hailshamchambers

Part 36 Offers
The Injustice Test and Enhancing Effectiveness

White Paper Conference

June 2020

Alexander Hutton QC,

Hailsham Chambers

Summary

- (1) What is a valid Part 36 offer and when it is open for acceptance?

- (2) The advantages of a successful Claimant's Part 36 offer vs successful Defendant's Part 36 offer;

- (3) How do the courts apply the "unjust" test:

(a) where a Part 36 offer is accepted more than 21 days later and

(b) where C beats their own Part 36 offer and wants the "goodies"?

Validity of "Part 36 offers"

hailshamchambers

- Before you can rely on a "Part 36 offer", it must be a valid one within the Rule, otherwise one cannot get the benefits the rule provides.

- "*Part 36 is highly prescriptive (so that even experienced lawyers may fail to make a compliant offer)*": Stanley Burnton LJ in *Webb v Liverpool Women's NHS Foundation Trust* [2016] EWCA Civ 365.
- And they often do.

CPR 36.5

- (1) Provides that "*A Part 36 offer must:*
- *(a) be in writing;*
- *(b) make clear it is made pursuant to Part 36;*
- *(c) specify a period not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with rule 36.13 or 36.20 if the offer is accepted;*
- *(d) state whether it relates to the whole of the claim or part of it or to an issue that arises in it and if so which part or issue; and*
- *(e) state whether it takes into account any counterclaim*."

Validity – what about a counterclaim and interest?

- In *Calonne Construction v Dawnus Southern* [2019] EWCA Civ 754 D made an offer to settle both a claim and a proposed counterclaim (latter not issued but set out in a letter and served 10 days after offer) if C paid D a net £100,000.

- Offer provided that figure was inclusive of interest up to 21 days for acceptance but thereafter interest would be added at 8% pa

Alexander Hutton QC

Calonne

- Matter went to trial where the net sum due to D was more than £100K, and since C failed to beat D's offer, court ordered C to pay D's costs from 21 days after the offer.

- C alleged on appeal the offer was invalid on two grounds:

Calonne: (a) Unpleaded Counterclaim

- (a) Not valid to take into account a counterclaim which had not been made at the time the offer was made.
- Held: since a Part 36 offer could be made at any time, including pre-action (r.36.7), and basis of counterclaim had been set out in a letter, the reference to taking into account the proposed counterclaim did not invalidate the offer.

(b) Interest in a Part 36 offer

- (b) Making stipulations about interest after the 21 day "relevant period" invalidated it as a Part 36 offer?
- No, it did not, and it was valid.
- CPR 36.5(4) provided that: "*A Part 36 offer which offers to pay or offers to accept a sum of money will be treated as inclusive of all interest until… the date on which the period specified under rule 36.5(1)(c) expires.*"

Calonne: (b) Interest after the 21 days

- While the offer validly took into account interest in the sum of money due by the end of the 21 day ”relevant period”, there was nothing in Part 36 which prevented extra terms as to interest if the offer was accepted more than 21 days afterwards and only relating to interest after that period and so the offer was a valid Part 36 offer.

- = VALID PART 36 OFFER ON BOTH GROUNDS.

In contrast to…. *King*

- In contrast to *Calonne* where it was valid to make a stipulation as to interest after the expiry of the 21 day period (and thus not inconsistent with Part 36),
- it is not valid to stipulate a provision about interest inconsistent with CPR 36.

King

- In *King v City of London Corporation* [2020] 1 WLR 1517 C made a "Part 36 offer" re detailed assessment proceedings for £50K "*exclusive of interest*" and then beat that offer at the assessment.

- Could one make a Part 36 offer "exclusive of interest"?

King v City of London

- CA held:
- (1) Since CPR 36.5(4) (above) provides that a Part 36 offer of a sum of money "*will be treated as inclusive of all interest*" up to the end of the 21 day period, an offer which stated it was "*exclusive of interest*" was not a valid Part 36 offer;
- (2) Interest was not properly "*part of a claim*" with r.36.5(1)(d) as it was ancillary to a claim not severable from it

Terms as to Interest

- (3) It made no difference to this analysis that the context was costs proceedings, even though the pre-2013 detailed assessment rules allowed parties to distinguish whether interest was included or not.

