

Show me the money

Fiona Gillett reports on an application for payment on account of costs after a part 36 offer was accepted, where the High Court said claimants should not be kept out of their monies

In an unreported case, the Commercial Court recently held that where a part 36 offer accepted by the claimants stated in relation to costs that 'the offer... is intended to have the consequences set out in part 36', the claimants were entitled to a payment on account of costs pursuant to CPR rule 44.3(8) notwithstanding the reference in the part 36 offer to the defendants paying the claimants' reasonable legal costs 'to be the subject of detailed assessment'.

To avoid the risk of enforcement measures being taken against them, defendants making part 36 offers need to have sufficient funds available to meet not only the principal amount offered in settlement of the claims (with such liquid funds being available within 14 days of acceptance of the part 36 offer), but also any payment on account of costs ordered by the court before the start of detailed assessment proceedings.

Defendants cannot and should not bank on it taking time for detailed assessment proceedings to run their course, thereby allowing defendants time to generate additional funds or realise non-liquid assets to meet the claimants' costs.

Background

In the claim, the subject matter and associated matters of which are the subject of confidentiality provisions between the parties, the defendants made a part 36 offer which included the usual wording that the defendants would be liable for the claimants' reasonable costs of the proceedings in accordance with CPR rule 36.10 but then went on to add that such costs were 'to be the subject of detailed assessment'.

On serving notice of acceptance of the part 36 offer, the claimants stated that they would be seeking a payment on account of costs immediately.

Further, as a case management conference (CMC) had been listed



before the part 36 offer was made, in accordance with their duty to inform the court promptly if any court hearings are to be vacated, the claimants' solicitors also wrote immediately to the Commercial Court to advise of the claimants' acceptance of a part 36 offer and requesting that the CMC hearing be vacated. By copy of such letter to the defendants' solicitors, the latter were requested to confirm directly to the court their agreement to this, which they duly did.

Within days of the part 36 offer being accepted, the claimants sought agreement from the defendants on their costs, alternatively that they agreed a payment on account of 50% of the claimants' costs (by reference to a schedule of costs).

In response, the defendants disputed the amount of costs sought by the claimants and refused to make

Why are we waiting? Whilst there had been no trial, this was not a bar to making an order for a payment on account of costs

any offer in advance of the conclusion of a detailed assessment. They stated: '[We] intend to seek a detailed assessment of all of [the claimants'] costs, consistent with the basis of [the] part 36 offer as accepted by [the claimants]. To be clear, the part 36 offer proposed by [the defendants] specifically stated that costs would be addressed and duly met following detailed assessment. [The claimants] should not have accepted the part 36 offer if they were not willing to accept this term.'

The claimants proceeded to issue an application pursuant to CPR rule 44.3(8) for a payment on account of costs, supported by evidence from a costs draftsman as to the likely irreducible minimum the claimants would recover on a detailed assessment. Mr Justice Simon heard the application.

Jurisdiction

The claimants submitted that, in circumstances where a part 36 offer is accepted, the court has jurisdiction to order a payment on account despite the preamble to CPR rule 44.3(8), which says that the power applies 'where the court has ordered a party to pay costs', because CPR rule 44.12(1) provides that a costs order will be deemed to have been made on the standard basis where a part 36 offer is accepted.

Further, the reference in the part 36 offer to the defendants paying the claimants' reasonable legal costs 'to be the subject of detailed assessment' was simply the standard phraseology to limit the amount that the defendants are liable to pay to the amount allowed on assessment but it is not inconsistent with the right to seek a payment on account.

This was reinforced by the notice of acceptance, which specifically said that the claimants would be seeking a payment on account of costs immediately; by confirming to the court that the CMC hearing be vacated as a result of the notice, the defendants could not therefore suggest that the notice of acceptance was a counter-offer.

In opposition, the defendants argued, amongst other things, that the costs order in this case had not been made by the court but was the result of an agreement between the parties contained in a part 36 offer made by the defendants and accepted by the claimants, and which did not include a provision for there to be a payment on account of costs prior to the determination of those costs by detailed assessment.

The defendants contended that the claimants could have insisted, as a term a settlement, that there be a payment on account of costs absent which no settlement would be agreed, but they did not do so and the court should not, in those circumstances, exercise its discretion in favour of ordering a payment on account of costs.

Simon J held that following the acceptance of a part 36 offer, there was jurisdiction to order a payment on account of costs pursuant to CPR rule 44.3(8). The wording of the part 36 offer did not preclude the claimants from seeking an order for a payment on account of costs and the

notice of acceptance made it clear that the claimants would be seeking such an order. The question in this case was rather whether it should be made and if so, in what amount

Discretion

It was common ground between the parties that there is no presumption in favour of a payment on account (*Blackmore v Cummings* [2010] 1 WLR 983). The principles to be considered by the court in deciding whether to exercise its discretion include the following:

For:

- A substantial sum will almost certainly be shown as due to the receiving party by way of costs on a detailed assessment and the winning party should not be kept longer than is necessary out of recovering part, at least, of its costs;
- There has been no delay in commencing detailed assessment proceedings but due to the substantial nature of the bill of costs and the likely points of dispute to be prepared, it will be some months before an assessment can take place and an interim costs certificate under CPR rule 47.15 can be sought;
- There is doubt as to whether the paying party will be good for the costs, plus interest (eg, there is a risk of dissipation of assets); and
- The paying party's conduct (eg, in fraud cases).

Against:

- The costs of the application (for a payment on account) are not justified by the amount at stake or because an early detailed assessment is anticipated;
- The paying party will be good for the costs ultimately ordered, including interest (with interest – currently at 8% pa – adequately compensating the receiving party for any delay);
- The court does not have any detailed knowledge of the case and therefore of the reasonableness or otherwise of the costs incurred;
- The court does not have sufficient detail (or breakdown) of the receiving party's costs;
- The potential effect of any order

and the potential prejudice to the paying party from the order being made; and

- The receiving party would not be good for any money if repayment is necessary following a detailed assessment hearing.

Judgment

Simon J weighed the importance of the claimants not being kept out of monies longer than necessary against the defendants' objections to a payment on account.

He held that the claimants were entitled to seek a payment toward their legal costs, rather than wait for the end of detailed assessment proceedings, and that whilst there had been no trial, this was not a bar to making an order for a payment on account of costs.

The court had a statement of costs in the form usually seen in litigation (on summary assessments of costs), together with evidence from a costs draftsman whose view was that it was unlikely that there would be a significant reduction on a detailed assessment. Simon J concluded, therefore, that this was an appropriate case for an order for a payment on account of costs.

As to quantum, Simon J noted that, whilst the defendants were individuals and had argued that it would be difficult for them to raise large sums of money at short notice, the defendants' evidence (and their solicitors' correspondence) confirmed that they had assets sufficient to meet an order (even if this meant selling or charging properties).

Based on the claimants' statement of costs and on the evidence of their costs draftsman, but allowing a discount for possible reductions which the costs draftsman and the court could not foresee, Simon J ordered a payment on account of costs of £350,000.

He did, however, afford the defendants three months to pay £300,000 of the £350,000, with the balance of £50,000 together with the costs of the claimants' application (summarily assessed) to be paid within the usual 14 days.

Fiona Gillett is a partner at London law firm Stewarts Law, which acted for the claimants in this case