THE FUTURE OF PART 36 (PART 11)

Introduction

The last article in this series, which has been looking at the development and future of Part 36, reviewed recent case law which dealt with the making of offers, clarification of offers, withdrawing offers and the acceptance of offers.

This article picks up where the last finished, with the acceptance of offers, before moving on to consider some further important decisions on the cost implications of Part 36 offers as well as rulings dealing with the distinction, for costs purposes, between Part 36 offers and non-Part 36 offers.

Acceptance

The previous article concluded by reviewing the analysis of Part 36.11 (6) made in Bingham –v- Abru Limited (County Court at Sheffield 13 November 2015).

The same approach to the interpretation of that part of the rule was subsequently taken in Titmus –v- General Motors UK Ltd [2016] EWHC 2021 (QB).

In that case judgment was given on both an application by the claimant, that a sum of money offered by the defendant under Part 36 be promptly paid on acceptance of that offer, and an application by the defendant, that there be an extension of time for payment by the defendant of the sum which had been offered.

Elisabeth Laing J held that the court did not have discretion under Part 3 to extend time for payment following acceptance of a Part 36 offer, because Part 36 was a self-contained code.

Payment after 14 days from acceptance would be appropriate in one circumstance only, namely when that was agreed in writing between the parties under the terms of Part 36 itself.

There was no power to order the Part 36 sum be paid into court as security for the defendant's costs.

It was, however, appropriate to order that the claimant pay the defendant a reasonable sum on account of costs, but not as an equitable set off.

This is a further decision emphasising the self-contained nature of Part 36, hence the requirement that on acceptance payment of the sum due be made under the terms of the rule, namely 14 days.

The only exception is where the offer stipulates payment will be made more than 14 days after acceptance and the claimant agrees to treat that as a Part 36 offer (the claimant

gets the benefit of provisions as to costs even though, in these circumstances, payment of damages will be delayed).

A defendant, even though QOCS is unlikely to apply, will not be entitled to delayed payment on acceptance of a Part 36 offer. The best a defendant can hope for is that the court, having made the usual order for costs on late acceptance that there be a detailed assessment of the defendant's costs after the end of the relevant period, will order a payment on account of costs under Part 44.2 (8).

Another case focusing on the self-contained nature of Part 36, and the significance of this in the context of accepting offers, is DB UK Bank Limited -v- Jacobs Solicitors [2016] EWHC 1614 (Ch).

This was a judgment, given in a professional negligence claim, on whether the claim had been settled.

The claimant bank alleged the defendant solicitors had failed to adequately report that the claimant's borrower was purchasing a properly by way of a form of sub-sale.

The claimant alleged that a loan to the borrower would not have been made if the defendant had reported properly.

Whilst making a partial admission on breach of duty the defendant denied any causative loss, on the basis the claimant would have made the loan to the borrower in any event.

On 28 August 2015 the defendant made the claimant an offer which was expressed to be "without prejudice save as to costs" and indicated that, if accepted, payment should be made within 6 to 8 weeks (as the defendant's insurer was in default and funds would have to be obtained from the Financial Services Compensation Scheme).

Whilst the defendant recognised the offer was not compliant with Part 36 (which was stated to be solely due to the unusual circumstances surrounding the insurers, meaning payment could not be made within 14 days of acceptance) the defendant, nevertheless, stated that Part 36 consequences would be sought "should the matter proceed to trial".

Subsequently, on 19 May 2016, the claimant made a Part 36 offer to the defendant.

With the trial due to commence on 27 June 2016 the claimant, on 22 June 2016, sent the defendant a letter which stated:

> "Our client …accepts the offer contained within your letter dated 28 August 2015."

An issue was whether that offer had been implicitly rejected by the counter offer contained in the claimant's Part 36 offer made on 18 May 2016. On this point the judge recognised that at common law a counter offer will amount to rejection of an earlier offer, for example Hyde –v – Wrench (1840) 3 Beav.334. The judge rejected an argument

that this common law rule did not apply because the defendant's offer was a Part 36 offer, explaining:

> "When looking at the effect on a common law, non-Part 36 offer of a counter-offer, the common law rule had to be applied. It made no difference whether the counter-offer was one which was compliant with Part 36 or not. It was still a counter-offer and therefore amounted to a rejection of the earlier, common law, non-Part 36 offer. By contrast, the effect on a Part 36 offer of any counter-offer, whether Part 36 complaint or not, had to be addressed by reference to the Part 36 "self-contained" regime. That produced a different result and the justification was to be found in the potential benefits conferred on the maker of a Part 36 offer, or indeed counter-offer."

The judge also dealt with the question of whether, had it not been rejected, the defendant's offer would have remained open for acceptance. At common law it was not appropriate to construe the offer as containing such a time limit. The judge relied on the observation of Lord Neuberger in Arnold –v- Britton [2015] UKSC 36 when he had observed:

> "The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of highsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingy, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party."

