

# PART 36

## OFFERS TO SETTLE AND PAYMENTS INTO COURT

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## SCOPE OF THIS PART

- 36.1 | (1) This Part contains rules about –
- (a) offers to settle and payments into court; and
  - (b) the consequences where an offer to settle or payment into court is made in accordance with this Part.
- (2) Nothing in this Part prevents a party making an offer to settle in whatever way he chooses, but if that offer is not made in accordance with this Part, it will only have the consequences specified in this Part if the court so orders.

(Part 36 applies to Part 20 claims by virtue of rule 20.3)

## PART 36 OFFERS AND PART 36 PAYMENTS – GENERAL PROVISIONS

- 36.2 | (1) An offer made in accordance with the requirements of this Part is called –
- (a) if made by way of a payment into court, ‘a Part 36 payment’;
  - (b) otherwise ‘a Part 36 offer’.

(Rule 36.3 sets out when an offer has to be made by way of a payment into court)

- (2) The party who makes an offer is the ‘offeror’.
- (3) The party to whom an offer is made is the ‘offeree’.
- (4) A Part 36 offer or a Part 36 payment –
  - (a) may be made at any time after proceedings have started; and
  - (b) may be made in appeal proceedings.
- (5) A Part 36 offer or a Part 36 payment shall not have the consequences set out in this Part while the claim is being dealt with on the small claims track unless the court orders otherwise.

(Part 26 deals with allocation to the small claims track)

(Rule 27.2 provides that Part 36 does not apply to small claims)

## A DEFENDANT’S OFFER TO SETTLE A MONEY CLAIM REQUIRES A PART 36 PAYMENT

- 36.3 | (1) Subject to rules 36.5(5) and 36.23, an offer by a defendant to settle a money claim will not have the consequences set out in this Part unless it is made by way of a Part 36 payment.

(2) A Part 36 payment may only be made after proceedings have started.

(Rule 36.5(5) permits a Part 36 offer to be made by reference to an interim payment)

(Rule 36.10 makes provision for an offer to settle a money claim before the commencement of proceedings)

(Rule 36.23 makes provision for where benefit is recoverable under the Social Security (Recovery of Benefit) Act 1997<sup>(43)</sup>)

## DEFENDANT'S OFFER TO SETTLE THE WHOLE OF A CLAIM WHICH INCLUDES BOTH A MONEY CLAIM AND A NON-MONEY CLAIM

- 36.4 |
- (1) This rule applies where a defendant to a claim which includes both a money claim and a non-money claim wishes –
    - (a) to make an offer to settle the whole claim which will have the consequences set out in this Part; and
    - (b) to make an offer in respect of both the money claim and the non-money claim.
  - (2) The defendant must –
    - (a) make a Part 36 payment in relation to the money claim; and
    - (b) make a Part 36 offer in relation to the non-money claim.
  - (3) The Part 36 payment notice must –
    - (a) identify the document which sets out the terms of the Part 36 offer; and
    - (b) state that if the claimant gives notice of acceptance of the Part 36 payment he will be treated as also accepting the Part 36 offer.

(Rule 36.6 makes provision for a Part 36 payment notice)

- (4) If the claimant gives notice of acceptance of the Part 36 payment, he shall also be taken as giving notice of acceptance of the Part 36 offer in relation to the non-money claim.

## FORM AND CONTENT OF A PART 36 OFFER

- 36.5 |
- (1) A Part 36 offer must be in writing.
  - (2) A Part 36 offer may relate to the whole claim or to part of it or to any issue that arises in it.
  - (3) A Part 36 offer must –
    - (a) 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;

(43) 1997 c.27.

- (b) state whether it takes into account any counterclaim; and
  - (c) if it is expressed not to be inclusive of interest, give the details relating to interest set out in rule 36.22(2).
- (4) A defendant may make a Part 36 offer limited to accepting liability up to a specified proportion.
- (5) A Part 36 offer may be made by reference to an interim payment.
- (Part 25 contains provisions relating to interim payments)
- (6) A Part 36 offer made not less than 21 days before the start of the trial must –
- (a) be expressed to remain open for acceptance for 21 days from the date it is made; and
  - (b) provide that after 21 days the offeree may only accept it if –
    - (i) the parties agree the liability for costs; or
    - (ii) the court gives permission.
- (7) A Part 36 offer made less than 21 days before the start of the trial must state that the offeree may only accept it if –
- (a) the parties agree the liability for costs; or
  - (b) the court gives permission.
- (Rule 36.8 makes provision for when a Part 36 offer is treated as being made)
- (8) If a Part 36 offer is withdrawn it will not have the consequences set out in this Part.

