THE FUTURE OF PART 36 (PART 8)

Introduction

Since the seventh article in this series, which looked at the impact of significant amendments to the CPR in both April 2013 and July 2013, caselaw has continued to interpret and clarify Part 36, whilst practitioners have begun to get to grips with the tactics of Part 36 in the post-2013 litigation world.

This eighth article in the series will look at various aspects of the rule considered in recent caselaw and what these decisions mean in practice.

Various aspects of Part 36 will be considered in turn, starting with the making of offers and then working through the topics of withdrawal, changing and acceptance of offers before concluding with the issue of costs consequences under Part 36 as well as, by way of contrast, costs consequences of Part 36 offers under Part 44.

Making Offers

A series of cases, reviewed by earlier articles in this series, have emphasised the importance of complying with the rules on form and content, particularly those set out in Part 36.2 (2) when making an offer intended to have the consequences provided for in the rule.

The courts will, nevertheless, try to give effect to an offer, as a Part 36 offer, if the rule is referred to, even when there may be issues about compliance with the requirements of form and content. A recent example of this approach is Haynes –v- Department for Business Innovation and Skills [2014] EWHC 643 (QB), which will be returned to later in this article on a different point, where an offer was made in the following terms:

> "We now have our client's instructions to put forward an offer to settle this claim against your client pursuant to Part 36 CPR in the sum of £18,000 plus standard costs. The amount is net of benefits in full and final settlement of her claim."

The judge held that, whilst this offer probably did not comply with the terms of Part 36, as no point had been taken by the defendant at the time any non-compliance was waived.

Withdrawing Offers

Part 36.3 (6) confirms that after expiry of the relevant period, provided the offeree has not previously served notice of acceptance, the offeror may withdraw the offer, or change its terms to be less advantageous to the offeree, without the permission of the court.

Part 36.3 (7) provides that is achieved by serving written notice of the withdrawal or change of terms on the offeree.

Recent caselaw has considered the proper approach to withdrawal of Part 36 offers within the relevant period, when permission of the court is required, and also what constitutes notice of withdrawal.

Permission

The approach of the courts to an application for permission to withdraw a Part 36 offer, within the relevant period, was reviewed in Evans -v- Royal Wolverhampton Hospitals NHS Foundation Trust [2014] EWHC 3185 (QB)

The defendant, in this clinical negligence claim, made an application for permission to withdraw a Part 36 offer within the relevant period of that offer in circumstances described as "remarkable" by the judge.

The unusual feature of the application was that it raised the question whether permission could be granted by the court on the basis of information, and for reasons, not disclosed to the offeree.

The claimant had been admitted to the defendant's hospital following a fall in the street while intoxicated. The claimant was discharged from hospital later on the day of admission but the following day re-admitted in an unresponsive state as a result of a brain injury leaving permanent disability. The claimant's case was that the defendant failed to properly assess and treat her properly and that this caused the adverse outcome of permanent disability.

The defendant admitted breach of duty but denied this had any causal effect on the claimant's clinical outcome.

On 3 July 2014 the defendant made a Part 36 offer of £325,000. At 11.25 am on 23 July 2014 the defendant's solicitors served, by fax on the claimant's solicitors, a notice of withdrawal of that offer. At 12.45 pm on the same day the claimant's solicitors served, on the defendant's solicitors by fax, a notice of acceptance of the offer.

Consequently, both notices were served within the relevant period, Part 36.3 (5) providing that before expiry of the relevant period a Part 36 offer may be withdrawn or its terms changed to be less advantageous to the offeree only if the court gives permission.

On 6 August 2014 the claimant made an application seeking a declaration the proceedings had been settled for a sum of £325,000 and an order for judgment accordingly.

Meanwhile, but unknown to the claimant, the defendant issued, on 24 July 2014, an application for permission to withdraw the Part 36 offer. Without notice of the

application being given to the claimant that application was heard on 7 August 2014 and an order made:

- giving the defendant permission to make application without serving a copy on the claimant;
- giving the defendant permission to withdraw the Part 36 offer;
- setting aside the purported acceptance of the Part 36 offer by the claimant;
- dispensing with the requirement to serve the application notice and evidence in support on the claimant after the without notice hearing; and
- reciting the defendant's right to set aside or vary the order under Part 23.10.

On 13 August 2014 the claimant received a copy of the order made on 7 August 2014 but, in accordance with the terms of that order, no application notice or evidence in support. Consequently, the claimant was never made aware of the basis on which that order was made. The following day the claimant issued an application under Part 23.10 to set aside the order made on 7 August 2014.

After reviewing the procedure adopted when the defendant's application was considered by the court, in the context of relevant authorities, Leggatt J concluded:

> "Two points emerge clearly from these cases. The first is that adherence to the principle of natural justice is not an optional feature of litigation from which a court has power to derogate because it considers that in the particular circumstances the need to follow a fair procedure is outweighed by a conflicting public or private interest. Subject only to certain established and tightly defined exceptions, the right to participate in proceedings in accordance with the principle of natural justice is absolute. The second point is that, although the Al Rawi case concerned the trial of a civil claim for damages, the reasoning which underpins that decision is not confined to trials and is of broader application. The broader principle which I derive from these authorities is that the logic of the Al Rawi case applies whenever a court is deciding a question of substantive legal right as between the parties to the litigation. This is consistent also with Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which establishes the right of everyone to a fair and public hearing in "the determination of his civil rights and obligations" and provides only for balancing the requirement of publicity and not that of fairness against other interests."

Consequently, the order of 7 August 2014 should not have been made and the claimant was entitled as of right to have it set aside.

