PART 36: RECENT DEVELOPMENTS

GORDON EXALL,

TODAY

Developments in Part 36 since February 2022.

LAST YEAR

Part 36: Recent Cases and What They Can Teach Us with Gordon Exall

https://www.youtube.com/watch?v=UxZypsHRWTM

REMEMBER…

- The PowerPoints will be sent out to you.
- You can ask questions which I will get to at the end.
- This webinar will be on YouTube afterwards.

THIS IS STUFF YOU'VE GOT TO KNOW

PART 1: TECHNICAL ARGUMENTS ABOUT PART 36

THE MEANS BY WHICH AN OFFER IS MADE

Coldunell Ltd v Hotel Management International Ltd [2022] EWHC 3084 (TCC)

TECHNICAL ARGUMENTS ABOUT THE VALIDITY OF OFERS

The defendant argued that the Claimant's Offers were not properly served and without valid service there was no valid Part 36 offer

WHAT THE WHITE BOOK SAYS…

The learned authors of the White Book note at paragraph 36.7.2 that "it is unlikely that anything less than formal service under Part 6 will suffice". The Claimant's 19 July 2019 Offer was served by email. However, the Defendant's solicitors had not consented to documents being served by email under CPR PD6A, para. 4.2. Mr Lees therefore submitted that service was not valid and that without valid service there was no valid Part 36 Offer.

CPR 3.10

There is therefore no need for the court to make an order. However, if there was then I would make an order under CPR rule 3.10(b) or indeed CPR rule 6.28 dispensing with service and stating that the Claimant's 2 July 2019 Offer was validly made on that date

“… there is no question of the Defendant being prejudiced by the fact that the Claimant’s 2 July 2019 Offer was sent by email rather than by post. So I entirely agree with Mr Webb that to invalidate the Claimant’s 2 July 2019 Offer on the basis of defective service would be a “triumph of form over substance”.

BUT… BE CAREFUL ANYWAY

Mate v Mate & Ors [2023] EWHC 806 (Ch)

- One of the Defendants (who had admitted liability) had not been served with the Part 36 offer.

- Defendants argued offer was not valid.

THIS WAS A VALID OFFER

There is nothing in CPR Part 36 which requires a claimant to serve a Part 36 offer on all the defendants. There was nothing to prevent Robert and Andrew from accepting Julie's Offer in full and final settlement of her claim and thereafter seeking a contribution from Shirley (if they considered themselves so entitled) in respect of the judgment sum and/or costs.

BUT WAS IT MADE TOO LATE?

- Trial due to start on 6th September 2022.
- 5th September put aside for reading time.
- If the trial “started” on the 5th September – offer was made less than 21 days before trial.

WHEN DOES THE TRIAL “START”?

The court notice referred to above plainly states that the trial of the claim is to take place on 6 September 2022 and the ensuing six days. It refers to judicial reading having been allocated for 5 September 2022 and the parties not being required to attend on that day. I do not consider that the extract from the Chancery Guide to which I was referred by Mr Ranson supports his submission that the trial is deemed to start on the day allocated to judicial reading.

THE OFFER WAS IN TIME

In my view the trial started on the day all parties were required by the notice to attend court. ***The fact that, in advance of the trial, trial bundles and skeleton arguments were prepared and lodged and that provision was made for a day's judicial reading does not override the clear terms of the notice given to the parties.***

TIME WOULD HAVE BEEN ABRIDGED

In case this matter goes further, I should indicate that, had I considered Julie's Offer was not served in time, I would not have been prepared to accede to her request that I abridge time under CPR 36.17(7)(c) since I see no good reason for doing so.

Mundy -v- TUI UK Ltd [2023] EWHC 385 (CH)

- C brought an action for personal injury damages
- C made two offers – one for £20,000, the other for 90:10 split on liability.
- D made offer of £4,000

FAILURE TO BEAT THE DEFENDANT'S PART 36 OFFER

- Judgment for £3,700 plus £105.60.

- Judge ordered claimant should recover costs up to date of expiry of the Part 36 offer. Claimant to pay defendant's costs thereafter.

