THE FUTURE OF PART 36 (PART 9)

Introduction

The eighth article in this series concluded by observing that the CPRC had re-drafted Part 36 and that the amended rule, set out in The Civil Procedure (Amendment No 8) Rules 2014, was to be introduced on 6 April 2015.

The updated version of Part 36 is the first major amendment to the rule since 2007, that version of the rule being reviewed by the second article in this series. Although, this time round, the amendments largely codify the caselaw decided since 2007 which has interpreted, or highlighted problems with, the rule there are some important changes which practitioners need to be aware of.

Before reviewing the updated version of Part 36 it is worth tracing the history of the rule and identifying some key milestones, as these make sense of, and put into proper context, the most recent.

This is also a useful opportunity to review further caselaw, not yet covered in this series, and also identify what were the key topics for the CPRC when setting about redrafting of the rule.

The starting point is, therefore, a reminder of the background.

Background

Prior to the introduction of the CPR the only offer likely to carry costs consequences was an offer made by the defendant in the form of a payment into court.

This changed in 1999 with the introduction of the CPR.

1999: The Original Part 36

The original version of Part 36, introduced with the CPR in 1999, preserved the payment into court, now in the form of a Part 36 payment which was still required by a defendant in a money claim. The Part 36 payment maintained, in the new rules, the costs consequences of a payment into court under the earlier regime.

Part 36 also introduced the new concept of a Part 36 offer. Such an offer might be made by a defendant in response to a non-monetary claim, as well as prior to issue of court proceedings in a money claim, and, significantly, by a claimant. For the first time, therefore, a claimant might secure costs, and other, benefits if judgment was at least as advantageous to the claimant as the claimant's own offer.

One of the often misunderstood features of the new regime was that those drafting the rules recognised a claimant's Part 36 offer would need "teeth", both to incentivise the

claimant into making an offer and also to focus the mind of the defendant on settlement following receipt of such an offer. That is why, from the outset of the CPR, claimant Part 36 offers have carried the potential for enhanced interest and indemnity costs.

Indemnity costs have traditionally been regarded as penal in nature but, whilst that remains the case when the court is exercising the general discretion as to costs conferred by Part 44, an assessment of costs on the indemnity basis is one of the important incentives for the claimant under Part 36 given that a successful claimant will usually recover costs in any event and so needs something extra.

Consequently, where judgment is at least as advantageous to the claimant as the claimant's own Part 36 offer the key question for the court is simply comparison of offer and judgment rather than any issue of conduct on the part of the defendant (a point recognised by Sir David Eady when giving judgment in Downing -v- Peterborough & Stamford Hospitals NHS Foundation Trust [2014] EWHC 4216 (QB) a case reviewed by the last article in this series).

Conversely, whilst a defendant who makes what proves to be a good Part 36 offer is likely to be entitled to costs from the end of the relevant period, where the claimant fails to obtain judgment more advantageous than the offer, there is no automatic entitlement to have those costs assessed on the indemnity basis.

These principles, which have held good ever since 1999, were made clear, in the relatively early days of Part 36, by Simon Brown LJ in Kiam -v- MGN Limited [2002] EWCA Civ 66 at paragraph 8 of the judgment where he said:

> "If the claimant thought that, even if he were to make and then beat an offer, he was going to get no more than his costs on the standard basis, why would he make it? It would afford him no advantage at all. He would do better simply to claim at large and recover his costs whatever measure of success he gained. His position is, in short, quite different from that of the defendant who plainly has every incentive to make a settlement offer, generally by way of payment into court, irrespective of the basis on which any costs order will be made. Take any ordinary damages claim. A defendant wishing to protect himself will pay money into court. The incentive to do so is self-evident. The incentive does not need to be created or stimulated by raising the defendant's expectation as to the level of costs he will recover. And, consistently with this, where payments in are not beaten, defendants routinely recover their costs on the standard basis; I know of no rule or practice in such cases for making indemnity costs orders."

2007: "On the Table"

Following caselaw, which had blurred the distinction between the costs consequences of a Part 36 payment and a Part 36 offer by the defendant, Part 36 was last substantially amended in 2007.

These amendments attempted to harmonise, where possible, the way the rule applied to claimants and defendants.

Both claimants and defendants could, from 2007, make Part 36 offers and the concept of the "relevant period" was introduced. That is the period of time within which the offer cannot be changed or withdrawn, without court permission, and during which, if accepted, automatic costs consequences will apply in favour of the claimant.

The relevant period has remained a significant aspect of Part 36 ever since.

It is important to recognise that the relevant period is not the period of time for which the offer is open. The offer remains open unless and until changed or withdrawn (though in some circumstances other developments will mean that the offer can no longer be accepted). In Gibbon -v- Manchester City Council [2010] EWCA Civ 726 Moore-Bick LJ observed that this meant Part 36 offers would remain "on the table".

In C -v- D [2011] EWCA Civ 646 the Court of Appeal held that a time limited offer could not be a Part 36 offer. Ambiguity would, however, be resolved, where the offer referred to Part 36, on the basis that the offer would be treated as a Part 36 offer if possible. On this basis with what looked like a time limit, but crucially had been expressed to be "the relevant period", the court was able to find that the offer did comply with the requirements of Part 36, as it did meet all the other requirements on form and content in the rule.

It was these changes, and this caselaw, which confirm that Part 36 operates as a self-contained code.

2010: "The Portal"

2010 saw Part 36 divided into two sections with the existing rule comprising the new Section I and a new Section II dealing with Part 36 in stage 3 of what was then just the RTA Protocol (this part of the rule subsequently also embracing the EL/PL Protocol).

2011: "More Advantageous"

A single, but significant, amendment was made to Part 36 in 2011 by the introduction of a new Part 36.14 (1A).

This rule provided that in relation to any money claim, or money element of a claim, the term "more advantageous" was to mean better in money terms by any amount, however small, and that the term "at least as advantageous" was to be interpreted the same way.

That gave added certainty to the operation of Part 36 and mitigated the effect of the Court of Appeal ruling in Carver -v- BAA Plc [2008] EWCA Civ 412.

2013: "Jackson"

Further amendments to Part 36 in 2013 reflected the terms of the Jackson Report.

The report contained a number of recommendations relating to Part 36 and, in particular, the need for this to be re-calibrated so that claimants had greater benefits.