That did not prevent the defendant still arguing there should be permission to withdraw the Part 36 offer, though the judge held that in accordance with the principle of natural justice such argument would have to be supported by reasons and evidence as it did not fall into a category where any form of "closed material procedure" was permissible. However, the defendant had not served any evidence or disclosed any reasons to support such a contention. In the absence of that the claimant's acceptance of the offer had to be treated as effective, and it followed the claimant was entitled to judgment under Part 36.11 (7).

Leggatt J went on to observe that there was another separate line of reasoning which would, in any event, have led him to the same conclusion. He explained:

> "The test to be applied when the court is considering whether to give a party permission to withdraw a Part 36 offer is whether there has been a sufficient change of circumstances to make it just to permit the party to withdraw its offer. That test was set out by the Court of Appeal in relation to payments into court in Cumper v Pothecary [1941] 2 KB 58 at 70. The Court of Appeal gave as examples of such circumstances "the discovery of further evidence which puts a wholly different complexion on the case … or a change in the legal outlook brought about by a new judicial decision…" This test was adopted in relation to Part 36 payments by the Court of Appeal in Flynn v Scougall [2004] 1 WLR 3069, 3079 at para 39. I see no reason why the test should be different in relation to a Part 36 offer and, as mentioned earlier, the defendant's application to withdraw its Part 36 offer was made on the basis that this is the applicable test."

In the absence of any evidence from the defendant there could be no basis for concluding there was a sufficient change of circumstances.

Leggatt J concluded:

> "Part 36 sets out a structured series of steps, with specified timescales, for the acceptance of an offer made in accordance with its provisions and for payment of the accepted sum. It would be inconsistent with this regime and with the aim of providing a fair, speedy and effective mechanism for the settlement of proceedings, if the offeree could be required to wait in limbo for an indeterminate time, as is proposed in this case, with the whole action stayed meanwhile, before it can be established whether the offer was validly accepted within the 21 day relevant period such that the offeree was entitled to payment or judgment within 14 days thereafter."

Whilst the background, as the judge noted, was indeed remarkable the judgment makes some important points, of more general application, in particular stressing that when an application to withdraw, and presumably change so it is less advantageous to the offeree, an offer within the relevant period is considered the offeror will need to prove

there has been a sufficient change of circumstances so that it is just to permit the party to take that step.

This principle might also be applicable in the event of the claimant seeking, in the limited circumstances where this is necessary, permission to accept an extant Part 36 offer made by the defendant outside the relevant period. In other words, if there was no sufficient change of circumstances permission ought usually to be granted subject, of course, to terms on costs.

In other circumstances, of course, the offeror can withdraw or change a Part 36 offer, unless and until accepted, at will.

Mistake

Barrett –v- Nutman (Liverpool County Court 20 June 2014) concerned an application by the Claimant for permission to withdraw a Part 36 offer on the basis of a mistake.

The proceedings arose out of a road traffic accident. The claimant made a Part 36 offer of £2,701.22. The defendant enquired whether that offer included £540 physiotherapy fees.

Within the relevant period the claimant then purported to withdraw the offer and to make another Part 36 offer, which included the physiotherapy fees. The defendant then accepted the original Part 36 offer.

The claimant argued that there had been a genuine mistake hence applying the overriding objective permission to withdraw the offer should be given.

The defendant contended a mistake about the calculation of the offer was something the claimant should fixed with and the court ought not to readily allow the withdrawal of a Part 36 offer, because that would undermine the certainty provided by the rule and did not assist in the administration of justice.

District Judge Clark concluded, taking account of the overriding objective, permission to withdraw the offer should not be given.

Noting the amount involved was £540 the judge held it was necessary to have regard to proportionality and also to allot only an appropriate share of the court's resources, given that if permission was granted that would effectively revive a case which had been stayed with the result further hearings, and possibly a final hearing, might be necessary.

Consequently, permission to withdraw the Part 36 offer was refused.

The decision does seem rather harsh on the claimant because, applying the common law of mistake, an agreement will be vitiated if there was no mutual mistake, in other words if one party made a mistake and the other party was aware of that mistake. That seems to have been the position here, given the request for clarification. The court was not referred to the potentially persuasive decision of Milton -v- Schlegel (2006) Limited

(Cambridge County Court 31 October 2008) where, although on the facts the agreement was held to be binding, this approach to the law was adopted.

Notice of Withdrawal

What amounts to notice of withdrawal was considered in Super Group plc –v- Just Enough [2014] EWHC 3260 (Comm)

The defendant made a Part 36 offer on 26 November 2013 but subsequently wrote on 25 April 2014 stating:

> "…our client made every effort to settle this matter, which was simply ignored by yourselves and your client which offers are, needless to say, withdrawn."

On 8 May 2014 the claimant served notice of discontinuance of the claim.

On 15 May 2014 the claimant wrote purporting to accept the Part 36 offer made on 26 November 2013.

The claimant applied to court for an order on the basis the offer was to remain open for acceptance. The defendant contended the offer had been withdrawn and, additionally, the offer could not, in any event, be accepted following notice of discontinuance.

Flaux J held that:

> "…the Part 36 offer that was made was clearly withdrawn by the letter of 25 April. It is accepted, as indeed it must be, that there does not have to be any specific form of notice and although Moore-Bick LJ says in the passage I cited from paragraph 17 of his judgment that it would be preferable if the date of the offer is specified so that it can be made absolutely clear that that is the offer that is being withdrawn, he recognises that there may be cases in which the court may need to explore what offers have been made and whether the Part 36 offer is one of them and whether that offer has been withdrawn. So that he is clearly contemplating that there does not have to be some rigid regime of a specific form of notice. Furthermore, it seems to me that although Rix LJ refers to a formal notice of withdrawal, he is simply making the point there that you have to serve something in writing that states in terms that an offer is being withdrawn. He is not prescribing a particular form of words or the incantation of some magic formula that has to be gone through. Indeed, any such suggestion would be contrary to the whole force of the passage of Moore-Bick LJ in his judgment as to the purpose of the Part 36 regime."

