Offer rejected by counter-offer – a cautionary tale

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Non-Part 36 offer not capable of acceptance once rejected by a Part 36 counter offer

A recent decision of the High Court in *DB UK Bank Limited (t/a DB Mortgages) v Jacobs Solicitors*[1] has confirmed that a Part 36 offer can reject an earlier common law offer, making it no longer open for acceptance.

The Claimant, DB UK Bank Limited (DB), brought a claim for professional negligence against Jacobs Solicitors (Jacobs) for failing to adequately report that one of DB's borrowers was purchasing a property by way of a sub-sale. DB claimed that had it known this, it would not have lent.

During the lifetime of the claim, various without prejudice correspondence passed between the parties as follows:

- 28 August 2015 – Jacobs sent DB a "without prejudice save as to costs" letter containing a settlement offer (the WPSAC Offer)
- 24 March 2016 – Jacobs wrote to DB restating the terms of the WPSAC Offer
- 12 May 2016 – Jacobs again restated the terms of the WPSAC Offer in correspondence with DB
- 19 May 2016 – DB made a Part 36 offer to Jacobs (the Part 36 Offer)
- 22 June 2016 – DB purported to accept the WPSAC Offer.

DB contended that on the basis of its 22 June purported acceptance, the claim had been settled and should not proceed to trial.

The Court clarified that the WPSAC Offer did not comply with the CPR's Part 36 rules and was an offer at common law.

Under common law (*Hyde v Wrench*)[2], a counter offer amounts to a rejection of an earlier offer. DB tried to argue that because one was an offer under common law and the other under Part 36, the two were separate and the common law rules could not apply to both. This was rejected by Mr Andrew Hochhauser QC, who confirmed that as the WPSAC Offer was under common law, DB's Part 36 Offer was a counter offer and had the effect of rejecting the WPSAC Offer, meaning it was no longer available for acceptance.

Any comments or queries?

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1. [2016] EWHC 1614 (Ch).
2. (1840) 3 Beav. 334.
3. [2015] UKSC 36.
4. [2015] UKSC 72.

Mr Hochhauser QC also confirmed that where the situation is reversed (ie a Part 36 offer is made first and followed by either a non-Part 36 or Part 36 counter offer) the common law rules would not apply, and the scenario would be governed by the "self-contained" Part 36 regime.

Additionally, the Court clarified whether the WPSAC Offer was capable of acceptance. Jacobs argued that as the WPSAC Offer contained imprecise terms regarding when a portion of the settlement payment would be paid, the offer was too uncertain to be capable of acceptance, and was, at best, an invitation to treat. The Court rejected this line of argument, confirming that the WPSAC Offer was capable of acceptance.

Jacobs also contended that, owing to the WPSAC Offer not having an express time for acceptance, it was implicit that the offer was subject to a 21 day period for acceptance which had lapsed, meaning it was no longer available for acceptance. This argument was rejected by the Court, which considered two recent Supreme Court decisions on interpretation of contractual provisions: *Arnold v Britton*[3] and *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited*[4]. It confirmed that there was no basis for implying any time limit for acceptance into the offer, commenting that it was not possible to on the one hand seek to take advantage of the fact that it is not a Part 36 offer, and at the same time use the Part 36 regime to import a time period of 21 days.

On this basis, the Court confirmed that had the Part 36 Offer not been made, the WPSAC Offer would still have been open for acceptance, and DB's acceptance of the offer on 22 June 2016 would have been valid.

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