99% Offer Not a Genuine Attempt to Settle Pursuant to CPR Part 36

15 September 2023

Introduction. In *Yieldpoint Stable Value Fund, LP v Kimura Commodity Trade Finance Fund Ltd* [2023] EWHC 1512, the High Court held that the claimant's 'very high offer' of 99% of the principal claim was not a genuine attempt to settle the proceedings, and so it was unjust to allow the claimant certain post-judgment monetary enhancements pursuant to CPR 36.17(4).

Background Facts. On 9 January 2023, the claimant, Yieldpoint Stable Value Fund, LP ("Yieldpoint"), made an offer pursuant to Civil Procedure Rule Part 36 (the "Part 36 Offer"). The Part 36 Offer sought a sum of US$4,950,000 (i.e. 99% of the claim value),[1] and stated, inter alia:

- "*Our client is confident that it has a strong case against your client, and is entitled to substantial damages, as set out in the Particulars of Claim*"; and
- "*The Settlement Sum* [i.e. US$4.95 million] *is inclusive of interest*".

On 22 May 2023, Yieldpoint succeeded in its claim against the defendant, Kimura Commodity Trade Finance Fund Limited ("Kimura"), for repayment of US$5 million plus interest. Subsequently, on 8 June 2023, Yieldpoint invoked the Part 36 Offer and served its statement of costs. Kimura's solicitors responded on 16 June 2023 objecting to the applicability of the post-judgment enhancements set out in CPR 36.17(4)(a)-(d) in favour of Yieldpoint. Kimura contended that such enhancements would be "*unjust*", including because the Part 36 Offer was not a "*genuine attempt to settle the dispute*".

The Law. CPR 36.17 deals with the costs consequences of a Part 36 offer following judgment. CPR 36.17(4) provides that:

[1] When accrued interest (calculated at the expiry of the 21-day acceptance period (30 January 2023)) was factored in, the Part 36 Offer represented c. 96% of the principal claim as at 30 January 2023.

> "*(4) Subject to paragraph (7), where paragraph 1(b) applies,*[2] *the court must, unless it considers it unjust to do so, order that the defendant is entitled to —*
>
> *(a) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period*[3] *expired;*
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> *(b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;*
>
> *(c) interest on those costs at a rate not exceeding 10% above base rate; and*
>
> *(d) […] an additional amount, which shall not exceed £75,000 […]*"

In considering whether it would be unjust to make the orders referred to at CPR 36.17(4)(a)-(d), CPR 36.17(5) provides that the court must take into account all the circumstances of the case, including:

> "*(a) the terms of any Part 36 offer;*
>
> *(b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;*
>
> *(c) the information available to the parties at the time when the Part 36 offer was made;*
>
> *(d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and*
>
> *(e) whether the offer was a genuine attempt to the settle the proceedings*".

The Judgment. Stephen Houseman KC (sitting as a High Court Judge) held that Yieldpoint's Part 36 Offer was not a genuine attempt to settle the proceedings under CPR 36.17(5)(e), and concluded that it would be "unjust" to grant Yieldpoint any of the enhancements under CPR 36.17(4).

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[2] CPR 36.17(1)(b) applies where judgment against the defendant is at least as advantageous to the claimant as the proposals contained in the claimant's Part 36 offer.

[3] The 'relevant period' means the period specified under CPR 36.5(1)(c) or such longer period as the parties agree (CPR 36.3(g)(i)). CPR 36.5(1)(c) provides that a Part 36 offer must specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs if the offer is accepted.

In making his decision, the Judge considered that CPR 36.17(5)(e) was not confined to so called '100% offers' made by claimants seeking to avail themselves of the benefits of CPR 36.17(4) when they obtain a monetary judgment "*at least as advantageous*" as their own prior Part 36 offer. The Judge also noted that for the purposes of considering whether an offer was a genuine attempt to settle the proceedings, it was not necessary to demonstrate that such an offer was being used as a 'tactical step'. In fact, the Judge noted at [14] that:

"*all Part 36 offers are made for tactical purposes - such procedural behaviour is both encouraged and supported in the interests of promoting settlement of disputes. That said, an offer which is a cynical attempt to manipulate the Part 36 regime and apply pressure on an adversary is unlikely to be effective for such purposes*".

The Judge also observed a theme arising out of the decided cases he was directed to on the issue; namely, that a 'very high claimant offer' (i.e. an offer involving a very small or negligible discount against the gross value of the claim and/or waiver of accrued interest) may only be vindicated where the claim itself was "*obviously very strong*" and could be so characterised at the time of the relevant offer. The Judge found that this was not a case where a 'very high claimant offer' reflected a very strong prospect of the claimant succeeding at trial. In fact, the Judge noted that the "*outcome of this dispute remained up for grabs to the end*". The Judge considered that the parties were also diametrically opposed in terms of their characterisation and understanding of the deal they had concluded. In this context, the Judge held that a discount of 1% in the claimant's Part 36 Offer was "*meaningless*" and amounted to saying "*pay up now, accept that you are wrong*".

Moreover, whilst the terms of the Part 36 Offer involved foregoing a six-figure sum of interest, this was not how the offer was pitched. On the contrary, the stated rationale was an expectation of "*substantial damages*" whilst the inclusion of interest within the Part 36 Offer lacked any context or calculation.

In his closing remarks, the Judge noted that his conclusion "*should not be taken as any kind of discouragement to claimants 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*".

Commentary. In Yieldpoint, the English Court has made clear that Part 36 tactical offers are "*both encouraged and supported in the interests of promoting settlement of disputes*". However, a 'very high' Part 36 offer will only be appropriate where the claim itself is "*obviously very strong*" at the time of the relevant offer. The question of whether a Part 36 offer is 'too high' (i.e. whether it constitutes a genuine attempt to settle), will involve an objective assessment of the specific facts of the case at the time of the

relevant offer, and so far as possible, be conducted without the benefit of "*hindsight gifted by a trial and its known outcome*".

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