Consequently, it was not necessary to determine the effect of the notice of discontinuance, though the Judge expressed the view that following service of that

notice the offer could not be accepted and observed this was consistent with the judgment of Kenneth Parker J in Joyce –v- West Bus Coach Services Limited [2012] EWHC 404 (QB).

Changing Offers

It is easy to overlook the option of changing, so it is less advantageous to the offeree, an offer rather than withdrawing that offer. The former may be a better step tactically for the offeror than the latter as the judgment in Burrett -v- Mencap Limited (Northampton County Court 14 May 2014) illustrates.

Giving judgment District Judge Ackroyd observed:

> "What I have before me is the interesting question of interpretation of Part 36. One would have thought that Part 36, having been in existence for many years now every possible wrinkle in it would be ironed out before now. It appears not to be so because the question I have to decide is whether on variation of a Part 36 offer the time for acceptance is fixed by the time for acceptance of the original offer or whether a fresh period of time begins to run."

The background was that the defendant made an effective Part 36 offer to settle the claim on 19 July 2013.

By a letter dated 17 January 2014 the defendant stated:

> "We hereby change the terms of our client's Part 36 offer dated 19th of July pursuant to CPR 36.3(6)."

The claimant accepted the offer as changed reasonably promptly.

The hearing before the district judge concerned the incidence of costs following acceptance of the offer.

The issues involved in the application were summarised by the judge:

> "One could I think reasonably assume that because maybe the nature of the case has changed or certainly the strength or weakness of the evidence has changed that a Defendant should have an opportunity of reviewing previous offers in order to bring the litigation to a conclusion. That makes good sense but should it be able to carry with it the costs protection that attached to the original offer? Of course, in this case we are talking about a difference of some six or seven months which may be of significance in terms of costs. One might also have thought that where an offer has been changed there should be a period of time allowed to the Claimant to at least reflect on that change and what the

> consequences of acceptance or refusing the offer bring to the Claimant. That also would make good sense."

After noting that Part 36.3(6) allows a party to withdraw or change, so it is less advantageous to the offeree, an offer once the relevant period has expired and also that Part 36.3 (7) confirms that can be done by serving written notice of the withdrawal or change of terms, the district judge, observing that this rule was silent about there being any further time allowed for acceptance, concluded there was no implied entitlement to such further time.

Consequently, the claimant did not get the benefit of the deemed costs order found in Part 36.10, which would be applicable on acceptance of a Part 36 offer within the relevant period.

This case does deal with an important point; namely the ability to change a Part 36 offer, after the relevant period has elapsed, at any time unless and until that offer is accepted. The significance of this is that changing an offer may be far more beneficial to the offeror, by preserving the benefits conferred under Part 36, than withdrawing the offer and making a new offer.

The judgment, it would seem correctly, recognises the ability, under Part 36, to change an offer which, on the basis the rule is a self-contained code (see Gibbon -v- Manchester City Council [2010] EWCA Civ 726), means simply that the original offer is now read as though it had been made as subsequently amended.

It is, of course, essential to either change or withdraw a Part 36 offer in the event that no longer represents an appropriate settlement and to do so irrespective of any events that would, under the law of contract, prevent acceptance (see Gibbon -v- Manchester City Council [2010] EWCA Civ 726). The wording used in the case might be adopted, or perhaps service of an amended notice in form N242A where that was used to communicate the original offer.

As the claimant appears to have accepted the offer more than 21 days after the change the judge could have approached costs on the basis of the general discretion found in Part 36.10 (5).

Acceptance

A series of cases have considered different issues that may arise in relation to the acceptance of a Part 36 offer.

Timescale for Payment

Treating Part 36 as a self-contained code is significant when considering timescale for payment of sums due following acceptance of an offer as confirmed in Cave –v- Bulley Davey [2013] EWHC 4246 (QB).

This was a judgment on costs following acceptance, by the claimant, of a Part 36 offer made by the defendant long after the expiry of the relevant period.

The background was that on 29 February 2012 the defendant made the claimant a Part 36 offer to pay £20,000. The claimant accepted the offer on 13 July 2013.

The first day of the trial of the action was 15 July 2013. At that hearing a number of matters were agreed.

- It was agreed the defendant should pay the claimant's costs up to 21 March 2012.

- It was agreed the claimant should pay the defendant's costs from 22 March 2012 to 13 July 2013.

- It was agreed there should be a set off of costs, so that whichever party was to receive the greater sum in costs should receive only the balance in excess of the amount found to be due to the other party.

There was, however, an issue between the parties as to whether the costs to which the defendant was entitled should be set off not merely against the costs to which the claimant was entitled but also against the £20,000 payable on acceptance of the Part 36 offer.

Part 36.11 (6) was held to provide that, unless the parties agree otherwise in writing, where a Part 36 offer is or includes an offer to pay a single sum of money then, on acceptance, that sum must be paid within 14 days of acceptance (or, where appropriate, when the court makes an order under Part 41.2 or Part 41.8).

Consequently, on acceptance of the Part 36 offer to pay £20,000 that sum had to be paid within 14 days with no right of set off.

This decision confirms a further advantage to the claimant on accepting a Part 36 offer, even at a late stage, namely that the damages must be paid even if there may be some potential liability for costs. Whilst the judge did go on to provide for an offset on costs that may not be viable if QOCS applies because there the right of set off does not extend to costs.