THE CLAIMANT'S "BAFFLING" APPEAL

"I am unpersuaded this rejected 90/10 liability offer can be fitted in to the terms of CPR 36.17(1)(b) consistently with the wording, integrity and practicality of the CPR 36.17 mechanism. Trying to do so strains the language of the provision, undermines its careful balance, and introduces a degree of complexity and uncertainty which I am not persuaded is within its contemplation. It is a provision that relies on its clarity, simplicity and predictability for the incentivising effects which puts it at the heart of the Part 36 code."

SO – OFFERS ON LIABILITY WHEN DAMAGES REMAIN IN ISSUE, MAY NOT BE OF MUCH HELP

- More accurately they may not be effective Part 36 offers.

MISTAKES & PART 36

- O’Grady -v- B15 Group Limited [2022] EWHC 67 (QB)

THE CLAIMANT'S MISTAKE

- The claimant brings an action for damages under the Fatal Accidents Act. The Claimant's solicitor sent a Part 36 offer.
- The claimant meant to concede contributory negligence of 20%. Inadvertently the offer said 80%.
- Promptly accepted by the defendant.

A BIT OF A DO…

- Defendant's solicitor was being summonsed (by the claimant) to attend because of the "obviousness" of the hearing.

- Very shortly before hearing it was conceded that the mistake was of a type that would render the agreement void if the court found that doctrine of mistake applied to Part 36 offers.

THE DOCTRINE OF MISTAKE *CAN* APPLY TO PART 36 OFFERS

I am satisfied that the doctrine of common law mistake can apply to a Part 36 offer in circumstances where a clear and obvious mistake has been made and this is appreciated by the Part 36 offeree at the point of acceptance. Authority is entirely in support with the application of the doctrine. Nothing about Part 36 being a self-contained code excludes it

CAN THE COURT EXTEND TIME TO ACCEPT PART 36 OFFERS?

Begum -v- Barts Health NHS Trust [2022] EWHC 1668 (QB) Master Thornett

THE OFFER & THE CLAIMANT'S DILEMMA

- The claimant, a protected party, brought an action for clinical negligence against the defendant.
- Liability was admitted but causation denied.
- The defendant made a Part 36 offer £100,000.
- The claimant stated that it was impossible to quantify the case and requested an extension of the time for acceptance.
- The defendant refused to extend time but stated that the offer was still open for acceptance.

THE CLAIMANT'S APPLICATION

The claimant applied to the court for an order extending time for acceptance of the offer without the normal costs penalties.

NO POWER UNDER PART 36 TO MAKE THE ORDER SOUGHT

- No Power in Part 36.

- No Power anywhere else in the rules.

CPR 3.1(2)(a) COULD NOT HELP

No case law was produced by either party in support of the proposition that r.3.1(2)(a) could apply to this type of Application. Miss Lumbers submits that the rule is self-evident in its potential application.

11.3 I accept here the Defendant's submissions that this rule is not apt for application to Part 36, as being (to repeat) a "self-contained code about offers". Rule 3.1(2)(a) refers to the power to adjust the time for compliance, not to adjust periods of time otherwise featured in rules.

SOME OTHER IMPORTANT PARTS OF THAT JUDGMENT

The Claimant's proposition that there exists an additional facility for the court to make a similar decision but on a pre-emptive basis is, at face value, a surprising and seemingly unfair one

UNFAIRNESS TO OFFEROR

Further, if granted, it would fetter the offeror's right freely to withdraw a Part 36 offer after the relevant period but without the permission of the court. It increases a defendant's costs exposure in a way that emasculates the costs effectiveness and hence significance of the making of a Part 36 offer

NOT GOING OUTSIDE PART 36

The notion that there exists a residual discretion of the court, either as argued by the Claimant in this Application or otherwise, is not easy to follow against the intended strict application of the provisions of Part 36 .

Moradi v The Home Office (Costs) [2022] EWHC 3125 (KB)

- The claimant brought an action for damages for unlawful detention.

- The action against one of the defendants (the MOJ) settled. The action against the Home Office continued.

- The defendant made a Part 36 offer £15,000 two days before trial.

- This was accepted the day before trial.

