Neutral Citation Number: [2021] EWCA Civ 1188

Case No: A3/2020/1284

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
His Honour Judge Dight CBE (sitting as a Judge of the High Court)
[2020] EWHC 1229 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2021

Before:

LORD JUSTICE NEWEY
LADY JUSTICE ANDREWS
and
LADY ROSE OF COLMWORTH

- -

Between:

RUSSELL DAVID EDWARD ADAMS	**Appellant**
- and -	
OPTIONS UK PERSONAL PENSIONS LLP (formerly OPTIONS SIPP UK LLP and CAREY PENSIONS UK LLP)	**Respondent**
- and –	
THE FINANCIAL CONDUCT AUTHORITY	**Intervener**

- -
- -

Gerard McMeel QC and Jay Jagasia (instructed by **Wixted & Co**) for the **Appellant**
Fenner Moeran QC (instructed by **Eversheds Sutherland (International) LLP**) for the **Respondent** (**Andrew Green QC** having also appeared at the main hearing)
The Intervener, although represented at the main hearing, did not appear at the further hearing on 20 July 2021

Hearing date: 20 July 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and Publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be Friday 30 July 2021 at 10:30am

Lord Justice Newey:

1. This judgment is supplemental to, and uses the same abbreviations as, the judgments we gave on 1 April 2021, with the neutral citation [2021] EWCA Civ 474. At that stage, we concluded that Mr Adams' appeal should be allowed in respect of the Section 27 Claim and, accordingly, that (a) the agreement entered into between Mr Adams and Carey concerning the establishment and operation of a SIPP was unenforceable against Mr Adams and (b) Mr Adams was entitled to consequential relief. The present judgment addresses that consequential relief and also the costs of the first instance proceedings.

2. There was a further oral hearing, on 20 July 2021, to consider these matters. By the time of that hearing, the parties had achieved a good deal of common ground. There was no dispute but that the consequential relief should be directed at putting Mr Adams in the position he would have been in if he had not transferred his pension provision from Friends Life; that Mr Adams should give credit for the £4,000 payment he received from CLP; that a report dated 23 April 2021 by Asset Risk Consultants ("ARC") could be used to assess what Mr Adams' Friends Life policy would have been worth; and that sums paid by way of restitution/compensation should be credited to Mr Adams' Carey SIPP rather than passing to Mr Adams personally. With regard to the last of these points, Mr Adams explained that, once the SIPP has the restitution/compensation, he will transfer the fund to the workplace pension to which he now belongs as an employee of Wincanton plc. For its part, Carey stressed, on the one hand, that payment into the SIPP instead of to Mr Adams himself would effectively give him what he would have had if he had not entered into the impugned transaction and, on the other hand, that an outright payment to Mr Adams would both give rise to tax problems and represent "pensions liberation by the back door".

3. In the course of the 20 July hearing, Mr Gerard McMeel QC, once again appearing for Mr Adams with Mr Jay Jagasia, sensibly accepted that the £4,000 which Mr Adams received from CLP in 2012 should be taken into account at that stage and so deducted from the amount which Mr Adams was to be assumed to have invested with Friends Life from then on. ARC calculated that, taking Mr Adams' Friends Life policy to have had a value of £55,507.06 on 31 May 2012, it would have had a transfer value as at 31 March 2021 of £99,524.16. The more appropriate approach, however, is to proceed on the basis that, by 31 May 2012, the Friends Life policy was worth only £51,507.06 (i.e. £55,507.06 less £4,000). On that footing, ARC's "Scenario B" is in point. That involved the transfer value as at 31 May 2012 being "adjust[ed] … down by £4,000 to reflect a retrocession payment, giving a starting value of £51,507.06". As to that, ARC concluded:

> "The notional transfer value as at 31st March 2021 for the Friends Life Policy number 9642849 based on a transfer payment date of 31st May 2012 and a valuation of £51,507.06 (after subtraction of £4,000 retrocession payment) at that date is £92,375.22".

