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High Court provides guidance on high Part 36 offers from Claimants

A Part 36 Offer is an offer made by a party with the aim of convincing the other party to settle the claim out of court which is governed by Part 36 of the Civil Procedural Rules ("CPR"). This may have costs and interest consequences if a party fails to accept a realistic Part 36 offer made by the other side.

In the case of *Yieldpoint Stable Value Fund, LP v Kimura Commodity Trade Finance Fund Ltd* [2023] EWHC 1512, the High Court was asked to determine whether a claimant who had made a high Part 36 Offer was entitled to the costs and interest benefits provided by rule 36.17 CPR.

When a claimant makes a Part 36 offer, CPR rule 36.17 (4) states that if the defendant rejects the offer and the claimant obtains a judgment which is equal to or more favourable than his Part 36 offer at trial, the defendant will have to pay whatever the court awards the claimant, and, ***unless it considers it unjust***, indemnity costs, enhanced costs and interest. An additional amount of 10% of the damages will also be awarded for awards of up to £500,000. For awards above £500,000, the sum will be 10% of the first £500,000 of damages awarded and 5% of any damages awarded above that figure, up to an overall limit of £75,000.

When considering whether it would be unjust to make any cost order, the court will consider all of the circumstances of the case, such as the terms of the Part 36 offer, the information available to the parties when the Part 36 offer was made, and whether the offer was a genuine attempt to settle the process. It is this last factor which the High Court considered in *Yieldpoint v Kimura*.

The case concerns a debt claim for the repayment of US$5 Million plus interest. On 9 January 2023, Yieldpoint made a Part 36 offer seeking the sum of US$4,950,000 inclusive of interest. Kimura rejected the offer, and at trial Yieldpoint's claim was successful. It obtained a judgment more favourable than its Part 36 offer, which represented 99% of the principal amount of the claim.

Consequently, Yieldpoint asked the court for the enhancements under CPR rule 36.17 (4), which Kimura opposed on the basis that it would be unjust as the Part 36 Offer was not a genuine attempt to settle the dispute.

High value Part 36 offers from a claimant had already been upheld by the courts as genuine offers to settle. For example, in *Jockey Club Racecourse Ltd v Willmott Dixon Construction Ltd* [2016] EWHC 167 (TCC), the court concluded that an offer to accept 95% liability was a genuine offer to settle. Similarly in *JMX (a child by his mother and litigation friend, FMX) v Norfolk and Norwich Hospitals NHS Foundation Trust* [2018] EWHC 185 (QB), the High Court held that a Part 36 offer to accept a 90% offer should appropriately be regarded as a genuine offer of settlement.

Notwithstanding such decided cases, which involved very high value Part 36 offers from a claimant, the High Court reached the following conclusions:

a) The Part 36 Offer was not a genuine attempt to settle the proceedings.

b) The decided cases provide guidance, but they do not dictate how a Part 36 offer should be evaluated.

c) "One theme that emerges from the decided cases […] is that a very high claimant offer may only be vindicated where the claim itself was obviously very strong and could be so characterised at the time of the relevant offer".

d) "A marked disconnect between the discount element of an offer, on the one hand, and the offeror's reasonable contemporary perception of the strength of their case, so far as discernible, on the other hand, may well be telling against it being a genuine attempt at settlement.

e) "This was not a case where a very high claimant offer reflected a very strong prospect of the claimant succeeding at trial. The parties were diametrically and evangelically opposed in terms of their characterisation – and […] subjective





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understanding of the deal they had concluded. A discount of 1% is meaningless in such context. It amounts to saying 'pay up now, accept that you are wrong".

f) The Court's conclusion did not imply any criticism of Yieldpoint or its legal team.

g) The judge stressed that his decision should not discourage claimants from making Part 36 offers: "It is, if anything, an encouragement to make offers at a level not so perilously close to the full value of the claim in a case of such adversarial intensity."

In summary, it is important to keep this recent High Court decision in mind, as it appears the Courts may be unwilling to grant the enhancements under rule 36.17 (4) CPR to a claimant who makes a high Part 36 offer where (i) the amount of the offer was not justified by the strength of the claim as perceived at the time of the offer and (ii) the offer is being used as a tactical step towards potentially recovering higher costs and interest instead of a genuine attempt to settle the dispute.

Part 36 offers are one of the most important tactical steps that parties can take in legal proceedings, although they may not be appropriate in every case or at every stage of a case. Before accepting or making a Part 36 offer, it is important that legal advice is sought as soon as possible.

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