These proposals were implemented by an amendment to Part 36.14 (3) so that where the claimant obtained a judgment "at least as advantageous to the claimant" as the claimant's own Part 36 offer the claimant would be entitled, in addition to indemnity costs and enhanced interest, to an "additional amount", equivalent to 10% of damages awarded but subject to a ceiling of £75,000.

Further amendments to the rule made at this stage reflected the introduction of fixed costs in ex-RTA Protocol and ex-EL/PL Protocol claims.

These amendments were reviewed by the seventh article in this series.

2014: "Soft Tissue Injury Claims"

The final amendment to Part 36, prior to 2015, took effect from October 2014 when the concept of the "Soft Tissue Injury Claim" was introduced.to characterise, and deal slightly differently with, what might loosely be termed "whiplash" claims being run through the RTA Protocol. Significantly, Part 36 now provided, with the intention of discouraging so-called "pre med offers", that in such a claim any offer would not be effective, in the event of late acceptance or judgment, until 21 days after the defendant receives the "fixed cost medical report".

It is the 2007 version of Part 36, in the format finally reached by October 2014, which was revised with effect from April 2015.

2015

April 2015 saw the introduction of an updated version of the rule, though this remains largely based on the 2007 version. The issues identified by the CPRC, underlying this revision, are best considered once the further caselaw has been reviewed, as some of this has had an impact on the thinking behind the terms of the new rule.

CASELAW

The caselaw can usefully be considered by reference to the main topic decided by each of the cases.

Making Offers

Earlier articles in this series have reviewed a line of cases all stressing the need for compliance with the rules on form and content when making Part 36 offers.

Whilst the Court of Appeal judgment in C -v- D [2011] EWCA Civ 646 appeared to suggest a more relaxed approach to form and content so, perhaps, a mere reference to "Part 36" might suffice to make the offer effective, that overlooks the emphasis placed in the very case on the need for compliance with the rules on form and content.

The pitfalls were highlighted by the judgment in Thewlis -v- Groupama Insurance Co Ltd [2010] EWHC 3 (TCC) which at first sight seemed almost indistinguishable from C but which had some important differences of real significance to the validity of the offer for the purposes of Part 36. Whilst the decision in Thewlis has been the subject of criticism it has since been roundly supported by the Court of Appeal in Shaw -v- Merthyr Tydfil County Borough [2014] EWCA Civ 1678.

That judgment in Shaw reflects the very strict approach to the rules on form and content taken under the pre-April 2015 version of Part 36, in particular the need for an offeror to comply precisely with the terms of the former Part 36.2 (2).

Prior to the issue of proceedings the claimant made a Part 36 offer. That letter was headed "Part 36 Offer" and read:

> "Our client offers to accept the sum of £2,000 in full and final settlement for the claim for general and special damages, such sums to be inclusive of interest together with payment (of) her reasonable costs to be detailed assessed in default of agreement. This offer remains open for a period of 21 days from the date of receipt of the offer, after which time the offer may only be accepted if the parties agree their liability in respect of costs or the court provides its permission for late acceptance."

The claim was, though only following an appeal, successful with damages of £6,510 being awarded.

When costs were being assessed the claimant contended she was entitled to the benefits conferred by Part 36.14, having beaten her own offer, including indemnity costs.

The district judge assessing costs held that the claimant's offer was not a valid Part 36 offer, following Thewlis -v- Groupama Insurance Co Ltd [2012] EWHC 3 (TCC). Accordingly, costs were assessed on the standard basis.

The claimant appealed this ruling, but that appeal was dismissed by the Court of Appeal.

After observing that Part 36 provides for certain costs consequences Maurice Kay LJ went on to hold:

> "However, all this is predicated upon the offer having been compliant with the requirements of Part 36. Rule 36.2(2) is expressed in mandatory language and its requirements have been held to be mandatory - see PHI Group Ltd v Robert West Consulting Ltd [2012] EWCA Civ 588, especially at paragraph 25, per Lloyd LJ. Five mandatory requirements are set out including (b) that the offer states on its face that it is intended to have the consequences of section 1 of Part 36…"

In this case the offer failed to expressly state that it was "intended to have the consequences" of Part 36.

Furthermore, the offer did not identify a relevant period but, rather, was made in terms reflecting the language of the rule before amended with effect from 6 April 2007.

Accordingly, Maurice Kay LJ held:

> "In these circumstances, as a matter of form, the offer did not satisfy the mandatory requirements of Part 36. Accordingly it was not a Part 36 offer, even though the letter described it as one. This case is indistinguishable from Thewlis which the judge followed with manifest reluctance."

It was in these circumstances that the Court of Appeal went on to reject criticism there had been of the judgment in Thewlis.

Detailed Assessment

Part 47.20 expressly applies the terms of Part 36, with necessary modification, to detailed assessment proceedings.

Two recent cases have considered the operation of Part 36 in the context of detailed assessment.

In Cashman -v- Mid Essex Hospital Services NHS Trust [2015] EWHC 1312 (QB) the claimant's claim against the defendant was settled on terms that the defendant would pay £90,000 damages together with costs to be assessed on the standard basis if not agreed.

The claimant served a bill of costs for about £262,000. About 7 months before the detailed assessment hearing the claimant made a Part 36 offer, in the costs proceedings, of £152,500.

Costs were assessed at £173,693.78 at the detailed assessment.

That judgment was "more advantageous" to the claimant than the proposal contained in the claimant's Part 36 offer on costs. Accordingly, under the terms of Part 47.20, the provisions of Part 36.14 (3) applied, unless that would be unjust.

The Master held that it would not be unjust for the consequences provided for under Part 36.14 (3) to apply, save for the additional amount. The Master concluded that it would be unjust to order the defendant to pay the claimant the prescribed additional amount, at 10% of the costs as assessed, explaining:

> "Had the rule permitted me to allow a figure fixed by applying the prescribed percentage to the difference between the sum which the claimant offered to accept and the sum which was allowed, then I think that may have been a just result, but that is not what the rule anticipates. In circumstances where there has been a significant reduction in the claimant's bill, it seems to me that it would be unjust to reward the claimant with an additional amount prescribed by 36.14(3)(d)."

