

# costs update

## Review your Part 36 offers!

Recent case law in [Gibbon](#) may have a dramatic impact on Part 36 offers and should encourage all fee earners to re-check their files.

One implication of the case could be that it gives claimants a way out of litigation since potentially, earlier realistic offers from defendants can simply be accepted by claimants once they realise their claims are not worth what they had hoped. Such a step may have costs consequences to the claimant, however if agreement is not reached then the court can decide the appropriate costs order.

The decision may also lead to an increase in satellite litigation about the stance the courts should take where offers are accepted out of time and which costs orders should be made. Claimants may seek their costs, or at worst seek no order for costs, post the period for

acceptance expiring, citing a change in circumstance or that their conduct was reasonable and suggesting the court should not use hindsight.

The Court of Appeal (in a decision published on 25 May 2010) held that an

offer made under Part 36 of the CPR may remain open (and unless steps are taken will be assumed to be open) for acceptance even if it has previously been rejected or the offeror has made a subsequent offer on different terms.

[Gibbon -v- Manchester City Council and LG Blower Specialist Bricklayer Limited -v- Reeves](#) [2010] EWCA Civ 726 were two interlinked cases that resulted in parties needing to review any Part 36 offers previously made which they no longer wish to keep 'on the table'. In light of the decision, if there is uncertainty as to the status of an offer, then earlier Part 36 offers must be specifically varied or withdrawn.

In [Gibbon](#) a Part 36 offer of £2,500 was made by the claimant. The defendant rejected this offer and made its own counter offers. These were rejected and ultimately the defendant made a further offer at £2,500. The claimant rejected this offer but had failed to withdraw her own previous offer of £2,500. The defendant then tried to formally accept the claimant's own Part 36 offer of £2,500.

The claimant argued that the defendant's initial rejection of her Part 36 offer rendered it incapable of acceptance



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## Welcome

Welcome to the Hill Dickinson costs update September 2010.

This update reviews the potentially dramatic implications of recent case law on Part 36 offers, profiles our new Sheffield based cost team, explores the changes in service of bills and highlights some of our recent success stories.

We hope you find this update informative. We would welcome feedback on any of the articles or the update in general.

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thereafter, in accordance with usual contractual principles. Traditionally most parties have relied upon basic contract law in terms of negotiations.

The Court of Appeal held that the wording of rule 36.9(2) is clear that an offer may be accepted **at any time** unless the offeror has withdrawn the offer by serving notice of withdrawal on the offeree. The rules do not provide for a Part 36 offer to lapse or become incapable of acceptance on being rejected by the offeree. This would be inconsistent with the concepts underlying Part 36, which proceeds on the basis that an offer is on the table and available for acceptance until the offeror chooses to withdraw it. It was held that Part 36 was such a strict and explicit regime that normal contractual principles do not apply.

The court also examined the issue of whether there could be an implied withdrawal. The claimant argued to the contrary that her rejection of the defendant's Part 36 offer of £2,500 had made it quite clear that she was unwilling to accept that sum in settlement of her claim and had therefore amounted to an implied withdrawal of her own previous Part 36 offer in the same amount.

The Court of Appeal also rejected this argument as rule 36.3(7) provides that an offer is only withdrawn by serving written notice on the offeree. Moore-Bick LJ stated:

**"In my view that leaves no room for the concept of implied withdrawal; it requires express notice in writing in terms which bring home to the offeree that the offer has been withdrawn."**

Moore-Bick LJ said there is no reason why a party should not make more than one Part 36 offer and leave it to the other to decide which, if any, to accept. Equally, a party might vary its original offer so that only the revised offer is available for acceptance. Moore-Bick LJ recognised that in some cases there could be argument that a later offer was intended to vary an earlier offer or to stand alongside it. He said it is for parties and their legal advisers

to make their intentions clear as to whether a new offer is intended to vary or supplement an earlier offer.

## Overtuning Carver?

The judgment also potentially limits the effect of Carver -v- BAA, a 2008 decision in which the Court of Appeal introduced a broad interpretation of whether a judgment is "more advantageous" than a defendant's Part 36 offer. Lord Jackson in his report on costs was extremely critical of it.

In the Carver -v- BAA case the claimant beat the defendant's Part 36 offer but only by a very small margin. It was held that the final outcome was "more advantageous" than accepting the offer, bearing in mind factors such as the emotional toll of the litigation on the claimant. The decision has been criticised as it introduced too much uncertainty. In Gibbon, the Court of Appeal supported that criticism and whilst bound by the decision in Carver -v- BAA, did much to limit its effect.

