<u>HOLIDAY OFFER GOES WRONG</u>

Have you ever made, or received, an offer to settle for a sum of money which makes no mention of costs? The prudent course would be ask if costs are included or excluded (i.e. a request for clarification under CPR r. 36.8). But what if you don't and you either accept or find that, in a later argument about costs, the offer is said by the offeror to be for a sum of money plus costs? The latter is what happened in *Toczek v Sunseeker International Limited*, Unreported, HHJ Richard Parkes, QC, sitting at Winchester County Court on 29 June 2020.

The facts. *Toczek* was an employer's liability personal injury claim. The claimant alleged that his asthma had been made worse following exposure to harmful fumes during the course of his employment. Breach of duty was admitted at an early stage. Quantum remained in dispute. Proceedings were issued. Around the time the Defence was due, the parties made a flurry of offers and counter-offers. On 19 October 2017 the defendant's insurers made a Part 36 offer in the sum of £14,000. On 1 November 2017 the claimant's solicitors made a Part 36 counter-offer of £35,000. The same day, the defendant's insurers rushed out a badly worded offer that was to become the focus of much argument. The key sentence read:

> "In an attempt to settle this matter and deal with the Proceedings by consent, we are prepared to offer your Client £18,000 in full and final settlement of the whole of his claim against the Insured."

There was no mention of costs; no mention of Part 36; and, not even any mention of the offer being without prejudice save as to costs. Read literally and within the four corners of the letter, this was an offer to settle for £18,000 inclusive of costs. The claimant's condition appeared to get worse. The 1 November 2017 offer was not accepted. A couple of months later the claimant's solicitors made a Part 36 offer to settle in the sum of £50,000. By this time solicitors were on the record for the defendant. After taking stock, they made a Part 36 offer to settle in the sum of £18,000 on 16 April 2018.

The litigation progressed. Six months later, the defendant's solicitors dropped a bombshell. They disclosed social media reports which demonstrated that the claimant was not as badly affected by his breathing difficulties as he had claimed. Their medical report said much the same. The claimant's solicitors had a frank discussion with their client. On 23 October 2018 they accepted the Part 36 offer dated 16 April 2018 out of time.

The parties were not able to agree costs. It was common ground that (a) the defendant should pay the claimant's costs up to 22 November 2017; and, (b) the claimant should pay the defendant's costs from 8 May 2018 onwards. There was dispute about who should pay the 5½ months of costs in between these dates. The defendant argued that the 1 November 2017 offer was to pay £18,000 plus costs; that it should have been accepted; that the rest of the litigation had been fruitless; and, thus, the claimant should pay those costs. The claimant argued that the 1 November 2017 offer was inclusive of costs; that, he had done better than that offer by a substantial margin; and, therefore, the defendant should pay those costs. Deputy District Judge Kirkconel decided that, looked at objectively, the 1 November 2017 offer was for £18,000 plus costs. Since it was not in Part 36 form, he took that offer into account under CPR r. 44.2(5)(a) and, exercising the wisdom of Solomon, decided there should be no order for costs from 23 November 2017 to 7 May 2018 inclusive. He commented that the defendant's medical evidence raised some "very clear difficulties" for the claimant but was not invited to, and did not, make any finding of dishonesty.

The claimant appealed on two grounds. First, that the DDJ had misconstrued the offer of 1 November 2017. Second, that he failed to apply the "formidable obstacle" test endorsed by the Court of Appeal in *Tuson v Murphy* [2018] EWCA Civ 1461, [2018] 4 Costs LR 733.

Construction. HHJ Parkes, QC, held that the offer dated 1 November 2017 was ambiguous as to whether costs were, or were not, included. Following *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 and applying "commercial common sense," the Designated Civil Judge held that the offer was to be construed as being for £18,000 plus costs. The DCJ pointed out that it was clear that "in its context" the defendant was trying to settle the matter by raising the £14,000 offer of two weeks earlier to £18,000. Business common sense surely pointed to this being a simple raise of £4,000, in the context of a series of offers that entailed a figure of damages plus costs. The notion that the offer should have been understood as an offer of £18,000 including costs seemed to the judge to fly in the face of common sense, for it was plain that such an offer would have represented no or no worthwhile improvement on the existing offer of £14,000 plus costs. Indeed, it might well have represented a lower offer than the Part 36 offer already made. The appeal on this ground failed.

