

## **THE FUTURE OF PART 36 (PART 2)**

### **INTRODUCTION**

The article in the March 2007 edition of JPIL considered some of the important case law dealing with Part 36 and looked at proposals made, following consultation by the Department for Constitutional Affairs, to amend the rule taking account of some of the issues raised by those cases.

Since that article was written the Civil Procedure (Amendment No. 3) Rules 2006, which came into force on 6 April 2007, have been made. The terms of the new Part 36 differ, in some cases significantly, from the proposals reviewed in the latter part of the earlier article.

Accordingly, this article looks at the actual terms of the new Part 36 and considers some of the practical considerations that arise from the changes to this rule.

### **THE NEW PART 36**

There are important changes about the requirements for an offer to comply with Part 36, withdrawal of offers, acceptance and cost consequences. Corresponding amendments have been made to other parts of the Civil Procedure Rules, perhaps most significantly for present purposes Part 44.

#### **Form and Content**

Part 36 offers (defined in Part 36.2 as “an offer to settle which is made in accordance with this rule”) remain but Part 36 payments have been dispensed with altogether. The proposal in the consultation paper that “payments in support” of Part 36 offers be retained for defendants not considered good for the money has been abandoned.

Accordingly, for an offer to settle to have the costs consequences found in Part 36 it is no longer necessary for any defendant to make a payment into court but it is essential the offer complies precisely with the requirements of Part 36 because, unlike the old rule, the court has no discretion under the rule itself to treat an offer which does not strictly comply with the requirements and form and content as being effective for the cost consequences found in Part 36.

The requirements as to the form and content of an offer to settle which will comply with Part 36 are found in a number of rules.

- The general requirements as to the form and content of a Part 36 offer are found in Part 36.2 (2). This rule applies to every offer which is intended to be made in accordance with Part 36 and requires such an offer to:

- be in writing;
- state on its face that it is intended to have the consequences of Part 36;
- specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with Rule 36.10 if the offer is accepted;
- state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and if so to which part or issue; and
- state whether it takes into account any counterclaim.

The requirement to specify a period of time within which the defendant will be liable for the claimant's costs if the offer is accepted does not apply if the offer is made less than 21 days before the start of the trial.

- Part 36.4 requires a Part 36 offer by a defendant (unless it includes periodical payments and/or provisional damages) to pay a sum of money in settlement of a claim to be an offer to pay a single sum of money. If the offer includes an offer to pay all or any part of the sum at a date later than 14 days after acceptance the offer will only be treated as a Part 36 offer if the offeree accepts that offer.
- If an offer contains an offer to pay or accept periodical payments the requirements of Part 36.5 must be complied with.
- Where there is a claim for provisional damages the requirements of Part 36.6 must be complied with.
- Where, on acceptance of the offer, payment to the claimant would be a compensation payment in accordance with the Social Security (Recovery of Benefits) Act 1997 the defendant should state either that the offer is made without regard to any liability for recoverable benefits or that it is intended to include any deductible benefits. If the defendant states deductible benefits are included the requirements of Part 36.15 must be complied with.

The requirements of Part 36.4 and Part 36.15 apply to offers made by a defendant whilst the other requirements apply to offers made by any parties.

### **Withdrawing or Changing an Offer**

Rule 36.3(5) restricts an offeree from withdrawing or changing the terms of an offer prior to expiry of the "relevant period", unless the court gives permission.

The "relevant period" is the period specified in the offer within which the defendant will be liable for the claimant's costs if the offer is accepted or, if the offer is made less than

21 days before trial, the period up to the end of the trial or such other period as the court determines.

However, once the “relevant period” has expired the offeree, as has always been the case with Part 36 offers (as opposed to Part 36 payments), may withdraw the offer or change its terms without the permission of the court.

Withdrawal of an offer or a change of terms is achieved by the offeror serving written notice on the offeree in accordance with Part 36.3(7).

