

# Part 36 update

*as at 24 May 2021*

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# Enhanced relief under r.36.17(4)

- *Telefonica UK Ltd v The Office of Communications* [2020] EWCA Civ 1374
  - CA allows C's appeal against trial judge's award of only 2 of the 4 costs consequences under r.36.17(4) (no enhanced interest on principal or costs), and allows 3.5% above base rate
  - Fact the P36 was a very high % of max poss award (96-97%, discount only of interest) **might justify court finding not a genuine attempt to settle, and so enhancements unjust**, (purpose of adding CPR 36.17(5)(e) but J accepted was genuine attempt to settle.
  - Unfair to just award some but not all of the costs consequences and unusual for circs of a case to yield a different result for only some of the consequences. Esp as £75k trivial in context of judgment for £54M and additional interest is the significant enhancement, but Q of whether enhanced interest all is different from Q as to rate of interest
  - Follow *JLE v Warrington & Hatton Hospitals* [2019] 1 EWHC 1582 (QB) which postdated trial J's decision: open to a judge to conclude unjust to order the 4 enhancements, but will be unusual

# D accepts C's offer out of time

- *Pallett v MGN Ltd* [2021] EWHC 76 (Ch)
  - C makes P36 offer £99,500 20 October 2020, trial to start Jan 2021
  - D accepts on 22<sup>nd</sup> day on basis court would be invited to extent to which it should pay costs, and asks court to disallow from 26 March 2019 on basis C had not engaged in proper settlement process
  - R.36.13(1) if accept within 21 days = deemed costs order; r.36.13(4) where P36 accepted outside relevant period liability to be determined by court unless agreed

# D accepts C's offer out of time

- Mann J:
  - Appears acceptance on 22<sup>nd</sup> day was deliberate.
  - C's contractual analysis wrong because Gibbon says contractual analysis inappropriate; and does not get C where wants to be because then no agreement
  - D is right that can invoke r.36.13(4) and court decides
  - D accepts 'formidable obstacle' is test, from *Smith v Trafford* but surmounts because C fails negotiate
  - D fails, C had reasons which were not unreasonable for not engaging in horse-trading and declining to negotiate until better informed was entirely reasonable
  - Not a green light for all Cs to refuse to negotiate until disclosure complete, don't apply this too generally

# CPRC meeting 14 May 2021

- The lacuna sub-committee had considered the Part 36 tactic as in *Pallett v MGN Ltd* [2021] EWHC 76 (Ch) and *Dutton v Minards* [2015] EWCA Civ 984
- "Tactical" use of Part 36, where a D purposefully waits until one day after the expiry of the relevant period" before accepting a Part 36 offer. Not subject to the default costs consequences, the court will determine the appropriate costs order.
- The tactical delay is aimed at avoiding the presumption of costs, and at trying to get the court to make a different order
- Lacuna Sub-committee: this tactical approach subverts the Part 36 regime, and it seems odd that a D can generate a better position by accepting an offer outside the relevant period.
- It was agreed that this point would be sent to the CPR Costs Sub-committee for consideration. Possible options for consideration include the addition of express wording regarding the costs position when an offer is accepted outside the relevant period so as to avoid this "vice", or the introduction of a rule that an offer cannot be accepted outside the relevant period without the offeror having a chance to decide whether the offer is still open.

# Unjust to recover r.36.17(4) payments

- *Head v Culver Heating Co Ltd* [2021] EWHC 1235 (QB) (Johnson J, 11 May 2021)
  - Lost years claim, C says £4.4m, D says nil
  - C made P36 13 Nov 2020 to accept £2,249,705.80 and will recover more (£2,261,786)
  - Formidable obstacle to show imposition of P36 orders unjust
  - Looking at identified factors in r.36.17(5)(c) not unjust, but test is all the circs; without the late evidence D showed C would not have beaten own offer; unjust to allow C to benefit where evidence was served late and without good reason

# C's failure to accept Part 36

- *Blackpool BC v Volkerfitzpatrick* [2020] EWHC 2128 (TCC)
- C wins but awarded much less than claimed (£1.1m v £6.7m): C is nonetheless the winner
- Failure to accept P36 re part of the claim does not merit indemnity costs but does turn D into winner tho offer withdrawn
- D ordered to pay 80% of C's costs to date 21 days after its Part 36 and C ordered to pay 80% of D's costs thereafter

# CPR 36.5(2) less than 21 days before trial

- *Reader v SPIE Ltd and another* [2021] EWHC 1221 (QB) (Andrew Baker J on appeal, 11 May 2021)
  - Mr Reader sought unpaid bonus and D settled but sought to recover from Mr Garside
  - Part 36 made less than 21 days before trial as listed (30 Jan 2017) and says SPIE will apply to abridge the relevant period but trial was stood out by the Court and first instance J held not made less than 21 days before trial and so no question of P36 results
  - CPR 37.17(7)(c) Part 36 made less than 21 days before start of is an offer to which Part 36 consequences do not apply unless the Court has abridged the relevant period
  - On appeal – position to be considered at date offer was made; and it would not have been appropriate for the Judge to abridge time retrospectively



