THE FUTURE OF PART 36 (PART3)

Introduction

The first of this series of articles on Part 36, in the March 2007 edition of JPIL, looked at topics then current in the caselaw and proposals which had been made for changes to the rule. Those proposals were intended to reflect, and to an extent deal with, some of the issues arising out of the decided cases.

The second article, in the June 2007 edition of JPIL, reviewed the consequent changes to Part 36, the new rule having come into effect on 6 April 2007. That article highlighted the changes made to the rule and issues that might arise in the future, once practitioners were exchanging offers under the new regime.

This third article in the series considers the way caselaw has developed under the new version of Part 36, now that we find ourselves in the landscape envisaged when the earlier articles were written, picking up some of the topics which the last article highlighted as likely to generate caselaw.

Form and Content

Part 36.2(2) sets out the general requirements, as to form and content, of a Part 36 offer.

Unlike the version of the rule it replaced the current Part 36 does not, itself, contain any provision for the court to dispense with those formal requirements.

So how have the courts approached offers which do not comply fully with the requirements of the rule? In what, if any, circumstances will such offers be treated as effective for costs purposes?

In J Murphy & Sons Limited -v- Johnston Precast Limited [2008] EWHC 3104 (TCC) there was some debate about whether an offer complied strictly with the terms of Part 36. The court held that the offer having expressly said to have been an offer under Part 36, and having been treated as such by the parties, that was how it should be treated by the court. In reaching this conclusion the approach in Hertsmere Primary Care Trust -v- Rabindra-Anandh [2005] EWHC 320, that the parties are under a duty to co-operate in furthering the overriding objective, was followed; in this context meaning that any technical point on non-compliance should be notified promptly by the offeree to the offeror.

This approach follows Mitchell -v- James [2002] EWCA Civ 997, a case decided under the earlier version of Part 36. The rule then specifically allowed the court to treat an offer as having been made under Part 36, even though all the requirements of the rule might not have been complied with. The offer in that case had failed to state expressly that after 21 days it might only be accepted if the parties agreed the liability for costs or the court gave permission. Given the technical nature of the non-compliance, and the absence of any evidence the offeree was misled, that

breach was held to be not material. However, the offer also included terms as to costs, a provision which was held to take the offer out of the scope of Part 36 (the subject of offers made inclusive of costs will be returned to later in this article).

The decision in Mitchell, about the technical non-compliance, was supported by the terms of Part 36 as it then read. The amendment to the rule, leaving no express provision to dispense with formal requirements, makes the decision in J Murphy & Sons Limited, whilst a practical solution, more difficult to justify from a purely forensic approach based on the terms of the rule itself.

A different approach to the same problem was taken in Huntley -v- Simmonds [2009] EWHC 406 (QB) where the judge, recognising the change in the terms of Part 36 since the decision in Mitchell, concluded the appropriate way of dealing with the problem of technical non-compliance with Part 36 was to exercise the general discretion as to costs under Part 44.3 (4) (c) so that the offer was would have exactly the same costs consequences as if it was "Part 36-compliant". Important factors in adopting this approach were that there was no suggestion the offeree was, at the time of the offer, unable to understand its terms and that no issue was, again at the time of the offer, raised about the technical point subsequently taken.

These decisions suggest that much will turn on how the parties treat the offer at the time it is made. Where an offer is expressed by the offeror to be made under Part 36 and the offeree acquiesces then, at least if the failure as to form and content is essentially technical, the offer seems likely to be treated as effective for cots purposes, whether under Part 36 or Part 44. If the failure to comply with the rule is more than purely technical a court may take a different view on effectiveness for costs purposes, even where there has been acquiescence. Moreover, if any objection is to be taken by the offeree, as to whether the offer does comply with the terms of Part 36, that is an issue which should be raised as soon as possible after the offer is made. In the event of such a challenge even a technical failure to comply with the rules as to form and content may present difficulties for the offeror.

