WHO NEEDS TO KNOW?

Rob Hunter and Bethany Sanders on disclosure of interim payments and offers

When a judge is asked to award an interim payment, should they be told about negotiations to settle?

In *Fryer v London Transport Executive* [1982] 11 WLUK 247 Times, December 4, 1982 [1982] C.L.Y. 2585, the evidence in support of an application for an interim payment included the amount that had been paid into court by the defendant. The Court of Appeal expressed the view that it was appropriate for the lower Courts to be told of the payment.

More recently, in *Handyside v Lowery* (Newcastle upon Tyne District Registry, 2 April 2015, unreported), HHJ Freedman refused to admit evidence of two Calderbank offers made by the defendant when deciding an application for an interim payment.

This article examines what led to the different outcomes in the above cases, and considers whether there are grounds for treating different types of offers differently.

Fryer v London Transport Executive

Fryer was an application for leave to appeal from the Court of Appeal. The appellant was a defendant in a personal injury case who sought to challenge an interim payment that had been ordered by a deputy judge of the High Court on appeal from a master.

Fryer was decided under the Rules of the Supreme Court 1965, which predated the Part 36 regime under the CPR. Order 22, Rule 7 prevented disclosure of voluntary payments into court 'until all questions of liability and of the amount of debt or damages have been decided'.

At the time, a payment into court, as opposed to a written offer complying with certain formalities, was required. The Court also considered Order 29 Rule 15, which provided that unless a defendant consented, no communication of an interim payment could be made to the court 'of any question or issue as to liability or damages until all questions of liability and amount have been determined'.

The appellant in *Fryer* argued that there was an error of law because the rules did not permit the amount of money paid into court, nor the existence of a voluntary interim payment, to be disclosed to the master and the judge.

In refusing permission to appeal, Waller LJ commented that the application for an interim payment did not raise a question of damages within the meaning of the rule 7 or 15. The object of the power to make interim payments, particularly in personal injury cases, was to relieve the injured party from the worst effect of the delay in the hearing of the claim.

In his view, the question was 'what, in the interlocutory proceedings before the learned Judge, should be done to meet the justice of the case'. Waller LJ also identified what he described as an even stronger reason

for refusing leave, which was that the defendant had failed to object to either payment being disclosed before the master or the judge.

Subsequent cases decided under the Supreme Court Rules

In *A Ltd v B Ltd* 29 ConLR 53, the applicant for an interim payment in a construction dispute sought to rely on a payment into court. HHJ John Davies QC held that he was not bound by *Fryer*, and that order 22, rule 7 did prohibit reference to an interim payment on an interlocutory hearing, which in his judgment *did* involve a question of damages.

In *Bowmer & Kirkland Ltd v Wilson Bowden Properties Ltd* [1995] 7 WLUK 345, the defendant had made a payment into court as well as a Calderbank offer.

HHJ Hicks QC held that evidence of a payment into court was admissible on an application for interim payment. He considered himself bound by *Fryer*. Even if not bound by *Fryer*, HHJ Hicks QC said that he would have come to the same conclusion. No separate objection was taken in relation to a Calderbank offer, and so this was also admitted in evidence. HHJ Hicks QC also observed, however, that there might be a distinction to be drawn between payments into court and Calderbank offers.

Handyside v Lowery

Handyside is the most recent judgment available concerning the admissibility of offers during an application for an interim payment, and fell to be decided in light of the Civil Procedure Rules. By CPR 36.16(2), the fact that a Part 36 offer has been made and the terms of such offer must not be communicated to the trial judge until the case has been decided. In the ordinary course of events, therefore, disclosure of a Part 36 offer to an interlocutory judge will be in order. Special circumstances could arise if the same judge was due to hear the interim payment application and trial.

The issue in *Handyside* was whether two Calderbank offers were admissible. The offers had been made in a letter that included the following assertion:

'For the avoidance of doubt this offer is made without prejudice save as to costs and should not be referred to at any hearing of an Application for an interim payment.'

HHJ Freedman noted that the point had arisen unexpectedly at the outset of the hearing. Having reserved judgment, he distinguished *Fryer* on the grounds that Calderbank offers are different from Part 36 offers (or their predecessors). It would appear that *A Ltd v B Ltd* was not drawn to his attention. He rightly observed that he was not bound by the decision in *Bowmer*, as HHJ Hicks QC had not heard argument as to whether a Calderbank offer was to be treated differently.

HHJ Freedman was influenced by the policy of encouraging settlement negotiations. He referred to the Supreme Court decision of *Ocean Bulk Shipping and Trading SA v TNT Limited and Others* [2010] UKSC 44, which concerned whether without prejudice negotiations were admissible to help interpret any agreement which results from them.

In *Ocean Bulk Shipping and Trading*, Lord Clarke emphasised that the without prejudice rule in the law of contract was founded on the public policy of encouraging litigants to settle their differences, as well as the express or implied agreement of the parties that communications in the course of their negotiations should not be admissible in evidence.

HHJ Freedman held that there was a distinction between Calderbank and Part 36 offers. He reasoned that a party who makes a Calderbank offer risked not obtaining the benefits under Part 36 but, as a quid pro quo, they should be entitled to the advantage of the offer not being known until costs fell to be decided. In his judgment, it would be unfair to the defendant to depart from the protection sought by the wording of the Calderbank offer, and to do so would also be contrary to public policy.

The downside of *Handyside*

Interim payments serve a vital role for claimants who may have needs that cannot wait. As observed in *Fryer*, the power exists to relieve the claimant from the result of the injuries caused by the defendant's negligence, and also to mitigate the delay before damages are awarded. These are important policy objectives that are supported by ensuring that the Court has the maximum information and assistance at the interlocutory stage.

It has long been the policy of the courts to promote settlement. If defendants were discouraged from making offers by the fear that they would be used for the purpose of interim payments, then that would run counter to the general policy. However, this is open to question: the costs sanctions that arise in the event that an offer is not beaten are a powerful incentive to negotiate.

At an interim payment application, the judge must determine the reasonable proportion of the likely 'final judgment' in accordance with CPR 25.7(4). Evidence of offers can help the Court in this process, and it is recognised that in certain circumstances, there are exceptions to the general exclusion of without prejudice communications for the purpose interlocutory hearings (see, for example, CPR 36.16(2) and *Family Housing Association (Manchester) Ltd v Michael Hyde and Partners* [1993] 1 WLR 354). If it is asserted that offers were motivated by commercial considerations, this is a matter the interlocutory judge will be able to weigh in the balance.

The decision in *Handyside* has the potential to do mischief. It could discourage litigants from using the Part 36 regime. It would reward defendants who unwittingly fail to comply with the formalities required by CPR 36.5 but subsequently find themselves at an advantage. If followed, *Handyside* would sanction the negotiating tactic of putting pressure on the claimant with a large financial offer while at the same time restricting access to interim funding. This ought to be deterred.

HHJ Freedman noted that he had heard comparatively brief argument on the point. Perhaps as a result, his decision does not engage with the rationale of *Fryer* or the policy objectives that underlie the power to make interim payments. The issue would benefit from further judicial consideration.

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