In Blower, the claimant only just beat one of the defendant's offers and the defendants argued that, bearing this in mind (and applying the principles in Carver -v- BAA), the claimant had failed to obtain a judgment that was "more advantageous" than the offer and therefore should suffer the Part 36 consequences. The Court of Appeal held that Carver -v- BAA was still binding authority that the court must take into account all aspects of the case, including such things as emotional stress and irrecoverable costs. However the weight or importance of each factor remained a matter of discretion and that the court should see things from the litigant's perspective. It was stressed that the use of this discretion would be likely to be rare. Moore-Bick LJ stated:

**"In most cases obtaining judgment for an amount greater than the offer is likely to outweigh all other factors."**

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## Our new Sheffield based costs team

We are delighted to confirm that as part of Hill Dickinson LLP's acquisition of parts of Halliwells in July, we have acquired the Sheffield based costs team.

### An enhanced service

The Sheffield team is working closely with our established team in Liverpool, continuing our growth in the costs arena and enhancing our national coverage to deliver:

- Enhanced capacity
- Improved turnaround times
- Costs effective solutions to our clients

Our costs capability has grown by 60% and this will allow us to improve further our high standards of technical excellence and customer service.

The Sheffield team is led by Lisa Walker who has 14 years of experience in costs including providing strategic advice, dealing with GLO work, conduct issues and with a speciality in the area of disease and mesothelioma, including a number of reported cases. Her team's robust and technical approach fits perfectly with our existing industry leading performance levels and savings achieved for clients.

Existing services that we provide to clients include dealing with all aspects of adverse costs such as preparing points of dispute and providing advocacy in all courts, assisting in the recovery of costs through preparation of detailed bills and through ongoing costs management services, providing training and tactical advice.

### Future developments

As a result of this enhancement we are developing a range of new products designed to make a difference in the current economic climate. This includes fixed fee agreements and specialist auditing services to challenge legal spend, benchmark and measure the performance of existing costs draftsmen and ultimately ensure value for money. We look forward to discussing how we can save you money on your existing legal spend and enhance the way you deal with third party costs.

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## Success story

### Kelly -v- Hill Dickinson client

Our head of costs, Paul Edwards, recently successfully reduced a total claim for costs of approaching £800,000 to £400,000, with claimant solicitors backing down shortly before a four day detailed assessment hearing was due to commence.

The case was a complex pensions dispute that had run for many years and been appealed to the Court of Appeal, with liability being settled four years before quantum was agreed. In addition to a bill of £630,000 a large claim for interest was sought with claimants seeking it backdated to the date of the liability decision. The bill itself was extremely poorly drafted and included Court of Appeal costs in the middle of a High Court bill, meaning additional efforts were required to ensure that Liverpool County Court had jurisdiction to hear the matter.

The bill was robustly challenged with the following main issues:

- The hourly rates claimed were grossly excessive being £360 per hour for work done in Liverpool in 2001
- The costs of over £30,000 were claimed for a period when legal aid had been suspended



- In addition to grossly excessive time being claimed totalling 530 hours an extra block of 50 hours of estimated time was added
- There was considerable duplication of expense with the claimant being on her fourth firm of solicitors and fourth costs draftsman by the time the matter was concluded
- Solicitor and client expenses during the trial were also claimed including £250 per night hotel bills for the Savoy and Waldorf, expensive evening meals, £60

bottles of wine and beer plus mini bar expenses, bringing the whole bill into disrepute

Detailed Points of Dispute were served and the matter was robustly pursued with defendants preparing fully for the hearing. Matters were also complicated with two of the claimant's solicitors being struck off (one was made bankrupt subsequently) and with SRA intervention. Shortly before hearing the claimant accepted a dramatic reduction in their claim to £400,000, regarded as an excellent result by our client.

## Jackson progress

We can remain confident that some reform will come, even with the new Government. It seems to be that while Parliament is slow with primary legislation there is still the will to complete the reforms, or certainly the main proposals.

The Parliamentary Under-Secretary of State for Justice (Jonathan Djanogly MP) stated that the Government will consult this autumn on implementing the recommendations made by Jackson LJ, in particular regarding the reform of CFAs which “**should lead to significant costs savings. The Government is therefore taking these proposals forward as a matter of priority.**”

Djanogly confirmed: “**Our consultation in the autumn would also seek views on other related recommendations on funding arrangements such as whether lawyers should be permitted to enter into damages-based agreements (DBAs) or ‘contingency fees’ in litigation. DBAs are also a type of ‘no win no fee’ agreements which allow a lawyer to take a percentage of the claimant’s damages for taking on the claim. DBAs are commonly used in employment tribunals but are not permitted in litigation before the courts. This consultation will take account of any relevant legal aid reform proposals on which we will**

**also be seeking views in the autumn, as previously announced.**”

The Government also confirmed that work continues on other proposed changes such as fixed costs in the fast track and regarding referral fees.