### **Acceptance**

Part 36.9 confirms a Part 36 offer is accepted by serving written notice of acceptance on the offeror.

Part 36.9(3) provides that the permission of the court is required to accept a Part 36 offer where:

- the claimant wishes to accept a Part 36 offer made by one or more, but not all, of a number of defendants (though Part 36.12 does contain two exceptions to this rule);
- the offer includes deductible benefits, the “relevant period” has expired and further deductible benefits have been paid since the date of the offer;
- the court needs to apportion money in a fatal claim; or
- the trial has started.

If any party is a child or patient it is, of course, still necessary to obtain court approval of any settlement in accordance with Part 21.

It is important to note that if the court’s permission to accept an offer is not required then, unless notice of withdrawal has been served, an offer may be accepted at any time, whether or not within the “relevant period”, under the terms of Part 36.9(2). The rule expressly states that a different offer by the offeree (in other words a counter-offer) will be irrelevant and the specific requirement for notice of withdrawal clearly implies any other arguments the offeror might advance as to rejection or lapse of the offer should not prevail.

Part 36.11 provides that once a Part 36 offer is accepted the claim will be stayed, depending upon the terms of the offer the stay will be on the whole claim or the relevant part of the claim.

Any stay will not affect the power of the court to enforce the terms of a Part 36 offer. Moreover, unless the parties have agreed otherwise in writing a Part 36 offer by a

defendant to pay a single sum of money must be paid to the offeree within 14 days of the date of acceptance (or subsequent order where the offer includes periodical payments on provisional damages) and if that sum is not paid the offeree may enter judgment for the unpaid sum.

### **Costs Consequences**

Part 36.10 preserves the deemed costs order, that the claimant is entitled to the costs of the proceedings up to the date of acceptance to be assessed on the standard basis if not agreed, where a Part 36 offer is accepted within the “relevant period”.

If the court’s permission to accept a Part 36 offer is required the court will need to make an order dealing with costs.

If a Part 36 offer is accepted after expiry of the “relevant period”, but permission of the court is not required, the court will need to make an order as to costs, unless the parties can agree the liability for costs. Part 36.10(5) appears to create a presumption that, in such circumstances, the claimant will be entitled to the costs of the proceedings up to the date on which the relevant period expires and the offeree will be liable for the offeror’s costs for the period from the date of expiry of the relevant period to the date of acceptance.

Part 36.14 deals with further costs consequences of a Part 36 offer “upon judgment being entered” where:

- a claimant fails to obtain a judgment more advantageous than a defendant’s Part 36 offer; or
- judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant’s Part 36 offer.

These costs consequences, accordingly, no longer apply only after a “trial”, as under the old Part 36, but now “upon judgment being entered”, which should include summary judgment and judgment by consent.

Furthermore, the claimant no longer has to beat the claimant’s own offer to obtain costs consequences following judgment as it will suffice if the judgment is “at least at advantageous” as the claimant’s own offer.

The presumption, in Part 36.14, is that the costs consequences when this rule applies are:

- for a claimant bettering the claimant’s own offer:
  - interest on damages;

- costs on the indemnity basis;
- interest on those costs;

from the end of the relevant period.

- for the defendant:
  - costs from the date the relevant period expired;
  - interest on those costs.

These are, however, only presumptions although the court must, as under the old Part 36, consider it would be “unjust” to make such an order before it declines to do so.

Significantly, Part 36.14(6) provides that the costs benefits following judgment do not apply to a Part 36 offer that has been withdrawn or changed so that its terms are less advantageous to the offeree, provided in the latter case the offeree has beaten the less advantageous offer.

#### **Part 44**

Part 44.3(4)(c) has been amended to require the court to take into account when considering whether to exercise the general discretion as to costs:

“... any payment into court or admissible offer to settle made by a party which is drawn to the court’s attention and which is not an offer to which costs consequences under Part 36 apply”.

It is still necessary, therefore, for such an offer to be an “admissible offer”, a point considered in the earlier article.

