

Part 36: An annotated guide to the new rules

By Andrew Hogan¹

Background

1. Part 36 has generated a large volume of litigation over the years, and has been amended on multiple occasions. Indeed, a causal link can be made between the amendments, and the litigation. Many of the cases have been generated by solicitors failing to realise that the rules have changed, using outdated precedent letters, and then finding that what they fondly imagined was a part 36 offer, was no such thing, or arguably so, leaving the appellate courts to agonise how to characterise such offers and what consequences flow from them.

2. In a sense all of the former case law can be consigned to the dustbin, after April 2015 (subject to the transitional provisions), when a wholly new Part 36 is brought into force. I say wholly new, in reality it codifies many of the principles, or points established by the case law over the years. In short, it is a new code and must be studied closely by everyone who makes or receives settlement offers, which in fact, is everyone.

Transitional provisions

3. The transitional provisions must be borne in mind. They provide as follows:

18.—(1) The amendments made by rules 7 to 9, 10(b), (d) and (e), 11 and 12 of and Schedule 1 to these Rules apply only in relation to Part 36 offers made on or after 6th April 2015, except as provided in paragraph (2).

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(2) Rules 36.3, 36.11, 36.12 and 36.16 in Schedule 1 to these Rules also apply in relation to any Part 36 offer where—

(a) the offer is made before 6th April 2015; but

(b) a trial of any part of the claim or of any issue arising in it starts on or after 6th April 2015.

The new Part 36

4. I include within this paper, the full text of the new part 36, and offer some thoughts about how it will work, and the consequences of the provisions.

Starting with the index, there are some 30 particular rules, meant to cover the common applications of part 36. The index reads as follows:

“PART 36 OFFERS TO SETTLE

Contents of this Part

Title	Rule number
Scope of this Part	Rule 36.1
Section 1 – Part 36 Offers to Settle	
GENERAL	
Scope of this Section	Rule 36.2
Definitions	Rule 36.3
Application of Part 36 to appeals	Rule 36.4
MAKING OFFERS	

Title	Rule number
Form and content of a Part 36 offer	Rule 36.5
Part 36 offers – defendant’s offer	Rule 36.6
Time when a Part 36 offer is made	Rule 36.7
CLARIFYING, WITHDRAWING AND CHANGING THE TERMS OF OFFERS	
Clarification of a Part 36 offer	Rule 36.8
Withdrawing or changing the terms of a Part 36 offer generally	Rule 36.9
Withdrawing or changing the terms of a Part 36 offer before the expiry of the relevant period	Rule 36.10
ACCEPTING OFFERS	
Acceptance of a Part 36 offer	Rule 36.11
Acceptance of a Part 36 offer in a split-trial case	Rule 36.12
Costs consequences of acceptance of a Part 36 offer	Rule 36.13
Other effects of acceptance of a Part 36 offer	Rule 36.14
Acceptance of a Part 36 offer made by one or more, but not all, defendants	Rule 36.15

Title	Rule number
UNACCEPTED OFFERS	
Restriction on disclosure of a Part 36 offer	Rule 36.16
Costs consequences following judgment	Rule 36.17
PERSONAL INJURY CASES	
Personal injury claims for future pecuniary loss	Rule 36.18
Offer to settle a claim for provisional damages	Rule 36.19
Costs consequences of acceptance of a Part 36 offer where Section IIIA of Part 45 applies	Rule 36.20
Costs consequences following judgment where Section IIIA of Part 45 applies	Rule 36.21
Deduction of benefits and lump sum payments	Rule 36.22
MISCELLANEOUS	
Cases in which the offeror's costs have been limited to court fees	Rule 36.23
Section II – RTA Protocol and EL/PL Protocol Offers to Settle	
Scope of this Section	Rule 36.24

Title	Rule number
Form and content of a Protocol offer	Rule 36.25
Time when a Protocol offer is made	Rule 36.26
General provisions	Rule 36.27
Restrictions on disclosure of a Protocol offer	Rule 36.28
Costs consequences following judgment	Rule 36.29
Deduction of benefits	Rule 36.30

5. Turning to consider the particular provisions, rule 36.1 is keen to emphasise that because this is a set of statutory provisions, the rules are self contained and there is no scope for eg, importing principles of the common law, such as contractual rules for offers and acceptance. This reflects the statement first made in the case of **Gibbon.v.Manchester City Council**²

Scope of this Part

36.1.—(1) This Part contains a self-contained procedural code about offers to settle made pursuant to the procedure set out in this Part (“Part 36 offers”).