- Per Arnold LJ: there were grounds for the Civil Procedure Rules Cttee to allow Part 36 offers exclusive of interest, but a matter for them.

Terms as to Costs inconsistent with Part 36

hailshamchambers

- **Offers with terms as to costs**:
- CPR 36.13 provides that where a Part 36 offer is accepted within the 21 days ”relevant period” C ”will be entitled to” its costs up to the date of acceptance. You cannot make a Part 36 offer with terms inconsistent with this:

Terms as to Costs

- (a) Stipulating "*no order for costs*" or "*costs inclusive offer*" will invalidate it as a Part 36 offer: *Mitchell v James* [2004] 1 WLR 158 and *French v Groupama* [2011] EWCA Civ 1119

Terms as to Costs

- (b) Specifying a period inconsistent with CPR 36.13 will invalidate it as a Part 36 offer: *James v James* [2018] EWHC 242 (Ch) the offer stated that D would pay C's costs "*up to the end of the relevant period or, if later, up to the date of acceptance*".
- Held: Not valid as a Part 36 offer.

- (c) Specifying a figure for costs in addition to damages also inconsistent and not Part 36.

Get the offer right!

- Use form N242A (PD 36, para 1.1) in making your offer which may avoid the usual pitfalls

Consequences of invalidity

- If the offer is not a valid Part 36 offer, can still rely on the offer on the court's discretion as to costs under CPR 44.2(4)(c) **but**
- lose the right to automatic or "semi-automatic" consequences, including re the "goodies" on a Claimant's successful Part 36 offer.

(2) When is a Part 36 offer open for acceptance?

- CPR 36.11(2) provides that: "*A Part 36 offer may be accepted at any time (whether or not the offeree has subsequently made a different offer), unless it has already been withdrawn*."

- So the usual contractual principles of offer and acceptance do not apply to Part 36 but they do apply to Calderbanks

hailshamchambers

When may a Part 36 offer be accepted?

- In *DB UK Bank v Jacobs Solicitors* [2016] EWHC 1614 (Ch):
- One side made a common law Calderbank offer
- The other side replied with a Part 36 counter-offer
- Held: the Calderbank offer was impliedly rejected by the Part 36 counter-offer and was no longer open for acceptance.
- But if the first offer had been a Part 36 offer, then a Part 36 counter-offer would have left the first Part 36 offer on the table until withdrawn.

Alexander Hutton QC

The Advantages of Part 36 offers

- If C beats their own Part 36 offer at trial then “unless it is unjust to do so":
- (a) If it’s a fixed costs case, C will get fixed costs to 21 days after the offer and then non-fixed costs on the indemnity basis thereafter: *Broadhurst v Tan* [2016] EWCA 94 (The fixed costs proposals in June 2019 suggested a simple 35% uplift).

Goodies for the Claimant

- (b) If a non-fixed costs case, then also indemnity costs from 21 days after the offer: reversal of burden, no proportionality.

- (c) Not bound by CPR 3.18, i.e. the approved budget is of no relevance where there is an indemnity costs order: see e.g. *Burgess v Lejonvarn* [2020] EWCA Civ 114 per Coulson LJ

Claimant's Goodies

- (d) Interest on both damages and costs can be recovered at a rate not exceeding 10% above BoE base rate: CPR 36.17(4);

- (e) the "*Additional Amount*" under CPR 36.17(4)(d) of 10% of the amount awarded up to **£75,000** [applies on damages in main action and applied to costs being assessed on detailed assessment].

Defendant's "goodies"?

- In contrast to Defendant's position when C fails to beat its Part 36 offer….
- CPR 36.17 provides that where D beats its own Part 36 offer, "*the court must, unless it is unjust to do so, order that the defendant is entitled to:*
- *(a) costs (including any recoverable pre-action costs) from the date on which the relevant period expired; and*
- *(b) interest on those costs*."
- So **no** indemnity costs, punitive interest on damages & costs, no "additional amount" etc.

Burgess v Lejonvarn

- [2020] EWCA Civ 2266
- Facts: don't do any favours to mates as a landscape gardener!
- D made an early Part 36 offer of £25K. C lost at trial. D exceeded her budget. D argued should be entitled to indemnity costs by having made an offer where C subsequently lost.

Burgess

- Held: **no** such right under Part 36 for D purely because D's Part 36 offer refused.