On this basis the judge concluded that no time limit for acceptance could be implied and went on to observe:

> "Unlike a common law offer, a Part 36 offer may still be accepted after the date of expiry. If a party wishes to make a non-Part 36 offer, it can do so without any time limit, and it will still be efficacious from a business perspective, because it can always be withdrawn at any time prior to acceptance."

For these reasons the judge concluded that the claim had not been settled and it must, therefore, proceed to trial.

This decision is a further example of the important distinction for the purposes of acceptance, as well as costs consequences, between Part 36 and non-Part 36 offers due to the self-contained nature of Part 36 which will, where appropriate, prevail over the general law of contract (for the reasons explained in Gibbon –v- Manchester City Council

[2010] EWCA Civ 726), a point which will be picked up, in a slightly different context, later in this article.

Costs on Judgment (Under Part 36)

The costs, and other, consequences provided for under Part 36 on judgment, and also acceptance (a separate topic which will be returned to later in this article), are key features of the rule.

It is unsurprising that there have been a number of decisions looking at different facets of this broad topic.

Those decisions have included a consideration of, first, what the term "costs" means when used in Part 36, specifically whether that has the effect of prevailing over the more general discretion on costs conferred by Part 44. Secondly, the courts have considered the apparent tension between the terms of Part 45, where fixed costs will generally apply, and Part 36. Thirdly, ruling have reviewed the circumstances in which it will be "unjust" for the usual costs and other consequences provided for under Part 36 to apply.

Costs?

Part 36 provides, whether this be on acceptance or on judgment (where that judgment is "more advantageous" or "at least as advantageous" as the relevant offer) for there to be an entitlement to "costs".

Exactly what, in this context, "costs" means was considered by the Court of Appeal in Webb –v- Liverpool Women's NHS Foundation Trust [2016] EWCA Civ 365.

This was an appeal by the claimant against a ruling on costs which followed judgment on substantive issues, for the claimant in clinical negligence proceedings brought against the defendant.

The claimant advanced two main allegations on breach of duty against the defendant but only established breach on a single ground.

The claimant had made a Part 36 offer on the basis that the claimant would, if the offer was accepted, receive 65% of the damages that would accrue on a 100% basis.

When dealing with costs the trial judge concluded that the first question was whether, in the absence of a Part 36 offer, a proportionate costs order would have been appropriate under Part 44.2 (6).

Here the claimant's case had two distinct limbs with neither dependant on the other and, rather than being separate, self- contained, discrete claims, each limb was supported by its own separate expert evidence.

On this basis the judge concluded that, in the absence of a Part 36 offer, he would have been disposed to make a costs order requiring the defendant to pay only a proportion of the claimant's costs, to recognise the failure of the claimant to establish the second limb of her claim.

The question was then how that view was affected by the actual Part 36 offer the claimant made.

The judge concluded a successful Part 36 offer did not mean the court was unable to make an issue based or proportionate costs order and accordingly, ruled that:

> "In the circumstances I propose to make a costs order in favour of the claimant limited to a percentage of her costs. The figure shall be that which is appropriate to reflect the percentage of time expended on establishing the First Limb but not the Second and 100% of the disbursements directly incurred in establishing the First Limb but not the disbursements directly incurred in seeking to establish the Second Limb. In this context I have particularly in mind the fees of the experts but there may be others. The costs order shall include all the enhancements stipulated in Part 36.14 from the Relevant Time. The starting point is that the Part 36.14 costs consequences *will* apply to those costs awarded to the offeror. I see no injustice in applying them."

In the Court of Appeal both parties accepted the claimant's entitlement to costs before the end of the relevant period (in the judgment described as "the effective date") of the Part 36 offer was to be determined in accordance with Part 44. So far as costs incurred after the effective date were concerned the issues were more complex, and involved an analysis of the relationship between Part 44 and Part 36.

The Court of Appeal dealt first with the issue on costs incurred before the effective date of the claimant's Part 36 offer, concluding that the trial judge could not have properly deprived the claimant of her costs relating to the second allegation. The court adopted the approach taken by Jackson LJ in Fox –v- Foundation Piling Limited [2011] EWCA Civ 790 when he had said:

> "In a personal injury action the fact that the claimant has won on some issues and lost on other issues along the way is not normally a reason for depriving the claimant of part of his costs: see *Goodwin v Bennett UK Limited* [2008] EWCA Civ 1658. For example, the claimant may succeed on some of the pleaded particulars of negligence, but not on others. Indeed the fact that the claimant has deliberately exaggerated his claim may in certain instances not be a good reason for depriving him of part of his costs: see *Morgan v UPS* [2008] EWCA Civ 1476. …"

The Court of Appeal then dealt with costs incurred after the effective date of the claimant's Part 36 offer.

The first question was what the word "costs" in Part 36.14 (3) (b) meant. Sir Stanley Burnton held that in that rule the words "his costs" meant "all his costs" and the subsequent removal of the word "his" in April 2015 did not alter that meaning. Hence he concluded:

> "On this basis, a successful claimant is entitled to all her costs on an indemnity basis, unless it would be unjust (as provided in 36.14(3)) for her to be awarded those costs."

