



Personal Injury and Medical Law Teams Practice and Procedure Note

THE CIVIL PROCEDURE RULES (AMENDMENT NO. 3) 2006

Significant changes have been introduced by this Amendment which comes into force on 6 April 2007. The clear and stated intention is to continue in the spirit of Woolf reforms to speed up and reduce the costs of civil litigation with the implementation of one set of Rules and encouragement to make and accept offers without recourse to the courts unless absolutely necessary. Hence the ability to enter judgment in default of payment of the offer sum within 14 days of acceptance and to accept an offer from one defendant severally sued and continue against the remaining defendants without seeking the court's permission to do so.

A number of the RSC and CCR Rules contained in Schedule 1 and Schedule 2 to the Civil Procedure Rules have also been revoked as 'part of the department's ongoing policy of modernisation of rules of court, as set out in 7.1' (of the Statutory Instrument). 'The provisions which the revoked rules made are now replicated in a practice direction which supplements the CPR (Part 8 Practice Direction (Alternative Procedure for Claims)). The opportunity has been taken at the same time to simplify that Practice Direction.'

For text see <http://www.opsi.gov.uk/si/si2006/20063435.htm> with explanatory notes at: http://www.opsi.gov.uk/si/em2006/uksiem_20063435_en.pdf

This Practice and Procedure Note should be read in the context of and as a continuum of the earlier **13 KBW PIMLU Practice and Procedure Note: Responses to Part 36 Consultation (August 2006)** [available on application to the Clerks – kkelly@13kbw.co.uk]

Comment on the new Rules in this Note is provided by way of footnotes

New Part 36 and Part 37

The consultation for this change showed wide support for the proposal to remove the requirement for defendants (deemed 'good for the money') to make offers to settle money claims in the form of a payment into court. The Civil Procedure Rule Committee conducted a follow-up consultation over the summer on the possibility of abolishing payments into court altogether, subject to suitable safeguards and there having been a slight majority in favour, this proposal has been adopted.

These amendments therefore:

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- remove the requirements for defendants to make payments into court and create a new regime for offers to settle. Defendants wishing to offer to settle a claim by payment of a sum of money will now simply make a written offer to settle. The rules then require that an accepted offer must be paid within 14 days, or the claimant will be able to enter judgment and the defendant will lose the costs protection afforded by the rules.
- simplify and clarify the process for offers to settle, so that the permission of the court is not generally required to accept an offer or to withdraw it.

Amendments are also made to rules 3.1, 27.2, 27.14, 44.3, 44.12, 45.3, 47.7 and 52.12, and a new rule 41.3A consequential upon the changes to Part 36 and Part 37.

Summary of principal provisions relating to Part 36 offers

36.2 – An offer to settle

- must be in writing
- state 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 r.36.10 if the offer is accepted; (r.36.3(1)(c)) allows for a longer period with the parties' agreement). Before expiry of this period the offer may only be withdrawn with the court's permission (r.36.3(5)). Thereafter the offer may be withdrawn by notice served on the other party including notice of change of terms (for example, a lesser sum)
- state whether it relates to the whole or part of the claim or an issue that arises identifying the part or issue
- state whether it takes into account any counterclaim,

36.2(4) - Further information is required in certain cases:

- r.36.5 – personal injury claims for future pecuniary loss
- r.36.6 – offer to settle a claim for provisional damages
- r.36.15 – deduction of benefits.

36.2(5) – A Part 36 offer may be made solely in relation to liability

36.3(2) – Timing an offer may be made at any time including before the commencement of proceedings and will be treated as inclusive of interest until the date on which the offer expires (36.4.(3)).

36.4 and 36.5 – Defendant offers. Save for personal injury claims the offer must be to pay a single sum of money. Any offer to pay all or part of the sum later than 14 days following the date of acceptance will not be treated as a Part 36 offer unless the offeree accepts the offer.

36.5 – Personal injury claims or a claim including a claim for future pecuniary loss.

36.5(3) – an offer may contain an offer to pay or accept:

- the whole or part of the damages for future pecuniary loss in the form of a lump sum or periodical payments or a combination of the two
- the whole or part of any other damages in the form of a lump sum

36.5(4) – the offer must specify the amount relating to a lump sum and what part, if any, relates to damages for future pecuniary loss and what part relates to other damage.

36.5(4)(c) - Periodical Payments. The offer must state what part of the offer relates to damages for future pecuniary loss to be paid or accepted in the form of periodical payments specifying:

- the amount and duration of the periodical payments
- the amount of any payments for substantial capital purchases and when they are to be made
- that each amount is to vary by reference to the retail prices index (or to some other named index, or that it is not to vary by reference to any index)¹

36.5(4)(d) – the offer must state either that any damages which take the form of periodical payments will be funded in a way which ensures that the continuity of payment is reasonably secure in accordance with s.2(4) Damages Act 1996 or how such damages are to be paid and how the continuity of their payment is to be secured².