- But on facts, claim "w*eak speculative, opportunistic or thin*" (did not have to show it was "*hopeless*") so indemnity costs awarded on those grounds from when that should have been realised.
- Important guideline case on indemnity costs test

But D beware of abandoning Part 36

- In *MEF v St George's Healthcare NHS Trust* [2020] EWHC 1300 (QB) D had made a Calderbank offer in detailed assessment proceedings which was not time-limited. C did not respond to the offer at the time.

- Went ahead to detailed assessment, it was clear C had already got less than D's offer by the end of day 2, C then "accepts" D's offer. D argued not open after hearing started.

- Held by Morris J – open for a reasonable time

MEF and non-time-limited offers

- Held by Morris J – offer open in law for a reasonable time, it remained open during the hearing and thus validly accepted.

- D could have made a Part 36 offer (which could only be accepted after the ”trial” started with the court’s permission – CPR 36.11(3)(d), which was unlikely in these circumstances) or a time-limited Calderbank offer

(3) Injustice

- (a) CPR 36.13(4)(b), (5) and (6) provides that where C accepts D's Part 36 offer after the relevant period (usually 21 days) expires:
- i. the liability for costs must be determined by the court unless the parties agree the costs, and

- ii. the court must, "***unless it considers it unjust to do so***" order that C gets its costs until 21 days after the offer and D gets its cost thereafter

Unjust

- (b) The phrase is used again twice in CPR 36.17 where:
- i. C has failed to beat D's Part 36 offer in which case the same default position applies as in CPR 36.13(5) "*unless it considers it unjust to do so*" and
- ii. C beats its own Part 36 offer, it gets its goodies "*unless it considers it unjust to do so*"

Express factors in the ”Unjust” test

- CPR 36.17(5) provides that the court must take into account all the circumstances of the case including –
- (a) terms of the Part 36 offer;
- (b) stage the offer was made;
- (c) information available at the time;
- (d) conduct re giving or refusing information;
- (e) whether the offer was a genuine attempt to settle the proceedings [new].

Application of the Unjust Test

- See per Briggs J (as he then was) in *Smith v Trafford Housing Trust* [2012] EWHC 3320 (Ch) [13]:
- (a) Q is not whether it was reasonable for C to refuse offer at time but whether in all the circs, an order that C pay the costs is unjust;
- (b) Q is who has in reality been the successful party;
- (c) Not limited by the listed factors, but

Application of the Unjust test

- (d) "*Nevertheless, the court does not have an unfettered discretion to depart from the ordinary costs consequences set out in CPR 36… The burden on a claimant who has failed to beat D's Part 36 offer to show injustice is a* ***formidable obstacle to the obtaining of a different costs order****. If that were not so, then the salutary purpose of Part 36, in promoting compromise and the avoidance of unnecessary expenditure of costs and court time, would be undermined*."

The Unjust test

- So the party contending for an order other than the default on the basis that it was unjust has a "***formidable obstacle***".
- In *Tuson v Murphy* [2018] 4 Costs LR 1461 where C had accepted D's offer more than 21 days later Bean LJ adopted Andrew Baker J's approach in *Titua PLC v Rawlinson & Hunter* [2016] EWHC 3480 (QB): in emphasising the difference between:

The Unjust Test

- a) a case where the facts known to D's advisers at the time of making the Part 36 offer do not change significantly during the period of delayed acceptance and
-
- b) a case where D's advisers' assessment at the time of making the Part 36 offer of the true value of the case, based on the facts then known to them, is upset or undermined by subsequent events or subsequently discovered facts.
- In a) it is highly unlikely to be unjust to apply the default costs rule.

