THE FUTURE OF PART 36 (PART 6)

Introduction

The fifth in this series of articles on Part 36 reviewed recent caselaw, focusing on the implications of those decisions for practitioners when making or accepting Part 36 offers.

That article emphasised the importance of the distinction between Part 36 and non-Part 36 offers in the context of offer and acceptance, as Part 36 is a self-contained code where the general law of contract will not necessarily apply.

This article deals with the other area where the difference between Part 36 and non-Part 36 offers is crucial; that is in potential costs consequences. The topics covered by this and the last article are related as for there to be certainty that the costs consequences found in the rule will apply to an offer it must be made in accordance with the terms of Part 36.

Part 36.10 deals with the costs consequences applicable when a Part 36 offer is accepted, whether or not that is within the relevant period, whilst the costs consequences which apply when comparing an extant Part 36 offer with a judgment are set out in Part 36.14.

Accordingly, it is worth considering costs consequences of Part 36 offers on acceptance and then on judgment in turn.

Costs Consequences of Part 36 Offers on Acceptance

Recent caselaw has considered the meaning of the phrase, found in Part 36.10 (1) and in Part 36.10 (5), "the costs of the proceedings", as well as the proper approach to be taken in the exercise of discretion on costs where a Part 36 offer is accepted by the claimant after the expiry of the relevant period.

"The Costs of the Proceedings"

Part 36.10(1) provides that where a Part 36 offer is accepted within the relevant period the claimant will be entitled to "the costs of the proceedings up to the date on which notice of acceptance was served on the offeror".

Since 2007 the rule has provided that Part 36 offers may be made prior to the issue of court proceedings. Hence a claim may settle, on acceptance of a Part 36 offer, before court proceedings have been issued.

Thompson -v- Bruce [2011] EWHC 2228 (QB) concerned an application, in Part 8 proceedings, for approval of a settlement and, consequent on approval, a ruling on costs. The issue of costs required the court to consider the meaning of the phrase "the costs of the proceedings. The judge observed that the notes in the 2011 edition of The White Book suggested that Part 36 offers made in advance of proceedings should expressly state that in the event of acceptance the costs provisions of Part 36

would apply. The judge concluded a purposive construction should be put on the word "proceedings" in the rule, to include steps taken prior to issue which would ordinarily be compensatable in costs on a formal assessment.

Solomon -v- Cromwell Group plc [2011] EWCA Civ 1584 gave the Court of Appeal an opportunity to approve the approach taken in Thompson to the meaning of the word "proceedings" in Part 36.10. Moore-Bick LJ held:

> "The effect of accepting a Part 36 offer made before a claim has been issued, therefore, is that the claimant is entitled to recover costs he has incurred in contemplation of the proceedings up to the date of acceptance insofar as they would have formed part of his recoverable costs if proceedings had already been issued."

In Solomon the Court of Appeal also considered the relationship between Part 36.10 and section II Part 45. Part 36.10 provides for assessment of costs on the standard basis whilst Part 45 provides, in appropriate circumstances, for predictable costs. On this point Moore-Bick LJ observed:

> "In my view the Rules must be read in accordance with the established principle that where an instrument contains both general and specific provisions, some of which are in conflict, the general are intended to give way to the specific. Rule 36.10 contains rules of general application, whereas Section II of Part 45 contains rules specifically directed to a narrow class of cases. Reading the Rules as a whole, I have no doubt that the intention is that Section II of Part 45 should govern the cases to which it applies to the exclusion of other rules that make different provision for the general run of cases."

Consequently, Part 36 can be used to make offers, in all cases, prior to the issue of court proceedings but if the claim arises out of a road traffic accident and settles for less than £10,000 then, unless the parties have expressly agreed otherwise, costs will be those found in section II Part 45 rather than being the subject of a detailed assessment.

Late Acceptance by the Claimant

Part 36.10 (4) (b) provides that where a Part 36 offer is accepted after the expiry of the relevant period, if the parties do not agree the liability for costs, the court will make an order as to costs.

