An offer you can't refuse?
Calderbank offers, weak cases and the risk of indemnity costs

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Introduction

Parties to litigation and their professional advisors must always keep in mind that there comes a point where the benefit of a *Calderbank* offer of settlement outweighs any likely benefit that could be achieved by continuing with the litigation to trial. Alongside the need to evaluate the legal and factual strength of a party's case – the eternal "will we win?" question - what may be less well understood is the Court's approach to awards of indemnity costs where such offers have been rejected and the offeree does not obtain a better outcome than the offer. This being especially true where a claimant's case has obvious evidential or legal weaknesses that could be found to make the refusal of a defendant's settlement offer objectively unreasonable; albeit the question of reasonableness in those circumstances should not involve a process of hindsight analysis following judgment.

Concessions made in the course of litigation or trial – where a party's continued reliance on an obviously weak evidential legal case would be unjustified – may also subject to similar considerations with regards to indemnity costs. That is to say pursuit of a weak or hopeless issue can trigger an award of indemnity costs.

Cases Considered

Kiam v MGN (No 2) [2002] EWCA Civ 66

ICI v Merit Merrell Technology Ltd [2017] EWHC 2299 (QB)

Lejonvarn v Burgess [2020] EWCA Civ 114

McKeown v Langer [2021] EWCA Civ 1792

The Right to Indemnity Costs – Conduct "*outside the norm*"

The general costs regime is set out at CPR r.44.2(4), which provides that when assessing costs the Court will take into account:

> "In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
>
> (a) the conduct of all the parties;
>
> (b) …; and
>
> (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply."

44.2(5) then provides that:

"The conduct of the parties includes –

(a) …;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

The Court's discretionary power in relation to costs is therefore to be viewed against a party's overall conduct and any offers to settle (outside of the Part 36 Regime), in circumstances where "conduct" includes the reasonableness of a party in pursuing or contesting a particular issue. Those considerations apply to both to an award of costs on the standard basis as to one for indemnity costs and on a strict reading of rules the existence offers of settlement is not one of the identified types of "conduct" defined in CPR r.42.2(5) but is a standalone consideration under r.44.2(4). The question then is in what circumstances will CPR r.44.2(4)(c) and r.44.2(5)(b) effectively be treated as a composite consideration justifying the award of costs on the indemnity basis -

When determining whether to award costs on the indemnity basis under CRP r.44.3 a number of factors must be weighed by the Court, as the notes in the White Book at para.44.3.9 explain:

> "*The weakness of a legal argument is not, without more, justification for an order for costs to be assessed on the indemnity basis. The position might be different if proceedings or steps taken within them are not based only on a plainly hopefully base, but are motivated by some ulterior commercial or personal purpose, or otherwise for purely tactical reasons unconnected with any real belief in their merits. Such an order should not be made simply because the paying party has been found to be wrong or his evidence has been rejected in preference to that of the receiving party.* ***In determining whether a paying party's conduct lies outside the norm the court must avoid making a determination based on hindsight; that is assessing conduct with the knowledge of the outcome of the case and with knowledge of how a particular issue was ultimately resolved***." [emphasis in bold added]

The question of what sort of conduct would take a case outside of the norm has been considered in a number of judgments. For example, in *Kiam v MGN (No 2*) [2002] EWCA Civ 66 at [39], Simon Brown LJ dealt opined:

> "*To my mind, however, such conduct would need to be unreasonable to a high degree; unreasonable in this context does not mean merely wrong or misguided hindsight*."

Whilst in relation to the more specific issue of pursuing on a weak case Fraser J. in *ICI v Merit Merrell Technology Ltd* [2017] EWHC 2299 (QB) at [10], summarising previous authority on this point, stated that:

> "*….the pursuit of a of a weak claim will not usually, on its own, justify an order for indemnity costs, provided that the claim was at least arguable. But the pursuit of a hopeless claim (or a claim which the party pursuing it should have realised was hopeless) may well lead to such an or*der."

And in the same case at [15] the Fraser J. also addressed the question of whether concessions made in the course of proceedings would justify an award of indemnity costs:

> "*I do not consider that that concession of itself would justify an award of indemnity costs or is one of the number of factors that would justify it. Although I explained in my judgment that that was a retreat by ICI from a wholly unarguable position, which it undoubtedly was, it would be wrong, in my judgment, to penalise such a sensible concession by treating it as one of those factors. It was entirely sensible. Concessions like that during litigation are to be encouraged*."