There may also be some uncertainty about the status of an offer which is intended to be made under Part 36 but, in fact, does not comply with the necessary form and content. A Part 36 offer, which must mean an offer which does comply with all the form and content requirements of the rule, is treated as being “without prejudice except as to costs” by Part 36.13(1). If an offer does not amount to a Part 36 offer then it will be necessary to establish whether, in any event, that offer is made as a “Calderbank” offer. If so it should be admissible. If not the substance, whatever the form, of the offer may mean that it is treated as a wholly without prejudice communication in which case, for reasons set out in the earlier article, this is likely to be inadmissible.

It remains to be seen how the courts will approach the question as to whether an offer is one “to which costs consequences under Part 36 apply”. This may be a point of some importance to the potential cost implications of withdrawn offers.

- The intention, expressed in the consultation carried out by the Department for Constitutional Affairs, was to make Part 36 a self-contained code. That is achieved if an offer has costs consequences under Part 36, as the terms of the new Part 44 will exclude its relevance under that rule.
- An offer which is never intended to be made under Part 36, or fails to comply with the requirements as to form and content, will, provided it is an “admissible offer”, be relevant under Part 44.
- But what of an offer made under Part 36 and then withdrawn? It could be argued that, under Part 36.14(6) such an offer does not have “costs consequences” under Part 36 and can, accordingly, potentially be relevant under Part 44. However, the actual terms of Part 36.14(6) do not exclude the costs consequences of Part 36, only certain of those consequences, and if the rule is read accordingly such an offer should not be taken into account under Part 44. That seems the preferable approach as it is based on a literal reading of Part 36 and also avoids withdrawn offers, which have nothing to offer in promoting settlement, having any further impact on costs.

### **Other Provisions**

There are some other important provisions in the new Part 36.

- Part 36.3(2) confirms a Part 36 offers can now be made at any time, including before the commencement of proceedings.
- A Part 36 offer can also be made in appeal proceedings but Part 36.3(4) confirms an earlier Part 36 offer will not have costs consequences in an appeal from a final decision.
- Part 36.7 confirms that a Part 36 offer is made, changed or withdrawn when written notice is served on the offeree.

### **Transitional Arrangements**

Rule 7 Civil Procedure (Amendment No 3) Rules 2006 deals with transitional arrangements for the introduction of the new Part 36.

- A valid Part 36 offer or Part 36 payment made 21 days before 6 April 2007 which would have had cost consequences under the old Part 36 will have the consequences of the new Part 36.10, 36.11 and 36.14. However, if court permission would have been required to accept the offer under the old rule permission of the court will still be required.

- For offers made in the 21 day period before 6 April 2007 the old rule will apply initially but the new rule will apply at the expiry of 21 days from the date of that offer or payment unless the trial starts within that period.
- Where an offer complying with Part 36.10, as it was, has been made before 6 April 2007 the court will take that offer into account under the new Part 36 and the permission of the court will be required to accept after proceedings have been commenced. This, therefore, effectively removes the obligation to follow up a pre-action offer with a payment into court within 14 days of service of proceedings with effect from the introduction of the new rule.

## **CONCLUSIONS**

The new Part 36, as hoped, should give greater certainty and does create an environment where both claimant and defendant are placed in very much the same position so far as the making of, withdrawal and accepting offers are concerned.

However, practitioners will need to keep the merits of cases under careful review so that, when appropriate, offers can be made, withdrawn, changed or accepted.

It is also important that clients understand offers, until changed or withdrawn, will remain open for acceptance but that, equally, offers made by the opponent may be changed or withdrawn at any time once the relevant period for acceptance has elapsed.

Defendants will need to be ready to make prompt payment of offers that are accepted as claimants may wish to move on, swiftly, to enter judgment in the event payment is not made.

There remain issues which will need to be clarified by future cases. However, the new rule does indeed make Part 36 as important in the future as it has been in the past.