Part 36.10 (5) provides that where paragraph (4) (b) applies, unless the court orders otherwise, then:

> "(a) the claimant will be entitled to the costs of the proceedings up to the date on which the relevant period expired; and

(b) the offeree will be liable for the offeror's costs for the period from the date of expiry of the relevant period to the date of acceptance."

The terms of Part 36.10(5) suggest a presumption, although the court clearly does have discretion, about the terms of the costs order that will be made by the court following acceptance of a Part 36 offer after the expiry of the relevant period. Where, of course, acceptance of the offer takes place within the relevant period the court will not need to make an order expressly dealing with costs as the terms of Part 36.10(1) will apply.

Under Part 36.10 (5), unless the court thinks it appropriate to order otherwise, the order for costs will be for the defendant to pay the claimant's costs up to the expiry of the relevant period and thereafter the offeree to pay the costs of the offeror.

Where late acceptance is by the defendant, of the claimant's offer, that will mean the claimant, under the default position set out in the rule, recovering costs up to acceptance (though, as the fourth article in this series noted, there may be an issue as to the basis on which those costs should be assessed).

Where late acceptance is by the claimant, of the defendant's offer, the terms of Part 36.10 (5) (b) mean that, unless the court orders otherwise, the claimant will be liable for the defendant's costs after the expiry of the relevant period in the offer. A number of cases have considered how the court should exercise the discretion conferred by the terms of Part 36.10 (5) where the claimant has accepted an offer from the defendant late.

In Thompson -v- Bruce [2011] EWHC 2228 (QB), following the preliminary ruling that Part 36.10 applied where a part 36 offer was accepted prior to issue of court proceedings, it was necessary for the court to consider the appropriate exercise of discretion under Part 36.10(5). Rejecting the defendant's submission the claim should have been valued before a letter a claim was sent, and allowing for the additional time the defendant took to provide a letter of response, the judge exercised discretion by allowing the claimant's costs down to and including approval of the settlement.

In Lumb -v- Hampsey [2011] EWHC 2808 (QB), however, the judge held the terms of Part 36.10 (5) should only be departed from if it would be unjust for the claimant to pay the defendant's costs after the expiry of the relevant period. On the facts of the case such an outcome was held not to be unjust.

SG -v- Hewitt [2012] EWCA Civ 1053 allowed the Court of Appeal to consider how costs should be approached following late acceptance of a Part 36 offer by a claimant who needs court approval to settle the claim.

In SG the claimant suffered a serious head injury on 6 March 2003, which it was alleged was caused by the negligence of the defendant.

On 2 April 2009 the defendant made a Part 36 offer of £500,000. Counsel advised, in July 2009, it was impossible to put a definitive value on the claim at that stage and hence it would be difficult to advise the court for approval purposes.

The claimant's solicitors, on the basis of counsel's advice, then wrote to the defendant's solicitors reminding them that the expert evidence indicated the claimant was still too young for final conclusions to be drawn and that, accordingly, the reasonableness of the offer could not yet be assessed. The claimant's solicitors also set out the further investigations they intended to carry out.

Significantly, as it later turned out, the claimant's solicitors did not reject the offer.

In January 2011 updated expert evidence gave a more definite prognosis. The defendant's 2009 offer had never been withdrawn and was ultimately accepted by the claimant following receipt of that further expert evidence.

On 22 August 2011 Part 8 proceedings were issued, seeking the court's approval of the settlement. The court approved settlement on the basis of the claimant accepting the offer of £500,000.

At the approval hearing there was, however, an issue between the parties as to the incidence of costs from 23 April 2009 (the end of the relevant period in the pre-action Part 36 offer). The judge held that this was not an exceptional case or one in which it would be unjust for the normal order in relation to costs, under Part 36.10 (5), to be made.

The Court of Appeal took a different view on the appropriate costs order given relevant principles and the background facts of the case. Whilst recognising decisions on costs would always be fact sensitive the judge was held to have erred in failing to give appropriate weight to all relevant factors, including the following.