# Part 36 and split trial

- *Original Beauty Technology v G4K Fashion Ltd* [2021] EWHC 954 (Ch)
  - Cs apply for costs following liability judgment in split trial
  - Ds had made Part 36, issues not yet determined
  - Possible relief obtained by Cs could be less favourable but Cs say D dishonest and unreasonable, rely r.36.17(3) and *Multiplex*,
  - Fail – court simply can't do what Cs ask because can't be told of terms of Part 36

# Interpretation of P36 offer

- *Seabrook v Adam* [2021] EWCA Civ 382
  - Low value PI claim following RTA, D had admitted primary liability but disputed causation of 2 separate injuries to neck and back
  - C appeals against award of costs without a/c 2 Part 36 offers he had made: 90% of claim for damages and 90% of liability, and he gets 100% of claim for whiplash and failed on back injury
  - C says if D had accepted, pays only 90% of damages awarded
  - Natural meaning of ‘claim for damages’ meant entire claim and offers required a concession as to liability and causation of both injuries – if D had accepted either could not have argued had not caused the back injury
  - C recovers for only 1 injury, and so D had beaten offers made
  - CA says turns on precise wording of pleadings and offers, important to say expressly if offer relates to whole of claim or part of it and/or precise issue, see r.36.15(1)(d)

# Part 36 and Part 21

- *Wormald v Ahmed* [2021] EWHC 973 (QB)
  - Can the D withdraw a P36 offer after accepted by the LF but before approval under CPR 21
  - P36 £2M 15 Oct 2014
  - 14 Sept 2020 C has cardiac episode
  - 17 Sept 20, accept P36 liability costs and appeal costs
  - 18 Sept notice of acceptance, D asks for update, C dies
  - 21 Sept D is told – J finds not notified of change in prognosis or critical condition until after offer accepted
  - 25 Sept D withdraws the offer
  - C (mother – was LF now executor) applies declaration offer accepted and can't be withdrawn

# Wormald

- C does not supply court with opinion on compromise or doc evidence; C says once P36 accepted can't be withdrawn and only Q is does court approve settlement; D says can't accept validly until court permits; or don't approve the settlement
- Held (21 April 2021: appeal?)
  - Compromise by protected party requires P21 approval, where P36 accepted not binding until approved
  - Until approved other P can resile from offer by giving notice of withdrawal
  - Either party can apply for approval and P seeking to resile can say so on application
  - What should the court do:
  - Unjust for D to be bound by P36 made 6 years earlier and where C had accepted it in hours before his death
  - Costs results left open and final determination left over so estate can adduce evidence to comply with CPR PD21 and info requests

# Part 36 and assessment

- *Best v Luton and Dunstable NHS Trust* [2021] EWHC B2 (Costs) (Master Leonard)
  - D accepts C's P36 out of time and C's costs of DA to be decided at hearing, goes to summary assessment and figure then agreed
  - C re-joins video hearing and seeks P36 benefits
  - C entitled to raise Q about benefits of successful P36 but cannot rely on P36 as to costs of DA because not an independent claim, or endless regression (CPR 47.20 treats DA as independent claim for P36 purposes)
  - Referred to costs sub-committee of CPRC by lacuna sub-committee

# Part 36 and assessment

- *Mullaraj v SSHD* [2021] EWHC B5 (Costs)
  - What circs justify ‘some other order’ in relation to costs of provisional asst
  - On prov asst bill for £74,060 was reduced to £45,000 inc interest, a 44% reduction, no big redn to HRs but ‘swathes of the bill had been disallowed as it had been littered with completely unreasonable items’ (part 1 no retainer; part 2 to counsel too often, every email charged); D had offered £40k and invited counteroffer and none made
  - DM Campbell relies on *GEHC v Gray* [2021] EWCA Civ 123: D can’t rely on substantial reduction to bill during provisional asst and on r.47.20(1)(b) where no effective P36 or *Calderbank*, parties who don’t make offers can’t be in a better position than those who do
  - No consistency in SCCO on this point, so if asked would give perm to appeal and transfer to High Court
  - Make early and fighting P36

# Validity of Part 36 offers

- Still an issue! *Essex CC v UBB Waste* [2020] EWHC 2387
- C's Part 36 says if accepted within 21 days of date of offer letter, D liable to pay C's costs in acc r.36.13
- D says did not comply r.36.5(1)(c) because sent by email at 4.54 and so made on 8 March 2019, relevant period is 20 days. Court applies *C v D* and says 21 days runs from date offer is made on 8 March.
- D unreasonably failed to engage with the Part 36 and conduct in running unwarranted allegations of lack of good faith, compromised expert = interest at max of 10% above base rate from expiry of P36 and indemnity costs and interest on those at 10% above base

# Questions?

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