Whilst a different view on the meaning of Part 36, as it then read, was taken by the Court of Appeal in Kastor Navigation Co Ltd –v- Axa Global Risks (UK) Ltd [2004] EWCA Civ 277 that decision was based on provisions in Part 36 and Part 44 which were materially different to the current terms of those rules, and hence the case was distinguishable. In particular there was then an express reference in Part 44 to Part 36 offers whilst the current wording in Part 44 exclude from the court's consideration any offer to which the costs consequences of Part 36 apply.

In these circumstances Sir Stanley Burnton concluded:

> "These differences in my judgment require this Court to consider the meaning and effect of Part 36.14 untrammelled by the decision in *Kastor.* My view as to the meaning of Part 36.14 is supported by the substantial line of authority to the effect that Part 36 is now a self-contained code, see, e.g., Ward LJ in *Shovelar v Lane* [2011] EWCA Civ 802 [2012] 1 WLR 637 at paragraph 52:
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> > "52. … Part 36 is a separate, self-contained code. It must be applied as such. If the offer is one to which the costs consequences under Part 36 apply, then it cannot be taken into account under Part 44 because, although CPR 44.3(4)(c) requires the court to have regard to "any payment into court or admissible offer to settle", those words are qualified by the words which follow namely 'which is not an offer to which costs consequences under Part 36 apply'. Part 36 trumps Part 44.""

Consequently, in deciding what costs order to make under Part 36.14 the court did not first exercise discretion under Part 44, as the only discretion is that conferred by Part 36 itself.

On this basis Sir Stanley Burnton held:

> "It follows from the above, and in particular that Part 36 is a self-contained code, that the discretion under 36.14 relates not only to the basis of assessment of costs, but also to the determination of what costs are to be assessed. I agree with the Judge that Part 36 does not preclude the making

> of an issue-based or proportionate costs order. However, a successful claimant is to be deprived of all or part of her costs only if the court considers that would be unjust for her to be awarded all or that part of her costs. That decision falls to be made having regard to "all the circumstances of the case". In exercising its discretion, the Court must take into account that the unsuccessful defendant could have avoided the costs of the trial if it had accepted the claimant's Part 36 offer, as it could and should have done. The principles were aptly summarised by Briggs J (as he then was) in *Smith v Trafford Housing Trust* [2012] EWHC 3320 (Ch)..."

The appeal was, accordingly, allowed and the defendant ordered to pay all of the claimant's costs, such costs to be on the indemnity basis from the effective date of the offer.

This judgment is important as confirmation that a Part 36 offer makes the first entitlement of a party able to rely on that offer, after the effective date, to "all costs". The claimant is, of course, also entitled to have those costs assessed on the indemnity basis, enhanced interest and an additional amount but it is important not to overlook the preliminary point about being entitled to costs in the sense of "all costs".

Moreover, the case is yet a further ruling, surely now a definitive ruling, that in the majority of personal injury and clinical negligence claims a claimant who succeeds overall, even if not succeeding on all the allegations advanced, is likely to recover costs without any deduction for an issue that fails, or at least unless the allegation was unreasonable and/or unsupported by the evidence.

Fixed Costs and Indemnity Costs

At first sight the post-2013 version of the CPR appeared to contain tension between the terms of Part 36 and Part 45 where, in a claim subject to fixed costs under section IIIA Part 45, the claimant obtained judgment "at least as advantageous" as the claimant's own Part 36 offer and the provision, in Part 36.17 (4) for the claimant to have "costs" assessed on the indemnity basis from the end of the relevant period in any such offer.

This point was considered by the Court of Appeal in Broadhurst –v- Tan [2016] EWCA Civ 94.

The claim arose out of a road traffic accident. Following a fast track trial the district judge held that the defendant was wholly liable for that accident.

When dealing with costs, following the trial, the attention of the district judge was drawn to (as the rule then read) Part 36.14 and Part 36.14A, being invited to apply at least some of the consequences set out in Part 36.14 (3). The judge ruled against these submissions on behalf of the claimant, explaining:

> "The court declines to apply CPR 36.14(3)(a) and (b) … or (b) and (c) on the basis that … the Part 36 offers relate solely as to liability and not as to

> quantum and secondly, in any event there appears to be a tension between that part and part 36.14(3), and permission to appeal is granted in an attempt to resolve that tension."

The claimant appealed the ruling on costs.

At the hearing of the first appeal the preliminary issue was whether the judge was right to hold Part 36.14 (3) applied only to a Part 36 offer dealing with quantum, and not liability.

HHJ Robinson accepted, applying Huck –v- Robson [2002] EWCA 398, the offer of 50% was a valid a Part 36 offer and went on to hold:

> "…I am driven to conclude that rule 36.14(3) must apply to a case where a claimant makes a Part 36 offer to settle in a case where Section IIIA of Part 45 applies, and where the judgment is at least as advantageous to the claimant as the proposals contained in that offer."