- The mere fact approval was required was not definitive in the claimant's favour, but the judge erred in failing to put this factor properly into the balance.

- The offer was made before the claimant commenced proceedings at a time when the prognosis was uncertain.

- Uncertainties about the evolution of the injury did not fit easily under the rubric "an ordinary contingency of litigation".

- The offer was not rejected.

- The defendant knew further reports were being obtained, not merely to improve or expand the claim but to ascertain the prognosis.

- The defendant not only had the advantage of choosing when to make the offer but also the option to withdraw it at a later stage (but chose not do to so).

Taking account of these factors the appeal was allowed and the defendant ordered to pay the claimant's cost throughout.

Costs Consequences of Part 36 Offers on Judgment

Where there is a judgment it is the terms of Part 36.14, requiring the court to compare that judgment with the terms of any extant Part 36 offer, which will, at least as a starting point, determine the appropriate order as to costs.

Part 36.14 provides, in effect, a special rule which limits the court's general discretion as to costs under Part 44 and stipulates certain costs consequences outlined in the rule itself will apply unless, specifically, that would be unjust.

It is the greater degree of certainty, as to costs consequences, conferred by Part 36 that, of course, makes it so important a party who wishes to obtain those benefits makes a valid Part 36 offer. As Moore-Bick LJ explained in Gibbon-v- Manchester City Council [2010] EWCA Civ 726:

> "In seeking to settle the proceedings, therefore, parties are not bound to make use of the mechanism provided by Part 36, but if they wish to take advantage of the particular consequences for costs and other matters that flow from making a Part 36 offer, in relation to which the court's discretion is much more confined, they must follow its requirements."

However, a party wishing to gain the benefits of Part 36.14 will need to show that the starting point should be the application of that rule.

Recent cases have looked at different facets of Part 36.14 including; the meaning of "advantageous", as used in the context of the rule; what will be "unjust", again for the purposes of this rule; the impact of Part 36.14 when preliminary issues are tried; and the consequences of the rule to withdrawn, changed or what might be termed quasi-Part 36 offers.

What will be "More Advantageous" or "At Least as Advantageous"

The effect of Part 36.14 is to apply specific costs consequences where, when compared with the judgment, a defendant's offer was "more advantageous" to the claimant or a claimant's offer "at least as advantageous" to the claimant.

A considerable amount of uncertainty, about the meaning of these words, was introduced by the judgment of the Court of Appeal in Carver -v- BAA Plc [2008] EWCA Civ 412. A degree of clarity was restored by the subsequent ruling in Gibbon -v- Manchester City Council [2010] EWCA Civ 726, reviewed in the previous article in this series, and still greater certainty has been given by The Civil Procedure (Amendment No. 2) Rules 2011 which provide that after Part 36.14 (1) there shall be inserted:

> "(1A) For the purposes of (1), in relation to any money claim or money element of a claim, "more advantageous" means better in money terms by any amount, however small, and "at least as advantageous" shall be construed accordingly."

This rule applies, as paragraph 1 (4) of the Civil Procedure (Amendment No 2) Rules 2011 confirms, to offers to settle made in accordance with Part 36.2 on or after 1 October 2011.

It seems likely, given cases such as Gibbon, the courts will adopt the approach of the new Part 14 (1A) when comparing pre-October 2011 Part 36 offers to any judgment entered.

McGinty -v- Pipe [2012] EWHC 506 (QB) concerned the trial of quantum in a clinical negligence claim, with the court ultimately awarding damages totalling £365,260.10. An issue then arose on costs as the defendant had made a Part 36 offer of £350,000 in October 2009 (two years prior to the judgment).

The defendant contended that an increase in damages of 4.3%, which was what the claimant achieved by going to trial, was "not worth the fight" (seeking to apply Carver). The judge concluded, however, that whilst Carver was authority for the proposition a court was not confined to looking only at the money value of a judgment cases such as Gibbon stressed that the comparison had to be made from the litigant's perspective. With a money award the amount of that award was likely to outweigh other factors in determining whether the judgment was "more advantageous" than the offer.