(2) Section I of this Part contains general rules about Part 36 offers.

(3) Section II of this Part contains rules about offers to settle where the parties have followed the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (“the RTA Protocol”) or the Pre-Action Protocol for Low Value Personal Injury (Employers’ Liability and Public Liability) Claims (“the EL/PL Protocol”) and have started proceedings under Part 8 in accordance with Practice Direction 8B.

² [2010] EWCA Civ 726. See also the later case of **Shovelar.v.Lane** [2011] EWCA Civ 726

6. The new part 36 also codifies and brings together the application of the principles, dealing first of all with general principles and then moving on to consider specifically the Protocols.

SECTION I Part 36 Offers to Settle

GENERAL

Scope of this Section

36.2—(1) This Section does not apply to an offer to settle to which Section II of this Part applies.

(2) Nothing in this Section prevents a party making an offer to settle in whatever way that party chooses, but if the offer is not made in accordance with rule 36.5, it will not have the consequences specified in this Section.

(Rule 44.2 requires the court to consider an offer to settle that does not have the costs consequences set out in this Section in deciding what order to make about costs.)

(3) A Part 36 offer may be made in respect of the whole, or part of, or any issue that arises in—

(a) a claim, counterclaim or other additional claim; or

(b) an appeal or cross-appeal from a decision made at a trial.

(Rules 20.2 and 20.3 provide that counterclaims and other additional claims are treated as claims and that references to a claimant or a defendant include a party bringing or defending an additional claim.)

7. It should be noted that part 36 does not preclude a party making a Calderbank offer, or an offer “without prejudice save as to costs” or any other conceivable offer, which will have the effect of being a material factor when the court comes to address issues of costs. The rule also reflects the Court of

Appeal decision in **AF.v.BG**³ an interesting decision dealing with counterclaims which exceed claims, and to what extent a net benefit to a defendant invokes part 36 consequences.

8. Rule 36.3 is the definitional section:

Definitions

36.3. In this Section—

- (a) the party who makes an offer is the “offeror”;
- (b) the party to whom an offer is made is the “offeree”;
- (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;
- (f) “trial judge” includes the judge (if any) allocated in advance to conduct a trial; and
- (g) “the relevant period” means—
 - (i) in the case of an offer made not less than 21 days before a trial, the period specified under rule 36.5(1)(c) or such longer period as the parties agree;
 - (ii) otherwise, the period up to the end of such trial.

9. An old problem, arising from a case I dealt with more than a decade ago, was the question as to whether part 36 offers made in advance of trial, needed to be renewed to be effective on an appeal. Rule 36.4 effectively confirms the earlier case law:

³ [2009] EWCA Civ 757

Application of Part 36 to appeals

36.4.—(1) Except where a Part 36 offer is made in appeal proceedings, it shall have the consequences set out in this Section 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 a decision in those proceedings.

(2) Where a Part 36 offer is made in appeal proceedings, references in this Section to a term in the first column below shall be treated, unless the context requires otherwise, as references to the corresponding term in the second column—

Term	Corresponding term
Claim	Appeal
Counterclaim	Cross-appeal
Case	Appeal proceedings
Claimant	Appellant
Defendant	Respondent
Trial	Appeal hearing
Trial judge	Appeal judge

10. A key rule is going to be 36.5, which in effect dictates the requirements for making an effective part 36 offer. The requirements are mandatory. It is worth reading. Then reading again. Even as recently as in the case of **Shaw.v.Merthyr Tydfil County Borough Council**⁴ solicitors were failing to draft

⁴ [2014] EWCA Ci 1678

effective part 36 offers: see the caustic comments of the Court of Appeal on the solicitor who had used an old and out of date precedent, without realising the rules had changed in the interim.

MAKING OFFERS

Form and content of a Part 36 offer

36.5.—(1) A Part 36 offer must—

(a) be in writing;

(b) make clear that it is made pursuant to 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 36.13 or 36.20 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.)

(2) Paragraph (1)(c) does not apply if the offer is made less than 21 days before the start of a trial.

(3) In appropriate cases, a Part 36 offer must contain such further information as is required by rule 36.18 (personal injury claims for future pecuniary loss), rule 36.19 (offer to settle a claim for provisional damages), and rule 36.22 (deduction of benefits).

(4) 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 specified under rule 36.5(1)(c) expires; or

(b) if rule 36.5(2) applies, a date 21 days after the date the offer was made.

11. Note also the provisions in relation to defendant's offers:

Part 36 offers – defendant's offer

36.6.—(1) Subject to rules 36.18(3) and 36.19(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) A defendant's offer that includes an offer to pay all or part of the sum 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.