That was not, however, the end of the matter as the judge considered there were difficulties inherent in conducting any assessment of costs in a case which would otherwise be subject to the fixed costs regime, given that the expiry date of the offer was bound to fall within one of the stages and could result in an award of costs on top of the staged costs with the prospects of a "windfall".

Accordingly, HHJ Robinson held:

> "I find that the reasoning of the Court of Appeal in Solomon –v- Cromwell Group PLC is applicable also to the factual circumstances of this case. The generality of rule 36.14(3) does not trump the specific fixed costs regime of Section IIIA of Part 45."

On this basis the judge concluded that whilst there was a valid Part 36 offer and the terms of Part 36.14 (3) applied there was not, in a case such as this, any difference between profit costs assessed on the indemnity basis and fixed costs provided by Section IIIA Part 45 (subject always to Part 45.29J).

The claimant pursued a further appeal, to the Court of Appeal.

In the Court of Appeal, recognising that the issue concerned the interplay between section IIIA Part 45 and Part 36, the Master of the Rolls went on to observe that section IIIA Part 45 made no provision as to what should happen when a claimant had made a successful Part 36 offer and held:

> "The effect of rules 36.14 and 36.14A when read together is that, where a claimant makes a successful Part 36 offer, he is entitled to costs assessed on the indemnity basis. Thus, rule 36.14 is modified only to the extent stated by 36.14A. Since rule 36.14(3) has not been modified by rule 36.14A, it continues to have full force and effect. The tension between

> rule 45.29B and rule 36.14A must, therefore, be resolved in favour of rule 36.14A. I reach this conclusion as a straightforward matter of interpretation and without recourse to the canon of construction that, where there is a conflict between a specific provision and a general provision, the former takes precedence."

It would not, accordingly, be necessary to resolve the apparent tension between different aspects of the CPR on the basis of identifying the specific provision in the way the Court of Appeal, under the previous version of the CPR, had concluded that specific costs provisions in Part 45 prevailed over the more general provision in the then Part 36: Solomon -v- Cromwell Group plc [2011] EWCA Civ 1584.

Accordingly, the Court of Appeal concluded there was no doubt as to the true meaning of the rule, the tension being clearly resolved in favour of Part 36.14A. If that were not so then it would have been legitimate to use the Explanatory Memorandum as an aid to construction (as the condition specified by Lord Browne-Wilkinson in Pepper -v- Hart [1993] AC 593 would be satisfied). That Explanatory Memorandum stated:

> "New rules 36.10A and 36.14A make provision in respect of the fixed costs a claimant may recover where the claimant either accepts or fails to beat a defendant's offer to settle made under part 36 of the CPR. Provision is also made with regard to defendants' costs in those circumstances. If a defendant refuses a claimant's offer to settle and the court subsequently awards the claimant damages which are greater than or equal to the sum they were prepared to accept in the settlement, the claimant will not be limited to receiving his fixed costs, but will be entitled to costs assessed on the indemnity basis in accordance with rule 36.14."

The Master of the Rolls also observed:

> "The starting point is that fixed costs and assessed costs are conceptually different. Fixed costs are awarded whether or not they were incurred, and whether or not they represent reasonable or proportionate compensation for the effort actually expended. On the other hand, assessed costs reflect the work actually done. The court examines whether the costs were incurred, and then asks whether they were incurred reasonably and (on the standard basis) proportionately. This conceptual difference was accepted in *Solomon* at para 19."

Whilst there might be some difficulties in assessment where costs were partly fixed and partly assessed these were not insurmountable. The Master of the Rolls held:

> "Where a claimant makes a successful Part 36 offer in a section IIIA case, he will be awarded fixed costs to the last staging point provided by rule 45.29C and Table 6B. He will then be awarded costs to be assessed on the indemnity basis in addition from the date that the offer became effective. This does not require any apportionment. It will, however, lead

> to a generous outcome for the claimant. I do not regard this outcome as so surprising or so unfair to the defendant that it requires the court to equate fixed costs with costs assessed on the indemnity basis. As Mr Williams says, a generous outcome in such circumstances is consistent with rule 36.14(3) as a whole and its policy of providing claimants with generous incentives to make offers, and defendants with countervailing incentives to accept them."

HHJ Robinson had suggested that assessment of costs on the indemnity basis would lead to windfalls where lawyers were retained on terms they would be paid only fixed costs yet there was no evidence to support that statement. Hence the Master of the Rolls concluded:

> "In my view, the problems identified by Judge Robinson on which Mr Laughland relies do not suggest that Parliament could not have intended to create a scheme which is to be interpreted in the way that I have described."

Consequently, if judgment, in a claim otherwise subject to fixed costs under section IIIA Part 45, is "at least as advantageous" to the claimant as a Part 36 offer that the claimant has made then, unless this would be "unjust" the claimant will receive the fixed costs, under section IIIA Part 45, applicable at the "staging point" when the relevant period in the offer expires and, thereafter, costs which will be assessed on the indemnity basis.