On this approach, in a case which was ultimately about the value of the final award, the claimant was held to be the successful party, having obtained an award which was more advantageous than the defendant's Part 36 offer. Consequently, the judge ordered the claimant should have the costs of the action throughout, on the standard basis to be assessed if not agreed.

Fox -v- Foundation Piling Limited [2011] EWCA Civ 790 required the Court of Appeal, as a preliminary point, to determine whether a claimant who had recovered damages from the defendant was the successful party, after allowing for offers to settle made by the defendant which included deductible benefits.

In Fox the claimant was employed by the defendant, suffering injuries in an accident at work whilst carrying a piece of heavy equipment across a building site. The defendant undertook surveillance of the claimant which was not disclosed for several years. Meanwhile, the defendant made a Part 36 offer of £63,000 including deductible benefits of £39,449.21 leaving a balance payable, if the offer were accepted by the claimant, of £16,050.79.

The defendant subsequently withdrew that offer and, at the same time, made a new offer. The gross figure, in the new offer, was reduced to £37,500 but deductible

benefits had also decreased, to £5,797.47, leaving a balance payable, if the new offer were accepted, which had increased to £31,702.53.

The parties agreed damages at the figure, after deductible benefits, of £31,705.53 leaving the question of costs, from the expiry of the relevant period in the first offer, to be determined by the court.

The judge, at first instance, concluded that the defendant had been the successful party after the end of the relevant period in the original offer of £63,000, even though the net sum recovered by the claimant exceeded the net figure which would have been payable had that original offer been accepted. Consequently, the claimant had to pay the defendant's costs after the date of the relevant period in that offer. The judge also held that, even if wrong on the issue of who was the successful party, the claimant's conduct warranted an order as to costs on these terms.

In the Court of Appeal, after drawing together the themes from caselaw in this area set out later in this article, Jackson LJ, with whom the other judges agreed, concluded that when the net figure in the judgment was compared with the net figure in the original offer, in accordance with Part 36.15 and 36.10 (8), judgment for the claimant was more advantageous than the defendant's first offer. Accordingly, the starting point was that the claimant had been the successful party in the litigation and, subject to the issue of conduct again dealt with later in this article, the appeal would, therefore, be allowed.

This ruling is a reminder, when considering what is "more advantageous" the net figures in the relevant offer and judgment, where that offer includes deductible benefits, must be compared. It is also a reminder of the need, so that comparison can be done, for any Part 36 made by the defendant which includes deductible benefits to provide the details required by Part 36.15. That rule is therefore effectively one of the rules about form and content of Part 36 offers, the importance of which has been emphasised by a number of cases reviewed in the fifth of this series of articles.

The focus in Carver, Gibbon, McGinty and Fox was whether the judgment ultimately obtained was "more advantageous" to the claimant than an offer by the defendant.

Acre 1127 Ltd (in liquidation) -v- De Montfort Fine Art Ltd [2011] EWCA Civ 130 involved the court determining whether a judgment was "at least as advantageous" to the claimant as the claimant's own offer. The Court of Appeal concluded, when considering this issue, the approach taken in Carver would not be applicable.

In Acre 1127 Ltd the claimant's judgment against the defendant, at first instance, was for £1,032,364.81. On appeal the judgment was reduced to £442,442.04. The claimant had made a Part 36 offer prior to the first instance decision, the relevant period expiring on 3 July 2008, of £500,000. That offer was stated to be "inclusive of interest until the relevant period has expired".

When comparing the offer and judgment, following the appeal, to determine whether the claimant retained the costs consequences provided for under Part 36.14 up to trial, the proper comparison was held to be between the offer of £500,000 and the judgment sum of £442,442.04, together with such discretionary interest as it was appropriate to award on the latter in respect of the period between accrual of the cause of action and the expiry of the relevant period.

