



## ***Carver v BAA* [2008] EWCA Civ 412**

### **A "more advantageous" approach to Part 36?**

**STEVEN SNOWDEN**



Steven's practice is predominantly in the areas of personal injuries and industrial disease, with some associated insurance and professional negligence work. He is recognised as a leading junior in the field of personal injuries in the Chambers & Partners and Legal 500 guides. He acts for both Claimants and Defendants and his practice involves a substantial amount of Court work, appearing in cases which range from maximum severity claims of the highest value down to modest multi-track claims.

#### **Summary**

Steven appeared successfully at first instance and in the Court of Appeal for BAA in a case which establishes the correct approach to the new wording of CPR 36.14. The Court of Appeal have held that the test of whether an award of damages is "more advantageous" than an offer is a broader one than a simple comparison of the financial value of the award against the financial value of the offer. The judgment establishes that a defendant whose Part 36 offer is beaten by a margin may nonetheless recover its costs on the proper construction of that rule, without having to have recourse to arguments over conduct under CPR 44.3. The case also re-emphasises the importance of both parties engaging in sensible dialogue about settlement, with costs penalties if they do not.

## Background

The Claimant was an air hostess who fell and injured her ankle on entering a lift at Gatwick airport. Liability was admitted almost immediately. The claim was initially presented as one of low value for a short-term ankle injury, but the Claimant then obtained further medical evidence as to prognosis and the need for future surgery, substantially increasing the claim's value. The Defendant applied successfully for permission to adduce its own expert medical evidence, and its expert took a different view of the severity of the Claimant's ankle condition and its attribution to the accident. Eventually the Claimant's expert agreed with the Defendant's and the claim as advanced at trial as a relatively modest one, but by that stage the Claimant had incurred very substantial sums of costs. The Claimant declined to put forward a realistic valuation of her case. The Defendant had made Part 36 offers at an early stage which it could not increase without exposing itself to a liability for those costs. The claim was therefore contested at trial.

## The Judgment

The award of £4,686 made by HHJ Knight QC exceeded the Defendant's most recent offer (after arguments over interest and over the date at which the award and the offer should be compared) by approximately £51. The Defendant ran arguments over CPR 44 and issues of conduct, but also argued that the change in the wording of CPR 36.14 for money claims, from the previous test of whether a claimant "does better than" a defendant's offer to the new test of whether a claimant obtains "a judgment more advantageous than" a defendant's offer, was important. HHJ Knight QC agreed with the Defendant's submissions and held that, in all the circumstances of the case, it could not be said that the Claimant had gained an advantage by fighting on, rather than accepting the Defendant's offer. He further agreed that, in broad terms, the Defendant had been the "winner" from the date of the most recent Part 36 offer, even though the award of damages exceeded it. Going one step back in time, he criticised the Claimant's conduct in failing to enter into discussions after the date of the Defendant's earlier (lower) Part 36 offer, and reflected that displeasure by making no order as to costs between the dates of the Defendant's two offers.

## The Court of Appeal

The Claimant's appeal was heard by Ward, Rix and Keene LJJ in January 2008, with judgment given on 22.4.08. The Court of Appeal accepted the Defendant's arguments and upheld HHJ Knight's ruling. In the course of his judgment (with which the other two agreed) Ward LJ indicated that:

- a) Some change in approach must have been intended by the change in the wording of the rule.
- b) The new test of "more advantageous" for money claims was (as Rix LJ had observed) an "open-textured phrase" which suggested a broad and subjective analysis.
- c) The old approach of simply comparing the financial value of the offer against the financial value of the award was no longer appropriate: *"Money is not the sole governing criterion."*
- d) Factors such as the time-consuming nature of litigation and its emotional and financial cost were among those to be taken into account.
- e) The fact that in this case the additional irrecoverable legal costs of pursuing the action for a further year would have exceeded the additional award of damages thereby recovered was clearly relevant.

## Comment

This judgment clarifies the new wording of Part 36 and will be of use to any defendant in any type of claim whose Part 36 offer is beaten by a margin. A much more subjective, case-by-case approach can now be adopted when considering whether a Part 36 offer has been beaten, and the financial sums will not, by themselves, be determinative. There will be some overlap with the usual costs arguments deployed under CPR 44.3, but this case establishes that the broader considerations are relevant under Part 36 itself. The case also serves as a salutary reminder that the Court will expect both parties to engage in reasonable and realistic dialogue about settlement, and will not be slow to penalise a party who does not do so.