The approach taken in Broadhurst was followed, and extended, in Lowin –v- W Portsmouth & Co Limited [2016] EWHC 2301 (QB) which was an appeal, by the claimant, against an order dealing with costs of detailed assessment proceedings.

The claimant's costs were provisionally assessed at a sum higher than a Part 36 offer made by the claimant on costs. However, the Master concluded that Part 36.17 (4) did not dislodge the application of Part 47.15 (5), capping the maximum amount awarded for a provisional assessment.

On appeal Elisabeth Laing J held that the terms of Part 47.40 imported Part 36 into Part 47, though with some express modifications. Although costs under Part 47 were capped rather than fixed the reasoning in Broadhurst –v- Tan [2016] EWCA Civ 94 was of assistance.

Part 36 applied, and was not displaced by Part 47.15 (5), so the cap on the costs of a provisional assessment did not displace the entitlement to having costs assessed on an indemnity basis.

That would increase the incentive to accept a sensible Part 36 offer.

"Judgment"?

The concept of a "judgment" is central to the costs, and other, consequences of Part 36 offers.

If the defendant makes a Part 36 offer the claimant is likely to face adverse costs consequences unless a judgment is obtained which is "more advantageous" than such an offer. If the claimant has made a Part 36 offer it is necessary for the claimant to obtain judgment which is "at least as advantageous" as that offer.

Consequently, what will amount to a "judgment" for these purposes is an important consideration. That point was considered in Vanden Recycling Limited –v- Tumulty [2015] EWHC 3616 (QB).

That case concerned "employee competition" litigation which was brought by the claimant against three defendants. A consent order was made containing terms of settlement agreed between the claimant and the second defendant, including provision for payment of £275,000 in full and final settlement of the claimant's claims against the second defendant.

The third defendant argued that as the judgment by consent against the second defendant had been satisfied that satisfied judgment, as against a joint or concurrent tortfeasor, discharged the tort so there was no claim left to bring against the third defendant.

Cox J rejected the claimant's argument that there was no reference in the order to a "judgment", and hence no "judgment" that had been satisfied, as well as the argument that it was clear, from the terms of the order, that the claim was to continue against the third defendant, explaining:

> "There is no basis, first, for the suggestion that the Consent Order of 25 June is not to be regarded as a consent judgment. Mr Quinn described it in argument as 'an agreement by the Claimant not to continue to sue the Second Defendant, which is incorporated in the order of the court staying the action,' but this somewhat strained interpretation of a straightforward court order cannot in my view remove or reduce its status as a judgment of the court containing the terms agreed by the parties. Consent judgments and orders are referred to interchangeably at CPR 40.6 and what matters is its substance rather than its form. It is therefore correct to refer to this consent judgment as having been satisfied, it being accepted that Bolton has paid the sums it was ordered to pay."

That was important for the purposes of determining the application but, on a broader basis, may be of significance to Part 36 as where the parties agree an order, or the court makes an order, reflecting terms agreed that can properly be regarded as a "judgment" that will trigger the benefits conferred by Part 36.17. The appropriateness of an order recording the terms agreed, for example, on late acceptance of an offer by the defendant, was acknowledged in Ontulmus –v- Collett [2014] EWHC 4117 (QB).

At Least as Advantageous?/Unjust?

If there is a "judgment" the court will need to determine whether such a judgment is, as appropriate, "more advantageous" or "at least as advantageous" as the relevant offer

and, if so, deal with the sometimes connected question of whether, nevertheless, it would be "unjust" for the usual consequences to apply.

These related topics were considered in Jockey Club Racecourse Limited –v- Willmott Dixon Construction Limited [2016] EWHC 167 (TCC).

The background was that the defendant had been engaged by the claimant to design and construct a new grandstand at Epsom Racecourse. Problems subsequently arose with the roof of the grandstand. In high winds, which were not unexpectedly high, the roof was damaged in two places.

The claimant had to carry out repairs to the roof and the costs of those repairs, and consequential losses, were claimed in the proceedings brought by the claimant against the defendant, ultimately formulated in schedules to amend the particulars of claim served on 30 January 2015.

Also on 30 January 2015 the claimant made the defendant an offer to settle:

> "….the issue of liability for losses arising out of the defects in the roof . . . (including losses arising out of storm damage occurring in January 2012 and December 2013)"

This was on the basis that the Defendant would:

> "accept liability to pay 95% of our client's claim for damages to be assessed."

By the time of the pre-trial review on 17 December 2015 the defendant had conceded liability, so the preliminary issue was resolved, by consent, in the claimant's favour.

The claimant contended entitlement to the benefits conferred by Part 36 on a claimant who has bettered the claimant's own Part 36 offer.

