

## **PART 36 AND THE NEW PROTOCOLS**

### **Introduction**

This article examines changes to the operation of Part 36 introduced with the extension to the RTA Protocol and the introduction of a new EL/PL Protocol. It also touches on the principles of Part 36 more generally to place the changes in context.

### **Background**

Since 2010, when the RTA Protocol was introduced, Part 36 has been divided into Section I, for non-RTA Protocol offers, and Section II, for RTA Protocol offers.

Section I provides for costs consequences on acceptance of a Part 36 offer whether that is within or after the expiry of the relevant period identified by the offer.

- Where a Part 36 offer is accepted within the relevant period the claimant is entitled to the costs of proceedings up to the date on which notice of acceptance was served, to be assessed on a standard basis if the amount of costs is not agreed.
- Where a Part 36 offer is accepted after expiry of the relevant period, the claimant will be entitled to the costs of proceedings up to the date on which the relevant period expired. However, unless the court otherwise orders, the offeree (whether the claimant or defendant) will be liable for the offeror's costs from the date of expiry of the relevant period to the date of acceptance.

Section II deals with costs consequences specific to the RTA Protocol and, now, EL/PL Protocol.

### **Within the Protocols: Section II Part 36**

The terms of Section II remain those that originally applied to the RTA Protocol before its extension, save that they are amended to cover the extended protocol and EL/PL cases in the separate protocol.

Part 36.17 confirms an offer under Section II is called a Protocol offer. That offer must be set out in the Court Proceedings Pack (Part B) Form.

Whilst Part A of the Court Proceedings Pack will contain the best pleaded case of the parties, together with the statement of any agreed damages, Part B, which is not disclosed to the Judge until a decision has been made, represents, at a Stage 3 hearing, the Section I Part 36 offers that parties would produce to the court, when dealing with costs, after a trial.

Under Part 36.21 there are three scenarios for the costs consequences of a Protocol offer following a Stage 3 hearing.

- Where the court determines damages at a figure less than or equal to the defendant's protocol offer, the claimant will be ordered to pay the defendant's Stage 3 costs (and of course the claimant cannot recover Stage 3 costs from the defendant).
- Where the court makes an award of damages more than the defendant's protocol offer, but less than the claimant's protocol offer, the court will order the defendant to pay the claimant's Stage 3 costs.
- Where the court makes an award of damages equal to or more than the claimant's protocol offer, the defendant will be ordered to pay the claimant's Stage 3 costs as well as:
  - Interest on the whole of the damages awarded at a rate not exceeding 10% above the base rate for some or all of the period starting with the date specified in Part 36.18, that is the first business day after the Court Proceedings Pack (Part A & Part B) Form is sent to the defendant.
  - Interest on Stage 3 costs at a rate not exceeding 10% above base rate.
  - An additional amount calculated in accordance with Part 36.14 (3) (d), for cases of the value that go to a Stage 3 hearing that will inevitably be 10% of the damages awarded.

### **Outside the Protocols: Section I Part 36**

Section I remains in force for non-protocol cases but also applies to cases which have not continued under the RTA Protocol or the EL/PL Protocol and hence are potentially subject to fixed costs under Part 45.

Where Part 45.29 applies the claimant will be entitled to fixed costs. These are set out in Table 6B (RTA fixed costs), Table 6C (EL fixed costs) or Table 6D (PL fixed costs).

RTA costs are the lowest, followed by PL costs, with EL costs the highest. Unlike protocol costs, a proportion of costs are comprised of a percentage of damages, ranging between 10%-20% in RTA cases, 10%-30% in EL cases and 10%-27½ % in PL cases. Higher rates attach to lower damages. Higher rates apply at trial, with the obvious policy intention of dis-incentivising the use of court hearing time.

The stages of fixed costs for ex-protocol claims (that is claims which have exited a protocol) are:

- Prior to issuing proceedings under Part 7

- After issuing proceedings under Part 7:
  - On / after issue, but prior to allocation.
  - On / after allocation, but prior to the date of listing.
  - On / after listing, but prior to trial.
  - Finally, at trial.

Offers made under Section I of Part 36 may have costs consequences either on acceptance or judgment. To some extent the rules have been modified, to reflect the introduction of fixed costs, in both these situations.

### *Acceptance*

A new Part 36.10A has been introduced to deal with the cost consequences on acceptance.

Where a Part 36 offer is accepted within the relevant period the defendant will pay the claimant's costs, in accordance with Part 45, up to the stage at which the offer is accepted.

Where a defendant's Part 36 offer is accepted after the relevant period, the claimant will be entitled to fixed costs applicable for the claim type, under the relevant table, for the stage applicable at the date on which the relevant period expired. The claimant will be liable for the defendant's costs for the period from the date of expiry of the relevant period to the date of acceptance.