The claimant appealed. Giving judgment in the appeal Slade J concluded this was a case where the Master had fallen into the temptation referred to by Sir David Eady in Downing -v- Peterborough & Stamford Hospitals NHS Foundation Trust [2014] EWHC 4216 (QB) when he said:

> "It is elementary that a judge who is asked to depart from the norm, on the ground that it would be 'unjust' not to do so, should not be tempted to make an exception merely because he or she thinks the regime itself harsh or unjust. There must be something about the particular circumstances of the case which takes it out of the norm."

Moreover, Slade J held:

> "The approach adopted by the Master penalises the Claimant for making what turned out to be a reasonable Part 36 offer. It is the terms of the Part 36 offer not the level of the sums claimed in the bill of costs which are to be considered under CPR 36.14(4). Whilst all the relevant circumstances are to be considered in deciding whether it would be unjust to make an award under any of the paragraphs of CPR 36.14(3), it was not suggested that there was any particular feature or consequence of the bill of costs other than its size which would render the making of an order under CPR 36.14(3)(d) unjust."

There being no reason advanced by the defendant, other than the high level of the bill of costs, why it would be unjust for there to be an order for an additional amount under Part 36.14 (3) (d) Slade J ruled:

> "In those circumstances, properly directing himself, in my judgment the Master could only have concluded that it was not unjust to make an order under CPR 36.14(3)(d). Accordingly this court orders that the Claimant is entitled to an additional award calculated in accordance with that subparagraph."

In Shepherd -v- Hughes (Mold County Court, 28 January 2015) the issue for the court was whether, following provisional assessment but prior to any detailed assessment, the offeree was at liberty to accept a Part 36 offer on costs made prior to the provisional assessment, that offer being more advantageous to the offeree than the outcome of the provisional assessment.

A Part 36 offer, which has not been withdrawn, can generally be accepted at any time but the terms of Part 36.9 (3), as the rule read prior to April 2013, required the offeree to obtain permission from the court to accept an offer once "the trial has started".

As HHJ Seys-Llewellyn QC observed the key issue was whether:

> "… the detailed assessment hearing has started, by reason that there was a provisional assessment or not?"

The judge concluded the answer was to be found within the terms of Part 47.15 and found:

> "Thus, all of those provisions are subject to the introduction that this Rule, 47.15, "*applies to any detailed assessment proceedings*" (my emphasis). Thus, it seems, that enables and informs me to construe the reference in CPR 36.9(3) to a detailed assessment hearing as including the provisional assessment which is intrinsically a part of the structure which may lead to a detailed assessment hearing; and thus requiring that the court's permission is required to accept a part (36) offer where the provisional assessment has been made."

CPRC

With all the issues highlighted by the caselaw in mind, perhaps not least the judgment in Shaw, the CPRC set about a review of Part 36 in 2014.

A number of topics identified for specific consideration by the committee were mentioned in the relevant minutes which included the following.

- Undue technicality.
- Split trials.
- Counter claiming defendants.
- Costs budgeting.
- "Cynical" claimant offers.

The new, 2015, rule is the product of that review.

Part 36: 2015

The revised Part 36, introduced from 6 April 2015, usefully contains a number of sub-headings dealing with different aspects of that rule.

Preliminaries

The new Part 36.1 (1) expressly states that Part 36 is "a self-contained procedural code", adopting the observations and language of Moore-Bick LJ in Gibbon -v- Manchester City Council [2010] EWCA Civ 726.

This emphasises the need to look at the terms of the rule itself, as explained by relevant caselaw, and, specifically, means the general law of contract does not prevail over express provisions in the rule itself, as confirmed in Gibbon.

The express adoption of caselaw interpreting Part 36 might suggest the amended rule should be seen as codifying and clarifying the existing rule, except where that rule is expressly varied (where necessary to deal with problems which were highlighted in caselaw).

General Provisions

Parts 36.2 to 36.4 contain some general provisions dealing with the scope and type of Part 36 offers as well as the definition of terms found in the rule.

Scope of Part 36 Offers

Part 36.2 (2) provides:

> Nothing in this Section prevents a party making an offer to settle in whatever way that party chooses, but if the offer is not made in accordance with rule 36.5, it will not have the consequences specified in this Section.

The rule contains a reminder that Part 44.2 requires the court to consider an offer to settle that does not have the costs consequences set out in Part 36 when deciding what order to make about costs.

Where the consequences of Part 36 do not apply to an offer that may be important because such an offer will not then carry the deemed or default costs provisions found in Part 36. Furthermore, if the offeror subsequently seeks to rely on the offer for costs purposes the "automatic" costs consequences provided for under Part 36 will not apply even though the offer may be relevant to the general discretion as to costs found in Part 44: Widlake -v- BAA Limited [2009] EWCA Civ 1256; Saigol -v- Thorney Limited [2014] EWCA Civ 556.

Type of Part 36 Offers

Part 36.2 (3) provides:

> A Part 36 offer may be made in respect of the whole, or part of, or any issue that arises in—
>
> (a) a claim, counterclaim or other additional claim; or
>
> (b) an appeal or cross-appeal from a decision made at a trial.

The distinction between "whole", "part" and "issue" may be significant in relation to costs, particularly costs on acceptance.

The former version of the rule referred broadly to "an offer to settle", although the rules on form and content required this to be in relation to the whole of the claim, part of the claim or an issue in the claim. The former rule expressly stated an offer could be made solely in relation to liability and whilst there is no corresponding provision in the new rule caselaw has confirmed offers on liability should be treated as offers on an "issue": Onay -v- Brown [2009] EWCA Civ 775; Sonmez -v- Kebabery Wholesale Limited [2009] EWCA Civ 1386.

The rule expressly provides for Part 36 offers to be made in counterclaims, where the party bringing the counterclaim will be, for Part 36 purposes, the claimant. The amendment to the rule does not allow a defendant, who does not bring a counterclaim, to make a Part 36 offer as though that party were a claimant, despite the views at first instance in F & C Alternative Investments (Holdings) Limited -v- Barthelemy [2012] EWCA Civ 843 that this was a "glitch" in the rules.

Definitions

Part 36.3 deals with definitions, a number of these being necessary because of the amendment to the rule dealing with disclosure of Part 36 offers following the trial of a preliminary issue.

Appeals

Part 36.4 deals expressly with appeals and provides:

> (1) Except where a Part 36 offer is made in appeal proceedings, it shall have the consequences set out in this Section only in relation to the costs of the proceedings in respect of which it is made, and not in relation to the costs of any appeal from a decision in those proceedings.

