Constantly evolving

Dominic Regan runs through an eventful period for Part 36 developments

Despite having just attained the age of 22, Part 36 continues to evolve and to generate novel issues after all these years. All references to the 'White Book' (SCP) commentary below are to pages in the excellent, updated edition published on 31 March 2021.

While 2020 was, for obvious reasons, a most miserable year, Part 36 aficionados saw a bumper crop of revealing decisions. In his introduction to the 2019 White Book, Sir Geoffrey Vos voiced concerns about how often the rule came before the courts. Money is the explanation. A receiving party can expect to enjoy 'a raft of enhancements', as it was so eloquently put by the Court of Appeal in *Calonne Construction v Dawnus* (2019) Costs LR 309.

Indemnity costs are not subject to the nebulous test of proportionality. Sir Rupert Jackson arranged for the recipient to get up to an extra £75,000 for simply having made a good, unaccepted offer to settle. Both costs and damages can attract enhanced interest, capped at a maximum of 10% above base rate. Little wonder that with so much at stake, parties will argue long and hard about figures.

NO PICK AND MIX

In *Telefonica v Office For Communications* (2020) EWCA Civ 1374 the claimant had bettered its offer by £4.5m or 9%, yet received no more interest than would have been payable had it made no offer at all. The appeal court endorsed the view of Stewart J in *JLE v Warrington* (2019) 1 WLR 6498 that it would be highly unusual for the court to grant some benefits but to withhold others. This was particularly so on the facts of this £54m case. Indemnity costs and an additional £75,000 'was an almost trivial uplift and any significant enhancement in overall relief would only have been achieved by the award of additional interest on the principal sum' (paragraph 42).The judge was in error by regarding the award of two trivial enhancements as justification for not awarding the major enhancement, uplifted interest. The appeal court corrected the omission, and so Telefonica gained a useful extra £900,000.

Some judges at first instance had flirted with the concept of withholding some of the rewards, adopting a pick and mix approach. The appeal court made it abundantly clear that the victor ought to receive each of the four enhancements pursuant to CPR 36.17(1)(b). There is nothing in the rule that undermines or lessens entitlement to the others. The rewards are a composite package. All of them ought to be bestowed.

On a practical note, I surmise that Sir Rupert Jackson would agree. An approach that encouraged arguments about dividing up the spoils would be a blatant incentive for the paying party to raise challenges in the hope of shaving something off.

PART 36 CASES

PERFECT PITCH

How high can an offer to settle be pitched? *Rawbank v Travelex* (2020) EWHC 1619 (Ch) saw the court deciding that an offer to take 99.7% was a genuine offer to settle. Unusually, there could be no argument about liability or quantum and so success was 'a near certainty'. This modest concession was thus held to be legitimate. The White Book note at page 1298 observes that there is nothing wrong with high offers in 'extremely strong cases but it may be prudent' to explain in writing why the discount is so low. The guidance continues to warn that the decision 'should not be seen as encouragement to claimants to make exceptionally high offers'.

Offers pitched at 95% were upheld in *Huck v Robson* (2002) EWCA Civ 398 and, post the 2015 rule changes, in *Jockey Club v Willmott Dixon* (2016) Costs LR 123. It is suggested that to go above 95% is dangerous. Ask for too much and the probability is that one will get nothing.

Get it right, no matter how tight the margin, and the rewards cascade down. *Hochtief v Atkins* (2019) EWHC 3028 (TCC) saw a claimant who bettered their Part 36 quantum offer by just £4,500 reap an uplift of £65,000 and interest at 6% above base plus indemnity costs.

The Court of Appeal delivered an important judgment for defendants in *Burgess v Lejonvarn* (2020) EWCA Civ 114. D made an early Part 36 offer of £25,000. C made a series of descending offers to settle. They lost at trial. D, who was only awarded standard costs, appealed. Part 36 is discriminatory! A claimant making a good offer is in line for indemnity costs. A defendant is only entitled to costs which means standard basis only. Consequently, a defendant has no direct claim under CPR 36 to generous costs. However, these costs can be pursued indirectly under CPR 44. In *Burgess* the court took in account several factors, one of which was the unreasonable failure of C to accept an eminently sensible Part 36 proposal (SCP page 1292).

