

CASE NOTES

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PART 36 AND THE “ORDINARY LAW OF CONTRACT”

Hubert Scammell and others v. Margaret Dicker

(2001) 98(7) L.S.G. 41 (C.A.) (Aldous and Mance L.JJ.)

INTRODUCTION

It only takes a moment's glance at the footers of the Stationery Office edition of the Civil Procedure Rules 1998, each giving the date of its last amendments, to see that Part 36, governing payments into court by defendants and the equivalent claimants' offers,¹ has been amended at least as much as any other rule. An idle comparison between the existing rule and practice direction, newly amended in February 2001, and the original draft in the famous “brown book” appended to Lord Woolf's final report demonstrates a process of shaping and reshaping of the rule that is, in this writer's opinion, yet to be completed. Practitioners will recall the initial uncertainty over CPR r. 36.20 which in its initial version, omitting the word “defendant's” from r. 36.20(1)(b), suggested that a claimant could be penalised for a failure to beat his or her own offer.

It is, of course the penalties² that render discussion of Part 36 of such immediate relevance to practitioners. There are penalties on both sides: the obvious penalties against the recipient of a payment or offer defined in rr. 36.20 and 36.21; and the less transparent penalty potentially suffered by a party making a payment or offer: that of having it accepted with such alacrity that it becomes clear the payment or offer was too generous. The parties are, in effect, penalised for a failure to come to an agreement or for coming to an agreement that unduly benefits one party. The latter is – as in the general law of contract – a matter of normal business hazard. It is the fact that the basis of CPR Part 36 is a sanction for a failure to come to an agreement that takes

¹ CPR Part 36 adds to the pre-existing defendant's payment into court (now CPR r. 36.3) the further possibilities of a defendant's offer in relation to non-money issues such as apportionment of liability (in effect regulating the common-law *Calderbank* offer, see for example CPR r. 36.5(4)) and offers to settle by claimants (for money or otherwise). If a claimant's offer is not accepted but is not “beaten” at trial by the defendant – for example, because the offer was to settle for £80,000 and the final award of damages was £100,000 – the defendant will be ordered to pay in addition to the damages awarded, interest of 10% above base rate from the date the offer could have been accepted, indemnity costs for the same period, and interest on those costs again at 10% above base rate: CPR r. 36.21. For an application of this sanction, see *Little and others v. George Little Sebire & Co.*, *The Times*, 17th November 1999.

² A common but in principle inaccurate description, a judicial preference having been expressed for regarding the costs and/or additional interest as no more than one amongst an armoury of sanctions available to ensure compliance with the rules now governing civil litigation in England and Wales: see *All-in-One Design and Build Ltd v. Motcomb Estates Ltd and another* (2000) 144 S.J.L.B. 219. One must, however, make a significant distinction between this and other sanctions; – here the party is being sanctioned for a failure to give up his or her case, a failure to forfeit the day in court.

it beyond the normal law of contract. It is, however, the interface between the law of contract and the special provisions of CPR Part 36 that informed the discussion of the Court of Appeal in *Scammell v. Dicker*.

THE FACTS

The facts relevant to this discussion are simple. The defendant made a Part 36 offer in a claim related to the grant of a declaration – and it is significant here to distinguish a Part 36 offer by a defendant from a Part 36 payment by a defendant in a money claim³ – less than 21 days before trial but otherwise apparently in proper format. Proper format in the circumstances requires the offer, *inter alia*, to “be expressed to remain open for acceptance for 21 days from the date it is made”.⁴ In fact, and because of the proximity of the trial, the offer could not in any event be accepted without either agreement between the parties as to costs or the permission of the court.⁵ Five days later the defendant withdrew her offer. The claimants then purported to accept the offer, to reach agreement as to costs and sought to adjourn the trial. At first instance it was considered that to allow the offer to be withdrawn flouted the spirit of the CPR. The Court of Appeal disagreed.