(2) Where a Part 36 offer is made in appeal proceedings, references in this Section to a term in the first column below shall be treated, unless the context requires otherwise, as references to the corresponding term in the second column—

Term	*Corresponding term*
Claim	Appeal
Counterclaim	Cross-appeal
Case	Appeal proceedings
Claimant	Appellant
Defendant	Respondent
Trial	Appeal hearing
Trial judge	Appeal judge

In the event of an appeal the parties will need to consider repeating (or renewing as varied) offers made in the proceedings under appeal as well as offers made specifically for the purposes of the appeal.

Costs

Part 47.20, although not expressly referred to in Part 36, adopts the Part 36 procedure, including costs consequences, for offers to settle in detailed assessment proceedings.

The absence of reference to Part 47 in Part 36 suggests these are to operate as separate regimes, hence costs will not be regarded as an issue preventing the case being "decided" nor should Part 36 benefits in the substantive claim prevent these being awarded, where appropriate, in subsequent costs proceedings.

Making Offers

Parts 36.5 to 36.7 deal with making Part 36 offers.

Form and Content

Part 36.5 deals with the rules on form and content of a Part 36 offer (necessary for an offer to have the consequences of Part 36 given the terms of Part 36.2 (2)).

The new rule reflects the issue identified by the CPRC about technicality.

Part 36.5 provides:

(1) A Part 36 offer must—

(a) be in writing;

(b) make clear that it is made pursuant to Part 36;

(c) 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 36.13 or 36.20 if the offer is accepted;

(d) 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

(e) state whether it takes into account any counterclaim.

(Rule 36.7 makes provision for when a Part 36 offer is made.)

(2) Paragraph (1)(c) does not apply if the offer is made less than 21 days before the start of a trial.

(3) In appropriate cases, a Part 36 offer must contain such further information as is required by rule 36.18 (personal injury claims for future pecuniary loss), rule 36.19 (offer to settle a claim for provisional damages), and rule 36.22 (deduction of benefits).

(4) A Part 36 offer which offers to pay or offers to accept a sum of money will be treated as inclusive of all interest until—

(a) the date on which the period specified under rule 36.5(1)(c) expires; or

(b) if rule 36.5(2) applies, a date 21 days after the date the offer was made.

The only material change to the existing rule on form and content is replacing the requirement the offer "state on its face that it is intended to have the consequences of Section I of Part 36" with the stipulation the offer "make clear that it is made pursuant to Part 36".

The objective of the CPRC was to avoid undue technicality without removing certainty.

In practice parties have, perhaps, encountered more difficulty with the relevant period than reciting the intended consequences of the offer.

The target of the amendment appears to be the first instance decision in Thewlis -v- Groupama Insurance Company Ltd [2012] EWHC 3 (TCC) where, paradoxically, the offer was made using the very wording now contained within the rule and, despite the endorsement of that case by the Court of Appeal in Shaw -v- Merthyr Tydfil County Borough [2014] EWCA Civ 1678.

Under the new version of the rule offerors will need to decide what will suffice to "make clear" the offer is "made pursuant to Part 36".

The words "made pursuant to Part 36" would surely put the matter beyond doubt. But would simply referring to "Part 36" suffice? It is important to note that whilst "make clear" does not require the incantation of certain words the continued use of the word "must" means that this remains a mandatory requirement. Consequently, if courts were to follow the strict, literal, approach in cases such as Shaw arguments may remain.

A question which will doubtless arise, if experience of the amendment to Part 36 in 2007 is anything to go by, will be whether an offer which states on its face that it "is intended to have the consequences of Part 36" will "make clear that it is made pursuant to Part 36". It would be ironic if the result of the rule change would be to validate the offer in Thewlis but to suggest the offer made in C -v- D [2011] EWCA Civ 646, and other similar cases, would not be effective!

Whilst it is clearly sensible for an offer which is intended as a Part 36 offer to be treated as such there are real dangers if there is any degree of ambiguity. In particular it is important for offerees to guard against an offeror framing an offer in such a way that, should this suit the offeror, it might be argued the offer is invalid (for example if the offeror wished to object to later acceptance) or, again if this later suits, valid (for example for costs purposes).

Offerors may wish to continue using the practice form, Form N242A (as updated), whilst offerees should endeavour to clarify any ambiguity at the time the offer is made.

There is no change to the requirements, on form and content, with offers in personal injury claims:

- which include a claim for future pecuniary loss (now dealt with by the new Part 36.18);

- which include a claim for provisional damages (now dealt with by the new Part 36.19); and

- where the offer is made by a defendant and the payment to a claimant following acceptance would be a compensation payment for the purposes of the Social Security (Recovery of Benefits) Act 1997 (now dealt with by the new Part 36.22).

Part 36.22 is, like the earlier Part 36.15, of particular importance.

Part 36.22 (3) provides:

> A defendant who makes a Part 36 offer must, where relevant, state either—
>
> (a) that the offer is made without regard to any liability for recoverable amounts; or
>
> (b) that it is intended to include any deductible amounts.

Where the offer is intended to include any deductible amounts other provisions in the rule apply including Part 36.22 (6) which stipulates:

> Subject to paragraph (7), the Part 36 offer must state—
>
> (a) the gross amount of compensation;
>
> (b) the name and amount of any deductible amounts by which the gross amount is reduced; and
>
> (c) the net amount of compensation.

Part 36.22 (7) confirms:

> If at the time the offeror makes the Part 36 offer, the offeror has applied for, but has not received, a certificate, the offeror must clarify the offer by stating the matters referred to in paragraph (6)(b) and (c) not more than 7 days after receipt of the certificate.

Identification of the net sum, one way or another, is important because Part 36.22 (8) provides:

> For the purposes of rule 36.17(1)(a), a claimant fails to recover more than any sum offered (including a lump sum offered under rule 36.6) if the claimant fails upon judgment being entered to recover a sum, once deductible amounts identified in the judgment have been deducted, greater than the net amount stated under paragraph (6)(c).

Defendant's Offers

Part 36.6 confirms a Part 36 offer by a defendant to pay a sum of money must be an offer to pay a single sum and that an offer including an offer to pay all or part of the sum at a date later than 14 days following the date of acceptance will not be treated as a Part 36 offer unless the offeree accepts the offer.

The latter provision protects, in particular, a claimant from arguments that because the offer failed to comply with the terms of Part 36 other provisions in the rule, such as the deemed costs order on acceptance, would not apply.