The dangers of departing too far from the requirements of a system designed to confer benefits were explained by Devlin J in Martin French -v- Kingswood Hill [1961] QB 96, when he observed:

> "…a payment into court is simply an offer to dispose of the claim on terms. If the defendant were free to formulate the terms himself, he could make his offer in whatever form he liked. But if he seeks to effect his compromise under the rules which permit a payment into court, he must make his offer according to the rules."

A party can, of course, make an offer on any terms he wishes but that will need to be an offer relevant to the exercise of the general discretion on costs under Part 44. Despite the decision in Huntley such an offer should not automatically attract the costs consequences of a Part 36 offer.

Problems in complying with the rules as to form and content under Part 36 should be avoided if Practice Form N242A is used. The reluctance of many offerors to make use of this standard form suggests a shrewd approach, designed to frame offers in a way which may not allow the offeree all the benefits intended to be conferred under Part 36 whilst hoping, nonetheless, to secure all the costs advantages which may be conferred on the offeror under the rule.

Such modifications to the requirements as to form and content which are typically encountered will be considered later in this article but these include the following.

- Limiting the time for which the offer remains open for acceptance.

- Restricting the costs implications of acceptance, either within the "relevant period" (the period of not less than 21 days within which, if the offer is accepted, the defendant will pay the claimant's costs) or after that period or perhaps even both.

- Providing for payment, if the offer is accepted, other than by way of a single sum of money to be paid within 14 days of acceptance.

Because, for the reasons already outlined, an offer not strictly complying with the terms of Part 36 may nevertheless be effective for costs purposes it is important that the offeree checks not just the formal requirements found in Part 36.2(2) but, more generally, whether the offer meets the other requirements found in Part 36.

Clarification

In Colour Quest Limited -v- Total Downstream UK plc [2009] EWHC 823 (Comm) the claimants suffered loss or damage as a result of the explosion at the Buncefield Oil Storage Depot. The defendants were involved in the operation of that depot and held, by the court, to be liable.

One of the claimants sought indemnity costs on the basis of having made a Part 36 offer to accept an admission of 90% liability.

Whilst the parties agreed, in the circumstances, an order for indemnity costs in favour of the claimant who made the offer was appropriate there was an issue as to the date from which costs should be assessed on the indemnity basis, given a request which had been made by the defendant for clarification of that offer.

The request for clarification was made one day outside the 7 day time limit provided for in Part 36.8. Nevertheless, the request was held to be proper and legitimate, as without the clarification sought the court considered the terms of the offer were uncertain.

Had an application been made for an order clarification be given the court would have had to specify the date when the Part 36 offer should be treated as having been made. From this the judge inferred that when clarification was legitimately

required time to accept the offer without penalty and costs should usually be extended beyond the end of the relevant period.

The claimant, though belatedly, had given clarification without the need for an application or consequent court order. Accordingly, liability for indemnity costs was calculated by reference to the period after the date when clarification of the offer had been given.

This decision leaves open the question of how the court might approach an application for indemnity costs where clarification, considered necessary, was requested but never given. Part 36.14 specifically provides that failure to give information regarding the offer may make the usual costs consequences "unjust" and where that information was sought in a formal request for clarification this decision may strengthen an argument that the failure to give the details requested at all may well have an impact on what would be just in relation to costs.

Acceptance

The new version of Part 36, introduced in April 2007, allowed the offeree, in most but not all circumstances, to accept a Part 36 offer, which had not been withdrawn or changed so as to be less favourable to the offeree, without permission from the court at any time after expiry of the relevant period.

In Fitzpatrick Contractors Limited -v- Tyco Fire & Integrated Solutions (UK) Limited (No 3) [2009] EWHC 274 (TCC) the claimant made a Part 36 offer in January 2008. Despite the trial of a preliminary issue meanwhile, in which the claimant was substantially successful, the defendant accepted the January 2008 offer in January 2009. The parties agreed this had been a valid acceptance.

