



# INSIDE 18



## FIXED COSTS, PART 36 AND LATE ACCEPTANCE OF A CLAIMANT'S OFFER: WHAT COSTS ARE CLAIMANTS ENTITLED TO RECOVER? PART II – THE FINALE?

**Lucy Coulson considers the recent Court of Appeal decision in *Hislop v Perde* on whether the Claimant is entitled to indemnity costs upon late acceptance of their Part 36 offer where fixed costs apply.**

Nearly a year ago, I reviewed a series of conflicting first instance decisions in search of an answer to the above question. There was no authoritative conclusion at that stage but I identified a trend in recent decisions. On 23 July 2017 the Court of Appeal finally answered that question in *Hislop v Perde; Kaur v Committee (for the time being) of Ramgarhia Board Leicester* [2018] EWCA Civ 1726, in a judgment led by Lord Justice Coulson (no relation!).

The question the Court of Appeal asked was: where a defendant accepts the claimant's Part 36 offer many months after it was made, and the case does not go to trial, in those circumstances, does the case remain within the fixed costs regime, or can the claimant escape its confines and recover standard or even indemnity costs from the date that the offer became effective?

### Facts of appeals

*Hislop* arose out of a road traffic accident on 17 December 2013. A few offers were made pre-issue, followed by a Part 36 offer on 11 November 2014. On 2 June 2016, 1 week prior to trial, the Defendant accepted this offer.

The Claimant sought fixed costs and indemnity costs. Parties agreed in principle at that stage that **CPR 36.13** empowered the court to allow indemnity costs. At first instance, the court allowed indemnity costs. On appeal, the court allowed fixed costs and standard costs from

expiry of the offer. On appeal to the Court of Appeal it was argued that only fixed costs could apply as **CPR 36.13** did not apply to fixed costs cases.

*Kaur* arose from a personal injury claim following an accident on 25 January 2014 that occurred on the Defendant's premises. On 7 September 2016 the Claimant made a Part 36 offer. The Defendant was wary of the consequences of late acceptance so made a higher offer by way of Pt 36 on 6 February 2017 and this was accepted by the Defendant.

The Claimant sought indemnity costs from the date of her offer until the acceptance of the Defendant's offer. The Defendant argued fixed costs only applied. At first instance the court awarded fixed costs up to the date of allocation and standards costs thereafter. The District Judge was of the view that if the Defendant had accepted the Claimant's offer, then the Claimant would have been entitled to fixed costs and indemnity costs, and so he concluded the Claimant should not be made worse off because the Defendant had tried to get around paying indemnity costs by making their own offer at a later date. He also concluded **CPR 45.29J** should apply, in that this was an exceptional case that justified a departure from fixed costs. He felt there was a lacuna in the CPR. The appeal from this decision was 'leap-frogged' to the Court of Appeal.

### Court of Appeal decision

The Court of Appeal reviewed Part 36 and Part 45 as well as a number of authorities. The court re-emphasised that the fixed costs regime is intended to be comprehensive in nature with a small category of exceptions. In *Solomon v Cromwell Group PLC* [2012] 1 WLR 1048 claimants were limited to fixed costs where their Part 36 offer was accepted within the relevant period, this was due to the specific rules in Part 45. In *Broadhurst v Tan* [2016] EWCA Civ 94 the claimants beat their Part 36 offers at trial and were held to be entitled to fixed costs plus indemnity costs from expiry of their offer. **CPR 36.21** did not state what the position was but in *Broadhurst* the Court of Appeal held **CPR 36.17** applied, entitling the claimant to indemnity costs. It was only due to the specific rule in **CPR 36.17** that the claimants were able to take themselves out of the ordinary fixed costs rules.

The general principles of indemnity costs were summarised as: (a) indemnity costs are appropriate only where the conduct of a paying party is unreasonable 'to a high degree'. 'Unreasonable' in this context does not mean merely wrong or misguided in hindsight, and (b) the court must therefore decide whether there is something in the conduct of the action, or the circumstances of the case in general, which takes it out of the norm in a way which justifies an order for indemnity costs.

In cases not involving fixed costs, the general rule is that late acceptance of a Part 36 offer may warrant an order for indemnity costs but this is a question of fact and not a presumption (as per *Fotzpatrick Contractors Ltd v Tyco Fire and Integrated Solutions (UK) Ltd* (3) [2009] EWHC 274 TCC). Even with the Jackson reforms, there is no presumption in favour of indemnity costs.

