LUNCHTIME TRAINING

FRIDAY 21ST OCTOBER 2016

Part 36 Update

- **Sutherland v Khan (2016)**
- **Whiting v Carillionamey (Housing Prime) Limited (2016)**
- **Purrunsing v A'Court & Co (a firm) (2016)**
- **DB UK Bank v Jacobs Solicitors (2016)**

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Carrot and Stick Effect: Part 36 Offers

22nd July, 2016

Indemnity costs awarded when Part 36 offer accepted out of time.

The case of Sutherland v Khan [2016] source, a relatively small RTA Claim subject to the fixed costs regime, highlights the importance of making reasonable Part 36 offers at an early stage and the risks of letting a reasonable Part 36 expire.

During the proceedings the Claimant made a Part 36 offer that was subsequently accepted by the Defendant some 28 days after the expiry of the relevant period. The parties were not able to agree costs, and so the Claimant made an application to the court under CPR 36.13.

The key questions for the court were this; are there any reasons it would be unjust to make an award of costs to the Claimant, and are the costs to be assessed on the standard or indemnity basis?

CPR 36.17(5) refers to CPR 36.17(4), which includes an order for costs to be awarded on the indemnity basis from the date on which the relevant period expires. The Defendant argued that for the court to award indemnity costs there must have been some, 'bad faith, unreasonable conduct or something to warrant an indemnity costs order against the Defendants,' which was not the case here.

Nonetheless, DJ Besford concluded that the court did not have to find that the Defendant had, in some way, been guilty of inappropriate behaviour in order for indemnity costs to be awarded.

DJ Besford, after taking into account all the circumstances of the case in accordance with CPR 36.17(5), concluded that there would have to be some, 'pretty exceptional findings' for the court to deny the consequences of accepting a Part 36 offer out of time; the very fact that the Claimant obtains a 'windfall...does not constitute unjustness,' and it was held that the Claimant would receive fixed costs up to the expiry of the relevant period for

acceptance of the Part 36 and thereafter an indemnity costs award after the expiry date for acceptance.

If this approach is followed by the higher courts it will add weight to the effect of Part 36 offers as a means to stimulate parties to settle.

Here at Attain we are experienced in dealing with the complexities and the benefits of Part 36 offers. Contact us on 01664 565325 or visit http://www.attaincosts.co.uk/ for more information.

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Case No: A81YM424

In the COUNTY COURT at
KINGSTON UPON HULL

Lowgate
Kingston upon Hull
HU1 2EZ

21st April 2016

BEFORE:

DISTRICT JUDGE BESFORD

Miss S L Sutherland	Claimant
v	
Z A Khan	Defendant

Judgment

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No. of folios in transcript: 43
No. of words in transcript: 3114

1. **District Judge Besford:** I apologise to the advocates for keeping them waiting, but I thought it was more important to give a decision today, rather than delay. It goes without saying that I have been assisted greatly by the submissions of both counsel, and the skeleton arguments. As I have already commented, I found the skeleton argument of Mr Smith of greater assistance than that of the claimant's solicitors, which being considerably longer is anything but a 'skeleton argument'.

2. The issue, I am told, is one that would appear not to have been argued previously and I echo the thoughts, I think of the Court of Appeal, that part 36 was meant to bring clarity to the parties, as opposed to bringing increasing amounts of satellite litigation.

3. Looking at this particular case, this is a claim in respect of a low value RTA. The brief details are that it was submitted to the portal on 31st July 2013, but subsequently came out on the issue of proceedings. The claim was defended, of sorts, as it was allocated and directions given. I understand that the bulk of the directions were complied with and pre-trial checklists were subsequently lodged. Some two days after the pre-trial checklists were lodged, the claimants made a compliant part 36 offer in the sum of £2,475.

4. The chronology thereafter becomes a little hazy, but both advocates accept that the offer was accepted by the defendants outside of the 21 day prescribed period by some 28 or 30 days. It is assumed, if only because of the silence on Mr Latham's brief, that the damages were thereafter paid.

5. Today the claimant makes an application to seek an order for costs in accordance with part 36 to include the additional benefits that accrue. The issue is the extent of any additional benefits the claimant is entitled to, and in particular, whether the claimant is limited to recovering fixed, standard or indemnity costs.

6. This, as I have already alluded to, was an RTA claim, which comes within part 45.29A of the rules. Under 45.29B, costs are limited to fixed costs under 45.29C and disbursements in accordance with 45.29I. There are however certain exceptions. The relevant exception is possibly 45.29J where the court considers there are 'exceptional circumstances'. Part 45.29, section IIIA does not incorporate any provision in respect of a claimant's costs flowing from any offers whether part 36 or otherwise. This is despite provision being made in respect of a defendant's part 36 offer.

7. The claimant made a valid part 36 which was accepted out of time, but prior to trial. My understanding, which I think is agreed by all the advocates, is that the proceedings on acceptance of that offer fall to be stayed under part 36.14. In such circumstances parties are encouraged to agree and pay costs. Where, as in this case, agreement is not reached part 36.14(5) provides:

> "Any stay arising under this rule will not affect the power of the court
> a) to enforce the terms of a part 36 order, or
> b) to deal with any question of costs, including interest on costs, relating to the proceedings."