## NOTICE OF A PART 36 PAYMENT

- 36.6 |
- (1) A Part 36 payment may relate to the whole claim or part of it or to an issue that arises in it.
  - (2) A defendant who makes a Part 36 payment must file with the court a notice ('Part 36 payment notice') which –
    - (a) states the amount of the payment;
    - (b) states whether the payment relates to the whole claim or to part of it or to any issue that arises in it and if so to which part or issue;
    - (c) states whether it takes into account any counterclaim;
    - (d) if an interim payment has been made, states that the defendant has taken into account the interim payment; and
    - (e) if it is expressed not to be inclusive of interest, gives the details relating to interest set out in rule 36.22(2).

(Rule 25.6 makes provision for an interim payment)

(Rule 36.4 provides for further information to be included where a defendant wishes to settle the whole of a claim which includes a money claim and a non-money claim)

(Rule 36.23 makes provision for extra information to be included in the payment notice in a case where benefit is recoverable under the Social Security (Recovery of Benefit) Act 1997)

- (3) The court will serve the Part 36 payment notice on the offeree unless the offeror informs the court, when the money is paid into court, that the offeror has served the notice.
- (4) Where the offeror serves the Part 36 payment notice he must file a certificate of service.

(Rule 6.10 specifies what must be contained in a certificate of service)

- (5) A Part 36 payment may be withdrawn only with the permission of the court.

## OFFER TO SETTLE A CLAIM FOR PROVISIONAL DAMAGES

36.7

- (1) A defendant may make a Part 36 payment in respect of a claim which includes a claim for provisional damages.
- (2) Where he does so, the Part 36 payment notice must specify whether or not the defendant is offering to agree to the making of an award of provisional damages.
- (3) Where the defendant is offering to agree to the making of an award of provisional damages the payment notice must also state –
  - (a) that the sum paid into court is in satisfaction of the claim for damages on the assumption that the injured person will not develop the disease or suffer the type of deterioration specified in the notice;
  - (b) that the offer is subject to the condition that the claimant must make any claim for further damages within a limited period; and
  - (c) what that period is.
- (4) Where a Part 36 payment is –
  - (a) made in accordance with paragraph (3); and
  - (b) accepted within the relevant period in rule 36.11,
 the Part 36 payment will have the consequences set out in rule 36.13, unless the court orders otherwise.
- (5) If the claimant accepts the Part 36 payment he must, within 7 days of doing so, apply to the court for an order for an award of provisional damages under rule 41.2.

(Rule 41.2 provides for an order for an award of provisional damages)

- (6) The money in court may not be paid out until the court has disposed of the application made in accordance with paragraph (5).

## TIME WHEN A PART 36 OFFER OR A PART 36 PAYMENT IS MADE AND ACCEPTED

- 36.8 |
- (1) A Part 36 offer is made when received by the offeree.
  - (2) A Part 36 payment is made when written notice of the payment into court is served on the offeree.
  - (3) An improvement to a Part 36 offer will be effective when its details are received by the offeree.
  - (4) An increase in a Part 36 payment will be effective when notice of the increase is served on the offeree.
  - (5) A Part 36 offer or Part 36 payment is accepted when notice of its acceptance is received by the offeror.

## CLARIFICATION OF A PART 36 OFFER OR A PART 36 PAYMENT NOTICE

- 36.9 |
- (1) The offeree may, within 7 days of a Part 36 offer or payment being made, request the offeror to clarify the offer or payment notice.
  - (2) If the offeror does not give the clarification requested under paragraph (1) within 7 days of receiving the request, the offeree may, unless the trial has started, apply for an order that he does so.
  - (3) If the court makes an order under paragraph (2), it must specify the date when the Part 36 offer or Part 36 payment is to be treated as having been made.