Where the claimant accepts the defendant's Protocol offer after the date on which a claim has exited the protocol the claimant will still be entitled to the applicable Stage 1 and Stage 2 fixed costs under Tables 6 in RTA claims or Table 6A for EL/PL claims however the claimant will be liable for the defendant's costs for the period from the date of expiry of the relevant period to the date of acceptance.

Part 36.10A (6) provides that for the purposes of that rule the defendant's Protocol offer is either an offer as defined by Part 36.17 or, if the claim leaves the protocol before the Court Proceedings Pack Form is sent to the defendant, as the last offer made by the defendant before the claim leaves the protocol (which will be deemed as having been made on the first business day after the claim leaves the protocol).

Part 36.10A does not expressly deal with acceptance of a claimant's Part 36 offer by the defendant after the relevant period has expired. In the absence of any modification to Part 36.10 that rule may, therefore, apply in this situation. Moreover, if judgment is entered, in terms at least as advantageous as the claimant's offer, the provisions of Part 36.14 (3) should apply.

## *Judgment*

A new Part 36.14A has been introduced to deal with the cost consequences of Part 36 offers following judgment.

Where a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer then, unless the court considers it unjust to do so, the defendant is entitled to the consequences set out in Part 36.14 (2) namely:

- (a) his costs from the date on which the relevant period expired; and
- (b) interest on those costs.

Where Part 36.14 (2) applies then the provisions of the new Part 36.14A will be relevant. In these circumstances the claimant will be entitled to fixed costs according to the relevant table in Section IIIA of Part 45 and in respect of the stage applicable at the date on which the relevant period expired. The claimant will be liable for the defendant's costs from the date on which the relevant period expired to the date of judgment.

Where the claimant fails to obtain a judgment more advantageous to the defendant's Protocol offer, the claimant will be entitled to Stage 1 and Stage 2 fixed protocol costs. The claimant, however, will be liable for the defendant's costs from the date on which the protocol offer is deemed to be made to the date of the judgment. For these purposes Part 36.14A adopts the same definition of defendant's Protocol offer as Part 36.10A.

The amount of the judgment will be less than the Protocol offer, where the judgment is less than the offer once deductible amounts identified in the judgment are deducted.

Where judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer then Part 36.14 (3), again unless the court considers it unjust to do so, provides that this will result in an order that the claimant is entitled to:

- (a) interest on the whole or part of any sum of money (excluding interest) awarded at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;
  - (b) costs on the indemnity basis from the date on which the relevant period expired;
- | and
- (c) interest on those costs at a rate not exceeding 10% above base rate; and

- (d) an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below to an amount which is –
- (i) where the claim is or includes a money claim, the sum awarded to the claimant by the court; or
  - (ii) where the claim is only a non-monetary claim, the sum awarded to the claimant by the court in respect of costs –

Amount awarded by the court	Prescribed percentage
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 any amount above that figure

It is worth noting that Part 36.14 (1A) confirms that, in relation to any money claim or money element of a claim, the term “more advantageous” means better in money terms by any amount, however small and “at least as advantageous” shall be construed in the same way.

Nothing in Part 36.14A removes the right of the claimant to all these benefits. Moreover, indemnity costs are plainly not fixed costs and hence will need to be assessed (and for these purposes assessed without regard to the test of proportionality).

### *Defendant’s Costs*

The claimant may become liable for the defendant’s costs under the terms of either Part 36.10/10A or Part 36.14/14A. If, however, the claim has left either the RTA Protocol or EL/PL Protocol then Parts 36.10A and 36.14A will cap, though these do not fix, the defendant’s costs.

These rules provide that where the court makes an order for costs in favour of the defendant the court will have regard to, and the amount of costs ordered shall not exceed, fixed costs in Table 6B, 6C or 6D in Section IIIA Part 36 applicable at the relevant date.

It should be noted that claimants should pursue arguments along the following lines in respect of the defendant’s capped costs. The defendant’s costs should normally be less than the claimants. This has always been argued by defendant representatives, FOIL, the ABI and insurers. This is also the experience of the judiciary. The only reason defendant’s costs were capped and not fixed at a lower level was the absence of clear empirical evidence to fix these costs at, say, one half or two thirds of the claimant’s costs. The concept of fixed costs and capped costs in this context is predicated on average costs incurred rather than those

incurred in a particular case. Proportionality will normally necessitate the defendant's costs being significantly below those of the claimant.

Moreover, because the claimant's costs in these circumstances will be fixed it seems clear the indemnity principle will not apply: Nizami -v- Butt [2006] 1 W.L.R. 3307. Because, however, the defendant's costs are not fixed the indemnity principle will apply. A very relevant consideration for the court might be the costs to which the defendant's solicitors are entitled to be paid by the defendant given that so many defendant firms now operate under the "no win-reduced fee" variety of a conditional fee agreement. In such circumstances the claimant, as paying party, may wish for full disclosure of the terms so that the court is aware of, certainly as the ABI would describe it, the "market rate" for such work.

## **Conclusion**

Part 36 is likely to be of even greater importance than it has been in the past, for both claimants and defendants, in the new era.

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