12. Rule 36.7 clarifies some points about timing and expressly makes it clear that a part 36 offer is subject to the normal rules of service: this can be quite important. I can recall cases where sudden changes of mind or instructions can necessitate the sudden withdrawal of an offer, which are eased where, it has not in fact been "made".

Time when a Part 36 offer is made

36.7.—(1) A Part 36 offer may be made at any time, including before the commencement of proceedings.

(2) A Part 36 offer is made when it is served on the offeree.

(Part 6 provides detailed rules about service of documents.)

13. Clarification means precisely what it says: there is no more scope under the new rules, than there was under the old rules, for eliciting how an offer is broken down, or on what assumptions it has been calculated.

CLARIFYING, WITHDRAWING AND CHANGING THE TERMS OF OFFERS

Clarification of a Part 36 offer

36.8.—(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 the offeror do 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.

14. Returning to the question of time, again note that withdrawal must be in writing and again, is subject to the rules of service. The classic mistake is not to recognise that many firms, still, do not accept service by email. This can and has led, to ineffective withdrawals, which are superseded by acceptances properly served.

15. Rule 36.9 is horribly convoluted, but quite important dealing as it does with further considerations on changing offers. It reflects a change from the position in **C.v.D**⁵ where it was established that purported part 36 offers which provided for their withdrawal or non acceptance, were not in fact part 36 offers. It also clarifies that making an improved new offer does not also withdraw the earlier offer, which of course might be of significance if that earlier offer is operative at trial:

Withdrawing or changing the terms of a Part 36 offer generally

36.9.—(1) A Part 36 offer can only be withdrawn, or its terms changed, if the offeree has not previously served notice of acceptance.

(2) The offeror withdraws the offer or changes its terms by serving written notice of the withdrawal or change of terms on the offeree.

⁵ [2011] EWCA Civ 846

(Rule 36.17(7) deals with the costs consequences following judgment of an offer which is withdrawn.)

(3) Subject to rule 36.10, such notice of withdrawal or change of terms takes effect when it is served on the offeree.

(Rule 36.10 makes provision about when permission is required to withdraw or change the terms of an offer before the expiry of the relevant period.)

(4) Subject to paragraph (1), after expiry of the relevant period—

(a) the offeror may withdraw the offer or change its terms without the permission of the court; or

(b) the offer may be automatically withdrawn in accordance with its terms.

(5) Where the offeror changes the terms of a Part 36 offer to make it more advantageous to the offeree—

(a) such improved offer shall be treated, not as the withdrawal of the original offer; but as the making of a new Part 36 offer on the improved terms; and

(b) subject to rule 36.5(2), the period specified under rule 36.5(1)(c) shall be 21 days or such longer period (if any) identified in the written notice referred to in paragraph (2).

16. The new rule 36.10 is a recipe for litigation:

Withdrawing or changing the terms of a Part 36 offer before the expiry of the relevant period

36.10.—(1) Subject to rule 36.9(1), this rule applies where the offeror serves notice before expiry of the relevant period of withdrawal of the offer or change of its terms to be less advantageous to the offeree.

(2) Where this rule applies—

(a) if the offeree has not served notice of acceptance of the original offer by the expiry of the relevant period, the offeror's notice has effect on the expiry of that period; and

(b)if the offeree serves notice of acceptance of the original offer before the expiry of the relevant period, that acceptance has effect unless the offeror applies to the court for permission to withdraw the offer or to change its terms—

(i)within 7 days of the offeree’s notice of acceptance; or

(ii)if earlier, before the first day of trial.

(3) On an application under paragraph (2)(b), the court may give permission for the original offer to be withdrawn or its terms changed if satisfied that there has been a change of circumstances since the making of the original offer and that it is in the interests of justice to give permission.

17. Again note the emphasis on written notice, and the rules of service in the rule on acceptance:

ACCEPTING OFFERS

Acceptance of a Part 36 offer

36.11.—(1) A Part 36 offer is accepted by serving written notice of acceptance on the offeror.

(2) Subject to paragraphs (3) and (4) and to rule 36.12, a Part 36 offer may be accepted at any time (whether or not the offeree has subsequently made a different offer), unless it has already been withdrawn.

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

(Rules 36.9 and 36.10 deal with withdrawal of Part 36 offers.)

(3) The court’s permission is required to accept a Part 36 offer where—

(a)rule 36.15(4) applies;

(b)rule 36.22(3)(b) applies, the relevant period has expired and further deductible amounts have been paid to the claimant since the date of the offer;

(c)an apportionment is required under rule 41.3A; or

(d) a trial is in progress.

