

## Part 36 revealed

In April 2001, we celebrated the second anniversary of the implementation of Lord Woolf's Civil Procedure Rules ('CPR') in the English Courts. One of the overriding objectives set by Lord Woolf was that the new system should not only be just and fair, but that it should be understandable and accessible to the layman. With this in mind, the CPR disposes of the old, over-elaborate language of the courts and introduces some new, more commonplace, expressions. So a "plaintiff" becomes a "claimant", a "writ", becomes a "statement of case", "discovery" of documents becomes "disclosure" and anything previously done with "leave" of the court is now done with the court's "permission".

The CPR however has also developed a new language of its own. "Payments into court" become "Part 36 Offers and Payments". So what are they?

Part 36 Offers and Payments are part of the new armoury to encourage claimants and defendants to settle disputes before trial. Part 36 of the CPR makes some important changes to the old "payment into court"

system. Under the old system, a defendant to a claim could make a payment into court. In doing so, he offered to settle the claim at that sum, though he did not admit liability to pay all or any part of that claim. Such a payment might be motivated by any number of reasons, but its chief purpose was to try to protect the defendant from exposure to his opponent's costs if the court found him liable at trial. The plaintiff could withdraw the defendant's payment from court in full and final settlement.

If the plaintiff did not withdraw the payment in (and the matter did not settle on some other basis), the matter continued to trial. If the court ultimately awarded him less than the payment in, the plaintiff recovered his damages from the defendant. However, he then had to pay the defendant's costs incurred from the date of the payment in until judgement.

This procedure is mirrored in the CPR though a defendant will now make a "Part 36 Payment" into court. A Part 36 Payment is an "all inclusive" offer representing the claim plus interest. It can be made at any time after proceedings have been commenced. Once made,

the claimant will generally have 21 days to accept that payment. If he accepts then the claim will be stayed and he will be entitled to recover from the defendant his costs to date on a standard basis. If he does not accept he risks exposure to the defendant's costs as before, even if his claim succeeds.

New under the CPR, is the fact that the claimant can now make an offer to settle, known as a "Part 36 Offer". Clearly this will not be backed by a payment in but it is an indication of willingness by the claimant to settle his claim for a particular sum, again inclusive of interest. This may give a claimant tactical advantages. The penalties for a defendant who refuses to accept a reasonable offer can be severe. If a Part 36 Offer is refused and the claimant recovers at trial at least that amount, the court then has discretion to penalise that defendant from the final date for acceptance of that offer. The court can:

- award the claimant a "bonus" by way of enhanced interest on the whole or any part of the sum awarded to him. This enhanced rate can be up to 10% per annum above base rate.

- award indemnity costs in place of standard costs. That is, the claimant will recover 100% of his costs, rather than lower, standard basis costs.

- order interest to be paid on those indemnity costs up to 10% per annum above the base rate.

For example, a claimant has a claim for \$100,000. He makes a Part 36 Offer to settle at \$60,000. The defendant has 21 days to accept, but either refuses, or says nothing. Some months later, the claimant is awarded \$75,000 at trial. The defendant, who had the opportunity to settle at \$60,000, must now not only pay the \$75,000 but may also face a punitive rate of interest on that sum from the date the Part 36 Offer expired, together with further cost penalties.

The risks in rejecting a Part 36 Offer are therefore considerable. The skill for both parties in using Part 36 is in pitching the offer at the right level, to reduce the risk of obtaining a worse result at trial. A penny too low and the strategy will fail. It is still, of course, open to parties to an action to engage in the normal toing and froing of negotiated settlements, but these negotiations would not attract

the Part 36 sanctions. Part 36 Offers and Payments therefore give some added incentives to the parties to achieve an early settlement in court proceedings.

Members who are party to English court proceedings should consider the desirability of using Part 36, preferably at an early stage. While the CPR have no direct application to arbitration proceedings, we have seen a number of "Part 36 style" offers being made in arbitrations as well. It must only be a matter of time before London arbitrators revise their procedures to mirror those of the English courts.

## Contractual Rights for Third Parties

It has long been a tradition under English law that only the parties to a contract can sue and be sued on it. This is known as the doctrine of privity of contract. This has created a particular difficulty for the chartering broker who has no direct right to sue under the charterparty he puts together. His rights lie against his own principal who he can also call upon to sue for his commission as trustee.

The Contracts (Rights of Third Parties) Act 1999 makes the broker's life easier, at least for contracts entered into after 10th May 2000. In certain circumstances, the Act gives a third party the right to take action under contract to which he is not a party. The Act works one way. It allows a third party to enforce his rights, but it does not allow a contracting party to impose an obligation on a third party.

The key provision in the new Act is in Section 1(1)(a) which gives a third party a right to enforce a term of a contract either if the contract expressly so provides, or if the term "purports to confer" a benefit on him. In general, a provision in a charter which refers to payment of broker's commission will "confer a benefit" on him, provided he is clearly identified. If so, he will now be in a position to sue for it directly under the terms of that contract. Due to this, Members need to take care at the drafting stage that that is the result they want to achieve, not just in relation to brokers but to any other third party referred to in their charterparties and other day to day contracts. If not, Members should either exclude third

party rights or address specifically those rights they want a third party to have.

While, in our experience, owner Members' disputes with brokers are rare, any such dispute will fall within the scope of Club cover.

Our charterer Members will also welcome the news that they no longer need to become involved in proceedings to assist their brokers in the recovery of legitimate commission claims.

## The HAPPY DAY – Notice of Readiness

Where a voyage charterparty provides for notice of readiness to be given for discharge and no notice is given, commercial sense might suggest that laytime should at least begin to run when discharge commences. The recent High Court decision in the HAPPY DAY however provides that where no valid notice is given, laytime does not commence at all. On the contrary, the court held that the charterers were entitled to full despatch. The HAPPY DAY was chartered to discharge at 1/2 safe berths Cochin. On her arrival, whilst

the berth was available, the ship was unable to reach it due to tidal restrictions. The Master nonetheless tendered NOR from the anchorage. No further NOR was tendered. When the ship finally berthed, discharge operations took almost three months. The owners presented their claim for demurrage.

In London arbitration, the owner's claim for demurrage was successful. The charterers appealed.

The High Court has now held that, under the terms of the charterparty, laytime could never commence as no valid NOR was given. As laytime did not commence, even though cargo operations did, the charterers were entitled to full despatch for the period of discharge.

The decision is likely to be appealed, but in the meantime Members should take care that:

- any Notice of Readiness given is valid at the time it is tendered
- if there is any doubt as to the validity of a Notice of Readiness, a new notice should be given marked "without prejudice to preceding Notice(s) of Readiness"
- in cases where there is delay in berthing, Members should

tender a further notice marked as above on berthing and/or on commencement of discharge

Members should note that subsequent events will not validate an invalid notice. This has long been English law following the decision in the MEXICO I, back in 1990. In that case, the charterers conceded that laytime should commence once discharge commenced. Similar concessions have been made in subsequent cases. This point was not conceded by the charterers in the HAPPY DAY. The court therefore found that laytime could never commence under that charter.