“Part 36 Does What It Says (Again)” A Commentary on Jolly v. Harsco Infrastructure Services Limited

Philip Turton

We give every single case the care and attention it deserves.

ROPEWALK CHAMBERS

+44 (0) 115 947 2581 - www.ropewalk.co.uk

1. Since the last change made to Part 36 by the Rules Committee on 6th April 2007, that section of the Civil Procedure Rules has probably occupied the Courts more than any other. Practitioners who may not have immediately appreciated the consequence of the changes then made have, in due course, been replaced by practitioners seeking every more inventive ways to obtain advantage for their clients. There can be no doubt that Part 36 has attracted applications both ingenious and convoluted in their attempt to either invoke or avoid what would otherwise be its consequences.

2. A clear principle that emerged early on is that Part 36 represents a "*self contained code*". This was emphasised by Lord Justice Moore-Bick in Gibbon v. Manchester City Council [2010] EWCA Civ 726 and confirmed by Mr. Justice Warren in C v. D [2010] EWHC 2940. In the context of those cases what would otherwise have been usual rules of contract in relation to offer, acceptance and rejection were held not to apply. Provided an offer was Part 36 compliant, it would be governed solely by the provisions of Part 36 itself.

3. That the answer to any problem posed in relation to a Part 36 offer must be drawn from Part 36 itself received further confirmation from Mr. Justice Cranston in Jolly v. Harsco Infrastructure Services Limited [2012] EWHC 3086.

4. Mrs. Jolly was the widow of Stephen Jolly, who died of Mesothelioma in July 2008. Her subsequent claim against the Defendant was allocated to the Mesothelioma Fast Track, where the Defendant, initially, satisfied the "show cause" procedure and was given permission to defend the claim; Master McCloud ordering liability to be tried separately.

5. Shortly after the direction for a liability trial, on 27th April 2012, the Claimant made a Part 36 offer, compliant with Part 36.2, offering to settle the issue of liability on terms that she would receive 99% of any Judgment in her favour. Practitioners familiar with Huck v. Robson [2002] EWCA Civ 398 will immediately sense a difficulty, but this was not the issue at the hearing before Cranston J.

6. The Defendant rejected the offer, allowing the 21 day period to expire but, in accordance with Part 36.3 the offer remained open. After service of further evidence and shortly before the trial of the preliminary issue was due to take place, the Defendant served notice that it accepted the offer. The parties then set about drafting an agreed Order to reflect the compromise on the issue of liability. It was here that the dispute arose.

7. The Claimant's Solicitors insisted that the Order entered Judgment in their client's favour. The wording of the first paragraph of the draft Order proposed was:

> "*Judgment on the issue of liability be entered 99% in favour of the Claimant*".

8. In many cases this would be uncontroversial and might even be agreed between the parties, but here a dispute arose over CPR Part 36.14. This, doubtless familiar, provision allows the Claimant to obtain enhanced interest and indemnity costs if:

> *"Judgment against the Defendant is at least as advantageous to the Claimant as the proposals contained in a Claimant's Part 36 offer".*

9. Thus what the Claimant (or more accurately her solicitor) planned then to do was to argue, subsequently, that the provisions of Part 36.14 had been triggered. Indeed, if judgment was entered, it would seem to be giving rise to some concern that every acceptance of a Part 36 offer would trigger the rule.

10. Although it was, perhaps, an ambitious contention the Claimant's Solicitor was determined and pressed the application hard. The essence of the Claimant's argument was that the Defendant having accepted the Claimant's offer, the Claimant was entitled to enter Judgment as of right.

11. The Defendant contended that it was inappropriate to enter Judgment and directed the Court to CPR 36.10 and 36.11. Part 36.11, particularly, sets out the position where a Part 36 offer was accepted and

provides that a claim would then be stayed. Where a Part 36 offer relates to part only of the claim it states:

a. *The claim will be stayed as to that part upon the terms of the offer; and*

b. *Subject to Rule 36.10(2), unless the parties have agreed costs, the liability for costs shall be decided by the Court.*

12. Rule 36.10(2) was not of application on the facts of the case. Thus the Defendant's contention was that the claim be stayed on the terms of the offer (that the Claimant recover 99% of any damages) and Directions be given for the disposal of the claim.

13. In a considered but unsurprising Judgment, Mr. Justice Cranston agreed with the Defendant. Part 36 of the CPR was designed to facilitate settlement and provides at 36.1 that offers to settle made in accordance with its provisions would produce the consequences set out in the Rules. In his view, accordingly, if an offer fell within Part 36, it was governed by the terms of Part 36 itself and not by any other principles, including those which would normally apply to the entry of Judgment. In his view Part 36 set out, in clear terms, what was to occur where a Part 36 offer was accepted. Nothing in the self-contained Code of Part 36 provided for Judgment to be entered in the situation with which the Court was faced, and the Claimant's Counsel, in the course of argument, had been unable to point to any specific power within the Civil Procedure Rules supporting the argument. There was thus no power to enter Judgment under Part 36 and the Order should follow CPR 36.10 and 36.11.

14. To have reached a different conclusion would have had far-reaching consequences, and it is noteworthy that the Claimant has not appealed the decision (to the Defendant's knowledge). Had the Claimant's argument been correct then, in almost every case where a Part 36 offer was accepted, a Claimant would then have been entitled to enter Judgment and so contend that s/he had obtained a Judgment as beneficial as his or her offer.

15. The Claimant was ordered to pay the costs of the contested hearing.

Philip Turton

January 2013

Philip Turton

Philip Turton was called to the Bar in 1989.

He is a specialist in personal injury, clinical negligence, disease, fraudulent claims, regulatory, costs, business and property, employment, planning and environmental and local government claims and professional discipline and regulation matters.

He has over 20 years experience of personal injury cases and specialises in high value personal injury actions, clinical negligence claims and industrial disease cases, including Group Actions.

He has been cited as a Leader at the Bar in the field of Personal Injury work for the last 9 years.

philipturton@ropewalk.co.uk

Disclaimer:

The information and any commentary on the law contained in this presentation is provided free of charge for information purposes only. The opinions expressed are those of the writer and do not necessarily represent the view of Ropewalk Chambers as a whole. Every reasonable effort is made to make the information and commentary accurate and up to date, but no responsibility for its accuracy and correctness, or for any consequences of relying on it, is assumed by the writer nor by Ropewalk Chambers. The information and commentary does not, and is not intended to, amount to legal advice to any person on a specific case or matter. You are advised to obtain specific, personal advice from a lawyer about your case or matter and not to rely on the information or comment contained within this Article.