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FOIL UPDATE 21st March 2023

Part 36 and split liability offers

Mundy v TUI UK Limited (2023) EWHC 385 (Ch)

IN BRIEF

A High Court Judge held that the claimant's 90/10 liability offer was not an offer to settle the claim, or a quantifiable part of or issue in the claim

The claimant went to Mexico on an all-inclusive holiday supplied by TUI. He complained of food poisoning and claimed against TUI, seeking general damages of between £25,000 and £35,000.

The case was heard in the County Court. The Circuit Judge (the judge) found the claimant had indeed become infected through contaminated food at the hotel, and TUI had therefore breached an implied term of the holiday contract by supplying goods not of a satisfactory quality. However, he found the illness caused, while 'very unpleasant', was less severe and long-lasting than the claimant had claimed and he awarded £3,700 in general damages and £105.60 in special damages.

The question of costs arose. Both parties had made 'Part 36' offers to settle, none of which had been accepted. The judge made a split order: the defendant to pay the claimant's costs up to the date of expiry of the defendant's offer and the claimant to pay the defendant's costs thereafter, to be assessed on the standard basis if not agreed. Meanwhile, the claimant's damages were to be held by the defendant on account, the defendant to be entitled to set off its costs against the claimant's damages and costs.

The appeal turned on the effects properly to be given to the parties' rejected offers. The claimant's second offer was in the following terms:

We are instructed by our client for entirely business and commercial reasons to make a Part 36 Offer to the Defendant in relation to liability. We annexe form N242A containing the Claimant's Part 36 Offer. You will see that the Claimant offers to settle the issue of liability on the basis of 90%/10% in favour of the Claimant. For the avoidance of doubt should the Defendant not accept the Claimant's

offer within the time specified within the annexed form N242A, the Defendant will become liable for the Claimant's costs on an indemnity basis from the 27 November 2018, the Defendant accepts full liability or the issue is determined by the Court.

The annexed form confirmed '*the Claimant offers to settle the liability aspect of this claim on the basis of a 90% / 10% apportionment in favour of the Claimant'*.

TUI did not accept either offer. It made a Part 36 offer to settle the whole claim for £4,000. The claimant did not accept.

Dismissing the claimant's appeal on three out of four grounds, a High Court Judge noted that the practice of making 90/10 liability offers, to secure costs advantages, had become widespread.

A 90/10 liability offer was not straightforward to recognise as an offer to settle a whole claim on quantified or quantifiable financial terms, in a case where there was no genuine question of issues-based liability. A 90/10 liability offer did not appear, in a case like this, to be an attempt to estimate or predict any split-liability orders a court might make in a given case. Unless split liability was a genuine prospect on the facts of a case (for example a road traffic case where contributory negligence was a live issue), a 90/10 liability offer looked, if accepted, like a complete concession of liability in return for a financial reward – a share of quantum. Otherwise, and if not accepted, it looked something like a claimant's stake on a 100% winning outcome on liability at trial. Despite its proportional form, it was something of a binary proposition in substance.

Returning to the basics, therefore, the appellate judge saw no encouragement at all in CPR 36.17, or anywhere else in the Part 36 scheme, for the idea of approaching rejected offers, where a defendant had made a money offer to settle the whole claim, by doing anything other than starting with the question at CPR 36.17(1)(a) and making a straightforward comparison between what a defendant offered and what a claimant got 'in money terms.' What a claimant got was to be considered in terms of obtaining a judgment. The judgment entered, obtained and recorded in this case was for a sum less than £4,000.

On a plain reading, CPR 36.17(1) (a) and (b) were directed to a like for like comparison. Both limbs were directed to the quantified (money) terms on which either party offered to settle the proceedings. It was a provision entirely simple in structure. That plain reading of CPR 36.17(1), as being directed in a case like this to quantified money offers to settle, was supported not just by its own internal logic, read together with CPR 36.17(2), but also by the logic of the rest of CPR 36.17.

