# Part 36: no presumption in favour of indemnity costs on late acceptance

*Where a defendant accepts a claimant's Part 36 offer after expiry of the 21 day period, many claimants (and legal commentators) have argued that the claimant should be entitled to recover indemnity costs from the expiry of the relevant period, just as they would if the case had gone to trial and the same result had been achieved. This argument has been particularly attractive to claimants where fixed costs apply, as an order for indemnity costs will allow the claimant to recover more than fixed costs. A number of County Court Judges and District Judges have accepted this argument in PI actions to which fixed costs apply.*

*The Court of Appeal has now decided in the appeals of Hislop v Perde and Kaur v Ramgharia Board [2018] EWCA Civ 1726 (a) that there is no presumption in favour of indemnity costs on late acceptance of a claimant's Part 36 offer; and (b) that where this occurs in fixed costs cases the recoverable costs are those defined by section IIIA of Part 45, and the general jurisdiction as to costs in CPR36.13 has no role to play, meaning there is no place for assessed costs.*

## The Issues

The costs consequences of acceptance of a Part 36 offer within the prescribed 21 day period are clearly defined by CPR 36.13. Where a Part 36 offer is made and not accepted and the case goes to trial, the costs consequences following judgment are governed by CPR 36.17. The consequences for a defendant who is rash enough to go to trial and to fail to beat a claimant's Part 36 offer can of course be stringent: indemnity costs, punitive interest and an additional amount of damages.

What, though of the situation where a claimant makes a Part 36 offer which the defendant does not accept within the 21 day period, but does accept before trial? Here CPR 36.13(4) applies and therefore the court must decide the appropriate costs order.

Various legal commentators have argued that in this situation it would be unfair for the claimant to be limited to standard basis costs, and that costs should be ordered on the indemnity basis from expiry of the 21 day period. The advantages of an indemnity costs order have become more marked with the new definition of proportionality meaning that necessary but disproportionate costs will be irrecoverable under an order for standard basis costs but recoverable under an indemnity costs order.

The incentive to obtain costs on the indemnity basis is particularly great for claimants bringing small personal injury actions to which the fixed costs in CPR Part 45 apply. In these cases claimants do not recover the assessed costs that they have incurred in the particular case, but rather a figure calculated to allow reasonable recovery over a basket of cases allowing for the swings and roundabouts of litigation. This inevitably means that there will be cases in which assessed costs would be significantly higher than the fixed costs (just as there will be others where the fixed costs will be higher than the actual costs). Where an order is made for the claimant to recover costs on the indemnity basis, the claimant will recover their actual costs,

subject to assessment costs, not just the fixed costs: see Broadhurst v Tan [2016] EWCA Civ 94.

All this means that it is self-evidently in the interests of solicitors acting for such claimants where more costs have been incurred (and/or in the interests of their clients), to seek to recover indemnity costs. There has therefore been a flood of applications for indemnity costs in fixed costs cases on late acceptance of Part 36 offers. These applications have come before District Judges and before Circuit Judges on first appeals, and they have produced a variety of outcomes and legal analyses.

The Court of Appeal therefore ordered that the appeals in Hislop v Perde, a modest claim arising out of a road traffic accident and Kaur v Ramgarhia Board, a modest public liability claim, should be heard together. In Hislop the Defendant had accepted a Claimant's Part 36 offer shortly before trial; in Kaur, following receipt of an unfavourable expert report, the Defendant had, instead of accepting the Claimant's earlier offer to accept £2,000, made a Part 36 offer in the sum of £3,000, which had been accepted by the Claimant. The making of that higher offer (rather than seeking to accept the Claimant's offer late) had been motivated both by the Claimant's valuation of the claim as expressed in WP negotiations and by a desire to avoid the arguments about indemnity costs that the Defendant anticipated if it had attempted late acceptance of the Claimant's offer.

In both judgments under appeal the judges below had decided that the Claimant was entitled to assessed costs, rather than fixed costs, but that those costs should be assessed on the standard basis rather than the indemnity basis.

## The Decision of the Court of Appeal

The substantive judgment was given by Coulson LJ; Longmore and King LJJ agreed with the judgment. It seems clear that Coulson LJ is becoming something of a costs and Part 36 specialist within the CA.

The substantive analysis starts with an acceptance of the comprehensive nature of the fixed costs regime in Part 45, and of the limited exceptions to that regime, as considered in Sharp v Leeds City Council [2017] 4 WLR 3465. It then considers the two Court of Appeal authorities on the interaction between Part 36 and the fixed costs regime: Solomon v Cromwell [2012] 1 WLR 1048 and Broadhurst v Tan [2016] 1 WLR 1928.

The judgment then, at [37-38] deals with the general approach to late acceptance of Part 36 offers in a section that is likely to be of general application, and to be much cited in future:

> *Leaving aside the complexities introduced by the fixed costs regime, the general position is that the late acceptance of a Part 36 offer **may** warrant an order for indemnity costs. But that will always be a question of fact in each case: there is no presumption to that effect.*

The Judge then quoted from his decision in Fitzpatrick v Tyco [2009] EWHC 274. He rejected argument from counsel for the Claimant that the Jackson reforms made a presumption in favour of indemnity costs appropriate. He did however accept that there might be cases in

which, on the facts, late acceptance without proper reason would justify an order for indemnity costs.

Turning to the way these issues work in a fixed costs case, Coulson LJ held that the effect of the rules is that, save where a case goes to trial, the fixed costs regime is applicable rather than the general Part 36 jurisdiction, and therefore on late acceptance in a fixed costs case the power to order assessed costs under CPR 36.13 does not arise at all.

Thus the only way out of the fixed costs regime in such a case is to argue under Part 45.29J that there are exceptional circumstances making it appropriate for the Claimant to recover more than fixed costs. The judge was, however clear that late acceptance of a Part 36 offer should not create a presumption that exceptional circumstances were present:

> *A long delay with no explanation may well be sufficient to trigger r.45.29J; a short delay with a reasonable explanation will not.*

Coulson LJ did not accept that a causative link between exceptional circumstances and increased costs had to be shown, but he did stress that the exceptional circumstances hurdle is a high one.

Thus, allowing both appeals, the Court of Appeal held that there had been no proper grounds for any exercise of the r.45.29J power in either case, and that each Claimant was only entitled to fixed costs.

Practical Points

In non-fixed fee cases claimants who want indemnity costs will need to do more than point to late acceptance: they will need to look at the reasons for the delay and at whether the usual indemnity costs test of being outside the norm can be made out. It will not, however, be enough for a Defendant to say that lots of other Defendants behave just as badly: objectionable conduct which is widespread can be out of the norm: see Whaleys (Bradford) v Bennett and Cubitt [2017] EWCA Civ 2143.

In fixed fee cases claimants who want indemnity costs will have to bring themselves within rule 45.29J. But this is not a risk-free course of action. The hurdle is high and if Claimants apply and fail they will usually be ordered to pay the costs, and those costs are likely, notwithstanding the QOCS rules, to be set off against the fixed costs payable: see Howe v MIB No 2 CA 6/7/17, reported on Westlaw.


## Andrew Post QC and Imran Benson

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Andrew Post QC acted for the appellant in the Kaur matter

Imran Benson acted for the respondent in the Kaur matter.