8. As the parties have been unable to agree costs, the claimant issued their application under 36.14(5)(b) and 36.13(5).

9. On the issue as to fixed or other costs, Mr Smith maintains that the claimant in seeking additional costs/benefits is seeking to recover an amount pursuant to part 45.29J. The provision of 45.29J(1) allows the court:

> "If it considers that there are exceptional circumstances making it appropriate to do so, the court will consider a claim for an amount of costs (excluding disbursements) which is greater than the fixed recoverable costs referred to in rules 45.29B to 45.29H."

10. In broad terms, that is what the claimants are seeking. They are seeking to claim costs in excess of fixed costs. Mr Smith argues that they could have specifically applied under 45.29J, but accepts that under 45.29J there will be different considerations at play. The burden will be upon the claimant to show that there are exceptional circumstances to warrant an amount greater than fixed costs. Also 45.29K provides that even if there are exceptional circumstances, there are penalties if the claimant does not recover 20% or more that the amount of the applicable fixed costs.

11. It was initially thought that the claimants were not applying under part 45.29J, although it has been pointed out that part 45.29J costs are sought as an alternative in the claimant's application and substantial skeleton argument. The first issue is therefore whether costs are being sought under part 36.13 and 36.14 or part 45.29J.

12. My view is that part 45.29J is relevant when looking to exceed costs that ordinarily fall within part 45.29. The whole tenor of the claimant's application is that they are seeking an award of costs under part 36, which is a self-contained code. In my view, it would not make sense if, in reality, the claimants were seeking to proceed under 45.29J, an application of general relevance and in respect of which the claimant has to surmount a higher hurdle. I am therefore satisfied that the claimant's application is under part 36 and not under part 45.29J.

13. Looking at the application under 36.13 or 36.14, I must firstly determine a liability for costs. Unfortunately, part 36, whilst dealing with situations where the claimant accepts out of time a defendant's offer, would appear to be silent as to a defendant accepting a claimants' offers out of time or prior to trial. The nearest analogy is part 36.17, but it is accepted that part 36.17 can only apply where a judgment has been entered. That situation is not applicable here.

14. Looking at part 36.13 and part 36.13(5) and (6) in particular, I have to take into account all the circumstances of the case, including the matters listed in rule 36.17(5). The defendant submits that in reality if I am going to make an award of costs under 36.13(5), I have two choices. I can either make an award on the standard basis, or alternatively I can make an award on an indemnity basis. By dint of clever footwork, Mr Smith submits that if I was to make an award of costs on the standard basis, then I should look to part 45.29B which stipulates that 'the only costs allowed' are fixed costs. So, an order for standard costs would circuitously bring the claimant back to part 45.29B and fixed costs.

15. Mr Smith argues that I should make an order for costs on the standard basis, as an order for indemnity costs requires that I am satisfied that there has been some bad

faith, unreasonable conduct, or something to warrant an indemnity costs order against the defendants. Mr Smith rightly points out that, in brief, this action is not one where criticism can attach to either party. I am told the action ran its predicted course. The only criticism against the defendant is that they did not accept the part 36 offer within the relevant period. Mr Smith refers to the case of *Fitzpatrick Contractors Ltd v Tyco Fire v Integrated Solutions (UK) Ltd [2010] 2 Costs LR 115,* before Coulson J. Mr Smith helpfully took me to paragraph 17 onwards of that judgment. The very argument that is being put forward by the claimant for indemnity costs, namely the defendant's failed to accept an offer, failed. Any presumption that the claimant should be awarded indemnity costs was not followed by Coulson J.

16. Coulson J gave a number of reasons at paragraph 17 onwards why he did not follow such an argument. It is put by Mr Smith that *Fitzpatrick* involved a very large value claim, and one would have thought with the sums involved, if there was going to be an order for indemnity costs, that *Fitzpatrick* was the appropriate case for such an order.

17. Mr Latham, on behalf of the claimant prays in aid firstly what perhaps can be described as a swinging of the pendulum as to the importance and effect of part 36. In general part 36 offers are meant to have teeth; it is meant to encourage both parties to make and accept offers; and it is meant to incentivise parties to do so. Perhaps as an indication of the pendulum swinging *Broadhurst & Anor v Tan & Anor [2016] EWCA Civ 94,* is a recent example where the Court of Appeal refers to a "*generous outcome*" where a party obtains a more advantageous judgment or outcome.

18. In addition, in the course of submissions I was referred to *Petrotrade Inc v Texaco Ltd [2000] All ER (D) 724,* which is mentioned by Coulson J in *Fitzpatrick.* Coulson J dealt with these cases at paragraph 22:

> "I accept Mr Thomas's submissions that the other cases relied upon by Fitzpatrick, namely *Petrotrade, Hook* and *Read,* do not offer very much assistance to the central question here, which is whether a rebuttable presumption in favour of the indemnity costs, taken from a rule dealing with a situation following a trial, where the offer has not been accepted, should be inferred into a rule dealing with the position prior to trial, where the offer has been accepted. I do not accept that the present situation is analogous to those cases. In all three of them, the courts were endeavouring to apply the words of the old CPR 36.21, in a commonsense way, to achieve a just and sensible result and to prevent injustice; they all arose after a trial on the merits, (either on a summary or a full basis). In contrast, I conclude that the replacement of old CPR 36.21 - the new CPR 36.14 - does not apply to the present case, because there has been a settlement, and it has occurred before the trial. The claimant has therefore been spared the cost, disruption and stress of the trial."