PREVIOUS AUTHORITY AS TO WITHDRAWAL

Given, as has been previously explained, the natural desire of the profession to concentrate on the sanctions and the circumstances in which they will be applied or disapplied, it is not surprising that the majority of the existing case law concentrates in that area.⁶ The existing case law as to withdrawal of the offer appeared to consist of a single decision in the Technology and Construction Court: *Pitchmastic plc v. Birse Construction Ltd (No. 2)*.⁷ Here, after the trial, but presumably prior to judgment, the claimants purported to accept a defendant’s offer that they had rejected before the trial. Dyson J. held that the ordinary rules of offer and acceptance applied to define whether or not a contract of compromise had been achieved.⁸ The offer had expired on its rejection⁹ and, unlike a Part 36 payment,¹⁰ no permission was required to withdraw it. This distinction between the Part 36 payment and the Part 36 offer was reinforced by the Court of Appeal in *Scammell v. Dicker* on the following grounds:

³ See note 1, *supra*.

⁴ CPR r. 36.5(6)(a).

⁵ CPR r.36.5(6)(b) and r 36.11 (2).

⁶ *Little and others v. George Little Sebire & Co.*, note 1, *supra*; *Ford v. GKR Construction Ltd and others* [2000] 1 W.L.R. 1397; *Jones v. Jones*, *The Times*, 11th November 1999; *All-in-One Design*, note 2, *supra*; *Petrotrade Inc. v. Texaco Ltd*, *The Times*, 14th June 2000; *Amber v. Stacey* [2001] C.P. Rep. 26; *Norwegian Cruise Line Ltd v. Thomson Holidays Ltd*, 2001, Lawtel Doc. C0100729, Ch. D.; *Clark Goldring & Page Ltd v. ANC Ltd*, *The Times*, 27th March 2001.

⁷ *The Times*, 21st June 2000.

⁸ There is insufficient scope in this casenote to discuss whether the doctrine of forbearance to sue is adequate to provide consideration in every case in which the use of Part 36 results in a settlement. In many ways it is attractive to consider the offer to be unilateral, provision of the appropriate notice of acceptance being itself the consideration. The decision in *Scammell v. Dicker*, however, that a Part 36 offer can be withdrawn at will causes some theoretical difficulty with a “unilateral contract” analysis. In terms of the latter, once performance has begun – for example the notice of acceptance has been posted but is yet to arrive (the “postal acceptance rule” being ousted by CPR r. 36.8(5)) – it may no longer be possible to withdraw the offer: see *Errington v. Errington* [1952] 1 K.B. 290 and the accumulating comment thereon.

⁹ The logical corollary, apparently accepted in this case, is that a Part 36 payment ceases to be effective on rejection even though the intervention of the court is required before it can be withdrawn (CPR r. 36.6(5)).

¹⁰ CPR r. 36.6(5).

- a) Part 36 does not state that an offer cannot be withdrawn;¹¹
- b) An offer made not less than 21 days before trial need only be initially “expressed” to remain open for 21 days.¹² There was no requirement that it *remain* open that long and there was no similar requirement for an ostensible validity period for the offer where it was made closer than 21 days to trial;¹³
- c) Nor was it contemplated by the rules that the offeror would be prevented from withdrawing the offer until a “reasonable period” had expired;¹⁴
- d) CPR r. 36.5(8) only set out the effect of withdrawal but placed no time limit on withdrawal. If the offer could not be withdrawn, that could cause hardship in which case one might expect a similar provision to that governing Part 36 payments in CPR r. 36.6(5) requiring the court’s permission to be obtained.

The Part 36 offer was, ultimately, defined as an offer to enter into a contract and it is axiomatic that an offer to enter into a contract can be withdrawn.¹⁵

CONCLUSION

Clearly, if it is a contractual offer, a Part 36 offer or payment is an unusual species of offer. Its format is prescribed, as are many of its terms. In one of its manifestations – the Part 36 payment – withdrawal of the offer is subject to the permission of the court.¹⁶ If its acceptance creates a contract, is the consideration forbearance to sue or is it a unilateral offer?¹⁷ It is an offer, which, if not positively withdrawn or rejected, the offeror can be held to after its ostensible 21-day validity has expired.¹⁸ It is an offer, the failure to accept which can be sanctioned. The reason, it is submitted, that the ordinary law of contract has to be used to define the effect of withdrawal of a Part 36 offer is simply that, as recognised in *Scammell v. Dicker*, neither Part 36 nor Practice

¹¹ Indeed, the only reference to withdrawal of an offer is in CPR r. 36.5(8) – “If a Part 36 offer is withdrawn it will not have the consequences set out in this part”.

