

## General Liability Update

November 2009

### Amending or withdrawing a Part 36 Offer

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### Case notes

#### Occupiers not obliged to highlight obvious risks

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*Bourne Leisure Limited (T/A British Holidays) v Marsden (on behalf of the Estate of M Marsden Deceased)* [2009] ECWA Civ 671  
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#### Summary Assessment not allowed where the nature of the insurance terms meant they would need to be determined at trial

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*AC Ward & Sons Ltd v Catlin (Five) Ltd & Others* (2009) CA (unreported). [More...](#)

### Update

As of 1 October 2009 there have been a number of changes to Civil Procedure Rule 35 and Practice Direction and the 2005 Protocol for the Instruction of Experts. [More...](#)



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### Any comments or queries?

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## Amending or withdrawing a Part 36 offer

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### Amending or withdrawing a Part 36 offer – The Relevant Law

36.3 (5) Before expiry of the relevant period, a Part 36 offer may be withdrawn or its terms changed to be less advantageous to the offeree only if the court gives permission.

36.3 (6) After expiry of the relevant period and provided that the offeree has not previously served notice of acceptance, the offeror may withdraw the offer or change its terms to be less advantageous to the offeree without the permission of the court.

36.3 (7) The offeror does so by serving written notice of the withdrawal or change of terms on the offeree.

36.9 (2) Subject to rule 36.9(3), a Part 36 offer may be accepted at any time (whether or not the offeree has subsequently made a different offer) unless the offeror serves notice of withdrawal on the offeree.

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### The current rules

Following amendments to Part 36 of the Civil Procedure Rules in April 2007, both claimants and defendants need the court's permission to withdraw or alter a Part 36 offer during the period for acceptance of such offer, but neither claimants nor defendants need the court's permission to withdraw or alter a Part 36 offer after the expiry of the relevant period. Any change in the offer has to be made by the offeror serving a written notice of the withdrawal or change of terms on the offeree.

If the offer has not been withdrawn it can be accepted after the offer period of 21 days or more without the permission of the court (with very few limited exceptions) even if the parties cannot agree liability as to costs. A Part 36 offer can be accepted by the offeree even after the offeree has made a counter offer.

### Amending or withdrawing an offer – a practical example

On 3 September 2009 His Honour Judge Holman considered two appeals which dealt with the acceptance and withdrawal of Part 36 offers (*Whistance v Valgrove Limited* and *Gibbon v Manchester City Council*). The facts of *Gibbon* are simple and provide a useful example of how the rules are applied in practice.

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In *Gibbon* the claimant suffered a personal injury. Liability was admitted and – following sight of the claimant’s medical evidence – the following negotiations took place:

<b>10 November 2008</b>	Defendant made a Part 36 offer of £1150
<b>18 November 2008</b>	Claimant rejects the defendant’s offer and makes a Part 36 offer of £2.5k plus CRU
<b>24 November 2008</b>	Defendant rejects offer and makes an increased offer of £1.5k
<b>6 January 2009</b>	Claimant rejects offer and invites an increased offer following updated medical evidence
<b>7 January 2009</b>	Defendant makes a Part 36 offer of £2.5k
<b>18 February 2009</b>	Claimant rejects offer and invites an increased offer
<b>26 February 2009</b>	Defendant accepts the claimant’s Part 36 offer of 18 November 2009
<b>2 March 2009</b>	Claimant asserts that the time for acceptance has expired, that the offer has been withdrawn and adds “ <i>we confirm that the Part 36 offer is withdrawn</i> ”
<b>3 March 2009</b>	The defendant cites CPR36.9(2) and sends a cheque for £2.5k. The claimant returns this cheque and subsequently issues proceedings

The defendant issued an application for a declaration that the claim had been compromised by a valid acceptance of the claimant’s Part 36 offer. The District Judge concluded that there had been a valid acceptance. The claimant was awarded costs up to 26 February 2009 (with costs from 10 December 2008 being assessed on an indemnity basis). The claimant was ordered to pay the defendant’s costs of the Application. The claimant was given permission to appeal.

The Court of Appeal declined to accept the transfer of the proceedings and therefore the appeal was heard before His Honour Judge Holman sitting at Manchester County Court.

The claimant argued that the defendant had specifically rejected the offer made on 18 November 2008 and, in applying contractual principles, there ceased to be an offer capable of acceptance. In the alternative there had been an implied withdrawal of the offer when the claimant invited an increased offer following sight of updated medical evidence.