Time

Part 36.7 confirms a Part 36 offer can be made at any time and will be made when served on the offeree (service being governed by the terms of Part 6).

Reviewing Offers

An offeree will usually want to carefully review any offer which makes reference to Part 36, to establish whether the offer does indeed comply with the rules on form and content as well as assessing the terms of the offer.

That is important because of the significant differences between an offer to which the terms of Part 36 apply and any other offer, to which the general law of contract will apply.

Clarifying, Withdrawing and Changing Offers

Parts 36.8 to 36.10 deal with clarifying, withdrawing and changing offers.

Clarification

Part 36.8 now deals with clarification of Part 36 offers.

Withdrawing or Changing Offers in the Relevant Period

Specific provision is now made for the withdrawal or changing of a Part 36 offer within the relevant period, by Part 36.10.

This rule prevails over the more general provisions allowing offers to be withdrawn or changed found in Part 36.9.

Under this rule there is now a sequence of events.

- If the offeror serves notice of withdrawal or change within the relevant period that notice will have effect, on expiry of the relevant period, unless the offeree has then served notice of acceptance.

- If the offeree does service notice of acceptance that will take effect unless the offeror applies to the court for permission to withdraw or change the offer within 7 days (or, if earlier, before the first day of trial).

- When application is made the court may give permission for the offer to be withdrawn or changed "if satisfied that there has been a change of circumstances since the making of the original offer and that it is in the interests of justice to give permission."

This test very much accords with the approach taken in Evans -v- Wolverhampton Hospitals NHS Foundation Trust [2014] EWHC 3185 (QB).

Withdrawing Offers (Time-limited Offers?)

Part 36.9 confirms a Part 36 offer can only be withdrawn if the offeree has not previously served notice of acceptance.

An offer is withdrawn by serving written notice of withdrawal which will take effect when served, subject to Part 36.10 where this is within the relevant period.

After the expiry of the relevant period an offer can be withdrawn without permission from the court.

Part 36.9 (4) (b) contains a new provision allowing an offer to be automatically withdrawn in accordance with its terms.

It is important to note that this provision does not validate a time-limited offer, in the sense of an offer that will lapse after the stipulated period of time expires. That would present difficulties because of the potential for an offer not formally withdrawn to still carry potential costs consequences yet not be "on the table". Hence in C -v- D [2011] EWCA Civ 646 Rix LJ held:

> "It is true that Part 36 does not contain an express exclusion of a time limited offer. However, the essence of the matter is that a Part 36 offer, to have effect in terms of costs consequences after trial, has to be an offer which has not been withdrawn, but has remained on the table. The initial offer has to specify a period of at least 21 days during which the defendant remains liable for the claimant's costs until acceptance (rule 36.2(2)(c) and rule 36.10(1)). The offer cannot be withdrawn within that period without the permission of the court (rule 36.3(5)). After that period has expired, the offeror can withdraw the offer only by serving notice of withdrawal on the offeree (rules 36.3(6) and (7)). In the absence of withdrawal, the offeree can accept the offer at any time (rule 36.9(2)). The language of that rule's "unless the offeror serves notice of withdrawal on the offeree" states a pre-condition which has to be fulfilled in order to prevent the offeree having the right to accept "at any time". That critical rule is made subject to a few limited exceptions (rule 36.9(3)), one of which is where the trial has commenced, but the expression of those exceptions only serves to emphasise that, in the ordinary way, unless the offer has been withdrawn before the expiry of the relevant period with the permission of the court,

> or the offer has been withdrawn after the expiry of that period by the service of a written notice of withdrawal, there is no room for an offer which is neither withdrawn before or after the expiry of the relevant period, but lapses as a matter of its own terms."

All the new rule permits is for a party to expressly give notice, in advance, of withdrawal provided that is contained in the terms of the offer. Crucially on withdrawal of a Part 36 offer the usual costs consequences following judgment, now found under Part 36.17, will not apply (see Part 36.17 (17) (a)).

This may be a useful provision for a party happy to hold an offer open, even though only for a defined period, for at least 21 days. Otherwise the provision may not be of much utility. Care will be required to ensure notice of withdrawal, within the terms of the offer, do not prevent that offer being open for the necessary relevant period.

Changing Offers

The general rule is, again, found in Part 36.9. That allows, provided the offeree has not previously served notice of acceptance and once the relevant period has expired, an offer to be changed, the change taking effect when written notice is served.

If the offeror wishes to change the offer, so that it is less advantageous to the offeree, within the relevant period the terms of Part 36.10 will apply, and the same procedure followed as when the offeror wishes to withdraw the offer during the relevant period.

Part 36.9 (5) confirms that if an offeror changes the terms of a Part 36 offer to make that offer more advantageous to the offeree that will not be treated as withdrawal of the original offer but the making of a new Part 36 offer on the improved terms, with the claimant having a "relevant period" in which to accept the offer.

The rules do not deal expressly with the consequences of changing an offer so it is less advantageous to the offeree. It seems likely the approach in Burrett -v- Mencap Limited (Northampton County Court 14 May 2014), which was reviewed by the lasr article in this series, would be followed.

Following any preliminary trial it will be important, within the 7 day window provided for in Part 36.12, for the offeror to make a decision on whether to change or withdraw any Part 36 offer made on an issue that has yet to be decided.

Accepting Offers

Parts 36.11 to 36.15 deal with accepting offers.

General Provisions

General provisions relating to acceptance of Part 36 offers are now set out in Part 36.11. This makes no changes of note to the existing version of the rule.

Split-Trial Cases

Part 36.12 does, however, deal expressly with the potential problem of Part 36 offers made in cases where there is a split trial. Sensibly, to avoid arguments about whether an offer survives such a trial, the new rule makes express provision to deal with this situation.

- If an offer relates only to parts of the claim or issues already decided such an offer can no longer be accepted after trial of a preliminary issue.

- Any other Part 36 offers cannot be accepted earlier than 7 clear days after judgment is given or handed down in such a trial, which affords the offeror a window to withdraw or change the offer which seems only appropriate given that the determination of the preliminary point may have a bearing on the appropriate terms for settlement of the remaining issues.

Costs Consequences on Acceptance

The well known costs consequences applicable on acceptance of a Part 36 offer, currently set out in Part 36.10, will now be found in Part 36.13. There is still a deemed costs order, now under Part 36.13 (1), where an offer is accepted within the relevant period but that is now subject to the exceptions found in Part 36.13 (2) and (4) which are as follows.

