

The Overhaul of Part 36

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The new Part 36 will come into force on 06/04/2015 and will apply to all Part 36 offers made on or after that date.

Some provisions will also apply to offers made before that date if the trial starts on or after it including those governing acceptance of offers (r36.11), split trials (r36.12) and restrictions on disclosure of offers (r36.16).

This is the first major overhaul of Part 36 since 2007 and its main objective is to provide more certainty and, therefore, reduce satellite litigation. The new Part 36 is based on the existing Part 36, but has a new and more logical structure, codifies some of the case law on the existing Part 36 and addresses some of the existing Part 36's inadequacies. In the process, it has become more comprehensive but also more detailed and more complex.

As before, the specific rules that apply to RTA Protocol and EL/PL Protocol offers to settle are set out in Section II.

The key points to note are as follows:

Self-contained code (r36.1)

The Part now states that it contains a "self-contained procedural code" thereby confirming that normal contractual principles governing offer and acceptance do not apply.

Counterclaims and additional claims (r36.2)

The Part now expressly applies to counterclaims and additional claims removing any remaining doubt over this. Accordingly, those making counterclaims and additional claims can take advantage of the favourable costs consequences of claimants' offers.

Appeals (r36.2)

The Part also confirms that a separate offer needs to be made in respect of appeals and that offers can be made in respect of cross-appeals.

Form and content of offer (r36.5)

Offers no longer need to state that they are intended to have the consequences of Section I of Part 36 but, instead, just need to make clear that they are made pursuant to Part 36. The basic form and content of an offer otherwise remains unchanged.

Pre-action offers (r36.7)

The Part now confirms that an offer may be made before the commencement of proceedings and (in r36.13) that the costs consequences also govern pre-action costs.

Time limited offers (r36.9)

It will now be possible to make time limited offers which are automatically withdrawn on expiry of the time limit although (under r36.17) the normal costs consequences will not apply once the offer has been withdrawn. This does, however, enable time bomb offers to be made in the form of Part 36 offers without having to (remember to) formally withdraw them on their expiry.

The effect of improved offers (r36.9)

The Part clarifies that more advantageous offers shall not be treated as a withdrawal of the original offer but as a new offer on improved terms with, therefore, 21 days allowed for acceptance.

Withdrawing/changing offers within the 21 day period (r36.10)

The mechanism has changed. An offer may now be withdrawn/changed within the 21 day period without the court's

permission, and will take effect on the expiry of that period unless the offeree accepts the offer before the expiry of the period in which case the offeror has to apply for the court's permission within 7 days of the acceptance or, if earlier, the first day of trial. The court will take into account whether there has been a change of circumstances since the original offer

was made and whether it is in the interest of justice to give permission.

Acceptance of offers after trial and before judgment (r36.11)

The court's permission is now required to accept an offer while a trial is "in progress" which includes the period up to the time when judgment is handed down.

Split trials (r36.12 & r36.16)

Judges are now allowed to be told about offers on the conclusion of a split trial although (unless it falls within one of the specified exceptions) they may only be told about the fact of an offer rather than the terms if it is a global offer of settlement, rather than an offer that relates to the issue that was decided. In addition, unless the parties agree otherwise, any global offer of settlement cannot be accepted earlier than 7 clear days after judgment is handed down which will allow time for an offeror to withdraw/change a quantum offer following a liability trial.

Cost consequences of accepting defendant's offer relating to part of claim (r36.13)

If a claimant accepts an offer relating to part only of the claim and abandons the balance of the claim, the claimant will now only be entitled to the costs of that part of the claim unless the court orders otherwise. This increases the scope for defendants to restrict a claimant's entitlement to costs.

Non-genuine offers (r36.17)

When deciding whether to impose the usual costs consequences when an offeror beats its own offer, the court must also now take into account whether the offer was a genuine attempt to settle. This rule is an effort to address the making of high offers solely in an attempt to gain the costs benefits of beating an offer but will not preclude high offers being made in appropriate cases.

Costs budgeting omissions (r36.23)

If a party's costs are limited to the court fees as a consequence of failing to file a costs budget on time, that party is entitled to recover 50% of its costs if it beats its own offer to ensure that Part 36 offers still have some teeth. Needless to say, this does not entitle the offeree to recover any additional costs if it accepts an offer having failed to file a costs budget.

There is no real need for parties to litigation to make or accept offers before 06/04/2015 under the existing regime as, with the possible exception of the new rule governing costs budgeting omissions, this is not more advantageous than the new regime. Indeed, the new regime may be more advantageous for the reasons mentioned. However, they will need to familiarise themselves with the new provisions and their structure, as well as updating their template offer letters because the numbering of some of the provisions has changed and there is no longer a requirement to refer to the consequences of Section I of Part 36.

Authors



Tom Baker

Bristol

+44 (0) 117 918 2758

tbaker@dacbeachcroft.com



David Williams

Leeds

+44 (0)113 251 4844

dwilliams@dacbeachcroft.com