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King's Bench Walk

Marsh v Ministry of Justice – Part 36/Discount Rate appeal allowed by consent.

This appeal gave rise to a novel point as to the impact of the change in the discount rate with regard to Part 36 offers. Andrew Roy and Vanessa Cashman instructed by David Marshall and Amanda Hopkins at Anthony Gold acted for the Claimant.

The point arose in the context of a stress at work claim. Following a three-week trial in the High Court at the end of 2016 the Claimant obtained judgment in July 2017 for just over £286,500. The Claimant benefitted from the change in the discount rate in March 2017 (i.e. between trial and judgment). At the old 2.5% rate he would have recovered in the region of £217,500. For a report of the substantive judgment click here. For the judgment itself click here.

The Claimant had made Part 36 offers of £223,500 on 20 March 2014 and of £180,000 on 14 October 2016. He sought an order that the normal Part 36 consequences apply in respect of both these offers. This was one of many disputes over costs and other consequential matters. The judge (Thirlwall LJ) gave a further judgment determining these matters. For a full report of the costs judgment click here. For the judgment itself click here.

The judge held, amongst other things, as follows:

- There was no reason why the Claimant should not have the full benefit of the £180,000 Part 36 offer. She therefore awarded a 10% enhancement of the award along with indemnity costs, enhanced interest and interest on costs for the period in question (which began shortly before the trial commenced).
- In light of the Defendant's conduct both generally and specially in relation to negotiations (it repeatedly refused point-blank even to enter into any exploration of settlement) she also awarded indemnity costs from July 2016.
- It would be unjust to award the Claimant any benefit from the earlier Part 36 offer as, but for the change in the discount rate between trial and judgment, he would not have beaten this. She held that "*a change to the discount rate is different in kind*" to other litigation contingencies (she did not elaborate on the nature of the difference or why it should lead to a different result).

The Claimant appealed against this last ruling. The grounds of appeal were that:

- A change to the discount rate is not materially different in kind from other litigation contingencies.
- Even if, in principle, a change to the discount rate was different to other litigation contingencies so as to potentially render it unjust to apply Part 36 consequences, it did not do so here:
- As even if the Defendant had predicted the change, it would have made no difference to its approach to settlement. It was determined to fight come what may.
- By reference to the Defendant's conduct.

Permission was granted on paper by Lewison LJ on 15 December 2017, who considered that the appeal raised a point of general importance. The Defendant filed a skeleton argument and Respondent's Notice seeking to uphold

the original order.

The parties then entered negotiations, the Defendant instructing different solicitors and counsel from the first instance hearing. These culminated in an agreement that the appeal would be allowed by consent, with the Defendant paying enhanced interest on damages during the period in question (c£14,500 extra) plus the costs of the appeal. In other words, in consideration for the Defendant's agreeing to pay this enhanced interest, the Claimant abandoned the claims for indemnity costs and interest on costs during the relevant period. This agreement was approved by the Court of Appeal.

There thus remains no appellate authority on the important question of the interplay between the change in the discount rate and Part 36 offers. Whilst there are likely to be few if any remaining cases so affected by the 2017 drop in rate, the point is likely to arise again with a vengeance when the planned increased in the discount rate is implemented. There will undoubtedly be cases where an increase in the rate will result in claimants failing to beat defendants' Part 36 offers which would be too low at the current -0.75% rate.

The effect of Thirlwall LJ's judgment in such cases remains to be seen. On the one hand, if the rationale that a change in the discount rate is different in kind from other contingencies with the effect that the court should assess Part 36 offers by reference to the old rate is correct, it appear to be a universally applicable one. If so, then defendants' offers should only bite if claimants fail to better them when calculated at the old rate. Against that, defendants' and claimants' Part 36 offers do not operate in the same way and, whilst the drop to -0.75% was something of a bolt from the blue, any later increase will have been signalled well in advance. Another possible point of distinction is that in ***Marsh*** the change occurred in between trial and judgment, and thus after the offer could have been accepted as of right (although given the Defendant's attitude this was in the event academic).

It is also unclear whether that rationale can be deployed as a sword as opposed to merely as a shield. In other words, if a claimant were to make an offer which was less than the judgment sum when calculated at the -0.75% rate, but more than the judgment sum calculated by reference to any rate, should he gain any benefit from the offer?

It is therefore a moot point as to whether and to what extent ***Marsh*** will be binding or persuasive in such future cases. These matters are thus likely to be the subject of future argument. It is likely that clear Court of Appeal authority would be needed to resolve any such argument.