- Where a defendant's Part 36 offer relates to part only of the claim (and when serving notice of acceptance the claimant abandons the balance of the claim).

- Where a Part 36 offer which was made less than 21 days before the start of a trial is accepted.

- Where a Part 36 offer which relates to the whole of the claim is accepted after expiry of the relevant period.

- Where (unless it is a Part 36 offer by the defendant relating to part only of the claim and when accepting the claimant abandons the balance of the claim) it is a Part 36 offer which does not relate to the whole of the claim, whenever that is accepted.

Where there is a deemed costs order in favour of the claimant Part 36.13 (3) provides that, unless fixed, those costs are to be assessed on the standard basis if not agreed.

In other circumstances Part 36.13 (4) requires the liability for costs to be determined by the court unless the parties have reached agreement.

Where an offer is accepted after expiry of the relevant period Part 36.13 (5) provides that, unless the court considers it unjust to do so, there will be an order that the claimant be awarded costs up to the expiry of the relevant period and the offeree pay the offeror's costs from that date up to the date of acceptance. Part 36.17 (5) deals with what would be "unjust".

Pre-Action Costs

After confirming entitlement to the "costs of the proceedings" the rule now expressly adds that this includes recoverable pre-action costs but also makes express reference to Part 36.20 which deals with the costs consequences on acceptance of a Part 36 offer where there are fixed costs in ex-protocol claims.

There must be some concern that the express addition of the words "including their recoverable pre-action costs" may cause difficulties if a claimant accepts a pre-issue Part 36 offer.

Before the addition of these words the word "proceedings" in this context had been given a broad definition. In Solomon -v- Cromwell Group plc [2011] EWCA Civ 1584.Moore-Bick LJ held:

> "It is quite true that the word "proceedings" normally refers to proceedings already pending and Part 36 as a whole is primarily directed to that situation. In that context the extension of the Rules to enable Part 36 offers to be made before proceedings have been started might be considered to be somewhat anomalous, but the terms of Part 36 as a whole make it quite clear, in my view, that steps taken in contemplation of proceedings are to be regarded as "proceedings" for the purpose of rule 36.10(1). That is the natural meaning of the language used and if it were not so the rules would be silent on the consequences of accepting a Part 36 offer made before proceedings had been issued. I think it unlikely that the Rule Committee simply overlooked that. It is far more likely that it intended the word "proceedings" in rule 36.10(1) to be construed in the way I have indicated. I am fortified in that conclusion by the fact that a similarly broad approach to the construction of the word "proceedings" was taken, albeit in another context, in Crosbie v Munro [2003] EWCA Civ 350, [2003] 2 All E.R. 856, paragraphs 26-33, citing Callery v Gray (No.1) [2001] EWCA 1117, [2001] 1 W.L.R. 2112. The effect of accepting a Part 36 offer made before a claim has been issued, therefore, is that the claimant is entitled to recover costs he has incurred in contemplation of the proceedings up to the date of acceptance insofar as they would have formed part of his recoverable costs if proceedings had already been issued."

The potential problem is the changing of context, by express reference to pre-action costs, so far as the word "proceedings" is concerned. Adopting a different interpretation to the meaning of "proceedings" would not, however, be a purposive approach to what is now, expressly, a self-contained code.

The use of the word "recoverable" might raise issues in the event of late acceptance, pre-issue, by a claimant of a defendant's Part 36 offer.

Late Acceptance

Claimants need to think carefully about the question of late acceptance by the defendants of Part 36 offers.

If judgment is obtained the problem will be avoided, as then the costs consequences in favour of the claimant will follow unless that be "unjust". In other circumstances the claimant may be restricted to costs on the standard basis which does seem unfair, particularly if the claimant has now had to do much additional work.

Many defendants are presently warning claimants that if the claimant fails to beat a Part 36 offer, or accepts late, the defendant will seek indemnity costs. There is no basis for any such argument under Part 36, hence indemnity costs would need to be claimed under Part 44 which, in turn, would mean late acceptance was "out of the norm". Claimants might regard such letters as helpful on the basis that if it could be said a decision to accept an offer late is something "out of the norm", justifying indemnity costs when these would not otherwise be available to a defendant, it is surely appropriate for the claimant to get indemnity costs, and other benefits, on late acceptance, given that this is the very incentive the claimant has to make a Part 36 offer at all.

The terms of Part 36.13 (4) appear to give the court an unfettered discretion on costs as there is no reference, unlike Part 36.13 (3), to those costs being assessed on the standard basis.

If, of course, a claimant obtained judgment that avoids these issues as the terms of Part 36.17 (4) will then apply, unless that would be "unjust". The claimant can certainly obtain judgment if payment of sums due is not made within 14 days. There seems no reason why a claimant cannot obtain judgment on agreement of terms whether that be by acceptance of a Part 36 offer or any other offer: Ontulums -v- Collet [2014] EWHC 4117 (QB).

ATE Insurance in Clinical Negligence Claims

The new rule says nothing about whether any entitlement to recover an insurance premium under The Recovery of Costs Insurance Premiums in Clinical Negligence No 2 Regulations 2013 is deemed to be included as part of the "costs".

Stay

Part 36.14 deals with other effects of acceptance of a Part 36 offer.

Multiple Defendants

Part 36.15 deals with acceptance of a Part 36 offer made by one or more, but not all, defendants.

Unaccepted Offers

Part 36.16 deals with unaccepted offers, and the rules relating to restriction on disclosure of the fact and/or terms of such offers to the court.

The fact that a Part 36 offer has been made, and the terms of any such offer, must usually not be communicated to the trial judge until the case have been decided.

The term "decided" is defined, in Part 36.3, as meaning "when all issues in the case has been determined whether at one or more trials". However, Part 36.16 (3) (d) provides an exception to the rule on disclosure where, although the case has not been decided, any part of, or issue in, the case has been decided and the Part 36 offer relates only to parts or issues that have been decided.

Part 36.16 (4) allows the trial judge, following a preliminary trial, to be told whether or not there are any Part 36 offers other than those relating to the parts or issues of the case which have been decided. In these circumstances if no offers have been made by the defendant the claimant is likely to get a costs order there and then. If there have been Part 36 offers the terms must not be communicated to the trial judge but the very fact there has been an offer means it is likely the court will defer making a ruling on costs so that when the claim as a whole is resolved the outcome can be compared with the offer and a decision on costs then made.