That was doubtless because, except where Part 36.9(3) provides otherwise, the offeree may accept a Part 36 offer at any time, unless that offer has meanwhile been withdrawn or changed.

This ability of offerees, in most circumstances, to accept an extant Part 36 offer after the relevant period may be why so many offerors seek to vary the terms of Part 36. That may be done by seeking to identify a specific date, by which the offer must be accepted. Alternatively, the offer may be framed by stating that after elapse of the relevant period that offer may only be accepted if the parties agree costs or the court gives permission. However, an offer framed in the latter way should not be necessary under the new rule, as Part 36.10 expressly deals with the costs implications of such a situation.

The potential danger, for the offeree in such circumstances, is that, once the relevant period has elapsed, there is an offer which might carry adverse costs consequences but may not be capable of acceptance, meaning it is of no real value towards resolution of the claim. Such an offer might be regarded by the court as more likely to hinder than help settlement (see, for example the comments of by Coulson J in Fitzpatrick Contractors Limited).

Faced with an offer limiting the right to accept after a certain date the offeree may wish to request that the offeror clarify whether, thereafter, the offer should be treated as remaining open for acceptance simply on the terms of Part 36 or be treated as having been withdrawn, as a withdrawn offer will not be effective for costs purposes under Part 36.

Whilst the concerns of offerors, about acceptance well after expiry of the relevant period, are understandable these may not always be well founded. That is because it seems likely the court retains a residual discretion to prevent, or even set aside, acceptance of an offer in such circumstances.

In Warren -v- Random House Group Limited [2008] EWCA Civ 834 the Court of Appeal, when considering the scheme for offers of amends under the Defamation Act 1996 concluded that with such a statutory scheme, whilst having many attributes of a contractual arrangement, the court retained a role. An analogy was drawn specifically with Part 36, and the similar approach taken in Flynn -v- Scougall [2004] EWCA Civ 873. Whilst Flynn was concerned specifically with Part 36 payments the subsequent modification of Part 36, in the light of the approach taken in Warren, suggests such a discretion exists where there was "a sufficient change of circumstance". What would, or would not, amount to a sufficient change in circumstance might, if Flynn is followed, be approached on the basis of caselaw defining the circumstances in which a payment in to court might have been withdrawn or reduced (see Cumper -v- Pothecary [1941] 2 KB 58).

Costs Consequences of Acceptance in the Relevant Period

Part 36.10 confirms that when an offer is accepted within the relevant period, unless the offer is made less than 21 days before the start of the trial, the claimant will be entitled to the costs of the proceedings, to be assessed on the standard basis if not agreed.

This is one of the few circumstances within the Civil Procedure Rules where there is a deemed costs order. In Walker Residential Limited -v- Davis [2005] EWCH 3483 (Ch) it was held that, once made, a deemed costs order could not be varied. In that case the defendant repeated a pre-action offer sometime after the issue of proceedings as a Part 36 offer. The claimant accepted the offer, within the relevant timescale, and an application by the defendant for costs from the time of the initial offer was refused as the deemed order under Part 36 prevailed.

The same approach was adopted by the Court of Appeal in Lahey -v- Pirelli Tyres Limited [2007] EWCA Civ 91. In circumstances broadly similar to those arising in Walker Residential Limited the court held it was not appropriate to restrict the costs judge to allowing a percentage of the costs assessed, although nothing prevented the judge disallowing costs unreasonably incurred.

These decisions may be significant for a claimant willing and able to accept an offer made under Part 36 within the relevant period if terms as to costs different from the deemed order under Part 36.10 would be likely to apply without such deemed order.

In both Walker Residential Limited and Lahey the claimant would have faced the risk, under the court's general discretion in Part 44, of an adverse costs order from the date by which the original offer should have been accepted. In different circumstances there might have been a risk, for example, of the claimant failing to recover costs on a particular issue without the benefit of the deemed order under Part 36.10.