4. In a further respect, there proved at the hearing to be no difference of real significance between the parties. Mr McMeel argued that Mr Adams was entitled to have the transfer from Friends Life to Carey reversed and, hence, to disavow the storepods

bought with the proceeds of the transfer. Carey, Mr McMeel submitted, should keep the storepods, and their value (if any) should be disregarded when calculating the amount which Carey should pay in compensation. In contrast, Mr Fenner Moeran QC, appearing for Carey, contended that the storepods remain in Mr Adams' SIPP and so their value must be taken into account when calculating the compensation due to him. When, however, the Court suggested that one way forward might be to order Carey to make a payment now of £92,375.22 less the estimated value of the storepods and for a subsequent adjustment when the storepods are sold to facilitate the transfer from the SIPP to Mr Adams' workplace pension, Mr Moeran voiced no objection. Since such an approach should achieve an economically equivalent result to that urged on us by Mr Moeran, I see no need to grapple with the points of principle underlying Mr McMeel's and Mr Moeran's differing contentions. They are better, I think, left to a case in which they matter. In the present case, it is convenient to adopt an approach such as I have outlined, not least because it removes the need to arrive at a definitive opinion, with only limited evidence, on the value of the storepods.

5. Even so, it is necessary to decide what the storepods should be *assumed* to be worth. Judge Dight concluded that the market value of the leases in January 2017 was £15,000. That, however, was 4½ years ago. Rather more recently, on 24 February 2020, Carey said in an email that it was valuing storepods at £430 each "[f]ollowing recent sales of Store First storage units at auction" and, on that basis, the value of the storepods in Mr Adams' SIPP was put at £2,580. In the circumstances, it seems to me that we should assume that the storepods are worth £2,580.

6. In my view, therefore, the appropriate course is to make an order along the following lines:

   i) Requiring Carey to pay £89,795.22 (i.e. £92,375.22 minus £2,580) into Mr Adams' SIPP now;

   ii) Requiring Carey to sell the storepods and add the proceeds of sale it receives into Mr Adams' SIPP;

   iii) Requiring Carey to make a further payment into Mr Adams' SIPP of the difference between £2,580 and the proceeds of sale of the storepods so added in the event that those proceeds are less than £2,580;

   iv) Granting the parties permission to apply in the event that the storepods are sold for more than £2,580.

7. Turning to the costs of the proceedings below, a good deal of the argument concerned a letter headed "Without prejudice save as to costs" and "Part 36 offer" which Mr Adams' solicitors sent to Carey's solicitors on 3 March 2016. The letter explained that Mr Adams was:

   > "amenable to compromising his claim on terms that:
   >
   > 1. Your client pays our client damages in the sum of £63,124 within 14 days of acceptance of this offer.

> 2. Your client takes ownership of the Storage Pods in question.
>
> 3. Your client pays our client's reasonable costs to be assessed in the absence of agreement".

The letter went on to state, among other things, that the offer was "made pursuant to Section I of Part 36 of the Civil Procedure Rules and is intended to have the consequences set out therein". It also warned that, if the offer were not accepted within the relevant period but Mr Adams achieved a better result at trial, indemnity costs, penalty interest and enhanced damages would be sought.

8. In their reply, dated 7 April 2016, Carey's solicitors referred to the offer "purportedly made pursuant Part 36 of the Civil Procedure Rules" and said this:

> "Notwithstanding the valid arguments which our client has in relation to liability … , our client cannot properly consider the Offer at the present time as your client has failed to quantify his loss – the Particulars of Claim simply state that '*Mr Adams is entitled to the return of the fund value of his PPP together with compensation representing the returns which the said fund would have earned but for the inception of the SIPP. Full particulars will be provided in the form of a Schedule of Loss hereafter*.' Our client cannot properly consider the Offer without the Schedule of Loss. Please provide it by return. We also request a breakdown of the Offer.
>
> In such circumstances your client cannot seek to enforce or rely on the adverse costs consequences in Part 36 against our client. Our client is aware of its responsibilities under the CPR and the need to properly consider settlement throughout the duration of this claim. However, it is unable to do so at all until your client has particularised his losses. We reserve the right to show this correspondence to the Court on the question of costs."

