Splitting the bill

Anna Lintner explains a recent case on *Calderbank* offers and split trials

In *McKeown v Langer* [2021] EWCA Civ 1792, the Court of Appeal recently considered the question of whether the existence of a global *Calderbank* offer requires the court to reserve the costs of the first stage of a split trial until the conclusion of the proceedings.

The case concerned an unfair prejudice petition pursuant to s.994 Companies Act 2006 that was brought by a minority shareholder (R) in the holding company for the Sophisticats lap dancing venues. Following a two-week trial to determine issues of unfair prejudice (the liability stage), the judge found comprehensively in favour of R, and ordered A to purchase R's shares at a price to be determined at the quantum stage. Despite the existence of a global *Calderbank* offer made by A in relation to the whole of the proceedings (which the parties agreed that the judge should not have sight of), the judge ordered that A pay R's costs of the petition up to and including the liability trial, largely on the indemnity basis, and ordered a payment of £450,000.

THE APPEAL

On appeal to the Court of Appeal against the costs order, A argued that: (i) cases such as *HSS Services Group v BMB Builders Merchants* [2005] EWCA Civ 626 establish that, where a global Part 36 offer has been made, the court should – save in exceptional circumstances – reserve costs until the conclusion of proceedings; and (ii) there was in substance no difference between Part 36 and *Calderbank* offers, such that the judge ought to have reserved costs in light of R's undisclosed global *Calderbank* offer. The overarching submission made by A was that the court should only make an immediate costs order after the first stage of a split trial if it can be reasonably sure that nothing is likely to happen subsequently that would render the costs order unfair to the paying party.

The Court of Appeal dismissed the appeal, for three reasons. First, it held that A's analysis was inconsistent with the language of CPR 44.2, which confers a broad discretion on the court and provides that the court is required to take into account any admissible offers in the exercise of that discretion. On the express terms of CPR 44.2, the judge was entitled to conclude that the *Calderbank* offer was inadmissible and proceed to make the costs order.

Second, there were important policy considerations in play. Citing *Merck KGaA v Merck Sharp & Dohme Corp & Ors* [2014] EWHC 3920 (Ch), the Court of Appeal held that 'an overly robust application of a principle that costs should follow the final event discourages litigants from being selective as to the points they take in litigation and encourages an approach whereby no stone or pebble, howsoever insignificant or unmeritorious, remains unturned'. The merits at trial were overwhelmingly in favour of R, and the judge had recorded his displeasure at the taking of unmeritorious points by A. Further, the judge had condemned the behaviour of A in the conduct of the litigation as falling below the standards to be expected of a professionally advised litigant.

The Court of Appeal observed that the making of discrete, issue-based costs orders and interim costs orders encourages professionalism in the conduct of litigation. The court also acknowledged the role of the principle of equality of arms; in certain types of litigation, such as minority shareholder suits, there may be an asymmetry of information between the parties, such that a petitioner is poorly placed to assess the reasonableness of an offer to settle. The court held that the appellant's position, if accepted, 'would represent the antithesis of good policy' and would be 'an enticement to strategic gameplaying', because it would enable a party to use the existence of an undisclosed, derisory *Calderbank* offer to prevent the making of an immediate costs order.

Third, the case law on Part 36 that was relied on by A to the effect that the court should reserve costs in the event of an undisclosed Part 36 offer could not be 'read across' to *Calderbank* offers.

The effect of the Court of Appeal's decision is that the court is only required have regard to a *Calderbank* offer when determining costs if the offer is admissible (for example, because it relates only to decided issues or because the offering party consents to its disclosure). That being the case, a party wishing to protect itself in costs by making a global offer to settle proceedings that are the subject of a split trial should always do so by making a Part 36 offer rather than a *Calderbank* offer.

Also of interest is Green LJ's *per curiam* comment to the effect that, where the court reserves the costs of a split trial on the basis of a global Part 36 offer, there is nothing to prevent the court from making an immediate costs order in relation to the costs incurred prior to the Part 36 order being made. In making this comment, Green LJ disagreed with the view expressed in *Lifestyle Equities CV v Sportsdirect.com Retail Ltd (No. 2)* [2018] EWHC 962 (Ch).

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