CPR 36.17(5) set out the mandatory considerations to be taken into account for a court considering whether it would be 'unjust' for the normal Part 36 consequences to follow. They included '(e) whether the offer was a genuine attempt to settle the proceedings.' That meant that in every case where the issue of 'unjust' was raised, the court must consider whether 'the offer' – that is, the operative offer referred to in CPR 36.17(1) – was a genuine offer to settle the proceedings. A single offer was referred to – either the unbeaten defendant's offer or the beaten or equalled claimant's offer. The single relevant offer must have been an offer to settle; the question for consideration by the court was then whether that offer, to settle, was genuine in its (unsuccessful) attempt.

The claimant's 90/10 liability offer was not an offer to settle the claim, or a quantifiable part of or issue in the claim. It was difficult to fit into the Part 36 scheme altogether. If accepted, in what sense would that produce the result that 'the claim will be stayed' (CPR 36.14(1))? If rejected, in what sense did that produce a quantifiable proposition capable of being compared with what a

claimant got 'in money terms' from a judgment – that is, from the judgment itself and not from a private algorithm pre-attached to the judgment? A simple case like this in which liability was not fought on a distinct issues basis but in its entirety could not produce anything other than a 100% result on liability either way; the value of a win on liability 'in money terms' was difficult if not impossible to separate from the quantum of damages awarded, and that would always and axiomatically be more advantageous to a claimant than 90% of it. There was a problematic degree of artificiality in all of this.

The effect proposed by the claimant in this appeal went far beyond incentivising the avoidance of a liability trial. It made a 90/10 liability offer into a means for a claimant, who failed to beat a money offer to settle his claim, to recoup a substantial premium for 'winning' the case nevertheless. It was an attempt at a unilaterally imposed insurance policy to reverse the losses otherwise provided for by CPR 36.17. It was, in other words, an attempt to use CPR 36.17 against itself, contrary to both its letter and its spirit.

How, then, did this 90/10 liability offer fit into the scheme of CPR 36.17? The simplest answer to that lay in CPR 36.17(5). In a case like this – an otherwise straightforward CPR Part 36.17(1)(a) case in which a claimant had failed to beat a defendant's offer – a court considering whether it would be unjust to visit the subsection (3) consequences on the claimant must take into account all the circumstances of the case. In an appropriate case – and whether or not a 90/10 liability offer counted as 'any Part 36 offer' for the purposes of CPR 36.17(5)(a) – a court might be invited to consider any injustice arising by virtue of the defendant having rejected that offer.

The 'unjust' bar of course remained a high one: a 'formidable obstacle'. The default provisions of CPR 36.17 could not be expected to be diluted by considerations relating to rejected 90/10 liability offers to the extent that it lost the very clarity, simplicity and predictability on which its incentivising effects depended. It might be that 90/10 liability offers, where no issue of split liability genuinely arose, largely needed to rely on any inherent attractiveness and incentivisation they might have in the context of a particular case to achieve an outcome – agreement to avoiding a liability trial – if that was in the commercial best interests of both parties. It might be that they could not rely on the incentivisation furnished by the 'Part 36' consequences of rejection. It might be, in other words, that in a simple case like the present they were all carrot and no stick. If so, that was a result which seemed to be entirely consistent with the letter and spirit of the Part 36 code, and its focus on backing sensible money offers to settle claims or quantifiable parts of claims.

The County Court Judge's decision on the issues raised by the rejected 90/10 liability offer was not 'wrong'.

With regard to the order setting off the defendant's costs, the defendant accepted that the fourth ground of appeal had now been settled by the Supreme Court in *Ho v Adelekun*, in favour of the claimant and so the order under appeal would be amended accordingly.

Matthew Hoe of Taylor Rose MW and a members of the FOIL Costs SFT comments:

Similar split liability offers have been seen in many claims without real liability apportionment issues. Hopefully this judgment will pave the way for sensible settlements in more of those claims, where hopes of favourable Part 36 consequences on the back of such offers may have otherwise encouraged arguments or even trials.

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