¹² CPR r. 36.5(6).

¹³ CPR r. 36.5(7).

¹⁴ Indeed, the contrary has applied where – entirely within the contemplation of the rules, the offer is accepted late: see for example, *R. v. Secretary of State for Transport, ex parte Factortame Ltd and others (No. 6)*, *The Times*, 10th January 2001.

¹⁵ *Byrne & Co v. Van Tienhoven* (1880) 5 C.P.D. 344. Clearly, however, additional consideration can be given, creating a contract to keep the offer open for a prescribed period. Simple logistics will normally prevent difficulty in the case of a Part 36 payment where the money is under the supervision of the court and will be paid to the acceptor by the court. Where there is a Part 36 offer, and specifically a claimant’s Part 36 offer to accept a sum of money in settlement of a claim, then what is the effect of a failure to pay? CPR r. 36.15 (5) would seem to suggest that, for enforcement purposes, it is not necessary to regard the acceptance as creating a contract as the court has specific power to enforce the agreement. However, if acceptance of the offer creates a contract, that contract will be enforceable outside the ambit of Part 36. It is suggested that this is particularly necessary in the one circumstance where the separate jurisdiction to enforce does not apparently apply; namely where both offer and acceptance take place prior to issue of proceedings under CPR r. 36.10. In early drafts of Part 36 the pre-issue offer was made explicitly analogous to the post-issue offer. This has not survived into the operational rules. It is in this case, that presumably the parties will have to rely on the doctrine that forbearance to sue can amount to consideration: see *Halsbury’s Laws of England Vol: Contract* at para. 740.

¹⁶ Of course leave was always necessary to withdraw a payment into court (RSC Ord. 22 r. 1(3)), essentially, it can be inferred, on logistical grounds. The existence of the Part 36 offer and the decision that a Part 36 offer can be withdrawn at will creates a discrepancy between the various forms of offer available under CPR Part 36 (in view of the differing penalties on claimants and defendants imposed by CPR rr. 36.20 and 36.21, one might indeed say, a further discrepancy, except that here a defendant’s Part 36 offer in a non-money claim will have the same effect as a claimant’s Part 36 offer in any claim). Pre-CPR case law suggested that there had to be good reason before a payment into court could be withdrawn (*Cumper v. Potheary* [1941] 2 All E.R. 516). Current policy will define whether or not a payment can be withdrawn by the principles of CPR Part 1: the overriding objective: *Marsh v. Frenchay Healthcare NHS Trust*, *The Times*, 13th March 2001.

¹⁷ See note 8, *supra*.

¹⁸ See CPR r. 36.11(2)(b) and r. 36.12 (2)(b).

Direction 36 regulate *how* such an offer can be withdrawn. Normally, of course, the litigation will be in the hands of solicitors and any withdrawal will be by letter. But for as long as the ordinary law of contract applies to the withdrawal; that withdrawal can be oral, or even notified to the offeree informally by someone other than the offeror.¹⁹ If the principle of CPR r. 1.4(f) is to be followed, it is acceptance, rather than withdrawal, that should be encouraged. A simple but clear mechanism regulating withdrawal of offers should, it is suggested, be added to CPR Part 36 for the benefit of all.

JANE CHING*

¹⁹ *Dickinson v. Dodds* (1876) 2 Ch. D. 463.

* M.A.(Cantab.), Solicitor, Principal Lecturer, Nottingham Law School. As so often, I am grateful to my colleague Maureen Maksymiw for the benefit of an informed discussion on the implications of this case.