WHEN THE USUAL RULES DON'T APPLY

- This meant that the usual provisions and presumptions in relation making and accepting a Part 36 offer did not apply.

- The parties could not agree issues in relation to costs liability and the matter was placed before the judge on the basis of written submissions.

NO STEER FROM THE RULES

this case falls into CPR 36.13(4)(a): where ‘A Part 36 offer which was made less than 21 days before the start of a trial is accepted’. However, unlike late acceptance of a Part 36 Offer at an earlier stage of proceedings, CPR 36.13 does not lay own specific consequences of acceptance within 21 days of trial. It simply states: ‘the liability for costs must be determined by the court unless the parties have agreed’. There is no ‘steer’ as to the approach to be taken in those circumstances, indeed CPR 36.13(3) standard basis assessment does not even explicitly apply to costs under (4)(a). Nor is there any real help to be found in the authorities or in the White Book.

ANYTHING DOES NOT GO…

Nevertheless, in my judgment, this lack of a ‘steer’ on CPR 36.13(4)(a) does not mean that ‘anything goes’ for the Court to determine costs on acceptance of a Part 36 Offer just before trial. Whilst CPR 36 is a ‘self-contained code’, where, as here, it is silent as to costs consequences, it should be applied consistently and in harmony with CPR 44.

NOT GOING TO AWARD THE CLAIMANT NOTHING

It is one thing to say those costs should be reduced. It is quite another (and comes closer to going behind the parties' agreement) to say that the Claimant should have no costs for the last ten months. After all, whilst the Claimant did unreasonably fail to negotiate for nine months, it is not as if the Defendant continued to raise its offer. When it did, it was accepted. That is not a criticism of the Defendant, but it contextualises its criticism of the Claimant. Moreover, by the time the Claimant accepted, she had also settled the MOJ claim and had plainly revised her expectations in the run-up to trial as so many litigants do. So, in my view it would be unreasonable to disallow all the Claimant's costs in 2022.

WHAT SHOULD THE PERCENTAGE DEDUCTION BE?

"… the Defendant submitted that the appropriate percentage costs order was 50% not 66%. Predictably, the Claimant argued the reduction should be none at all as her litigation conduct was reasonable and that the Defendant raised a new point at the last minute prompting settlement, or any reduction should be only 10% as 33% would amount to a penalty aggravated by the operation of the statutory charge."

THE HISTORY OF OFFERS

The Defendant made an offer of £10,000 and the Claimant then did not make an offer for several months, settled for a low value with the MoJ (who had refused to mediate), then made an offer of £40,000 to the Defendant: four times its offer and nearly three times what the Claimant eventually accepted

THE 33% REDUCTION IN COSTS

Overall, that reveals the Claimant's settlement strategy with the Defendant until then had been completely unrealistic and I find conduct which justifies a significant not token reduction. As for the effect of the statutory charge on the Claimant's damages, bluntly that is something the Claimant should have been advised about before pursuing an unrealistic settlement strategy. Therefore, a reduction is justified and one markedly more significant than 10%. However, 50% would be too great a reduction in the circumstances, especially as the Claimant did belatedly settle at a reasonable level. The fair, reasonable and proportionate reduction remains in my judgement 33%.

OVERVIEW

- When an offer is made late.
- The usual “steers” under CPR 36 do not apply.
- The Court looks at CPR 44 (general rules as to costs)
- Conduct and history of offers could become relevant.

IS A PART 36 OFFER WITH A DEDUCTION OF 1.15% A VALID OFFER?

Omya UK Ltd v Andrews Excavations Ltd & Anor [2022] EWHC 1882 (TCC)

THE NARROWEST OF MARGINS…

- The judge had awarded £765,094.40 in damages (the full amount claimed by the claimant). The claimant had made a Part 36 offer of £756,287.05

- A difference of £8,807.35.

DEFENDANT'S ARGUMENT

The defendants argued that they should not face the normal consequences of failing to beat a Part 36 offer because the minor concession involved did not amount to a "genuine attempt to settle" the action.

