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Claimant's Part 36 Offers: How should a defendant respond?

Practitioners are familiar with the contents of CPR 36 – the requirements as to the form and content of a Claimant's Part 36 offer (CPR 36.5), the costs consequences of acceptance of the offer by the Defendant (CPR 36.13) and the costs consequences of unaccepted offers following judgment (CPR 36.17).

The critical issue in relation to an unaccepted claimant's offer at trial is then whether the judgment is "*at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer.*"

Whilst this is easy enough to state as a principle, applying it on the facts of particular cases – and taking it into account when advising what to do upon receipt of a claimant's offer – can sometimes be more challenging. For example, imagine a case in which a Claimant has claimed a mixture of relief, including declarations, orders to set aside agreements on the grounds of mistake or misrepresentation and also financial claims. In many cases, especially in real property cases, the consequences of the declarations or set aside orders might be by far the most important issue in the proceedings. The financial claims might be simply consequent upon the Court's conclusions on the principal claims. Indeed, the financial claims might not even be in dispute, provided only that the Court declares the validity of a document – for example outstanding rent dependent on the validity of a lease.

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What happens, then, if in such a case the Claimant makes a Part 36 Offer which in effect concedes all of the material issues between the parties – e.g. concedes the validity of a lease – but offers to compromise the proceedings on payment only of the financial claim? If such an offer is made, say, 2 years into the proceedings then although the terms in the Part 36 Offer taken alone might be reasonable, they will feel manifestly unreasonable to a Defendant who would then have to pay all of the costs of the proceedings if accepting the offer. Yet if the offer is not accepted, how can the Defendant respond if the parties go to trial, the Claimant loses on all of the material issues (save for the consequential financial claim), but the Claimant then says that the ultimate outcome is at least as advantageous as the Part 36 Offer already made?

This situation arose in a case in which I was involved recently. Yet I found it surprising that the situation is not expressly referred to in the notes to CPR 36.17 in the White Book and that the principal authority on the issue is not referred to.

At first thought, it is tempting to think that the answer might be found in a comparison of the position both at the date of the offer and at the date of judgment, but taking into account the effect of costs. This is because the reason a Defendant would feel aggrieved in accepting the Claimant's Part 36 Offer in the scenario mentioned above is essentially due to the automatic costs consequences of Part 36 being at odds with the reality of a Claimant offering to abandon most of its case.

However, it is generally accepted as being implicit in the wording of CPR 36.17 that costs do not fall to be considered when determining whether rule 36.17(1)(b) has been satisfied. No case is cited in the White Book which is expressly to this effect, however it has been thought to follow from the judgment of the Court of Appeal in Mitchell v James [2004] 1 WLR 158 to the effect that it is not permissible to include within a Part 36 Offer terms as to costs. This conclusion was partly predicated on the assumption that the word "judgment" in CPR 36.17 naturally connotes what the trial judge holds on the substantive issues, as distinct from the ancillary question of costs. Hence it is assumed that the costs consequence element in a Part 36 Offer will be ignored in deciding whether the judgment was more or less advantageous than the offer.

What then is a Defendant supposed to do in this scenario?

The answer, it turns out, was provided by Popplewell J in Transocean Drilling UK Ltd v Providence Resources plc [2016] 6 Costs LO 883.

In that case, a Claimant had brought a claim for a very large sum of money, but had lost at trial on issues going to around 75% of the costs. Although it had received judgment for $7.6 million, the trial judge therefore made no order as to costs. However, the judgment sum was then increased on appeal to $13.8 million, which then meant that the Claimant had "beaten" a Part 36 Offer it had made for $13 million. On reconsideration of costs by the trial Judge, the Judge was clear that, apart from the Part 36 Offer, he would have made the same costs order – no order as to costs. Moreover, it was common ground that the Claimant's costs at the time of its Part 36 Offer were in the region of $3 million. The Defendant therefore argued that the Claimant had not beaten its Part 36 Offer, since the ultimate outcome of $13.8 million was worse for the Claimant than if the Defendant had accepted the offer and paid $16.8 million. Alternatively, it argued that to apply the usual costs consequences would be unjust.

Popplewell J concluded that costs are not to be taken into account when determining whether judgment is at least as advantageous as a Part 36 Offer. This was partly because it would not make sense for the Court first to make a provisional determination on costs (in the absence of Part 36 Offers), and then a second determination based on the Part 36 Offer. In addition, the provisional determination would then have to be treated as a "judgment being entered" in order to fit within the wording of CPR 36.17. Further, the same hypothetical costs exercise would have to be undertaken at the date of the Part 36 Offer, which cannot have been contemplated under the rules.

However, the Judge also concluded that it is legitimate for a Court to have regard to the costs consequences of acceptance, when considering whether the default rule in CPR 36.17 would be "unjust" (and applying the principles set out in Webb v Liverpool Women's NHS Foundation Trust [2016] 1 WLR 3899). On the facts of the Transocean case, this meant it was relevant that if the Defendant had accepted the offer, it would have paid the Claimant more than the Court would have ordered it to pay had the action been determined at the time of the Part 36 Offer (including a determination on costs). The Court therefore ordered the Defendant to pay all the Claimant's costs from the date of the Part 36 Offer, but without any of the additional consequences provided for in CPR 36.17.

This conclusion was affected by the fact that the Defendant had not accepted the offer, or otherwise protected itself against it. How could it have done so? Popplewell J stated that the Defendant could either:

1. Have made an ordinary Calderbank Offer, explaining why it would have been unjust for the Defendant to accept the Part 36 Offer, but offering the same terms but with no order as to costs; or
2. Have made its own Part 36 Offer, but on monetary terms which were equivalent to the financial consequences of the Part 36 Offer adjusted for costs – i.e. the Defendant should have made a Part 36 Offer for payment of $10 million.

The lesson, then, is clear: as a Defendant one cannot simply ignore a Part 36 Offer which on its face is acceptable, but is too ambitious or is unrealistic once one takes into account costs. If the Defendant would be prepared to accept the offer on the same terms, but different costs terms, then it should expressly say so by its own "without prejudice save as to costs" correspondence in response. Failure to do so will leave the Defendant at serious risk of some or all of the automatic costs rules in CPR 36.17(4) taking effect.

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