

Part 36

Case Law Review

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Can indemnity costs be awarded following late acceptance? Lyons Davidson SOLICITORS

- CPR 36.17 clearly establishes indemnity basis awards.
- CPR 36.13 remains a contested area by both parties.
- Indemnity costs can negate the effect of both costs budgets in multi-track cases and fixed costs in the fast-track.
- Consider **Broadhurst v Tan [2016]** for the fixed costs argument.

(4) Where—

(a) a Part 36 offer which was made less than 21 days before the start of a trial is accepted; or

(b) a Part 36 offer which relates to the whole of the claim is accepted after expiry of the relevant period; or

(c) subject to paragraph (2), a Part 36 offer which does not relate to the whole of the claim is accepted at any time, the liability for costs must be determined by the court unless the parties have agreed the costs.

(5) Where paragraph (4)(b) applies but the parties cannot agree the liability for costs, the court must, unless it considers it unjust to do so, order that—

(a) the claimant be awarded costs up to the date on which the relevant period expired; and

(b) the offeree do pay the offeror's costs for the period from the date of expiry of the relevant period to the date of acceptance.

- **Jordan v MGN Ltd [2017]**, a phone hacking case where the court were required to address costs issues arising from the Part 36 rules.
- The defendant's offer was accepted out of time under CPR 36.13 and therefore CPR 36.17 was not the relevant provision.
- The judge had to consider whether the claimant's late acceptance of the Part 36 offer should warrant an indemnity basis order.
- Indemnity costs were ordered against the claimant for late acceptance.

Other relevant indemnity order cases

- **Sutherland v Khan (2016)**
- **McKeown & Anor v Venton (2017)**
- **Manna v Central Manchester Hospitals NHS Trust [2017] EWCA Civ 12**

What is a genuine attempt to settle the proceedings?

- **Jockey Club Racecourse Ltd v Willmott Dixon Construction Ltd [2016]**
- The court must consider the factors under CPR 36.17 to ascertain whether any order made would be unjust.
- 95% liability offer made to compromise.
- Judge explained this was unlikely to be a possible outcome of the proceedings but was a commercial attempt at settlement.
- Court considered this to be a genuine attempt and awarded indemnity costs.

- **Interactive Technology Corporation Ltd v Ferster & Ors [2017]** considered this issue in some detail.
- CPR 36.16 contains the disclosure rules on Part 36 offers.
- Parties should neither refer to amount nor the existence of an offer until the matter has been decided.
- Failure to comply with CPR 36.16 places any hearing at risk.

Questions?

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