19. The interpretation of these cases put forward by Coulson J is not, with respect how I read the more recent cases coming forth from higher courts. My understanding is, as I have alluded to, that there has been a tightening up as to the 'carrot and stick effect' of part 36 offers. To my mind, notwithstanding the comments of Coulson J, if there was no incentive or penalty there would be little point in a defendant accepting offers early doors, as opposed to waiting immediately prior to trial. It also seems to me unsatisfactory that there should be penalties flowing if you do not beat an offer at trial, whereas if you settle before trial there are none. This position does not sit

comfortably with the overriding objective of saving expense. In my view, I think that *Fitzpatrick* is perhaps a statement of the law as it was in 2009, but not necessarily the way the law in respect of part 36 is being interpreted in 2016.

20. In conclusion, I do not find that the court has to find that the defendant has, in some way been guilty of inappropriate behaviour or conduct capable of censor before I can consider making an order for costs on an indemnity basis.

21. Going back to 36.13(6):

> "In considering whether it would be unjust to make the orders specified in (5), the court must take into account all the circumstances of the case, including the matters listed in rule 36.17(5)."

22. If one looks at 36.17(5), that says:

> "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 ..."

23. Paragraph (3) is the costs consequences which flow in favour of the defendant and (4) is the costs consequences which flow in favour of the claimant. As I read 36.17(5), I am required to consider whether it would be unjust to make the orders that would ordinarily flow under 36.17(4), which provides:

> "The court must, unless it considers it unjust to do so, order that the claimant is entitled to ..."

24. There follows a list of benefits, including interest and indemnity costs.

25. So, by looking at 36.13(6), I have regard to all the circumstances of the case including the maters listed in part 36.17(5). Part 36.17(5) starts with the premise that the claimant is entitled to the benefits under sub-section (4) which should only be denied if it would be unjust. The factors that I have to have regard to under 36.17(5) are the terms of the part 36; stage of the proceedings; information; conduct; and whether the offer was a genuine to settle.

26. In this case the terms of the part 36 offer were clear and unambiguous and the parties accept it was a valid part 36 offer – nothing turns on this circumstance. The stage of the proceedings the offer was made and how long before the trial – the offer was made at an appropriate stage, presumably after the witness statements and medical evidence had been exchanged. Again, nothing turns on this circumstance. Information available to the parties – one assumes this was a very simple claim. Both parties had the material information to make and consider the offer at the time it was made. Conduct – again nothing has been brought to my attention to suggest it is relevant. Lastly, a genuine offer to settle – I do not know what the potential value of the claim was, but I have not been told that the offer made was in any way a sceptical one or anything other than a genuine attempt to settle the proceedings. I think as Mr Smith alluded to, in reality, the proof of the pudding is in the eating, in as much as the offer was made, and it was subsequently accepted.

27. It follows that for the court to deny the consequences that flow from accepting a part 36 out of time the court has to make pretty exceptional findings and there has to be some very good reason as to why it is unjust not to make the usual order. The very fact that the claimant obtains a 'windfall', most certainly does not constitute unjustness, under part 36.17.

28. For all these reasons, I find that the usual consequences of part 36 should flow. I hope the advocates will correct me if I am wrong, that what the claimant is seeking is fixed costs, up to the last section and thereafter, I think you are looking for indemnity costs, is that right?

29. **Mr Latham** : The position as it's set out in the written submissions, I think, points to …

30. **District Judge Besford** : I think that's what they're saying.

31. **Mr Latham** : Yes, if you'll forgive me a moment Sir. I don't want to get this wrong, because it's so important.

32. **District Judge Besford** : Be assessed … it's paragraph 79. Costs to be assessed on the indemnity basis from the end of the earliest applicable relevant period.

33. **Mr Latham** : Yes that's it.

34. **District Judge Besford** : And prior to that I think you're saying … I thought I'd read actually that you wanted fixed costs.

35. **Mr Latham** : I think … here we are paragraph 69. Oh not it's not that paragraph at all sorry. There is a paragraph in here, I'm afraid I'm rather struggling to see the wood for the trees, which deals with the difficulty that might arise if you only assess part of the costs. But I think it's also right for me to acknowledge that in *Broadhurst,* that's exactly what the court did.

36. **District Judge Besford** : *Broadhurst*, that's the way they went. Now the other way round is, which we discussed at the very beginning, is to give you standard costs and that comes within my discretion as the assessing judge, doesn't it?

37. **Mr Latham** : It does. Yes, it's this paragraph of the judgment in *Broadhurst*, paragraph 33. It refers to …

38. **District Judge Besford** : That's under a different rule.

