

# OFFERS TO SETTLE

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## 36.1 Scope of this Part

- (1) This Part contains rules about –
  - (a) offers to settle; and
  - (b) the consequences where an offer to settle 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 the offer is not made in accordance with rule 36.2, it will not have the consequences specified in rules 36.10, 36.11 and 36.14.

(Rule 44.3 requires the court to consider an offer to settle that does not have the costs consequences set out in this Part in deciding what order to make about costs)

## 36.2 Form and content of a Part 36 offer

- (1) An offer to settle which is made in accordance with this rule is called a Part 36 offer.
- (2) A Part 36 offer must –
  - (a) be in writing;
  - (b) state on its face that it is intended to have the consequences of Part 36;
  - (c) specify a period of not less than 21 days within which the defendant will be liable for the claimant’s costs in accordance with rule 36.10 if the offer is accepted;

- (d) 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; and
- (e) state whether it takes into account any counterclaim.

(Rule 36.7 makes provision for when a Part 36 offer is made)

- (3) Rule 36.2(2)(c) does not apply if the offer is made less than 21 days before the start of the trial.
- (4) In appropriate cases, a Part 36 offer must contain such further information as is required by rule 36.5 (Personal injury claims for future pecuniary loss), rule 36.6 (Offer to settle a claim for provisional damages), and rule 36.15 (Deduction of benefits).
- (5) An offeror may make a Part 36 offer solely in relation to liability.

### **36.3 Part 36 offers – general provisions**

- (1) In this Part –
  - (a) the party who makes an offer is the ‘offeror’;
  - (b) the party to whom an offer is made is the ‘offeree’; and
  - (c) ‘the relevant period’ means –
    - (i) in the case of an offer made not less than 21 days before trial, the period stated under rule 36.2(2)(c) or such longer period as the parties agree;
    - (ii) otherwise, the period up to end of the trial or such other period as the court has determined.
- (2) A Part 36 offer –
  - (a) may be made at any time, including before the commencement of proceedings; and
  - (b) may be made in appeal proceedings.
- (3) A Part 36 offer which offers to pay or offers to accept a sum of money will be treated as inclusive of all interest until –
  - (a) the date on which the period stated under rule 36.2(2)(c) expires; or
  - (b) if rule 36.2(3) applies, a date 21 days after the date the offer was made.
- (4) A Part 36 offer shall have the consequences set out in this Part only in relation to the costs of the proceedings in respect of which it is made, and not in relation to the costs of any appeal from the final decision in those proceedings.
- (5) Before expiry of the relevant period, a Part 36 offer may be withdrawn or its terms changed to be less advantageous to the offeree, only if the court gives permission.
- (6) After expiry of the relevant period and provided that the offeree has not previously served notice of acceptance, the offeror may withdraw the offer or change its terms to be less advantageous to the offeree without the permission of the court.
- (7) The offeror does so by serving written notice of the withdrawal or change of terms on the offeree.

(Rule 36.14(6) deals with the costs consequences following judgment of an offer that is withdrawn)

### **36.4 Part 36 offers – defendants’ offers**

- (1) Subject to rule 36.5(3) and rule 36.6(1), a Part 36 offer by a defendant to pay a sum of money in settlement of a claim must be an offer to pay a single sum of money.

- (2) But, an offer that includes an offer to pay all or part of the sum, if accepted, at a date 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 for future pecuniary loss**

- (1) This rule applies to a claim for damages for personal injury which is or includes a claim for future pecuniary loss.
- (2) An offer to settle such a claim will not have the consequences set out in rules 36.10, 36.11 and 36.14 unless it is made by way of a Part 36 offer under this rule.
- (3) A Part 36 offer to which this rule applies may contain an offer to pay, or an offer to accept –
- (a) the whole or part of the damages for future pecuniary loss in the form of –
    - (i) a lump sum; or
    - (ii) periodical payments; or
    - (iii) both a lump sum and periodical payments;
  - (b) the whole or part of any other damages in the form of a lump sum.
- (4) A Part 36 offer to which this rule applies –
- (a) must state the amount of any offer to pay the whole or part of any damages in the form of a lump sum;
  - (b) may state –
    - (i) what part of the lump sum, if any, relates to damages for future pecuniary loss; and
    - (ii) what part relates to other damages to be accepted in the form of a lump sum;
  - (c) 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 and must specify –
    - (i) the amount and duration of the periodical payments;
    - (ii) the amount of any payments for substantial capital purchases and when they are to be made; and
    - (iii) 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); and
  - (d) 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 section 2(4) of the Damages Act 1996 or how such damages are to be paid and how the continuity of their payment is to be secured.
- (5) Rule 36.4 applies to the extent that a Part 36 offer by a defendant under this rule includes an offer to pay all or part of any damages in the form of a lump sum.
- (6) Where the offeror makes a Part 36 offer to which this rule applies and which offers to pay or to accept damages in the form of both a lump sum and periodical payments, the offeree may only give notice of acceptance of the offer as a whole.
- (7) If the offeree accepts a Part 36 offer which includes payment of any part of the damages in the form of 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.

