



ARE YOU ENTITLED TO THE FULL RANGE OF PART 36 BENEFITS, IF YOU BEAT YOUR OWN SETTLEMENT OFFER? THE COURT OF APPEAL SAYS... YES!

The English Court of Appeal has given welcome clarity on whether claimants who beat their own Civil Procedure Rule (CPR) Part 36 settlement offer at trial are entitled to the full range of Part 36 benefits; the good news for claimants is that the Court of Appeal in *Telefonica UK Ltd v Office of Communications*¹ has decided they are.

¹ [2020] EWCA Civ 1374
<https://www.bailii.org/ew/cases/EWCA/Civ/2020/1374.html>

Despite an understandable lull in March, the Covid pandemic does not appear to have reduced the overall amount of English commercial litigation - the data shows that the number of claim forms issued are now back to the levels we saw in 2019. It does however appear that there is a trend towards increased settlement of cases, and so now more than ever parties need to be alive to using CPR Part 36 settlement offers in order to obtain a tactical advantage.

Part 36 settlement offers

Before looking at the judgment in this case and its consequences, it might be helpful to give a brief overview of Part 36 offers, what they are, and the benefits they give:

- A Part 36 offer, is a written offer to settle a claim, which needs to follow the very prescriptive format provided for by the English CPRs, and in particular Part 36 (hence the name). These offers can have very significant financial benefits and consequences for both claimants and defendants, beyond the usual costs discretion the court has under CPR Part 44, and are therefore key tactical weapons in a litigator's armoury.
- The offer can be made before the claim is issued; whether or not the claim is financial; and can be made in counterclaims as well.
- Part 36 offers are made "*without prejudice, save as to costs*", meaning that the court will not be made aware of the offer until the question of costs comes to be decided.
- Part 36 offers can be accepted even after they are rejected, unless withdrawn. However, if withdrawn, the benefit derived by the offeror will be lost.
- The benefits and consequences of claimant offers:
 - *Offer accepted within the Relevant Period (RP)* – this is usually up to 21 days after the offer is made the: claimant is awarded costs of the proceedings up to the date of acceptance;

- *Offer accepted after expiry of the RP*: claimant is awarded costs to the end of the RP, and defendant is awarded its costs from the expiry of the RP.
- *Claimant is successful and judgment is either greater than or equal to its offer*, under CPR36.17 (4) claimant recovers:
 - its costs of the proceedings up until the end of the RP, assessed on the standard basis, and its costs from the end of the RP, assessed on the indemnity basis (a more generous assessment than the standard basis), plus:
 - interest on costs up to 10% above base rate;
 - interest on the *damages* awarded up to 10% above base rate; and
 - an additional amount not exceeding £75,000.

The Commercial Court judgment

In *Telefonica UK Ltd v Office of Communications*, the claimant made two offers, both of which were beaten at trial. At first instance, the Commercial Court accepted that the offers were genuine attempts to settle, but awarded only two of the four enhanced CPR Part 36 benefits, namely:

- indemnity costs; and
- the additional £75,000

and declined to award the remaining two benefits, namely:

- enhanced interest on damages; and
- enhanced interest on costs

The Commercial Court felt that to do so would be disproportionate, as the:

- offers were only fractionally less than the claimed and subsequently awarded sum of £54.38million, where the claimant discounted the interest, but not the principal claimed amount; and

- additional interest would amount to a significant sum (in the region of £3.2 million).

It is worth noting that, this reasoning had similarities with *Carver v BAA*², in which the Court of Appeal held that a claimant had not obtained a "*more advantageous*" judgment compared to the defendant's Part 36 offer, which was only £51 more than the offer. The Civil Procedure Rules Committee later addressed this when they added a definition in CPR 36.17(2) to make it clear that "*more advantageous*" would mean "*better in money terms by any amount, however small*" and that "*at least as advantageous*" would be construed accordingly.

The Court of Appeal judgment

The Court of Appeal took a different view to the Commercial Court, and in allowing the appeal reasoned that once that court had decided that the offers were genuine offers to settle, the amount of the offers should not have been a consideration, Phillips LJ commented: "*it is difficult to see the relevance of the level of the offers given that the key factor is that the defendant could have avoided the need for the proceedings (or most of the proceedings) by accepting one of the offers*". The Court of Appeal acknowledged that the Commercial Court was entitled to exercise its discretion over the amount of the enhanced interest to be awarded, but it was not entitled to decline to award it.

In its judgment, the Court of Appeal upheld the appeal, and in addition to the two Part 36 costs benefits ordered by the Commercial Court (indemnity costs and the £75,000), it also awarded the claimant enhanced interest on both its damages and its costs, equating to about £900,000 - with the total interest payable at 3.5% above base rate on both principal and costs, from the relevant date.

What does this mean for you?

This case shows that in so far as Part 36 benefits are concerned, it is very much an 'all or nothing' approach- Phillips LJ, who gave the leading judgment states: "*The rule provides*

for the successful claimant (in the terms of CPR 36.17(1(b)) to receive each of the four enhancements and there is no suggestion that the award of one in any way undermines or lessens entitlement to the others.”

As this judgment shows, claimants can obtain a significant benefit from using Part 36 offers – even if you only just beat the amount awarded under the judgment, unless it was deemed not to be a genuine attempt to settle, all the benefits will apply. It is therefore recommended that claimants give consideration to making these offers, and defendants to whether to accept them.

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