What is a "genuine attempt to settle the proceedings" for the purposes of CPR rule 36.17(5)(e)?

JMX v. Norfolk and Norwich Hospitals [2018] EWHC 185 (QB) Foskett J. 7 February 2018

Background

CPR rule 36.17 provides at sub-rules (1) and (4) that “unless it considers it unjust to do so” the consequences set out under rule 36.17(4) (hereafter “Part 36 consequences”) will be ordered where a claimant has obtained a judgment at least as advantageous as his offer. Sub-rule 36.17(5) gives guidance on what the court must take into account in considering whether to order Part 36 consequences would be “unjust”.

Paragraph (e) was added to rule 36.17(5) (as it became) with effect from 6 April 2015 purportedly in response to a concern about potential abuse by claimants making Part 36 offers with no intention of settling the claim, but solely to achieve the benefits available under Part 36, including indemnity costs and the "additional sum" under what is now rule 36.17(4)(d) which became recoverable in April 2013.

Previously in *AB v. CD* [2011] EWHC 602 (Ch) a claimant had sought to obtain an order for Part 36 consequences having succeeded at trial following a Part 36 offer “to accept 100% of his claim". Unsurprisingly Henderson J (as he then was) declined to make such an order saying that the concept of settlement involved "an element of give and take" and that to be effective under Part 36 a settlement offer must involve some genuine element of concession. He said that the "offer" in that case was simply a demand for total capitulation.

The addition of paragraph (e) to rule 36.17(5) also no doubt reflected an earlier Court of Appeal decision in *Huck v. Robson* [2002] EWCA Civ 398 [2003] 1 WLR 1340 applying Part 36 consequences where an offer of 95% had been beaten by success at trial, but adding *obiter* that if the offer was "merely a tactical step to design designed to secure the benefits of Part 36" the court would not give it effect. However as Norris J observed in *Wharton v. Bancroft* [2012] EWHC 91 (Ch) all Part 36 offers are tactical (see White Book 2017 commentary at 36.17.5.1).

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JMX’s claim was for damages for birth injury (brain damage from prolonged partial hypoxia in the hours before his delivery) which in very broad terms was contended to result from negligent failure of a hospital maternity unit to diagnose that his mother was in the latent phase of labour and to admit her for monitoring as an acknowledged "high risk" pregnancy. The claimant had a secondary case that even if his mother did not require admission she should only have been discharged upon the clearest advice to return immediately to the maternity unit should there be any increase in the frequency or pain of her contractions. Factual and medical causation was admitted by the defendant NHS Trust on both aspects of

the claimant's case – admission to hospital or immediate return would have avoided his injury.

Prior to trial both sides had supportive expert witness evidence from obstetricians and midwifery experts, but the claimant's case had the added point on his secondary case that the very timing of his mother's return to the hospital and the surrounding events demonstrated that she could not have been given the necessary advice.

The case was tried by Foskett J on the breach of duty issue, plainly with an "all or nothing" outcome to both sides. Just over 21 days before trial the claimant made a Part 36 offer to accept 90% of damages to be assessed. The defendant did not respond and made no counter offer. The claimant succeeded at trial ([2017] EWHC 3082 (QB)) and sought an order under rule 36.17 applying Part 36 consequences.

The defendant objected. The thrust of the objection was that the claimant's Part 36 offer was not “a genuine attempt to settle the proceedings”.

The basis of the defendant's argument was that the claimant's offer was purely tactical, the grounds being that the claimant could not reasonably have expected the defendant to accept the offer. In the defendant's written argument put before the court an explanation was set out for the defendant’s stance in pre-trial discussions and there was a detailed exposition of expert evidence disclosed by each side prior to the trial and extant at the time of the claimant’s Part 36 offer. This was to support the argument that the case was finely balanced and should have been seen to be so by the claimant at the time of his offer. On that basis it was asserted that an offer to accept 90% of damages could not have represented a reasonable assessment by the claimant’s advisers of his prospects of success, and thus was not a genuine attempt to settle the proceedings.

The claimant's response was to say that the claimant’s advisers plainly saw the prospects in the case very differently to the defendant’s advisers but that this was in any event asking the wrong question. To follow the defendant's proposed approach would require a trial judge in every contested application for Part 36 consequences to embark upon a mini-trial to attempt to assess in retrospect how the prospects ought reasonably to have looked to the Part 36 offeror at the time the offer was made. The claimant’s argument was that this was plainly inappropriate. The claimant argued that the only question for the court under paragraph 36.17(5)(e) was whether the Part 36 offer contained some real concession, some "give and take". The claimant argued that this test has plainly been met here, as the value of the claim meant that a 10% concession was of significant value to both sides.

The judge rejected the defendant's proposed approach for the reasons identified in the claimant's argument (see [11] – [13]) stating specifically (at [12]) that it was commonplace for the two sides of litigation to perceive their litigation risk very differently. The judge accepted that what matters under paragraph 36.17(5)(e) is whether there was a sufficient concession

in the Part 36 offer. The judge held that the offer in this case to accept 90% of damages was such a concession (see [16] - [17]).

Thus the claimant succeeded in recovering Part 36 consequences.

It is respectfully suggested that the upshot is that caution should be exercised when considering the White Book 2017 commentary at para 36.17.5.1. There it is said that on considering whether Part 36 consequences should apply "judges are likely to resist attempts to call evidence or obtain disclosure…. preferring instead to take a broad brush view largely informed by their own assessment of the strength of the case that they have just tried and therefore the extent to which the offer appeared to be a genuine attempt to settle." The first part is undoubtedly true (and occurred in *JMX*) and Foskett J expressly commended the broad brush approach (at [12]), but with respect the second part is inapposite. The task for the judge considering Part 36 consequences is not a retrospective assessment of the strength of either party's case when the offer was made but rather to assess whether some genuine concession was offered.

Three footnotes on this aspect in Foskett J's judgment are worthy of mention:

(a) The judge noted the suggestion in the White Book (paragraph cited above) about explanation being given by covering letter for a Part 36 offer but doubted whether it would necessarily assist (see [14])
(b) The judge was concerned that if he had accepted the defendant's argument offers at 90% might never be accepted, whereas it was his experience from hearing applications for settlement approval that such offers are often a successful means of reaching compromise (see [15])
(c) The judge observed (at [18]) that the court will usually be reluctant to accept any invitation to consider the content of or the reasoning underpinning without prejudice discussions between the parties.

With regard to "penalty interest" on costs under 36.17(4)(c) the defendant properly reminded the court that the figure of 10% above base rate set out in the rule was the maximum. The claimant did not dispute that and did not contend for any specific figure or suggest that the defendant's conduct of the litigation had been unreasonable such as to require a specific enhancement in the award of interest (contrasting *OMV Petrom SA v Glencore International AG* [2017] 1 WLR 3465). The judge awarded 5% over base rate, taking into account that the sum concerned was likely to be small: see [20].

Note by Dominic Nolan QC and Eva Ferguson (Counsel for the Claimant JMX)

Hailsham Chambers, Tuesday 20th February 2018