36.5(6) – The offeree may only give notice of acceptance of the offer as a whole and if the offer includes periodical payments, the claimant must within 7 days of the date of acceptance, apply to the court for an order for an award of damages in the form of periodical payments under rule 41.8.

36.6 – Provisional Damages Claims. The offer must specify whether or not the offeror is proposing that the settlement shall include an award for provisional damages (r.36.6(2)) and state that the sum offered in satisfaction of the claim for damages is made on the assumption that the injured person will not develop the disease or suffer the type of deterioration specified in the offer and that the claimant must make any claim for further damages within a limited period as specified in the offer (r.36.3(3)).

If the offeree accepts the Part 36 offer, the claimant must, within 7 days of the date of acceptance, apply to the court for an order for an award of provisional damages under rule 41.2 (r.36.6(5)).

¹ It would be interesting to know whether this rule was included post Flora v Wakom [2006] EWCA 1103 and Thompstone (A Child) v Tameside & Glossop Acute Services NHS Trust [2006] EWHC 2904 (QB). This provision clearly envisages indexation being other than the RPI under s2(8) Damages Act 1996

² This rule covers the problems hitherto encountered with such bodies as Foundation Trusts and the MIB and the provision for mandatory application to the court under 36.5(6) ensures appropriate safeguards on this and other issues relating to periodical payments. In practice most cases that are suitable for periodical payments of future losses relate to children or patients and therefore will require court approval in any event. Contrast r.36.9(3) which specifically states that the court's permission "*is only now required in limited circumstances*"

36.8 – Request for clarification. The offeree may request clarification of the offer within 7 days of being made (deemed to be the date upon which the offer is received) and if such clarification is not given, the offeree may apply to the court for an order that such clarification is forthcoming.

36.9 – Acceptance is by written notice on the offeror and may be made at any time unless the offeror has served notice of withdrawal on the offeree (r.36.9(2)). However acceptance on behalf of a child or patient will not be valid unless the court has approved the settlement (r.21.10)³.

36.9(3) – the court's permission is only now required in limited circumstances including where the relevant period has expired and further deductible benefits have been paid to the claimant since the date of the offer (r.36.15(3)(b)) or an apportionment is required in proceedings under the Fatal Accidents Act 1976 and Law Reform (Miscellaneous Provisions) Act 1934 (r.41.3A).

36.9(5) – a Part 36 offer may not be accepted after the end of the trial but before judgment is handed down save with the parties' agreement,

36.10 – Costs entitlement. Where a Part 36 offer is accepted within the relevant period the claimant will be entitled to his costs of the proceedings assessed on the standard basis (44.4(2)) up to the date on which notice of acceptance was served on the offeror. Where part of the claim is abandoned the claimant will be entitled to his costs unless the court orders otherwise (r.36.10(2)).

³ See Brennan v Eco Composting Ltd & Anor [2006] EWC 3153 (QB) Silber J which has specifically held that interest accruing on a Part 36 payment between the date of acceptance and the date of court approval, accrues to the benefit of the Defendant and not the Claimant. This apparent inequity in claims concerning minors and patients has not been specifically addressed in the new Part 36 and 37 rules. Specifically, whilst r.36.11(6) provides for payment within 14 days of the date of acceptance "or order of the court" for an award of provisional damages or periodical payments, nothing is stated concerning the position where court approval is required. The only implicit guidance is to be found in r.36.9 and r.36.11(4).

Rule 36.9 provides that "acceptance on behalf of a child or patient will not be valid unless the court has approved the settlement (r.21.10)". It will be recalled that in Brennan, Silber J held that the terms of r.21.10 meant that "the date of acceptance" was the date when the court's approval was obtained: Drinkall v Whitwood [2003] EWCA Civ 1547, [2004] 1 WLR 462 applied, and that there was nothing unjust in this and the overriding objective did not preclude this conclusion [paragraphs 18 to 26]

Rule 36.11(4) provides that If the approval of the court is required before a settlement can be binding, any stay which would otherwise arise on the acceptance of a Part 36 offer will take effect only when that approval has been given. Does this mean that the Defendant in those circumstances is not required to make payment within 14 days or at all until ordered to do so by the court at the approval hearing? In which all interest will *de facto* accrue to the Defendant as the court will not be required to make a ruling on this interest or even be aware of the rate of interest and the interest sum accrued since the date of acceptance.

