether to accept the offer, and was information within the offeror's organisation, the court might well find that it would be unjust to order that the Normal Consequences should follow from non-acceptance. I accept the purpose of Part 36 offers is as Lord Pannick described it but that cannot be the sole purpose of CPR 36: a subsidiary purpose must be to prevent injustice from the Normal Consequences as a result of non-acceptance of a Part 36 offer.

22. So, in my judgment, the judge was entitled to look at all the circumstances, including those pertaining to the offer. On the other hand, as Lord Pannick submits, it is not enough for the party who fails to beat an offer to show that the decision not to take up the offer was a perfectly reasonable one. He must show that it would be unjust were the Normal Consequences to apply.

23. That leads to the possibility of a statement in open court. CPR 53 certainly provides that in an action for misuse of private information a party can as well as accepting a Part 36 apply to the court to make a statement in open court, and can invite the party making the offer to join in it. However, the judge had to confront the fact that Mr Yentob did not invite MGN to agree to a statement in open court in connection with the Offer.

24. MGN submits that the judge was wrong to conclude that it would not have agreed to a statement in open court in the terms of the judge's findings against them at trial, and that this finding was against the weight of the evidence. MGN had made such statements in other cases.

25. I accept Mr Browne's submission that a statement in open court would not have achieved its purpose unless MGN fully participated in it. Mr Browne took us to a previous offer made by MGN to Mr Yentob. It too did not contain any proposal for a statement in open court. Mr Yentob's solicitors, Steel & Shamash, wrote back:

> "Your letter makes no mention of whether MGN have agreed to [and Mr Browne emphasise these next words] join in making a statement in open court. As you are aware, Part 53.6(14) provides our client with a right to a statement where a Part 36 offer on a complaint of misuse of private information is accepted. If your client is willing to do so we will supply a draft of a statement on which our client would intend to seek

> the court's permission to read should the offer be accepted. Please clarify MGN's position on this. As you will note from the terms of the CPR, clarification in this matter is anticipated prior to any offer being accepted".

26. However, MGN did not take up that suggestion. This is no doubt one of the matters which led the judge to raise a "serious question mark" over whether Mr Yentob would have been able to secure a joint statement in open court when the Offer was subsequently made. That is how the judge dealt with Mr Yentob's failure to approach MGN for a statement in open court on this occasion, and that was the basis on which he took that factor into account when he reached his conclusion on CPR 36.17(5). It was a factual question which he was entitled to resolve as he did. Likewise the judge was also entitled to find that it was improbable that MGN would have agreed to a statement in terms of his subsequent findings at trial.

27. MGN also submits that the judge had wrongly assumed that it mattered that a statement in open court would not match a favourable judgment. It submits that, if that were relevant, non-acceptance of a Part 36 offer where the making of a statement in open court was an option could never lead to the Normal Consequences of a Part 36 offer. In my judgment, that submission misses the point.

28. A joint statement in open court is an appropriate course if the party making the offer is willing and able to make a frank statement of its wrongdoing towards the party accepting the offer. In the light of the disclosures by Mr Evans, the judge had every reason to consider that that was at the least questionable in this case. What I understand the judge to be saying in his judgment (elliptical though part of it is) is that it would be positively unjust to penalise Mr Yentob in costs for not accepting the Offer in those circumstances. The judge was very familiar with the whole background to the case, and he had regard to the fact that MGN's admissions had been made at a very late stage and were vague, and had fallen far short of what he had found to have occurred in Mr Yentob's case. This is in my judgment the explanation for the judge's conclusion, and it was a conclusion that he was entitled to reach. As Lord Pannick does not challenge this exercise of discretion, it is unnecessary to say more.

Conclusion

29. For the reasons given above, I conclude that the judge concluded that the Normal Consequences would be unjust and this conclusion was based on relevant considerations. There was no error of law. I would grant permission to appeal but dismiss MGN's appeal.

Lady Justice Rafferty

30. I agree.

Lord Justice Kitchin

31. I also agree.