The rule does not deal expressly with all the circumstances in which a judge who is not the trial judge may be referred to a Part 36 offer or by whom such reference might be made.

Pre-CPR there was authority that the court might be referred to a payment into court (the precursor to a Part 36 offer) on the hearing of an application for an interim payment and that such reference might be made by the offeree in the evidence filed in support of the application: Fryer -v- London Transport Executive (The Times, 4 December 1982, Court of Appeal).

In Fryer, an interim payment of £15,000 had previously been made. There was before the Master an application for a further interim payment of £50,000 to include the interim payment of £15,000. In the Affidavit in support of the application, there was reference to the fact that the sum of £48,194 had been paid into court. The Master declined to award an interim payment of £50,000 but he did make an interim payment totalling £20,000.

The matter then came before Sir Douglas Frank, siting as an additional judge of the High Court, and he varied the order of the Master so as to permit an interim payment of £50,000. On appeal it was argued there was an error of law, in that the Master and the Judge should not have been told about the payment into court and, in any event, the interim payment was excessive. Waller LJ in considering the provisions of Order 22, rule 7 and Order 29, rule 15 came to the conclusion that the application for the interim payment did not raise a question or issue as to damages in the way contemplated by the two rules. He expressed the view that whether or not an interim payment should be made and, if so, in what sum was not "an issue as to damages." Rather he said, "It is a question of what, in the interlocutory proceedings before the learned judge, should be done to meet the justice of the case." Accordingly, he found that there was no error in law in the Master and the Judge being informed of the payment into court.

More recently in Handyside -v- Lowery (Newcastle upon Tyne District Registry, 2 April 2015) the claimant, on an application for an interim payment, wished to refer to a Calderbank offer made by the defendant, placing reliance in the decision in Fryer. Ruling that such reference could not be made by the claimant HHJ Freedman held:

> "It seems to me that if there were no material differences between a Calderbank offer and a Part 36 offer, there would be no purpose to be served in preserving the concept of a Calderbank letter. The party who makes a Calderbank offer risks not obtaining the benefits of making a Part 36 offer but, in my judgment, it is entirely reasonable that he should be entitled to another type of benefit which, in this instance, is the advantage of the offer not being made known to the court except when the question of costs comes to be considered."

Costs Consequences Following Judgment

The current Part 36.14, dealing with costs consequences of Part 36 offers following judgment, is largely replicated in the new Part 36.17 but this does contain an amendment which it is important to be aware of. It is also important to understand the context in which this amendment has been made.

This rule deals with the situation where judgment is entered and either the 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 the claimant's Part 36 offer.

The new rule still provides that in relation to any money claim the term "more advantageous" means better in money terms by any amount however small as does "at least as advantageous".

The new rule preserves the "additional amount" payable to the claimant, 10% of damages up to a ceiling of £75,000 which was introduced as a result of the reforms

following the Jackson Report, along with the other benefits of indemnity costs and enhanced interest. However, Part 36.17 (4) (d) now limits the award of the additional amount to the time when the case has been "decided" and on the basis there has been no previous order under this sub-paragraph. That does not appear to rule out the award of an additional amount where, for example. a judgment which is at least as advantageous to the claimant as an offer on an issue such as liability, though that will have to be held over until the case as a whole has been "decided".

The change of significance is found in the new Part 36.17 (5) which deals with the matters to be taken into account by the court when deciding whether it would be unjust to make usual costs orders where one party or another fails to obtain judgment which is more advantageous or at least as advantageous as an offer made by the other party. This provision requires the court to consider "whether the offer was a genuine attempt to settle the proceedings".

The minutes of the CPRC suggest this is intended to deal with the "problem" created by Huck -v- Robson [2002] EWCA Civ 398.

In Huck the very argument advanced, by the defendant, was that the claimant had not made an offer in the sense of a genuine and realistic attempt to reach agreement.

It is interesting to note that the judgment of Jonathan Parker LJ, setting out the background to the case, recorded that:

> "…the judge commented that an 80:20 split might be realistic, and that he had even known of cases being resolved on the basis of a 90:10 split, but that he had never heard of a case being resolved at 95:5, and that he would regard such a result as "nonsensical"."

Hence the judge at first instance ruled:

> "In my judgment 95% on the kind of value that we are talking about here was no kind of offer and it seems to me inevitable that the defendant would reject it. In those circumstances, in my judgment it would be unjust to award indemnity costs even though I have found that the claimant succeeds in the proportion of 100%."

In the Court of Appeal Jonathan Parker LJ was in the minority when he held:

> "…in order to qualify for the incentives provided by paragraphs (2) and (3) of the rule a claimant's Part 36 offer must represent at the very least a genuine and realistic attempt by the claimant to resolve the dispute by agreement. Such an offer is to be contrasted with one which creates no real opportunity for settlement but is merely a tactical step designed to secure the benefit of the incentives. That is not to say that the offer must be one which it would be unreasonable for the defendant to refuse; that

> would be too strict a test, and would introduce considerations of punishment and moral condemnation which (on the authority of *Petrotrade* and *McPhilemy*) are irrelevant in the context of paragraph (3) of rule 36.21. Indeed, the terms of the offer may reflect a degree of optimism and confidence on the part of the claimant/offeror. Provided only that the offer represents a genuine and realistic offer to resolve the dispute by agreement, it is for the claimant to decide at what level to pitch his offer. In some cases, an offer which allows only a small discount from 100 per cent success on the claim may be a genuine and realistic offer; in other cases, it may not. It is for the judge in every case to consider whether, in the circumstances of that particular case, and taking into account the factors listed in paragraph (5) of rule 36.21, it would be unjust to make the order sought."

The terms of Part 36.17 (5) seem intended to pick up the language of Jonathan Parker LJ. It is worth noting, however, that all Jonathan Parker LJ concluded was that, on an appeal, it could not be said the judgment, which was a matter of discretion, could be impugned.

In the majority Tuckey LJ held:

> "…I would however add that if it was self-evident that the offer made was merely a tactical step designed to secure the benefit of the incentives provided by the Rule (e.g. an offer to settle for 99.9% of the full value of the claim) I would agree with Jonathan Parker L.J. that the judge would have a discretion to refuse indemnity costs. But that cannot be said of the offer made in this case, which I think did provide the Defendant with a real opportunity for settlement even though it did not represent any possible apportionment of liability. I would therefore allow this appeal."

