[2010–12 Gib LR 355]

SILVA v. LITTON

SUPREME COURT (Prescott, J.): September 11th, 2012

Civil Procedure—settlement of proceedings—Part 36 offer/acceptance—offer under CPR, Part 36 not time-limited—open until formally withdrawn—reference to offer being "open for acceptance within 21 days" guarantees period in which offer will not be withdrawn not indication that offer only open for that period

Legal proceedings were purportedly settled under the CPR, Part 36.

The claimant made the defendant what was expressly stated to be a Part 36 offer on August 5th, 2010, in the standard form, meeting the requirements of the CPR, r.36.2(2). The original offer was stated to be "open for acceptance within 21 days." On October 25th, 2010, that offer was rejected by the defendant, who made a counter-offer. The plaintiff rejected the counter-offer on November 2nd, 2010 and purportedly reopened the original Part 36 offer "for a further 21 days." The claimant had, at no point, served a notice withdrawing his first offer. The offer was accepted by the claimant on February 28th, 2011, but no notice of acceptance was filed with the court.

The claimant applied for summary judgment, submitting that (a) neither its offer on August 5th, 2010, nor its renewal on November 2nd, 2010, had been a Part 36 offer, having been time-limited by the reference to their being "open for acceptance within 21 days"; (b) by the time the offer had been accepted, it had lapsed; and (c) in any event, the defendant's acceptance of the offer had not been in accordance with Part 36 and was, therefore, invalid.

The defendant submitted in reply that judgment should be entered to enforce the settlement, as (a) the claimant's offer had been a Part 36 offer and had not, on a proper construction, been time-limited; (b) the offer had not lapsed, and the claimant had never withdrawn the offer; and (c) it had given the claimant notice of acceptance in accordance with Part 36, its failure to file the notice with the court should not invalidate the settlement, and a consent order or notice could still be filed to fulfil the conditions of Part 36.

Held, staying the claim upon the terms of the Part 36 offer:

(1) The claimant's application for summary judgment would be dismissed and the claim stayed upon the terms of the settlement. The claimant's offer of August 5th, 2010 had been expressly stated to be a Part

36 offer, having been made in the standard form, meeting the requirements of Part 36. Reference to the offer being "open for acceptance within 21 days" did not make it time-limited, but meant that it would not be withdrawn within the first 21 days. Words would be given their ordinary and natural meaning and any ambiguity in an offer purporting to be a Part 36 offer would be construed, so far as reasonably possible, in a manner which made it comply with Part 36 (paras. 4–12).

(2) It followed that the original Part 36 offer of August 5th, 2010 had not lapsed after 21 days or upon its rejection by the defendant, as it could only cease upon formal withdrawal and no notice of withdrawal had been given. The original offer had continued to subsist and its purported "re-opening" had been unnecessary (para. 17).

(3) Moreover, the defendant's failure to serve the court with written notice of its acceptance, contrary to the CPR, r.36.9(1), did not invalidate the Part 36 settlement. The defendant had served notice of acceptance on the claimant and, in the absence of detriment to the claimant, invalidating the acceptance would be disproportionate and contrary to the parties' intentions. The requirements of r.36.9(1) could still be fulfilled—not by filing a consent order, but by filing the notice of the acceptance (paras. 20–23).

Cases cited:

(1) *C* v. *D*, [2012] 1 W.L.R. 1962; [2012] 1 All E.R. 302; [2011] EWCA Civ 646, *dicta* of Rix, L.J. applied.

(2) *Gibbon* v. *Manchester City Council*, [2010] 1 W.L.R. 2081; [2011] 2 All E.R. 258; [2010] EWCA Civ 726, *dicta* of Moore-Bick, L.J. applied.

Legislation construed:

Civil Procedure Rules, r.36.2(2):

"A Part 36 offer must—

(a) be in writing;

(b) state on its face that it is intended to have the consequences of Section I of Part 36;

(c) specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with rule 36.10 if the offer is accepted;

(d) state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and if so to which part or issue; and

(e) state whether it takes into account any counterclaim."

r.36.3: "(5) Before expiry of the relevant period, a Part 36 offer may be withdrawn or its terms changed to be less advantageous to the offeree, only if the court gives permission.