Costs of the Proceedings

Part 36.10 deals with the costs consequences on acceptance of a Part 36 offer and provides that this will generally entitle the claimant to the "costs of the proceedings".

The meaning of this phrase, in the context of a claim against multiple defendants, was considered in Haynes –v- Department for Business Innovation and Skills [2014] EWHC 643 (QB).

The claimant commenced proceedings against 10 defendants, including the defendant involved in the appeal, alleging that her husband had, in breach of duty, been exposed to asbestos and that this had caused his death.

The total value of the claim against all defendants was £195,000. The claimant made the defendant involved in this appeal a Part 36 offer of £18,000. That offer was accepted by this defendant.

The claimant did not pursue the claims against the other defendants, proceedings having been issued but never served on those defendants.

The claimant sought costs, without these being disaggregated, apportioned or divided, from the defendant who had accepted the Part 36 offer.

At first instance it was held that costs should be apportioned, with the defendant involved in the appeal only to pay costs directly attributable to the action against that defendant and 1/10 of the common costs.

On appeal the judge recognised that when a Part 36 offer was accepted within the relevant period a costs order in favour of the claimant, for the "costs of the proceedings up to the date on which notice of acceptance was served on the offeror", will be deemed to have been made on the standard basis.

The effect of such a deemed order is that the claimant becomes entitled to 100% of the costs found to be due and owing on a detailed assessment (and the costs judge has no power to vary the deemed order): Lahey –v- Pirelli Tyres Ltd [2007] 1 WLR 998 (CA).

On the issue of what the term "costs of the proceedings" in Part 36.10 (1) meant Jay J held:

> "I have no hesitation in concluding that the term means, in this context, "the costs of proceeding against the defendant against whom the deemed order has been made". Any broader definition would achieve obvious injustice and violate the language of the rule as seen in its proper contextual setting."

On this basis the court had to consider technical points relating to apportionment outside the scope of this article.

This case highlights the potential difficulties, in relation to Part 36, where there are multiple defendants unless those defendants collectively make the Part 36 offer which, in turn, emphasises the need, wherever possible, to have a single defendant.

Judgment

An important consideration, particularly for claimants, is whether, on acceptance of a Part 36 offer, the court can, or should, enter judgment. This is particularly significant if the defendant accepts the claimant's Part 36 offer after the end of the relevant period

because on judgment, unless that would be unjust, the claimant will then be entitled to the benefits conferred by Part 36.14 (3).

There has been caselaw which suggests judgment is not appropriate following acceptance of a Part 36 offer (Jolly –v- Harsco [2012] EWHC 3086 (QB)).

More recently, however, Warby J reached a different conclusion in Ontulmus –v- Collett [2014] EWHC 4117 (QB).

This was a libel claim brought by three claimants. The defendant made offers to settle each of those claims comprising:

The defendant made offers to settle the claimant's claims:

- a Part 36 offer of £75,000 to the first claimant;
- a Part 36 offer of £25,000 to the second claimant; and
- a non-Part 36 offer of £25,000 to the third claimant.

Those offers were accepted over 10 months after being made. The judgment dealt with the various issues then arising including the appropriate order in respect of the damages which, following agreement, the defendant had agreed to pay to each claimant.

The Judge noted that so far as the first claimant was concerned under Part 36.11 (1) and (2), if a Part 36 offer which relates to the whole of the claim is accepted that claim will be stayed on the terms of the offer but Part 36.11 (5) confirms this does not affect the power of the court to enforce the terms of the order or to deal with any question of costs relating to the proceedings.

The Judge also noted that so far as the third claimant was concerned a stay could be imposed under the court's general powers of case management: Part 3.1 (2) (f). As the relevant offer was in full and final settlement a stay, subject to the question of costs, was appropriate.

The parties agreed it was appropriate for judgment to be entered and Warby J concurred with that approach. The Judge held that, so far as the Part 36 offers made to the first and second claimants were concerned, that was consonant with Part 36.11 (7), which provides that if a Part 36 offer is accepted and the sum not paid within 14 days judgment may be entered for that unpaid sum.

Settlement with the second claimant was not governed by Part 36 but as a contractual obligation had been entered into it was agreed judgment should be entered for the sum payable.

In The Chief Constable of Hampshire Constabulary –v- Southampton City Council [2014] EWCH Civ 1541 the Court of Appeal implicitly confirmed that the making of an order,

following acceptance of a Part 36 offer, could be appropriate when noting this was an exercise of the power under Part 36.11 (5) "to deal with any question of costs … relating to the proceedings". On the facts of the case, however, the consent order was held not to be a judgment. That would suggest that if there is intended to be a judgment it is important the order states as much in clear terms. Whilst other comments in that case suggest a judgment may not be necessary following acceptance of a Part 36 offer these were not made in the context of argument about the need for a judgment following late acceptance when, perhaps, the matter needs to be looked at in the context of the overriding objective which may put a different complexion on the exercise of a power that these cases suggest, contrary to earlier decisions, the court has.

Limitation

The Court of Appeal ruling in The Chief Constable of Hampshire Constabulary –v- Southampton City Council [2014] EWCH Civ 1541 also deals with a very important point on limitation, triggered by acceptance of a Part 36 offer, for the purposes of the Civil Liability (Contribution) Act 1978.

The claimant in these proceedings sought a contribution from the defendant following settlement of a personal injury claim which had been previously brought against the claimant.

In the earlier claim the claimant, in those proceedings, made a Part 36 offer which the claimant, as Defendant in the proceedings, accepted on 4 November 2010. Terms of settlement were subsequently recorded in a consent order made on 15 December 2010.

