



Revised Part 36 - Kill or Cure??

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As from 6th April 2007 Part 36 of the Civil Procedure Rules 1998 has been extensively revised. The change has been on the cards for some time and no doubt given a nudge by the pioneering cases of *Crouch v Kings Healthcare NHS Trust* 2004 and *Trustees of Stokes Pension Fund v Western Power Distribution (South West) PLC* 2005 which have served to undermine payments in to court and to have offers taken as seriously as Part 36 payments. Perhaps unsurprisingly therefore the most significant feature of the new regime is that it is no longer necessary - or possible - for an offer to be supported by a payment into Court.

Format of a valid offer?

A Part 36 Offer is required to be made in the appropriate format and the rules in CPR 36.2 set out a slightly stricter and more precise definition of what is to be included to make the Offer valid. It is clear however that any purported Offer which departs from the prescribed format will not be valid and the automatic costs consequences of Part 36 will not follow. The notes to the green book in particular make clear that the Court will not cure any irregularity in the form or content of the Offer and therefore the Offeror should beware. An Offer can be made using form N242A which has been revised, however use of this form is not mandatory. An invalid offer may however be taken into account in terms of costs under the Court's general discretion under Part 44. The Court in the case of *Trustees of Stokes Pension Fund* indicated that the closer the terms of an offer to the requirements under Part 36, the more weight would be given to the offer when considering the costs consequences. The notes to the Green Book appear to suggest that this will no longer be the case however no doubt there will soon be case-law on the point. It is however noteworthy that the wording of Part 44.3(4)(c) has been amended so that there is specifically no discretion as to costs when a valid Part 36 offer has been made.

21 days to make your mind up? Not necessarily...

A Part 36 Offer is still required to state that it remains open for a period of not less than 21 days from the date of the Offer. Thereafter however a counter-offer will not have the effect of rejecting the Offer and an Offer may therefore still be accepted until it is specifically withdrawn. An Offer cannot be withdrawn or altered to become less favourable within the 21 day period except with leave of the Court. After the 21 days a party can withdraw or alter the Offer without leave of the Court at any time by serving notice - remember however that the benefit of the costs protection under Part 36 will be lost! - (although there still might be an argument under Part 44).

Can an offer be withdrawn 'automatically' after the 21 days?

Given that until an Offer is withdrawn it effectively remains on the table this does raise a question as to whether an Offer can be formulated to stipulate that it is automatically withdrawn after the expiry of 21 days. Bearing in mind the strict requirements for a valid offer would this still be an effective Part 36 Offer? The notes to the Green book suggest that this may be acceptable - subject to the Offer not having previously been accepted within the 21 days - however the authors openly state that the point is "not free from doubt".

How to apply to withdraw an offer?

In respect of an application for permission to withdraw an Offer this must be made in accordance with Part 23 and must be issued in the Court in which the claim relates. Part 36.13 deals with restrictions on disclosure of the Part 36 Offer. Clearly, an Offer should not be communicated to the Trial Judge in order that a fair Hearing can proceed however the parties can agree that this rule should not apply - such agreement should be in writing.

So withdrawn / altered offer's don't count?

A withdrawn or altered offer will not gain the costs protection of Part 36 but may potentially be taken into account under the Courts Part 44 discretion - which can work both ways!

So what happens with costs if an offer is accepted late?

Under the old rules a Claimant could, with the approval of the Court, accept a payment in out of time on the basis that they pay the Defendant's costs after expiry of the period for acceptance of the offer and bear their own costs. Under the new rules an offer can be accepted late and the rules do not specify any particular costs order. The Court will however make an Order in the absence of agreement as to costs between the parties. It may therefore still be necessary and sometimes may even be advantageous to force the issue before the Court when wider issues relating to costs can be raised - e.g. conduct issues or seek an issue based costs order.

What else do I need to know?

Additional requirements for a valid Part 36 Offer apply in respect of Personal Injury claims for future pecuniary loss, offers to settle a claim for provisional damages and/or where there is a deduction of benefits. In situations involving a deduction in benefits, Part 36.15 requires that an Offer must state what benefits are deducted. The revised rules endeavour to clarify the position following the decision of the Court of Appeal in *Williams v Devon County Council* in that the rules make clear that a Defendant, when making an Offer, should either state that the Offer is made without regard to any liability for recoverable benefits or that it is intended to include any deductible benefits. Whether that opaque case has in fact been clarified I leave to practitioners.