At paragraphs 43-45 Coulson LJ said:

43. *The fundamental difficulty for a claimant in a fixed costs case seeking to say that something very similar should happen where the defendant has delayed before accepting the claimant's Part 36 offer is that different rules apply. In my view, those different rules demonstrate that the applicable costs regime in fixed costs case where there has been late acceptance is different to that described in Broadhurst v Tan and, on analysis, very similar to that explained in Solomon.*

44. *Whilst the general rule dealing with costs consequences following judgment (r.36.17) is expressly preserved by the particular rule relating to the fixed costs regime (r.36.21), that is not the position in relation to the rules relating to the costs consequences of accepting Part 36 offers before trial. For that situation, the general rule (r.36.13, old rule r.36.10) is not preserved by the rule applicable to fixed costs cases (r.36.20, old rule r.36.10A). **Instead, r.36.20 makes plain that it is the only rule which applies to the costs consequences of acceptance of a Part 36 offer in fixed costs cases. It preserves no part of the general rule set out in r.36.13.***

45. *What is more, r.36.13 itself says that it is "subject to" r.36.20 which, because that rule applies to fixed costs cases and r.36.13 does not, also leads to the conclusion that r.36.13 does not apply to fixed costs cases. **Where (without more) a general rule is made 'subject to' a specific rule that governs a particular class of case then, in that class of case (here, those subject to fixed costs), it will be the specific rule that applies, not the general rule (see Solomon).***

The Court of Appeal concluded that in a fixed costs case, **CPR 36.20** applies where an offer is accepted late and **CPR 36.13** does not apply at all. Therefore a claimant is only entitled to fixed costs on late acceptance, unless **CPR 45.29J** applies.

Coulson LJ went on to explain why this interpretation led to a sensible and coherent result, why this was not a drafting error in the CPR and why there was no lacuna in the CPR:

1. This interpretation is in accordance with the comprehensive nature of fixed costs which are meant to apply with limited exceptions;
2. This preserves the autonomy of Part 45 and provides certainty save for in exceptional circumstances;
3. This interpretation places claimants and defendants in the same position on late acceptance of a Part 36 offer, in that Defendant's costs are assessed with reference to fixed costs.
4. In cases of exceptional delay Claimants can escape fixed costs under **CPR 45.29J** and this remains a clear incentive for Defendants not to delay in accepting a claimant offer.

On **CPR 45.29J**, the court did not consider late acceptance would always be regarded as an exceptional circumstance – again each case must turn on its own facts. The furthest Coulson LJ would go was to say that a long delay accepting with no explanation may trigger CPR **45.29J** whereas a short delay with a reasonable explanation may not. Further, a party did not have to show the exceptional circumstances led to litigation becoming more expensive.

### Conclusions in *Hislop and Kaur*

In *Hislop* the appeal was allowed and the claimant was limited to fixed costs on late acceptance. **CPR 45.29J** was not found to apply as the assessment at first instance was that this was not a case out of the norm.

In *Kaur* the appeal was also allowed and the claimant was limited to fixed costs on late acceptance. As the first instance decision was based upon the wrong assumption that the claimant would have been entitled to indemnity costs had her offer been accepted and there was no other criticism of the defendant's conduct, **CPR 45.29J** was found to apply in this case either.

### The End

Some may feel the decision is generous to defendants and claimant Part 36 offers are left with little teeth to encourage settlement within the relevant period. Uncertainty does remain for both sides as to whether very late acceptance will justify a departure under CPR 45.29J – in most ordinary cases, it seems likely that the bar of exceptional circumstances will not be met (though each case turns on its facts), but the threat of the unknown may be enough to encourage early acceptance of Part 36 offers.

Whilst Coulson LJ may have set out quite clearly why he did not think the rules were wrongly drafted or left some lacuna in the CPR, one cannot help but think that the rules could have been more explicit if this interpretation was the intention! In any event, this chapter in the battle between Part 36 and Part 45 appears to have come to an end. For now.

Counsel has a copy of the judgment which can be forwarded on request.

## LUCY COULSON

[lcoulson@18sjs.com](mailto:lcoulson@18sjs.com)

Lucy Coulson is a member of the Civil and Personal Injury Department dealing in all areas of Personal Injury litigation including road traffic accidents, fraud, employer's liability and public liability.

For further information please contact:

[civil@18sjs.com](mailto:civil@18sjs.com)



18 St John Street  
Manchester  
M3 4EA

T • 0161 278 1800

F • 0161 278 8220

E • [clerks@18sjs.com](mailto:clerks@18sjs.com)

[@18stjohn](https://twitter.com/18stjohn)

[www.18sjs.com](http://www.18sjs.com)

The Inside 18 Newsletter is provided free of charge to clients of 18 St John Street Chambers and others on request.

This newsletter does not constitute the provision of legal advice. 18 St John Street cannot be held liable for any errors or omissions herein.

**GDPR is upon us. We now require you to inform us directly if you wish to continue to receive our newsletter, and details of our social and training events. Please also let us know if you do not want to hear from us further.**