(A practice direction supplementing Part 41 contains information about periodical payments under the Damages Act 1996)

### **36.6 Offer to settle a claim for provisional damages**

- (1) An offeror may make a Part 36 offer in respect of a claim which includes a claim for provisional damages.
- (2) Where he does so, the Part 36 offer must specify whether or not the offeror is proposing that the settlement shall include an award of provisional damages.
- (3) Where the offeror is offering to agree to the making of an award of provisional damages the Part 36 offer must also state –
  - (a) that the sum offered 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 offer;
  - (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) Rule 36.4 applies to the extent that a Part 36 offer by a defendant includes an offer to agree to the making of an award of provisional damages.
- (5) 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.

### **36.7 Time when a Part 36 offer is made**

- (1) A Part 36 offer is made when it is served on the offeree.
- (2) A change in the terms of a Part 36 offer will be effective when notice of the change is served on the offeree.

(Rule 36.3 makes provision about when permission is required to change the terms of an offer to make it less advantageous to the offeree)

### **36.8 Clarification of a Part 36 offer**

- (1) The offeree may, within 7 days of a Part 36 offer being made, request the offeror to clarify the offer.
- (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.

(Part 23 contains provisions about making an application to the court)

- (3) If the court makes an order under paragraph (2), it must specify the date when the Part 36 offer is to be treated as having been made.

### **36.9 Acceptance of a Part 36 offer**

- (1) A Part 36 offer is accepted by serving written notice of the acceptance on the offeror.
- (2) Subject to rule 36.9(3), a Part 36 offer may be accepted at any time (whether or not the offeree has subsequently made a different offer) unless the offeror serves notice of withdrawal on the offeree.

(Rule 21.10 provides that acceptance on behalf of a child or patient shall not be valid unless the court has approved the settlement)

- (3) The court's permission is required to accept a Part 36 offer where –
- (a) rule 36.12(4) applies;
  - (b) rule 36.15(3)(b) applies, the relevant period has expired and further deductible benefits have been paid to the claimant since the date of the offer;
  - (c) an apportionment is required under rule 41.3A; or
  - (d) the trial has started.

(Rule 36.12 deals with offers by some but not all of multiple defendants)

(Rule 36.15 deals with recoverable benefits and deductible benefits)

(Rule 41.3A requires an apportionment in proceedings under the Fatal Accidents Act 1976 and Law Reform (Miscellaneous Provisions) Act 1934)

- (4) Where the court gives permission under paragraph (3), unless all the parties have agreed costs, the court will make an order dealing with costs, and may order that the costs consequences set out in rule 36.10 will apply.
- (5) Unless the parties agree, a Part 36 offer may not be accepted after the end of the trial but before judgment is handed down.

### **36.10 Costs consequences of acceptance of a Part 36 offer**

- (1) Subject to paragraph (2) and paragraph (4)(a), where a Part 36 offer is accepted within the relevant period the claimant will be entitled to his costs of the proceedings up to the date on which notice of acceptance was served on the offeror.
- (2) Where –
- (a) a defendant's Part 36 offer relates to part only of the claim; and
  - (b) at the time of serving notice of acceptance within the relevant period 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) Costs under paragraphs (1) and (2) of this rule will be assessed on the standard basis if the amount of costs is not agreed.

(Rule 44.4(2) explains the standard basis for assessment of costs)

- (4) Where –
- (a) a Part 36 offer that was made less than 21 days before the start of trial is accepted; or
  - (b) a Part 36 offer is accepted after expiry of the relevant period,
- if the parties do not agree the liability for costs, the court will make an order as to costs.
- (5) Where paragraph (4)(b) applies, unless the court orders otherwise –
- (a) the claimant will be entitled to his costs of the proceedings up to the date on which the relevant period expired; and
  - (b) the offeree will be liable for the offeror's costs for the period from the date of expiry of the relevant period to the date of acceptance.
- (6) The claimant's costs include any costs incurred in dealing with the defendant's counterclaim if the Part 36 offer states that it takes into account the counterclaim.

### **36.11 The effect of acceptance of a Part 36 offer**

- (1) If a Part 36 offer 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 the stay <sup>(GL)</sup> will be upon the terms of the offer.
- (3) If a Part 36 offer which relates to part only of the claim is accepted –
  - (a) the claim will be stayed <sup>(GL)</sup> as to that part upon the terms of the offer; and
  - (b) subject to rule 36.10(2), 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 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.
- (6) Unless the parties agree otherwise in writing, where a Part 36 offer by a defendant that is or that includes an offer to pay a single sum of money is accepted, that sum must be paid to the offeree within 14 days of the date of –
  - (a) acceptance; or
  - (b) the order when the court makes an order under rule 41.2 (order for an award of provisional damages) or rule 41.8 (order for an award of periodical payments), unless the court orders otherwise.
- (7) If the accepted sum is not paid within 14 days or such other period as has been agreed the offeree may enter judgment for the unpaid sum.
- (8) Where –
  - (a) a Part 36 offer (or part of a Part 36 offer) which is not an offer to which paragraph (6) applies is accepted; and
  - (b) a party alleges that the other party has not honoured the terms of the offer, that party may apply to enforce the terms of the offer without the need for a new claim.

