

When more is not necessarily better.

Part 36 offers are an essential element of a party's strategy and tactics in any personal injury claim. For a Claimant, it presents the opportunity to put pressure on a Defendant to settle a claim rather than risk facing a potentially expensive order for costs on the indemnity basis and for a Defendant, a well timed Part 36 offer can often persuade a Claimant to settle the claim for less than they would expect. In light of this, the Court of Appeal's recent decision in *Carver v BAA* (2008) on the costs consequences of Part 36 offers is essential reading for any practitioner.

The Claimant, Miss Carver, was an air hostess who suffered an accident at work when she stepped from a lift which had stopped some 2 feet below floor level. She suffered ligament damage to her ankle and was absent from work for a 4 week period. She claimed against her employers and the Defendant quickly admitted liability. Thereafter, the Claimant's solicitors obtained a medical report and disclosed this to the Defendant together with a schedule of loss for £2,170. Nine months later, a further medical report was obtained and disclosed and in November 2005, the Defendant made a Part 36 offer of £3,486 in addition to a previous interim payment of £520, making the total offer £4,006. The Claimant did not accept the offer and obtained a further medical report from an expert in ankle injuries. This was disclosed in March 2006 and proceedings issued later that month, with the claim pleaded at between £5,000 and £15,000. In June 2006, the Defendant made a further Part 36 offer of £4,520 and this was also rejected by the Claimant. In September 2006, the Claimant served an updated schedule of loss in excess of £19,000 and as a result, the case was transferred from the fast track to the multi track. The Defendant therefore obtained their own medical report and, following agreement between the experts, the schedule of loss was amended back down to £2,700. The Defendant then made an offer to settle the Claimant's damages, interest and costs in the sum of £20,000 to which the Claimant responded with a Part 36 offer of £12,500. This offer was then withdrawn and the Claimant made a further offer of £20,000. This was rejected and the matter proceeded to trial.

At trial, damages were assessed at £4,686.26 including interest. After factoring in the interest accrued since the Defendant's Part 36 offer, it was agreed that the Claimant had beaten the Defendant's Part offer by a mere £51. On this basis, the Claimant sought their costs of the claim on the standard basis. The Defendant, by contrast, argued that the Claimant's costs should be limited to a date 21 days after the Defendant's Part 36 offer.

The general starting point for the Court's determination of this issue is CPR 44.3(2):

CPR 44.3

(2) If the Court decides to make an order about costs

- (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but*
- (b) the Court may make a different order*

More specifically, in relation to Part 36 offers, CPR 36.14(1) states:

CPR 36.14

(1) *This Rule applies where upon judgement being entered-*

(a) *a claimant fails to obtain a judgment more advantageous than a Defendant's Part 36 offer; or*

(2) *Subject to paragraph 6, where Rule 36.14(1)(a) applied, the court will, unless it considers it unjust to do so, order that the Defendant is entitled to-*

(a) *His costs from the date on which the relevant period expired; and*

(b) *Interest on those costs*

The trial judge was not persuaded that the Claimant had obtained a judgment more advantageous than the Defendant's Part 36 offer, notwithstanding that the Claimant recovered £51 more than the offer:

'So far as the claimant's position is concerned, I take the view that this is a claim where they have not succeeded in obtaining a judgment more advantageous than the defendant's Part 36 offer. Having regard to such exchanges and conduct which I am entitled to, this case, it seems to me, ought never to have been fought and that the lack of response following the Part 36 offer and the way in which the matter has been conducted between June 2006 and today, in my view, has been highly regrettable and it is that which I have regard to in coming to the conclusion that the claimant has failed to secure a judgment more advantageous than the position it was in upon receipt of the Part 36 payment into court. On no view does it seem to me can it be said that for an excess of a few pounds within a margin of £50-£87 odd could it be said that the monetary judgment obtained today is more advantageous than the position in June of last year.' (per HHJ Knight QC at paragraph 13)

The Defendant was therefore awarded their costs from 27th June 2006, being 21 days after the Part 36 offer of £4,520. The judge then went further and made no order for costs from the date of the Defendant's pre-issue offer of £4,006:

'The defendant has also submitted that between November 2005 and June 2006 there should be no order as to costs. The reason for that was that there was a pre-issue offer of £4,006, which again is adjacent to the sum awarded in this case. I find that a very powerful argument and certainly one which of itself and in conjunction with the other matters, indicates a failure to pursue this claim in the way I think it should have been pursued between admission of liability and issue, and justifies me in acceding to that suggestion and I make no order as to costs between November 2005 and June 2006.' (per HHJ Knight QC at paragraph 15).

The Claimant's costs were therefore limited to costs incurred up to November 2005. On this basis, the Claimant's appealed.

The Court of Appeal, in considering its decision, surveyed not only the case law in this area, but also compared the previous incarnation of CPR Part 36 prior to April 2007. Under the old rule, where a Claimant obtained damages for a monetary claim in excess of a Part 36 offer, they were entitled to their costs. The new rule, with its phrase of 'more advantageous' was intended to put money claims and non money claims on a common footing, hence the more 'open textured' phrase (to quote Rix LJ). The new Part 36 encouraged the courts to take a more holistic view of whether a Part 36 offer had been bettered, in the sense that a more advantageous result had been obtained, and this went beyond a simplistic comparison of offer and judgment.

'Nonetheless, the Court must give effect to the new rule and if that has introduced a change in practice, so be it. Are the concepts of bettering a Part 36 payment and obtaining a judgment more advantageous than the Part 36 offer synonymous? Posed in that way, perhaps they are. But in the context of the new Part 36, where money claims and non-money claims are to be treated in the same way, "more advantageous" is, as Rix L.J. observed in the course of argument, "an open-textured" phrase. It permits a more wide-ranging review of all the facts and circumstances of the case in deciding whether the judgment, which is the fruit of the litigation, was worth the fight. (per LJ Ward at para 30)

The Court therefore concluded that the trial judge was entitled to exercise his discretion as he had and upheld the decision that the Claimant had failed to achieve judgment more advantageous than the Defendant's offer. The order that the Claimant had to pay the Defendant's costs from June 2006 was upheld.

As to the order for costs from November 2005 to June 2006, the Court of Appeal was not inclined to interfere with the trial judge's exercise of discretion and therefore upheld this element of the costs order as well. Consequently, the appeal was dismissed.

This is a very important decision. The outcome of trials in personal injury claims are often considered either a win or a loss, dependent on whether a Defendant's offer was bettered or not. This dichotomy is, however, too simplistic. The costs provisions of the CPR are all about a more graded approach. Cases are to be approached on their individual merits having considered all of the relevant factors. Primary amongst these factors is the conduct of the parties. The Claimant's had made little effort to compromise this claim from the beginning, whereas the Defendant's had made offers which turned out to be not unreasonable, even if they were slightly light. The Claimant's failure to reciprocate was a major factor in the Court's approach. As with many cases dealing with costs, a party will often find its conduct of the litigation coming back to haunt them when it comes to dealing with costs of the case.

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Cases Cited:

Carver v BAA [2008] EWCA Civ 412

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