

**EXPLANATORY MEMORANDUM TO**  
**THE OFFERS TO SETTLE IN CIVIL PROCEEDINGS ORDER 2013**

**2013 No. 93**

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

**2. Purpose of the instrument**

2.1 This Order makes provision in respect of costs orders in civil proceedings with regard to offers to settle made by claimants (and which are currently subject to Part 36 of the Civil Procedure Rules 1998 – “the CPR”).

2.2 Together with section 55 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“the LASPO Act”), this Order provides for a court to order a defendant to pay, as an additional sanction, a sum to a claimant in those cases where—

- (a) the claimant has made an offer to settle the claim,
- (b) the defendant has refused to accept that offer,
- (c) the court subsequently gives judgment in favour of the claimant, and
- (d) the judgment for the claimant is “at least as advantageous” to the claimant as the claimant’s offer.

**3. Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 None.

**4. Legislative Context**

4.1 Part 2 of the LASPO Act contains reforms to the funding and costs of civil litigation following the Government’s acceptance of recommendations made by Lord Justice Jackson – see *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson’s Recommendations: The Government Response*, March 2011 (CM8041). The additional sanction referred to above forms part of those reforms and is intended to encourage the making and acceptance of early and better offers to settle claims.

4.2 Section 55 of the LASPO Act came into force on 1 October 2012 under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No.2 and Specification of Commencement Date) Order 2012.

4.3 The effect of section 55 is two-fold. First, it provides for rules of court to be made in relation to civil proceedings which only involve a claim for damages to permit a court to order an “additional amount” to be paid to a claimant by a defendant, where the defendant does not accept the claimant’s offer to settle, and the court

subsequently gives judgment for the claimant which is at least as advantageous to the claimant as the claimant's offer. It also confers power on the Lord Chancellor to prescribe, as a percentage of the amount awarded to the claimant by the court, the additional amount that may be paid by the defendant in such cases.

4.4 Secondly, it confers a power on the Lord Chancellor to provide that rules of court may make similar provision in relation to civil proceedings which include a non-monetary claim (i.e. a claim for a benefit other than damages) and also enables the Lord Chancellor to prescribe how the amount to be paid should be calculated in those circumstances.

4.5 Rules of court made under both section 55 and this Order will be made by the Civil Procedure Rule Committee to come into force on 1<sup>st</sup> April 2013.

## **5. Territorial Extent and Application**

5.1 This Order applies to England and Wales.

## **6. European Convention on Human Rights**

6.1 As the Order is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

## **7. Policy background**

- *What is being done and why*

7.1 Part 36 of the CPR sets out a formal process whereby parties are encouraged, via a system of costs sanctions and rewards, to make and accept reasonable offers to settle. This process follows the general principle that claims should be settled wherever possible and as early as possible, thereby reducing the costs of litigation.

7.2 However, Lord Justice Jackson considered that the current regime did not provide a sufficient incentive for defendants to settle claims. He concluded that the costs sanctions against a defendant generally amount, in financial terms, to considerably less than the sanctions which may be imposed on a claimant, meaning that there is less incentive for defendants to accept claimants' reasonable offers. If a defendant makes an offer which is not beaten by the claimant at trial, and the offer is made early enough, the sanctions incurred by the claimant can substantially reduce the final award. There is, then, a strong incentive for defendants - but not claimants - to make early offers.

7.3 Lord Justice Jackson therefore recommended that defendants should have to pay an additional 10% of the total damages awarded, if they failed to beat a claimant's offer. He considered, first, that the court should have discretion to order an additional payment of less than 10%, if appropriate, and, secondly, that there might be a level in higher value claims beyond which a set figure of 10% might provide too great a reward to the claimant – creating a perverse incentive to proceed to trial merely to obtain the uplift – and too great a penalty for a defendant (for example, a claim of £2m would involve a penalty at 10% of £200,000). He further considered that a well placed offer by the claimant leading to an additional 10% uplift on the award would

7.4 The existing power to make rules of court does not enable rules to be made to give effect to these proposals without primary legislation.

