Claimant denied costs benefits as it only beat Part 36 offer due to Brexit exchange rate drop

Introduction

In *Novus Aviation Ltd v Alubaf Arab International Bank BSC(c)*[1], the successful claimant, Novus Aviation Ltd (the **"Claimant"**), was denied the beneficial costs consequences that can accompany beating a Part 36 offer because it beat its offer only due to the fact that the judgment was delivered a week after the UK's referendum on its membership of the European Union, the outcome of which caused the value of sterling to fall sharply against the dollar. A Commercial Court judge decided that in light of the circumstances, it would be unjust to give full effect to Part 36.

Background

In this case, the Claimant sued the Bahraini investment bank Alubaf Arab International Bank BSC(c) (the **"Defendant"**) for losses it had suffered as a result of the Defendant's breach of a contract that had been made between the parties. Pursuant to the contract, the Claimant was responsible for managing the lease of an aircraft on behalf of the Defendant, and was entitled to annual management fees and a fee on disposal of the aircraft. The Claimant successfully proved that it had suffered loss as a result of the Defendant's breach, and accordingly the judge ordered the Defendant to pay the Claimant's costs.

Following his decision, the judge turned to consider the Part 36 offer that had been made by the Claimant earlier in the proceedings. On 30 April 2014, the Claimant (through its solicitors) had made the following Part 36 offer to the Defendant (including interest):

> *"That your client pay our client an amount of £3,775,272. This amount is a significant 25% discount on our client's claim."*

The Part 36 offer which was made in sterling was the equivalent of US$6,342,457 at the time it was made, when the exchange rate stood at £1 = US$1.68. Although the offer was never withdrawn, the Defendant did not accept it.

Given that the amounts in the contract were denominated in US dollars and the Claimant's losses were therefore calculated in US dollars, the judge gave his judgment in US dollars. On 30 June 2016, one week after the "Brexit" referendum, the judge awarded the Claimant the sum of US$5,430,924, including interest. On that date, the exchange rate stood at £1 = US$1.319, giving the judgment sum an equivalent sterling value of £4,117,114.

The Commercial Court's application of Part 36

The Claimant, who considered that it had achieved a judgment sum more advantageous than its Part 36 offer (albeit in terms of the sterling value rather than the US dollar equivalent), applied for the enhancements that may be ordered following such a result under old CPR Rule 36.14(3)[2], namely interest at a rate not exceeding 10% above base rate, indemnity costs and an additional sum of £75,000.

The Defendant argued that the judgment sum of US$5,430,924 gave a less advantageous outcome to the Claimant than it would have achieved if the Defendant had accepted its Part 36 offer (which, as mentioned above, was worth US$6,342,457 at the time it was made). However, the judge considered that the relevant time to make the comparison in monetary terms was not when the offer is made, but at the date of the order containing the court's judgment.[3] This was logical because the offer was never withdrawn, so the

1 [2016] EWHC 1937 (Comm)

2 Now CPR Rule 36.17(4)

3 *Barnett v Creggy* [2015] EWHC 1316 (Ch) at paragraphs 26-30.

Defendant could have accepted it at any time if the offer had become more attractive due to accruing interest or moving exchange rates. At the date of the order, the judgment sum was worth £4,117,114, which gave the Claimant a more advantageous result.

Nevertheless, the judge considered that it was still relevant to look at the value of the offer at the time it was made, as the court was required by old CPR Rule 36.14(4)[4] to take into account all the circumstances of the case when determining whether it would be unjust to make orders for enhanced interest, indemnity costs and additional sums. The judge considered the fact that if judgment had been entered at any time between the start of the trial on 26 April 2016 and the UK referendum on 23 June 2016, the Claimant would not have beaten its Part 36 offer and the costs benefits of doing so would not have been available to it. It was therefore a "highly material circumstance" that the Claimant only beat its Part 36 offer due to the fall in sterling against the dollar because the judgment, by chance, was not handed down until 30 June 2016. As a result, the judge decided not to make any orders for costs enhancements under old CPR Rule 36.14(3), as he considered that it would have been inconsistent with the principle of risk allocation underlying Part 36 to have done so.

Summary

This case will be of interest to companies contracting in foreign currencies that might, at some stage, be involved in legal proceedings in England and Wales. It provides a useful insight into the application of Part 36 by the courts where offers to settle are given in sterling, but judgment is entered in a foreign currency. The decision demonstrates that whilst the starting point for valuing Part 36 offers is how much the offer is worth at the date of the judgment, courts will take into account all the circumstances of the case (including the value of the offer when it was made and throughout the proceedings), and will not grant costs enhancements to a claimant where it would be unjust to do so. Although Part 36 has been updated and a new regime applies to offers made after 6 April 2015, the principles of this case are likely to remain applicable, since the court must still consider whether it is unjust to make an order, and in doing so, must consider all the circumstances of the case.

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4 Now CPR Rule 36.17(5)