

## Up and Coming changes to CPR Part 36: Still on the face of it Part 36?

The Civil Procedure (Amendment No.8) Rules 2014, laid before Parliament on 18 December 2014, makes significant changes to Part 36 of the Civil Procedure Rules. This article summarises some of the key amendments, due to come into force on 6 April 2015.

*CPR Part 36* is a “self contained code” designed to provide parties to a dispute with a mechanism to encourage early resolution. Its method of incentivising settlement are the cost consequences of failing to ‘better’ a valid offer at trial, as set out currently in *CPR 36.14*.

Following a review by the CPR committee, a number of important changes have been made to *Part 36*, to “reflect [recent] case law and... simplify the rules as far as possible to make them more accessible to court users”. These changes will, generally, apply to any offer made pursuant to *Part 36* on or after 6 April 2015.

Below is a summary of the key revisions:

### Form and Content

It has been a long held requirement of *Part 36* that in order to be a valid *Part 36* Offer, it must ‘state on it’s face that it is intended to have the consequences... of *Part 36*’. Under the new rules, the offer will have to ‘make clear that it is made pursuant to *Part 36*’. It is not clear what motivated the authors to make this change now (*Part 36* has been subject to a number of significant revisions previously, without this requirement being changed) although arguably it avoids a procedural irregularity in drafting that could cause a purported *Part 36* offer to fail (as in *Thewlis v Groupama* [2012] EWHC 3).

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## Time limited offers

Previously a 'time limited' offer was not capable of being a valid *Part 36 Offer* (see for example *C v D* [2011] EWCA Civ 646). This will be addressed by a new provision at **CPR 36.9(4)(b)** which will allow, within the terms of the offer itself, for it to be automatically withdrawn after the expiry of the relevant period. However, as *CPR 36.14(6)* (soon to be *CPR 36.17(7)*) will continue to provide that the cost sanctions available under *Part 36* will not apply to offers that have been withdrawn, it is difficult to see what advantage this change will have.

## Full freight offers

Under the current provisions where a claimant obtains judgment 'at least as advantageous' as its *Part 36* offer, it can take advantage of *CPR 36.14* to recover its costs. As such, if a claimant offers to settle for full freight and subsequently succeeds in achieving this at trial, they can take the benefits of the cost consequences of *Part 36*. The courts have previously indicated (in cases like *AB v CD* [2011] EWHC 602) that there needs to be a 'genuine element of concession' in order to be a valid offer and this will now be enshrined in **CPR 36.17(5)(e)** which will require the court to consider, when deciding whether it would be unjust to make an order on costs as prescribed under *Part 36*, 'whether the offer was a genuine attempt to settle the proceedings'.

## Consequences of failing to file a cost budget

*CPR 3.14* limits a party's recoverable costs to court fees where that party fails to file a cost budget in time. To try and incentivise settlement in such situations, the new **CPR 36.23** will allow a defaulting party to recover 50% of their costs that would otherwise be recoverable (not just limited to court fees) from the expiry of the relevant period of their *Part 36 Offer*.

## Split trials/trials of preliminary issues

Under the current regime, a trial judge cannot know that a *Part 36 Offer* has been made 'until the case has been decided'. As there has been no provision for split-trials or hearings on preliminary issues in *Part 36* to date, the court often has to decide, at the conclusion of such hearings, whether to make a costs order in respect of the preliminary issues without the knowledge of whether any relevant offer of settlement has been made. A new **CPR 36.16** will allow a judge to be told of the existence (but **not** the terms) of a *Part 36 Offer* after judgment has been given on a preliminary issue. Unlike most of the other changes to *Part 36*, provided the hearing itself is on or after

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6 April 2015, this provision will apply *retrospectively* to offers made **before** 6 April 2015.

## Counterclaims/Additional Claims

To try and remedy previous confusion as to whether a defendant to proceedings who makes a *Part 36* offer in respect of a counterclaim/additional claim, can take the benefit of the provisions that apply to 'claimant's *Part 36 Offers*', the new **CPR 36.2(3)** will expressly affirm the position by cross referring to *Part 20 CPR*.

## Appeals

The new **CPR 36.4** will clarify that the appellant of an appeal is capable of making a 'claimant's *Part 36 Offer*' in respect of the appeal (and *vice versa*).

## Improved offers

The new **CPR 36.9(5)** will clarify (albeit arguably unnecessarily) that where an offeror amends their offer so as to make it's terms more advantageous to the offeree, is shall not be treated as a withdrawal of the original offer but rather a 'new offer'.

## Withdrawal of offers

Presently, where a party wishes to withdraw a *Part 36* offer or vary it's terms so as to make them 'less advantageous to the offeree', before the relevant period has expired, the offeror has to apply to the court in accordance with *Part 23*, for permission. Whilst the court's permission is still required, the new **CPR 36.10** sets out more clearly the procedure. The new rule stipulates that the offeror should serve a notice of the change(s)/withdrawal on the offeree. Then: if on expiry of the relevant period, (i) the offer has not been accepted, the notice of change(s)/withdrawal will take effect; Alternatively, (ii) if the offeree, during the relevant period, accepts the offer, within seven days of the offeree's notice of acceptance (or if earlier, the first day of trial), the offeror must apply to court for permission. Under **CPR 36.10(3)** before giving permission, the court must be satisfied that 'there has been a change of circumstance since the making of the original offer and that it is in the interest of justice to give permission'.

## Late acceptance

Under the current *Part 36*, on late acceptance of a *Part 36 Offer* the court will make the usual order as to costs unless it is unjust to do so. The new **CPR 36.14(5)** will amend this to state that the court must make the usual order as

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to costs unless it would be unjust to do so (codifying the position in *Lamb v Hampsey* [2011] EWHC 2808).

## Impact

Practitioners will need to get to grips with new references to the key parts of *Part 36* (which have invariably changed, e.g. *CPR 36.14* will become *CPR 36.17*).

Whilst the *CPR* committees' intentions in making these amendments are to clarify and simplify the rules, it is unclear at present to what extent this objective aim has been achieved. The potential benefits available under *Part 36* mean that its boundaries, however defined, will always be explored by litigation lawyers. Recent changes are unlikely to eradicate this.

It is not envisaged that time limited offers will make a 'ground breaking' impact on litigation, given the continued presence of *36.14(6)*. The new rules on 'full freight' offers are also vague as to what constitutes a 'genuine attempt to settle'. Case law (like *Huck v Robson* [2002] EWCA Civ 398, where a claimant's *Part 36* offer for 95% of the value of their claim was considered valid) will of course help, but the 'new' ambiguity surrounding this certainly bears the hallmarks of an area primed for satellite litigation.

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