# Costs: when the loser becomes a winner

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The general rule for litigation conducted before the Courts in England and Wales is that the unsuccessful party will be ordered to pay the costs of the successful party. But who is the 'unsuccessful party' where the defendant admits liability in a £15m claim but is only awarded to pay nominal damages?

This is precisely what happened in the recent case of *Marathon Asset Management v James Seddon and ors*. In this case, Marathon © spent c. £8m in its pursuit of its damages claim of £15m against Mr Bridgeman (D3) (a case in which this firm acted). D3 admitted liability for his wrongdoings very early on in the proceedings, so the claim principally concerned an assessment of quantum.

In his judgment, The Honourable Mr Justice Leggatt ordered D3 to pay to Marathon nominal damages in the amount of £1 only.

Furthermore, it transpired to the Court that D3 had also made a Part 36 offer half way through the proceedings in the amount of £1.5m. In circumstances where there was admitted wrongdoing on the part of D3, the question for the Court was whether the standard Part 36 Rules after the relevant period for acceptance should be varied, disentitling the successful party to none or only some of their costs.

## THE PARTIES' POSITIONS

C argued that, despite the award of nominal damages and the Part 36 offer, D3 should be liable for C's costs up to the relevant period for acceptance of the Part 36 offer, and that C should only have to pay 50% of D3's costs thereafter on the basis that D3 had brought the proceedings on himself by virtue of his wrongdoings and his attempts to conceal them.

C contended that they were right to have conducted the investigations they did and to go to trial because had they not done so, they would never have known the true extent of the wrongdoing. They argued that, if substantial use had been uncovered by the forensic inquiry (which was conducted at vast expense), it would have been pleaded at least as an alternative case and therefore it was right to go to trial and should, therefore, recover its costs for doing so. In respect of the post-Part 36 period, C's position was:

- that there was no general rule that a claimant who is awarded nominal damages should pay the defendant's costs, and that the Court should have regard to all the circumstances. In particular, C claimed that D3's conduct took this case out of the ordinary run because he had brought the case on himself by his conduct, which fuelled C's suspicions.
- given the nature of its business, clients and investors had a legitimate expectation that C would take all actions necessary to protect their confidential information and documents.
- to the extent that costs were incurred in issuing proceedings to recover Marathon's confidential information and identify the extent of its misuse, those costs were caused by D3 because he had denied, or (for the later period) not been open as to, the full extent of the misuse.

D3 argued that the Court is required to treat success in litigation not as a technical term, but as a 'result in real life' and with the exercise of common sense. A claimant who recovers nominal damages has in reality lost because the defendant has established a complete defence and he should, therefore, recover his costs.

In relation to the costs incurred post-Part 36, D3's position was clear: the Rules provide that if the claimant does not beat the offer, the court must order that the claimant pays the defendant's costs from the relevant date unless it considers it unjust to do so. In order to vary this rule, there must be something about the particular circumstances of the case which takes it out of the norm and the court's discretion is heavily circumscribed. D3 admitted liability for misuse of confidential information and had made it clear from very early on that any use he made of the documents was extremely limited, a position that C refused to accept (but which the Court did).

## JUDGMENT

The judge wasted no time in finding for the defendants stating that, in a commercial case such as this, an award of nominal damages is a defeat. Marathon's only objective with this claim was to win a financial 'jackpot' and it failed to do so. Therefore, the judge found that the defendants were successful and he approached the question of costs of the misuse claim on that footing, ordering that D3 pay Marathon's costs up to the point

when he admitted liability, and Marathon pay D3's costs thereafter. Given the findings made against D1 (James Seddon), Marathon was ordered to pay 50% of his costs up to the relevant period for acceptance of the Part 36 offer, and all his costs for the period thereafter.

However, the judge did exercise his discretion and allowed Marathon its costs incurred in respect of the period before which D3 had admitted liability, which happened very early on in the proceedings. It is also of interest to note that, in respect of Marathon's costs of investigating the alleged wrongdoing, which Marathon said it had to conduct in order to uncover the extent of the wrongdoing, the Judge found that a party which pursues a claim for damages for misuse of confidential information without evidence of any significant misuse, but in the expectation that such evidence will or may be uncovered through the litigation process, takes the risk that such evidence will not be uncovered because it does not in fact exist.

As the judge had awarded D3's costs in any event, there was no need to consider the effects of the Part 36 offer, at least as far as it concerned D3. However, the Judge noted that, notwithstanding the defendants' conduct, he would not have departed from the usual rule in any event, citing the judgment of Briggs J in *Smith v Trafford Housing Trust* that anyone seeking to depart from the usual consequences faces a *'formidable obstacle as the salutary purpose of Part 36 in promoting compromise and the avoidance of unnecessary expenditure of costs and court time would be undermined'.* The Part 36 offer was a 'game-changer' and cast the pursuit of the litigation in a very different light. The fact that Marathon refused the £1.5m offer in the pursuit of 'jackpot damages' made it fair to treat them as litigating entirely on their own risk. After receiving an offer to settle, instead of taking a realistic attitude, Marathon *'opened their mouths too wide'*. A sore message to any recipient of an offer to settle to put motives to one side and consider carefully and strategically that which has been put before you.

The judge went on to order the parties to pay interest from the date those costs were paid at the rate of 2% plus base rate and he refused permission to appeal.

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