



The Changes in the new Part 36

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The New Part 36 came into operation on the 6th April 2015. It is with us now.

The Important Changes in the New Rules:

36.1 Makes clear what has been ruled upon in *Gibbon v Manchester CC [2010] EWCA Civ 726* namely that the Part 36 regime is a code within itself and not governed or influenced by other common law on offer and acceptance.

36.2 Addresses the problem for counterclaiming defendants. They are now to be treated as claimants for the purposes of Part 36.

36.2(3) You can now make a Part 36 offer in relation to a part of, or issue in, a claim, counterclaim, additional claim or in an appeal or cross-appeal (in the latter as long as it is from a decision in a “trial” rather than an Interlocutory Hearing). See also the new Part 36.4(2) in this regard.

36.3 There is a new cadre of definitions:

“(c) a “trial” means any trial in a case whether it is a trial of all issues or a trial of liability, quantum or some other issue in the case;

(d) a trial is “in progress” from the time when it starts until the time when judgment is given or handed down;

(e) a case is “decided” when all issues in the case have been determined, whether at one or more trials;”

This has important ramifications in the other rules relating, in particular to a split trial or trial of a preliminary issue.

36.5 This replaces the old 36.2. It does away with the requirement that a Part 36 Offer must state that it is, and instead requires that it is sufficient to make it clear that it is made pursuant to Part 36. Another technicality disposed of (see *Thewlis v Groupama [2012] EWHC 3*).

36.9 Here there are significant changes, concerning the withdrawing or changing of a Part 36 offer, and this needs to be read with Part 36.10; it relates to situations where the offer has not been accepted within the time specified (Part 36.9(1):

36.9(4)(a) permits withdrawal or changes to an offer without permission but by written notice, and 36.9(4)(b) permits time-limited offers (i.e. automatic withdrawal) – but note that under 36.17(7) if not accepted within time, they will not have the usual consequences under Part 36 thereafter.

36.9(5) provides that a change which is more advantageous to the offeree is not treated as a withdrawal of the previous offer but is a new offer. This means that if the original offer as well as the revised offer is effective, then the costs consequences would run from the earlier offer. Where the offer is more than 21 days before trial (36.5(2)) a new period of 21 days applies.

36.10 seeks to deal with the “battle of forms” situation in relation to notices of change/withdrawal and acceptance. It addresses the difficulties shown in *Evans v Wolverhampton Hospitals NHS Foundation Trust [2014] EWHC 3185*. This applies where the offeror wants to withdraw or make the

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offer less advantageous to the offeree. The offeree has until the end of the relevant acceptance period to accept, and if he does then he prevails, if not then the offeror prevails.

36.11 This needs to be looked at with Part 36.3 (definitions). Permission is required to accept an Offer when “a trial is in progress” (instead of “the trial has started”). 36.3(d) makes clear that this is until judgment is given or handed down.

36.12 Is new and expressly prevents an offer relating only to a split trial to be accepted after that issue has been decided, until 7 days have passed. Thus the offeror can withdraw its offer before acceptance.

36.13 deals with costs consequences of acceptance. Under 36.13(2) the claimant is entitled to the costs only in relation to the relevant part of the claim to which the offer related, not to “the proceedings” where a claimant abandoned the balance of the proceedings. 36.13(3) codifies *Solomon v Cromwell Group plc [2011] EWCA Civ 1584* so that where fixed costs apply that is what the claimant will be entitled to on acceptance not standard basis. Finally, under 36.13(4)(c) on an acceptance of an offer not related to the whole claim, the court must decide costs then unless they are agreed between the parties. 36.13(5) changes the exception from “unless the court orders otherwise”, to “unless it considers it unjust to do so”, and 36.13(6) now sets out the circumstances that it will take into account, pursuant to *Lumb v Hampsey [2011] EWHC 2808*.

36.16 (3)(d) adds an exception to the general rule against disclosure of Part 36 Offers or their terms; which is that:

“(d) where, although the case has not been decided:
(i) any part of, or issue in, the case has been decided; and
(ii) the Part 36 offer relates only to parts or issues that have been decided.”

so as to incorporate *Ted Baker plc v AXA Insurance Ltd [2012] EWHC 1779*. Essentially, the Judge can be informed as to the existence of the offer (whether it relates to the issue decided or not), but he may only be told its terms where it relates to the issues that have been decided.

NB. The effect of the transitional provisions is that the new changes apply to offers made before 6th April 2015 where a trial of any part or the claim or any issue in it starts on or after that date.

36.17 (5)(e) is new and important: it relates to costs after judgment. Costs will follow an effective offer, “unless it [the court] considers it unjust to do so”. Now the court will consider “whether the offer was a genuine attempt to settle the proceedings” (see *AB v CD and others [2011] EWHC 602*).

36.23 deals with the situation where a party failed to file a costs budget and was sanctioned by limitation to court fees. It was thought that this might reduce the desire to settle. This provision allows an effective offer to attract up to 50% of the costs that would have been awarded, absent the sanction.

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