These aspects will need to be specifically considered in the near future – whether by the Rules Committee or the Court of Appeal - as in practice a significant period can elapse between acceptance and approval which can have a substantial impact financially in large claims (**for further discussion see 13 KBW December 2006 PIMLU, pages 17 and 18**)

36.10(4) – if the offer was made less than 21 days before the start of trial or accepted after expiry of the relevant period, the court will make an order as to costs if liability for these is not agreed. The norm will be that the offeree is liable for the offeror's costs for the period from the date of expiry of the relevant period unless the court orders otherwise (r.36.10(5))⁴

36.11 – Stay following acceptance. Following acceptance of an offer relating to the whole claim the claim will be stayed upon the terms of the offer, although any stay will not affect the power of the court to enforce the terms of the offer or to deal with any question of costs (including interest on costs) relating to the proceedings (r.36.11(5)). Where the offer relates to part only of the claim that part will be stayed and the liability for costs if not agreed shall be decided by the court.

36.11(4) – If the approval of the court is required before a settlement can be binding, any stay which would otherwise arise on the acceptance of a Part 36 offer will take effect only when that approval has been given.

36.11(6) – Payment provisions. Unless otherwise agreed in writing between the parties, where a Part 36 offer by a defendant to pay a single sum of money is accepted, that sum must be paid to the offeree within 14 days of the date of acceptance or order by the court for an award of provisional damages (r.41.2) or periodical payments (r.41.8)

36.11(7) – If payment is not made within 14 days or as otherwise agreed, the offeree may enter judgment for the unpaid sum. In respect of other offers to which 36.11(6) does not apply, a party (i.e. either claimant or defendant) alleging that the other party has not honoured the terms of the offer may apply to enforce those terms without the need for a new claim.

36.12 – Multiple Defendants. Where an offer is made by one or more, but not all, defendants, then:

- where the defendants are sued jointly or in the alternative, a claimant may accept the offer if he discontinues his claim against those defendants who have not made the offer and those defendants given written consent to the acceptance of the offer (r.36.12(2))
- if the defendants have a several liability, the claimant may accept the offer and continue with his claims against the other defendants if he is entitled to do so (r.36.12(3)). In all other cases the claimant must apply to the court for permission to accept the offer (r.36.12(4))

36.13 – Part 36 offers will be treated “without prejudice” save as to costs and must not be communicated to the trial judge “*or to the judge (if any) allocated in advance to conduct the trial until the case has been decided*”⁵. This rule does not apply where the proceedings have been stayed under r.36.11 following acceptance of a Part 36 offer or

⁴ See footnote 7 below. There remains a risk that a court will exercise its discretion in favour of an offeror on the issue of costs even if the offer is made less than 21 days before trial if the judge determines that the circumstances warrant such departure from the norm

⁵ the implication therefore is that such offers can be disclosed in the course of Case Management hearings provided that the judge conducting the CMC has not been 'allocated'. This is a useful tactic if, for example, applying to amend the Statement of Case or seeking an increased interim payment.

where the offeror and offeree have agreed that it should not apply.

36.14 – Costs consequences following judgment:

36.14(2) - where the claimant has failed to obtain a judgment more advantageous than a defendant's Part 36 offer in which circumstances the court will order that the defendant is entitled to his costs from the date on which the relevant period has expired and interest on those costs (r.36.14(1)(a) and r.36.14(2))

- NOTE. Under **36.15(8)** a claimant fails to recover more than the sum offered (including a lump sum offered under 36.5) if , once deductible benefits identified in the judgment have been deducted, he fails to recover a sum greater than the net amount (see r.36.15(6)(c) below)
- For the purposes of rule 36.14(1)(a), a claimant fails to recover more than any sum offered (including a lump sum offered under rule 36.5) if he fails upon judgment being entered to recover a sum, once deductible benefits identified in the judgment have been deducted, greater than the net amount stated under r.36.15(6)(c). [(Section 15 of the Social Security (Recovery of Benefits) Act 1997 provides that the court must specify the compensation payment attributable to each head of damage]

36.14(3) - where the judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer (r.36.14(1)(b) and r.36.14(3)), the claimant will be entitled to:

- interest on the whole or any part of the sum of money awarded (excluding interest) at a rate not exceeding 10% above base rate (36.14(5)) for some or all of the period starting with the date upon which the relevant period expired (r.36.14(3)(a))
- costs on the indemnity basis from the date on which the relevant period expired (r.36.14(3)(b))
- interest on those costs not exceeding 10% above base rate (r.36.14(3)(c))

36.14(4) - in considering whether it would be unjust to make these orders the court will take into account all the circumstances of the case including:

- the terms of any Part 36 offer (r.36.14(4)(a))
- the stage in the proceedings when any Part 36 offer was made including how long before trial this was made⁶ (r.36.14(4)(b))