Limitation under the 1978 Act is governed by Section 10 Limitation Act 1980. The terms of that Act provide that if any person becomes entitled to a contribution under the 1978 Act no action shall be brought after the expiration of 2 years from the date on which that right accrued.

Whilst a consent order had been made in the earlier proceedings that was held not to constitute a "judgment", meaning that the "right accrued" on the date the Part 36 offer was accepted for the purposes of Section 10 (3) 1980 Act.

The Court of Appeal left open the question whether, had there been a judgment following acceptance of the Part 36 offer, the time limit would have run under Section 10 (4) from the date of that judgment. A defendant, contemplating contribution proceedings, might prefer there to be a judgment, as this may afford additional time, and, for the reasons already noted when dealing with the topic of judgment following acceptance of a Part 36 offer, it would seem the court does have power to do this.

Costs Consequences of Part 36 Offers (Under Part 36)

Part 36 provides for very specific costs, and other, consequences for offers made in accordance with the rules which, when the rule applies, will prevail over the more general provisions as to costs found in Part 44.

For these consequences to apply there must be a judgment which is "more advantageous" or "at least as advantageous", as appropriate, as an effective and extant Part 36 offer, unless those consequences would be "unjust".

More Advantageous?

The question of whether a judgment was "more advantageous" arose in slightly unusual circumstances in Newland Shipping & Forwarding Ltd –v- Toba Trading FZC [2014] EWHC 864 (Comm).

The claimant sued the defendant on two contracts, the claims being initially conjoined. The claims were subsequently divided into separate actions but, meanwhile, the claimant made a Part 36 offer to settle both claims for $2.9 million.

Judgment was eventually given for the claimant in each of the, now separated, claims, though at different times. The claimant argued the judgments in each action should be added together for the purpose of determining whether that cumulative figure was "at least as advantageous" to the claimant as the claimant's own Part 36 offer.

Leggatt J rejected that argument, concluding that Part 36.14 was not apt to cover a situation where two different judgments were given at different times in two separate actions so as to enable those judgments to be aggregated and treated as if they were one.

Unjust? (Claimant's Additional Amount)

Part 36.14 (3), reflecting a recommendation in the Jackson Report, was amended in April 2013 so as to confer on claimants, with offers made after the amendment to the rule, the potential benefit of an additional amount. That is, in broad terms, 10% of the damages awarded, in a money claim, subject to a ceiling of £75,000.

Caselaw on this topic has considered, particularly with Part 36 offers made at a late stage, whether it would be unjust for the claimant to have this benefit.

Feltham -v- Freer Bouskell [2013] EWHC 3086 (Ch) was a judgment on costs following trial of a negligence claim brought by the claimant against the defendant when judgment was entered for the claimant in the sum of £650,000.

The trial started on 4 June 2013. On 10 May 2013, more than 21 days before the start of that trial, the claimant made a Part 36 offer of £700,000.

The judge noted that the claimant had obtained judgment at least as advantageous as the claimant's own Part 36 offer so, unless that would be unjust, was entitled to the benefits conferred by Part 36.14 (3).

Interest, under Part 36.14 (3) (a), was awarded at 3.5% above base rate from 3 June 2013, on the basis current interest rates are rather different from when this rule was first devised and "it would be quite wrong to order a sum anywhere near 10% as that would be effectively penal".

Under Part 36.14 (3) (d) the claimant was entitled to an additional amount unless, again, that would be unjust. Part 36.14 (4) sets out some of the circumstances for consideration by the court in deciding whether it would be unjust to make such an order. On this point the judge took particular account of:

- the raising of the key allegation by the claimant at a very late stage;
- the late disclosure of documents by the claimant; and
- the offer was "very much last minute".

The new point raised by the claimant during the opening of the trial proved to be the principal ground on which liability was decided, although not the only ground.

Whilst, with enhanced interest, the length of time since the offer was reflected in the amount of the award, where the court was concerned with the "additional amount" it was "all or nothing" and hence the timing of the offer might well be a factor rendering such an order unjust.

Having regard to all these matters, but in particular the claimant having raised a new issue during the opening of the trial which proved to be of "fundamental importance", it was held to be unjust for the claimant to receive the additional amount.

No reduction was made from the order for costs in favour of the claimant, though the judge indicated a relevant factor was the decision not to allow any additional amount and that, had such an award been made, the claimant would have received less than the full amount of her costs. This was on the basis it would be unfair to penalise the claimant a second time in respect of the matters taken into account in deciding not to award the additional amount.

Davison –v- Leitch [2013] EWHC 3092 (QB) was also a case in which the judge had to consider whether the claimant should receive indemnity costs, additional interest and an additional amount under Part 36.14 (3).

This was a clinical negligence claim in which, following trial, damages, excluding interest, were awarded for a total of £1,534,293.

The claimant had made a Part 36 offer of £900,000 on 11 September 2013. The relevant period in that offer expired on 2 October 2013. The trial did not start until 8 October 2013, but had been delayed because it was not ready to commence on 2 October as originally scheduled.

In these circumstances the judge had to determine whether it would be "unjust" for the claimant to receive all or any of the benefits potentially conferred by Part 36.14 (3).

The judge, reflecting the terms of Part 36.14 (4), considered a number of factors were relevant to the exercise of discretion.

- The terms of the Part 36 offer: the clamant had beaten her own offer by a very substantial margin.

- The stage in the proceedings at which the offer was made (including how long before trial): noting the later the offer was made the less costs savings were likely to be made if it was then accepted the judge observed that had the claimant's legal team "got their tackle in order" the trial would have started on 2 October, hence Part 36.14 (3) would not have applied at all because the offer would have been made less than 21 days before the start of the trial.