THE DEFENDANTS FAILED TO ESTABLISH THAT THIS WAS NOT A GENUINE OFFER

In my judgment the Defendants have failed to establish that the offer made was not a genuine attempt to settle: on the contrary, on the information available to me I conclude that it was indeed a genuine attempt to settle – an entirely sensible course for a commercial enterprise such as the Claimant which had no interest in the proceedings being dragged out and faced risks that important witnesses might not appear at trial.

THE CLAIMANT WAS BEING GENUINE

These matters indicate to me that the Claimant had every incentive to try to achieve a settlement and that this was not, as in some cases posited in the authorities, a cynical attempt to manipulate a scheme designed to encourage settlement.

AS A RESULT

One consequence (agreed in the event I decide as I have done) is that £63,254.72 is payable by the Defendants pursuant to CPR 36.17(4)(d)(i), being (i) 10% of £500,000 and (ii) 5% of £265,094.40.

IN SUMMARY

- Claimant offered to give up £8,807.35.
- Got an additional £63,254.72 in return.

Plus

- Enhanced interest (5% over base)
- Indemnity costs.

PART 36 AND COMPLEX OFFERS

Grant & Ors v FR Acquisitions Corporation (Europe) Ltd & Anor [2022] EWHC 3366 (Ch

THE FACTS

- The administrators of a company, Lehman Brothers International (Europe) sought a declaration that when their appointment ended a suspensory condition in an agreement, which meant that the defendant's did not have to pay interest, would fall away and the defendants would be liable to make payment of interest.
- The administrators succeeded in the their application.
- During the course of the proceedings the administrators had made Part 36 offers to settle. There were issues as to whether Part 36 was engaged and, if so, what the consequences should be.

THIS WAS REALLY ABOUT MONEY

- This was, on the face of it, an application for a declaration. However the blunt reality was that it was about money (a lot of money). The judge considered the question of whether Part 36 was engaged.

THE JUDGE FOUND

- Part 36 was engaged.
- The CPR offer was compliant.
- The offer had been beaten

THIS WAS NEVER “NOT ABOUT THE MONEY”

I do not accept Firth Rixson’s argument that these proceedings were not “about money”. Plainly they are and always have been so: the question being whether the sums specified in the Swaps will become due on termination of the Administrators’ appointment.

BUT THE MONEY WAS NOT DUE IMMEDIATELY

INTEREST NOT PAYABLE

In my judgment, CPR 36.17(4)(a) applies only to an award for the immediate payment of sums of money (excluding interest). I do not consider that it was the intention of the rule to provide for an award of interest in respect of sums which are not yet immediately due and payable. To that extent, I agree with Firth Rixson's submissions in this regard.

INTEREST WOULD NOT HAVE BEEN AWARDED AS A MATTER OF DISCRETION

Further, even if (contrary to my view) CPR 36.17(4)(a) is applicable, I would consider it unjust to apply it in circumstances where it is common ground (and always has been) that Firth Rixson is under no obligation to make payments to LBIE for as long as Events of Default are continuing (which they are, and may be so for up to three years or even longer if the administration process is once again extended).

If I am wrong in that regard also, I would not have awarded interest at a rate higher than that specified in the relevant contract between the parties: none being so specified in the case of the Sterling Swaps.

INDEMNITY COSTS WERE AWARDED

The purpose of ordering costs on an indemnity basis, though outside the context of Part 36 unusual, is compensatory and not penal. It is intended to ensure a more realistic and complete level of cost recovery for the paying party. In my judgment, it is not unjust that Firth Rixson should have to pay costs on the indemnity basis. I therefore order Firth Rixson to pay costs on the indemnity basis from the date on which the “relevant period” expired, being 21 days after the date of the Administrators’ Offer.

ENHANCED DAMAGES

it does not seem to me that I have been provided with any sufficient reason specifically referable to this provision why, under the regime, the Administrators should not be entitled to the specified reward in the maximum figure. I have concluded that I am required to make such an order accordingly.

TRYING TO ESCAPE THE CONSEQUENCES OF A PART 36 OFFER

Von Westenholz & Ors v Gregson & Anor [2022] EWHC 3374 (Ch)

- The claimants had succeeded at trial in obtaining a sum of £400,000 for equitable compensation.
- The claimants had made two Part 36 offers. The first, was made by one of the claimants for £150,000, prior to the issue of proceedings.
- The second was made on behalf of all the claimants shortly after proceedings were issued, for £120,000.
- The claimants had clearly done better than their offers.