7.5 These proposals breach the indemnity principle, a common law concept which stipulates that costs are awarded to indemnify a successful party for the costs and expenses incurred in the litigation. Even where damages, rather than costs, are concerned, the proposed additional sum payable to a claimant under Part 36, is not indemnifying the claimant for the costs he has incurred, nor compensating the claimant for the damage or loss he has incurred. Instead it is a new concept that acts as a penalty against the paying party or a reward to the claimant for making a successful offer to settle under Part 36, thus addressing an imbalance in the incentives to settle.

7.6 In respect of claims for damages only (such as a claim for personal injury), section 55 of the LASPO Act provides that the additional amount shall be calculated as a percentage of the damages awarded to the claimant. Article 2 of this Order prescribes the percentage of damages which a defendant may be ordered to pay to a claimant as an additional amount:

<i>Amount awarded by the court</i>	<i>Prescribed percentage</i>
Up to £500,000	10% of the amount of damages awarded.
Above £500,000, up to £1,000,000	10% of the first £500,000 and 5% of the damages awarded above that figure.
Above £1,000,000	7.5% of the first £1,000,000 and 0.001% of the damages awarded above that figure.

7.7 In respect of mixed claims (i.e. a claim which concerns both a claim for damages and a non-financial benefit), article 3 provides, again, that the additional amount shall be calculated as a percentage of the damages awarded to the claimant. However, in respect of non-damages claims (such as a property dispute), the additional amount will be calculated as a percentage of the costs ordered by the court to be paid by the defendant to the claimant. In each case, article 3 also prescribes the amount that a defendant may be ordered to pay. In mixed claims the amount will be:

<i>Amount awarded by the court</i>	<i>Amount to be paid by the defendant</i>
Up to £500,000	10% of the amount awarded.
Above £500,000, up to £1,000,000	10% of the first £500,000 and 5% of the amount awarded above that figure.

In a non-damages claim only, article 3 prescribes the percentage of costs which a defendant may be ordered to pay to a claimant as an additional amount, as follows:

<i>Costs ordered to be paid to the claimant</i>	<i>Amount to be paid by the defendant</i>
Up to £500,000	10% of the costs ordered to be paid.
Above £500,000, up to £1,000,000	10% of the first £500,000 and 5% of any costs ordered to be paid above that figure.

7.8 In order to ensure that the amount ordered to be paid to the claimant does not provide too great a reward, this Order tapers the amount that might be paid and, in mixed and non-damages claims caps the amount (whether as a percentage of damages or costs) at £75,000. In respect of damages only claims, however, section 55 of the LASPO Act, does not enable a cap to be applied. This has been addressed by prescribing a nominal percentage increase in respect of damages over £1 million. Nonetheless, the existing powers under which rules of court in respect of costs orders are made will enable the maximum payment in these cases to be limited to £75,000.

7.9 A brief summary of the existing and new provisions is set out in the table below:

Claimant fails to beat defendant's offer at trial (court awards less than or equal to defendant's offer)	Defendant fails to beat claimant's offer at trial (court awards equal to or more than the claimant's offer)
<i>Existing provisions</i>	
Claimant must pay: <ul style="list-style-type: none"> <li>defendant's costs from the last date the offer could have been accepted (post offer) plus interest of up to 10% above base rate on those costs.</li> </ul>	Defendant must pay: <ul style="list-style-type: none"> <li>interest on the whole or part of the damages post offer at a rate of up to 10% above base rate;</li> <li>claimant's costs on an indemnity basis post offer; and</li> <li>interest on costs at a rate of up to 10% above base rate.</li> </ul>
<i>New provisions</i>	
Claimant must pay: <ul style="list-style-type: none"> <li>as above.</li> </ul>	Defendant must pay <ul style="list-style-type: none"> <li>as above;</li> <li>in damages only claims and mixed claims, an additional amount of up to 10% of the value of the damages awarded to the claimant by the court as awarded by the court; and</li> <li>in non-damages claims, an amount of up to 10% of the costs ordered by the court to be paid by the defendant to</li> </ul>

