

Costs in Focus

Issue 49

Welcome to the 49th issue of Costs in Focus. This edition is going to consider a number of recent developments in costs law and the impact they will have on Costs Drafters and Practitioners.

Part 36 late acceptance: no indemnity basis costs in low value RTA's, save in exceptional circumstances

Robyn Shepherd considers the case of *Whalley v Advantage Insurance Company Limited* (2017, Kingston-upon-Hull), in which the court considers a defendant's late acceptance of a Part 36 offer in a low value RTA.

The claimant's costs are fixed where it is started under the pre-action protocol for low-value personal injury claims in road traffic accidents. A claim that exits the pre-action protocol and that is not allocated to the multi-track become subject to fixed costs under CPR 45.29D.

In recent years there have been a number of applications to the courts to determine the liability for costs arising from a defendant's late acceptance of the claimant's Part 36 offer.

CPR 36 is silent on late acceptance by a defendant in fixed-costs cases,

bar references made to CPR 36.17. This section states that the defendant is encouraged to settle prior to trial and avoid unfair costs consequences.

In this matter, the claimant made an application for the court to determine costs arising from the defendant's late acceptance of the claimant's Part 36 offer. The issue was whether costs were limited to fixed costs for the entire action or whether the claimant could be entitled to assessed or indemnity basis costs for the period after the expiry of the relevant period and the date of acceptance.

The application was heard before District Judge Besford. In *Sutherland v Khan* (Kingston-upon-Hull, 2016), he had previously ruled that late acceptance of a Part 36 offer entitled the claimant to an award of indemnity costs, providing a route out of fixed costs.

In this application hearing, District Judge Besford concluded that his previous decision in *Sutherland* was "not supported". He concluded that unless there are "exceptional circumstances" or conduct to justify indemnity costs, fixed costs would apply where a defendant accepts a Part 36 offer late.

Comments

District Judge Besford examined the inconsistent approach judges are taking to late acceptance in fixed-costs matters. He accepted the reasoning that the omission to address this specific situation was deliberate, so that costs would be determined under CPR 45.29B.

Alternatively, if there is tension

between CPR 36.13(4) and CPR 45.29B, then Part 36 is the general rule and CPR 45 is the specific rule, and the specific rule is to be preferred.

This decision holds that 'exceptional circumstances' in accordance with CPR 45.29J, or 'conduct out of the norm' is required to justify indemnity

basis costs.

This point is likely to reappear until it is brought before a higher court. In the alternative, Lord Justice Jackson proposed in his July report that in cases of late acceptance that are subject to fixed costs, indemnity costs should be replaced with a percentage uplift.

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Part 36 late acceptance: failure to negotiate leads to indemnity basis costs

Jessica Winter-Riley considers the case of *Jordan v MGN Limited* [2017] EWHC 1937 (Ch), in which the court considers the claimant's late acceptance of a Part 36 offer on the eve of trial.

In this matter Mr Justice Mann had to determine whether the claimant, having accepted a Part 36 offer out of time, would have to pay the defendant's costs after the expiry of the relevant period and upon what basis those costs should be assessed.

The claimant sought remedies for telephone hacking and the matter was listed for trial, when the claimant submitted an application on the eve of trial. Initially, the claimant submitted that damages were agreed at £90,000 and the only outstanding matter was costs but then abandoned this argument. The application proceeded solely on the basis that the claimant had accepted

the defendant's Part 36 offer but sought to escape the costs consequences of CPR 36.13(5).

The defendant argued that they were entitled to late acceptance costs, which should be assessed on the indemnity basis because the claimant had failed to negotiate properly during the course of the litigation, whereas the defendant had made many offers, with the highest allowing damages at £80,000.

Mr Justice Mann found no reason why the claimant should not be responsible for paying costs since the expiry of the September 2014 Part 36 offer. The claimant had prolonged the litigation for a

considerable period and then, essentially, caved in. The claimant had received a number of higher offers that he could have accepted and the judge therefore held that the just result was that the normal consequences of late acceptance of a Part 36 offer should apply.

The judge further held that this was reinforced by his findings in relation to indemnity basis costs: there was "a culpable failure to engage in negotiations which would, if conducted more properly, have been likely to have led to a settlement. That is [a] very significant matter." [66]

Comments

Mr Justice Mann criticised the claimant's approach and considered that there had been a culpable failure to negotiate, the claimant having run his case for two and a half years without responding to offers. If the claimant had negotiated, this could have helped the parties achieve settlement and avoid the costs

incurred. He was also critical of the fact that the claimant "at the very last minute (almost literally)" had conceded for no disclosed reason. Mr Justice Mann therefore ordered costs to be paid on the indemnity basis.

This judgment reminds parties to negotiate from the outset of the

claim, to make early Part 36 offers and not to delay negotiations. It shows how the court can punish the misconduct of parties who fail to negotiate and therefore prolong litigation for a considerable period by ordering the party at fault to pay costs on an indemnity basis.

Services we provide

We deal with all aspects of costs including the preparation of Bills of Costs, Schedule of Costs, Points of Dispute, Points in Reply, negotiating settlement, solicitor own client disputes, auditing, providing estimates, costs budgeting and costs advocacy.

Our dedicated costs team is made up of 50 employees based in Bristol and New Malden with a wealth of experience including Costs Lawyers, Solicitors and members of the ACL.

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The purpose of this newsletter is to highlight some of the recent developments and changes in costs law. It should not be taken as legal advice and should not be relied upon as such.