The defendant argued that the offer had been made before the claimant's claim had been fully pleaded. Edwards-Stuart J disposed of this point shortly by concluding:

> "The offer related to liability, not to quantum. The fact that quantum had not been fully pleaded by the time when the offer was made does not affect its validity, although it may be a factor to take into account when deciding whether or not it would be unjust to make an order for indemnity costs from the date when the offer could have been accepted."

The defendant also argued that the claimant would only have beaten the offer if at least 95% of the roof required replacement. Edwards-Stuart J again disposed with this argument shortly by holding:

> "…this is ingenious but misconceived. The offer was to pay 95% of the Claimant's damages "*to be assessed*": whether the damages to which the

> Claimant was entitled represented the costs of repairing only half the roof or the whole of it is a matter of quantum, not liability."

The next issue was whether the offer was an offer within the meaning of Part 36 and, if so, a genuine attempt to settle liability (a related point being whether an offer coming close to requiring total capitulation could be an offer at all).

Edwards-Stuart J considered the most relevant authorities to be Huck –v- Robson [2002] EWCA Civ 398 and AB –v- CD [2011] EWHC 602 (Ch).

In Huck Tuckey LJ did accept that a judge would have discretion to refuse the offeror Part 36 benefits where "if was self-evident that the offer made was merely a tactical step" and Schiemann LJ endorsed this approach where, in his words, the claimant offeror had "recovered in full after making a Part 36 offer for marginally less".

Edwards-Stuart J also endorsed the views, on this point, of Norris J in Wharton -v- Bancroft [2012] EWHC 91 (Ch) when he said:

> "All Part 36 offers are tactical in the sense that they are designed to take advantage of the incentives provided by Part 36. A low offer in a case where the offeror considers that the offeree's position has no merit cannot be written off as self evidently "merely a tactical step". But the principle has no application here. The sum to be received by each of the Daughters was small. But the offer was not derisory."

Consequently, Edwards-Stuart J concluded:

> "I am persuaded by the authorities that the offer in this case was a valid offer within the meaning of Part 36 and that it was a genuine attempt to settle the claim. Whilst the discount was very modest, even in the context of a claim of some £400,000 it amounted to £20,000, which in my view cannot be described as derisory."

Finally, the defendant argued Huck could now be distinguished because it was decided under the earlier version of Part 36 which did not include the provision now found in Part 36.17 (5) (e), namely: "whether the offer was a genuine attempt to settle the proceedings", a specific factor now found in the rule to which the court should have regard when deciding whether the usual costs consequences under Part 36.17 would be "unjust". Rejecting this argument Edwards-Stuart J held:

> "…I have no doubt whatever that Tuckey LJ's observations would have been to no different effect if that provision had been included in the rule at the time …"

This is, accordingly, an important decision considering what is an "offer", confirming any such offer, for the purposes of Part 36, does not have to reflect an available outcome of the litigation and clarifying that the change to Part 36.17 in April 2015 affirms, rather

than displaces, the approach which should be taken to claimant offers on liability adopted in Huck.

Purrunsing -v- A'Court & Co [2016] EWHC 1528 (Ch) considered the very specific point about whether, in deciding whether a judgment was "at least as advantageous" as a Part 36 offer interest accrued, from the end of the relevant period in the offer up to judgment, should be left out of account. On this point HHJ Pelling QC held:

> "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 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".

Accordingly, the judge ruled that the claimant had not obtained judgment "at least as advantageous" as the claimant's offer and so was not, therefore, entitled to the benefits provided for under Part 36.17 (4).

Costs on Judgment (under Part 44)

Case law continues to draw a sharp distinction between the, as they are sometimes termed, "automatic" costs consequences under Part 36 and the more general discretion under Part 44.

This is of particular significance when a party elects not to make an offer pursuant to Part 36 as some recent decisions confirm.

In Burrell –v- Clifford [2016] EWHC 578 (Ch) the claimant (who was employed by the Royal Family latterly as butler to the late Diana, Princess of Wales) was awarded damages of £5,000 in the substantive claim for breach of confidence and misuse of private information by the defendant (for many years a prominent and successful public relations consultant).

The claimant's costs budget had been set at £128,695.41 (excluding VAT).

Following the award of damages the claimant sought an order that the costs of the proceedings be paid by the defendant, on the basis the usual starting point is that costs follow the event and there were no particular circumstances which warranted any different order.

The defendant relied on the terms of an offer which had been made on 30 January 2015, without prejudice save as to costs, to pay the clamant damages of £5,000 and also payment of the claimant's reasonably incurred legal costs and disbursements up to £5,000 inclusive of VAT. The defendant argued that the court should make a different order to the one that costs follow the event on the basis of the discretion conferred by Part 44.2 and as the offer letter stated

> "If your client fails to do better than the settlement offer at trial, we intend to seek an order requiring your client to pay our client's costs from the expiry of the deadline together with the interest on those costs from that date until payment".