39. **Mr Latham** : It is. It goes to the difficulty … here we are, paragraph 31:

> "As we have seen, Judge Robinson considered that Parliament could not have intended a claimant should recover indemnity costs in a 3A case because of potential difficulties such as interpretation entail. I accept that there are bound to be some difficulties of assessment, where the costs are partly fixed and partly assessed, but I also accept the submission of Mr Williams and the written submissions of Mr McQuater on behalf of the

Association of Personal Injury Lawyers that these are overstated by Judge Robinson."

40. **District Judge Besford** : Then he goes on to say:

> "Where a claimant makes a successful part 36 offer, in a section 3A case, he will be awarded fixed costs to the last staging point provided by rule 25.29C."

41. **Mr Latham** : Yes and then he will be awarded costs to be assessed on the indemnity basis, in addition, from the date the offer became effective.

42. **District Judge Besford** : I didn't quite know what you were pushing me for, but I think I have to be guided by that.

43. **Mr Latham** : Well, I think the skeleton has sought indemnity costs, but I accept what the Court of Appeal says, which post dates the skeleton to some extent. I don't think that particular paragraph has reworked since *Broadhurst.*

44. **District Judge Besford** : In the alternative, if I give them to you on a standard basis, I think I would have to have regard to the quantum of costs set out in the fixed regime.

45. **Mr Latham** : Yes.

46. **District Judge Besford** : I don't know what your costs are, but whether it would be reasonable and proportionate to allow an amount in excess of that.

47. **Mr Latham** : Which exceeded that yes. I think it's probably sensible to have the fixed costs brought to the point and then the indemnity after.

End of judgment

We hereby certify that this judgment has been approved by District Judge Besford.

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A Lingering Affair: Part 36 & Late Acceptance (http://pic.legal/a-lingering-affair-part-36-late-acceptance/)

(http://pic.legal/a-lingering-affair-part-36-late-acceptance/)

The late acceptance by the Defendant of a Part 36 offer in *Whiting* v *Carillionamey (Housing Prime) Limited* (unreported) resulted in a decision on costs that has seen both sides debate the matter furiously. It's an issue that won't be going away anytime soon either, as Sean Linley, Costs Consultant, PIC (http://pic.legal/why-choose-us/our-people/#), reports.

Late Acceptance of Part 36 – Indemnity Costs or not?

Those who follow some of the prominent legal blogs will no doubt already have heard of the case of *Whiting v Carillionamey (Housing Prime) Limited (Claim No B80YM364)* (recently reported by Andrew Hogan on his blog (http://costsbarrister.co.uk/uncategorized/late-acceptance-of-part-36-offers-and-indemnity-costs/))

The bottom line of the case was that late acceptance of a Part 36 offer by a Defendant did not equate to indemnity costs.

This has led to some intense debate between those who act for claimants and those who represent defendants. Understandably, it was a decision largely applauded on one side and met with outcry on the other.

The What

On 6 September 2012, the Claimant sustained personal injury. The Claimant had fallen over owing to some missing concrete slabs. It wasn't a high value claim with the Claimant suffering soft tissue injuries. On 23 June 2015, the Claimant made a Part 36 offer to settle the claim for £3,000.00. This settlement was accepted by the Defendant on 18 May 2016 (some 10 months late and around a month before the proposed trial window).

The matter proceeded to a hearing on 7 June 2016 in order to deal with the issue of costs. The District Judge ordered that the Defendant do pay the Claimant's costs, including the costs of the hearing, to be assessed on the standard basis up to 14 July 2015 (the date of the expiry of the relevant period) and thereafter on an indemnity basis.

The decision was appealed by the Defendant on the basis that late acceptance of a Part 36 offer alone was not the basis for making an award of indemnity costs. At Appeal the Court agreed with the Defendant with the Claimant awarded costs on the standard basis throughout.

It should also be noted at this juncture that this was not a fixed costs case.

The Defendant's case

The Civil Procedure Rules themselves in some ways support the Defendant's position.

CPR 36.17 deals with the cost consequences following judgment which sets out explicitly that indemnity costs *must* be awarded by the Court where judgment against the Defendant is at least as advantageous than a Defendant's Part 36 offer.

This, however, only concerns cases that are won at trial. Where an offer is accepted late by a Defendant, the CPR is silent.

One of the leading authorities on the awarding of indemnity costs remains the case of *Excelsior Industrial and Commercial Holdings* v *Salisbury Hammer Aspden and Johnson [2002] EWCA Civ*. The case itself dealt with the old Part 36 rules but its relevance is still felt.

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Lord Woolf stated in the judgment that the absence of any reference to an indemnity basis in CPR 36 20 (the precursor to CPR 36 13 that details the consequences of the acceptance of a Part 36 offer), that

> *"In normal circumstances, an order for costs which the court is required under that Part to make, unless it considers it unjust to do so, is an order for costs on the standard basis. That means that if the court is going to make an order for indemnity costs, as it can in a case where Part 36 20 applies, it should do so on the assumption that there must be some circumstance which justifies such an order being made."*

If late acceptance on its own doesn't warrant an indemnity costs order, what does? What is a 'circumstance' that justifies such an order being made?

