Kate Wilson discusses recent case on late acceptance of a claimant's Part 36 offer

The cost consequences following the late acceptance of a Claimant's Part 36 offer have been hotly debated for some time. In fixed recoverable costs cases, the Claimant is entitled to the fixed costs for the stage set out in 45.29C-E, up to the expiry of the Part 36 offer. After that time, liability for costs must be agreed by the parties or determined by the court and unless the court considers it just to do so, the Defendant is ordered to pay the Claimant's costs from the date of the expiry of the offer to the date of acceptance (CPR r 36.13(4) and (5)). The issue faced by many judges at first instance and on appeal is whether to award the Claimant costs on the indemnity basis from the date of expiry of the offer (rather than the fixed costs up to the date of expiry). Part 36 is silent on this point.

One of the latest cases to decide this issue, is Anderson v Ladler in Newcastle County Court.

Anderson v Ladler

There is no Judgment available online, however a summary of the decision and reasons are provided in the Law Society Gazette: https://www.lawgazette.co.uk/news/no-indemnity-costs-for-late-acceptance-of-offer-court-rules/5061813.article

The claim arose out of a road traffic accident and therefore was commenced in the RTA protocol before Part 7 proceedings were commenced. The Claimant made a Part 36 offer of £4,429 on 31st July 2015, prior to proceedings being issued. The Defendant accepted the offer out of time ten months' later.

The Claimant sought costs on the indemnity basis. The Defendant argued that Part 36 did not apply and in the alternative that the fixed costs regime should apply and it was not appropriate to order indemnity costs.

At first instance, the Deputy District Judge seized of the case decided that there was a presumption in favour of an award of costs on the indemnity basis.

There is little detail as to the circumstances of the case or the arguments before the court, however the Law Society Gazette reports that HHJ Gargan found that Part 36 applied however did not order costs on the indemnity basis. The Judge found that a presumption in favour of indemnity costs may provide a "reverse incentive" to proceed to trial once the offer had expired as late acceptance would attract the same costs basis as losing at trial. There was no such presumption and the court had discretion as to the basis of the assessment. There was nothing out of the ordinary other than late acceptance and therefore costs were ordered on the standard basis (i.e. fixed costs).

The Court's discretion as to indemnity costs for Claimant's offers

Whilst the consequences of late acceptance of a defendant's offer are set out in CPR r 36.20, the rules dealing with Claimant's offers do not. CPR 36.14 does not set out the basis of the assessment. The commentary in the White Book states "there is no presumption that the court would order a late-accepting party to pay the other party's costs on an indemnity basis. The usual basis will be the standard basis unless (say) conduct is in issue, in which event r44.2 will apply." This sets out the High Court decision of Fitzpatrick Contractors Ltd v Tyco Fire [2009] EWHC 274.

This issue has been the subject of much debate, with decisions both ways. This is likely to continue unless clear guidance is provided by the Court of appeal.

Arguments made by Claimants

Claimants seek to distinguish the rule set out in Fitzpatrick as this was determined before the fixed recoverable costs regime. They rely upon the decision of RCJ Besford in Sutherland v Khan in April 2016 which referred to this as "a statement of the law as it was in 2009". It is not necessary, therefore, to find that the late accepting party has been guilty of unreasonable conduct of behaviour before considering an order for costs on the indemnity basis. This decision has been interpreted as stating that there is a presumption in favour of indemnity costs following late acceptance.

Claimants argue that they should have the same benefit of late acceptance if Judgment had been granted, in order for Part 36 to have teeth and this furthers the overriding objective.

Further, Claimants often rely upon the decision of Broadhurst v Tan [2016] EWCA Civ 94 where the Court of Appeal determined that claimants should have the benefit of indemnity costs when judgment has been obtained which is at least as advantageous as an offer made by the Claimant. Therefore, effectively the provisions of Part 36 trump those of Part 45.

Arguments made by Defendants

Defendants argue that had the rules intended that late acceptance should have the same consequences as the offer being beaten following judgment, this would have been expressly set out in CPR 36.13 as in 36.17. There is a clear distinction between acceptance of an offer and Judgment being entered and the rules intend to punish the party for failing to accept a reasonable offer.

Fairness is irrelevant because the fixed costs regime is intended to be a "swings and roundabouts" regime.

In addition to relying on the Fitzpatrick decision, earlier cases took the same approach: Excelsior Industrial and Commercial Holdings v Salisbury Hammer Aspden and Johnson [2002] EWCA Civ 879 Lord Woolf (in summary) stated that the absence of any reference to indemnity costs (in contrast to the consequences following judgment), a court should only make an order for indemnity costs following late acceptance when there are circumstances which justify such an order being made. Late acceptance alone is not sufficient. There must be some conduct or some circumstance which takes the case out of the norm.

Comment

Although Claimants seek to rely on Broadhurst v Tan, this does not actually provide any authority on this point. Cost consequences following judgment and following late acceptance must be different and are dealt with separately in Part 36.

Whilst some situations may justify costs on the indemnity basis, the problem with a presumption in favour of indemnity costs (as per Sunderland v Khan) is that it encourages a "one-size fits all" approach and does not consider the circumstances of each case and in particular the timing of the offer and acceptance. It was clear that 36.14 was drafted in order to allow judges to determine the issue on the facts before them.

Currently, the only binding authorities on how a court should exercise its discretion are Fitzpatrick and Excelsior, which set a particularly high bar for indemnity costs to be awarded.

As in Anderson v Ladler the Claimant is still compensated where the offer is made at an earlier stage in the proceedings, but accepted after the costs have increased by virtue of crossing the threshold into the next stage of the tables

set out in 45.29. The difficulty is likely to arise in cases where the offer is made just after the trial has been listed (especially as courts are listing trials at the same time as giving directions) yet is only accepted days before trial.

It is unhelpful that Part 36 does not expressly deal with the consequences following late acceptance of a Claimant's offer, despite Part 36 being expressly updated to deal with the fixed recoverable costs regime. There are a number of applications dealing with this point before the County Courts and the present inconsistency in judicial approach is likely to continue until guidance is provided from the Court of Appeal.