BUT THE PLEADINGS WERE AMENDED

Whilst it is of course true that the Guardian Trust claim had not been pleaded at the time the Part 36 offer was made, the court also found against the Defendants on the basis of a breach of their fiduciary duties towards the Claimants. This was part of the original pleaded claim. In my view, the normal consequences of the Part 36 offer should therefore follow. However, the fact that the Guardian Trust claim had not been pleaded is a factor which I should take into account in deciding the extent of those consequences.

A FORMIDABLE OBSTACLE

As Briggs J noted in *Smith v Trafford Housing Trust* [2012] EWA 3320 Ch at [13], ***the burden of showing injustice is a "formidable obstacle to the obtaining of a different costs order" in the light of the purpose of Part 36 to promote compromise and avoid unnecessary expenditure of costs and court time.***

LATE AMENDMENT MADE NO DIFFERENCE TO THE RESULT

In this case, the fact that the Guardian Trust claim had not been pleaded at the time of the Part 36 offer is not a reason for denying the Claimants all of their costs on the indemnity basis after the expiry of the relevant time given that the Claimants would have been successful even if that claim had not been pleaded

THE RATE OF INTEREST: 4% ABOVE BASE

this is not a case in my view where the maximum interest should be awarded. Instead, I will award interest on costs at 4 per cent above base rate (from time to time) from the 18 August 2020 up to the date of this order.

INTEREST ON THE EQUITABLE COMPENSATION

The next consequence is that the Claimants are entitled to interest on the equitable compensation at a rate which is again not to exceed 10 per cent above base rate. For the reasons I have set out above, the appropriate rate is in my view 4 per cent above base rate from time to time, reflecting the fact that the award of interest is not purely compensatory

SIMPLE INTEREST – NOT COMPOUND

In both cases, the interest should be simple interest and not compounded.

THE ADDITIONAL AMOUNT

The final consequence provided for in Rule 36.17 is the payment of an additional amount which, in this case, is 10 per cent of the amount awarded. The Claimants seek £40,000, being 10 per cent of the equitable compensation (accepted by the Claimants to be £400,000 – i.e. not including any interest for the period up to the expiry of the relevant period). For the same reasons I have concluded that it would not be unjust to award indemnity costs, there is in my view no reason why, taking into account all of the circumstances, it would be unjust to require the Defendants to pay this additional amount, having failed to beat the Part 36 offer made by the Claimants.

NOTE THE TEST HERE

For the same reasons I have concluded that it would not be unjust to award indemnity costs, there is in my view ***no reason why, taking into account all of the circumstances, it would be unjust to require the Defendants to pay this additional amount***, having failed to beat the Part 36 offer made by the Claimants.

PART 36 OFFERS AND COSTS

TRX v Southampton Football Club [2022] EWHC 3392 (KB).

- Claimant accepted offer of £4,000 in an action about sexual abuse.
- Matter went to assessment and costs were reduced substantially.
- Judge made no order for the costs of the assessment.

WHAT WAS THE RELEVANCE OF A PART 36 OFFER?

- Claimant argued that the defendant could have protected itself by making an effective Part 36 offer.

- Therefore claimant should recover their costs.

WHEN A PART 36 OFFER IS EFFECTIVE THERE IS USUALLY NO PROBLEM

With that note of caution in mind, I am willing to say that there will usually be no difficulty where a Part 36 offer is made in detailed assessment proceedings by either party which beats, or is beaten, by the amount allowed by the Costs Judge conducting the detailed assessment

WHEN THE PART 36 OFFERS ARE NOT EFFECTIVE

The difficulties emerge, as demonstrated by Mullaraj and Millbrooke, with near, or even not so near, Part 36 misses or where no Part 36 offers have been made by a paying party, or where offers that do not comply with the Part 36 formalities are made

ABSENCE OF AN EFFECTIVE PART 36 IS ONLY A RELEVANT FACTOR

But I cannot accept the Claimant's argument that, in those situations, as a matter of principle, it would be wrong for a Costs Judge to make no order for the paying party to pay any of the costs of the receiving party. It will be a relevant factor, but will not necessarily be the most important or only relevant factor.