Alexander Hutton QC

Tuson

- In that case C had been deceitful about work she had performed since the accident but D had known that at the time it made the offer. C accepted the offer out of time. D argued that it should have its costs from before its offer given C's dishonesty
- CA held that D had made the offer in full knowledge of C's dishonesty and it was not unjust for the default rule to apply

Contingencies of litigation

- In *Briggs v CEF Holdings* [2018] 1 Costs LO 23 D had made a Part 36 offer at a time where an issue of prognosis in the PI claim was uncertain. In fact it turned out better than might have been and C accepted D's offer out of time.
- CA held: "*it is up to the offeree to show injustice, not simply that it may have been difficult to form a view as to the outcome of the litigation. The whole point of the Part 36 offer is to shift the incidence of the risk as to costs onto the offeree*." The usual contingencies do not render it unjust for the normal costs order to apply

Campbell v MOD

- [2020] Costs LR 13
- C accepted D's Part 36 offer over a year later
- C argued default rule was unjust as evidence of likely career path was incomplete at time of offer, but no stay had been sought so should have all his costs.
- Lambert J held: at the time the evidence was incomplete but it is the job of C's advisers to give risk advice: it involved judgment and experience but C's solicitors were specialists.
- No injustice to C in applying the usual rule.

Unjust Test

- In *JLE v Warrington & Halton NHS Trust* [2019] 1 WLR 6498 C beat her own offer on a detailed assessment by £7,000.
- The Master awarded C punitive interest, indemnity costs, punitive interest on costs of detailed assessment but refused to award the "additional amount" of 10% of the bill i.e. £43,200 given how much C had beaten their offer by (£7,000).
- D appealed.

JLE

- Stewart J held:
- (1) Master was wrong. While the court had jurisdiction to award some of the goodies but not others, it would perhaps be an unusual case where the circs of the case yielded a different result for only some of the goodies in 36.17(4);
- (2) the amount by which the offer had been beaten (or that it was a disproportionate bonus) was irrelevant and had wrongly been taken into account;
- (3) There was no discretion to award less than the 10% additional amount: it was all or nothing.

JLE

- Stewart J [59]:
- "*there was nothing unusual about the circumstances so that the high threshold of proving injustice could properly be regarded as met. This is important because if this case qualifies for withholding the additional award, that would be a green light to similar arguments in many, many detailed assessment. It would also be a serious disincentive to encouraging good practice and incentivising parties to make and accept appropriate offers*."

Withdrawn Part 36 offers

- By virtue of CPR 36.17(7) withdrawn Part 36 offers do not have the automatic or semi-automatic consequences non-withdrawn Part 36 offers have (whether made with a “sunset” clause or withdrawn later in writing).

- Then a matter of discretion under CPR 44.2.

Genuine Attempt to Settle

- Now in CPR 36.17(5)(e) as a relevant factor in the injustice test:
- In *AB v CD* [2011] EWHC 602 (Ch) Henderson J at [22] said “an offer which was all take and no give would not be regarded as a valid offer to settle”. So 100% of the claim won’t do.
- In *Huck v Robson* [2003] 1 WLR 1340 a majority held 95% was genuine.

Genuine Attempt to Settle

- In *Jockey Club v Willmott Dixon* [2016] EWHC 167 (TCC) even if a case was all or nothing, a 95% offer was still considered a genuine attempt to settle the proceedings.

- So <u>not</u> a high hurdle for the offeror to satisfy.

Make and Engage with offers

- In *OMV Petrom v Glencore* [2017] 1 WLR 3465 C made an early Part 36 offer in a case alleging D's fraud. D made no offers but defended the case vigorously. C won and easily beat his Part 36 offer.
- Judge awarded C 5% above base interest on damages and costs.
- C appealed contending that he should have been given the full 10% above Base

OMV

- Court of Appeal (Vos C) held that, while 10% above Base was not the starting point, trial judge had been wrong to approach it on a purely compensatory basis.

- The culture of litigation had changed: parties are obliged to make reasonable offers to settle and to respond to the other side's offers.
- Hardly a stronger case for the full 10%.

Make and Engage with Offers

- In *Lomax v Lomax* [2019] EWCA Civ 1467 Vos C held that early neutral evaluation could be forced by the court on the parties.
- Vos C wrote in his editorial of the White Book 2020: “during 2020 there may well be significant developments in the CPR’s approach to settlement.”
- Whether Covid delays that remains to be seen…

Part 36 and Payments on Account of Costs

hailshamchambers

- Re last year's White Paper costs conference, one issue has been cleared up.
- In *Global Assets v Grandlane Developments* [2019] EWCA Civ 1764 it was held that, where a Part 36 offer is accepted, the court does then have the power to make a payment on account of costs under CPR 44.2(8): CPR is not entirely free-standing. (*Finnigan v Spiers* holding otherwise overruled).

Alexander Hutton QC