Interest, calculated on a basis agreed between the parties, on the judgment sum of £442,442.04, to 3 July 2008 when the relevant period in the offer expired, meant the comparator sum representing the value of the judgment as it would have been at that time with interest, to be compared with the Part 36 offer, was £510,113.44.

Consequently, the claimant obtained a judgment in the Court of Appeal "at least as advantageous" as the claimant's own offer.

Whilst, following the appeal, the claimant had improved, by judgment, on its offer only marginally the Court of Appeal held that it was not appropriate to re-visit the trial judge's exercise of discretion in awarding indemnity costs and enhanced interest.

For these purposes the Court of Appeal recognised that in Carver the phrase "more advantageous" had been interpreted broadly. However, the court went on to hold that the situations addressed by Parts 36.14 (1) (a) and (b) were not analogous, as sub-rule (b) requires the court to examine the advantage to the claimant. It would, the Court of Appeal held, have been difficult on that basis to justify a conclusion the outcome, even after the appeal, was not at least as advantageous to the claimant as the proposal to settle for £500,000.

Consequently, where the court is comparing a Part 36 offer made by the claimant against judgment, even where that offer was made prior to the introduction of Part 36.14(1A), it would seem the phrase "at least as advantageous" means a straightforward comparison between the terms of the offer and the terms of the judgment.

The decision also illustrates what is "advantageous" may ultimately turn on interest.

If a party seeks more than monetary damages that may be a factor in determining what is "advantageous" but where the case really is "all about money" then the comparison will be made on that basis alone as illustrated by Force India Formula One Team Limited –v- Malaysia Racing Team SDN BHD [2012] EWHC 1621 (Ch)

What will be "Unjust"?

Those cases which have adopted the test of what would be "unjust" for the purposes of exercising the discretion as to costs found in Part 36.10 (5), when considering the appropriate costs order on late acceptance of a Part 36 offer, obviously offer guidance on how the court will approach what is unjust for the purposes of Part

36.14 (see Thompson -v- Bruce [2011] EWHC 2228 (QB); Lumb -v- Hampsey [2011] EWHC 2808 (QB) and S G -v- Hewitt [2012] EWCA Civ 1053).

Other cases have specifically considered when the costs consequences provided for under Part 36.14 would be unjust.

The costs consequences provided for under Part 36.14 will, generally, not be unjust. For example, in Hemming -v- Westminster City Council [2012] EWHC 1582 (Admin) the defendant contended the costs consequences provided for under Part 36.14 would be unjust because the case involved a point of principle which could affect licensing authorities, such as the defendant, in other cases. That argument was not accepted as the particular claim could have been compromised without prejudice to the stance that might be adopted in other cases.

Similarly, in Blue Sphere Global Limited -v- Revenue & Customs Commissioners [2010] EWCA Civ 517 the defendant was unable to persuade the court it would be unjust for the costs consequences provided for under Part 36.14 to apply simply because the defendant was engaged in the laudable purpose of protecting public revenue.

Preliminary Issues

The third in this series of articles noted that the proper approach to costs, taking account of offers to settle, following the determined of preliminary issues was not entirely clear given the rather different approach taken to this issue by the Court of Appeal in HSS Hire Services Group -v- BMB Builders Merchants [2005] 1 WLR 3158 from that in Kew -v- Bettamix Limited [2006] EWCA Civ 1535.

Subsequently, in AB -v- CD [2011] EWHC 602 (Ch) Henderson J held that it was:

> "… on balance preferable … to reserve the costs … so that the court can review the whole question of costs with a free hand at the conclusion of the litigation."

That approach was endorsed in Jean Scene Limited -v- Tesco Stores Limited [2012] EWHC 1275 (Ch) where HHJ Pelling QC added:

> "… I regard it as almost inevitable that the court will only in the most exceptional of circumstances be prepared to entertain a costs application in relation to even part of the general costs of a claim."

