

THE FUTURE OF PART 36 (PART 7)

Introduction

The sixth in this series of articles suggested that the significant changes to civil litigation, then on the way as part of the implementation of the Jackson Report, would have an impact on the terms, and use in practice, of Part 36.

Amendments made to the CPR in both April 2013 and July 2013 have indeed made important changes to Part 36. Moreover, in the new regime, brought into effect by the wider terms of those amendments to the CPR, Part 36 is, perhaps, even more important than it was, for both claimants and defendants, in all types of civil litigation but particularly in personal injury claims.

This seventh article in the series will review the changes to Part 36 made by amendments in 2013 to the CPR, where appropriate in the context of other changes made to implement the Jackson Report.

Meanwhile caselaw has continued to interpret Part 36 and shape the way this rule should be used by practitioners.

Accordingly, after considering the recent changes to the CPR affecting Part 36 this article will review, and consider the implications for practitioners, recent caselaw.

April 2013 CPR Amendments

Part 36 was amended in April 2013 to implement the recommendation made in the Jackson Report that a claimant who obtains judgment at least as advantageous as that claimant's own Part 36 offer ought to have benefits above and beyond those of indemnity costs and enhanced interest which were introduced under the terms of the original rule in 1999.

Consequently, rule 14 of The Civil Procedure (Amendment) Rules 2013 provided that:

“In Part 36, in rule 36.14(3)—

(a) in subparagraph (b)—

(i) omit “his”; and

(ii) at the end, omit “and”;

(b) in subparagraph (c), for the full stop substitute “; and”; and

(c) after subparagraph (c), insert—

“(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—

<i>Amount awarded by the court</i>	<i>Prescribed percentage</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 any amount above that figure”

Rule 22 (7) dealing with transitional provisions, provides:

“The amendments made by rule 14 of these Rules do not apply in relation to a claimant’s Part 36 offer which was made before 1 April 2013.”

Following this amendment a Part 36 offer made by the claimant now carries the potential for indemnity costs, enhanced interest on those costs, enhanced interest on damages and (if the offer was made on or after 1 April 2013) an additional amount.

The additional amount will not apply to offers made prior to 1 April 2013 but there is nothing to stop the claimant repeating earlier offers, assuming these still represent appropriate terms for agreement, whilst leaving the earlier offers extant with a view to preserving the benefits of costs and interest back to the date of such offers. That is because more than one Part 36 offer may be made, even on the same issue, at the same time: LG Blower Specialist Bricklayer Ltd -v- Reeves [2010] EWCA Civ 726.

Whilst this is a consideration less likely to arise in personal injury claims, because the principal remedy sought will usually be damages, where the claim is largely for non-monetary remedies a claimant may wish to forego a modest claim for damages with a view to securing an additional amount calculated by reference to costs. This, tactically, may apply more pressure on a defendant where costs are likely to be more substantial than the damages element of a claim.

July 2013 CPR Amendments

Further amendments have been made to the rules by The Civil Procedure (Amendment No. 6) Rules 2013, which came into effect on 31 July 2013.

These Rules introduce Parts 36.10A and 36.14A. Those provisions provide for fixed costs, where otherwise applicable, to apply in most, but not all, circumstances when a Part 36 offer is accepted or judgment is entered. Fixed costs even in a litigated claim will be applicable where the claim started in, but subsequently left, either the RTA Protocol or the EL/PL Protocol.

Acceptance

Part 36.10A deals with costs consequences on acceptance of a Part 36 offer where Section IIIA of Part 45 applies (in other words the claim is one that entered but subsequently left either the RTA Protocol or EL/PL Protocol).

The terms of Part 36.10A are as follows:

- “(1) This rule applies where a claim no longer continues under the RTA or EL/PL Protocol pursuant to rule 45.29A(1).
- (2) Where a Part 36 offer is accepted within the relevant period, the claimant will be entitled to the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 for the stage applicable at the date on which notice of acceptance was served on the offeror.
- (3) Where—
- (a) a defendant’s Part 36 offer relates to part only of the claim; and
 - (b) at the time of serving notice of acceptance within the relevant period the claimant abandons the balance of the claim,
- the claimant will be entitled to the fixed costs in paragraph (2).
- (4) Subject to paragraph (5), where a defendant’s Part 36 offer is accepted after the relevant period—
- (a) the claimant will be entitled to the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 for the stage applicable at the date on which the relevant period expired; and
 - (b) 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.
- (5) Where the claimant accepts the defendant’s Protocol Offer after the date on which the claim leaves the Protocol—
- (a) the claimant will be entitled to the applicable Stage 1 and Stage 2 fixed costs in Table 6 or Table 6A in Section III of Part 45; and