Another situation in which the defendant may be wary of the deemed costs order is when the defendant contends the value of the claim is such that the court would allocate, or should have allocated, to the small claims track. Hence in Hall -v- Stone [2007] EWCA Civ 1354 the defendant justified the absence of any offers to settle claims of modest value on the grounds the terms of Part 36 effectively prevented this, as if the claimant accepted such an offer in the relevant period the deemed costs order would give an unjustified windfall in costs recovery. The Court of Appeal, however, offered the solution to this problem. Whilst Mitchell prevented a party making a Part 36 offer which stipulated terms as to costs there was nothing to prevent a party making an offer, which did stipulate such terms, for the purposes of Part 44, in other words a "Calderbank" offer.

These decisions suggest it may be unwise to use Part 36 in cases that would otherwise be subject to the predictable costs regime provided for in Part 45.II. If such an offer is accepted the terms of the deemed costs order clearly envisage assessment in accordance with Part 44.4. Lahey confirms costs unreasonably incurred may be disallowed, but that is not the same thing as limiting, somewhat arbitrarily, the claimant to a specified figure for costs. That would be akin to the percentage reduction which Lahey specifically disapproved of. The court might limit costs on the grounds of conduct, but it is hard to see how voluntarily reaching an agreement on certain terms could amount to conduct for these purposes.

Whilst recognising the pre-action protocol envisages Part 36 offers be made it would surely be most unlikely that a court would regard a Calderbank offer, in a predictable costs case, as conduct which breached the protocol, remembering that at the time the protocol was introduced the predictable costs scheme was not in place.

As well as the danger for the defendant in making a Part 36 offer in cases which may be subject to the predictable costs regime there is also the risk for a claimant who makes such an offer. This is that the defendant may subsequently argue, in the event proceedings were issued, the claimant was never willing to accept predictable costs, on the basis Part 36 is inconsistent with the scheme, that the claimant was always set on a course towards recovery of costs assessed on the standard basis and that this should be regarded as conduct which the court should take into account when determining the level of those costs.

The difficulties of offers made inclusive of costs have already been considered but, for reasons explained later in this article, may well be appropriate in a case which is subject to the predictable costs regime.

Costs Consequences of Late Acceptance

If an offer is accepted after the "relevant period" there is no deemed costs order but Part 36.10 does provide what are, in effect, some presumptions.

The costs position for the defendant, where a claimant accepts late, is very much the position that the defendant would be in whenever judgment was entered for the claimant in terms that are not "more advantageous" to the claimant, namely that the claimant will be entitled to costs up to the end of the relevant period and thereafter be liable for the defendant's costs.

But if the defendant accepts a Part 36 offer made by the claimant after the end of the relevant period will the claimant obtain the advantage of indemnity costs and enhanced interest as provided for under Part 36.14?

This question had to be determined in Fitzpatrick Contractors Limited -v- Tyco Fire & Integrated Solutions (UK) Limited (No 3) [2009] EWHC 274 (TCC), the claimant's offer being accepted by the defendant a year after it was made.

The claimant contended, in these circumstances, costs should be assessed on the indemnity basis from the date the relevant period in the offer expired, by analogy with Part 36.14. The claimant also argued there was no difference between a claimant who recovered a sum equivalent to his offer after a trial and a claimant who recovered a sum equivalent to his offer before trial where that offer was accepted by the defendant but outside the relevant period.

The judge noted there was no reference within Part 36.10 (5) to a presumption that costs payable by a late-accepting defendant be assessed on the indemnity basis, also recognising the usual basis for assessment of costs would be the standard basis.

In these circumstances the judge held it would not be appropriate, as a matter of policy, to import a provision for indemnity costs under Part 36.10 (5). Rather, a defendant should be encouraged continuously to evaluate and re-evaluate the claim and hence be ready to change a view reached on any claimant offer. There was the irony that a well-judged Part 36 offer could make a trial and fight to the finish more, rather than less, likely because of the risk on costs. Hence imposing indemnity costs on late acceptance would actively discourage late settlement.

