

# Fixed Costs and Part 36 offers - does late acceptance by the defendant lead to costs on the indemnity basis?

Published 31 July 2018

The Court of Appeal's judgment in *Broadhurst v Tan* allowed claimants to recover costs, assessed on the indemnity basis from the date of expiry of the claimants' Part 36 offers, where they beat their own Part 36 offers despite the claims having commenced within the Low Value Protocols and being subject to fixed recoverable costs.

What is the position where the claimant's offer is accepted by the defendant, after expiry of the 21 day period but before 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?

The Court of Appeal's judgment of 23 July 2018 in *Hislop v Perde* and *Kaur v Committee (for the time being) of Ramgarhia Board Leicester* has provided clarification of the position, and should be positive reading for defendants and their insurers.

Where a claimant beats his own Part 36 offer at trial on a claim presented through the Low Value Protocols, r.36.21 expressly provides that the claimant should recover costs assessed on the indemnity basis from expiry of the 21 day period (and fixed costs up to that date). In contrast, Part 36 does not expressly provide for costs assessed either on the standard or the indemnity basis from the expiry of the 21 day period if the claimant's offer is accepted late by the defendant, or if the claim settles at a level which sees the claimant recover more damages than his offer.

Where a claimant accepts a defendant's Part 36 offer late (or fails to beat the offer at trial) in a claim commenced within the Low Value Protocols (and to which fixed recoverable costs apply), the defendant is liable to pay the claimant's fixed recoverable costs up to and including the stage at which the offer's 21 day period expired, and the claimant must pay the defendant's fixed costs for the stages through which the claim progresses between expiry of the offer and acceptance of the offer (or trial).

Lord Justice Coulson's lead judgment confirms that the late acceptance of a Part 36 offer on a claim to which fixed recoverable costs applies does not take the claim outside the fixed recoverable costs regime; the two exceptions to a claimant recovering fixed recoverable costs are the beating of a Part 36 offer at trial and 'exceptional circumstances'. The late acceptance of an offer is not 'exceptional circumstances' which justify the claim falling from the fixed costs regime. The costs payable will be the fixed recoverable costs up to the point at which the offer is accepted.

Whilst the judgment removes some of the sanctions of Part 36, it should be welcomed by defendants and their insurers as it provides certainty, enables insurers to reflect on offers made and accept them if circumstances change, and reduces the impact of early offers made by claimants.

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