- (b) the claimant 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 acceptance.
- (6) For the purposes of this rule a defendant's Protocol Offer is either—
 - (a) defined in accordance with rules 36.17 and 36.18; or
 - (b) if the claim leaves the Protocol before the Court Proceedings Pack Form is sent to the defendant—
 - (i) the last offer made by the defendant before the claim leaves the Protocol; and
 - (ii) deemed to be made on the first business day after the claim leaves the Protocol.
- (7) A reference to the 'Court Proceedings Pack Form' is a reference to the form used in the Protocol.
- (8) Fixed costs shall be calculated by reference to the amount of the offer which is accepted.
- (9) Where the parties do not agree the liability for costs, the court will make an order as to costs.
- (10) Where the court makes an order for costs in favour of the defendant—
 - (a) the court will have regard to; and
 - (b) the amount of costs ordered shall not exceed,

the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 applicable at the date of acceptance, less the fixed costs to which the claimant is entitled under paragraph (4) or (5).
- (11) The parties are entitled to disbursements allowed in accordance with rule 45.29I incurred in any period for which costs are payable to them."

Consequently, where a Part 36 offer, in a case subject to the terms of Part 45.29, is accepted within the relevant period the defendant will pay the claimant's costs, in accordance with Section IIIA Part 45, at which stage that 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, however, 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. Once again, however, the claimant will be liable for the defendant's costs from the date of expiry of the relevant period in the offer to the date that offer is accepted.

Part 36.10A (6) provides that for the purposes of the rule a 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, 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, when this happens. Alternatively, this may be a situation regarded as exceptional for the purposes of Part 45.29J. Either way that would allow the claimant to have costs assessed. 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 entitling the claimant, amongst other benefits, to indemnity costs (so again assessment would be required).

Judgment

Part 36.14A deals with the costs consequences following judgment where Section IIIA of Part 45 applies.

The terms of Part 36.14A are as follows:

- “(1) Where a claim no longer continues under the RTA or EL/PL Protocol pursuant to rule 45.29A(1), rule 36.14 applies with the following modifications.
- (2) Subject to paragraph (3), where an order for costs is made pursuant to rule 36.14(2)—
 - (a) the claimant will be entitled to the fixed costs in Table 6B, 6C or 6D in Section IIIA of Part 45 for the stage applicable at the date on which the relevant period expired; and
 - (b) the claimant will be liable for the defendant's costs from the date on which the relevant period expired to the date of judgment.
- (3) Where the claimant fails to obtain a judgment more advantageous than the defendant's Protocol Offer—

- (a) the claimant will be entitled to the applicable Stage 1 and Stage 2 fixed costs in Table 6 or Table 6A in Section III of Part 45; and
- (b) the claimant 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 judgment; and
- (c) in this rule, the amount of the judgment is less than the Protocol Offer where the judgment is less than the offer once deductible amounts identified in the judgment are deducted.

("Deductible amount" is defined in rule 36.15(1)(d).)

- (4) For the purposes of this rule a defendant's Protocol Offer is either—
 - (a) defined in accordance with rules 36.17 and 36.18; or
 - (b) if the claim leaves the Protocol before the Court Proceedings Pack Form is sent to the defendant—
 - (i) the last offer made by the defendant before the claim leaves the Protocol; and
 - (ii) deemed to be made on the first business day after the claim leaves the Protocol.
- (5) A reference to the 'Court Proceedings Pack Form' is a reference to the form used in the Protocol.
- (6) Fixed costs shall be calculated by reference to the amount which is awarded.
- (7) Where the court makes an order for costs in favour of the defendant—
 - (a) the court will have regard to; and
 - (b) the amount of costs ordered shall not exceed,

the fixed costs in Table 6B, 6C or 6D in Section IIIA of Part 45 applicable at the date of judgment, less the fixed costs to which the claimant is entitled under paragraph (2) or (3).
- (8) The parties are entitled to disbursements allowed in accordance with rule 45.29I incurred in any period for which costs are payable to them."

Consequently, 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 costs from the date on which the relevant period expired and interest on those costs.

If judgment is not more advantageous than the defendant's Part 36 offer the claimant will remain entitled to costs up to the expiry of the relevant period but in an ex-protocol case those will be the fixed costs, according to the relevant table in Section IIIA Part 45, up to the stage applicable at the date on which the relevant period expired.

