EIP

Remember to seriously consider Part 36 Offers!

Background

This is a judgment on costs for a probate case, where the case law for analysing whether a communication should be considered 'without prejudice' was discussed.

This was then followed up with the application of CPR Part 36. The claimant in this case has been wholly successful at trial and had previously made a Part 36 offer which he was able to beat. Therefore, the judge had to decide whether the effects of a Part 36 offer should be applied.

'Without prejudice' communication

Master Marsh has stated that when analysing whether a communication should be classified as "without prejudice" two things will generally be considered:

"(1) The starting point for the court is the manner in which the letter is drafted. It will normally be the case that the writer of a letter can be taken to have intended to mark a letter in a particular way or otherwise to have intended to write an open letter. However, if it is clear from the context that a letter was intended to be open, or without prejudice or without prejudice as to costs, it will be treated as such.

(2) In some cases the true nature of the letter will be obvious such as a letter that falls within a chain of communications of a particular type. Commonly a letter which is not marked 'without prejudice' that falls within a chain of communications in the context of settlement negotiations will be treated as being without prejudice unless the opposite intention is obvious. The converse may also be true…"

He commented that communications between parties on the possibility of ADR do not

need to be 'without prejudice' and it will usually be favourable for the parties to rely on it; further, no reasonably minded recipient would regard this communication about ADR as 'without prejudice'.

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He also cautioned against conflating ADR and mediation as there are other methods of ADR that the parties could consider.

Costs

Master Marsh then considered whether the claimant did give an effective Part 36 offer.

The third defendant tried to rely on the fact that the claimant did not respond to her offer to mediate, citing a number of well-known authorities, including Halsey v Milton Keynes NHS Trust [2004] EWCA Civ 576 Dyson LJ at [16] and PGF II SA v OMFS Co 1 Limited [2013] EWCA Civ 1288 Briggs LJ at [30], [42] and [51]. As a consequence, the claimant should be deprived of a proportion of his costs.

This was rejected for several reasons:

- the fact that the claimant made most of the running in relation to settlement.
- the third defendant's behaviour in her conduct of the claim and
- the strong merits of the claim which either were known or should have been known to the third defendant and
- the late stage at which the third defendant expressed a willingness to engage in ADR.

Order

He finally considered whether the effects of a Part 36 offer were unjust, with reference to CPR rule 36.17 (4) and 36.17 (5). He did not consider it to be unjust and accepted the claimant's submissions on costs and awarded costs including on an indemnity basis after the relevant period, interest at 4% above base rate, and an additional sum award of 10% of the assessed costs.

Jones v Tracey 2023 EWHC 2256 (Ch) [link]