YOU PAYS YOUR MONEY AND YOU TAKES YOUR CHOICE – THE SETTLEMENT OFFER DILEMMA FACING LITIGATORS

LITIGATION AND DISPUTE RESOLUTION

Making an offer to settle a dispute can be an effective tactic in litigation because it exerts pressure on the recipient of the offer and provides a degree of costs protection to the maker of it. There are, in broad terms, two ways of making a settlement offer:

- a "Part 36 Offer"; or
- a "Calderbank Offer".

As the name suggests, a Part 36 Offer must comply with the relatively inflexible requirements of Part 36 of the Civil Procedure Rules. There are no formal requirements for a Calderbank Offer. Part 36 prescribes costs sanctions which will (in most cases) be imposed on a party that rejects an offer and then fails to beat that offer at trial. A Calderbank Offer will be relevant when judges are exercising their general discretion on costs under Part 44 of the Civil Procedure Rules and **may** result in the imposition of sanctions that are similar to those that would be made under Part 36. However this will not necessarily be the case as it will depend on how the judge exercises his very broad discretion. Furthermore, there are some sanctions which are available under Part 36, but not Part 44 (see below).

This note considers a recent case in which the Court of Appeal highlighted the differences between the two types of offer in the context of a "near-miss" (i.e. where an offer is narrowly beaten at trial) and goes on to discuss the advantages and disadvantages of each type of offer. The key practice point is that a Part 36 Offer is the more potent weapon but, in some cases, a desire for greater flexibility will mean that it is more appropriate to make a Calderbank Offer.

Coward v Phaestos

In *Coward v Phaestos* and others [2014] EWCA Civ 1256, the parties' combined legal fees amounted to £19m. The claimant, who lost the substantive dispute at trial, argued that it should not be required to pay all of the defendant's costs because it had made a Calderbank Offer which the defendant had only beaten by a small margin, if at all. The successful defendant, on the other hand, pointed to the rule that the costs consequences of Part 36 will not apply where a Part 36 Offer has been beaten by any amount (however small) and argued that the same rule should apply "by analogy" when the court is exercising its general discretion on costs under CPR Part 44.

On this issue, the Court of Appeal found in favour of the claimant. Richards J noted that, whilst there is little scope for the exercise of judicial discretion under Part 36, Part 44 confers a discretion on the court "in almost the widest possible terms" and contains no rules as to the way in which the court is to have regard to offers. He said that, under Part 44, the task of the judge in any particular case is to exercise his or her discretion as to the just order for costs having regard to all the circumstances of the case. This included the fact that an offer to settle has been made even if that offer has been beaten at trial.

In the event, success on this particular point did not help the claimant. This was because, on the facts, the Court of Appeal rejected the claimant's argument that its Calderbank Offer provided for all that the winning party had ultimately recovered at trial save only for insignificant items. Rather, the defendant had achieved a substantially better outcome at trial than it would have done if it had accepted the claimant's Calderbank Offer. In those circumstances the normal rule, that the loser pays the winner's costs, should apply.

Calderbank or Part 36?

The advantages of making a Part 36 Offer, as opposed to a Calderbank Offer, are as follows:

1. As explained above, the costs sanctions for failing to beat a Part 36 Offer are potentially more onerous than the available sanctions under CPR Part 44. For example, the court has the power to order a defendant to pay an additional sum by way of damages where it has failed to beat a Part 36 Offer. That power is not available under Part 44.

2. Furthermore, where a court is exercising its general discretion under Part 44, the making of an offer to settle is just one of the circumstances that a judge can take into account. He may, or may not, attach much importance to that offer. A judge has a much more limited discretion to depart from the usual consequences of failing to beat a Part 36 Offer.

3. As is clear from *Coward v Phaestos*, Part 36 does not apply when the court is exercising its general discretion under Part 44 in relation to a Calderbank Offer. However, the reverse is not the case. A party who has made a Part 36 Offer, which has been beaten at trial, can still ask the court to take the offer into account when exercising its general discretion under Part 44.

Nevertheless, there may be circumstances where it is better to make a Calderbank Offer. This will be the case where a party wishes to make an offer in terms which are not permitted by Part 36. For example, a party may want to make a global offer which:

i. specifies how much will be paid in respect of costs, as well as dealing with the substantive issues in dispute; or

ii. departs from the Part 36 rules on liability for costs (such as the requirement that the defendant will be liable for the claimant's costs up until the date 21 days after service of the offer or the date of acceptance, whichever is the earlier).

Part 36 does not permit either of these things. Furthermore it is not possible to make a valid Part 36 Offer which contains a "sunset clause" limiting the period of time for which the offer will be open for acceptance.

In short, Part 36 is a more potent weapon which provides greater certainty of outcome. However, there will be circumstances where the need for greater flexibility will mean that a Calderbank Offer is the better option. In either case, the skill is in making a well-judged offer. As *Coward v Phaestos and others* shows, a settlement offer will be of no assistance if it is beaten by a significant margin at trial.

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