- Information available to the parties when the offer was made: whilst some crucial evidence relied on by the claimant at trial had been obtained late it had been served by the time of the offer and could, therefore, have been evaluated by the defendant.

- Other factors: the judge held costs savings were not the only important factor, for example acceptance of the claimant's Part 36 offer would have avoided the need for her to leave a small baby in Hong Kong and to give evidence, which inevitably would have been an unpleasant and distressing experience given the subject matter of the claim.

Taking all these matters into account the judge concluded that it would not be unfair to the defendant for some of the consequences found in Part 36.14 to be visited upon him but it probably would be unfair for all of them to apply. On this basis:

- costs should be assessed on the standard basis;

- interest should be awarded on costs recoverable from the date at which the offer expired until the date of judgment at 2% above base rate;

- the claimant would receive the full "additional amount" of £75,000; and

- there would be no additional interest on damages.

This judgment confirms the potency of the "additional amount", particularly in a higher value claim, as the claimant may secure this benefit even with an offer made at a very late stage.

Another case considering the additional amount under Part 36.14 (3)(d) was Elsevier Ltd –v- Munro [2014] EWHC 2728 (QB). This was another late offer but, crucially, the offeree received the offeror's witness statements at a late stage and the judge concluded it was unduly harsh to criticise the offeree for not accepting the offer promptly in these circumstances. Consequently, imposing an additional amount would involve an unjust element of penalty and that was not, therefore, awarded.

In Watchorn –v- Jupiter Industries Limited [2014] EWHC 3003 (Ch) the claimant was awarded the additional amount, along with other benefits conferred by Part 36.14 (3), HHJ Purle QC observing:

> "The whole purpose of these consequences is to encourage claimants to make and the defendants to receive and consider very carefully Part 36 offers so as to avoid some of the horrendous costs that are on display in this case. That encouragement, to be effective, needs to be underpinned by an effective sanction."

That was so even if the claimant received well short of the sum originally claimed given that, for Part 36.14 (3) to apply at all, the claimant had to have made a realistic offer.

Downing –v- Peterborough & Stamford Hospitals NHS Foundation Trust [2014] EWHC Civ 4216 (QB) completes the recent cases considering whether the award of an additional amount would be unjust.

This was a clinical negligence claim in which agreement was reached on liability but the issue of quantum had to be tried. The judge awarded, after apportionment to reflect agreement on the issue of liability, damages totalling £1,508,524. The claimant had made a Part 36 offer to accept £1.2m. Sir David Eady rejected an argument by the defendant that indemnity costs, and enhanced interest on costs, would be "punitive" concluding:

> "I believe that there is nothing here to justify a departure from the presumption in favour of indemnity costs. The Defendant's advisers made a particular judgment call which turned out (at least at first instance) to have been wrong. Such an award does not carry with it any implied criticism of their professional skill or of their conduct. It is just one of the consequences imposed by the rules. I rule, accordingly, that costs should be assessed from the relevant date on the indemnity basis and, further, that there should be interest on those costs at 10% above base rate under CPR 36.14(3)(c)."

On the question of the additional amount the judge held:

> "There is also provision in CPR 36.14(3)(d) for an additional sum, not exceeding at the moment £75,000, to be paid in accordance with a sliding scale there set out. I cannot see any reason why, under this new regime, the Claimant should not receive the maximum figure."

The judge also emphasised the need for an objective approach to the application of costs consequences under Part 36 observing:

> "It is elementary that a judge who is asked to depart from the norm, on the ground that it would be "unjust" not to do so, should not be tempted to make an exception merely because he or she thinks the regime itself harsh

> or unjust. There must be something about the particular circumstances of the case which takes it out of the norm."

Unjust? (Defendant's Costs)

In Ted Baker Plc –v- AXA Insurance UK Plc [2014] EWHC 4178 (Comm) the court considered what would be "unjust" in the context of the usual costs consequences in favour of a defendant where the claimant has failed to obtain a "more advantageous" judgment than a Part 36 offer.

On this point Eder J approved and adopted the observations of Briggs J in Smith –v- Trafford Housing Trust [2012] EWHC 3320 who held:

> "The question is not whether it was reasonable for the claimant to refuse the offer. Rather, the question is whether, having regard to all the circumstances and looking at the matter as it affects both parties, an order that the claimant should pay the costs would be unjust: see Matthews v Metal Improvements Co Inc [2007] EWCA Civ 215".

Eder J also approved the comments of Briggs J in Smith that:

> "… the court does not have an unfettered discretion to depart from the ordinary cost consequences set out in Part 36.14. The burden on a claimant who has failed to beat the defendant's Part 36 offer to show injustice is a formidable obstacle to the obtaining of a different costs order".

Interestingly, Eder J went on to observe that it would be unjust, within the meaning of Part 36, to require the claimant to pay the entirety of the defendant's costs. That was because the defendant took an approach that left "no stone unturned" and ignored all sense of proportionality. Consequently, the judge concluded:

> "It is for these reasons that I consider that it would be unjust to order the claimants to pay the entirety of the costs of Part 1 notwithstanding the offers (in particular, the first offer) made by the defendants. In my view, the just course is to reduce the amount of the costs to which the defendants are entitled by a substantial amount to reflect the very exceptional circumstances which I have described. Whilst recognising that any assessment of such reduction involves an exercise which is necessarily imprecise and somewhat broad-brush, the conclusion which I have reached is that the defendants should be entitled to 25% of their costs…".

ADR

A party who makes a Part 36 offer, even if that offer is subsequently proved to be well-judged, cannot ignore the need to continue engagement with ADR as the Court of Appeal ruling in PGF II SA –v- OMFS Company 1 Limited [2013] EWCA Civ 1288 confirms.

