

Part 36 – is a loophole about to be closed?

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Pallett v MGN Ltd [2021] EWHC 76 (Ch)

In the case of Pallett v MGN Ltd [2021] EWHC 76 (Ch), the Claimant made a Part 36 offer to the Defendant with the usual 21 day 'relevant period' for acceptance. If the Defendant had accepted the offer within the relevant period, the Defendant would be obliged to pay the Claimant's legal costs. But the Defendant didn't – it accepted the offer on the 22nd day. This meant that the automatic liability to pay the Claimant's costs did not apply and instead, the Defendant argued that it was entitled to invite the Court to consider its liability to pay the Claimant's costs.

The delay in accepting the Claimant's offer was a tactical move so the Defendant could raise arguments about the Claimant's costs. This loophole allowed the Defendant to avoid the automatic costs consequences of accepting the offer which on a common-sense analysis, surely cannot have been the drafting intention.

What next for Part 36 offers?

We expect there to be further case law on this point or that Part 36 will soon be amended to close this loophole.

If you are involved in litigation then you should consider Part 36 carefully before making, or accepting, an offer.

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