

CPR Part 36 – Costs Consequences Following Judgment

If a claimant beats a defendant's Part 36 offer by a modest amount, say £1.00, has the claimant necessarily obtained a judgment more advantageous than the offer for the purposes of CPR r.36.14? The recent decisions in *Carver v BAA Plc* [2008] EWCA Civ 412 (Ward, Rix and Keene LLJ) and in *Multiplex Constructions (UK) Limited v Cleveland Bridge UK Limited* [2008] EWHC 2280 (TCC) (Jackson J) suggest not.

Insofar as is relevant, CPR r.36.14 provides as follows:

“Costs consequences following judgment

(1) This rule applies where upon judgment being entered -

- (a) a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer; or*
- (b) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer.*

(2) Subject to paragraph (6), where rule 36.14(1)(a) applies, the court will, unless it considers it unjust to do so, order that the defendant is entitled to –

- (a) his costs from the date on which the relevant period expired; and*
- (b) interest on those costs.*

(3) Subject to paragraph (6), where rule 36.14(b) applies, the court will, unless it considers it unjust to do so, order that the claimant is entitled to –

- (a) interest on the whole or part of any sum of money (excluding interest) awarded at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;*
- (b) his costs on the indemnity basis from the date on which the relevant period expired; and*
- (c) interest on those costs at a rate not exceeding 10% above base rate.*



(4) In considering whether it would be unjust to make the orders referred to in paragraph (2) and (3) above, the court will 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; and

(d) the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer to be made or evaluated.

...

(6) Paragraphs (2) and (3) of this rule do not apply to a Part 36 offer –

(a) that has been withdrawn;

(b) that has been changed so that its terms are less advantageous to the offeree, and the offeree has beaten the less advantageous offer;

(c) made less than 21 days before trial, unless the court has abridged the relevant period.”

In *Carver v BAA Plc* [2008] EWCA Civ 412, an air hostess had injured her ankle at Gatwick Airport when stepping into a lift which, due to a mechanical defect, had stopped some 2 feet below floor level. BAA, the body responsible for the safety of the airport, conceded liability and indicated a willingness to consider any reasonable claim. On 9 February 2004, BAA made an interim payment in the sum of £520.00. On 17 November 2005, it made a Part 36 offer (including the £520.00) of £4,006.00. On 6 June 2006, BAA made a Part 36 payment of £4,000.00 into court, making it clear that this was in addition to the aforementioned £520.00. Ultimately, judgment was entered for Ms Carver in the sum of £4,686.26 inclusive of interest i.e. making



allowances for interest at the date of the Part 36 payment in and at the date of judgment, the judgment exceeded the payment in by £51.00. At trial, the judge (His Honour Judge Knight QC) held that Ms Carver had not succeeded in obtaining a judgment more advantageous than the Part 36 offer.

Upholding the decision of the trial judge, Ward LJ (with whom the other Lords Justices agreed) said at [31] – [32]:

“The Civil Procedure Rules, and Part 36 in particular, encourage both sides to make offers to settle. Compromise is seen as an object worth of promotion for compromise is better than contest, both for the litigants concerned, for the court and for the administration of justice as a whole. Litigation is time consuming and it comes at a cost, emotional as well as financial. Those are, therefore, appropriate factors to take into account in deciding whether the battle was worth it. Money is not the sole governing criterion.

It follows that Judge Knight was correct in looking at the case broadly. He was entitled to take into account that the extra £51 gained was more than set off by the irrecoverable cost incurred by the claimant in continuing to contest the case for as long as she did. He was entitled to take into account the added stress to her as she waited for the trial and the stress of the trial process itself. No reasonable litigant would have embarked on this campaign for a gain of £51.”

In *Multiplex Constructions (UK) Limited v Cleveland Bridge UK Limited* [2008] EWHC 2280 (TCC), Jackson J recognised at [69] that the Court of Appeal’s approach in *Carver* was:

“...very different from the earlier approach of the courts towards offers which were not quite sufficient.”



Notwithstanding the novelty of the Court of Appeal's approach to Part 36 offers, Jackson J declined to hold that it should be confined to personal injury cases. Adding a slight gloss to the decision, His Lordship held at [71]:

“Paragraphs 28 to 32 of the Court of Appeal's decision in Carver set out how the court ought to approach the matter in circumstances where: (a) one party has made an offer which was nearly but not quite sufficient; and (b) the other party has rejected that offer outright without any attempt to negotiate.”

In summary, under CPR r.36.14, the question whether a judgment is more advantageous than a Part 36 offer will involve consideration of matters beyond a strictly financial comparison between the offer itself and the judgment debt. The phrase “more advantageous” is an open-textured one and permits a wide-ranging review of all the facts and circumstances of the case in deciding whether the judgment was worth the fight.

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