NEW PRESSURE TO COMPROMISE

Goodbye to the posse and the subpoena. Hello to Part 36 Offers - new mumbo-jumbo?

In 1999 our civil litigation system was blessed with new rules as a consequence of the Woolf Reforms which were primarily aimed at reducing delay and cost in litigation but which took the opportunity at the same time to sweep out gobbledygook, in particular Latin. So, "subpoena" gave way to "witness summons", "garnishee" to "third party debt order" etc. "Posse" is Latin too, which would have surprised John Wayne, but we had not used posses for years. Of course, the new rules gave rise to new gobbledygook, e.g."Part 36 Offer".

Payments in

Before 1999 we all understood payments into court. If a Claimant sued for £100 and the Defendant thought he was probably liable for something but £100 was exaggerated, he could pay into court say £45. This payment was kept secret from the trial Judge until after the judgment and revealed only when costs had to be sorted out. The Claimant knew that there was £45, certain, in cash available for him if he was prepared to compromise at £45 and call it a day. The payment-in became significant when the Claimant succeeded but for ***less*** than £45 and did not "beat" the payment-in. From the date of the payment-in the Defendant would not have to pay any costs to the Claimant, and the Claimant would have to pay the Defendant's costs. This reversal of the costs burden, particularly where the successful payment-in had been made early on in the proceedings, could have a dramatic effect on the overall outcome.

Part 36 offers

Instead of payments-in we now have Part 36 Offers. These are also kept secret from the trial Judge until costs come to be determined, but they are different from payments-in in three ways. First, no cash is required: our Defendant can now simply write a formal letter offering to pay £45, and if the Claimant accepts within three weeks it is assumed that the Defendant will have available the £45 plus the Claimant's costs up to that stage. If the Defendant does not pay, the Claimant can apply immediately for judgment for £45 plus costs.

The second difference is that whereas a payment-in could be made only by a Defendant, Part 36 Offers can be made by both Defendants and Claimants. The rules and the courts encourage both to consider making Part 36 Offers, for good reason. In our case, the Claimant could, after suing for £100, or even before suing, make a Part 36 Offer offering to accept say £60.

For Defendants making Part 36 Offers, the consequences are much the same as for payments-in except that the Defendant does not actually have to put up the cash. (The NHS, for example, objected with some justification to paying large sums of money into court to remain idle pending the outcome, when those funds could have been put to far better use in the interests of patients).

It is in connection with costs and interest that the Part 36 regime penalises Claimants who reject a Defendant's Part 36 Offer and then fail to "beat" that offer: the Claimant in these circumstances will probably have to pay the Defendant's costs from the date of the Part 36 Offer on the indemnity basis (more generous than the standard basis) and may have to pay interest on those costs at a very high rate, namely base plus 10%.

For Claimants the incentive to make a Part 36 Offer is this: if the Claimant having sued for £100 makes a Part 36 Offer to accept £60 and then (after rejection of that offer) is awarded more than £60 by the trial court, he can seek costs at the indemnity rate, interest at base plus 10% on the damages, and interest at base plus 10% also on the costs.

For both Claimants and Defendants these are powerful considerations.

Commercial and property litigation

The regime created by Part 36 was largely motivated by the desire to cut down the number of personal injury and clinical negligence cases, which constitute the overwhelming majority of the workload in certain civil courts. (There was also a disturbingly large proportion of such cases in which the costs exceeded the damages).

The dynamics of commercial litigation and property litigation are, sadly, seldom as straightforward as run-of-the-mill personal injury cases. For example, counterclaims are frequent, as is serious consideration about the solvency of the Defendant, and the relief claimed may well be something other than money, such as an injunction, a possession order or a declaration about the validity of a trademark. Such claims do not fit easily with a Defendant's offer to pay money to buy off the claim.

Accordingly, the standard Part 36 Offers of the type discussed above may require intricate adjustment in order to suit the needs of the commercial or property litigation, which in turn contributes to the potential difficulty for the court at the end of the trial in determining whether the offer has been "beaten" or not.

Despite the possible difficulties of Part 36 Offers in commercial and property cases, litigants should give serious consideration not only at the outset but from time to time as the case progresses to making or revising (and, obviously, to accepting) Part 36 Offers, which

1. Will compel the parties to make an objective assessment of the value of their claim or defence
2. May promote negotiations
3. Do provide a platform for increased costs claims
4. Can pay dividends, such as interest of 15% per annum, and
5. Must inevitably cut down the number of cases which proceed through litigation when they should have been resolved.

Forget the subpoena, the posse and John Wayne: latch on to Part 36 Offers. You will need to understand them.

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