UNUSUAL BUT NOT IMPOSSIBLE

it may be unusual to make no order for costs where no successful Part 36 offer has been made by the paying party, especially where, as here, both sides are very experienced and specialist personal injury litigators, sophisticated in costs matters. But as set out in the rule, to make a different order will depend on all the other relevant circumstances in the case, including, as per the rule, the conduct of the parties, the amount, if any, by which the bill of costs has been reduced, and whether it was reasonable for a party to claim the costs of a particular item or to dispute that item in question.

THE FIRST INSTANCE JUDGE WAS NOT WRONG IN PRINCIPLE

I, therefore, do not accept the Claimant's argument that Cost Judge Brown's order was wrong in principle when it is such a fact and circumstance specific assessment. Part 36 can be a rather cumbersome procedure that does not always assist the speed and flexibility that may be required in detailed costs negotiation which may just as well be conducted in Calderbank offers in less formal steps in a negotiation. The Claimant's argument also fails to address the difficulties for litigants in person who may have difficulty navigating the Part 36 regime

AVOIDING THE CONSEQUENCES OF A PART 36 OFFER ON COSTS

Holly Wright (& others) -v- Birmingham City Council District Judge Baldwin (sitting as Regional Costs Judge)

THE CLAIMANTS MADE OFFERS

- The claimants had each brought claims for disrepair against the defendant council. Each case had settled without the need for proceedings. Each claimant had then issued proceedings for costs. The defendant sought an order that a number of cases be linked for the purpose of assessment.
- After the court ordered the matters be heard together each claimant made a Part 36 offer to settle the costs.

ACCEPTANCE OUTSIDE THE 21 DAY PERIOD

- The defendant accepted each of the offers shortly after the 21 day period. There was, therefore, no automatic entitlement to costs.
- The defendant made an application that a “different” order for costs be made. That is the claimants pay the defendant’s costs.
- The defendant put forward a number of arguments in support of its contention that a different order should be made.

THE ARGUMENTS

Mr Exall's approach on behalf of the Claimants is to emphasise the contended for straightforward nature of both the issue and the Court's approach. In essence, the Defendant, he reminds the Court, has the heavy and high burden imposed upon it because, having voluntarily placed itself in a position whereby it was willing to go down the settlement route, it now wishes to escape the normal and natural consequences of doing so, the latter being part of the intentional framework of the Part 36 approach to encourage settlement as a whole

A HEAVY AND SIGNIFICANT BURDEN

any party setting itself down the path of attempting to escape the norms of that framework and thereby continuing an element of division bears a heavy and significant burden of persuading the Court that therein lies the only route to a just outcome.

A DELIBERATE DECISION TO ACCEPT LATE

The Defendant, in response, I am entirely satisfied, not least as it was conceded by Mr Hogan, deliberately chose to accept the offers, but out of time, in order to avoid, or at least attempt to avoid the normal Part 36 consequences. There is no evidence that there were any evidential or clarification issues preventing acceptance, nor that any other circumstances, beyond deliberate choice, were preventing the Defendant being able to reach its decision in a more timely fashion.

A STRAIGHT AND NARROW ROAD

“Part 36 is intended to be a two-way straight and narrow highway, with a significant limitation on escape lanes. In my judgment, the Defendant has come a long way short of establishing injustice to cause this Court to overturn the presumption in r. 36.13(5) in this case.”

UK Sovereign Investments Ltd v Hussain [2022] EWHC 2390 (SCCO)

- The claimant obtained an order for damages of £103,816.62 plus costs.
- Detailed assessment proceedings were commenced, the claimant seeking £83,425.18 in costs.
- Those costs proceedings were resolved by the parties agreeing a sum of £59,000.

THE DEFENDANT'S ARGUMENT

- The defendant argued that there should be a departure from the principle that the receiving party pay the claimant's costs.