Lord Woolf spoke of the circumstances of the case in general with reference to CPR 44.3(4) that today can be found at CPR 44.4. A Claimant would point to the fact that where 'conduct' is referred to there is no reference to 'bad conduct'. A Defendant would argue that the award of an indemnity costs order where a Part 36 offer is accepted late is not a significant enough conduct issue in isolation and resultantly a departure from the usual costs order would be unjust.

Lord Woolf confirmed that the threshold for an indemnity award is high when he said:

> *"It follows from all this that in my judgment it will be a rare case indeed where the refusal of a settlement offer will attract under Pt 44 not merely an adverse order for costs, but an order on an indemnity rather than standard basis."*

The other issue that a Defendant can draw attention to is, where time based costs are awarded, they will remain liable to pay all costs up to the acceptance of the Claimant's Part 36 offer. To this end the Claimant loses nothing whilst the Defendant has to pay costs for the entire period (and resultantly is already penalised for late acceptance). Whether that penalty goes far enough remains contested.

The Claimant's case

The other side is that late acceptance must have consequences otherwise it disincentives the use of Part 36. The Judiciary has made it abundantly clear that failing to engage in ADR will carry consequences. It should surely follow that where a Part 36 offer is a 'genuine attempt at settlement' that penalties should exist where a Defendant has accepted an offer out of time. Indeed, penalties exist for Claimants whereupon the Defendant is awarded costs (on a standard basis) for time spent post expiry of the relevant period.

One of the more recent cases that dealt with this issue with a favourable outcome for the Claimant was *Sutherland v Khan*. District Judge Besford stated:

"If there was no incentive or penalty there would be little point in a defendant accepting offers early doors, as opposed to waiting immediately prior to trial. It also seems to me unsatisfactory that there should be penalties flowing if you do not beat an offer at trial, whereas if you settle before trial there are none. This position does not sit comfortably with the overriding objective of saving expense. In my view, I think that Fitzpatrick is perhaps a statement of the law as it was in 2009, but not necessarily the way the law in respect of part 36 is being interpreted in 2016."

He concluded:

"It follows that for the court to deny the consequences that flow from accepting a part 36 out of time the court has to make pretty exceptional findings and there has to be some very good reason as to why it is unjust not to make the usual order. The very fact that the claimant obtains a 'windfall', most certainly does not constitute unjustness, under part 36.17."

Unsurprisingly, District Judge Besford awarded costs, to be assessed on an indemnity basis from the end of the relevant period.

If common sense prevails then some form of penalty is the only way to incentivise both Claimants and Defendants to engage with Part 36 in a meaningful way. A Claimant is incentivised to put forward a genuine attempt at settlement whilst a Defendant has to consider the consequences of not giving due consideration.

Should a Claimant not be applauded for seeking to settle a matter promptly and rewarded for taking this approach? A Defendant has 21 days to consider a Part 36 offer without penalty (as does the Claimant) and if the consequences are taken away or diluted what incentive is left?

The Finale

There is a clear tension between what is just and incentivising parties to seek settle claims at an early stage. In *Sutherland*, the stakes were raised again given that it gave Claimants the opportunity to recover monies in excess of fixed costs.

The purpose of Part 36 was to incentivise both Claimants and Defendants to seek to settle claims early in an effort to both minimise costs and save Court time. There is a real danger that if there are no consequences for late acceptance, Claimants may look to steamroll matters to trial (particularly in fixed costs cases). This is not an approach to be endorsed or recommended but removing incentives to make sensible Part 36 offers at an early stage could have an adverse effect for all.

Perhaps the simplest solution of all would be to address the rules themselves. Satellite litigation could be avoided if the consequences of late acceptance were clearly defined in Part 36 of the CPR.

Whilst it may be unjust for a Defendant to pay indemnity costs where a Part 36 offer is accepted a day late, it is equally likely in the same circumstances that the award for indemnity costs would be so negligible it would have no effect (if any at all). The certainty of the rules would arguably negate any adverse effect to a Defendant. Such a simplistic revising of the rules would incentivise Claimants and would force Defendants to carefully consider any Part 36 offers made.

However, such a punitive and Draconian approach could run the risk of dis-incentivising Defendants in accepting Part 36 offers. If the 21-day relevant period elapsed, then it could become more commercial to run the risk of taking a claim to trial (depending upon the stage of the claim and when the Part 36 offer was made). The Claimant view to this is a simple one. The Defendant should have proper regard to the Part 36 when it is made. Clearly this dilutes the issue as there are a multitude of factors to give consideration to. However, it does highlight the difficulty in solving a problem where the different parties involved want contrasting outcomes.

This is not an issue that will go away. Indeed, there are cases presently awaiting appeal that will no doubt shape this fascinating narrative further. One certain point is that Claimants and Defendants are unlikely to find common ground and with so much at stake, litigation on the issue won't slow down any time soon. The next chapter is eagerly awaited.

For further information and to discuss the cost implications of your case under a Part 36 offer late acceptance, please contact Sean Linley (mailto:sean.linley@pic.legal) or call 03458 72 76 78

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A Blog about Civil Procedure, Costs, Limitation, Sanctions & Evidence by Gordon Exall, Barrister, Zenith Chambers Leeds & Hardwicke Building London.

