

SETTLEMENTS

General

Most disputes between parties are not resolved by a Court judgement. Instead the parties reach a settlement in the light of what is likely to occur in view of the facts as they appear, the law and the entire circumstances.

Settlements will sometimes come after direct negotiation or sometimes following the use of so called "Alternative Dispute Resolution" procedures. Sometimes it is enough that the terms of the settlement is recorded in correspondence. Often, however, there would be a more formal settlement agreement. A person by whom or against whom a claim is made can make a so called "Part 36 Offer".

A claimant can offer to settle his claim for a specified sum or on terms, if there is no monetary claim. If the defendant does not accept this offer and the claimant is later awarded a greater sum or more advantageous terms by the court, the defendant is likely to suffer a heavy financial penalty for not settling. The claimant will not generally recover costs incurred after this offer, if he is later awarded a lesser sum or less advantageous terms.

Part 36 Offers

A Defendant may make a Part 36 Offer. This requires payment of monies into Court. Where the claimant does not accept an offer made by the defendant and the claimant is awarded more than the amount offered, the Court would normally order the defendant to pay the claimant's costs. If, the award is less, the Court may either order the costs to be paid by the defendant or may make an order splitting the liability for costs.

Where a party makes a part 36 offer, this will not become known to the judge until after the dispute has been decided in full. Only at that point will the Part 36 Offer be

considered in the context of the court's decision as to which side shall pay for costs of the legal proceedings.

The offer must be open for 21 days and must comply with certain terms and conditions. In the case of an offer by a defendant, it must include an offer to pay the costs up to that date. If a money claim is involved and a so called Part 36 Offer is made, then the payment must be made in to Court within 14 days of the service of claim form.

Tactical Considerations

The above possibilities give "teeth" to prompt and realistic settlement offers. A defendant needs to make a careful assessment of how much to pay in. An over generous payment will be snapped up, while an unrealistically low payment will not put any real pressure on the claimant to accept. The defendant will wish to pitch his claim at a level that is high enough for the claimant to feel that it would be unsafe not to accept it.

Where proceedings have been started, the only way the defendant can obtain protection against costs is by making a formal part 36 Offer. Where a claim has both monetary and non monetary elements, an offer can be made in respect of the monetary and non monetary element.

With non-monetary elements of a claim, the claimant can make an offer setting out the terms on which he is prepared to settle. If the claimant does not "beat" the offer no specific penalty is imposed. However, the offer can be taken into account by the Court in exercising its discretion as to costs, particularly if the claimant has an exaggerated claim.

If the claimant does better than his offer, the Court will, unless it considers unjust to do so, award interest on the whole of the sum awarded to him at a rate not exceeding 10% above the Bank of England base rate and allow him to recover his costs on a full indemnity basis i.e. pound for pound and be awarded interest on those costs. This effectively gives a very significant incentive to a defendant to settle on reasonable terms offered by a claimant.

The offer made by the claimant can be less than the amount claimed. For example, proceedings might be started seeking £50,000. The claimant can offer to accept £40,000. If the defendant rejects this offer and the ultimate award (making allowance for the extra interest from the date of the offer to the trial) is greater than the amount for which the claimant would have settled, the defendant will effectively be penalised for wasting the time and money of the claimant and the Court since that date. The Court will impose these penalties unless it is unjust in the circumstances. It can take account of the full circumstances and the information available to the parties and the conduct and reason for refusing to accept the offers.

Supposing a claimant claims breach of contract damages of £75,000 plus interest. He makes a formal offer to settle for £60,000, utilising the procedures. If the claimant wins but does not beat his offer he will be awarded his costs on a standard basis. If he wins and beats his offer the defendant will be ordered to pay damages and unless a Court considers it just will be subject to penalty interest and his costs on an indemnity basis from the date at which the claim could have been settled forward.

This Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances.

This Guide should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances.

While we have taken due care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in this Guide. The reader should rely only on specific legal or taxation advice.