His Honour Judge Holman did not accept this argument. The central issue in the case was whether a written notice of withdrawal or change of terms was served by the claimant. The judge noted that the January 2009 letter from the claimant’s solicitors did not address the November offer at all nor did it change the terms of this offer. In light of the updated medical evidence it would have been a simple matter for the claimant to have put forward an updated Part 36 offer or, alternatively, state that the November offer was withdrawn. Either way the defendant would have been precluded from accepting the claimant’s November 2008 offer.

In the circumstances the claimant's appeal was dismissed.

### Amending or withdrawing a Part 36 offer – practical considerations

- Keep offers under constant review. If there are developments which strengthen your case or weaken your opponent's case, consider whether or not you should withdraw or amend any outstanding offers
- Withdrawals or amendments should be in writing. Make your letter as clear as possible and, for the avoidance of doubt, refer to CPR 36.3 (7)
- Bear in mind that if you receive a Part 36 offer which is expressed to be open for acceptance for 21 days (or more) the offer can still be withdrawn before the end of this period if permission from the court is obtained

## Case notes

### Occupiers not obliged to highlight obvious risks

*Bourne Leisure Limited (T/A British Holidays) v Marsden (on behalf of the Estate of M Marsden Deceased)* [2009] ECWA Civ 671

Bourne Leisure Limited (B) appealed against the decision that it was liable for an accident in which a two year old boy died.

B was the owner of a holiday site. The deceased child (C), his parents and brother were staying in a caravan on the site. On arrival they had been provided with a plan which showed, inter alia, lakes, ponds, a river and the beach. Whilst C's mother was talking to a neighbour, C and his brother wandered away towards a small pond which was surrounded by rails and fencing. C climbed over the rails and drowned.

At first instance B was held liable for the incident. The District Judge held that the failure to draw specific attention to the pond and the access which might be gained to it was a breach of the common duty of care. B should have specifically warned of the dangers had C gone there unaccompanied.

On appeal this decision was reversed. B was not under an obligation to bring the precise location of a pond nor the existence of the pathway to the attention of C's parents. The danger to a small unaccompanied child was obvious, particularly where B had provided a plan which showed the exact location of the pond.

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## Summary Assessment not allowed where the nature of the insurance terms meant they would need to be determined at trial

*AC Ward & Sons Ltd v Catlin (Five) Ltd & Others* (2009) CA (unreported)

The appellant insurers (C) appealed against a decision that they were not entitled to summary judgment in a case where their insured (AW) had made a claim for lost property following a theft from their warehouse. C had refused to pay the claim on a variety of grounds including breach of two warranties which required:

- a stated burglar alarm was installed and effective when the premises were closed
- a protection and maintenance warranty which required that all security measures were maintained in good order and defects promptly remedied

The warehouse was protected by a vibration detector. Whilst the burglars had disturbed the detector, the alarm was not activated. CCTV that was in operation also failed to be transmitted to the monitoring station, which would have also raised the alarm in ordinary circumstances. C declined cover for the claim on the basis that the warranties had the effect that insurers were not on risk during the time the warranties were not complied with. When proceedings were issued, C applied for summary judgment on those grounds. The application failed on the basis the terms were not suspensive conditions as C had argued, but warranties as defined in the policy. Further, the judge held that AW had an arguable case which they were entitled to seek a determination for at trial. C appealed on the basis that the breach of the warranties meant that AW had no prospects of success. However, the Court of Appeal held that the wording was such that unless an approved alarm and protective measures were installed which were in full working order when the premises were closed, the entire policy would be discharged automatically. Whilst the court considered this to be a draconian interpretation, it held that the more draconian or unreasonable the effects of breach of the policy would be, the more clear and specific those terms needed to be. It was clear that the court considered those terms to be unreasonable and/or draconian and as a result the appeal was dismissed, as AW was entitled to have the construction of those terms and the facts of the case considered and determined at trial.

This case represents a further indication that where breach of policy terms may lead to a significant outcome for the policyholder, the court will expect such terms to be clear and precise to avoid any uncertainty or ambiguity on the requirements of, and the impact of those terms on the policyholder. Simply seeking to rely on breach of those terms as forming the basis of the declinature of the alone is unlikely to be sufficient unless those terms are specific, clear and precise.

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## Update

As of 1 October 2009 there have been a number of changes to Civil Procedure Rule 35 and Practice Direction and the 2005 Protocol for the Instruction of Experts. Of specific note are:

- A change to the definition of 'expert'
- Guidelines on whether or not expert evidence should be provided by a single joint expert
- New wording for the expert's Statement of Truth
- New guidance on written questions to the experts and on expert's meetings

A copy of the amended Rule, Practice Direction and Protocol can be accessed via:

[http://www.justice.gov.uk/civil/procrules\\_fin/index.htm](http://www.justice.gov.uk/civil/procrules_fin/index.htm)

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