CLAIMANT'S PART 36 OFFERS: WHEN HAS THE CLAIMANT BEATEN ITS OWN OFFER? AN INTERESTING QUESTION

July 4, 2016 · *by* gexall · *in Assessment of Costs, Costs, Part 36* · *4 Comments*

The judgment of HH Judge Pelling QC in Purrunsing -v- A'Court & Co (a firm) [2016] EWHC 1582 (Ch) considers the impact of interest on a claimant's Part 36 offer. Should the court simply compare the offer with the sum awarded at trial or should it take into account the interest that has accrued in the supervening period?

"It is in the highest degree unlikely that it was intended that the applicability of the enhanced costs regime would depend on an entirely random event such as when judgment would be given following a trial."

KEY POINTS

- In considering whether a claimant had "beaten" its own Part 36 offer the Court ignored the interest that had accrued since the date of the offer.

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- So when the offer was £516,000 and the award at trial £518,983.01 the claimant had not "beaten" the offer because the only reason the award was higher was the accrued interest.
- The claimant's arguments seeking indemnity costs had led to unnecessary expense and the claimant was ordered to pay a percentage of the defendants' costs of the hearing.

THE CASE

- The claimant had succeeded at trial and recovered £470,000 plus interest of £48,983.01. Totalling £518,983.01.
- On the 20th May 2015 he had made an offer to settle in the sum of £516.,000 inclusive of interest.
- The court held a separate hearing to deal with the issue of costs, including the question of whether the claimant had beaten its own Part 36 offer.

THE ISSUE IN RELATION TO PART 36

The issue was whether the court should find that the claimant had done "better" than the Part 36 offer.

11. **"Mr Flenley submits that in deciding whether this should be the outcome it is necessary to deduct the interest that has been awarded between the date 21 days after the Part 36 offer was made and the date of judgment and determine whether the offer has been bettered by the claimant by reference to the resulting figure. It is submitted that if this exercise is carried out correctly then it becomes apparent that the claimant has recovered less than his effective Part 36 offer and the enhanced costs provisions are of no application. Mr Hale adopts this submission so far as HOC is concerned. Mr Marshall on behalf of the claimant submits that this is an impermissible approach and that all that is required is to compare the sum offered on 20 May 2015 with the sum inclusive of interest that the claimant was left with at the date when judgment was given and if the latter figure is higher than the former then the claimant is entitled to an enhanced costs order."**

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- LATE ACCEPTANCE OF CLAIMANT'S PART 36 OFFERS: TWO CONTRASTING CASES & THE GREAT DEBATE

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THE DECISION: INTEREST IS TAKEN INTO ACCOUNT

14. The factual basis of Mr Flenley's submission is relatively straight forward. He says that in this case the last date for acceptance of the operative Part 36 offer was 10 June 2015, being the date identified by CPR r.36.5(1)(c). This is common ground and is correct given the terms of the offer letter. Judgment was handed down on 14 April 2016. This too is not in dispute. There were thus 309 days between the two relevant dates and Mr Flenley submits that it is necessary to deduct 309 days interest from the judgment sum (inclusive of interest) in order to test whether the claimant has done better than the offer. Mr Flenley submits that the interest inclusive judgment sum is £518,983.01. This again is common ground. Mr Flenley submits that the correct rate to adopt for the exercise he submits must be carried out is 3% being the interest rate that I directed should apply. I do not understand Mr Marshall to disagree with this point. In any event in my judgment it is correct for reasons that are obvious and results in a figure of £11,936.71. If this sum is deducted from the interest inclusive judgment sum then the resulting figure is £507,046.30. That being so, it is submitted that the offer sum was greater than the properly adjusted judgment sum and thus the claimant is not entitled to recover enhanced costs. I do not understand Mr Marshall to disagree with any of this if otherwise the approach is a correct one. As I have said already, his submission is that this approach is wrong in principle and that the only proper approach is to compare what was offered with what has been awarded and if what has been awarded is greater than what had been offered then that triggers the entitlement to an enhanced costs order.

15. In my judgment Mr Marshall's submission is mistaken and must be rejected. My reasons for reaching that conclusion are as follows. As is apparent from the extract from the Rules set out above, by CPR r.36.5(4) a Part 36 offer to pay money is deemed to include all interest down to the date when the relevant period for acceptance of the offer expires. In order to work out whether a judgment is more advantageous than such an

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offer it is necessary to ensure that the offer or the judgment sum is adjusted by eliminating from the comparison the effect of interest that accrues after the date when the relevant offer could have been accepted. In my judgment this is the effect of the words "... *better in money terms* ..."in CPR r. 36.17(2). If that is not done then comparing the offer with the judgment is not comparing like with like and thus it is not possible to assess whether the judgment is "... *more advantageous* ..."in money terms than the offer. Interest compensates for the loss of use of money over a given period. In theory at least interest that accrues due for the period between the last date when the offer could have been accepted and the date of judgment is neutral and so immaterial in deciding the question whether a subsequent judgment is "... *more advantageous* ..."than a previous offer. The only interest that is material is that included or deemed included within the offer.