(6) After expiry of the relevant period and provided that the offeree has not previously served notice of acceptance, the offeror may

withdraw the offer or change its terms to be less advantageous to the offeree without the permission of the court.

(7) The offeror does so by serving written notice of the withdrawal or change of terms on the offeree."

r.36.9(1): The relevant terms of this paragraph are set out at para. 20.
r.36.9(2): The relevant terms of this paragraph are set out at para. 16.

I. Winch for the claimant;
R.G. Fischel, *Q.C.* for the defendant.

1 **PRESCOTT, J.:** There are two application notices before the court: one is on behalf of the claimant for summary judgment and the other is on behalf of the defendant for judgment to be entered on the basis that the claimant recover 85% of his damages in accordance with the defendant's acceptance of the claimant's Part 36 offer.

2 For the claimant it is said that whilst an offer was made it was not a Part 36 offer, that by the time the offer was accepted by the defendant the validity of the offer had lapsed, that in any event even if it were a valid Part 36 offer the defendant has not effected acceptance in accordance with the rules, and that as a result the Part 36 procedure is rendered invalid.

3 Counsel are agreed that before addressing the question of summary judgment the court should first consider whether there was a Part 36 offer made by the claimant and, if so, whether that was validly accepted.

A Part 36 offer?

4 On August 5th, 2010, counsel for the claimant wrote to counsel for the defendant in the following terms: "I attach my client's Part 36 offer on liability which is open for acceptance within 21 days from receipt of this letter." The attachment consisted of the standard pro forma notice of offer to settle under Part 36.

5 It is not in dispute that for an offer to be classified as a Part 36 offer it must comply with the requirements of the CPR, r.36.2(2). I have been referred to these by counsel and do not propose to rehearse them now, although I bear them very much in mind.

6 There appears to be an inconsistency between the offer being described as a Part 36 offer and it being subject to acceptance within 21 days. *C* v. *D* (1) is a Court of Appeal decision which provides authority for the proposition that an offer cannot be both time-limited and a Part 36 offer, as the letter of August 5th purports to be, at least on the face of it. It is apparent from the ruling of Rix, L.J. in that case that whether or not an offer is a Part 36 offer, or is governed by the common law, is a matter of construction and ([2012] 1 W.L.R. 1962, at para. 45) that—

> "both the writer and the reader of that offer must be taken, objectively, to know the legal context. Of course, mistakes occur and must be allowed for. However, the question is how a reasonable solicitor would have understood the offer in that context . . ."

7 In favour of the offer being a Part 36 offer is the fact that counsel referred to it as such in his letter of August 5th, 2010 and, more importantly, that the actual offer attached was in the standard form headed "*Notice of Offer to Settle—Part 36*." The duly completed form signed by counsel for the claimant meets all the requirements in the CPR, r.36.2(2).

8 The pro forma notice makes reference to a period of 21 days in the following way:

> "Take notice the (defendant/claimant) offers to settle the claim. This offer is intended to have the consequences of Part 36. If the offer is accepted within 21 days (must be at least 21 days) of service of this notice the defendant will be liable for the claimant's costs in accordance with Rule 36.10 of the Civil Procedure Rules."

It is apparent that the reference to 21 days in the notice relates to costs consequences.

9 In the letter of August 5th, that reference to 21 days had metamorphosed into the offer being "open for acceptance within 21 days." The claimant contends that the words "open for acceptance within 21 days" made it a time-limited offer, divorced it from Part 36 and placed it within the common law ambit. I disagree, and can put it no better than Rix, L.J. in *C* v. *D* (1) ([2012] 1 W.L.R. 1962, at paras. 53–54):

> "53 In my judgment, there is an entirely feasible and reasonable construction of the offer letter which avoids it being construed as a time limited offer . . .
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> 54 In the context of Part 36, it seems to me to be entirely feasible and reasonable to read the words 'open for 21 days' as meaning that it will not be withdrawn within those 21 days. Part 36 permits withdrawal within the 21-day relevant period, but only with the permission of the court. It seems to me that 'open for 21 days' is an obvious way of saying that there will be no attempt to withdraw within those 21 days. It is also a warning that after the expiry of those 21 days, a withdrawal of the offer is on the cards. Such a construction would save the Part 36 offer as a Part 36 offer and would also give to both parties the clarity and certainty which both Part 36 itself, and the offer letter with its reference to 'open for 21 days,' aspire to. It would leave the offeror entirely free to withdraw the offer immediately upon expiry of the stated period, or let it roll on for as long as it wished. At the same time it would assure the offeree that it had 21

> days to consider what it wanted to do, but was at risk if it had not accepted within that period."

