Marginal gains

Jack Ridgway explains how the courts decide if a Part 36 offer is 'genuine'

Since changes to Part 36 offers in the Jackson reforms of April 2013, both parties – particularly claimants – have been incentivised to make Part 36 offers as a form of alternative dispute resolution. The rewards when a claimant beats their own offer are potentially significant:

- An additional amount of up to £75,000 on the sum awarded
- Interest at up to 10% above the base rate on the sum awarded
- Legal costs on the indemnity basis
- Interest on legal costs at up to 10% above the base rate

The four provisions taken individually and collectively are potentially significant, increasing the sum that will be awarded, plus the legal costs and interest recovered. Of particular significance is the award of indemnity costs, which would disapply any Costs Management Order and could potentially open up an opponent to paying significantly more costs than would have otherwise been the case.

Given the powerful incentive available, the safeguard is surprisingly slight; being whether or not it would be unjust to apply the penalties. The approach to this is set out in CPR 36.17(5):

(5) In considering whether it would be unjust to make the orders referred to in paragraphs (3) and (4), the court must take into account all the circumstances of the case including –
(a) the terms of any Part 36 offer;
(b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;
(c) the information available to the parties at the time when the Part 36 offer was made;
(d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and
(e) whether the offer was a genuine attempt to settle the proceedings.

The majority of scripture on the issue concerns matters that may affect the validity of the offer. However it is unusual for the court to find the terms of a Part 36 offer made by competent solicitors to be unjust. Therefore, in many cases where a Part 36 offer is equalled or beaten, the paying party's hope hangs squarely on the most subjective element, whether an offer was a genuine offer. It should be borne in mind that CPR 36.17(5)(e) was added to the CPR in April 2015, two years after the initial changes, and as a clear backstop for the court where it sees injustice.

What may seem an obvious test, 'you'll know it when you see it', has proven to be one of the most challenging over time. While offers ranging from 90%, as in *JMX (a Child) v Norfolk and Norwich Hospital NHS Trust* [2018] EWHC 185 (QB) and 95%, as in *Jockey Club Racecourse Ltd v Willmott Dixon Construction Ltd* [2016] EWHC 167 (TCC), are usually be found to be genuine, there still continues to be much litigation over offers in this range. The very recent decision of *Colicci & Ors v Grinberg & Anr* [2023] EWHC 2075 (Ch) involved a dispute as to whether an offer of 90.6% was a genuine offer - Mr Anderson KC found that it was.

MOVING THE DIAL

Where the dial on 'genuine' may have been considered to have moved

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is in *Rawbank SA v Travelex Banknotes Ltd* [2020] EWHC 1619 (Ch), where it was found that an offer representing 99.7% of the sum awarded was a genuine offer. However, this case contained some truly unique facts, including a breach of contract, an insolvent defendant, that quantum was not in dispute, and that the claimant reasonably considered there was no realistic prospect of failure.

Perhaps, wrongly, spurred on by this unique decision, parties have pushed the limit of what is deemed to be genuine, with offers to accept 99% in *Yieldpoint Stable Value Fund LP v Kimura Commodity Trade Finance Fund Ltd* [2023] EWHC 1512 (Comm), and 99.9% in *Sleaford Building Services Ltd v Isoplus Piping Systems Ltd* [2023] EWHC 1643 (TCC).

In *Yieldpoint*, the Part 36 offer arose in relation to the repayment of monies due. The offer of £4,950,000 represented 99% of the sum sought. Interestingly with accrued interest, the offer represented 96% of the sum sought. However, Houseman J considered that in such a binary claim, the offer could not be seen as genuine.

In *Sleaford*, the Part 36 offer arose in relation to enforcement of an adjudicator's decision. The offer of £323,502.32 was an offer to accept the principal sum sought and to forgo 10 days of interest, being circa £350. Mr Nissen KC found that while no arguable defence was advanced by Sleaford, as in Rawbank, this was not a genuine offer.

KEY FACTORS

While there is little guidance within the percentages, it is clear that the court will take certain key factors into account:

- Is the dispute 'binary', ie. all or nothing?
- Can a realistic defence be mounted?
- Is the discount so slight that the Part 36 awards seem unjust?
- Is the offer constructive? Could it have saved court resources?
- Is the discount enough that a party would even consider its acceptance?

While there is no hard and fast rule, some may consider the test to be subjective, given that it requires the court to put itself in the place of the parties. However, at its heart is an objective evaluation - and therein lay the inconsistency at the most extreme end.

We may now be seeing the courts gently steering parties back towards the 95% mark in contested litigation, with smaller deductions only being seen as genuine where unique circumstances apply, or the gap between the parties is so narrow as to justify only a small reduction.

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