16. If it was otherwise then whether an offer from a claiming party should be accepted by a defending party would depend not on an analysis of liability in respect of the claim but what in many cases will be entirely unpredictable namely the date when a trial takes place and what is perhaps even more unpredictable, when judgment will be handed down. An enhanced costs order is draconian in effect. Particularly draconian is CPR r.36.17(4)(d), which provides for the payment of an additional amount not exceeding £75,000 which is arrived at by applying a percentage to the sum (including interest) that has been awarded by the Court. It is in the highest degree unlikely that it was intended that the applicability of the enhanced costs regime would depend on an entirely random event such as when judgment would be given following a trial.

17. Although Mr Flenley's methodology is one way of arriving at the point at which advantageousness can be assessed, another way of arriving at the same point would involve taking the principal adjudged due (in this case £470,000) and adding to that interest at the rate adjudged applicable following the trial (here 3%) for the period down to the date by which the offer had to be accepted (here 10 June 2015). If this methodology was

adopted in this case then the outcome would be the same for the reasons identified by Mr Hale in paragraph 14.7 of his written submissions.

18. In those circumstances, I conclude that the claimant is not entitled to recover enhanced costs by reference to CPR r.36.17 as against ACC. The relevant Part 36 offer was sent to both defendants at the same time. Although an additional sum of £3,787.84 was recovered by the claimant as against HOC it is not suggested that made any practical difference once it is accepted that the assessment requires adjustment as described above. In those circumstances the discretionary issues that would otherwise have arisen had the enhanced costs regime applied do not arise.

A STING IN THE TAIL: THE COSTS OF THE HEARING TO ARGUE COSTS

The issue of costs was considered at a separate hearing. The judge ordered the claimant to pay a percentage of the costs of that hearing. Much of time spent at the hearing involved the claimant's (unsuccessful) application for indemnity costs. The claimant had made an application for indemnity costs independent of the argument in relation to Part 36.

42. Following the delivery of this judgment in draft to the parties, Mr. Hale applied for an order that the costs of and occasioned by the hearing on 27 May 2016 should be paid as to 50% by ACC and 50% by the claimant on the basis that HOC had succeeded in resisting the claim for costs to be assessed on the indemnity basis made by the claimant and against ACC in relation to the costs of the contribution proceedings. This stimulated both the claimant and ACC to submit that there should be no separate order in respect of the costs of the argument on 27 May, and ACC to submit in the alternative that the costs should be disposed of by an order requiring the claimant to pay 80% of the defendants' costs and ACC 20% of HOC's costs of the argument on 27 May.

43. In my judgment the hearing on 27 May was unnecessary and in consequence generated

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unnecessary and avoidable cost. The issues that arose could have been dealt with in a fraction of the time and at a fraction of the cost if they had been determined orally at the hand down of the judgment, as they should have been. If that was not possible because of the non-availability of Mr. Flenley, then the issues that arose could have been disposed of more quickly and at significantly less cost on the basis of written submissions, and in any event the hearing was needlessly over elaborate. It generated a lever arch file of authorities, comprehensive written submissions and lengthy oral submissions that lasted 5 1/2 hours. In reality, if the issues had to be determined at an oral hearing at all, the arguments that arose should have been dealt with in half that time.

44. Mr Marshall informs me that he suggested to the defendants that the remaining issues were ones that could be addressed on paper but that the defendants rejected this proposal. The defendants have not disputed this. That said, the points made by Mr. Marshall would have had more force had most of the hearing not been taken up with a problematic application for the claimant's costs to be assessed on the indemnity basis that failed. It had been open to the claimant to avoid the costs of the 27 May hearing by not making that application.

45. In those circumstances, I consider that all parties are responsible for the 27 May hearing taking place. In those circumstances, I am satisfied that a costs order ought to be made in respect of that hearing and, in the circumstances, I am satisfied that in principle, issue based provision ought to be made for the costs of the 27 May hearing.

46. In my judgment as between the claimant and HOC, the claimant ought to meet 50% of HOC's costs of and occasioned by the 27 May hearing. As best I can judge it that portion of HOC's costs of the 27 May hearing is properly attributable to the indemnity costs issue. Whilst in the end both defendants made essentially the same point that does not mean that HOC should not recover its costs of resisting the application made by the claimant against it since assessment on the

indemnity basis was sought against by the claimant against HOC and HOC was put to the trouble of resisting that application and did so using a different method to that advocated by ACC.

47. As between ACC and the claimant, in my judgment ACC ought to recover 40% of its costs of the 27 May from the claimant. I reach that conclusion because I consider that the claimant is entitled to recover his costs of successfully resisting ACC's application that the claimant should be deprived of some of its costs because he had pleaded an issue that was subsequently abandoned. The costs relevant to that issue were limited however, which is why I have dealt with it in that way.

48. Finally as between the defendants in my judgment HOC is entitled to recover the balance of its costs against ACC because it was successful in resisting a submission made on behalf of ACC concerning the costs of the contribution proceedings.