The judge noted the sum offered by the defendant in damages was exactly the amount awarded to the claimant but the proposal for costs in the offer did not reflect the incurred costs and disbursements up to the date of that offer, a point confirmed by the costs budgeting exercise. For these reasons the judge concluded that costs, at the time of the offer, were "well in excess of the sum offered by that without prejudice save as to costs letter".

Accordingly, the judge concluded:

> "So, dealing with that letter, it seems to me that it was an inadequate offer. It did not give the defendant protection. (Counsel for the defendant) is fully entitled to invoke the last paragraph of the letter, and refer me to it. But the position is that, in my judgment, Mr. Burrell has done better than that settlement offer at trial, and Mr. Clifford's appropriate remedy was to offer the £5,000 in respect of damages that he happens, in my judgment, to have got right, and the costs incurred down to that date subject to detailed assessment in the usual way."

Sugar Hut Group Limited -v- AJ Insurance Service [2016] EWCA Civ 46 was an appeal, by the claimant, against a costs order made following an assessment of damages after earlier agreement on liability between the parties.

Damages had been assessed by the court so that, after apportionment to reflect an agreement reached on liability, the sum payable by the defendant to the claimant was £1,090,021.02 (though after allowing for interim payments already made the balance payable was only £277,021).

Tomlinson LJ summarised the status of negotiations by observing:

> "Part 36 and Calderbank offers had been made by both sides, but it was common ground that none had been "effective", in that each of the Claimants' offers had been for sums higher than in the event recovered, and each of the Defendant's offers had been for sums lower than in the event allowed. The last of the Part 36 offers made by the Defendant was on 23 May 2014. It offered to settle the claim for a payment of a further £250,000 in addition to the payments made on account."

At first instance, whilst agreeing with the approach of Ramsey J in Hammersmatch Properties (Welwyn) Ltd -v- Saint-Gobain Ceramics and Plastics Ltd [2013] EWHC 2227 (TCC) that a "near miss" offer should not be relevant for these purposes, Eder J concluded that the offer was relevant to conduct, in particular whether it was reasonable for a party to pursue or contest an allegation or issue and whether a party who succeeds, in whole or part, had exaggerated its claim.

On appeal Tomlinson LJ considered that:

> "Although the Judge directed himself correctly by reference to the relevant authorities concerning the exercise of the court's discretion under CPR 44.2, I have no doubt that he fell into error in his approach to the Part 36 offer and, partly in consequence thereof, mischaracterised the conduct of the Claimants as unreasonable. His award of costs fell outside the ambit of reasonable decision-making."

Tomlinson concluded:

> "The Claimants' recovery exceeded the Part 36 offer by a comfortable margin and in any event there is no longer a "near-miss" rule. There is no basis upon which it is appropriate to deprive the Claimants of their costs after 13 June 2014, still less to require them to pay the Defendant's costs. The Claimants' failure to succeed on all of their claim is adequately reflected in the Judge's Order depriving them of 30% of their costs."

Costs on Acceptance (under Part 36)

The decisions in Webb and Broadhurst clearly identify the proper approach to costs where judgment is "more advantageous" or "at least as advantageous" as a Part 36 offer, but do those principles apply where a Part 36 offer is accepted, particularly after expiry of the relevant period?

The general approach adopted in Webb was applied, in the context of late acceptance, by the Court of Appeal in Dutton –v- Minards [2015] EWCA Civ 984.

On 30 July 2010 the defendant made a Part 36 offer of £25,000. The claimant subsequently commenced proceedings and, on 21 October 2011, made a Part 36 offer of £18,000.

The defendant, quite deliberately, waited until one minute after the 21 day relevant period in the claimant's offer dated 21 October 2011 had expired before accepting that offer.

The defendant then argued that the claimant should have accepted the defendant's earlier offer of £25,000 and, having pursued the litigation but ending up with a lower sum it was not fair or just for the defendant to have to bear the additional costs incurred after the defendant's offer.

At first instance the judge concluded that, "on the facts" it was not "unjust" to apply the terms of Part 36.10(5). Accordingly, the defendant was not entitled to the costs after 21 days from the defendant's offer.

In the Court of Appeal Lewison LJ observed that it was clear from the terms of Part 36.10(5) the starting point was that the claimant would be entitled to costs up to the end of the relevant period and that the offeree, which in this case was the defendant, would be liable for the claimant's costs thereafter to the time of acceptance. However, that was subject to the important qualification "unless the court ordered otherwise".

In deciding whether to order otherwise the Court of Appeal confirmed in SG –v- Hewitt [2012] EWCA Civ 1953, by analogy with the terms of Part 36.14, the order envisaged by Part 36.10(5) would be made unless that would be "unjust".

By concluding "on the facts" the application of Part 36.10(5) was not unjust the Judge had both posed the right question.

In answering that question the Judge had, first, to decide whether or not applying the presumption in Part 36.10(5) would be unjust and, if so, deciding what other order to make as to costs. That was an exercise of judicial discretion. In these circumstances Lewison LJ observed:

> "There is, therefore, a formidable hurdle to overcome on appeal because the question is not whether we would have made the order that the judge made, but whether the conditions exist for an appeal court to interfere with the value judgment of and exercise of discretion by the lower court."

