

PART 36 UPDATE

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PART 36 AND PAYMENTS ON ACCOUNT

- ***Gamal v Synergy Lifestyle Ltd* [2018]**
EWCA Civ 210 Flaux LJ and Arden LJ
- Ms El-Gamal (appellant) was defendant to claim brought by her builder. Claim for £151K but found to be fraudulent. Value of work assessed by Judge at over £30K. D had paid £16,600 towards the works and judgment sum was £19K odd.
- Ms El-Gamal made P 36 offer of £15,000 and HHJ Bailey concluded builder had beaten offer
- Judgment sum then reduced to £14K odd after J accepted wrongly added VAT to judgment sum
- Ms El-Gamal then argued builder had failed to beat her £15K offer. J refused to review order again

Payments on account cont..

- Ms El-Gamal appealed.
- Flaux LJ considered *Macleish v Littlestone* [2016], Briggs LJ where D admitted liability for specific sum in defence after service of D P 36 offer: “an admitted payment on account following a part 36 offer in a higher amount must, in the absence of agreement to the contrary be taken as being made on account of the P 36 offer to settle”
- Nothing inconsistent in D making offer to settle whole claim and making payments outright pursuant to admissions
- Ms El-Gamal argued *Macleish* to be limited to cases of admissions or where paying party made clear that payment reduced amount of P 36 offer

Payments on account cont..

- Held Flaux LJ (Arden LJ agreed)
- Critical aspect of *Macleish* was not admission of liability but admissions payment been on account of claim, reducing D's liability for claim as whole
- Presumption of law where such a payment made also on account of earlier P 36 offer
- Unconditional payment on account of sum claimed, made after date of P 36 offer, results in amount of P 36 offer being correspondingly reduced UNLESS payer makes it clear at any time prior to judgment or acceptance of P 36 offer that not to be so treated

WITHDRAWAL OF P 36 OFFER

- **Ballard v Sussex Partnership NHS Foundation Trust [2018] EWHC 370 QB, Foskett J on appeal**
- D made two P 36 offers. First offer had been withdrawn. C failed to beat both P 36 offers.
- Agreed that C had to pay D's costs of trial (from expiry of relevant period of 2nd offer) and interest on those costs and C entitled to costs up to expiry of 1st offer
- Dispute was over who to pay costs from expiry of 1st offer up until commencement of trial

WITHDRAWAL cont.

- Trial Judge held C had to pay D's costs for that period (applying CPR 44.2(4)(c) – any admissible offer to settle)
- Foskett J: wrong. 2nd offer letter made it clear that if C failed to beat it D would seek costs from date of expiry of 2nd offer (trial costs). Silent about costs from date of expiry of 1st offer. C entitled to take that at face value.
- Judge recognised tension between offeror who withdraws P 36 not being able to “reap” the benefits of r. 36.17 and proposition that such an offer still relevant to issue of costs (Jackson LJ in Fox v Foundation Piling Ltd [2011] EWCA 790)
- Crucial thing in this case: D had made plain would not be relying on first offer once withdrawn

Genuine offer to settle

- **JMX (a child by LF FMX) v Norfolk & Norwich Hospitals NHS FT [2018] EWHC 185 (QB)**
- Liability only trial in clin neg claim
- C's advisers put forward P 36 offer to accept 90% of damages. J found in favour of C on liability.
- D sought to argue that it was unjust (CPR r. 36.17(4) on the basis it was not a genuine offer to settle

Genuine offer to settle cont..

- Held: Offer was a genuine one
- Judge not impressed by D's attempt to argue that 10% could not have been a realistic valuation by C's team of weaknesses of claim – argument “one which could hardly ever succeed”. Refused to embark on such an exercise of evaluation.
- A case which C's team regarded as very strong but prepared to offer modest discount

Additional amount r. 36.17(4)(d)

- **JMX** again
- Does court have power to award additional amount when offer made on liability?
- Foskett J accepted that 36.17(4)(d) was not engaged at all. Refers to “provided case has been decided” and only “decided” when “all issues in the case have been determined” (r. 36.3(e))

Additional amount cont...

