NWL COSTS LAWYERS

NWL Costs Update – November 2021

CPR changes and case law review

1. Part 36 – CPR change

From 6 April 2021, CPR Part 36 was amended to include 36.5(5):

(5) A Part 36 offer to accept a sum of money may make provision for accrual of interest on such sum after the date specified in paragraph (4). If such an offer does not make any such provision, it shall be treated as inclusive of all interest up to the date of acceptance if it is later accepted.

This means an offer can now include a provision for interest after the date for acceptance has expired – paragraph (4) is a reference to the 21 day period for acceptance – see 36.5(1)(c).

Prior to the rule update there was no reference to the interest that may have accrued after the 21 day period. That would be subject to negotiation between the parties, or intervention by the court, leaving an element of uncertainty.

Whilst a receiving party might be content for a paying party to accept its Part 36 Offer and pay costs this change does mean that when making a Part 36 offer a party needs to properly consider any entitlement to interest that could be claimed after the 21 days.

Including it could allow for arguments on whether a Part 36 made by a Receiving Party has been bettered on assessment, so as to achieve a *"more advantageous"* Judgment.

Various issue will need to be considered - is the interest that accrues a reasonable claim, has there been delay, or a high level of payment(s) on account?

Should a Part 36 Offer be a clear line in the sand to which any Judgment can be easily compared?

Interest is claimed at the Judgment rate of 8% so significant sums can be involved.

Will the inclusion of the interest claim after the 21 days mean a Defendant can no longer delay, possibly until near to the start of a hearing (as we often find in costs cases), in accepting the Part 36 Offer?

Assessing the level of a Part 36 Offer, the timing and the interest element does involve careful consideration – but these are all issues we can help with on costs cases.

The benefits of a well-judged Part 36 offer are clear and the additional awards from the Court can be significant.

Indeed in one financial year additional Part 36 bonuses awarded on cases we took to assessment for clients amounted to in excess of **£250,000!**

2. Case Law Review - Ho v Adelekun [2021] UKSC 43 (6 October 2021)

Qualified One-Way Costs Shifting (QOCS) – a change but not for the better if you are a Defendant.
An order for costs in favour of a Defendant cannot be set of against an order in favour of the Claimant's costs.
https://www.bailii.org/uk/cases/UKSC/2021/43.html

It is rare for the Supreme Court to become involved in costs cases. Comments within the Judgment such as *"results that at first blush look counterintuitive and unfair"* and *"results that appear anomalous"* when the reasoning is set out show this was a difficult case to rule on.

The Claimant/Appellant accepted an offer of £30,000 plus costs (RTA case). An issue arose as to fixed costs, that is £16,700 if fixed or if on the standard basis £42,000. The Deputy District Judge said fixed costs, on appeal, His Honour Judge Wulwik disagreed but on a further appeal the Court of Appeal ruled only fixed costs were payable – ordering that the costs of these hearings – the *"assessment dispute"* be paid to the Defendant/Respondent.

The Defendant wanted to set off her costs of that dispute, some £48,600, against the fixed costs she had been ordered to pay.

The Supreme Court ruled for the Claimant/Appellant – costs are not to be set off against costs on a QOCS case.

There were detailed submissions by both sides, as well as written submissions by Counsel for APIL.
There followed a careful and considered Judgment.

The Court stated that any apparent unfairness is *"part and parcel of the overall QOCS scheme devised to protect claimants against liability for costs and to lift from defendants' insurers the burden of paying success fees and ATE premiums in the many cases in which a claimant succeeds in her claim without incurring any cost liability towards the defendant".*

It is possible the CPR Committee could review the rules as there was a discussion on whether they would be better placed to deal with the ambiguities which the rules create.

For now, setting off against costs has been taken away from a Defendant. Will this affect decisions on some cases, as the effect of a Defendant's Part 36 Offer has now changed?

A link to the video of the Judgment Summary is given here – https://www.supremecourt.uk/watch/uksc-2020-0102/judgment.html - it takes 10 mins to view should anyone prefer this to the usual bailli link given above.

3. Part 36 – Case Law Review - TT, R (On the Application Of) v Secretary of State for the Home Department [2021] EWHC B21 (Costs) (08 July 2021)

An NWL case in which our Andrew Tollitt successfully acted for the Claimant on a Detailed Assessment.
The Judgment touched on a number of points, interest on a Part 36 Offer, delay in making a payment on account and whether a public body should have to pay the additional sum provided for under CPR Part 36.

The Assessment took a day initially, by way of a Teams Hearing including the joys of electronic bundles, followed by a short further hearing on whether the Defendant could avoid the consequences of the Claimant achieving a result which was more advantageous than his Part 36 offer.

There was a significant delay between the order for costs and assessment (for a number of legitimate reasons including the Claimants Lawyers Liquidation) - Order giving authority 2014, with Detailed Assessment in July of this year.

However, the parties were able to agree the period to which interest on costs would apply as well as the actual interest (£3,870) and the costs of Assessment.

On NWL's advice the Claimant had made a Part 36 of £72,750 inclusive of interest. As a result of the assessment the Claimant had beaten his own Part 36 but only by virtue of the interest element.

The Defendant submitted that for a number of reasons it would be unjust to award the 10% additional sum under 36.17(4)(d).

The reasons included the fact that it was only the interest element that took the assessed costs above the Part 36 Offer and that as the Defendant was a government body, it would be unjust for the additional sum to be paid from the public purse.

The Deputy Master, a Deputy only by virtue of stepping down as a full time Costs Judge, is one of the most experienced and knowledgeable Judges.

Within the Judgment reference is made to the decision of Mr Justice Stewart, dealing with an Appeal from a decision from Master McCloud. Interest was taken into account when ruling on the effect of a Part 36 offer. The Master's Judgment stated -

"…it was said I should not be influenced on the "injustice" point by the fact that it was the award of interest on the bill which had pushed the sum assessed above the level of the Part 36 offer. That was foreseen by the rules. I accept that."

The Deputy Master also noted the Defendant had delayed in making a payment on account – it was made in December 2020 and should have been by 14 August 2020 under a previous order. It was clear that interest should be taken into account when working out if a Part 36 Offer has been beaten.

NWL pointed out that there was no authority to support the proposition that a government body should be treated any differently from any other paying party. The Master accepted there was no authority for the submission that a publicly funded body should not have to pay an additional sum under Part 36.

The Deputy Master concluded by saying *"…a realistic Part 36 was turned down."*

The case underlines the importance of a well-pitched, considered Part 36 made in *"a genuine attempt to settle the proceedings"* – a quote not from the Judgment but the CPR rules, 36.17(5)(e).

After written and verbal submissions, the Deputy Master found for the Claimant and awarded an additional sum of £7,080.

The result meant that this was one of those cases (and we are involved in quite a few!) where the paying party, after assessment, ended up paying more than the bill of costs as originally presented.

The decision rightly confirms that a government body shouldn't receive preferential treatment over any other paying party. Indeed failing to accept a reasonable Part 36 Offer (or indeed to make one) is the reason the public purse was put to the additional expense in the first place.

If you have any questions about anything in this update please do get in touch with us.

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