The relevant Part 36 offer in this case, of £700,000, was made on 11 April 2011 by the defendant.

On the same day the claimant made a Part 36 offer and also wrote to the defendant, in a letter headed "without prejudice save as to costs", suggesting a mediation any time after 6 May 2011 (the letter suggesting dates and nominating possible mediators).

The defendant made no response to the suggestion of mediation.

On 10 January 2012, the day before trial, the claimant accepted the Part 36 offer which had been made by the defendant on 11 April 2011.

On the issue of costs the judge at first instance concluded, on the basis the defendant unreasonably refused to mediate, there should be no order for costs following expiry of the relevant period in the defendant's offer.

In the Court of Appeal Briggs LJ observed that there are automatic costs consequences where a Part 36 offer is accepted (rule 10) and where at trial a claimant fails to improve upon it (rule 14). In the latter case, rule 36.14 (2) preserves the court's discretion to order otherwise where "it considers it unjust" to make an order as prescribed by the rule. By contrast, rule 10(5) provides only that the specified costs consequences will ensue "unless the court orders otherwise", with no specific reference to an injustice test.

Despite this distinction the judge, following Lumb –v- Hampsey [2011] EWHC 2808 (QB) had concluded that the same test should be applied under rule 10 as under rule 14, including the non-exclusive guidelines set out in rule 14(4). That approach was, meanwhile, endorsed by the Court of Appeal in SG –v- Hewitt [2012] EWCA Civ 1053.

Briggs LJ confirmed that where that threshold test (the "injustice test") was satisfied the judge then had a wide discretion as to the form of costs order to be made in substitution for the prescribed consequences noting:

> "Part 36 is itself designed to encourage parties to make, and promptly to accept, realistic offers of settlement."

Briggs LJ went on to observe:

> "It may for example be used by a defendant to encourage its opponent to accept a lower offer than its own valuation of the claim, on account of the claimant's limited appetite for costs risk."

Picking this point up later in his judgment Briggs LJ continued:

> "….it is in my view simply wrong to regard a Part 36 offer, without any supporting explanation for its basis, as a living demonstration of a party's belief in the strength of its case. As I have said, defendants' Part 36 offers are frequently made at a level below that which the defendant fears having to pay at trial, in the hope that the claimant's appetite for, or ability to undertake, costs risk will encourage it to settle for less than its claim is worth."

Briggs LJ added:

> "Nor do Part 36 offers necessarily or even usually represent the parties' respective bottom lines. There was, accordingly, no unbridgeable gulf between these parties' respective Part 36 offers, which could not in any circumstances have been overcome in mediation."

After concluding there had been, therefore, an unreasonable refusal to engage in ADR the Court of Appeal concluded the exercise of discretion by the judge, to make no order for costs as he did, could not be faulted.

This is an important decision highlighting the need for parties to engage in ADR, not least because that helps to ensure parties do not receive more than a fair share of the court's limited resources: Hague Plant Limited –v- Hague [2014] EWCA Civ 1609.

Costs Consequences Of Part 36 Offers (Under Part 44)

An offer which is made under Part 36 but does not have the costs consequences found in that rule may, nevertheless, still have costs consequences when the court exercises the general discretion as to costs under Part 44. Non-Part 36 offers are also, of course, potentially relevant for these purposes.

Part 44.2 (4) provides that when deciding what order to make as to costs, the court must have regard to all the circumstances including:

> "(a) the conduct of all the parties;
>
> (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
>
> (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply."

Near Miss Offers

Since the introduction of Part 36.14 (1A) it has been clear that what might be termed "near miss" offers will not be relevant under Part 36. But might such an

offer be relevant under Part 44 where there is no express requirement judgment be "more advantageous" or "at least as advantageous" as the relevant offer?

In Hammersmatch Properties (Welwyn) Limited –v- Saint-Gobain Ceramics & Plastics Limited [2013] EWHC 2227 (TCC) the court had to consider the application of Part 44 to costs in a claim where judgment was entered for the claimant in the sum of £1,058,678 when the defendant had made a Part 36 offer of £1,000,000. Allowing for interest the judgment exceeded the offer by £3,637.90.

The defendant's offer was made after 1 October 2011 and, accordingly, Part 36.14 (1A) applied, defining "more advantageous" as "better in money terms by any amount".

Consequently, the defendant's offer carried no automatic costs consequences under Part 36 as the judgment was "more advantageous" to the claimant than the defendant's offer.

Ramsey J held that whilst the Part 36 offer made by the defendant could fall within the wording of Part 44.2 (4) (c) it was wrong to apply hindsight on the basis the defendant should have offered a small amount more and the claimant have reasonably accepted that offer if made.

The judge noted that in Johnsey Estates (1990) Limited –v- Secretary of State for the Environment, Transport and the Regions [2001] EWCA Civ 535 Chadwick LJ held, on an argument by the defendant the claim had not settled simply because the claimant was not interested in any reasonable offer, that:

> "The submission has some superficial attraction on the facts of the present case; but, for my part, I would reject it. It seems to me that a court should resist invitations to speculate whether offers to settle litigation which were not in fact made might or might not have been accepted if they had been made. There are, I think, at least two reasons why a court should not allow itself to be led down that road. First, the rules of court provide the means by which a party who thinks that his opponent is not open to reason can protect himself from costs. He can make a payment in; he can make a Calderbank offer; now, under the Civil Procedure Rules 1998, he can make a payment or an offer under CPR Part 36. The advantage of the courses open under the rules is that they remove speculation. The court can see what offer was made, when it was made, and whether it was accepted. Secondly, speculation is likely to be a most unsatisfactory tool by which to determine questions of costs at the end of a trial."

