

## Personal Injury and Medical Law Teams Practice and Procedure Note

### Part 36 - responses and proposals to DCA consultation paper CP(R) 02/06

The responses and comments on proposals can be downloaded from  
<http://www.dca.gov.uk/consult/civilproc36/response0206.pdf>

Responses included those received from the judiciary including the Association of District Judges, the Bar Council, the Law Society, insurers and various insurance bodies other bodies including APIL. The total of 33 responses from the legal profession indicates a worrying apathy particularly as only 2 were from individual members of the Bar.

It will be recalled that consultation for reform was sought in the light of recent procedural developments including:

- recent judgments of the Court of Appeal setting out the general criteria which should allow a written offer to be treated in the same way as a payment into court: Trustees of Stokes Pension Fund v Western Power Distribution (South West) PLC [2005] EWCA Civ 854<sup>1</sup>; Crouch v King's Healthcare NHS Trust (2004) EWCA Civ 1332, (2005) 1 WLR 2015.
- acceptance and rejection of offers
- withdrawal of offers
- indemnity costs

The aim is to clarify and simplify the rules

### Responses

#### Payments into Court

There was broad support for reform (including the judiciary and the Bar Council) along the lines set out in Western Power and those Defendants such as NHS Trusts who can be deemed good for the money. Many suggested enlarging these categories to include insured defendants such as medical defence organizations, local authorities and large corporations. Prompt payment was urged if an offer was accepted with some suggesting default time limits and others proposing sanctions. A few suggesting dispensing with payments altogether including Burnton J and the Law Society, the view being expressed

---

<sup>1</sup> digested and commented upon in 13 KBW 19 August 2005 PIMLU, pages 10 to 12. See too **Codent Ltd v Lyson Ltd** [2005] All ER (D) 138 in which the Court of Appeal considered the four requirements mentioned in Western Power: the offer was expressed in clear terms, was genuine, the Ds were good for the money. Although the offer was only made 12 days before the hearing, since the short period for acceptance was not a material reason why the claimants refused the offer, the Ds were awarded their costs from the first day of trial. Effectively therefore this *Calderbank* offer was as good as a payment into court.

that the absence of a payment did not create any real disadvantage for a claimant and this would avoid the need of determining whether or not a defendant was 'good for the money'. Five respondents (including APIL) were against removing the requirement for a payment included APIL whose concern is that this would create further difficulties in obtaining prompt payment and enforcement of offers and that payments could fund interim payments. This however was very much a minority view.

#### Permission to extend/abridge time for accepting a Part 36 offer

A significant majority considered that the court should have this power particularly in personal injury cases where if an offer was made early in proceedings, time was need for proper investigation of quantum. Some felt that the circumstances in which such extension was given should be 'exceptional' with opponents stressing the importance of certainty and also that such interference with the terms of a litigant's offer was an interference with freedom of contract. An overwhelming number considered that an offeror should have the opportunity to make the offer for more than 21 days although some defendants understandably expressed concerns that such an extension would leave defendants liable for increased costs.

#### Permission to accept an offer out of time

The consultation paper argued that the requirement for the court's permission should be removed. In general there was agreement with this proposal but the margin was quite narrow with those disagreeing believing that the court should retain the ability to decide costs if these are not agreed. There was also concern that subsequent developments might indicate that a claimant would be over-compensated<sup>2</sup>

#### Permission to withdraw offers

This concerns the anomaly that has arisen whereby Part 36 payments can be withdrawn with permission, while Part 36 offers can be freely withdrawn and do not have Part 36 cost consequences. The majority favoured the option which allowed for offers to be withdrawn during the initial acceptance period only with the court's permission in order to provide certainty for claimants, and thereafter freely by serving notice. All respondents agreed that no reasons should be required for parties rejecting an offer.

#### Indemnity costs and enhanced interest for defendants and claimants alike

At present only claimants enjoy this sanction. The majority of respondents were in favour but the responses were finely balanced with the proposal being rejected by most of the judiciary and other government Departments. Whilst those in favour argued that there should be parity, the judiciary and others considered that this was not comparing like with like since claimants needed a financial incentive to propose a compromise otherwise, unlike with defendants, there would be advantage in making an offer particularly if sanctions were to be attached. It would also place claimants under additional pressure to settle when faced with an unfair offer, particularly where they were not on an equal financial footing as in PI and clinical negligence cases.