However, there are circumstances where a party may find itself exposed to indemnity costs as a consequence of its continued pursuit of a weak evidential or legal case. The tipping point would appear to be the existence of a reasonable offer of settlement. The settlement offer is the additional element - over and above the mere weakness of the case - that takes the case out of the norm and thereby justifies indemnity costs, so as to reflect the overall justice of the case.

In *Lejonvarn v Burgess* [2020] EWCA Civ 114, Coulson LJ considered (see [37] to [45]) it to be settled law that a claimant's refusal to accept a reasonable settlement offer came against the backdrop of a "…*weak, opportunistic or thin claim, then the order for indemnity costs may very well be made*." [43], subject always to the fact that the reasonableness of the offer should not be considered with the benefit of hindsight. As Coulson LJ explained the proper question to be addressed was "…*whether, at any time following the commencement of the proceedings, a reasonable claimant would have concluded that the claims were so speculative or weak or thin that they should no longer be pursued*." [54]. If the claim was still pursued in such circumstances, then there was a significant risk that indemnity costs would be awarded.

It would therefore seem incumbent on a defendant who regards the claim against it as weak or speculative to make a reasonable offer of settlement, in order to place the claimant at a real risk of indemnity costs (at least from the date the offer could / should have been accepted). It would not be sufficient for the defendant to raise the issue of the weakness of the claimant's case after judgment in the absence of any offer of settlement, with the expectation of successfully arguing

that the weakness of the claimant's was sufficient grounds to justify an award of indemnity costs. Both elements are required.

***Calderbank* Offers and the Part 36 Regime**

It should though be noted that in the cases referred to above *Calderban*k offers are not being raised to the status of quasi part 36 offers. Lord Justice Green giving the judgment of the CA in *McKeown v Langer* [2021] EWCA Civ 1792 at [31] - [35], considered the differing roles of Part 36 Offers, *Calderbank* Offers and the general costs rules under CPR Part 42 made it clear that [33]:

> "*CPR 44.2 is by its very nature different to CPR 36 which is a self-contained set of rules which departs from the more general rules in CPR 44.2 (see e.g. the analysis in the White Book (2021) paragraph [36.2.1ff]. The special rules in CPR Part 36 do not therefore govern or limit the broader discretion which arises under CPR 44.2 where there is no CPR Part 36 offer in play*".

And his Lordship went on to confirm at [34] that there is to be no "*read across*" between Part 36 and Part 42 – an unsurprising conclusion in light of the wording of CPR r.44.2(c). So, if a party wishes to obtain the very clear benefits that accrue to a party in a position to rely on a Part 36 offer, then the only option is to make such and offer and keep it in play until the conclusion of the litigation, albeit even a withdrawn Part 36 make still be weighed in the balance of the conduct of the parties when the question of indemnity costs is to be addressed.

Where a defendant beats its Part 36 offer then the Court should always consider whether the claimant's conduct in refusing the offer took the case outside of the norm: See *Lejonvarn* at [80], in all other cases the claim for indemnity costs will require something more.

Conclusions

It is clear from the authorities cited above that parties are free to pursue cases to trial that have weak evidential or legal underpinnings or make appropriate concessions when it becomes apparent that a particular part of their case has been exposed as hopeless – without facing the automatic sanction of indemnity costs. However, where a weak case or issue is pursued in the face of reasonable settlement offers then this can take the case outside of the norm so as to justify indemnity costs, although *Calderbank* offers are not to be treated as if they were effectively Part 36 offers.

When assessing whether a settlement offer should have been accepted the Court's should not engage in any sort of hindsight reasoning with the benefit of the judgment in hand: See *Lejonvarn* at [54]. The question to be answered is whether the reasonable party – knowing what they did about the weakness in their own case at the time the offer was made – could

realistically expect to obtain a better outcome at trial than the offer. If not the failure to accept the offer will then take the case outside of the norm, rather than the underlying weakness of the case being put when considered in isolation: See *ICI v MMT* at [15].

Consequently, where such an objectively reasonable settlement offer is made in relation to a weak case, then parties must understand that refusing to accept such an offer will expose them to a significant risk of indemnity costs – probably from the date it would have been justified in accepting the offer. It should also encourage the making of such reasonable settlement offers – even if only so as to open up the possible of a later award of indemnity costs.

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