Ramsey J concluded:

> "In my judgment, to do so would be to seek to use the provisions of CPR44.2(4)(c) to give a similar effect to a Part 36 offer and thereby introduce the same uncertainty into Part 36 offers which are near to but

below the sum awarded, as led to the criticism of Carver and the subsequent amendment introduced in CPR 36.14(1A)."

The judge accepted that if there was an unreasonable refusal to negotiate that was in itself a matter the court could take into account under Part 44.2 (4) (a), but to find a "near miss" offer amounted to an unreasonable refusal to negotiate would raise the difficulties highlighted in Johnsey.

Withdrawn Part 36 Offers

The costs significance of a withdrawn Part 36 offer under Part 44 was considered by the Court of Appeal in Rehill –v- Rider Holdings Limited [2014] EWCA Civ 42.

Shortly before trial of quantum the claimant accepted an offer of £17,500 by the defendant.

The parties were not, however, able to agree the incidence of costs as the defendant had made a number of offers for more than the claimant ultimately recovered, in particular:

- on 23 April 2007 the defendant made a Calderbank offer of £75,000, expressed to expire on 1 June 2007;

- on 8 November 2007 the defendant made a Part 36 offer of £100,000 which was withdrawn on 18 January 2008; and

- on 10 June 2009 the defendant made a Part 36 offer for just under £40,000, stated as being "open for 21 days and intended to have the consequences of Part 36 CPR".

On the basis the claimant had failed to beat the defendant's Part 36 offer made on 10 June 2009 the judge ordered the claimant to pay the defendant's costs on the standard basis with effect from the expiry of the relevant period in that offer.

The defendant was ordered to pay the claimant's costs prior to that date, despite the other offers made. That was because at the time of the April 2007 offer there was held to be uncertainty about the claimant's prognosis which persisted until after that offer was withdrawn. The same observations were made regarding the November 2007 offer.

On the defendant's appeal the Court of Appeal held that as the offers of both April 2007 and November 2007 were withdrawn the terms of Part 36.14 (6) (a) meant the automatic consequences applicable to a subsisting Part 36 offer did not apply to those offers.

However, those offers fell within Part 44.3, which requires the court to take into account any admissible offer to settle.

Consequently, the question for the Recorder was whether the claimant acted reasonably in not accepting one or other of the 2007 offers. In reaching that decision the terms of

Part 36.14 (4) (c), which requires the court to have regard to the information available to the parties at the time a Part 36 is made, must be applied when considering whether an offeree is reasonable in declining a Part 36 offer that has subsequently been withdrawn.

On that point the question was not what the medical experts said at the time, or whether a competent legal advisor should have advised the claimant to accept the offer, but what the claimant himself knew. Here the Recorder overlooked the agreed medical evidence which, whilst not available at the date of the offer, was available before the end of 2007 and that the claimant had reached the end of his recovery from the injuries 2 years after the accident,

On this basis the Court of Appeal concluded the Recorder's exercise of discretion was vitiated and should be exercised afresh.

It was held to have been unreasonable for the claimant not to have accepted the offer of November 2007, as that was not withdrawn until January 2008 and hence open for acceptance at a time the claimant should reasonably have taken it. The same could not be said, however, about the April 2007 offer.

Accordingly, the November 2007 offer was effective for costs purposes and the claimant ordered to pay the defendant's costs after that offer.

The applicability of Part 36.14 (4), in the self-contained code which is Part 36, to the exercise of discretion under Part 44 might be questioned, as the issue is not whether the usual costs consequences would be "unjust" but a broader assessment, taking all factors into account, of the appropriate order as to costs (applying the approach in Widlake -v- BAA Limited [2009] EWCA Civ 1256). Subsequently the Court of Appeal have affirmed the significant difference between a Part 36 offer and a non-Part 36 offer in Coward –v- Phaestos Ltd [2014] EWCA Civ 1256, though the court also observed there was no justification for applying the rigid test found in Part 36.14 (1A) to Part 44 because that rule conferred a broad discretion which depended very much on the particular circumstances of the case.

In Saigol –v- Thorney Limited [2014] EWCA Civ 556 the Court of Appeal held that a judge had fallen into error by treating an offer which was time-limited, and only open for a very short period of time, as having the costs consequences of a Part 36 offer.

Whilst there may be some questions raised about the relevance of Part 36.14, when the automatic costs consequences of that rule are not applicable, the judgment in Rehill and Saigol are reminders that with time limited or withdrawn offers a crucial consideration is likely to be whether, during the time the offer was open for acceptance, it would have been reasonable for the offeree, on what was known at the time, to have accepted the offer.

Conclusion

This review of recent caselaw confirms that the courts continue to regard Part 36 as an important rule of real significance for both claimants and defendants.

Part 36 has become even more important for claimants from 2013, given the greater emphasis on proportionality and the imposition of fixed costs for certain types of claim. That is because Part 36 is the most likely route for a claimant to secure an order for indemnity costs which do not have to be proportionate and, by definition, are not fixed.

For defendants the advent of QOCS, again from 2013, makes effective Part 36 offers all the more important as that will be the most likely way, for a defendant, around QOCS.

Over the years caselaw has thrown up some anomalies in the workings of Part 36 and the CPRC have now taken the opportunity of codifying the rule, both to reflect existing caselaw and to modify the rule where that caselaw has suggested there are matters which require amendment.

The revised Part 36 can already be found within The Civil Procedure (Amendment No 8) Rules 2014 and will be introduced on 6 April 2015.

The next in this series of articles will review and consider the new Part 36.

Part 36 still very much has a future!