49. HOC ask me to assess its costs of the 27 May hearing and I do so in the sum identified by HOC in its revised costs schedule for the 27 May hearing. I arrive at the conclusion that the sum claimed is both reasonable and proportionate and is the correct sum claimed because I accept the submissions made by Mr. Hale in support of that contention. However, I direct that no sum shall be recoverable by HOC from the claimant until after agreement or completion of the detailed assessment of the claimant's costs and that the sum due from the claimant to HOC shall be set off against the sums due to the claimant by way of costs from HOC. The sum due to HOC from ACC shall be paid within 14 days of the date of the final order in these proceedings. The costs that ACC is entitled to recover from the claimant will be the subject of detailed assessment. Again there will be a direction that the sum found recoverable by ACC will be set off against the sums due to the claimant from ACC. However, there is a difficulty about this identified by Mr Marshall. ACC is indemnified only in respect of 90% of the sums found due from them to the claimant. Clearly if there are sums due to the claimant from ACC that have not been paid or which ACC says it will not or

cannot pay at the date when the set off is applied then to apply the set off without taking account of what is due but unpaid or cannot or won't be paid would unfairly penalise the claimant. In those circumstances, the best course is that any sum due from the claimant to ACC should be calculated net of any sum due from but unpaid or which won't or cannot be paid by ACC at the date of the calculation. "

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Tags: Conduct and costs, costs, Part 36

4 comments

Robin Torr · July 4, 2016 · 1 01 pm · *Reply* →

Hi Gordon,

Can you please clarify the figures in the blog post as you seem to suggest that even if interest has not been taken into account C would not have beaten their own offer (of £561k) as they were only awarded £518k inclusive of interest.

Should £561k read £516k?

If so, what would have happened, in your view, if C had offered £516k inclusive of interest (and was subsequently awarded £518k inclusive of interest, thereby meaning that they beat their own offer)?

I look forward to hearing from you.

Kind regards,

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gexall · July 4, 2016 · 1:41 pm · *Reply* →

Many thanks Robin,

I have clarified the figures (which are now set out above). The scenario is that the claimant offered £516,000 and received £518,000. He did not recover additional liabilities because the only reason the award was higher was the supervening interest.

Andy · July 4, 2016 · 1:43 pm · *Reply* →

The figures above are a bit confused. C's offer was £516K (not £561K). The award was £470K + interest £48,983.01, totalling £518,983.01 (which explains why C considered he had beaten his offer). Once interest which had accrued between expiry of the relevant period of the offer and the trial date was deducted, the award for comparison with the offer was £507,046.30.

Andy · July 4, 2016 · 3:02 pm · *Reply* →

Sorry – it was clearly being corrected as I typed.

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15 July 2016

Mr Hochhauser: "no authority on the point"

High Court: part 36 offer meant party could not accept earlier 'without prejudice' offer

The High Court has ruled that a claimant's part 36 offer was a counter-offer, meaning that an earlier common law offer by the defendants no longer remained open for acceptance.

Andrew Hochhauser QC, sitting as a High Court judge, said there was "apparently no authority directly on the point".

Mr Hochhauser said he preferred the arguments of counsel for the defendant law firm, Jacobs Solicitors, which was being sued for professional negligence by the bank DB UK.

"A part 36 counter-offer is still a counter-offer," he said. Mr Hochhauser said that because in the case "one is dealing with an initial common law offer, the impact on it of any counter-offer has to be addressed by reference to common law principles".

This meant that once the bank's part 36 offer was made in May 2016, the law firm's earlier 'without prejudice save as to costs' letter was no longer available to be accepted.

Delivering judgment in *DB UK Bank v Jacobs Solicitors* (claim no HC2013000358), Mr Hochhauser said the bank argued that that the law firm had "failed adequately to report" on the fact that the bank's borrower was purchasing a new-build property by way of a sub-sale and claimed over £162,000 in damages.

Jacobs argued that the bank would have made the loan in any event and pleaded contributory negligence. The law firm denied that the claim had been settled. The bank argued that it had.

The court heard that a few days before trial, at the end of last month, the bank's solicitors, Rosling King, sent Caytons Law, acting for for Jacobs, a letter saying that it was accepting a without prejudice offer made by Caytons in August 2015.

The judge rejected an argument by the bank that the offer was not capable of acceptance on the grounds of uncertainty.

However, Mr Hochhauser said that in May this year Rosling King sent Caytons a letter containing a part 36 offer. Counsel for Jacobs argued that this was a counter-offer, which had the effect of rejecting the earlier without prejudice letter.

The judge agreed that once the part 36 offer was made, the law firm's letter was no longer available to be accepted. As a result there had not been a settlement of the claim, which must proceed to trial.

By Nick Hilborne

Tags: counter-offer, High Court, part 36

One Response to "High Court: part 36 offer meant party could not accept earlier 'without prejudice' offer"

1 The decision in DB UK Bank v Jacobs Solicitors is logical, but begs the question (of the parties, not the judge): if this has arisen out of miscommunication, have the parties attempted to

settle it through mediation? There is clearly a willingness to find a settlement, since a WP offer was made and an attempt made (albeit too late) to accept it

David Hooper on July 19th, 2016 at 11:43 am

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