10 Counsel seeks to distinguish *C* v. *D* (1) on the basis of the difference in meaning between the words "open for 21 days" and "open for acceptance within 21 days." He submits that in the present case, the use of the word "acceptance" converts the offer into a time-limited offer, whereas "open for 21 days" does not and relates only to the question of costs, presumably meaning that there is a period of at least 21 days during which the defendant remains liable for the claimant's costs until acceptance. Counsel relies on no authority for this proposition, and in the absence of any I am not persuaded. I can spot little material difference between the two phrases, and see no reason why the analysis of Rix, L.J. above should not apply equally to both. It is important not to split hairs in a retrospective attempt to make an otherwise simple phrase fit a submission which would have the effect of rendering an otherwise valid procedure invalid. Words should be given their ordinary and natural meaning and, as Stanley Burnton, L.J. said ([2012] 1 W.L.R. 1962, at para. 84): "Any ambiguity in an offer purporting to be a Part 36 offer should be construed so far as reasonably possible as complying with Part 36."

11 That view is re-inforced by Rix, L.J. in the same case, who had this to say (*ibid.*, at para. 55):

> "Another principle or maxim of construction which is applicable in the present circumstances is that words should be understood in such a way that the matter is effective rather than ineffective . . . There are numerous instances of the application of this maxim. This is how *Chitty on Contracts*, 30th ed., (2008), vol. 1, para. 12–081 refers to this rule:
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> > 'If the words used in an agreement are susceptible of two meanings, one of which would validate the instrument or the particular clause in the instrument, and the other render it void, ineffective or meaningless, the former sense is to be adopted.'"

12 There is not the slightest doubt in my mind that this was intended to be a Part 36 offer, not only because of counsel's referral to it as such, but, more importantly, because counsel opted for the standard form which he then proceeded to fill in, meeting all the requirements of the rules. As a reasonable solicitor, he must be assumed to have known the legal context of this. The references to 21 days do not, for the reasons given above, invalidate the Part 36 status and I find such a reference to be no more than an indication consistent with a warning that the offer could be withdrawn after 21 days (*C* v. *D* (1) (at para. 85, *per* Stanley Burton, L.J.)). I find this to be a valid Part 36 offer. The next question is whether such an offer was withdrawn or superseded.

13 On October 25th, 2010, that Part 36 offer was rejected by the defendant, who made a counter Part 36 offer. By letter of November 2nd, 2010, the claimant rejected the defendant's counter-offer in these terms: "I refer to my letter dated August 5th, 2010 and the Part 36 offer attached to it . . . I am instructed to re-open the above-mentioned for a further 21 days from today . . ."

14 On February 28th, 2011, the defendant accepted the claimant's offer. On the same date, having received notification of the acceptance, the claimant emailed the defendant indicating that—

> "our first Part 36 offer on liability in the claimant's favour was made on August 5th, 2010—this offer had lapsed before your client rejected it on October 25th, 2010 . . . On November 2nd, that same offer was re-opened for a further 21 days . . . Your client now purports to accept it more than three months after it lapsed."

15 For the claimant it is said that even if the court were to find (as it has) that the offer of August 5th was a valid Part 36 offer, the offer of November 2nd was not, because the requirements of the CPR had not been fulfilled.

16 I find this argument entirely devoid of merit. The letter of February 28th makes it clear that the offer made on August 5th was made as a Part 36 offer, and this court has so found. Intrinsic in the nature of a Part 36 offer as discussed above is that it is not a time-limited offer. It therefore remains alive until withdrawn and is not subject to lapse. Pursuant to the rules, a Part 36 offer can be withdrawn before expiry of the relevant period only if the court gives its permission and after expiry of the relevant period without the court's permission (the CPR, r.36.3(5)–(6)), but in any event it is clear from the CPR, r.36.9(2) that—"subject to rule 36.9(3), a Part 36 offer may be accepted at any time (whether or not the offeree has subsequently made a different offer) unless the offeror serves notice of withdrawal on the offeree." Under the CPR, r.36.3(7), the offeror withdraws his offer by serving written notice of the withdrawal or change of terms on the offeree.