DEFENDANT'S ARGUMENTS REJECTED

I do not accept the defendant's submissions for the following reasons:

i) Without having carried out a detailed assessment of the bill, after hearing full argument, I am not in a position to make a finding that the figure advanced in the bill was one that was exaggerated, and that the Claimant's conduct had been "unreasonable conduct".

A DISCOUNTED BILL MAY NOT BE SIGNIFICANT

In this context, I do not regard the fact that the bill was claimed £83,000 odd, but the matter settled for £59,000 leads to an irrebuttable inference that the costs claimed must, accordingly, have been exaggerated. There may have been many reasons why the Claimant was willing to discount the bill about which the court does not know and will never be told

COSTS NOT LIMITED TO £1,500

Taking these factors into account, I am not persuaded that the Claimant's costs should be limited to £1,500, plus VAT, based upon an allegation of exaggeration and misconduct about which the court can make no finding because the matter settled.

THE TERMS OF EACH OFFER CONSIDERED

I regard it as a factor in favour of the Claimant and against the Defendant that the former accepted in settlement, a figure much closer to its own Part 36 offer of £60,000 made on 25 July 2022, than the sum of £42,500 inclusive of interest and costs advanced by the Defendant.

SOMETHING WITHIN THE DEFENDANT'S GIFT

Put another way, it was within the Defendant's gift to make a realistic Part 36 offer at an early stage which would have put the Claimant at risk at to costs going forward, were the sum allowed at detailed assessment to be less the offer. As it seems to me, what the Defendant is trying to do now is to have a second bite of the cherry, having failed to make an offer under Part 36 which could have achieved exactly what he is asking the court to do now, namely to make a different order to the default order to be found in CPR 47.20.

THE RULES COULD HAVE SAID THIS

I agree with the Claimant that rule 47.15 is self-contained in the sense it does not say what the Defendant wants it to say, namely that if a bill is brought in for assessment at over £75,000 but is allowed at less than that figure, it means that it was obviously exaggerated, so provisional assessment costs must apply. On the contrary, the rule says no such thing, in circumstances where it would have been open to the rule makers to provide that where a bill was reduced under £75,000, the receiving party would only be entitled to provisional assessment costs rather than, as here, to detailed assessment costs.

PART 36 OFFERS ARE BEST

There is an argument that CPR 44.4, which deals with the factors in deciding the amount of costs, includes:

(3) The court will also have regard to –

(a) the conduct of all the parties, including in particular –

(i) conduct before, as well as during, the proceedings; and

(ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;

Arguably offers made, including Part 36 offers, are part of the “conduct of the parties”.

More significantly, however, the judgment emphasises the point that the best way for a paying party to protect themselves is to make a realistic Part 36 offer which puts the receiving party at risk.

THE LESSON

More significantly, however, the judgment emphasises the point that the best way for a paying party to protect themselves is to make a realistic Part 36 offer which puts the receiving party at risk.

IN CONCLUSION

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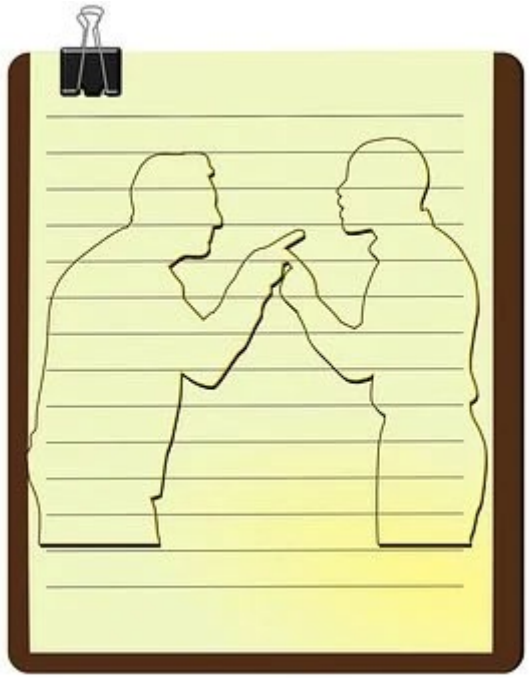
SO… IN CONCLUSION