Rupert Cohen persuaded the court that indemnity costs were payable because of this, as well as the fact that the action was 'speculative, weak, opportunistic or thin'. As to the conduct of the litigation, dealt with in the costs judgment from [17] – [22], the judge addressed various specific matters such as the confused nature of the pleadings, the making of allegations without expert evidence, the shambolic nature of the disclosure, and the 'haphazard and spray gun manner' of the case on defects. The hopeless nature of their case should have been evident after the claimants had digested the earlier Court of Appeal decision about the scope of liability; (2017) EWCA Civ 254. Accordingly, indemnity costs were due starting one month after that first judgment going to duty.

The third judgment of Pepperall J in *Essex County Council v UBB Waste* (2020) EWHC 2387 (TCC) is bursting with wisdom on Part 36. The claim concerned the future of a 25-year long contract worth £800m. The claimant spent £15m in successful pursuit of the claim and in defending a very large counterclaim. Damages of £9m were awarded, as was an interim payment of £8m on account of costs.

Ed Pepperall QC as he then was oversaw the 2015 reforms to Part 36. His knowledge of the measure is without equal.

The claimant had failed to make their Part 36 offer by way of the court form N242A, the intelligent mode of making a compliant offer as recommended at page 1278 of the White Book. Instead, Slaughter and May wrote to Norton Rose on the 7th making an offer specifying the 21-day relevant period as running from the date of their letter. CPR 36.7(2) stipulates that offers are made when served. The letter was sent by fax after 4.30pm on the 7th, and so was deemed to have been served under CPR 6.26 on the following day. D argued that this meant the relevant period was less than 21 days and so was invalid for Part 36 purposes.

The judge found (paragraph 19) that a reasonable person aware of the circumstances would appreciate that the letter was intended to be a Part 36 offer and the 21-day period ran from the date made ie. 8 March. The guiding principle is 'validate if possible' as Lewison LJ elegantly stated in *Dutton v Minards* (2015) EWCA Civ 984.

An invaluable, albeit *obiter*, observation from the judge should be noted. He rejected the notion of an estoppel argument based on a requirement in an offer letter for the recipient to notify the offeror of any perceived defects in the offer made. At paragraph 37 of his impeccable judgment, Sir Edward firmly concluded that 'estoppel should play no part in the procedural code'. He declared 'the responsibility for ensuring that an offer is compliant with Part 36 should lie squarely upon the offeror and his lawyers'. Indeed so. Given the additional benefits that a good offer can generate it should be blindingly clear that the offeror must craft their proposal in compliant terms.

Lambert J in *Campbell v MOD* (2020) Costs LR 13 gave advice about what to do when confronted by a Part 36 offer when evidence was incomplete; seek a stay so as to stop costs running on! She said that everyone must 'keep in mind the salutary purpose of the Part 36 regime which is to promote compromise and avoid unnecessary expenditure of costs and court time'.

A manoeuvre seeking to evade the usual Part 36 consequences was rejected by Mann J in *Pallett V MGN Limited* (2021) EWHC 76 (Ch). This hearing came about because the defendant had waited for 22 days to elapse before accepting the Part 36 offer made by the phone hacked claimant: 'It appears that that was deliberate'.

Where acceptance is after the expiry of the 21-day relevant period, CPR 36.13(4) stipulates that the liability for costs must be determined by the court unless the parties have agreed the costs. Had the offer been accepted the day before, the claimant would have enjoyed an unassailable right to recover costs! Mann J was clearly bemused by this scenario stating that 'odd though it may seem' Ben Williams QC for the defendant was plainly right in opening up a costs dispute.

While the rule opens the door for a costs enquiry, CPR 36.13(5) goes on to give a clear steer that, unless unjust, the court must order that the claimant be awarded costs up to the date on which the relevant period expired. The conduct of the claimant in the dispute was irreproachable, and so she recovered her costs.

DROP HANDS OFFERS

Another gem of wisdom which emerged last year was that it is not possible to make a 'drop hands' offer under Part 36. So held Deputy Master Henderson in *Akinola v Oyadare*, unreported but noted in 'Civil Procedure News' 12 October 2020 at page 3. The idea of each party bearing their own costs was incompatible with the deemed Costs Order provision. Instead, one should make the proposal by way of an offer to settle without prejudice save as to costs.

Coming up in the Court of Appeal later this year is a question about what happens where a claimant makes an offer to settle to a group of defendants. All but one accepted the offer. What happens about the costs of the refusenik? My thanks to Nicholas Bacon QC for the tip off.

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