In the latter case the Offer must state the amount of gross compensation and name any deductible benefit by which the gross amount is reduced and also the net amount after deduction of the amount of benefit.

As stated above, an Offer can be accepted at any time however, it is worth noting that permission is required to accept an Offer in certain circumstances, notably where the 21 day period has expired and further deductible benefits have been paid to the Claimant. In such a case where permission of the Court is granted to the Claimant to take the money the Court may direct that the amount of the Offer payable to the Claimant is to be reduced by a sum equivalent to the deductible benefits paid to the Claimant since the date of the Offer. The rule however, does not appear to allow for reductions of benefits as against particular heads of loss and this may therefore be something of a penalty to the Claimant. Whether this is an intention of drafting or erroneous is unclear.

Offer accepted - can I sit back and relax? ...only when you pay up!

Under the old rules when a payment in to court had been made it was clear to a Claimant that the money was there. The case of Trustees of the Stokes Pension Fund began the attack on payments in but did not resolve the issue of what would happen if the money was not forthcoming or if it took a long time. The new rules therefore provide that in the event of an Offer being accepted payment must be made within 14 days unless the parties agree a longer date for payment. In the event that payment is not received within the specified period judgment for the unpaid sum can be entered and enforcement action taken or, in the case of an un-issued claim the claim can be issued in the normal way. With such consequences it is unlikely that a Claimant is going to agree a longer date for payment. It is surprising that a period of 14 days has been decided upon when the Courts usually order payment within 21 days. For larger organisations with complicated accounting systems however it is likely to cause some difficulties.

An offer could be made which includes provision for payment to be made over a longer period than the required 14 days (as stated above, 21 days has become the norm), or it could provide for payment by instalments (not to be confused with periodical payments). Such offers however are not valid Part 36 offers UNLESS the offeree accepts the offer on those terms. If the offer is accepted this then becomes an enforceable Part 36 offer. Alternatively an offeree can ignore the offer on the basis that it is not a valid Part 36 offer and could counter offer for the same amount which would be payable within the required 14 days. This would be a valid Part 36 offer.

...so costs consequences are automatic?

As with the previous rules under Part 36, the revised rules also have inherent cost consequences. Given the inherent nature of the cost consequences an Offer which tries to impose additional provisions in terms of costs than would otherwise be the case would make an Offer invalid.

In considering whether a party has beaten an Offer the Court is concerned only with the figure after deduction of benefits. It appears that costs will usually follow the win under the revised rules as with the previous rule however this is not absolute. The winning party will get its costs unless the Court considers it 'unjust' to award them. In considering whether it is 'just' a Court will have

regard to the terms of the Offer; the stage in the proceedings when the Offer was made and in particular how long before trial the Offer was made; the conduct of the parties with regard to giving or withholding information relevant to valuing the claim; and the information available to the parties at the time the offer was made - does this give a party the defence of “the medical evidence has changed”?

It is also worth noting that the definition of a ‘win’ has altered with the new rules. If a Claimant fails to beat a Defendant’s offer the Defendant wins. A Claimant will however get the advantage of its Part 36 offer if the judgment beats or equals its own Part 36 offer. Arguably therefore a judgment in full in favour of the Claimant is at least as advantageous as a 100% offer on liability made by the Claimant. The spirit of the rules, with Part 36 offers being tools to negotiate settlement, suggest that Part 36 offers should be genuine offers and not just tactical devices however this will no doubt be tested.

And don’t forget that under the new rules the costs consequences take effect after any judgment, not just after Trial. Part 36 offers can also be made in Appeal Proceedings.

Clear as mud?

For a detailed explanation of the revised rules the green book and the white book should of course be consulted however, the reader should beware that there are a number of inconsistencies in the notes which may be indicative of the confusion that has been caused by the amendments. The most obvious discrepancy in this respect is in regard to the applicability of the rule. It is clear that Part 36 offers can be made pre proceedings however, the notes to the green book clearly state that Part 36 Offers do not apply to small claims within the small claims track whereas the notes to the white book boldly say that Part 36 is available irrespective of track allocation. The position therefore remains entirely unclear.

The amendments to Part 36 are intended to give certainty however what appears to be certain from a detailed analysis of the revised rules is that in key respects the rules are unclear. There is likely to be litigation on the points raised above and to an extent therefore we will have to wait and see. The aim of course of Part 36 Offers is to get parties in negotiation with a view to settle claims however it appears that parties will have to be very careful as to the offers that are made both in terms of formulation and in reviewing whether the Offer should be left open.