- BUT obiter D wrong that r. 36.17(4) could only operate on offer in respect of “claim as a whole”
- C can make different P 36 offers on different issues and could make more than one C P 36 offer that qualifies for additional amount. Can only have one award of additional amount so court would have to exercise discretion

UNJUST TO MAKE THE USUAL ORDER R. 36.17(4)

- **Briggs v CEF Holdings Ltd [2018] 1 Costs LO 23**
- C suffered foot injury in workplace accident. C had medical report with unfavourable prognosis. D made early P 36 offer of £50K in 2012. Stay granted to could undergo foot surgery and following lifting of stay, C substantially increased claim to nearly £250K and got revised orthop report which more favourable in prognosis. Joint expert meeting led to agreement that prognosis favourable and C could work to retirement age
- C accepted 2012 P 36 offer in 2015 and obtained an order D pay his costs up to date in 2014 (date when J took view he could have reasonably taken a view on the offer).

INJUSTICE CONTINUED

- CoA, Briggs LJ: J's decision wrong. Important not to undermine salutary purpose of P 36. Ct not to conduct microscopic examination when considering uncertainty. General rule is that if offer not accepted C bears the costs of D until time offer is accepted. Up to offeree to show injustice. A general contingency of litigation did not shift the costs burden (Matthews v Metal Improvements)

INJUSTICE CONTINUED

- **Shakar Ali, Shahida Aslam v Channel 5**
[2018] EWHC 840 (CH), Arnold J
- Cs brought successful claim for misuse of private information in relation to TV programme Can't Pay We'll Take It Away which showed Cs being lawfully evicted from their home
- Channel 5 had made P 36 offer which Cs failed to beat
- Cs argued unjust to apply 36.17(3) consequences on basis of refusal to offer apology or statement in open court. Relied on decision in Yentob v MGN [2015], Mann J

INJUSTICE cont....

- **Held:** No injustice. Cs to pay Channel 5's costs from date of offer 1) No settled practice in misuse of private information cases that Cs are entitled to apology or agreed statement in open court (2) Cs could have applied to make unilateral statement in open court (3) damages are compensatory and not vindicatory
- Channel 5 had failed to serve costs budget so only entitled to 50% of assessed costs post expiry of P 36 offer (r. 36.23(2)(a)). 50% rule applied to whole period and not just period after costs management order made – sanction in r. 3.14 imposed earlier by failure to file budget in accordance with order of court.

Acceptance during trial

- **Application in private, Sir Jeremy Cooke [2017] EWHC 3606(Comm)**
- Complicated multi-party action concerning alleged anti-competitive effect of fee charged by issuers of debit/credit cards. Complex economic issues and expert evidence.
- Cs permitted to accept D's P 36 offer during trial following handing down of judgment in related litigation. Even at late stage acceptance of offer better than no acceptance and saved substantial judicial time. Not unjust for Ds to be held to offer

Indemnity costs for D

- **Lokhova v Longmuir [2017] EWHC 3152, Warby J**
- Late acceptance of D's P 36 offer in libel/slander action. Was D entitled to indemnity costs between expiry date and acceptance date?
- Mere fact of late acceptance not basis for order
- But did C behave in a way "outside the norm"? Accepted court to be cautious before reaching such a finding. Desirable for C to know acceptance will close matters on usual basis
- C's conduct in pressing on with claims highly unreasonable. Has pursued unreasonable application to amend claim after D's P 36 offer. Conduct fell well outside the norm.

Disclosure of amount of settlement under P 36

- **Sir Cliff Richard v BBC & anor** (8 March 2018, unrep)
- C claimed damages for misuse of private information against police authority and BBC. BBC and police had served contribution notices on each others. Police authority had settled claim with C on payment of substantial sum under P 36 but pursued contribution claim against BBC
- Police argued CPR r. 36.6 prevented disclosure
- CPR r. 36.6 “a Part 36 offer will be treated as without prejudice except as to costs”
- Mann J. 36.6 did not apply to situation where P 36 accepted. Once accepted no longer a P 36 offer but a binding compromise. Did not mean could freely refer to amount, had to be relevant and court could prevent if possible prejudice but prejudice would have to be heavy. Issue would be revisited a trial.

END

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