This ruling was, perhaps, influenced by the basis on which submissions were made for the claimant, which focused upon what the costs position would have been under Part 36.14 following "trial". Whilst the predecessor to the current Part 36.14 did indeed use the word "trial" the current rule refers to "judgment". Thus there needs to be "judgment", but not necessarily "trial", to raise the presumption of costs consequences, which then must apply unless this would be "unjust".

Perhaps the solution for the claimant, in such circumstances, is to seek judgment in the agreed terms as the cost consequences in Part 36.14, including indemnity costs and interest, should then follow unless this would be "unjust".

Given that the court may have to make a ruling on costs, which would probably involve a "judgment", under Part 36.10 (5) it would be strange if, in those circumstances, the claimant secured the benefits of Part 36.14 but in other circumstances did not.

It may be difficult for a party accepting an offer late to argue costs consequences will be unjust, certainly it should not suffice to show simply that the party has acted reasonably (perhaps because of re-evaluation in the light of further evidence), see for example Huck -v- Robson [2002] EWCA Civ 398 and Matthews -v- Metal Improvements Co Inc [2007] EWCA Civ 215

Who Has Won?

If no agreement is reached which deals, by deemed costs order or otherwise, with the incidence of costs the court will need to make an adjudication, which will usually involve the exercise of the general discretion as to costs found in Part 44.3.

The starting, and often finishing, point in the exercise of this general discretion is the provision in Part 44.3 (2) (a) that "the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party".

One of the factors, in deciding who has "won" is the presence, or indeed absence, of offers.

Caselaw has revealed how important offers may be in determining the winner, especially in cases where the claimant has successfully recovered damages but only obtained judgment for a fraction of the sum claimed.

In Painting -v- University of Oxford [2005] EWCA Civ 161 the claimant recovered damages, in excess of a Part 36 offer made by the defendant, but did not recover costs, at least for the time after the defendant's offer. It is often suggested that was simply because of exaggeration on the part of the claimant. Rather, the core reason for the decision was that, in a trial where the sole issue was effectively the credibility of the defendant, it was the defendant who had "won", so it was not even necessary for the defendant to place reliance on the offer which had been made and argue the judgment was less advantageous to the claimant. Of course, a trial on such a narrow issue will occur only infrequently. More significant are the observations of Longmore LJ in connection with the failure of the claimant to put forward proposals in response to the defendant's offer when he said:

> "...it is relevant that Mrs Painting herself made no attempt to negotiate, made no offer of her own and made no response to the offers of the University. That would not have mattered in pre−CPR

> days but, to my mind, that now matters very much. Negotiation is supposed to be a two−way street, and a claimant who makes no attempt to negotiate can expect, and should expect, the courts to take that into account when making the appropriate order as to costs. "

The relatively limited application of Painting has been highlighted by subsequent cases including, in particular, Hall -v- Stone [2007] EWCA Civ 1354 where Smith LJ observed:

> "The mere fact that the defendant has succeeded in keeping the damages down below the sum claimed by the claimant will not necessarily make him the victor or even a partial victor. Of course, where, as in Painting, the main issue in the case was whether the claimant had grossly exaggerated the claim and that issue had important costs consequences, it will be open to the judge to hold that the defendant was the victor. But if the claimant's exaggeration was no more than to put his case rather high, it does not seem to me that a defendant who has not made an effective and admissible offer can be regarded as the victor."

More recently, in Biffa Waste Services Limited -v- Maschinenfabrik Ernst Hese GMBH [2008] EWHC 2657 (TCC) the claimant incurred costs of over £1 million in a claim seeking just under £2 million. Judgment was entered, however, for just over £140,000. Crucially, the claimant had made various Part 36 offers, latterly to accept £125,000. The defendant had only responded to these proposals belatedly and the judge held the fact the claimant had made offers and the fact the defendant had failed to respond to those offers were both relevant considerations, as even with exaggeration by one party it must be remembered the other party can make a Part 36 offer. Accordingly, the defendant was ordered to pay the claimant's costs, despite the claimant incurring very substantial costs in the recovery of only a small part of the sum claimed.