Furthermore, if the claimant fails to obtain judgment which is more advantageous than the defendant's Protocol Offer the claimant will still be entitled to Stage 1 and Stage 2 fixed protocol costs. 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.

If judgment against the defendant is at least as advantageous to the claimant as the proposals contained in the claimant's Part 36 offer then the terms of Part 36.14 (3) will apply to an ex-protocol claim just as those terms apply in other circumstances. Consequently, whether or not a claim has entered the RTA Protocol or EL/PL Protocol where Part 36.14(3) applies the claimant will receive enhanced interest, an additional amount and indemnity costs. The latter is significant because indemnity costs are plainly not fixed costs and hence will need to be assessed (and on the indemnity basis such costs are not subject to the test of proportionality).

It is worth remembering 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.

Defendant's Costs

For claims subject to Section IIIA of Part 45 the defendant's costs are not fixed in the same way as the claimant's costs, but the rules have been amended to provide guidance on how the court should approach assessment of the defendant's costs, which may be significant if these are payable under the terms of either Part 36.10A or Part 36.14A.

Defendant's costs are dealt with by Part 45.29F which provides:

"(1) In this rule—

- (a) paragraphs (8) and (9) apply to assessments of defendants' costs under Part 36;

- (b) paragraph (10) applies to assessments to which the exclusions from qualified one way costs shifting in rules 44.15 and 44.16 apply; and
 - (c) paragraphs (2) to (7) apply to all other cases under this Section in which a defendant's costs are assessed.
- (2) If, in any case to which this Section applies, the court makes an order for costs in favour of the defendant—
- (a) the court will have regard to; and
 - (b) the amount of costs order to be paid shall not exceed, the amount which would have been payable by the defendant if an order for costs had been made in favour of the claimant at the same stage of the proceedings.
- (3) For the purpose of assessing the costs payable to the defendant by reference to the fixed costs in Table 6, Table 6A, Table 6B, Table 6C and Table 6D, “value of the claim for damages” and “damages” shall be treated as references to the value of the claim.
- (4) For the purposes of paragraph (3), “the value of the claim” is—
- (a) the amount specified in the claim form, excluding—
 - (i) any amount not in dispute;
 - (ii) in a claim started under the RTA Protocol, any claim for vehicle related damages;
 - (iii) interest;
 - (iv) costs; and
 - (v) any contributory negligence;
 - (b) if no amount is specified in the claim form, the maximum amount which the claimant reasonably expected to recover according to the statement of value included in the claim form under rule 16.3; or
 - (c) £25,000, if the claim form states that the claimant cannot reasonably say how much is likely to be recovered.
- (5) Where the defendant—
- (a) lives, works or carries on business in an area set out in Practice Direction 45; and

- (b) instructs a legal representative who practises in that area, the costs will include, in addition to the costs allowable under paragraph (2), an amount equal to 12.5% of those costs.
- (6) Where an order for costs is made pursuant to this rule, the defendant is entitled to disbursements in accordance with rule 45.29I
- (7) Where appropriate, VAT may be recovered in addition to the amount of any costs allowable under this rule.
- (8) Where, in a case to which this Section applies, a Part 36 offer is accepted, rule 36.10A will apply instead of this rule.
- (9) Where, in a case to which this Section applies, upon judgment being entered, the claimant fails to obtain a judgment more advantageous than the claimant's Part 36 offer, rule 36.14A will apply instead of this rule.
- (10) Where, in a case to which this Section applies, any of the exceptions to qualified one way costs shifting in rules 44.15 and 44.16 is established, the court will assess the defendant's costs without reference to this rule."

The claimant will not have the benefit of QOCS were the defendant is entitled to costs under the terms of Part 36. However, where the relevant claim has left either the RTA Protocol or the EL/PL Protocol the terms of Part 36.10A and 36.14A will effectively cap those costs.

That is because 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 45 applicable at the relevant date.

Where one of the exceptions to QOCS, other than Part 36, applies the court will assess the defendant's costs without reference to the same restrictions that apply under Part 36. Even so it is to be expected the costs of the defendant will be less than the equivalent costs of the claimant. Furthermore, because the defendant's costs are not fixed the indemnity principle will apply. Because many solicitors acting for defendants operate on a conditional fee agreement, though of the "no win-reduced fee" variety, the claimant may wish to see a valid retainer is established justifying the defendant's entitlement to costs at all.

It is worth noting the court still has power to direct the parties to file costs estimates under the case management powers found in Part 3, and specifically Part 3.1 (2) (II). Claimants may wish to make use of this provision to ensure, in the absence of any capping on defendant's costs where QOCS does not apply, that estimates are obtained and the risk of adverse costs properly managed.