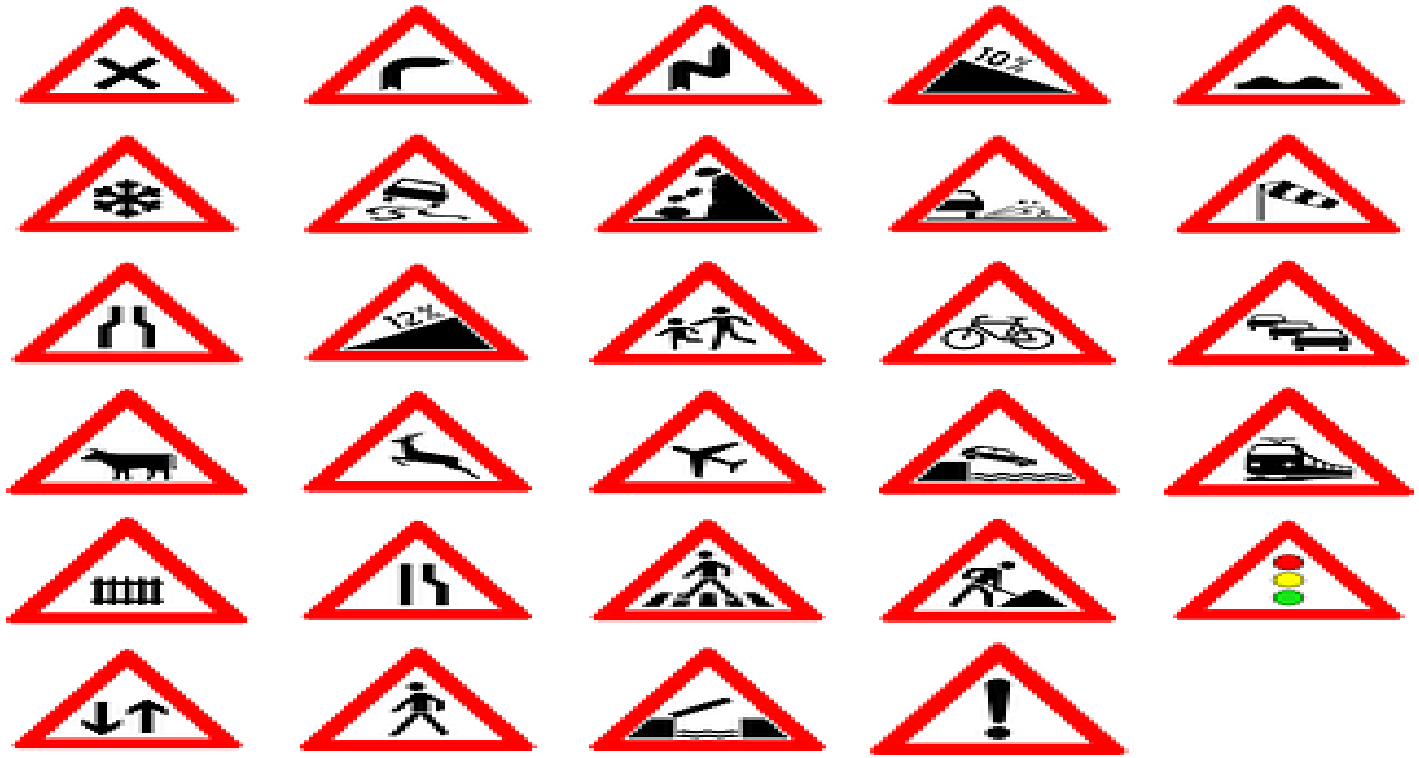
Technical arguments about the validity of Part 36 offers abound.



MAKE SURE YOUR PART 36 OFFER IS IN TIME

MAKE SURE IT IS IN THE RIGHT TERMS

WARN YOUR CLIENTS THAT EVEN A MODEST DISCOUNT IN A PART 36 OFFER CAN BE EFFECTIVE



WARN YOUR CLIENT THAT ESCAPING PART 36 CONSEQUENCES IS AN UPHILL BATTLE

MOST PROBABLY NEGLIGENT NOT TO ADVISE CLIENT TO MAKE A PART 36 OFFER

WATCH THIS SPACE – NEXT YEAR

ANY QUESTIONS