

Part 36 offers – Pushing your luck?

13 MARCH 2024

ROGER MALLALIEU KC



Three issues to consider

- **Percentage Offers?**

- Is it a Part 36 offer at all?
- Does it work even if it is?
- Was it actually bettered?
- Are the consequences 'unjust' - CPR 36.17?

- **Interest**

- Where does it feature in a Part 36 offer;
- Should the offer deal with interest post end of relevant period?

- **Is there a tactical gain from accepting Part 36 offers 'out of time'?**

The 'percentage offer cases'

- Where C offers to accept a % of the damages in issue in the case;
- In fact several issues with percentage offers;
 - What was the offer? Was it a Part 36 offer at all?
 - If so, was it in fact bettered (CPR 36.17(1))?
 - CPR 36.17(5) - was the offer was a genuine attempt to settle the proceedings - and if not, is it unjust to award Part 36 benefits even if bettered;
- Different, but related, issues. A few examples;

Mundy v TUI [2023] EWHC 385

- A holiday contaminated food case. General damages claimed £25-35k;
- Liability disputed. Trial judgment £3,700 GD. D's offer - £4k;
- C's offers (i) £20k for damages 'net of acceptance of any liability offer';
(ii) 90/10 on liability;
- C said 'beaten 90/10' offer'. TJ said 'no - either offering to take 90% of pleaded claim (which didn't get), or an offer to determine liability at 90% when only real issue was causation';
- On appeal - where no real issue of liability, a % offer on liability doesn't really work. It was not a quantifiable offer to settle the claim or 'an issue' in it.
- The 90/10 offer was not a Part 36 offer (and was not bettered).

Seabrook v Adam [2021] EWCA Civ 382

- RTA liability admitted case. Causation denied. No cont. neg. pleaded;
- Claim £10k for neck and back injuries. At trial - judgment for £1,574.40 - for neck injury only;
- C had offered (twice) to accept 90% of damages if liability was admitted. C therefore said had beaten offer;
- TJ said no. If accepted, D would have accepted 'liability' - and therefore have to pay damages for the pleaded injuries (neck and back). C had only recovered damages for the neck;
- CA said - since liability had been admitted already, the offer could only be construed as resulting in causation being admitted (if accepted).
- C did not therefore better his own offer.

Chapman v Mid & South Essex [2023] EWHC 1871 (KB)

- Clinical negligence claim. Split trial.
- Claimant Part 36 offer to accept 90% of damages - *"...a deduction of 10% from the full value of the claim"*;
- D sought clarification as to what this meant - and was told - this is an offer to accept 90% of the value of the case, based on the value if the Claimant's case on breach and causation is accepted;
- C won on liability;
- The offer was a Part 36 offer, it had been bettered and it was not unjust for D to face the consequences.
- Mundy distinguished due to clarity of the effect of the offer.

CPR 36.17 (5) - injustice

- Persuading the court that it is 'unjust' to be visited with Part 36 consequences;
 - Establishing injustice 'a formidable obstacle'
(Briggs J (as was) in *Smith v Trafford Housing Trust* [2012] EWHC 3320 (Ch) as approved in *Webb v Liverpool Women's NHS Trust* [2016] EWCA Civ 365);
 - It is not a test of whether the refusal was reasonable. A refusal does not need to be unreasonable in order for it to be just that the refusal be met with costs consequences.
- The burden rests upon the offeree;
- CPR 36.17(5) - a non exhaustive list (also applies to late acceptance - CPR 36.14);
- CPR 36.17(5)(e) - whether the offer was a genuine attempt to settle the proceedings;

Yieldpoint Stable Value Fund v Kimura [2023] EWJC 1512(Comm);

- Successful claim- judgment for US\$5m;
- US\$5m was the full principal sum claimed;
- Part 36 offer by Y to accept US\$4.95m - allowing for accrued interest, circa 96% of claimed sum;
- Claim was an 'all or nothing' claim - 'US\$5m or bust';
- In the circumstances, not a genuine offer to settle;
- Importantly, 'all or nothing' meant that the only issue was liability. If liability was established, the sum due was fixed.

Highly fact dependent

- 90% offer pre breach of duty trial - a birth injury case - genuine offer (*JMX v. Norfolk & Norwich Hospitals NHS Foundation Trust* [2018] EWHC 185 (QB));
 - Note - it was sufficiently clear that if accepted the offer was a 'quantifiable' discount.
- 95% offer - construction case - genuine (*Jockey Club Racecourse Ltd. v. Willmott Dixon Construction Ltd.* [2016] EWHC 167 (TCC))
 - The need for a genuine (and broadly quantifiable?) element of concession
- 99.7% offer - genuine (*Rawbank SA v. Travelex Banknotes Ltd.* [2020] EWHC 1619 (Ch) (0.3% of US\$60m is still £180k & the claim was 'near certain');
- But 96% offer not genuine (Yieldpoint).