Caselaw

Whilst the changes to Part 36, already reviewed in this article, have been in the process of introduction caselaw has continued to analyse various aspects of the existing rule.

That caselaw has dealt with some important facets of the rule in practice.

Form and Content

The scope of the rules on form and content, found in Part 36.2 (2), were considered in The Procter & Gamble Company -v- Svenska Cellulosa Aktiebolaget Sca [2012] EWHC 2839 (Ch) where the judge held this rule does not mandate that for a claimant to make a valid Part 36 offer the payment of costs has to be a condition of the offer. That is because the terms of Parts 36.10 and 36.14 deal with the costs consequences on acceptance or judgment.

Service

The terms of Part 36 require any offer, notice changing an offer, notice withdrawing an offer or acceptance of an offer to be served. The importance of properly serving documents, during proceedings, under Part 6 was emphasised in Sutton Jigsaw Transport Ltd -v- Croydon London Borough Council (QBD 27 February 2013).

The defendant had made a Part 36 offer shortly before trial that was not withdrawn after the 21 day period referred to in the offer had elapsed.

At court, on the first day fixed for trial, the claimant purported to orally accept the defendant's Part 36 offer. The defendant maintained oral acceptance was insufficient under Part 36 following which the claimant handed over a hand written note at 1.58, pm again purporting to accept the offer. The defendant then sent a fax to the office of the claimant's solicitors, at 2.00 pm, withdrawing the offer.

The judge held that the Part 36 offer had not validly been accepted before it was withdrawn. That was because the defendant had given an address for service and, consequently, under Part 6 it was necessary for service, including notice of acceptance of a Part 36 offer, to be effected at that address. Moreover, because the defendant had given the address of a solicitor for service Part 6 precluded personal service.

Consequently, there had been no valid acceptance of the offer prior to that offer being withdrawn.

Permission to Accept

Permission to accept a Part 36 offer is required from the court, under Part 36.9 (3) (d), once the trial has commenced.

The meaning of “trial”, when issues have been dealt with on a preliminary basis, was considered in Wilson -v- Ministry of Defence (Winchester County Court 23 April 2013).

On 4 February 2011 the claimant made a Part 36 offer, to settle the whole claim, to the defendant. That offer was promptly rejected by the defendant.

Following issue of proceedings the defendant raised a limitation defence. Case management directions provided for limitation to be listed as a preliminary point before the circuit judge. (This was subsequently held to be the direction of a separate trial of the issue of liability under Part 3.1 (2) (i) CPR.)

The preliminary issue was tried, with judgment being given for the claimant.

Further directions were then given for an assessment of damages hearing before the district judge.

A few days before that hearing the defendant purported to accept the Part 36 offer made on 4 February 2011.

The claimant objected, on the basis Part 36.9 (3) (d) applied as there had already been a trial.

The district judge held the hearing dealing with limitation was part of the trial and, accordingly, the claimant’s Part 36 offer could not be accepted without court permission.

The defendant appealed. The appeal was dismissed, even though the district judge was held to have reached his decision for the wrong reasons.

The circuit judge noted that Part 36.9 (3) (d) uses the phrase “the trial has started”. That use of the definite article suggested a single event which could only mean the start of the first, or only, contested hearing of an issue ordered to be tried.

Furthermore, the judge held it would be wrong for a party to await the result of a trial on a preliminary issue and then, depending on that result, decide to accept the offer. This was because the only way the offeror could obtain protection would be to withdraw the offer, but that would deprive the offeror of the benefits provided by Part 36.14.

Consequently, as soon as the trial on the issue of limitation began Part 36.9 (3) took effect and the defendant could not accept the Part 36 offer without permission of the court.

Costs Consequences of Late Acceptance

This topic was explored by the Court of Appeal in Jopling -v- Leavesley (Court of Appeal 24 July 2013).

The claimant made a Part 36 offer, to settle the whole claim, to the defendant. The defendant accepted that offer after the relevant period had expired.

The costs consequences of late acceptance could not be agreed and had to be determined by the court.

In the absence of agreement as to costs the judge exercised discretion under Part 36.10 (4) (b) to make a costs order.

On the basis it was held to have been unlikely the claimant would have been successful on the whole claim the defendant was ordered to pay 50% of the claimant's costs up to acceptance of the offer.

The claimant appealed, arguing the judge should have applied the default rule under Part 36.10 (5), that the defendant be liable for the whole of the claimant's costs.

