

Begum v Barts Health NHS Trust [2022] EWHC 1668

Frequently, not all of the evidence that a lawyer would like to have is available when the other side makes a Part 36 offer. In some (relatively rare) cases it might properly be said that it is impossible to advise on whether an offer should be accepted. The problem may feel particularly acute when the recipient of the offer is a protected party where there is an additional burden on the lawyers advising to gain Court approval, and a moral burden on the litigation friend to do the best for the protected party.

In the case of a Defendant's Part 36 offer, after the relevant period (of at least 21 days) expires, the usual rule is that the Claimant will pay the Defendant's costs if the offer is later accepted or is not beaten at trial. To persuade the Court to make a different order, the Claimant must show that the usual order "*would be unjust*" (CPR 36.17(5)).

In an earlier case of *RXL (a protected party by her litigation friend) v Oxford University Hospitals NHS Foundation Trust* [2021] EWHC 1349 (QB), it was suggested that a party faced with a Part 36 offer that they could not properly evaluate should make an application to extend the relevant period.

In the present case, that is exactly what the Claimant did, relying on the comments made in *RXL*.

Dismissing the application, Master Thornett found that he had no jurisdiction to make an order of the type that the Claimant wanted.

In outline, the Master held that:

- The jurisdiction in *RXL* appeared to be assumed, and there was no express discussion in the judgment of what power the Court might exercise on such an application. That part of the decision in *RXL* was also *obiter dicta*.
- Courts have no power to require parties to settle or to dictate the terms of settlement (so it would be odd if the Court could re-write a party's offer).
- There is no express power for the Court to vary the relevant period provided in Part 36, and Part 36 is a "self-contained code".
- With the exception of *RXL* no other case identified by counsel suggested a power existed of the type for which the Claimant contended, and by implication a number of other cases suggested that there was no such power. (It is worth noting that the earlier cases do suggest that a stay could be applied for in an appropriate case, which would provide at least some protection against the offeror incurring further costs during the period of the stay).
- The general provisions in CPR 3.1(2)(a) to "*extend or shorten the time for compliance with any rule, practice direction or court order*" do not apply to the self-contained code of Part 36.

- The wording of CPR 3.1(2)(a) is in any event inapposite to catch the relevant period contained in a Part 36 offer for various reasons, including that the relevant period of at least 21 days is set by the offeror (not by a rule, practice director or order), and there is no “*time for compliance*” with the relevant period.

Nicholas Pilsbury appeared for the successful Defendant / Respondent to the application.

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