The defendant's argument, that the Judge adopted the wrong starting point by failing to recognise the claimant had not obtained judgment which was "more advantageous" than the defendant's offer, was rejected with Lewison LJ observing:

> "…in a sense, the Claimants had beaten the offer of 30 July because the costs consequences for them, at any rate if the default position in Part 36.10(5) applied, were much to their financial advantage, which, after all, is why this appeal is being brought at all."

Furthermore, Lewison LJ accepted the claimant's argument that:

> "the primary focus of Part 36.10(5) insofar as it enables a court to disapply the presumption is the costs incurred since the expiry of the relevant period. That is certainly how the point has arisen in previous cases. Here, by contrast, the Defendants seek to obtain advantage from the late acceptance of the Part 36 offer and, moreover, an advantage that relates to a period before the relevant period even began."

The costs consequences of late acceptance, and the need for the court to conclude it would be "unjust", before departing from the usual consequences set out in Part 36, was also considered in ABC –v- Barts Health NHS Trust [2016] EWHC 500 (QB).

The claimant alleged delay on the part of the defendant in treatment after he suffered a dissection of his aorta. The claimant contended that with timely surgical repair he would have made a better recovery and avoided a blood clot forming in the aorta which occluded the left middle cerebral artery causing a catastrophic infarction of the brain. The defendant admitted breach of duty at a relatively early stage but, initially, denied causation of any injury, loss or damage.

The claimant's claim was put at a figure exceeding £1 million. However, on 24 February 2016, shortly before the trial was due to commence on 7 March 2016, the claimant accepted a Part 36 offer of £50,000, which had been made by the defendant on 4 June 2015.

HHJ McKenna concluded it would not be "unjust" to depart from the usual order and held:

> "The difficulty with the broad thrust of the Defendant's submissions as it seems to me is that the Defendant had the means and opportunity to protect itself in respect of the costs that it was going to have to incur in respect of the causation issue but chose for whatever reason when making its Part 36 offer to frame the offer as a settlement of the whole claim and then subsequently when that offer was not accepted did not make any revised offer excluding causation. True it is that in rejecting the offer and pursuing the action up to or close to trial the Claimant acted unreasonably but Part 36 expressly provides an effective remedy to cater for that very situation in that the Claimant will have to pay all the Defendant's costs incurred post expiry of the Part 36 offer and in the circumstances of this case it seems to me that the assessment of those costs should be on the indemnity basis. To my mind, there is nothing unjust about making the usual order in the circumstances of this case, accepting as I do, the thrust of the Claimant's submissions on this issue."

The decision to make the party accepting late pay costs after the end of the relevant period on the indemnity basis is of particular significant, given the judgment in

Broadhurst, to claims subject to fixed costs under section IIIA Part 45, a point explored in Sutherland –v- Khan (in the County Court at Kingston upon Hull, 21 April 2016).

The claimant and defendant were involved in a road traffic accident. The claimant's claim was dealt with in accordance with the Pre-action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ("The RTA Protocol"). The claim subsequently left the RTA Protocol and Part 7 proceedings were issued.

The claimant made a Part 36 offer to settle the whole claim at £2,475. The defendant accepted that offer but only some 28 days after the relevant period in the offer had expired.

The defendant resisted an argument by the claimant for indemnity costs by relying on Fitzpatrick Contractors Limited –v- Tyco Fire & Integrated Solutions (UK) Limited (No 3) [2009] EWHC 274 (TCC). Giving judgment in that case Coulson J, on the basis of earlier authorities such as Petrotrade Inc –v- Texaco Limited [2000] All ER (D) 724, held that the claimant, who had been spared the costs, disruption, and stress of trial, should not recover indemnity costs on late acceptance of a Part 36 offer by the defendant.

The claimant, however, emphasised the importance of Part 36 in the need to incentivise parties to both make and accept offers, an example cited being Broadhurst –v- Tan [2016] EWCA Civ 94.

District Judge Besford preferred the argument advanced by the claimant and held:

> "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."

Consequently, the judge held that:

> "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."

The Claimant was, accordingly, awarded costs, to be assessed on the indemnity basis, from the end of the relevant period in the claimant's Part 36 offer.

Whilst, anecdotally, other judges have reached a different view on the costs consequences of late acceptance the decision in Sutherland is, at the time of writing, the only reported decision on this point.

Conclusion

The recent cases, reviewed in this and the previous article, confirm the increasing importance of Part 36, particularly in the new era of fixed costs for some types of claim, and, more generally, how Part 36 affords a degree of certainty not available where reliance is placed, under Part 44, on a non-Part 36 offer to settle.

For the reasons outlined by the last article in this series, however, it remains crucial, if parties are to secure the potential benefits of Part 36, to ensure the rules on form and content are complied with and that parties do appreciate exactly what the consequences of Part 36 offers are.