9. Mr McMeel argued that the letter of 3 March 2016 represented a valid Part 36 offer; that what Mr Adams is to obtain under this Court's order is "at least as advantageous to [Mr Adams] as the proposals contained in [his] Part 36 offer" (to use words in CPR 36.17(1)(b)); and that there should be the consequences for which CPR 36.17 provides. What is now CPR 36.17 (formerly CPR 36.14) is, so far as relevant, in these terms:

> "(1) Subject to rule 36.21, this rule applies where upon judgment being entered—
>
> …
>
> (b) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer.

(Rule 36.21 makes provision for the costs consequences following judgment in certain personal injury claims where the claim no longer proceeds under the RTA or EL/PL Protocol.)

(2) For the purposes of paragraph (1), in relation to any money claim or money element of a claim, *'more advantageous'* means better in money terms by any amount, however small, and *'at least as advantageous'* shall be construed accordingly.

…

(4) Subject to paragraph (7), where paragraph (1)(b) applies, the court must, unless it considers it unjust to do so, order that the claimant is entitled to—

(a) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;

(b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;

(c) interest on those costs at a rate not exceeding 10% above base rate; and

(d) provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below to an amount which is—

(i) the sum awarded to the claimant by the court; or

(ii) where there is no monetary award, the sum awarded to the claimant by the court in respect of costs—

Amount awarded by the court	*Prescribed percentage*
Up to £500,000	10% of the amount awarded
Above £500,000	10% of the first £500,000 and (subject to the limit of £75,000)

5% of any amount above that figure.

(5) In considering whether it would be unjust to make the orders referred to in paragraphs (3) and (4), the court must take into account all the circumstances of the case including—

(a) the terms of any Part 36 offer;

(b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;

(c) the information available to the parties at the time when the Part 36 offer was made;

(d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and

(e) whether the offer was a genuine attempt to settle the proceedings.

…

(Rule 44.2 requires the court to consider an offer to settle that does not have the costs consequences set out in this Section in deciding what order to make about costs.)"

10. It is also relevant to refer to CPR 36.1, 36.5 and 36.8. CPR 36.1 states that Part 36 "contains a self-contained procedural code about offers to settle made pursuant to the procedure set out in this Part". CPR 36.5, headed "Form and content of a Part 36 offer", is in these terms:

"(1) A Part 36 offer must—

(a) be in writing;

(b) make clear that it is made pursuant to 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 36.13 or 36.20 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.

> (Rule 36.7 makes provision for when a Part 36 offer is made.)
>
> (2) Paragraph (1)(c) does not apply if the offer is made less than 21 days before the start of a trial.
>
> (3) In appropriate cases, a Part 36 offer must contain such further information as is required by rule 36.18 (personal injury claims for future pecuniary loss), rule 36.19 (offer to settle a claim for provisional damages), and rule 36.22 (deduction of benefits).
>
> (4) A Part 36 offer which offers to pay or offers to accept a sum of money will be treated as inclusive of all interest until—
>
> > (a) the date on which the period specified under rule 36.5(1)(c) expires; or
> >
> > (b) if rule 36.5(2) applies, a date 21 days after the date the offer was made.
>
> (5) A Part 36 offer to accept a sum of money may make provision for accrual of interest on such sum after the date specified in paragraph (4). If such an offer does not make any such provision, it shall be treated as inclusive of all interest up to the date of acceptance if it is later accepted."

CPR 36.8 allows an offeree, within seven days of a Part 36 offer being made, to request the offeror to clarify the offer and, should the offeror not give the clarification requested, to apply for a Court order.