The "formidable obstacle" test. The costs consequences of a late acceptance of a Part 36 offer are set out in CPR 36.13(5). This provides that:-

> "… the court must, unless it considers it unjust to do so, order than (a) the claimant be awarded costs up to the date on which the relevant period expired; and (b) the offeree do pay the offeror's costs for the period from the date of expiry of the relevant period [of 21 days] to the date of acceptance."

It is worth emphasising the use of the mandatory language "must". In *Smith v Trafford Housing Trust*, [2012] EWHC 3320 (Ch). Briggs J., as he then was, gave much quoted guidance on the identical position that prevails when a claimant fails to beat a defendant's Part 36 offer at trial (what is now CPR r. 36.17(3)). He pointed out that in each case the court was trying to assess who in reality was the party responsible for costs being incurred which should not have been; that each case turned on its own facts; and, that there was no limit on the circumstances that may, in any particular case, make it unjust for the ordinary consequences of late acceptance to apply. He then said (at [13d]):

> "Nonetheless, the court does not have an unfettered discretion to depart from the ordinary cost consequences set out in [what is now CPR r. 36.17(3)]. The burden on a claimant who has failed to beat the defendant's Part 36 offer to show injustice is a formidable obstacle to the obtaining of a different costs order. If that were not so, then the salutary purpose of Part 36, in promoting compromise and the avoidance of unnecessary expenditure of cost and court time, would be undermined."

The "formidable obstacle" test was applied to the situation where a claimant accepts a Part 36 offer out of time by the Court of Appeal in *Tuson v Murphy (ibid).* The rational is that, had the claimant accepted the Part 36 offer in time, the defendant would have been required to pay the claimant's costs up to the date of acceptance under CPR r. 36.13(1). Thus, it will usually only be just to depart from the ordinary order if something has happened to undermine the basis on which the Part 36 offer was made. Any other approach would encourage expensive satellite litigation. In *Tuson v Murphy* the Court of Appeal concluded that a distinction was to be drawn between:

a) A case where the facts known to the defendant's advisers at the time of the Part 36 offer do not change significantly during the period before the delayed acceptance; and,

b) A case where the defendant's advisers' assessment at the time of making the Part 36 offer of the true value of the case, based on the facts then known to them, is upset or undermined by subsequent events or subsequently discovered facts.

The Court of Appeal said that, in the first type of case, "it is highly unlikely to be unjust to apply the default costs rule."

In *Toczek* there was no suggestion that the defendant's advisers' assessment of the true value of the case was upset or undermined by subsequent events or subsequently discovered facts. The defendant's solicitors had the claimant's Facebook postings, but it is not suggested that they did not factor them in to their assessment when they made the Pt36 offer on 16 April 2018. Even if the defendant had discovered later facts that undermined its advisers' assessment of the value of the claim, it could have withdrawn the offer or have made a *Calderbank* offer. In those circumstances, the defendant should be taken to have been content to compromise on the basis of paying the claimant's costs to the end of the relevant period by reference to its assessment of matters as they then stood. The judge below had failed to properly apply the "formidable obstacle" test. The appeal would be allowed. The defendant must pay the claimant's costs up to, and including, 7 May 2018.

Practice Points.

- Offers should be clearly expressed and free from ambiguity. The costs consequences of accepting or not accepting should be spelled out, ideally by reference to Part 36.
- Confronted with an ambiguous offer, the offeree should seek clarification before accepting.
- Where the defendant uncovers evidence of dishonesty any extant Part 36 offers should be withdrawn and an application made to amend the Defence or Counter Schedule to allege fundamental dishonesty. If the defendant wishes to try to settle such a claim, it should make a *Calderbank* offer, e.g., to pay the claimant's costs up to the date on which the dishonesty and/or deliberate exaggeration manifested itself (e.g. service of a witness statement) but then requiring the claimant to pay the defendant's costs on an indemnity basis thereafter.
- Where a Part 36 offer is accepted out of time and a party wishes to seek an order other than the ordinary order, its evidence should concentrate on how its assessment of the claim at the time it made the Part 36 offer was upset or undermined by subsequent events or subsequently discovered facts.