⁶ The clear intention is to encourage early offers and thus reduce use of court time with a commensurate reduction in costs. The encouragement for claimants to make early part 36 offers has tended to be honoured in the breach rather than the observance and claimants who are publicly funded are often hampered in doing so where such funding does not extend to a quantum work-up; similar constraints are sometimes imposed by ATE or BTE insurers. This can provide defendants with a tactical advantage if they make Part 36 offers early unfettered by such financial funding constraints. Claimants may be able to rely upon the criteria at r.36.15(4)(c) namely the lack of available information upon which to formulate a sensible offer when

- the information available to the parties at the time when the Part 36 offer was made (r.36.14(4)(c))
- the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer to be made or evaluated (r.36.14(4)(d))

36.14(6) - The 'sanctions' provisions do not apply:

- to an offer that has been withdrawn
- to an offer that has been changed so that the terms are less advantageous to the offeree and the offeree has beaten the less advantageous offer
- to an offer made less than 21 days before trial unless the court has abridged the relevant period⁷

36.15 – Statutory Benefits. This rule specifically addresses the hitherto vexing question of the position where statutory benefits fall to be deducted from a compensation payment as defined in section 1 of the Social Security (Recovery of Benefits) Act 1997 (see too r.36.9(3) above)

36.15(3) - a defendant making a Part 36 offer 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

36.15(5) - before making such an offer the offeror must apply for a certificate of recoverable benefits

36.15(6) - the Part 36 offer must state:

- the amount of gross compensation (r.36.15(6)(a))
- the name and amount of any deductible benefit by which this gross amount is reduced (r.36.15(6)(b))
- the net amount after deduction of the amount of benefits (r.36.15(6)(c))

36.15(7) - if a Part 36 offer is made after the certificate has been applied for but not received, the offeror must clarify the offer by providing the information set out in 26.15(6) not more than 7 days after he receives the certification.

36.15(8) - a claimant fails to recover more than the sum offered (including a lump sum offered under r.36.5) if, once deductible benefits identified in the judgment have been deducted, he fails to recover a sum greater than the net amount.

arguments on costs arise; otherwise they will be in the unenviable position of having to quantify claims without the necessary evidence.

⁷ See too r.36.10(4) and footnote 1 above. Thus the court retains a discretion in this area which means that parties ignore to their peril any offer even if made very close to trial as there remains a risk that the judge will take such offer into account and abridge the 21 day rule. Further, (Rule 44.3 requires the court to consider an offer to settle that does not have the costs consequences set out in r.36.14 in deciding what order to make about costs).

36.15(9) – where further deductible benefits have accrued since the Part 36 offer was made and the court gives permission to accept the offer, the court may direct that the amount of the offer payable to the offeree shall be reduced by a sum equivalent to those deductible benefits paid to the claimant since the date of the offer⁸. Rule 36.9(3)(b) [see above] states that permission is required to accept an offer where the relevant period has expired and further deductible benefits have been paid to the claimant)"

NOTE: Paragraph 7 of the Statutory Instrument provides that where, before 6th April 2007, a person has made an offer to settle before commencement of proceedings which complied with rule 36.10 as it was in force immediately before 6th April 2007—

(a) the court will take that offer into account when making any order as to costs; and

(b) the permission of the court will be required to accept the offer after proceedings have been commenced."

⁸ This is clearly a trap to the unwary claimant particularly where an offer is made at an early stage in the proceedings and where the amount of benefits is significant. A careful eye must therefore be kept on accumulating deductible benefits and updated certificates regularly obtained from the Benefits Agency

Pre-action admissions

Summary of new Rule 14.1A

This change makes provision for admissions made before proceedings are commenced. Where a party to a case admits the truth of the whole or any part of another party's case before proceedings start equal weight will be attached to such admissions as to those made during proceedings:

14.1A – provides that a person may, by giving notice in writing, admit the truth of the whole or any part of another party's case before commencement of proceedings (a "pre-action admission") providing the admission is made after the party making it has received a letter of claim in accordance with the relevant protocol or if the admission is made before such letter of claim has been received but is stated to be made under Part 14.

14.1A(3) – a pre-action admission may be withdrawn before the commencement of proceedings with the agreement of the person to whom the admission was made or after commencement of proceedings if all the parties consent or with the permission of the court.

14.1A(4) – after commencement of proceedings any party may apply for judgment on the pre-action admission and the party who has made the pre-action admission may apply to withdraw it. Such application must be made in accordance with Part 23 (14.1A(5))

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Please note that this Case Note is intended to provide a summary and comment of the subject matter covered. It is not intended to be comprehensive or to provide legal or other professional advice.

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