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Part 36 recast

Emma Reynolds & Emily Tearle discuss whether the new Pt36 regime is an opportunity seized or overlooked

Given that the vast majority of cases settle before coming to trial, the importance of CPR Pt 36 and the need for it to operate in a consistent and coherent fashion is unquestionable. It is therefore unfortunate that the courts have been inundated with so many cases concerning the interpretation of Pt 36 in recent years. Such numbers suggest that the mechanics of Pt 36 were neither fully functional nor entirely fit for purpose.

The CPR Committee (the CPRC) had these issues well in mind when they reviewed Pt 36 at the end of last year and the result of their consultation is the new Pt 36, applying from 6 April 2015, which promises a simplified model which reflects the lessons learned in the case law and which reacts proactively to recent developments, such as the Jackson reforms and the trend towards high, strategic claimant offers which are seen as an abuse of the Pt 36 framework.

This article discusses whether the CPRC made good use of this occasion to address the practical issues arising out of Pt 36, or whether this opportunity was overlooked in favour of a more conservative approach which fails to hit the mark.

Highlights of the new regime

The CPRC has addressed and remedied, largely through codification, a number of practical difficulties which the courts have been tasked with resolving in recent years. For example:

i. A new carve-out to the rule restricting disclosure of a Pt 36 offer until the case has been decided has been introduced in the context of split trials, a provision which Mr Justice Eder lamented had not existed at the time of his judgment in *Ted Baker plc and Another v Axa Insurance UK plc and Others* [2012] EWHC 1779 (Comm), [2012] 6 Costs LR 1023. It was undisputed in that case that the claimant had been the successful party at the preliminary issues stage. However, the defendants contended that the question of costs should be reserved until the case had been decided, as to do otherwise would run the risk of an adverse costs order being made in ignorance of whether any Pt 36 offers had been made. Eder J rejected the contention that the rule could be interpreted in this way; however he stressed the urgent need for the old CPR 36.13 to be amended in order to resolve this issue. It is apparent that the CPRC took Eder J's advice and this anomaly has been rectified. Under new CPR 36.16, a judge may be told of the existence, but not the terms, of any Pt 36 offers at the end of a preliminary issues hearing (save where the Pt 36 offer relates only to the issues that have been decided, in which case the terms can also be disclosed).

ii. Following a number of inconsistent judgments, the CPRC has also clarified that a Pt 36 offer made in a counterclaim will be treated as if it was made in a claim (CPR 36.2(3)). This clarification should prevent a recurrence of the result in *F&C Alternative Investments (Holdings) Limited v Barthelemy* [2012] EWCA Civ 843, [2012] 4 All ER 1096, a case which highlights the shortcomings of an overly strict interpretation of the roles of "claimant" and "defendant" in the context of Pt 36. The respondents (who were effectively in the position of claimants) made their settlement offer outside the Pt 36 regime, conscious that if they had not done so, any costs consequences, had the offer been accepted, would have been limited to those afforded to a defendant's Pt 36 offer. The respondents invited the court to award indemnity costs by analogy with Pt 36. This invitation was declined as the court held that there was no justification for indirectly extending Pt 36 beyond its expressed ambit. The CPRC's decision to clarify the position should be welcomed not only because it seeks to correct the somewhat unjust result where parties do not assume the traditional roles of claimant and defendant, but also in confirming that defendants in these circumstances do not have to bring separate proceedings in order to benefit from the consequences of making a claimant's offer.

In addition to clarifying the existing provisions, a number of entirely new provisions have been introduced which aim to curtail abuse of the Pt 36 framework. In particular:

i. The CPRC identified a growing trend of claimant offers which offer little by way of compromise. The decision in *Huck v Robson* [2002] EWCA Civ 398, [2002] 3 All ER 263, in which a claimant's offer which equalled 95% of the relief sought in the claim was held to be valid, has popularised a practice of making Pt 36 offers which are bereft of any genuine element of concession, so that claimants can avail themselves of indemnity costs, punitive rates of interest and now the £75,000 additional payment should the claimant beat its own offer. Perceiving this to be a cynical strategy, the CPRC has sought to eradicate it by granting the court an additional discretion to refuse to make a costs order where the offer was not a genuine attempt to settle the proceedings (CPR 36.17(5)(e)). While ultimately the court will decide what weight, if any, to afford

to this new element, it is creditable that the CPRC has attempted to tilt the scales which are slanted in favour of claimants in the direction of defendants by limiting the scope for claimants to make purely tactical offers.