The same approach was taken in Ted Baker plc -v- AXA Insurance UK plc [2012] EWHC 1779 (Comm) where the judge considered Part 36 does not, as presently drafted, provide an ideal solution for dealing with costs in cases where there is a preliminary trial and observed:

> "In my view, there is an urgent need for CPR 36.13 to be reviewed and possibly reformulated in order to deal in particular with the question of "split trials" and the kind of difficulties which have arisen in the present case."

This approach was followed yet again in Beasley –v- Alexander [2012] EWHC 2715 (QB).

Interim Hearings

A distinction can be drawn between costs following the trial of preliminary issues and costs orders made for interim hearings, whether a case management hearing or the hearing of an application.

In Jean Scene Limited -v- Tesco Stores Limited [2012] EWHC 1275 (Ch) the judge reflecting this distinction by observing:

> "It is undesirable for a judge to make even a partial costs order if it is in relation to part of the costs of the action generally, as opposed to a freestanding application…"

Where there is a freestanding application the court may be more ready to conclude costs should follow the event in that application, certainly where it might be said one party has generated the need for that application and hence incurred costs that could otherwise have been avoided. In that context the approach advocated in Kew can be readily appreciated. The Court of Appeal might, in that case, be seen as having applied the test appropriate to freestanding interim hearings but in the slightly different context of the trial of a preliminary issue.

Withdrawn Offers

Part 36.14(6)(a) expressly provides that the costs consequences set out in Part 36.14 will not apply where a Part 36 offer has been withdrawn.

In Epsom College -v- Pierse Contracting Southern Limited [2011] EWCA Civ 1449 the Court of Appeal held it an error simply to apply the consequences of Part 36.14 to an offer that had been withdrawn. That is because the exercise of discretion under Part 44 is a quite different exercise to determining whether the costs consequences of Part 36 apply, even though it may sometimes lead to the costs consequences set out in Part 36.14 being applied.

Similarly, the Court of Appeal was clear in Fox -v- Foundation Piling Limited [2011] EWCA Civ 790 that the defendant's withdrawn Part 36 offer ceased to attract the consequences set out in Part 36.14 and could only be considered under Part 44.3(4)(c).

A decision which may give a misleading impression of the law, away from the particular context of the case, is Owners and/or Bareboat Charterers and/or Sub Bareboat Charterers of the Ship Samco Europe -v- Owners of the Ship MSC Prestige [2011] EWHC 1656 (Admlty) where the court had to determine the incidence of costs following a decision apportioning responsibility for a collision at sea. That is because, as an admiralty case, Part 61 CPR was applicable and that rule has no equivalent provision to Part 36.14 (6).

Changed Offers

Part 36.14(6)(b) confirms that the costs consequences found in Part 36.14 will not apply to a Part 36 offer that has been changed so that its terms are less advantageous to the offeree, provided the offeree has beaten the less advantageous offer.

Quasi-Part 36 Offers

Prior to the April 2007 amendments to Part 36 the court had discretion to treat a purported Part 36 offer, not complying fully with the rules as to form and content, as effective. This topic was explored by the Court of Appeal in Trustees of Stokes Pension Fund -v- Western Power Distribution Power Distribution (South West) plc [2005] EWCA Civ 854.

The current version of Part 36 contains no equivalent provision but, of course, there are still offers extant which were made before April 2007.

So it was that in French -v- Groupama Insurance Co Limited [2011] EWCA Civ 1119 the Court of Appeal dealt with issues summarised by Rix LJ as:

> "… how a pre-litigation offer to settle should be treated in the light of CPR provisions to be found in Part 36, as amended over the period concerned, and in the light of Trustees of Stokes Pension Fund -v- Western Power Distribution Power Distribution (South West) plc [2005] EWCA Civ 854."

The Court of Appeal concluded the CPR amendments made in 2007 reflected a new determination to specify carefully what did or did not count as a Part 36 offer with Part 36 consequences, other admissible offers being relevant to the exercise of discretion under Part 44 but not carrying the costs consequences of Part 36.

On this basis the Court of Appeal concluded it was now harder to formulate an approach to the Part 44 discretion that some offers which were not Part 36 offers should nevertheless be treated as such for the purposes of applying Part 36 consequences.