11. For my part, I am in no doubt that Mr Adams has beaten what was proposed in the 3 March 2016 letter. That letter expressed Mr Adams' willingness to accept a payment of £63,124. This Court's order will provide for Mr Adams to receive a total of £92,375.22. More to the point, ARC's assessment of "Scenario D" shows that, had matters been approached in March 2016 in the way in which the Court is doing so now, Mr Adams would have been entitled to £70,449.21, £7,325.21 more than Mr Adams was asking for. ARC stated its conclusion on "Scenario D" as follows:

> "The notional transfer value as at 31st March 2016 for the Friends Life Policy number 9642849 based on a transfer payment date of 31st May 2012 and a valuation of £51,507.06 (after subtraction of £4,000 introducer payment) at that time is £70,449.21."

The value of the storepods is irrelevant in this context since the 3 March 2016 letter proceeded on the basis that Carey would take these and so Mr Adams would derive no benefit from them.

12. It was Mr Moeran's submission, however, that the 3 March 2016 letter did not include an "offer" for the purposes of CPR Part 36. Mr Adams' proposal, Mr Moeran said, was never capable of being accepted and put into effect. It did not explain how Carey was to, or properly could, "[take] ownership" of the storepods and, had it been

implemented, would have resulted in funds which should have been in a registered pension scheme being put into Mr Adams' hands. In this connection, Mr Moeran emphasised that the 3 March 2016 letter referred to Carey "pay[ing] our client [i.e. Mr Adams]" £63,124. It was not suggested that the £63,124 should be credited to Mr Adams' SIPP.

13. As, however, Mr Moeran accepted, the 3 March 2016 letter satisfied each of the conditions set in CPR 36.5(1). More than that, it seems to me that a Part 36 offer can potentially leave more to be resolved than a contractual offer could. While contractual principles can be relevant to the interpretation of a Part 36 offer (see *Ho v Adelekun* [2019] EWCA Civ 1988, [2019] Costs LR 1963), CPR 36.1 explains that Part 36 contains a "self-contained code" and Part 36 nowhere stipulates that a Part 36 offer must have the certainty that a contractual offer requires. Further, the facility which CPR 36.8 provides for asking for clarification of an offer tends to confirm that something can be a Part 36 offer while yet needing to be clarified. I do not doubt that an "offer" can be so lacking in certainty as not to represent a Part 36 offer, but, on the other hand, a valid Part 36 offer can still, as I see it, leave some matters (especially of mechanics) to be further defined.

14. It is true that, in the present case, the 3 March 2016 letter said nothing about how the storepods would be put into Carey's ownership. Even supposing, however, that an assignment would have been needed, nothing in the terms of the storepod leases suggests that that would have been problematic. It is notable, too, that Carey's solicitors did not identify any difficulty about Carey "tak[ing] ownership" of the storepods when replying to the 3 March 2016 letter.

15. Mr Moeran's more significant objection to regarding the 3 March 2016 letter as a Part 36 offer relates to the fact that it spoke of Carey "pay[ing] our client" damages, not of money being paid into Mr Adams' SIPP. While, however, payment direct to Mr Adams might have been very disadvantageous from a tax perspective, it could not, as I understand it, have been stigmatised as unlawful "pension liberation" given that Mr Adams had already turned 55 years of age. In any event, the essence of what was proposed in the 3 March 2016 letter lay in the figure that Carey was being asked to pay (viz. £63,124), not whether the payment was to be to Mr Adams personally or into his SIPP. While, moreover, a payment into the SIPP would not have been *to* Mr Adams, it would nonetheless have been to his benefit and no "to" is to be found between "pays" and "our client" in the 3 March 2016 letter. Further, it is not apparent that Carey attached importance at the time to the distinction between paying £63,124 to Mr Adams personally and paying that sum into his SIPP. No concern on the point was expressed in the response to the 3 March 2016 letter from Carey's solicitors.