The court must, however, be wary of speculating about what might have happened if offers, not made, had in fact been made.

In Straker -v- Tudor Rose [2007] EWCA Civ 368. Waller LJ held:

> "In my view it does not come well from a defendant who has paid money into court to argue that if a claimant had been more reasonable he would have offered more. An investigation as to how negotiations would have gone is precisely the form of investigation which should be avoided. In a case about money a defendant has the remedy in his own hands where a claimant is being intransigent. He can pay into court the maximum sum he is prepared to pay."

That approach was followed by HHJ Stewart QC in Ellison -v- Fairclough (Liverpool County Court 30 July 2007) in the specific context of a case about entitlement to

standard, as opposed to predictive, costs where, following issue of proceedings, the defendant's offer increased to £1,100 to the settlement figure of £1,700. Allowing the appeal, against the order made by the district judge, that the claimant should be limited to predictable costs, the circuit judge concluded that the district judge had engaged on exactly the kind of speculation the Court of Appeal had ruled inappropriate in Straker.

What will be "More Advantageous"?

Assuming the claimant is treated as having "won" the question for the court, if the defendant has made a Part 36 offer, is whether, at least from the time of the relevant offer, the winner's usual entitlement to costs will be displaced by the terms of Part 36 itself.

Part 36.14 provides that "upon judgment being entered" where a claimant fails to obtain a judgment "more advantageous" than the defendant's Part 36 offer the defendant will be able to recover costs from the end of the relevant period and interest on those costs.

In deciding whether the judgment is "more advantageous" the court can clearly take into account conditions attached to an offer of outright settlement, such as an apology in Jones -v- Associated Newspapers Limited [2007] EWHC 1489 (QB) or that an appeal be withdrawn as in Biffa Waste Services Limited -v- Maschinenfabrik Ernst Hese GMBH [2008] EWHC 2657 (TCC)

But what about comparing a purely monetary judgment against a purely monetary offer? It is enough for the claimant to recover anything more, in cash terms, by the judgment than was offered?

In Carver -v- BAA plc [2008] EWCA Civ 412 the Court of Appeal considered the meaning of the phrase "more advantageous" in the context of comparing a purely monetary offer against the judgment ultimately obtained by the claimant. The court concluded the phrase was "open-textured", which permitted a wide ranging review of all the circumstances in deciding whether the judgment obtained was, when compared with the offer, "worth the fight".

The facts of Carver were rather unusual. The defendant admitted liability and, from a relatively early stage, made offers of settlement which events proved to have been in the right region, although even the final offer was still £51 short of the figure for which judgment was eventually entered for the claimant. The claimant, however, sought substantially more than the sum for which judgment was eventually entered and, importantly, seemed reluctant to engage in negotiations. In these circumstances the Court of Appeal attached importance to the offer made by the defendant, which was reasonable if not quite enough to match the judgment, and the absence of any appropriate response or counter-offer, as well as the claim then becoming exaggerated by the claimant.

In these circumstances the judgment was held not to be "more advantageous" to the claimant than the offer.

That decision, at the time, seemed to suggest that it might be necessary for a claimant to beat a defendant's offer by some, perhaps indeterminate, margin in order to achieve a judgment which was "more advantageous" than the relevant offer.

Subsequent decisions have suggested Carver was very much a decision on the particular facts of the case.

In Multiplex Constructions (UK) Limited -v- Cleveland Bridge UK Limited [2008] EWHC 2280 (TCC) it was held the approach taken in Carver would only be appropriate where one party engaged in ADR and the other did not.