Hence the decision in Stokes should, perhaps, now be treated with some caution. Perhaps all that can be said with any certainty is that in French the Court of Appeal affirmed the observations in Stokes that where an offer was open for a limited

period or time and it was not reasonable for the claimant to have accepted the offer within that timescale, the offer would be unlikely to carry costs consequences.

Time Limited Offers

It is now well established that a time limited offer cannot be a Part 36 offer: C -v- D [2011] EWCA Civ 646; Thewlis -v- Groupama Insurance Co Ltd [2010] EWHC 3 (TCC); PHI Group Limited -v- Robert West Consulting Limited [2012] EWCA Civ 588.

Accordingly, like a withdrawn offer, a time limited offer can only be relevant to the exercise of the court's general discretion as to costs under Part 44.

A court should, perhaps, adopt the same approach to the efficacy of such an offer as it would to a withdrawn offer, in other words focussing only the period of time the offer was open and, at the very least, determining whether the offer should have been accepted within that timescale.

Costs Consequences of Non-Part 36 Offers on Acceptance

It is important to note that away from Part 36 there are no deemed costs provisions applicable on acceptance, so the offeree will need to ensure the terms of the offer provide adequately for costs before accepting any offer and seek clarification, or a further proposal, where terms as to costs are unclear or inadequate.

Cost Consequences of Non-Part 36 Offers on Judgment

Where the court gives judgment it will, unless there is agreement on this issue, also need to determine what, if any, order to make as to costs.

In the absence of any extant Part 36 offer which is, as appropriate "more advantageous" or "at least at advantageous", so that unless "unjust" the terms of Part 36.14 will apply, it will be necessary for the court to exercise the general discretion on costs conferred by Part 44.3.

What is described as the general rule, for the exercise of this discretion, is found in Part 44.3 (2) (a), namely that the unsuccessful party will be ordered to pay the costs of the successful party.

The court can, however, make a different order as to costs and in deciding what order to make Part 44.3(4)(c) specifically identifies, as relevant, an "admissible offer to settle made by a party which is drawn to the court's attention and which is not an offer to which the costs consequences under Part 36 apply". However, that rule specifically identifies a number of further factors also relevant to the exercise of discretion, hence Part 44 should not follow the more mechanistic approach applicable under Part 36, which include the conduct of the parties and whether a party has succeeded on part of the case even if not all wholly successful.

Moreover, an offer for the purposes of Part 44.3 (4) (c) must be both an "admissible offer", meaning it must amount to an "offer" and have expressly been made "without prejudice except as to costs" rather than on a wholly without prejudice basis, and, even if originally made as a Part 36 offer, not be an offer to which the costs consequences found in Part 36 have applied.

Although Part 44 does not, like Part 36, expressly suggest a comparison between offer and judgment, in terms of what is more "advantageous", that seems implicit at least for the purposes of identifying who is the successful party.

The relationship between Part 44 and Part 36, and the different scenarios, within which those rules might need to be applied, was reviewed in Fox -v- Foundation Piling Limited [2011] EWCA Civ 790. Jackson LJ, with whom the other members of the court concurred, summarised those different scenarios.

- "First, where one party makes a Part 36 offer and then achieves a more advantageous result than that proposed in his offer, the provisions of rule 36.14 modify the court's general discretion in respect of costs."

- "Secondly, parties are quite entitled to make "Calderbank" (that is an offer expressed to be without prejudice except as to costs) offers outside the framework of Part 36. Where a party makes such an offer and then achieves a more advantageous result, the court's discretion is wider than under Part 36. Nevertheless, it may well be appropriate to order the party which has optimistically rejected the "Calderbank" offer to pay all costs since the date when that offer expired: Trustees of Stokes Pension Fund -v- Western Power Distribution (South West) Ltd [2005] EWCA Civ 854."

