



New - 10% additional damages if offers to settle are refused

13 March 2013

Summary

From 1 April 2013 a new sanction against defendants (or reward for claimants) will apply where it can be shown that the defendants should have accepted an offer to settle made by claimants. New rules will come into force to discourage litigation going to Court and to put pressure on defendants to seriously consider claimants' offers to settle or else risk potential financial penalties of up to £75,000.

The New Law

From 1 April 2013, under the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO), Part 36 of the Civil Procedure Rules (CPR) will be changed to equalise the incentives between claimants and defendants to make and accept reasonable offers. A new reward/sanction will be introduced, to be paid by defendants who fail to accept a claimant's reasonable offer that is not matched or beaten at trial as follows:

- on money claims and claims involving a monetary element - the reward will be calculated as 10% of the amount awarded up to £500,000, with 5% of the award between £500,001 and £1,000,000, with an overall cap of £75,000;
- on non-money claims - the reward will be based on costs ordered to be paid to the claimant, but otherwise with the same approach and cap as on money claims.

Comment

Offers to settle can have serious consequences. If a claimant makes an offer to settle but the defendant refuses to accept, then from 1 April there are new financial penalties. These changes are in addition to the existing sanctions under Part 36 and will require practitioners to review Part 36 offers even more carefully and with very different considerations depending upon which side of the claim you sit:

- for claimants - the tactical use of Part 36 Offers should be further encouraged to obtain the benefits of these changes and apply increased pressure upon the Defendant accept a reasonable settlement offer at an early stage;
- for defendants - Part 36 offers from a claimant must be reviewed with even more caution and evaluated early on, particularly taking into account the additional liability that the defendant may face if a reasonable offer to settle is refused.

Explanation

If a defendant makes an offer to settle then the claimant needs to decide if he is going to accept. If the claimant does not accept and it turns out that he should have accepted (because the trial outcome gives him less than the defendant's offer to settle), then the Claimant might have to pay his own costs and the defendant's costs from when the offer to settle was made even though the claimant was successful and the outcome of the trial was that the defendant was liable.

Litigation costs can be high and the chance of having to pay both sides' costs is a very significant risk for claimants. A defendant's offer to settle is, therefore, a powerful weapon.

However if a defendant refuses to accept a reasonable offer made by the claimant, the claimant will have to continue its claim and incur costs even though it is not at fault.

If a claimant makes an offer to settle, then the defendant needs to decide if he is going to accept. If the defendant does not accept and it turns out he should have accepted the claimant's offer, then the defendant might have to pay his own costs and the claimant's costs from when the offer to settle was made, but this is fair because the defendant has lost and the usual rule is that the loser pays the total costs anyway.

New rules as part of various court reforms have been introduced to penalise defendants who fail to accept reasonable claimant's offers to settle.

Example

A claimant claims £250,000 damages in June 2013. In August 2013 the claimant says it will accept £100,000 plus the claimant's costs to that date of £20,000. This offer is made "without prejudice save as to costs" (under CPR Part 36) so that it can be brought to the attention of the Court after the trial in respect of the reasonable conduct and liability for costs. The defendant refuses and the trial takes place in December 2013 with the result that the defendant is ordered to pay £150,000 in damages (£50,000 more than the claimant's offer to settle). The claimant will argue that the defendant should have accepted his offer of £100,000 made in August. As the defendant has failed to better the claimant's Part 36 offer of £100,000 at trial, the existing rules mean that the defendant could be liable to pay the claimant's costs as well as his own costs from when he failed to accept the claimant's offer. The new rules will also mean that the defendant will have to pay an extra penalty of 10% of the damages awarded of £15,000.

The following table illustrates this example:

Defendant's Position if Claimant's Offer Accepted	
Offer sum	£100,000.00
Claimant's costs to August	£20,000.00
Defendant's costs to August	£20,000.00
Total:	£140,000.00
Defendant's Position if Claimant's Offer is Refused	
Damages	£150,000.00
New penalty (10% of damages)	£15,000.00
Claimant's costs to August	£20,000.00
Claimant's costs to December	£50,000.00
Defendant's costs to August	£20,000.00
Defendant's costs to December	£50,000.00

Total:	£305,000.00
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(Note - Simplistic example for illustration only)

Conclusion - The defendant will bear additional costs of £165,000 including a £15,000 penalty because the claimant's offer was refused.

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