A variety of pilot schemes are in place or about to be introduced:

- **Concurrent evidence** - “hot-tubbing”, whereby expert witnesses can be called simultaneously and go head to head in the witness box. This is now available in Manchester but all involved must agree to participate.
- **Costs management pilot** - continues to run in Birmingham Mercantile Court.
- **Provisional assessment** - Leeds will be experimenting with the provisional assessment of costs. This is assessment of bills based on the file and the paperwork being before the judge. If either side is unhappy then a full hearing can be requested but one presumes the courts will not be that sympathetic! Certain degrees of improving their position will need to be achieved by the party who seeks a full hearing, otherwise they will have to pay costs. This pilot is being run in Leeds, York and Scarborough from 1 October 2010 for a period of 12 months. This will apply to all cases where the costs to be assessed are £25,000 or less.

**Hill Dickinson comment:** This proposal may in fact lead to more assessments and delay the settlement of cases. Parties who are anxious to avoid great expense may be happy to test their arguments on paper before a district judge.

Lord Young has been asked to look at health, safety and compensation issues. He qualified as a solicitor and was a director of Autohit which became Accident Exchange, so is expected to be well versed on litigation costs. The new Attorney General Dominic Grieve QC confirmed even before the election that the new Government is focused on reform, particularly now in light of a £325 million cut from the MOJ budget.

Feedback from lawyers’ experiences in the courts post Jackson is interesting; obviously six months is a comparatively short period of time, and of course there has been no change in statute to support the Jackson proposals.

That said it does seem as if the courts are being stronger on costs, perhaps in response to Jackson’s criticisms of the failure to use existing powers. There have been a number of strong decisions on conduct recently, and the Court of Appeal quickly followed Jackson’s view that Carver -v- BAA was a nonsense that led to too much uncertainty.

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## Claiming costs against claimant solicitors?

(1) Mohammed Adris (2) Shelagh Brownlow (3) Rajan Mandal (4) Iain McNicol (claimants) -v- Royal Bank Of Scotland PLC (defendant) and other conjoined cases saw a potentially important decision which related to Consumer Credit Act cases. It was held that the failure of a firm of solicitors to obtain ATE cover for unsuccessful claimants amounted to a gross breach of its duty to the claimant and rendered it liable to a non-party costs order.



## Success story

Claimant solicitors had recommended a policy of insurance with Composite Legal Expenses. Composite had advertised previously that they paid referral fees and due to collation of evidence on other cases involving the same provider, we established there was a financial interest that should be disclosed pursuant to Regulation 4.2.e of the CFA regulations.

It was argued that there was an interest which was declarable to the claimant and the solicitors had failed to disclose the schedule attached to the CFA dealing with same. Due to a failure to comply with a direction to disclose evidence in respect of this point, an application was made to strike out the claimant's claim for costs which was granted by the judge. As a consequence the bill was disallowed and the defendants were awarded the costs of the detailed assessment process.

## Changes in requirements for service of bills

As of recent amendments to the CPR and CPD, the details to be provided regarding success fees when commencing the detailed assessment process have been changed. They create a situation whereby claimants can no longer hide behind the rules, particularly in post November 2005 CFAs where it was argued that Hollins -v- Russell was not relevant.

CPD 32.5 now states that for pre November 2005 CFAs, a statement of reasons for the percentage increase (success fee) must be provided and more importantly where the conditional fee agreement was entered into on or after 1 November 2005 (save where a fixed success fee applies in RTA or EL cases), either a statement of the reasons for the percentage increase or a copy of the risk assessment prepared at the time that the conditional fee agreement was entered into should be served.

The rule confirms the Court of Appeal approach in Hollins -v- Russell regarding disclosure of the CFA, but adds that where it is not disclosed a statement setting out a considerable degree of information should be provided "so as to enable the paying party and the court to determine the level of risk undertaken by the solicitor".

Such information includes:

- the definition of 'win' and 'lose';
- details of the receiving party's liability to pay costs if that party wins or loses; and
- details of the receiving party's liability to pay costs if that party fails to obtain a judgment more advantageous than a Part 36 offer.

More detail also must be provided regarding ATE insurance premiums such as a copy of the insurance certificate showing what the policy covers and the extent of that cover. The level of detail required is now quite in depth and may allow for challenges to be raised against success fees if proper risks are not taken into account.

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## About Hill Dickinson

The Hill Dickinson Group offers a comprehensive range of legal services from offices in Liverpool, Manchester, London, Chester, Sheffield, Piraeus and Singapore. Collectively the firms have more than 1,300 people, including 190 partners.

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