

# Tactically, what is the most effective use of Part 36 Offers in cases where Costs are fixed per CPR 45?

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# 'Recent' changes to Part 36

- 06/04/15 - the whole of Pt 36 was re-numbered
- Many amendments clarified the rules, often by codifying the relevant case law
- Principal amendments were:
  - (1) the Rule Committee sought to remove unnecessary technicality by amending the formal requirements (now r.36.5)
  - (2) the application of Pt 36 to counterclaims, other additional claims, appeals and cross-appeals was clarified (now rr.36.2 and 36.4)
  - (3) new rules were introduced to ease the restrictions on disclosure of Part 36 offers in split-trials (now r.36.16)
  - (4) more detailed rules were introduced in respect of withdrawing or changing the terms of a Part 36 offer (now rr.36.9 and 36.10). The new rules effected a notable change to the law in that an offeror can now make a time-limited Part 36 offer (r.36.9(4)(b))
  - (5) the Rule Committee sought to address the problem of very high claimant offers (new r.36.17(5)(e))
  - (6) there was a new provision regulating Part 36 offers where the offeror's entitlement to costs is limited to court fees, whether pursuant to r.3.14 or some equivalent order (new r.36.23).



# Unpicking some of the changes...

- New 36.5(1)(b) states that an offer must “make clear that it is made pursuant to Part 36” as opposed to the previous verbiage of “state on its face that it is intended to have the consequences of Section I of Part 36”
- Editorial Note White Book – terms as to costs are inconsistent with Part 36; and an offer to pay a global sum inclusive of costs is not compliant with Part 36; but offers must still specify that costs are to be paid within 21 days
- The new Form 242A should be used
- Withdrawal or changing of terms not governed by ordinary contractual principles – see rules at 36.9 & 36.10



# Unpicking some of the changes...(2)

- Time-limited offers are expressly permitted
- A withdrawn offer will not enjoy the usual Part 36 consequences
- Whether a common law offer is impliedly rejected by the making of a subsequent Part 36 offer is the subject of an appeal to the CA
- 36.12(2) prevents offers being accepted where the only issues have been decided in a preliminary trial – somewhat a statement of the obvious; but where there are still some outstanding issues, the offeror is given a 7-day window to re-assess the offer (36.12(3))



# Unpicking some of the changes...(3)

- CPR 36.16 allows Part 36 offers formulated on specific issues to be notified to the trial judge where there is a split trial; this is plainly to encourage the making of immediate costs orders and should encourage the making of offers on both specific issues as well as globally
- The punitive consequences of Part 36 now sit in 36.17; a judgment made in a foreign currency falls to be converted to sterling at the exchange rate applicable at judgment; and payments made by a defendant after the date of the Part 36 should specify whether they are on account of the claim and the Part 36, or whether they are in addition to the offer in order that it is made more attractive.



# Unpicking some of the changes...(4)

- CPR 36.23 allows an offeror who would otherwise be limited in costs recovery to court fees (for failing to file a budget) to 50% of the assessed costs without reference to the limitation where an offer is accepted.



# Part 36 on Fixed Costs

- The new rules set out these provisions at CPR 36.20 - 36.21 [previously at CPR 36.14A]
- If C accepts D's offer in time – C gets fixed costs
- If C accepts D's offer after the specified date – C gets fixed costs for the stages applicable, but pays D's costs after the specified date
- Following judgment?
- Previously, there was confusion about whether Part 36 indemnity costs trump the fixed costs of Part 45....



# *Broadhurst & Or v Tan & Or [2016] EWCA Civ 94*

- *Old Rule numbering referred to herein*
- Explored the tension between the rules fixing costs in most lower personal injury cases (section IIIA of Part 45 CPR) and the provisions in Part 36 applying to such claims
- HHJ Robinson (Sheffield CC) held in *Broadhurst* that, although CPR 36.14(3) applied, there was no difference between profit costs assessed on the indemnity basis and the fixed costs prescribed by Table 6 of CPR 45.29C, and the only basis to award more than fixed costs was the 'exceptional circumstances' pursuant to 45.29J.
- HHJ Freedman (Newcastle-U-Tyne) held in *Smith* that 36.14(3) applied but that it was wrong to equate indemnity costs with fixed costs.



## *Broadhurst v Tan...(2)*

- The tension was that 45.29B stated that the only costs to be awarded in a section IIIA case are fixed costs; whereas 36.14 stated that in such cases 36.14 would apply subject only to modifications set out in 36.14A.



# *Broadhurst v Tan...(3)*

## PRINCIPLES:

- The tension is resolved by the principle that the general provisions yield to specific provisions
- Part 36 is a self-contained code: this indicates that Part 36.14A is intended to prevail over rule 45.29B which is a rule of a more general nature
- Where fixed costs provisions are intended to prevail, Part 36 says so
- The effect of Part 36.14 and 36.14A is that where C makes a successful Part 36 offer he is entitled to costs on the indemnity basis



## *Broadhurst v Tan...(4)*

- Explanatory Memorandum to the 2013 Amendment Rules which was laid before Parliament to accompany the draft statutory instrument stated:

*If a defendant refuses a claimant's offer to settle and the court subsequently awards the claimant damages which are greater than or equal to the sum they were prepared to accept in the settlement, the claimant will not be limited to receiving his fixed costs, but will be entitled to costs assessed on the indemnity basis in accordance with rule 36.14.*



## *Broadhurst v Tan...(5)*

- If there was any doubt about the construction of the rules, it would be legitimate to use the Explanatory Memorandum as an aid to construction (this was not the Explanatory Note to the statutory instrument).
- Fixed costs and assessed costs are conceptually different. Fixed costs are awarded whether or not they were incurred, and whether or not they represent reasonable or proportionate compensation for the effort actually expended. On the other hand, assessed costs reflect the work actually done.



## *Broadhurst v Tan...(6)*

- Where a claimant makes a successful Part 36 offer in a section IIIA case, he will be awarded fixed costs to the last staging point provided by rule 45.29C; he will then be awarded costs to be assessed on the indemnity basis in addition from the date that the offer became effective. This does not require any apportionment.
- Whilst this leads to a generous outcome for claimants, that is not inconsistent with 36.14(3) as a whole and there are countervailing incentives in any event



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