### **36.12 Acceptance of a Part 36 offer made by one or more, but not all, defendants**

- (1) This rule applies where the claimant wishes to accept a Part 36 offer 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 if –
  - (a) he discontinues his claim against those defendants who have not made the offer; and
  - (b) those defendants give written consent to the acceptance of the offer.
- (3) If the claimant alleges that the defendants have a several liability <sup>(GL)</sup> to him, the claimant may –
  - (a) accept the offer; and
  - (b) continue with his claims against the other defendants if he is entitled to do so.
- (4) In all other cases the claimant must apply to the court for an order permitting him to accept the Part 36 offer.

### 36.13 Restriction on disclosure of a Part 36 offer

- (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 offer has been made 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.
- (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 36.11 following acceptance of a Part 36 offer; or
  - (c) where the offeror and the offeree agree in writing that it should not apply.

### 36.14 Costs consequences following judgment

- (1) This rule applies where upon judgment being entered –
  - (a) a claimant fails to obtain a judgment more advantageous than a defendant’s Part 36 offer; or
  - (b) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant’s Part 36 offer.
- (2) Subject to paragraph (6), where rule 36.14(1)(a) applies, the court will, unless it considers it unjust to do so, order that the defendant is entitled to –
  - (a) his costs from the date on which the relevant period expired; and
  - (b) interest on those costs.
- (3) Subject to paragraph (6), where rule 36.14(1)(b) applies, the court will, unless it considers it unjust to do so, order that the claimant is entitled to –
  - (a) interest on the whole or part of any sum of money (excluding interest) awarded at a rate not exceeding 10% above base rate <sup>(GL)</sup> for some or all of the period starting with the date on which the relevant period expired;
  - (b) his costs on the indemnity basis from the date on which the relevant period expired; and
  - (c) interest on those costs at a rate not exceeding 10% above base rate <sup>(GL)</sup>.
- (4) 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 was made, including in particular how long before the trial started the offer was made;
  - (c) the information available to the parties at the time when the Part 36 offer 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 to be made or evaluated.
- (5) Where the court awards interest under this rule and also awards interest on the same sum and for the same period under any other power, the total rate of interest may not exceed 10% above base rate <sup>(GL)</sup>.
- (6) Paragraphs (2) and (3) of this rule do not apply to a Part 36 offer –
  - (a) that has been withdrawn;
  - (b) that has been changed so that its terms are less advantageous to the offeree, and the offeree has beaten the less advantageous offer;
  - (c) made less than 21 days before trial, unless the court has abridged the relevant period.

(Rule 44.3 requires the court to consider an offer to settle that does not have the costs consequences set out in this Part in deciding what order to make about costs)

### 36.15 Deduction of benefits

- (1) This rule applies where a payment to a claimant following acceptance of a Part 36 offer would be a compensation payment as defined in section 1 of the Social Security (Recovery of Benefits) Act 1997.
- (2) In this rule, and in rule 36.9 –
  - (a) ‘recoverable benefits’ means any of the benefits referred to in section 1, sub-section (1)(b) of the 1997 Act; and
  - (b) ‘deductible benefits’ means any benefits by the amount of which damages are to be reduced in accordance with section 8 and Schedule 2 to the 1997 Act.
- (3) A defendant who makes a Part 36 offer should state either –
  - (a) that the offer is made without regard to any liability for recoverable benefits; or
  - (b) that it is intended to include any deductible benefits.
- (4) Where paragraph (3)(b) applies, paragraphs (5) to (9) of this rule will apply to the Part 36 offer.
- (5) Before making the Part 36 offer, the offeror must apply for a certificate of recoverable benefits.
- (6) Subject to paragraph (7), the Part 36 offer must state –
  - (a) the amount of gross compensation;
  - (b) the name and amount of any deductible benefit by which that gross amount is reduced; and
  - (c) the net amount after deduction of the amount of benefit.
- (7) If at the time he makes the Part 36 offer, the offeror has applied for, but not received a certificate of recoverable benefits, he must clarify the offer by stating the matters referred to in paragraphs (6)(b) and (6)(c) not more than 7 days after he receives the certificate.
- (8) 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 paragraph (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)

- (9) Where –
  - (a) further deductible benefits have accrued since the Part 36 offer was made; and
  - (b) the court gives permission to accept the Part 36 offer,the court may direct that the amount of the offer payable to the offeree shall be reduced by a sum equivalent to the deductible benefits paid to the claimant since the date of the offer.

(Rule 36.9(3)(b) 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)