## COURT TO TAKE INTO ACCOUNT OFFER TO SETTLE MADE BEFORE COMMENCEMENT OF PROCEEDINGS

- 36.10 |
- (1) If a person makes an offer to settle before proceedings are begun which complies with the provisions of this rule, the court will take that offer into account when making any order as to costs.
  - (2) The offer must –
    - (a) be expressed to be open for at least 21 days after the date it was made;
    - (b) if made by a person who would be a defendant were proceedings commenced, include an offer to pay the costs of the offeree incurred up to the date 21 days after the date it was made; and
    - (c) otherwise comply with this Part.
  - (3) If the offeror is a defendant to a money claim –
    - (a) he must make a Part 36 payment within 14 days of service of the claim form; and

- (b) the amount of the payment must be not less than the sum offered before proceedings began.
- (4) An offeree may not, after proceedings have begun, accept –
  - (a) an offer made under paragraph (2); or
  - (b) a Part 36 payment made under paragraph (3), without the permission of the court.
- (5) An offer under this rule is made when it is received by the offeree.

### TIME FOR ACCEPTANCE OF A DEFENDANT'S PART 36 OFFER OR PART 36 PAYMENT

- 36.11 | (1) A claimant may accept a Part 36 offer or a Part 36 payment made not less than 21 days before the start of the trial without needing the court's permission if he gives the defendant written notice of acceptance not later than 21 days after the offer or payment was made.

(Rule 36.13 sets out the costs consequences of accepting a defendant's offer or payment without needing the permission of the court)

- (2) If –
  - (a) a defendant's Part 36 offer or Part 36 payment is made less than 21 days before the start of the trial; or
  - (b) the claimant does not accept it within the period specified in paragraph (1) –
    - (i) if the parties agree the liability for costs, the claimant may accept the offer or payment without needing the permission of the court;
    - (ii) if the parties do not agree the liability for costs the claimant may only accept the offer or payment with the permission of the court.
- (3) Where the permission of the court is needed under paragraph (2) the court will, if it gives permission, make an order as to costs.

### TIME FOR ACCEPTANCE OF A CLAIMANT'S PART 36 OFFER

- 36.12 | (1) A defendant may accept a Part 36 offer made not less than 21 days before the start of the trial without needing the court's permission if he gives the claimant written notice of acceptance not later than 21 days after the offer was made.

(Rule 36.14 sets out the costs consequences of accepting a claimant's offer without needing the permission of the court)

- (2) If –
  - (a) a claimant's Part 36 offer is made less than 21 days before the start of the trial; or

- (b) the defendant does not accept it within the period specified in paragraph (1) –
  - (i) if the parties agree the liability for costs, the defendant may accept the offer without needing the permission of the court;
  - (ii) if the parties do not agree the liability for costs the defendant may only accept the offer with the permission of the court.
- (3) Where the permission of the court is needed under paragraph (2) the court will, if it gives permission, make an order as to costs.

### **COSTS CONSEQUENCES OF ACCEPTANCE OF A DEFENDANT'S PART 36 OFFER OR PART 36 PAYMENT**

- 36.13 |
- (1) Where a Part 36 offer or a Part 36 payment is accepted without needing the permission of the court the claimant will be entitled to his costs of the proceedings up to the date of serving notice of acceptance.
  - (2) Where –
    - (a) a Part 36 offer or a Part 36 payment relates to part only of the claim; and
    - (b) at the time of serving notice of acceptance the claimant abandons the balance of the claim,
 the claimant will be entitled to his costs of the proceedings up to the date of serving notice of acceptance, unless the court orders otherwise.
  - (3) The claimant's costs include any costs attributable to the defendant's counterclaim if the Part 36 offer or the Part 36 payment notice states that it takes into account the counterclaim.
  - (4) Costs under this rule will be payable on the standard basis if not agreed.

### **COSTS CONSEQUENCES OF ACCEPTANCE OF A CLAIMANT'S PART 36 OFFER**

- 36.14 |
- Where a claimant's Part 36 offer is accepted without needing the permission of the court the claimant will be entitled to his costs of the proceedings up to the date upon which the defendant serves notice of acceptance.

