Recovery of the "additional amount" under CPR rule 36.17(4)(d) after a successful Part 36 offer on a liability only trial

JMX v. Norfolk and Norwich Hospitals (No.2) [2018] EWHC 675 (QB) Foskett J. 28 March 2018

Background

This note deals with the third judgment of Foskett J. in this case.

The judge had previously decided:

(a) First judgment ([2017] EWHC 3082 (QB)): The claimant should have judgment against the defendant for damages to be assessed
(b) Second judgment ([2018] EWHC 185 (QB)): The claimant was in principle entitled to the consequences set out at CPR rule 36.17(4) ("the Part 36 consequences") having made a Part 36 offer shortly before trial to accept 90% of damages to be assessed (the defendant had unsuccessfully opposed this on the grounds that the offer was not a "genuine offer of settlement" - see previous Note).

The issue

The point under consideration in this judgment was whether the court could make an order now for recovery by the claimant of the "additional amount" under rule 36.17(4)(d) by reference to the claimant's award of damages which are yet to be assessed.

Rule 36.17(4)(d) provides that unless considered unjust the claimant who has made a successful Part 36 offer shall be entitled to:

> *(d) provided the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below to an amount which is –*
>
> > *(i) the sum awarded to the claimant by the court*
> >
> > *(ii) where there is no monetary award, the sum awarded to the claimant by the court in respect of costs*

Argument and result

The defendant objected specifically to the award of the additional amount only after the second judgment had been given. The claimant's initial response was that the point was now *res judicata* by virtue of the second judgment. In seeking to recover Part 36 consequences the claimant had expressly sought (by his skeleton argument and in his draft order) an order for payment of the additional amount by reference to the award of damages in due course. The defendant had not objected to that specific aspect of the order but rather adopted the general argument that the Part 36 offer had not been a genuine offer of settlement. In his

second judgment Foskett J had identified payment of the additional amount by reference to the award of damages as one of the Part 36 consequences at issue (see [5iii]).

In this third judgment Foskett J did not accept the claimant's argument that the point concerning payment of the additional amount was *res judicata*. He did agree that the defendant should have raised the point earlier but said that since there had been no specific argument and in particular since no final order had yet been made the court was entitled to consider the point now raised. Underpinning this was the judge's concern raised by him with the parties as to whether he had the power under the CPR to make the order for payment of an additional amount at this stage.

The judge's concern arose from the word "decided" within rule 36.17(4)(d) and the specific definition of that phrase at CPR rule 36.3(e) as "when all issues in the case have been determined whether at one or more trials". He was concerned that according to that definition although the liability aspect the subject of the Part 36 offer had been finally resolved the claim as a whole had not been "decided".

The defendant unsurprisingly (and not improperly) adopted that argument that no additional amount could be recovered because the case is not yet "decided". The defendant also sought to argue that no liability for an additional amount could arise because the Part 36 offer was not "an effective offer in respect of the claim as a whole". The judge rejected that latter approach, accepting the claimant's argument that an inability to recover an additional amount after an effective Part 36 offer on the liability issue would arguably neutralise the clear intent of the provision namely to encourage claimants to make offers on specific issues such as breach of duty and to encourage defendants to give such offers serious consideration. (In any event the defendant did acknowledge in argument that as and when damages are assessed the claimant is bound to recover an award "at least as advantageous" as his Part 36 offer since 100% of anything is always better than 90%).

The defendant put an alternative argument that a judgment on the liability issue did not represent the recovery by the claimant of a monetary award and thus implicitly the additional amount could only be recovered in respect of costs. The claimant's argument was that a judgment for damages to be assessed is a monetary award albeit unquantified and postponement of quantification does not change the nature of the award. The judge's view (expressed *obiter*) was to agree with the defendant and to say that at this stage in the absence of a quantified award any additional amount would fall to be assessed with reference to costs.

Mindful of the provision that only one order for payment of an additional amount can be made in any claim the judge postponed the question of the recovery of the additional amount by this claimant, to be considered if still in dispute once damages had been agreed or assessed. The judge did indicate that given the claimant's effective Part 36 offer on liability he is *prima facie* entitled to recovery of the additional amount in due course but concluded no order could be made at this stage.

Comment

With respect it is hard to quarrel with the court's conclusion based on the wording of 36.17(4)(d) and 36.3(e) that no order can be made at this stage for payment of the additional amount but this does call into question whether rule 36.17(4)(d) should remain as currently drafted.

There is no doubt that the defendant's potential liability for the "additional amount" is an important aspect of Part 36 from a claimant's perspective. The addition to Part 36 consequences in April 2013 of a requirement to pay the additional amount forms part of the policy of the court and the rules to foster realistic negotiation and compromise. The defendant's potential liability for the additional amount is an important element of such consequences having been introduced following the observation in the Review of Civil Litigation Costs (2009) of a need to introduce a specific benefit to claimants to rebalance the potential benefits/consequences of Part 36 as between claimants and defendants (see Review of Civil Litigation Costs Final Report (21 December 2009) Ch 41 para 3.1 to 3.16 cited in White Book 2018 para 36.17.4.4).

There is also no question that Part 36 is meant to apply in its full rigour to offers made on single issues such as liability – Foskett J expressly held so in this case. Although in reality the claimant in this case is merely having recovery of the additional amount postponed there does not seem to be any real justification for that. A reformulation of rule 36.17(4) to apply immediately the full Part 36 consequences where there is an effective Part 36 offer on a specific issue seems to be called for.

The "one award only" provision is rightly in place to prevent claimants seeking numerous additional amounts from a series of offers *on the same issue*, which would include where offers overlap (eg a liability percentage offer made at the same time as a global damages offer) but it is respectfully suggested that there is no good reason why a claimant should not recover an additional amount on an effective Part 36 liability offer and then a second additional amount on a subsequent effective Part 36 quantum offer. Not to permit this means that a claimant who has taken a reasonable view on the liability issue resulting in a successful Part 36 offer is then illogically in a worse position on quantum since although his Part 36 offer may have some consequences if rejected but then bettered they will not include an additional amount and the threat to the defendant in rejection is lessened.

Note by Dominic Nolan QC and Eva Ferguson (Counsel for the Claimant JMX)

Hailsham Chambers, Monday 7th April 2018