ii. The CPRC has also reacted proactively to the potentially oppressive effect which the Jackson cost budgeting consequences would otherwise have on Pt 36 offers where the offeror has failed to file a timely costs budget and its recoverable costs going forward have been limited to court fees. Under CPR 36.23, a party who has failed to file a timely costs budget but who is awarded costs pursuant to Pt 36 will be entitled to recover 50% of such costs. The introduction of CPR 36.23 will reduce the disincentive to settle in such circumstances, as the threat of adverse cost consequences, should that offer be rejected, remains intact at least to the extent of 50% of the offeror's costs. It is worth noting that this rule won't help a claimant who has failed to file its cost budget and who accepts a Pt 36 offer before the expiry of the relevant period, as the entitlement to 50% of its costs applies from the date of expiry of the relevant period. The CPRC ought to be commended in this instance for implementing preventative measures to curb any potential abuse of the Pt 36 framework by offerees of Pt 36 offers where the offeror's potential cost recovery is otherwise limited to court fees.

A flawed approach?

While it is clear that the CPRC has taken heed of a number of practical issues which have arisen in the context of Pt 36, there is a sense of disappointment among some who feel that the CPRC has not gone far enough and its continued approach of "bolting on" additional elements to what is arguably an already unstable framework is flawed and has proved ineffective in the past. The recent case of *Sugar Hut Group Ltd & Others v AJ Insurance* [2014] EWHC 3775 (Comm), [2014] All ER (D) 205 (Nov) is arguably a telling example of this. This case casts doubt over the effectiveness and robustness of the old CPR 36.14(1A) which appears to have been side-stepped in favour of an approach akin to that adopted in the controversial decision of *Carver v BAA Plc* [2008] EWCA Civ 412, [2008] 3 All ER 911, the very decision which prompted the CPRC to implement CPR 36.14(1A).

Old CPR 36.14(1A) was introduced to remove any doubt that where a claimant does not accept a defendant's offer and then obtains a judgment which is more advantageous than the offer, meaning better in money terms by any amount, however small, the claimant is to be regarded as the successful party. However, the court in *Sugar Hut* held that a successful claimant who had bettered the defendant's Pt 36 offer by a marginal sum was not entitled to recover all of its costs. Eder J acknowledged that the defendant's offer did not beat the damages awarded to the claimant, but he held that the offer was still a highly relevant factor in how the court exercised its discretion on costs. Accordingly, Eder J exercised his discretion under CPR 44.2(4) to reduce the recoverable amount by 30% and held that the claimant's costs were only recoverable up to the expiry of the relevant period. Thereafter, the defendant should recover its costs on the standard basis.

It is evident that Eder J was irked by the claimant's failure to comply with its disclosure obligations and by its pursuit of vexatious claims. As such, he applied the discretionary power given to the court under CPR 44.2(4)(a) to take the conduct of the parties into account when considering cost consequences, an approach which Ramsey J had cautioned against in *Hammersmatch Properties (Welwyn) Ltd v Saint-Gobain Ceramics and Plastics Ltd and another* [2013] EWHC 2227 (TCC), [2013] 5 Costs LR 758 as it had the effect of imposing Part 36 costs sanctions "by the back door", in the way that *Carver* did. However, Eder J was at pains to stress that his decision to rely on CPR 44.2 was not an attempt to impose costs sanctions in that way and that he bore well in mind the warnings of Ramsey J that to deviate from CPR 36.14(1A) would be to tread down a "dangerous path". Eder J distinguished *Hammersmatch* and confined the decision to the facts of the case. Nevertheless, the fact that Eder J was able to make such a ruling arguably undermines Pt 36 and the CPRC's efforts to resolve difficulties borne out of the case law by tacking on additional elements to an already complex Pt 36 structure.

Conclusion

From a holistic standpoint, the CPRC has done a reasonable job of clarifying a number of the most troublesome provisions as well as curbing potential abuse of Pt 36. While its piecemeal approach towards rectifying the inadequacies of Pt 36 has not received universal approval and cases such as *Sugar Hut* draw attention to its shortcomings, a more radical overhaul of Pt 36 would not necessarily lead to a more satisfactory result. There is an inherent element of complexity and prescription necessary if Pt 36 is to operate effectively within the specific circumstances in which it is meant to apply. An unfortunate by-product of such complexity is that there will inevitably be instances where the court is asked to address issues which arise on particular facts, and it is unrealistic to suggest that any new world Pt 36 would automatically bring an end to such problems. **NLJ**

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