### **THE EFFECT OF ACCEPTANCE OF A PART 36 OFFER OR A PART 36 PAYMENT**

- 36.15 |
- (1) If a Part 36 offer or Part 36 payment relates to the whole claim and is accepted, the claim will be stayed<sup>(GL)</sup>.
  - (2) In the case of acceptance of a Part 36 offer which relates to the whole claim –



- (a) the stay<sup>(GL)</sup> will be upon the terms of the offer; and
  - (b) either party may apply to enforce those terms without the need for a new claim.
- (3) If a Part 36 offer or a Part 36 payment which relates to part only of the claim is accepted –
- (a) the claim will be stayed<sup>(GL)</sup> as to that part; and
  - (b) unless the parties have agreed costs, the liability for costs shall be decided by the court.
- (4) If the approval of the court is required before a settlement can be binding, any stay<sup>(GL)</sup> which would otherwise arise on the acceptance of a Part 36 offer or a Part 36 payment will take effect only when that approval has been given.
- (5) Any stay<sup>(GL)</sup> arising under this rule will not affect the power of the court –
- (a) to enforce the terms of a Part 36 offer;
  - (b) to deal with any question of costs (including interest on costs) relating to the proceedings;
  - (c) to order payment out of court of any sum paid into court.
- (6) Where –
- (a) a Part 36 offer has been accepted; and
  - (b) a party alleges that –
    - (i) the other party has not honoured the terms of the offer; and
    - (ii) he is therefore entitled to a remedy for breach of contract,
 the party may claim the remedy by applying to the court without the need to start a new claim unless the court orders otherwise.

## **PAYMENT OUT OF A SUM IN COURT ON THE ACCEPTANCE OF A PART 36 PAYMENT**

- 36.16** | Where a Part 36 payment is accepted the claimant obtains payment out of the sum in court by making a request for payment in the practice form.

## **ACCEPTANCE OF A PART 36 OFFER OR A PART 36 PAYMENT MADE BY ONE OR MORE, BUT NOT ALL, DEFENDANTS**

- 36.17** |
- (1) This rule applies where the claimant wishes to accept a Part 36 offer or a Part 36 payment made by one or more, but not all, of a number of defendants.
  - (2) If the defendants are sued jointly or in the alternative, the claimant may accept the offer or payment without needing the permission of the court in accordance with rule 36.11(1) if –

- (a) he discontinues his claim against those defendants who have not made the offer or payment; and
  - (b) those defendants give written consent to the acceptance of the offer or payment.
- (3) If the claimant alleges that the defendants have a several liability<sup>(GL)</sup> to him the claimant may –
- (a) accept the offer or payment in accordance with rule 36.11(1); and
  - (b) continue with his claims against the other defendants.
- (4) In all other cases the claimant must apply to the court for –
- (a) an order permitting a payment out to him of any sum in court; and
  - (b) such order as to costs as the court considers appropriate.

### OTHER CASES WHERE A COURT ORDER IS REQUIRED TO ENABLE ACCEPTANCE OF A PART 36 OFFER OR A PART 36 PAYMENT

- 36.18 | (1) Where a Part 36 offer or a Part 36 payment is made in proceedings to which rule 21.10 applies –
- (a) the offer or payment may be accepted only with the permission of the court; and
  - (b) no payment out of any sum in court shall be made without a court order.

(Rule 21.10 deals with compromise etc. by or on behalf of a child or patient)

- (2) Where the court gives a claimant permission to accept a Part 36 offer or payment after the trial has started –
- (a) any money in court may be paid out only with a court order; and
  - (b) the court must, in the order, deal with the whole costs of the proceedings.
- (3) Where a claimant accepts a Part 36 payment after a defence of tender before claim<sup>(GL)</sup> has been put forward by the defendant, the money in court may be paid out only after an order of the court.

(Rule 37.3 requires a defendant who wishes to rely on a defence of tender before claim<sup>(GL)</sup> to make a payment into court)

### RESTRICTION ON DISCLOSURE OF A PART 36 OFFER OR A PART 36 PAYMENT

- 36.19 | (1) A Part 36 offer will be treated as ‘without prejudice<sup>(GL)</sup> except as to costs’.

- (2) The fact that a Part 36 payment has been made shall not be communicated to the trial judge until all questions of liability and the amount of money to be awarded have been decided.
- (3) Paragraph (2) does not apply –
  - (a) where the defence of tender before claim<sup>(GL)</sup> has been raised;
  - (b) where the proceedings have been stayed<sup>(GL)</sup> under rule 36.15 following acceptance of a Part 36 offer or Part 36 payment; or
  - (c) where –
    - (i) the issue of liability has been determined before any assessment of the money claimed; and
    - (ii) the fact that there has or has not been a Part 36 payment may be relevant to the question of the costs of the issue of liability.

