Cost Consequences of Accepting a Part 36 Offer late in former RTA and EL/PL Protocol Claims – *Hislop v Perde* [2018] EWCA Civ 1726

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I. INTRODUCTION

1. In the joined cases of *Hislop v Perde* and *Kaur v Committee (for the time being) of Ramgarhia Board Leicester* [2018] EWCA Civ 1726, the Court of Appeal considered the question of the correct approach to costs in cases falling under the fixed costs regime in CPR Part 45 Section IIIA where a Part 36 offer is accepted after the expiry of the relevant period. Section IIIA is the part of Part 45 which applies to cases no longer proceeding under the RTA and EL/PL Protocol (**'PAP'**) such as those proceeding to Fast Track trial. The Court also provided a useful steer on the previously uncanvassed 'exceptional circumstances' test under CP45.29J, which provides a general gateway out of the fixed costs regime, and the test for indemnity costs, (see paragraphs 8 to 13 below).

2. A summary of the position in relation to Part 36 offers in former PAP matters, where they have been contentious, is given at paragraph 18 below.

II. THE CLAIMS

(a) Hislop v Perde

3. In *Hislop,* the claimant had made a Part 36 offer, in the sum of £1,500.00 to settle her RTA claim following commencement: the defendant had already failed to respond on liability so that the matter had been removed from the PAP. That offer was not accepted until a week before trial, ([4] and [7]). In costs only proceedings, the claimant sought costs from the expiry of the offer on the indemnity basis. The Judge awarded fixed costs only. The claimant appealed that decision whereon she was awarded costs after the relevant period on the standard basis. The defendant appealed to the Court of Appeal where the point was taken that r36.13 did not apply to fixed costs cases, ([10] and [11]).

(b) Kaur v Committee (for the time being) of Ramgarhia Board Leicester

4. In *Kaur,* the claimant was injured at the defendant's premises. Liability was denied so that the matter did not proceed under the PAP. The claimant issued and the defendant made a Part 36 offer to settle for £3,000.00 which was accepted. The claimant had made a prior offer of £2,000.00 which had not been accepted with the relevant period. She argued in costs only proceedings that she was entitled to indemnity costs from the date of her offer, since it had remained open until she accepted the defendant's offer, notwithstanding that it had previously been rejected, ([14] to [16]). The Judge found the claimant was entitled to fixed costs up to the date of allocation and costs on the standard basis thereafter. He concluded that if the defendant had accepted the earlier offer then the claimant would have been entitled to costs on the indemnity basis: the defendant ought not be able to subvert that by making a later offer. He also concluded that the case justified a departure from the fixed costs regime under r45.29J due to its exceptional nature, ([17] and [18]).

III. THE JUDGMENT

(a) The Court's Interpretation of the Rules

5. The Court found that, in the case of settlement before trial but outside the relevant period, the situation is dissimilar to that where a Part 36 offer is beaten at trial: different CPR rules apply, ([43]). In particular, the Court found that in the former:

5.1 the relevant Part 36 rule, namely r36.13, is not preserved by the rule applicable to fixed cost cases, namely r36.20, ([44]);

5.2 r36.20 makes plain that it is the only rule which applies to acceptance of an offer in Section IIIA fixed costs cases, ([44]);

5.3 r36.13 states that it is 'subject to' r36.20 which, because that rule applies to fixed costs cases and r36.13 does not, leads to the conclusion that r36.13 does not apply to fixed costs cases. That deduction was justified by the principle of construction adopted in *Solomon v Cromwell Group PILC* [2012] 1 WLR 1048:

> *'… where an instrument contains both general and specific provisions, some of which are in conflict, the general are intended to give way to the specific.'* (*Solomon at* [21]) ([45]); and

5.4 the signpost in brackets after r36.13(1) makes it clear that r36.20 *'makes provision for'* the relevant rules in fixed costs cases, and r36.13(3), which

qualifies the reference to standard costs with the words *'except where the reasonable costs are fixed by these Rules'*, ([46]).

6. The Court concluded that: *'[i]n this way, the interaction between the fixed costs regime and Part 36 is different where the claimant is successful after trial … as compared to where a Part 36 offer is accepted before trial …',* ([47]).

(b) The Effects of the Interpretation: Policy Reasons

7. The Court gave four reasons for why that analysis resulted in a 'coherent result':

   7.1 it was in accordance with the intention that the fixed costs regime should apply to PAP cases *'without further ado or argument'*, ([50]).

   7.2 it preserved the autonomy of Part 45 by ensuring *'… that both sides begin and end in the expectation that fixed costs is all that will be recoverable'* and that *'… in low value claims, the costs which are incurred are proportionate.'* ([51])

   7.3 it did not place claimants and defendants in a radically different position in respect of late acceptance of a Part 36 offer since r36.20(12) makes it clear that the costs awarded in that case would be assessed by reference to fixed costs only, ([52] and [53]).

   7.4 it remained the position that in an exceptional case of delay a claimant might be able to escape the fixed costs regime under r45.29J so that the interpretation did not result in a dogmatic approach, ([54]).

8. In relation to paragraph 7.4 above, the Court found that a defendant's late acceptance of a Part 36 offer could not always be regarded as an 'exceptional circumstance' under r45.29J. It would be necessary to consider the particular facts of the case although a long delay with no explanation might be sufficient to trigger r45.29J, ([56]).

9. r45.29J would not, however, be conditional upon the delay having made the litigation more expensive for the claimant, ([57]). Nor would the claimant necessarily need to establish a precise causative link between the exceptional circumstances and any increased costs: that would be too restrictive notwithstanding that a test of exceptionality must anyway be high, ([58]).