17 It is self-evident, therefore, that in the absence of notice of withdrawal from the offeror or permission for withdrawal from the court, the Part 36 offer, once made, remains on the table. There is no basis in law for saying that the Part 36 offer of August 5th, 2010 lapsed through passage of time or that the letter of November 2nd constituted a "re-opening" of the original offer. The original offer could not be re-opened because it had never been closed by service of notice of withdrawal.

18 The point was reinforced by Moore-Bick, L.J. in *Gibbon* v. *Manchester City Council* (2) ([2010] 1 W.L.R. 2081, at para. 16):

> "In my view, attractive though these arguments are, they cannot be

reconciled with the clear language of Part 36, or indeed with the scheme which it embodies. Rule 36.9(2) is quite clear: a Part 36 offer may be accepted *at any time* unless the offeror has withdrawn the offer by serving notice of the withdrawal on the offeree. Moreover, it may be accepted whether or not the offeree has subsequently made a different offer, a provision which is contrary to the general position at common law. The rules state clearly how a Part 36 offer may be made, how it may be varied and how it may be withdrawn. They do not provide for it to lapse or become incapable of acceptance on being rejected by the offeree. That would be the case at common law, but it is inconsistent with the concepts underlying Part 36, which proceeds on the footing that the offer is on the table and available for acceptance until the offeror himself chooses to withdraw it. There are good reasons for that. An offer which appears unattractive when made, and which is therefore rejected, may become more attractive as the proceedings progress and the parties reassess the strength of their respective cases. A defendant who chooses to leave his offer on the table may tempt the claimant into accepting it, with the benefit to himself of the consequences for costs of an offer made at an early stage. Part 36 allows a defendant (or for that matter a claimant) to decide whether to leave his offer open for acceptance or to withdraw it and make another offer later. To import into Part 36 that common law rule that an offer lapses on rejection by the offeree would undermine this important element of the scheme."

19 For these reasons, I find that the offer of August 5th was a valid Part 36 offer, which was not withdrawn and which was capable of acceptance. That acceptance was communicated by the defendant's solicitors to the claimant's solicitors by the letter of February 28th, 2011.

20 The final point which requires determination is the submission of the claimant that the acceptance by the defendant of the Part 36 offer is ineffective because it does not comply with the rules, specifically the CPR, r.36.9(1), as read with Practice Direction 36A, which supplement the CPR, r.36, and provide:

(i) CPR, r.36.9(1): "A Part 36 offer is accepted by serving written notice of the acceptance on the offeror."

(ii) Practice Direction 36A, 3.1: "Where a Part 36 offer is accepted in accordance with rule 36.9(1) the notice of acceptance must be served on the offeror and filed with the court where the case is proceeding."

21 It is apparent that notice of acceptance was served by the defendant on the claimant under cover of the letter of February 28th, 2011. It is not in dispute that notice of acceptance has not, to date, been filed in court. Counsel for the defendant indicates that the onus of filing the notice of acceptance in court will be discharged by the filing of a consent order.

Ingenious though this plan may be, I am not persuaded it is what the rules intended. That said, counsel for the claimant has provided the court with no authority to suggest that a failure to comply with a limb of the Practice Direction has the inevitable resultant effect of invalidating the entire offer process. Of particular significance here is that notice of acceptance was communicated to the claimant in writing in compliance with the rules. The claimant is, therefore, on notice that the offer has been accepted. Thus far, the Part 36 process has been followed.

22 To render this whole process invalid because notice has to date not been filed in court is to my mind disproportionate, opportunistic and contradictory to the parties' intentions as evidenced by the correspondence referred to above. Crucially, the Practice Direction places no time limit on the requirement of the filing of acceptance in court, and, having been put on notice that the offer was being accepted, there has been no indication of any detriment which might be caused to the claimant by notice not having been filed in court to date. I can see no reason why notice should not be filed in court now. For these reasons the claimant's submissions on this point fail.

23 I order that, following acceptance of the Part 36 offer, the claim be stayed upon the terms of the offer.

Orders accordingly.