16. In the circumstances, the better view is, I think, that the 3 March 2016 letter was a Part 36 offer. That being so, we are required by CPR 36.17 to order that Mr Adams is entitled to the relief specified in CPR 36.17(4) unless we consider it unjust to do so. In deciding what order to make under CPR 36.17 (formerly CPR 36.14), "the court does not first exercise its discretion under Part 44": "[i]ts only discretion is that conferred by Part 36 itself" (see *Webb v Liverpool Women's NHS Foundation Trust* [2016] EWCA Civ 365, [2016] 1 WLR 3899, at paragraph 37). Also in point is the following comment by Briggs J in paragraph 13(d) of his judgment in *Smith v Trafford Housing Trust* [2012] EWHC 3320 (Ch):

> "Nonetheless, the court does not have an unfettered discretion to depart from the ordinary cost consequences set out in Part 36.14. The burden on a claimant who has failed to beat the defendant's Part 36 offer to show injustice is a formidable obstacle to the obtaining of a different costs order. If that were not so, then the salutary purpose of Part 36, in promoting compromise and the avoidance of unnecessary expenditure of costs and court time, would be undermined."

17. I did not understand Mr McMeel to press to any real extent for relief under CPR 36.17(4)(d). In any event, I would myself regard it as unjust to make an order under CPR 36.17(4) going beyond (a), (b) and (c) when Mr Adams is already to receive full compensation, by reference to the considerable returns which his Friends Life policy would have enjoyed had he not transferred out of it.

18. On the other hand, it was Mr McMeel's firm submission that Mr Adams should be awarded his costs of the proceedings below on the indemnity basis from 24 March 2016 (under CPR 36.17(b)) and interest both on those costs and on the money which Carey is being required to pay into the SIPP from 24 March 2016. He suggested that the interest rate should be 2% above base rate.

19. Mr Moeran argued that it would be unjust to make such orders against Carey. He stressed, in particular, that, notwithstanding what Carey's solicitors had said in their response to the 3 March 2016 letter, Mr Adams did not produce a document detailing his loss until shortly before the trial; that by October 2016 the litigation had come to be seen as a test case; and that Mr Adams lost in this Court as well as before Judge Dight on two of his three heads of claim. He pointed out that the matters which the Court is directed by CPR 36.17(5) to take into account when considering whether it would be unjust to make an order under CPR 36.17(4) include "the information available to the parties at the time when the Part 36 offer was made" and "the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated".

20. To my mind, however, it is not unjust to grant relief in accordance with CPR 36.17(4)(a), (b) and (c). A litigant should be able to seek to settle even a test case and, as *Webb v Liverpool Women's NHS Foundation Trust* shows, the starting point for the purposes of CPR 36.17(4) is that a claimant who beats a Part 36 offer should have "all his costs" on the indemnity basis. As for Mr Adams' failure to particularise his loss, Carey knew how much had been transferred to it (viz. £55,766.50) and the £63,124 for which Mr Adams was willing to settle was less than £7,500 more than this. Further, while there is no reason to think that Carey knew how Mr Adams' pension provision had been allocated as between different Friends Life funds, it would have been well-placed to work out roughly how his pension fund would have fared if left with Friends Life.

21. It follows that, in my view, Carey should be ordered to pay all of Mr Adams' costs of the proceedings below on the indemnity basis from 24 March 2016 and also to pay interest at 2% above base rate from the same date on such costs. Mr Adams should also, as it seems to me, be entitled to interest at 2% above base rate on the money which Carey is being ordered to pay into the SIPP, but only from 31 March 2021, the date used in ARC's "Scenario B". Requiring Carey to pay interest on those sums from

an earlier date would give Mr Adams interest on loss which he had not yet suffered and for a period in respect of which he is already to have the benefit of the appreciation which his Friends Life policy would have achieved. As regards the period before 24 March 2016, it seems to me that Carey should be ordered to pay 70% of Mr Adams' costs on the standard basis.

22. The next question is what sum Carey should be ordered to pay on account of costs under CPR 44.2(8). We were told that Mr Adams' costs below totalled £262,127.60. I would order a payment on account of £210,000.

23. Finally, Carey asked for a stay pending the determination of its application to the Supreme Court for permission to appeal. I have not myself, however, been persuaded that any stay is appropriate.

Lady Justice Andrews:

24. I agree.

Lady Rose of Colmworth:

25. I also agree.