	the claimant.
--	---------------

- **Consolidation**

7.10 None

## 8. Consultation outcome

8.1 The public consultation paper *Proposals for reform of civil litigation funding and costs in England and Wales* (Consultation Paper CP 13/10) contained initial proposals relating to the additional sanction under Part 36 of the Civil Procedure Rules. That consultation was published on 15 November 2010 and closed on 14 February 2011. The overall consultation received a total of 625 responses. Over half of those responding on this aspect supported the general proposal of an additional sanction equivalent to 10% of damages awarded where a claimant offer is refused but not beaten at trial. However, there was considerable concern about how the uplift would be calculated on a non-monetary award (where there would be little evidence before the court of the value of the remedy sought) and the resulting prospect of satellite litigation. Others thought that 10% uplift on very large claims was too much of an incentive and would tip the balance of the Part 36 sanctions in favour of claimants.

8.2 The Government's response, *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations: The Government Response*, may be found at:  
<http://www.justice.gov.uk/downloads/consultations/jackson-report-government-response.pdf>

8.2 In its Response to consultation, the Government said (at paragraph 12):

***“Part 36 of the Civil Procedure Rules (offers to settle) will be amended to equalise the incentives between claimants and defendants to make and accept reasonable offers. This will apply to all civil cases, and the Government will discuss the details with stakeholders in due course. In particular, it will be made clear that where a money offer is beaten at trial, by however small a margin, the costs sanctions applicable under Part 36 will apply. An additional sanction (equivalent to 10% of the value of the claim) will be introduced to be paid by defendants who do not accept a claimant's reasonable offer that is not beaten at trial. The Government is minded to explore an alternative sanction (linked to costs rather than damages) for claims where a remedy other than damages is sought, to avoid satellite litigation around the court's valuations of such claims.”***

8.3 Most claims where the Part 36 procedure arises are money claims, where assessing the additional 10% would be a simple calculation. However, as suggested in the Government response, Part 36 offers may arise in other cases – for example, in

defamation claims, the defendant might offer an apology but no damages. The Government's view is that in non-damages cases it is simpler and clearer to levy the 10% uplift on the costs.

8.4 Whilst there was no statutory obligation to consult on the draft Order, we further consulted, by letter, with the designated judges, the General Council of the Bar, the Law Society and such other bodies as the Lord Chancellor considered appropriate between 4 October and 26 October 2012.

## **9. Guidance**

9.1 There is no formal guidance but the Ministry of Justice has set up a web page providing detailed information on the general reforms for practitioners and users. The web page address is <http://www.justice.gov.uk/civil-justice-reforms>.

## **10. Impact**

10.1 There will be some impact on business, but no impact on charities or voluntary bodies. The additional sanction may impact on the volume of cases and volume of work that is required in cases. Any sectors that derive an income from civil litigation may therefore be affected.

10.2 There will be some impact on the public sector. The additional sanction will increase costs for defendants that do not accept a reasonable offer which is then not bettered at trial.

10.3 The impacts of the Government's programme of legal aid reform are set out in an Impact Assessment, which was updated following the LASPO Act receiving Royal Assent in May 2012. This is available at <http://www.justice.gov.uk/legislation/bills-and-acts/acts/legal-aid-and-sentencing-act/laspo-background-information>. An Impact Assessment has not been prepared specifically for this instrument.

## **11. Regulating small business**

11.1 The Order applies to small business. We do not anticipate that the additional sanction will have any special impact on small firms over and above those that apply to any other party in civil litigation.

## **12. Monitoring & review**

12.1 It is intended to review the policy between three to five years after the implementation date. The review will form part of a wider review of the entire package of reform policies implemented following the passing of the LASPO Act. Further details are attached to Annex A of the Impact Assessment.

## **13. Contact**

Vilopa Patel at the Ministry of Justice (telephone: 020 3334 3118, or email: [vilopa.patel@justice.gsi.gov.uk](mailto:vilopa.patel@justice.gsi.gov.uk)) can answer any queries regarding the Order.