The Court of Appeal held that inherent in the order made as to costs was the assumption the claimant would have been unsuccessful on part of the claim, but there was no basis for making that assumption.

Furthermore, the rationale behind the Part 36 offer was to encourage settlement and reduce costs. If a party was better off by delaying then one of the objectives of Part 36 would be undermined.

There was, therefore, no reason to dis-apply the default rule under Part 36.10 (5) and the defendant ordered to pay the claimant's costs up to the acceptance of the offer.

"Unjust"

Further cases have considered when it would be "unjust" for the costs consequences found in Part 36.14 to apply.

In Mehjoo -v- Harben Barker [2013] EWHC 1669 (QB) the claimant sought indemnity costs on the basis judgment was more advantageous than the terms of the claimant's Part 36 offer.

The defendant argued that it would be unjust for the court to order indemnity costs because the claimant had not given details of costs, which the defendant had sought.

While Part 36.2 sets out the requirements for a valid Part 36 offer, but nothing in that provision requires details of costs of the party making the offer having to be included in the offer or supply to the offeree.

Silber J observed Part 36.14 (4) requires the court to "take account of all the circumstances of the case" but deficiencies in information will not automatically mean the costs consequences provided by the rule do not apply, that will be so only if the court considers it would be "unjust" for those consequences to follow. Silber J held:

“This requirement envisages a more detailed exercise by the Court looking at other factors, such as the consequences of the alleged deficiencies for the party receiving the Part 36 offer and whether that party would have acted differently in relation to the offer if the information had not been deficient.”

Part 36.14 (4) makes specific reference to information “available to the parties” when determining whether the usual costs consequences under that rule would be “unjust”. On this point Silber J held:

“I think that the information “*available to the parties*” referred to in CPR 36.14(4)(c) is the information relating to the merits of the claim and it is not information as to what costs the maker of the offer had incurred at the date of the offer. Indeed the decision whether to accept a Part 36 offer means that the recipient of the offer needs to consider the merits of the claim and that information is clearly relevant to carrying out that exercise.”

The judge also observed that a party who accepts a Part 36 offer will be protected against excessive costs, as those costs will be subject to scrutiny as part of the assessment process, so the absence of information about costs would not mean it was “unjust” for the usual consequences to follow.

Furthermore, the absence of information was not causative. As Silber J held:

“It is of crucial importance that the Defendants do not say they would have accepted the offer if they had known the actual position as to costs, even though they have had many opportunities to do so. In my view, it cannot be “*unjust*” to make a Part 36 order in circumstances in which the alleged deficiencies in the offer have not been the reason why the recipient of the offer did not accept it.”

Silber J also considered the absence of any request for clarification of the offer to be relevant for these purposes, holding:

“I should also add that CPR 36.8 states that a party may request the offeror to clarify the offer. So before a party is able to say that it would be unjust for a Part 36 order to be made against it because it had failed to comply with an obligation to make information available, the party should have invoked Part 36.8. That is, after all, the procedure designed to deal with cases where there is a need for clarification. So that is another reason why I must reject the Defendants’ contentions.”

In Webb Resolutions Ltd -v- Waller Needham & Green [2012] EWHC 3529 (Ch) the court had to determine costs following the settlement of a negligence claim by the claimant mortgage lender against the defendant solicitors' firm in connection with a loan for the purchase of residential property.

In July 2010 the claimant had sent a letter of claim in accordance with the Professional Negligence Pre-Action Protocol.

The defendant subsequently requested disclosure of documents which it said was needed in order to prepare a letter of response under the Protocol. The claimant provided some documents but maintained that the others were not necessary for the defendant to assess its liability.

The claimant made a Part 36 offer on 17 May 2011 and then indicated no further disclosure would be provided until liability had been admitted by the defendant.

The defendant maintained it was unable to respond further on the issue of liability pending disclosure by the claimant.

The claimant commenced proceedings and then provided standard disclosure following which, on 23 May 2012, the defendant accepted the Part 36 offer made the previous year.

On the issue of costs the judge ruled that the claimant had acted unreasonably and against the letter and spirit of the Protocol by refusing to comply. It was therefore unjust to follow the normal rule as to costs under CPR r.36.10 (4). The claimant recovered costs up to 17 June 2011 but had to pay the defendant's costs incurred thereafter.

Conclusion

Caselaw had given added certainty to the practical use of Part 36. However, important changes to the rule, as part of the implementation of the Jackson Report, will inevitably lead to further issues requiring clarification by the courts in the future.