

Dispute Resolution
Case Law Update
Rosling King LLP



Background

The substantive litigation was settled by a consent order in which costs were to be assessed if not agreed on the standard basis. The Claimant served his Bill of Costs and commenced detailed assessment proceedings. The Claimant then made a settlement offer to the Defendant by letter headed “Part 36 Offer”, in the sum of £50,000 in full and final settlement of his costs. The letter stated that the offer “excluded interest”.

The Defendant did not accept the offer and at the detailed assessment hearing the Bill was assessed at £52,470 excluding interest. The Claimant argued he had beaten his Part 36 offer and that the usual costs consequences in CPR 36.17(4) should follow. However, the Deputy Master, held that the offer was not a valid Part 36 offer because the term in respect of interest was inconsistent with Part 36. The Claimant appealed and the Costs Judge dismissed the Claimant’s appeal. The Claimant brought a further appeal to the Court of Appeal.

The Decision

The Court of Appeal dismissed the appeal. There were three issues to be determined by the Court of Appeal:

- 1 whether a Part 36 offer could generally exclude interest;
- 2 whether a Part 36 offer could exclude interest in detailed assessment proceedings; and
- 3 whether the offer made by the Claimant is to be treated as inclusive of interest as a result of CPR 36.5(4).

On the first issue, the Court rejected the Claimant’s argument that there could be no objection to an offer excluding interest. The Claimant argued that Part 36 allowed an offer to be limited to part of a claim, and the principal sum and a claim for interest on that principal sum were both “parts of” a claim within the meaning of CPR 36.2(3). The Court rejected this argument and clarified that an offer exclusive of interest is not an offer in respect of part of the claim and stated that “Part 36 proceeds on the basis that interest is ancillary to a claim not a severable part of it...interest could not be hived off.”

The Claimant then submitted that CPR.36.5(4) was not mandatory, relying on CPR PD 47 para.19, which provides that an offer to settle made under Part 36 should specify whether or not it was intended to include interest. However, the Court rejected this submission by stating the Practice Direction “has no legislative force” and that the CPR takes precedence over the Practice Direction. The Court repeated that Part 36 is a “self-contained procedural code” that it is “carefully structured and highly prescriptive”.

The Claimant then submitted that CPR.36.5(4) was not mandatory, relying on CPR PD 47 para.19, which provides that an offer to settle made under Part 36 should specify whether or not it was intended to include interest. However, the Court rejected this submission by stating the Practice Direction “has no legislative force” and that the CPR takes precedence over the Practice Direction. The Court repeated that Part 36 is a “self-contained procedural code” that it

is “carefully structured and highly prescriptive”.

On the third issue, the Court rejected the Claimant’s submission that the offer in this case could be treated as inclusive of interest as a result of CPR 36.5(4), even though it stated expressly that it “excludes interest”. The Court added, “inconceivable that CPR 36.5(4) was meant to turn an offer specifically stated to be exclusive of interest into one including interest” as that would grossly distort the Claimant’s intentions.

Commentary

The Court has clarified that Part 36 is a “self-contained procedural code” that is “carefully structured and highly prescriptive set of rules” and that the relevant Rule takes precedence over the Practice Direction.

It is essential to understand that interest should be calculated and added to the principal amount when making a Part 36 offer. Therefore, it is important that when making a Part 36 offer proper regard is given to the requirements of Part 36 to ensure the offer is valid.

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.