EIP

IPEC Refuses to "Doff its Cap" – Stays Firm on Cost Limits

Equisafety v Battle [2024] EWHC 283 (IPEC)

Summary

This case was originally a trade mark and passing off dispute between two entities over the use of the word mark "mercury" in relation to high visibility equestrian products being marketed by the First Defendants in the UK. The present judgment deals with two issues on the costs of the trial as to quantum, following an earlier trial on liability, and reiterates certain rules regarding costs stage caps in the IPEC.

Background

Following a trial on liability in December 2021 at which it was held that the First Defendants did indeed infringe the Claimant's trade mark and that their activities in the UK constituted passing off, the Claimants elected for an account of profits to assess damages. The amount of these damages was decided by the court at a trial on quantum in July 2023 and set at £12,568 plus interest.

As the successful party at the trial on liability, the Claimant was also awarded its costs of that trial, less a sum to take account of points on which the First Defendant had succeeded at trial, totalling around £22,000.

The Claimant was also found to be the successful party at the trial on quantum, however, as it had failed to beat the amount put forward by the First Defendant in a Part 36 Offer,

the First Defendant was entitled to its costs of the trial on quantum following the expiration of that Offer.

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Issues

1. The First Defendant requested that the Court award interest on its costs of the trial on quantum, pursuant to CPR 36.17(3)(b), on the basis that the Claimant had failed to obtain a judgment more advantageous than the Part 36 Offer made and that it would not be unjust for the Court to make such an award.
2. The First Defendant also argued that the Claimant should be made to pay further costs incurred subsequent to the trial on quantum, citing what it called "unreasonable behaviour" on the part of the Claimant. This behaviour included, it was alleged, failing to provide proper costs schedules or to agree interest calculations and the fact that it had significantly failed to achieve an award of costs commensurate with the Part 36 Offer made by the First Defendant.

Decision

On interest, the Court held that while it would not be unjust in principle for the Claimant to pay interest on the First Defendant's costs of the trial on quantum, it was not possible to make such an award. In support, the Court reiterated the judgment of HHJ Hacon in Martin v Kogan (No.2) [2017] EWHC 3266, that the provisions of CPR 36.17(3) cannot be used to override the IPEC stage or overall costs caps.

In awarding the First Defendant an amount of £23,000 for its costs of the trial on quantum, the Court had granted the maximum sum allowable for each of the stages of the trial on quantum, according to the IPEC stage costs caps. There was therefore no scope to add interest to those sums.

As to the substantial further costs incurred by the First Defendant following the trial on quantum in July 2023, some £20,000 of which the First Defendant sought outside the IPEC cap, the Court held that, while the Claimant's handling of the proceedings following the quantum judgment may have been "ill-judged", such behaviour was not "truly exceptional" or "unusually bad" such as to meet the threshold required to disapply the IPEC costs caps.

The Court did however make an additional costs award of £2,000 in favour of the First Defendant for the costs thrown away as a result of the adjournment of the original form of order hearing, at the Claimant's request and with just 4 days' notice. It was made clear

however that this amount represented the amount that would take the First Defendant to the overall costs cap for an account of profits in IPEC and that, although the First Defendant's costs occasioned by the adjournment exceeded this amount, this was the maximum which could be awarded in the circumstances.

Analysis

This short judgment provides a useful reminder of how strictly the IPEC stage costs caps are enforced. Even with the backing of a successful Part 36 Offer, which usually puts a party in a very strong position in a costs dispute, it will not be possible to override the rigid IPEC costs cap rules in the absence of truly exceptional circumstances or an abuse of process. To do otherwise, as noted by HHJ Birss (as he then was) in Westwood v Knight [2011] EWPCC 11, would undermine one of the key objects of the costs capping framework, namely that it enables litigants and their advisors to have a level of certainty about the likely costs of litigation before an action is commenced.

This does not however weaken, or render less advisable, the making of Part 36 Offer in cases before the IPEC in the right circumstances. Parties are still incentivised to agree issues on a without prejudice basis, thereby saving considerable costs and court resources. It should be appreciated too that the costs ceilings work both ways and, should your Part 36 Offer fall short of the final amount, act to limit any costs bill which might be coming your way.

What should perhaps focus the minds of potential litigants is the fact that, in the end, the parties in the present case were each left with costs bills of roughly equal size (around £22,000). In the context of the damages ultimately awarded (around £12,000 plus interest), this should encourage others to approach the question of damages in such cases more sensibly and to limit costs as far as possible to the level of any caps which apply to their case, since the Court will rarely disregard them.