Similarly, in Morgan -v- UPS [2008] EWCA Civ 1476 the approach in Carver was not followed, even though the claimant beat the defendant's offer only "by a whisker", because the claimant had engaged in reasonable negotiations. In these circumstances the claimant's judgment, though for substantially less than he had claimed, was "more advantageous" than the defendant's offer.

In Morgan the court effectively followed the approach in Straker, though in the context of whether the judgment was "more advantageous" than the defendant's Part 36 offer rather than the broader question of who had "won".

This focus on whether the parties have engaged in negotiations, or other forms of ADR, is surely logical. Where both parties have negotiated the onus must be on both to find some middle ground and it would be wrong to penalise one party or the other simply because the judgment was more, but not much more, than the relevant offer. If the court did otherwise that would be to engage on the kind of speculation ruled out in Straker. Conversely, where one party is intransigent it is easier for the other party to argue that if a more constructive approach had been taken towards settlement there might have been movement and for the court to conclude that victory by a narrow margin was not, in such circumstances "worth the fight".

The facts in Carver are not likely to arise often in practice, as it is unusual for a claimant, faced with an offer, to not engage in negotiations. A more frequent occurrence is a defendant who, even when faced with offers from a claimant, refuses to engage in ADR simply on the basis that the defendant considers the claimant does not have a claim of sufficient merit. If, in such a case, the court eventually rules in the claimant's favour and gives judgment which is not quite as favourable as the terms of the claimant's own offer, can the claimant nevertheless seek indemnity costs and interest? In such circumstances perhaps the court does, as in Carver, have to ask whether it was "worth the fight" for the defendant. That should entail the court considering the saving in damages for the defendant, when compared with the figure which would have been paid if the claimant's offer had been accepted, but giving due allowance for the costs thereby incurred, especially if some may have

been irrecoverable even if the defendant had succeeded outright, along with the inevitable stress and strain of the trial for the defendant.

The Effect of Offers on Costs of Preliminary Issues

A Part 36 offer on the issue tried as a preliminary point will, of course, be relevant to the costs of that issue, depending upon who made the offer and how the judgment compares with that offer.

If, however, the only offers are of outright settlement should any such offers have a bearing on the costs of the preliminary issue, such as limitation or liability?

In HSS Hire Services Group PLC -v- (1) BMB Builders Merchants Limited (2) Grafton Group (UK) PLC [2005] EWCA Civ 626 the Court of Appeal held that where preliminary points have been decided by a court at first instance but there is a Part 36 offer of settlement, and quantum is still unknown, the best person ultimately to rule on costs will be the trial judge.

However, in Kew -v- Bettamix [2006] EWCA Civ 1535 there was a preliminary trial on the issue of limitation. The claimant succeeded, in part, on this issue and was ordered to pay the defendant's costs on the unsuccessful issue, despite the claimant having made a Part 36 offer of settlement.

The approach in HSS Hire Services Group PLC has subsequently been followed by the Court of Appeal in RTS Flexible Systems Limited -v- Morkerei Alois Müller GmbH & Co KG [2009] EWCA Civ 26.

At face value it does seem curious if a claimant who has made a Part 36 offer of outright settlement and is unsuccessful on a preliminary issue should be ordered to pay the costs of that issue there and then whilst a defendant, in essentially the same situation, can defer determination of the costs issue until such time as the outcome of the case as a whole is known.

In these circumstances a party who has made a Part 36 offer of settlement can, at the very least, argue the costs of a preliminary issue, which goes against that party, might not be determined until all aspects of the case are concluded. If, however, the relevant issue is a discrete one, which can readily to be seen to have added to the overall costs of the case, the court may feel able to make a costs ruling there and then, notwithstanding the offer of outright settlement.

The Effect of Offers on Costs of Issue-Based and Percentage Costs Orders

Part 44.3 (6) gives the court, when exercising the general discretion as to costs, power to make a variety of orders, including a proportion of costs (which will often be made on a percentage basis) or costs in relation to a distinct part of the proceedings, for example a specific issue.

