

News flash

IS IT WORTH THE FIGHT? Lisa Carver v BAA PLC

The recent Court of Appeal case of **Lisa Carver v BAA PLC [2008] EWCA Civ 412 (CA)** illustrates how the provisions of the new **CPR Part 36, which came into force in April 2007, can have severe cost consequences for claimants.** Simon Gildener and Peter Olymbios review the implications of the case.

Recent changes to CPR 36

Part 36 deals with offers to settle and the costs consequences of failing to accept such offers. Under the old rules, a defendant was deemed successful if a claimant either (a) failed to better a defendant's Part 36 payment or (b) failed to obtain a judgment which was more advantageous than the defendant's Part 36 Offer. The first test was intended for money judgments while the second test was used for non-monetary judgments.

The new Part 36 no longer makes this distinction and under CPR 36.14 a defendant is deemed 'successful', whether it be a monetary claim or not, if a claimant fails to obtain a judgment 'more advantageous' than the defendant's Part 36 Offer. In such circumstances the Court may order that the defendant is entitled to his costs from the expiry of the offer and interest on those costs.

Background to Carver v BAA

The Claimant was an air hostess. On making her way to the airport terminal building she stepped into a lift which, due to a mechanical defect, stopped 2 feet below floor level. She fell heavily and was advised that she had suffered torn ligaments in her left foot. She sued BAA, who conceded liability and indicated their willingness to consider a reasonable claim. BAA then made an offer to settle on a

Part 36 basis for £4,006. The Claimant rejected that offer and instructed a further medical expert bringing her claim for damages in excess of £5,000. BAA then made a payment into Court in the sum of £4,520. The Claimant again rejected this offer and filed a claim in excess of £19,000. The case was reallocated from the fast track to the multi-track. The case went to trial. The Claimant won £4,686.26 inclusive of interest. The judgment exceeded the Part 36 payment by £51, when making allowance for interest. The Claimant therefore sought her costs from BAA.

Costs Order

In stark contrast to the amount of her award, she sought costs in the region of £80,000 plus VAT (including a success fee of 100%). Despite her 'success' at trial, His Honour Judge Knight QC took the view that the Claimant failed to secure a judgment 'more advantageous' than the Part 36 payment into court. The judge ordered the Claimant to pay the defendant's costs after the expiry of the offer. The Claimant appealed the decision.

Appeal

On appeal, Ward LJ identified the main issue as follows: if a claimant beats a payment of money into Court by a modest amount, even £1, has she obtained a judgment more advantageous than the defendant's Part 36 offer? ▶

- Or is the Court entitled to look at all the circumstances of the case in deciding where the balance of advantage lies?

Giving the lead judgment, Ward LJ considered whether the change in the language of Part 36 resulted in a change of approach. Under the old rule the Claimant would have recovered her costs. However, in the context of the new Part 36, where money claims and non-money claims are to be treated in the same way, 'more advantageous' is an 'open textured' phrase. It permits a more wide-ranging review of all the facts and circumstances of the case in deciding whether the judgment is worth the fight. Ward LJ commented that the modern approach to litigation must also be taken into account as the Civil Procedure Rules (and Part 36 in particular) encourage both sides to make offers to settle.

Ward LJ agreed that the judge was right to look at the case broadly and was entitled to take into account that the extra £51 gained was more than offset by the huge costs incurred by the Claimant in continuing to contest the case. No reasonable litigant would have embarked upon such a campaign for a gain of £51. Ward LJ maintained that the claim became exaggerated and the Claimant had to bear ultimate responsibility for the manner in which her claim was conducted. Accordingly, the Claimant's appeal was dismissed.

Comment

This case has given the Court the opportunity to consider the implications of the new Part 36 wording. It used to be accepted practice that beating a defendant's payment in by as little as £1 could permit a claimant to recover his costs. However, CPR36.14 now expands a judge's area of discretion beyond a strict financial comparison between the offer and judgment sum. When addressing the issue of costs, the court will take into account all the facts and circumstances of the case including the conduct of the parties. Those parties who act unreasonably, and fail to act in the spirit of the CPR by settling disputes early, are likely to be punished by way of costs.

The judgment will no doubt act as a warning sign to claimants who receive Part 36 Offers. It adds pressure on claimants to seriously consider reasonable offers to settle or risk the possibility of suffering adverse cost consequences at trial. Beating an offer at trial no longer guarantees a full recovery of costs, especially where the amount in dispute exceeds costs by a significant margin. This begs the question is it sometimes really worth the fight? In Lisa Carver's case, it clearly wasn't.

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Summary of Key Points

- A change of language in Part 36 has resulted in a change of approach in the determination of costs consequences following judgment
- Courts will adopt a broad approach when considering costs and question of whether result is 'more advantageous' to the successful party
- All circumstances of case will be taken into account
- The new rule expands court's discretion beyond a strictly financial comparison of payment in and monetary award

We can put together a seminar/talk or panel discussion on the issue above, or any of the issues featured in our publications to be held at any of our offices, or yours. If you are interested, please contact any one of our lawyers or **David Simon at david.simon@robinsimonllp.com.**

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