(Rule 36.15 deals with offers by some but not all of multiple defendants.)

(Rule 36.22 defines “deductible amounts”.)

(Rule 41.3A requires an apportionment in proceedings under the Fatal Accidents Act 1976(1) and Law Reform (Miscellaneous Provisions) Act 1934(2).)

(4) Where the court gives permission under paragraph (3), unless all the parties have agreed costs, the court must make an order dealing with costs, and may order that the costs consequences set out in rule 36.13 apply.

18. Clarity is provided in relation to split trials: this is important, when, for example limitation is being fought and embodies a doctrine of implied withdrawal:

Acceptance of a Part 36 offer in a split-trial case

36.12.—(1) This rule applies in any case where there has been a trial but the case has not been decided within the meaning of rule 36.3.

(2) Any Part 36 offer which relates only to parts of the claim or issues that have already been decided can no longer be accepted.

(3) Subject to paragraph (2) and unless the parties agree, any other Part 36 offer cannot be accepted earlier than 7 clear days after judgment is given or handed down in such trial.

19. Rule 36.13 creates a deemed costs Order: what is interesting is to note that it expressly cross refers to part 45 and the fixed costs regime there: in effecting following the case law on how part 45 will trump the notion of a standard basis costs order following on acceptance, in certain categories of case.

Costs consequences of acceptance of a Part 36 offer

36.13.—(1) Subject to paragraphs (2) and (4) and to rule 36.20, where a Part 36 offer is accepted within the relevant period the claimant will be entitled to the costs of the proceedings (including their recoverable pre-action costs) up to the date on which notice of acceptance was served on the offeror.

(Rule 36.20 makes provision for the costs consequences of accepting a Part 36 offer in certain personal injury claims where the claim no longer proceeds under the RTA or EL/PL Protocol.)

(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 only be entitled to the costs of such part of the claim unless the court orders otherwise.

(3) Except where the recoverable costs are fixed by these Rules, costs under paragraphs (1) and (2) are to be assessed on the standard basis if the amount of costs is not agreed.

(Rule 44.3(2) explains the standard basis for the assessment of costs.)

(Rule 44.9 contains provisions about when a costs order is deemed to have been made and applying for an order under section 194(3) of the Legal Services Act 2007(3).)

(Part 45 provides for fixed costs in certain classes of case.)

(4) Where—

(a) a Part 36 offer which was made less than 21 days before the start of a trial is accepted; or

(b) a Part 36 offer which relates to the whole of the claim is accepted after expiry of the relevant period; or

(c) subject to paragraph (2), a Part 36 offer which does not relate to the whole of the claim is accepted at any time,

the liability for costs must be determined by the court unless the parties have agreed the costs.

(5) Where paragraph (4)(b) applies but the parties cannot agree the liability for costs, the court must, unless it considers it unjust to do so, order that—

(a) the claimant be awarded costs up to the date on which the relevant period expired; and

(b) the offeree do pay the offeror's costs for the period from the date of expiry of the relevant period to the date of acceptance.

(6) In considering whether it would be unjust to make the orders specified in paragraph (5), the court must take into account all the circumstances of the case including the matters listed in rule 36.17(5).

(7) The claimant's costs include any costs incurred in dealing with the defendant's counterclaim if the Part 36 offer states that it takes it into account.

20. Rule 36.14 deals with some procedural consequences:

Other effects of acceptance of a Part 36 offer

36.14.—(1) If a Part 36 offer is accepted, the claim will be stayed.

(2) In the case of acceptance of a Part 36 offer which relates to the whole claim, the stay will be upon the terms of the offer.

(3) If a Part 36 offer which relates to part only of the claim is accepted, the claim will be stayed as to that part upon the terms of the offer.

(4) If the approval of the court is required before a settlement can be binding, any stay 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 arising under this rule will not affect the power of the court—

(a) to enforce the terms of a Part 36 offer; or

(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 that is or includes an offer to pay or accept a single sum of money is accepted, that sum must be paid to the claimant 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 such sum is not paid within 14 days of acceptance of the offer, or such other period as has been agreed, the claimant 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.

21. One of the problems of part 36 is the fact that there can be quite a division between the way damages are calculated and the way that costs are recoverable: in particular in multiple defendant cases, a defendant who makes an offer needs to be clear that if accepted, it is likely to trigger a liability to pay common costs, as well as the costs of individually pursuing that defendant. Of course, the starting point is to be clear, whether the claim that is being pursued is against joint or several tortfeasors:

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

36.15.—(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) the claimant discontinues the 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 (GL) to the claimant, the claimant may—

(a) accept the offer; and

(b) continue with the claims against the other defendants if entitled to do so.