### **COSTS CONSEQUENCES WHERE CLAIMANT FAILS TO DO BETTER THAN A PART 36 OFFER OR A PART 36 PAYMENT**

36.20

- (1) This rule applies where at trial a claimant –
  - (a) fails to better a Part 36 payment; or
  - (b) fails to obtain a judgment which is more advantageous than a Part 36 offer.
- (2) Unless it considers it unjust to do so, the court will order the claimant to pay any costs incurred by the defendant after the latest date on which the payment or offer could have been accepted without needing the permission of the court.

(Rule 36.11 sets out the time for acceptance of a defendant's Part 36 offer or Part 36 payment)

### **COSTS AND OTHER CONSEQUENCES WHERE CLAIMANT DOES BETTER THAN HE PROPOSED IN HIS PART 36 OFFER**

36.21

- (1) This rule applies where at trial –
  - (a) a defendant is held liable for more; or
  - (b) the judgment against a defendant is more advantageous to the claimant,

than the proposals contained in a claimant's Part 36 offer.
- (2) The court may order interest on the whole or part of any sum of money (excluding interest) awarded to the claimant at a rate not exceeding 10% above base rate<sup>(GL)</sup> for some or all of the period starting with the latest date on which the defendant could have accepted the offer without needing the permission of the court.
- (3) The court may also order that the claimant is entitled to –

- (a) his costs on the indemnity basis from the latest date when the defendant could have accepted the offer without needing the permission of the court; and
  - (b) interest on those costs at a rate not exceeding 10% above base rate<sup>(GL)</sup>.
- (4) Where this rule applies, the court will make the orders referred to in paragraphs (2) and (3) unless it considers it unjust to do so.

(Rule 36.12 sets out the latest date when the defendant could have accepted the offer)

- (5) In considering whether it would be unjust to make the orders referred to in paragraphs (2) and (3) above, the court will take into account all the circumstances of the case including –
- (a) the terms of any Part 36 offer;
  - (b) the stage in the proceedings when any Part 36 offer or Part 36 payment was made;
  - (c) the information available to the parties at the time when the Part 36 offer or Part 36 payment was made; and
  - (d) the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer or payment into court to be made or evaluated.
- (6) The power of the court under this rule is in addition to any other power it may have to award interest.

## INTEREST

36.22

- (1) Unless –
- (a) a claimant's Part 36 offer which offers to accept a sum of money; or
  - (b) a Part 36 payment notice,
- indicates to the contrary, any such offer or payment will be treated as inclusive of all interest until the last date on which it could be accepted without needing the permission of the court.
- (2) Where a claimant's Part 36 offer or Part 36 payment notice is expressed not to be inclusive of interest, the offer or notice must state –
- (a) whether interest is offered; and
  - (b) if so, the amount offered, the rate or rates offered and the period or periods for which it is offered.

## DEDUCTION OF BENEFITS

36.23

- (1) This rule applies where a payment to a claimant following acceptance of a Part 36 offer or Part 36 payment into court would be a

compensation payment as defined in section 1 of the Social Security (Recovery of Benefits) Act 1997<sup>(44)</sup>.

- (2) A defendant to a money claim may make an offer to settle the claim which will have the consequences set out in this Part, without making a Part 36 payment if –
  - (a) at the time he makes the offer he has applied for, but not received, a certificate of recoverable benefit; and
  - (b) he makes a Part 36 payment not more than 7 days after he receives the certificate.

(Section 1 of the 1997 Act defines ‘recoverable benefit’)

- (3) A Part 36 payment notice must state –
  - (a) the amount of gross compensation;
  - (b) the name and amount of any benefit by which that gross amount is reduced in accordance with section 8 and Schedule 2 to the 1997 Act; and
  - (c) that the sum paid in is the net amount after deduction of the amount of benefit.
- (4) For the purposes of rule 36.20, a claimant fails to better a Part 36 payment if he fails to obtain judgment for more than the gross sum specified in the Part 36 payment notice.
- (5) Where –
  - (a) a Part 36 payment has been made; and
  - (b) application is made for the money remaining in court to be paid out,

the court may treat the money in court as being reduced by a sum equivalent to any further recoverable benefits paid to the claimant since the date of payment into court and may direct payment out accordingly.

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(44) 1997 c.27.