#### Service of Part 36 offers and other notices

The large majority considered these should be served and that the requirement to file a note of a Part 36 payment with the court should be dispensed with

---

<sup>2</sup> not surprisingly this suggestion came from the Association of District Judges who clearly saw it as part of their Case Management to prevent such over-payment

Other matters were raised by the respondents:

### **Respondents' comment on Proposals**

Further suggestions included

- Amendment of r.36.21 so that claimants who equal their own offers receive Part 36 costs benefits
- Amendment to of.36.20 (costs consequences where claimant fails to better a Part 36 payment) to include the criteria in r.36.21(5) (costs consequences where a claimant does better than a Part 36 payment). R.36.21(5) provides:
  - in considering whether it would be unjust to make the orders referred to in (2) and (3) above, the court will take into account all the circumstances of the case including—
  - the terms of any Part 36 offer;
  - the stage in the proceedings when any Part 36 offer or Part 36 payment was made;
  - the information available to the parties at the time when the Part 36 offer or Part 36 payment was made; and
  - the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer or payment into court to be made or evaluated.
- Extending the period for making a payment upon receipt of a certificate of recoverable benefit from 7 to 14 days.
- Amending Part 36 and Part 52 to clarify that fresh offers are required to have effect in appeals (reflecting current case law)<sup>3</sup>
- Inserting a cross-reference in Part 27 to clarify that, exceptionally, the court has discretion to apply Part 36 in small claims (see rule 36.2(5)). 75% were in favour of this.
- Reversing the decision in Petrograde Inc v Texaco Ltd so that the cost consequences of not beating an offer should apply in the case of a summary judgment as well as trial.
- In cases involving Compensation Recovery (CR) payments, cost consequences should be assessed on the basis of the net amount

<sup>3</sup> This is in direct response to the observations of Brooke LJ in Hawley v Luminar Leisure [2006] EWCA Civ 30, [2006] All ER (D) 12 (Feb) see digest and comment on this case in 13 KBW February 2006 PIMLU, pages 32-33

receivable by the claimant, rather than the gross compensation including CR<sup>4</sup>.

- Extending the time limit for perfecting pre-issue offer with payments in support from 14 to 28 days.
- All offers should be taken as including interest up to the end of the initial acceptance period. At present, rule 36.22 makes this the norm, but allows offers to indicate otherwise.
- That the decision in Hawley v Luminar<sup>5</sup> that offers could no longer be accepted after the end of the trial (but before judgment was delivered) should be reversed.
- Some also thought that the rules should make clear whether a counter-offer constituted a rejection of the original offer (so that the latter could not later be accepted) should be written into the rules.

### Comment

The enlargement of the categories of secure defendants are likely to have caused headaches for the insurance industry and the government is likely to be reluctant to extend the protection given to NHS Trusts<sup>6</sup>

The requirement for prompt payment of offers when accepted particularly applies to the NHSLA which is notorious for delaying payment, and in cases where court approval is required, insist on 28 days from the date of the court order (as opposed to the date of acceptance) relying upon the somewhat spurious explanation that NHS accounting procedures require such an order before a cheque can be raised. In this way particularly in the higher value claims, claimants are deprived of significant sums of interest of damages.

It is disappointing that the terms of reference of the consultation did not allow for the impact of Periodical Payment Orders upon Part 36 offers, an area which is still causing confusion to many practitioners who do not wish to make such offers or assessments but reference to a lump sum order, particularly in cases where there is a significant dispute on life expectancy.

For the most part the responses are measured and sensible. Not surprisingly some are somewhat partisan depending upon the interests represented (e.g. APIL and insurance groups). On balance, the proposed intention of clarification and simplification appears to be met. It will now be a question of waiting to see what evolves from these responses and proposals.

---

<sup>4</sup> if implemented this would effectively shift the burden of establishing the amount of CRU paid onto the claimant

<sup>5</sup> see comment at footnote 3 above

<sup>6</sup> recalling the difficulties concerning Foundation Trusts (see 13 KBW PIMLU June update, page 22, digest and comment on **YM (a child) v Gloucestershire Hospitals NHS Foundation Trust** [2006] EWHC 820 [QB], [2006] All ER (D) 187, Forbes J.

A word of warning: in the interim, all *Calderbank* offers should be treated as if they were payments into court. A court will take these into account when reaching a decision on costs, however the offer is expressed and even if made a late stage and less than 21 days before trial: Codent Ltd v Lyson Ltd [2005] All ER (D) 138. This is particularly so if the court is of the view that the offer is a genuine attempt to settle and satisfies the principal requirements of Trustees of Stokes Pension Fund v Western Power Distribution. The emphasis has therefore shifted from enquiring into whether a payment should have been made (the argument in Crouch) to whether the offer is genuine and good for the money. This shift in emphasis is reflected in the responses and comments on the Consultation Paper. The downside must be that some Defendants will use this case as a reason for making last minute 'genuine' offers only a matter of days before trial – often with a weekend intervening. Whereas with commercial clients this may not present a problem, there are often considerable logistical difficulties in contacting PI or clinical negligent claimants over a weekend and thus a measured and reasoned discussion of such an offer in the 'working day' time available may smack somewhat of double glazing pressure on already stressed litigants. This is not something that will trouble Defendants who are entitled to take full advantage of the decision in this case to exert maximum tactical pressure to settle.

© DEIRDRE GOODWIN

13 King's Bench Walk  
Temple EC4Y 7EN

August 2006

Please note that this Case Note is intended to provide a summary and comment of the subject matter covered. It is not intended to be comprehensive or to provide legal or other professional advice.