Guiding factors

Liability offers

- *'if the issue to be settled is 'liability', it would be sensible to make clear whether the defendant is being invited only to admit a breach of duty, or, if the admission is intended to go further, what damage the defendant is being invited to accept was caused by the breach of duty'* (Mundy);
- Is the consequence quantifiable? Is C offering to accept x% of the pleaded claim, or x % of the damages otherwise to be awarded in the claim?
- Such offers are not contrary to Part 36 (probably) as long as their consequences are clear;
- Inviting D to seek clarification if unsure is a useful tactic.

Guiding factors

Simple percentage offers

- Is the 'discount' a sum of real value? A 3% discount to a very large claim may be a genuine attempt to provide the opponent with a way to avoid costs of proceeding;
- To what extent does the offer represent something the court 'could' award?
 - Is it a damages claim?
 - Are there issues of causation or quantum?
- Was the claim 'obviously strong' at the time of the offer? See *Rawbank & Omya UK Ltd. v. Andrews Excavations Ltd. & another* [2022] EWHC 1882 (TCC)
- 'Tonal' issues;
 - Does it have the 'feel' of a genuine attempt to settle?
 - Tactics and using Part 36 are not bad things? But were they the only reasons?

Part 36 and interest

- *CPR 36.5*
 - A Part 36 offer which offers to pay or accept a sum of money will be treated as being inclusive of all interest until [the end of the relevant period];
 - A Part 36 offer...may make provision for interest after the [end of the relevant period]. If it does not, it will be treated as inclusive of interest up to the date of acceptance.
- *Three points*
 - 36.5(4) is effectively mandatory - the offer must include interest up to end of the RP (and is deemed to do so).
 - See *King v City of London Corporation* [2019] EWCA Civ 2266
 - A detailed assessment case - offer to accept £50k on a bill 'excluding interest';
 - On assessment by an eminent costs judge, bill assessed at £52,470;
 - But the offer was not a Part 36 offer, since excluded interest.

Point 2

- The comparison for CPR 36.17 purposes is the between the sum awarded, including interest to the end of the RP and the sum offered (which is deemed to include interest to that date);
- It is not between the sum awarded, including interest to judgment, and the sum offered;
- A point so tempting that it has been decided twice - to the same effect;

Purrusing v A'Court [2016] EWHC 1528 (Ch);

Blackham v Entrepose UK [2004] EWCA Civ 1109

Point 3

- A term as to interest post end of the RP is not merely permitted, but is to be encouraged;
- CPR 36.5(5) was introduced to codify the decision in *Calonne Construction* [2019] EWCA Civ 754;
- If it isn't done, then the value of the offer (if later accepted) diminishes with each passing day after the end of the relevant period;
- If you're going to do it, do it properly - identify the sum on which interest will run post RP and the rate at which it will accrue;
MGS v University Hospitals Bristol and Weston NHS Foundation Trust [2023] EWHC 1547 (KB)

Out of time acceptance

- If an offer is accepted after the end of the RP, 'the liability for costs' must be determined by the court unless the parties have agreed costs (CPR 36.13(4));
- Where this applies, the presumption, unless unjust, is C is awarded costs to the end of the RP and the offeree pay the offeror's costs post;
- CPR 36.17(5) applies.
- The 'just out of time' jurisdiction - deliberately late acceptance to allow D to accept, but not be bound by automatic liability for costs pre acceptance.

“Just out of time” in practice

- The applicable presumption and the ‘formidable obstacle’ of establishing injustice;
- A legitimate tactic - see *Optical Express Ltd v Associated Newspapers* [2017] EWHC 2707 (QB), but often met with judicial scepticism;
- See *Pallett v MGN* [2021] EWHC 76 (Ch) for a recent example of the tactic failing.
- A lacuna which opens an unwarranted gateway to arguments on pre offer costs?
- Or an issue adequately addressed by the formidable hurdle of injustice?

Acceptance out of time – an object lesson

- The hurdle of injustice is truly a high one;
- *Tuson v Murphy* [2018] EWCA Civ 1491
 - C, in a PI claim, failed to disclose that she had been working;
 - D made a part 36 offer, which C accepted out of time;
 - D was aware of the alleged fabrication when making the offer;
 - D sought - and was awarded - costs pre offer, from the time of the fabrication;
 - Court of Appeal overturned the decision. By making a Part 36 offer, D had been aware that if C had accepted in time, D would have paid costs to date of acceptance;
 - It was not, therefore, unjust for it to do that now;
 - Nothing had emerged since the offer that made that outcome unjust.

Conclusions

- Percentage offers do work;
 - But require clarity as to what is being offered; and
 - Care in presentation - to ensure the Court perceives a genuine attempt to settle;
- Interest is important
 - Claimant solicitors advising clients to make offers should be making provision for interest, absent good reason not to;
 - If done, it must be done properly - don't presume the rate etc;
- The just out of time tactic can work;
 - But only in cases with a strong argument and usually where D was not aware of relevant matters at the time the offer was made.

Thank You

ROGER MALLALIEU KC

4 New Square Chambers
Lincoln's Inn
London
WC2A 3RJ

CONTACT

+44 20 7822 2000
clerks@4newsquare.com