IV. THE OUTCOME

(a) The Cases in Issue

10. The Court overturned the original appeal decision in *Hislop*, finding that the claimant had not been entitled to anything other than fixed costs. There was no relevant difference in the wording of the old CPR rules applying at the time. The Court did not consider that a 19-month delay with no apparent justification was exceptional within the meaning of r45.29J, ([63]).

11. The Court further overturned the first instance decision in *Kaur* on the basis that the decision had been based on the premise that the claimant would have been entitled to indemnity costs from the expiry of her offer but for the later Part 36 counteroffer. The forgoing analysis rendered that premise false, ([66]). The decision that r45.29J was triggered had been based on the same faulty premise; there being nothing else that could render the case exceptional, ([67]). That meant that the judge had taken into account some material feature that should not have been considered as a result of a material error of principle so that the exercise of discretion was impugnable, ([69] and [70]). The claimant was therefore able to recover fixed costs only, ([77]).

(b) The Consequences of the Decision

12. As was expressly noted by the Court, the most important effect of the decision is that the only way out of the fixed cost regime in PAP matters will be in exceptional cases under CPR r45.29J. The court declined to impose the strict requirements suggested in relation to that test, but it is clear that the threshold remains high: *Hislop* shows that a 19-month delay without justification will not be sufficient without more. It is likely that the provision will not be engaged unless the test for indemnity costs is made out:

> *'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.*
>
> *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.'* ([35]).

13. The judgment does not make explicit whether the two tests are coextensive although it was held that a case that does not meet the test for indemnity costs could not hope to meet the exceptionality test, ([63]). That implies that the exceptionality test may be more stringent although, given the lack of jurisprudence on r45.29J, the decision is not definitive.

V. COMMENTS ON THE DECISION

14. There are several difficulties with the Court's reasoning, (at paragraph 5 above). Firstly, it cannot be the case that r36.20, which applies to former PAP cases, is the only rule which applies to acceptance of a Part 36 offer in such cases. That is so because by its wording it only covers acceptance, outside of the relevant period, of offers made by a defendant. That leaves r36.13 to cover claimant offers; the same being supported by the use of the word 'offeree', as opposed to 'defendant' or 'claimant' in r36.13(5)(b). Secondly, the fact that r36.13 states that it is 'subject to' r36.20 does not change that analysis since the latter does not cover offers made by a claimant and cannot modify the former in that regard. Finally, for the same reason, the bracketed statement in r36.13(1) that r36.20 'makes provision in fixed cost cases' must indicate a relationship of further specification rather than that r36.13 is excluded in such cases.

15. Accordingly, most of the interpretive reasons given by the Court are on shaky ground. Of course, the Court also gave general policy reasons, (paragraph 7 above). Those are more robust although they lack specific support from the particular rules. Of those reasons, the one most undermined by the rules is that under defendants and claimants are not treated radically differently under the Court's interpretation, (paragraph 7.3 above). That lacks compulsion since, in relation to claimant offers, r36.13 does not include the express qualification in r36.20, applicable in relation to defendant offers, that the Court merely 'have regard to', and not award in net excess of, the fixed amounts: the rules appear to differentiate between claimants and defendants in any event. It is also not immediately obvious why the Court should have been wary of treating claimants and defendants differently where settlement occurs prior to trial when they are clearly treated differently following trial. Defendants do not, on the wording of the rules, benefit from indemnity costs but only costs by reference to, and not in net excess of, fixed costs under r36.21(9) along with interest on those costs under r36.17(3)(b).

16. Although the point was not made in the judgment, r36.17(4)(b) *explicitly* provides for 'indemnity costs', as well as enhanced interest and an additional amount, in case a claimant beats their offer at trial. That might be taken to imply that the less specific reference to 'costs' in r36.13(4)(b) and (5) supports the Court's conclusion that only fixed costs are recoverable prior to trial. However, had the draftsmen intended that, they could have used the same degree of specificity in the opposite direction: i.e. by referring *explicitly* to 'fixed costs'. It is arguable that the more generic term in r36.13

implies a degree of discretion as to basis. One advantage of that, discretion-granting interpretation, is that under the Court's approach there may be less incentive for the parties to accept Part 36 offers outside of the relevant period so as to avoid increased costs thereafter, including at trial. That having been said, the hurdle would nonetheless remain high under the indemnity basis test, which it is, anyway, not yet completely clear is an appreciably lower hurdle than the exceptional circumstances test under r45.29J.

17. The judgment was unanimous and remains binding until the question is considered by the Supreme Court. Although it suffers from a lack of textual support, the outcome is not clearly wrong, particularly given the other policy justifications given. It may not, compared to the discretion-granting interpretation, in any event, alter the position of the parties much in practice owing to r45.29J. Accordingly, the prospects for change remain slight.

VI. SUMMARY

18. As things stand in contentious cases, the position under the Part 45 Section IIIA, so far as Part 36 offers are concerned is, in summary, as follows:

(a) *Offer accepted within the relevant period:* claimant is bound by the fixed amounts, (*Solomon v Cromwell Group PILC* [2012] 1 WLR 1048).

(b) *Offer accepted before trial but after relevant period:* both parties bound by the fixed amounts, (this case). In case of a defendant offer, r36.20 provides for defendant costs from expiry, assessed by reference to those amounts.

(c) *Offer bettered at trial*: if a claimant beats their own offer, they are entitled to indemnity costs from the date of expiry (*Broadhurst v Tan* [2016] EWCA Civ 94). Where a defendant offer is not beaten r36.21(3)(b) and (9) provide for defendant costs from expiry, assessed by reference to the fixed amounts.

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