

Legal Briefing

Ted Lowery considers a case in which the legitimacy of a Part 36 offer was challenged

Yieldpoint Stable Value Fund, LP v Kimura Commodity Trade Finance Fund Ltd [2023] EWHC 1512 (Comm)

Before Stephen Houseman KC sitting as a judge of the High Court

Judgment delivered 20 June 2023

The facts

Under an arrangement known as the MTV Facility, Kimura Commodity Trade Finance Fund Ltd (“**Kimura**”) provided commodity finance to Minera Tres Valles SPA, a Chilean copper-mining and cathode-production company. On 30 March 2021, Yieldpoint Stable Value Fund, LP (“**Yieldpoint**”) and Kimura entered into a participation arrangement under which Yieldpoint advanced Kimura some US\$5 million to the MTV Facility.

Minera Tres Valles suspended operations during January 2022, thereafter defaulted on its repayments under the MTV Facility and subsequently entered into bankruptcy.

On 10 February 2022, Yieldpoint gave notice that it would not renew the participation arrangement and requested repayment of the US\$5 million. Yieldpoint contended that its capital was provided as a fixed-term loan for 12 months which absent any notice of extension became automatically repayable on 31 March 2022. Kimura responded that the participation arrangement was a conventional proportionate sub-participation agreement under which Yieldpoint’s capital was subject to default risk.

During late 2022 Yieldpoint commenced proceedings in the Commercial Court claiming the US\$5 million as a debt that became unconditionally due on 31 March 2022, alternatively as damages.

On 9 January 2023 Yieldpoint issued a Part 36 offer that proposed a settlement sum of US\$4.95 million inclusive

of interest, albeit that no interest calculation or figure was stated. Kimura did not respond and the dispute proceeded to trial on 18 May 2023.

In a judgment dated 22 May 2023, the judge concluded that the participation arrangement imposed on Kimura an unconditional obligation to repay the US\$5 million on 31 March 2022: hence Kimura was liable in debt, alternatively in damages for the US\$5 million together with interest.

During June 2023, Yieldpoint claimed some US\$520,000 in legal costs, including an entitlement to rely upon the enhancements provided for by CPR 36.17(4)(a)-(d). Kimura contended, per CPR 36.17(5)(e), that such enhancements would be unjust on grounds that Yieldpoint’s 9 January Part 36 offer was not a genuine attempt to settle the dispute.

The issue

Was the Part 36 offer a genuine attempt to settle the proceedings, therefore entitling Yieldpoint to the costs recovery enhancements set out in CPR 36.17(4)(a)-(d)?

The decision

The judge noted that the authorities regarding CPR 36.17(5)(e) usually concerned high-value claimant offers: whilst, as Yieldpoint had submitted, offers above 90% had been upheld by the courts, the judge considered that the authorities provided no more than illustrative guidance. He noted that one of the themes of the authorities was that a very high claimant offer could be vindicated where the claim itself was obviously very strong and could be so characterised at the time that the offer was made. Applying an objective assessment free from hindsight, it followed that if there was a marked disconnect between the discounted element of the offer and the offeror’s reasonable perception of the strength of its case at the time the offer was made, that could indicate that the offer did not amount to a genuine attempt to settle.

On the present facts, the judge concluded that as of 9 January 2023, Yieldpoint’s offer had not reflected a very strong prospect of success at trial: the offer had been made before witness evidence was served, the whole claim turned upon a single issue over the construction of the participation arrangement, and the dispute was essentially binary with the court being required to

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choose between two imperfect interpretations. In these circumstances, the discount for settlement offered in Yieldpoint's Part 36 offer – some 4% of the total sum claimed – was meaningless.

Accordingly, Yieldpoint's Part 36 offer did not represent a genuine attempt to settle the proceedings: thus Yieldpoint could still recover the 70% of its costs as assessed at the trial but was not entitled to the enhancements provided for in CPR 36.17(4)(a)-(d).

Commentary

As highlighted by the judge, the objective of the Part 36 regime is to incentivise the making (and acceptance) of constructive offers of settlement, i.e. those which can be said to have a meaningful impact upon the chances of avoiding trial and/or further consuming the court's resources in the run up to trial. Yieldpoint's Part 36 offer was not consistent with that objective. (It is worth noting that the same outcome was obtained in a contemporary case on similar facts: see *Sleaford Building Services Ltd v Isoplus Piping Systems Ltd* [2023] EWHC 1643 (TCC) (4 July 2023).¹)

Both cases confirm that Part 36 offers are not just about the numbers but must also comprise a genuine and constructive attempt to settle a dispute by reference to the reasonably perceived strengths and weaknesses of the parties' respective cases at the time the offer is made.

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¹ Discussed by Jeremy Glover in *Dispatch*, Issue 277: <https://www.fenwickelliott.com/research-insight/newsletters/dispatch/archive/sleaford-building-isoplus-piping-2>