

Defendant Entitled to Ask Court to Determine Costs after Accepting Part 36 Offer after Expiry of Relevant Offer Period

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In a recent judgment, the High Court held that a defendant who accepted a claimant's Part 36 offer after the expiry of the relevant offer period could ask the court to determine costs. This was the case despite the fact that the offer contained a term as to costs.

Background. *Pallett v. MGN Limited* [2021] EWHC 76 (Ch) involved a claim for infringement of privacy rights resulting from the interception of mobile phone voicemails and other unlawful information-gathering techniques. The claim was due to be heard in January 2021, but, in October 2020, the Claimant made a Part 36 offer to settle for £99,500 and ancillary relief. The offer specified, in accordance with Part 36, that if the Defendant accepted the offer within 21 days, the Defendant would be liable for the Claimant's costs.

On the 22nd day, the Defendant accepted the offer to settle. However, the Defendant's acceptance was on the basis that the Defendant would invite the court to deal with the extent to which the Defendant had to pay the Claimant's costs. The Defendant's argument was that since the Part 36 offer was accepted outside the relevant period of 21 days, it was not bound to pay costs as it otherwise would have been had it accepted the offer within 21 days in accordance with CPR 36.13(5). The Defendant alleged that the Claimant had not properly engaged with the settlement process, in particular by refusing to engage in settlement discussions before the disclosure process was complete.

Both the Claimant and the Defendant had made offers of settlement, though the Defendant's offers had always been on the basis of only partial payment of the Claimant's costs. The Claimant's offers were made on the basis that the Defendant would pay all of her costs.

The Claimant argued (in short) that the Part 36 offer was accepted, and so it followed that the Defendant was obliged to pay her costs.

Findings. Mr Justice Mann concluded that the Defendant was entitled to accept the offer and invite the Court to exercise discretion over the costs of the action. CPR 36.13

provides for what is to happen in respect of a party's costs during the "relevant period", being the period of not less than 21 days within which a Defendant will be liable for the Claimant's costs if the offer is accepted. The Court accepted that the Defendant was entitled to accept the Part 36 offer in the manner that it did. Further, the Court held that the normal contractual analysis of "offer and acceptance" does not apply to Part 36 offers. Part 36 is a self-contained procedural code, and pursuant to CPR 36.13(4), where a Part 36 offer is accepted after the expiry of the 21-day relevant period, the Court must determine liability for costs unless costs are agreed to by the parties.

Despite the Defendant's success in this regard, on the facts of the case the Court determined that the Claimant's conduct was not so unreasonable as to warrant a departure from the Defendant paying the Claimant's costs in the normal way.

A Note on Settlement Strategy. Although the analysis on Part 36 offers is an important continuation of a line of recent cases on Part 36 offers generally, the judgment also includes an important warning regarding a common litigation strategy. It is often the case that parties decline to engage in settlement discussions (either by way of formal mediation or informal discussions) until after the disclosure process is completed and the parties have access to one another's documents.

The Court was careful to add a warning (headed "A word of caution") in the judgment that it turned on its own facts and that it "*should not be taken as a green light for all claimants to decline to enter into negotiations before disclosure is complete*". Mr Justice Mann noted that there may be other cases in which a non-engagement until after disclosure is complete will be unreasonable.

Parties should bear this warning in mind when considering their reasons for delaying entry into settlement negotiations.



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