- "A not uncommon scenario is that both parties turn out to have been over-optimistic in their Part 36 offers. The claimant recovers more than the defendant has previously offered to pay, but less than the claimant has previously offered to accept. In such a case the claimant should normally be regarded as "the successful party" within rule 44.3 (2). The claimant has been forced to bring proceedings in order to recover the sum awarded. He has done so and his claim has been vindicated to that extent."

- "However, an adjustment may be required to reflect the costs referable to a discrete issue which the successful party has lost. An adjustment may also be required to compensate the unsuccessful party for costs which it was caused to incur by reason of unreasonable conduct on the part of the successful party."

- "For these purposes 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: Goodwin -v- Bennett UK Limited [2008] EWCA Civ 1658."

- "Similarly, even deliberate exaggeration of the claim may not be good reason to deprive the claimant of costs as a defendant may always make a Part 36 offer."

- "Even so, the costs order may be modified to allow the successful party a specified proportion of costs."

Given the terms of the Court of Appeal judgment in French, already considered in this article, the second point made by Jackson LJ may need to be refined in the light of that further ruling. Otherwise this should, perhaps, be taken to accurately reflect the law in this area particularly on the crucial point that recovery of damages above and beyond the amount, if any, offered by the defendant, whether or not as a Part 36 offer, will be sufficient vindication to render the claimant the successful party.

Having overturned the first instance decision that the claimant had not been the successful party the Court of Appeal in Fox then had to determine whether the claimant's conduct was such that under Part 44 it had, in any event, been appropriate to deprive him of the costs he would otherwise have been entitled to as the winner of the case. The Court of Appeal held there was nothing remarkable in the claimant's conduct of the case to justify departure from the normal order he should recover the costs of the action. The appeal was, accordingly, allowed. Moreover, the claimant having made Part 36 offers, in relation to the appeal, recovered most of the costs of the appeal on the indemnity basis and with interest at 10% above base rate.

Jackson LJ took the opportunity of endorsing the need for courts to follow, in most cases, the basic framework of Part 44.3 (2) when he held:

> "There has been a growing and unwelcome tendency by first instance courts and, dare I say it, this court as well to depart from the starting point set out in rule 44.3 (2) (a) too far and too often. Such an approach may strive for perfect justice in the individual case, but at huge additional cost to the parties and at huge costs to other litigants because of the uncertainty which such an approach generates. This unwelcome trend now manifests itself in a (a) numerous first instance hearings in which the only issue is costs and (b) a swarm of appeals to the Court of Appeal about costs, of which this case is an example."

It is interesting to note that the comments of Jackson LJ in Fox, endorsed by the rest of the court in that case, were essentially a repetition of the views he expressed a

few weeks earlier, as part of a different division of the Court of Appeal, in Medway Primary Care Trust -v- Marcus [2011] EWCA Civ 750.

It is difficult to reconcile Medway Primary Care Trust with Fox. The approach in Fox should, perhaps, be preferred given that it was a unanimous, rather than a majority, decision and that, although not asked to decide between these two decisions, it is Fox to which the Supreme Court referred, and could be said to have endorsed, in Summers -v- Fairclough Homes Limited [2012] UKSC 26.

For the claimant an offer outside Part 36 is unlikely to attract the benefits of indemnity costs and enhanced interest (at least unless there is something exceptional about the defendant's conduct which merits such a sanction) endorsing the need for an effective Part 36 offer to be made if those consequences are to follow in the event of a judgment at least as advantageous to the claimant as the offer: F & C Alternative Investments (Holdings) Limited -v- Barthelemy [2012] EWCA Civ 843.

Conclusion

The need for clarify from the parties, when making or accepting offers, as well as certainty from the courts, particularly when dealing with the workings of Part 36, are just as essential to the costs consequences of offers as to the issues surrounding offer and acceptance.

In the future, as well as continuing to explore the workings of Part 36, the courts are likely to have to grapple with yet further problems, not least being the relationship between Part 36 and the proposed QOCS along with the enhancement of benefits given to claimants who beat their own offers. Watch this space!