The making an offer can, once again, be relevant to the exercise of this discretion.

In J Murphy & Sons Limited -v- Johnston Precast Limited [2008] EWHC 3104 an issue-based costs order was not considered appropriate, partly because the defendant, who was the successful party overall, had made offers to the claimant and the claimant would have been in a much better position, than the judgment given, had either of those offers been accepted.

Inclusive Offers

A party may wish to make an offer of settlement which is inclusive of damages and costs, either as a lump sum or with a breakdown of the total between damages and costs.

Can such an offer be effective for costs purposes?

In Mitchell -v- James [2002] EWCA Civ 997 the claimant sought specific performance of an alleged agreement. The claimant made an offer, described as a Part 36 offer, which, amongst other provisions, proposed that, if accepted, each party bear their own costs.

The claimant succeeded at trial but did not obtain benefits, in terms of indemnity costs and interest, found in the predecessor to the current Part 36.14 because the court held terms as to costs were not intended to be included in Part 36 offers. The reason for that was because it was considered Part 36 was intended to involve comparison of the offer and judgment on substantive issues, rather than ancillary issues such as costs. Whilst there was nothing to prevent a party making an offer containing provisions as to costs, which that party might later seek to rely on in connection with the exercise of the court's general discretion as to costs under Part 44, such an offer would not attract the specific costs consequences found under Part 36.

The court also recognised a practical problem that unless the trial judge was to make a summary assessment of costs, or those costs were fixed, it would, in any event, be impossible to make a comparison between an offer containing provision as to costs and the judgment.

Although the revised version of Part 36 has come into force since the decision in Mitchell, the terms as to costs now found in Part 36.10 essentially replicate the earlier rule on which Mitchell was decided. Accordingly, it would seem Part 36 offers must still be made on substantive issues, leaving the consequences in relation to costs provided for in the rule to prevail independently. That was certainly the approach taken by the Court of Appeal in Hall -v- Stone [2007] EWCA Civ 1354.

Even if the court, as envisaged in Mitchell, did make a summary assessment of costs there would be difficulty in comparing a claimant's offer, made inclusive of costs, with the judgment as a whole, including damages and assessed costs. That is because the court would have to know, before assessing costs, whether those costs were to be assessed on the standard or indemnity basis. If that, in turn, could only

be determined by having a figure for those costs the court would become engaged in a circularity with no effective start or end point.

A broader consideration is whether such an offer would be relevant under the more general discretion as to costs found in Part 44. For these purposes the court may be able to take a more rough-and-ready approach looking, for example, at the costs estimates given by the offeree, as the offeror might reasonably take such an estimate into account when formulating an offer.

Whether an inclusive offer needs to provide a breakdown between costs and damages may be depend upon whether that offer is made by the claimant or the defendant. A defendant's offer will surely need to include a breakdown as otherwise the claimant's representative is an invidious position of trying to apportion the figures. If the claimant makes an offer the defendant is, of course, simply looking at payment of a global figure so this may be less of an issue save for the difficulty already referred to about identification of the start and end points for this exercise where indemnity costs may be involved.

Since Mitchell predictable costs have been introduced for lower value claims arising out of road traffic accidents. Such costs are largely ascertainable and, accordingly, that would seem the most appropriate area of work for inclusive offers as it should be possible for the parties to identify the costs payable if the figure proposed for damages is accepted.

Conclusion

The last article in this series concluded by expressing the hope the new Part 36 would give greater certainty and create an environment where both claimant and defendant were placed in very much the same position so far as offers were concerned.

Unfortunately, as the caselaw reviewed in this article indicates, some complexities, and apparent lack of parity between parties, still exists. Furthermore, there remain issues, highlighted in the earlier article, which have yet to be clarified by caselaw.

Nevertheless, Part 36 remains an important rule, crucial to the reforms made at the time the Civil Procedure Rules were introduced.