Schiemann LJ, agreeing with Tuckey LJ, concluded that what influenced the judge, erroneously, was that it was inevitable that if the case was fought the judge would not apportion liability 95/5 and therefore it was unjust for the consequences under Part 36 to follow but he added:

> "…Nevertheless, I accept, like my Lords, that circumstances can exist where, notwithstanding that a claimant has recovered in full after making a Part 36 offer for marginally less, he will not be awarded costs on the indemnity basis. I do not consider that Part 36 was intended to produce a situation in which a claimant was automatically entitled to costs on the indemnity basis provided only that he made an offer pursuant to Part 36.10 in an amount marginally less than the claim."

The majority judgment in Huck could, therefore, be regarded as concluding, certainly on the facts of the case, an offer of 95% on liability was a genuine offer, whilst an offer of 99.9% would not have been. This view would accord with the approach that the amendments to Part 36 in 2015 are generally of a codifying nature.

Part 36.17 (2) preserves the 2011 amendment to Part 36 by confirming, under the revised rule, the term "more advantageous" still means, in relation to a money claim or money element of a claim, "better in money terms by any amount, however small". It would be unfortunate to introduce, in money claims, a distinction between offers expressed directly in monetary terms and those expressed indirectly, for example, a percentage offer on liability when that ultimately translates into monetary terms. Surely, with all such offers, the comparison must be in absolute terms between the offer and the judgment. Otherwise there is the risk of re-introducing all the uncertainty, and risk of disproportionate satellite litigation, which arose from the ruling in Carver –v BAA plc [2008] EWCA Civ 412.

However, a cautious offeror might take the view that, given all the judges involved in Huck appeared to have agreed this would have been a genuine attempt to resolve the dispute, that, in a case of this kind, an appropriate offer on liability, which would have to be regarded as a genuine attempt to settle the proceedings, would be 90%.

It is also worth considering, in this context, the comments of Briggs LJ in PGF II SA -v- OMFS Company 1 Limited [2013] EWCA Civ 1288 where he held:

> "Part 36 is itself designed to encourage parties to make, and promptly to accept, realistic offers of settlement. It may fairly be described as lying at the interface between litigation and ADR, see paragraph 10.25 of the ADR Handbook. It is however also designed to provide parties with a measure of protection against costs risk: see *Matthews v Metal Improvements Co. Inc* [2007] EWCA Civ 215 and the *Hewitt* case (*supra*) at paragraph 75. It may for example be used by a defendant to encourage its opponent to accept a lower offer than its own valuation of the claim, on account of the claimant's limited appetite for costs risk. It is a procedure frequently used by parties determined to pursue litigation to trial, precisely for the purpose of obtaining one or more layers of insulation against the costs risk arising from an uncertain outcome."

Moreover, remembering that Part 36 is intended to promote parity between the parties it is difficult to see how an offer by the claimant to accept less than the court, in the event, awards is not a "genuine attempt to settle the proceedings" if the defendant is entitled to corresponding benefits even where the offer was for only marginally more than the claimant recovers.

Costs Budgets

An issue addressed specifically by the new Part 36 is the problem of a party who fails to file a costs budget so, under the terms of Part 3.14, is treated as having filed a budget comprising only the applicable court fees, given that under Part 3.18, if the court then assesses costs on the standard basis the budget cannot be departed from unless there is

good reason to do so. At face value this may conflict with the terms of both Part 36.13, dealing with costs on acceptance, and Part 36.17, providing for costs on judgment.

For these reasons Part 36.23 expressly provides that for the purposes of Part 36.13 (5) (b), which deals with the costs of the offeror after the expiry of the relevant period when a Part 36 offer is accepted late, and Parts 36.17 (3) (a) and 36.17 (4) (b), which deal with costs where judgment is more advantageous or at least as advantageous as the relevant offer, "costs" will be 50% of the costs assessed without reference to the limitation otherwise applied by Part 3.18, together with any other recoverable costs.

It is important to note, for the purposes of Part 36.17, that a claimant must obtain judgment, and this be "at least as advantageous" as the claimant's Part 36 offer whilst a defendant may not need to obtain judgment, as the onus is on the claimant to "obtain a judgment more advantageous" than the defendant's Part 36 offer. That could have the potential for some unfairness in the application of this rule unless the courts are ready to enter judgment for a claimant reflecting terms of agreement, as for example occurred in Ontulmus –v- Collett [2014] EWHC 4117 (QB).

A party seeking to recover costs in this way might, perhaps, need to consider giving an estimate of costs as the matter progresses, as might a party who hopes to obtain an order for indemnity costs and hence exceed the amount of the budget.

Costs Consequences Where Section IIIA Part 45 Applies (Fixed Costs Claims)

There are no material changes to what was, ultimately, the final version of Section II Part 36 in the former version of the rule.

Transitional Provisions

Transitional provisions are found in rule 18 of The Civil Procedure (Amendment No. 8) Rules 2014 which provides, so far as relevant to Part 36, as follows:

> **18.**—(1) The amendments made by rules 7 to 9, 10(b), (d) and (e), 11 and 12 of and Schedule 1 to these Rules apply only in relation to Part 36 offers made on or after 6th April 2015, except as provided in paragraph (2).
>
> (2) Rules 36.3, 36.11, 36.12 and 36.16 in Schedule 1 to these Rules also apply in relation to any Part 36 offer where—
>
> (a) the offer is made before 6th April 2015; but
>
> (b) a trial of any part of the claim or of any issue arising in it starts on or after 6th April 2015.

(3) The amendments made by rule 10(a)(i)(aa) and rule 10(f)(i)(aa) apply only to claims where the claim notification form is submitted on or after 6th April 2014.

Conclusion

Part 36 remains a vital procedural topic for both claimant and defendant practitioners. Experience from the last major change to the rule, in 2007, confirms the importance of keeping up to date with the terms of the rule in both practical use and advice given.

Whilst many of the revisions to the rule will be welcome, by giving greater clarity or dealing with problems that have arisen in practice, there is no doubt that other changes will generate future caselaw as the revised terms of Part 36 are considered by the courts and the role of the rule is tested in the new litigation era.

There is no doubt Part 36 still has a future.