Questions answered

Dominic Regan reports on an illuminating decision on Part 36 and indemnity costs

While this unforgettable year is not quite over, I feel confident in saying that the decision in *Essex County Council v UBB Waste (Essex) Limited* (2020) EWHC 1581 (TCC) is the most helpful, illuminating decision for anyone involved in the world of costs. I urge everyone to read it.

It deals with several issues of real importance. On the Part 36 front, how should the court approach an offer where, arguably, the requisite 21-day relevant period has not been specified? Can an invalid offer somehow be transformed into a good one if the offeree fails to raise a challenge at the time? What is the effect of rounding off an offer by asking the offeree to inform you of any defects within it?

The judgment also carefully considers what aspects of litigation activity could warrant an award of indemnity costs.

The judge was Pepperall J who, when Ed Pepperall QC, was responsible for the overhaul of Part 36 that took place in 2015. His knowledge of the subject is second to none, and he continues to be a contributor to 'The Supreme Court Practice'.

The litigation 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.

This, the third judgment generated by the case, concerned costs. The two core issues were the validity of a purported Part 36 offer, and whether aspects of conduct warranted an award of indemnity costs being made against the defendant.

THE PART 36 OFFER

The claimant solicitors wrote to those acting for the defendant on 7 March 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, and so was deemed to have been served under CPR 6.26 on the following day (8 March). D argued that this meant the relevant period was less than 21 days, and so was invalid for Part 36 purposes.

The judge found that a reasonable person aware of the circumstances would appreciate that the letter was plainly 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.

Pepperall J relied on *C v D* (2011) EWCA Civ 646, where Stanley Burnton LJ stated [84]: 'Any ambiguity in an offer purporting to

be a Part 36 offer should be construed so far as reasonably possible as complying with Part 36. Once it is accepted that a time-limited offer does not comply with Part 36, one must approach the interpretation of the offer in this case on the basis that the party making the offer, and the party receiving it, appreciated that fact.'

Do note that since 2015, it has been possible to make a time limited offer under Part 36.

The Court of Appeal has observed on a number of occasions that 'Part 36 is highly prescriptive (so that even experienced lawyers may fail to make a compliant offer)', as Burnton LJ said in *Webb v Liverpool Womens NHS Foundation Trust* (2016) EWCA Civ 365.

Coulson LJ wearily observed that 'the law reports are over-full of cases in which parties made offers outside the scope of Part 36, and then unsuccessfully sought to obtain the Part 36 benefits later', in *King v City Of London Corporation* (2019) EWCA Civ 2266. He cited *Mitchell v James* (2004) 1WLR 158, where it was held that an offer that was inconsistent with Part 36 on the right to costs was not valid under the rule.

THE SOLUTION

The simple solution? Citing the advice found in the 2020 'White Book', Pepperall J urged all practitioners to make offers in the prescribed Court Form N242 A. It is user friendly and contains helpful reminders about essential requirements, such as a minimum relevant period of 21 days.

While use of the form is not compulsory, the wise would act as if it were! By all means, write a side letter if you want to set out the rationale of your proposal. Critically, the court will only have regard to the form with which the offer was made. Complete that correctly and all will be well.

At trial, it was clear that the outcome secured by the claimant was at least as advantageous as the terms of their offer. Unusually, it did not seek any monetary reward, but proposed a series of declarations.

This is a rare example of a court having to gauge success in the absence of any figures. *Obiter*, the court firmly rejected a suggestion that an offer that did not satisfy the formal requirements of CPR 36.5 could somehow be rendered valid if the offeree did not promptly take issue with the defect.

As we know from the seminal decision in *Gibbon v Manchester City* Council (2010) EWCA Civ 726, the measure is a strict procedural code, and offers are either valid or not; there is no halfway house. The activity – or indeed inactivity – of the offeree cannot validate that which was defective from the outset.

Again *obiter*, but coming from one who knows this area intimately, the judge gave short shrift to a term that many have appended to offers. The gist of it was to impose a requirement upon the offeree to flag up any perceived flaws. At paragraph 37.5 he says 'as a matter of policy, the responsibility for ensuring that an offer is compliant with Part 36 should lie squarely upon the offeror and his lawyers'. This must surely be correct. A good offer generates a 'raft of enhancements', as it was elegantly described in *Calonne Construction Limited v Dawnus Southern Limited* (2019) EWCA Civ 754. Getting the offer right is the obligation of the offeror. Inviting the offeree to point out defects thus appears pointless.

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INDEMNITY COSTS

The second aspect of the judgment addressed three aspects of conduct by the defendant. Indemnity costs for the lifetime of the litigation were sought by the claimant. The appropriate test was set out in *Excelsior v Salisbury* (2002) EWCA Civ 879. The critical requirement was 'some conduct or some circumstance which takes the case out of the norm'.

At trial, the defendant asserted that council employees had failed to act in good faith. While it was never alleged that they had acted in bad faith, the court considered that allegations of sharp practice without a shred of supporting evidence was 'out of the norm'. Parties cannot make unjustifiable allegations of a lack of good faith with impunity. This in itself warranted an award of indemnity costs. To try and distinguish alleged lack of good faith from bad faith was a miserable exercise in sophistry.

Second, a counterclaim was pleaded at £77m, and by trial was approaching £100m. Pepperall J categorised it as both weak and opportunistic. It was calculated to put improper pressure on the claimant. This was a further ground to justify indemnity costs.

Many a claimant will have experienced the blockbuster counterclaim that dwarfed by far the originating claim. It is of course possible that the counterclaim is legitimate, but I surmise that a judge will ask themselves why, if the defendant were due a vast amount, it had not itself vigorously launched proceedings?

Finally, the expert instructed by the defendant was hopelessly compromised, and could never have been seen as impartial. His organisation had worked closely with the defendant in the past. This undermined the evidence adduced by the expert. The conduct of an expert can justify indemnity costs in respect of costs they generate; *Williams v Jervis* (2009) EWHC 1837 (QB).

Consequently, there were ample grounds to justify an award of indemnity costs. Let it never be forgotten that the test of proportionality is inapplicable on this basis, and that budgeting constraints fall away too: *Lejonvarn v Burgess* (2020) EWCA Civ 114.

One might reasonably regard this judgment as a judicial exercise in clarifying Part 36 conundrums, in the same way that Pepperall J set about, through the Rule Committee, tidying up the rule in 2015. While some guidance is strictly *obiter*, the 21-page judgment clearly displays real thought and attention to detail. And he delivered it in under two months - so will be in the good books of our next Master of the Rolls. Sir Geoffrey Vos, who takes office in January, expects every judgment, no matter how complex the matter, to be handed down within three months.

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