(4) In all other cases the claimant must apply to the court for permission to accept the Part 36 offer.

22. Rule 36.16 has potential application in any split trial situation: liability/quantum or limitation.

UNACCEPTED OFFERS

Restriction on disclosure of a Part 36 offer

36.16.—(1) A Part 36 offer will be treated as “without prejudice except as to costs”.

(2) The fact that a Part 36 offer has been made and the terms of such offer must not be communicated to the trial judge until the case has been decided.

(3) Paragraph (2) does not apply—

(a) where the defence of tender before claim has been raised;

(b) where the proceedings have been stayed under rule 36.14 following acceptance of a Part 36 offer;

(c) where the offeror and the offeree agree in writing that it should not apply; or

(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.

(4) In a case to which paragraph (3)(d)(i) applies, the trial judge—

(a) may be told whether or not there are Part 36 offers other than those referred to in paragraph (3)(d)(ii); but

(b) must not be told the terms of any such other offers unless any of paragraphs (3)(a) to (c) applies.

23. The consequences of a part 36 offer being beaten, have been tidied up. It should be noted, that defendants have improved their position, by being entitled to interest on their costs, the claimants position has worsened, through the capping of all interest at 10% above base rate, and there is scope on a split liability trial, to get an additional amount in respect of costs, by an appropriately worded offer. There is of course scope within the rules for a conflict of interest, as the additional amount can only be awarded once: what would you rather have: more damages or more costs?

Costs consequences following judgment

36.17.—(1) Subject to rule 36.21, 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.

(Rule 36.21 makes provision for the costs consequences following judgment in certain personal injury claims where the claim no longer proceeds under the RTA or EL/PL Protocol.)

(2) For the purposes of paragraph (1), in relation to any money claim or money element of a claim, "more advantageous" means better in money terms by any

amount, however small, and “at least as advantageous” shall be construed accordingly.

(3) Subject to paragraphs (7) and (8), where paragraph (1)(a) applies, the court must, unless it considers it unjust to do so, order that the defendant is entitled to—

(a) costs (including any recoverable pre-action costs) from the date on which the relevant period expired; and

(b) interest on those costs.

(4) Subject to paragraph (7), where paragraph (1)(b) applies, the court must, 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 for some or all of the period starting with the date on which the relevant period expired;

(b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;

(c) interest on those costs at a rate not exceeding 10% above base rate; and

(d) provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below to an amount which is—

(i) the sum awarded to the claimant by the court; or

(ii) where there is no monetary award, the sum awarded to the claimant by the court in respect of costs—

Amount awarded by the court	Prescribed percentage
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Up to £500,000	10% of the amount awarded
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Amount awarded by the court	Prescribed percentage
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Above £500,000	10% of the first £500,000 and (subject to the limit of £75,000) 5% of any amount above that figure.
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(5) In considering whether it would be unjust to make the orders referred to in paragraphs (3) and (4), the court must 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;

(d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and

(e) whether the offer was a genuine attempt to settle the proceedings.

(6) 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 must not exceed 10% above base rate.

(7) Paragraphs (3) and (4) do not apply to a Part 36 offer—

(a) which has been withdrawn;

(b) which has been changed so that its terms are less advantageous to the offeree where the offeree has beaten the less advantageous offer;

(c) made less than 21 days before trial, unless the court has abridged the relevant period.

(8) Paragraph (3) does not apply to a soft tissue injury claim to which rule 36.21 applies.

(Rule 44.2 requires the court to consider an offer to settle that does not have the costs consequences set out in this Section in deciding what order to make about costs.)

24. Perhaps unsurprisingly, rules for personal injury claims have continued to have their own niche, starting with periodical payments:

PERSONAL INJURY CLAIMS

Personal injury claims for future pecuniary loss

36.18.—(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 this Section 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;

(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 or to accept 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 paid or 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 payments is reasonably secure in accordance with section 2(4) of the Damages Act 1996(4) or how such damages are to be paid and how the continuity of their payment is to be secured.

(5) Rule 36.6 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.

(Practice Direction 41B contains information about periodical payments under the Damages Act 1996.)

25. Rule 36.19 deals with provisional damages:

Offer to settle a claim for provisional damages

36.19.—(1) An offeror may make a Part 36 offer in respect of a claim which includes a claim for provisional damages.

(2) Where the offeror 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 36.6 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 award of provisional damages under rule 41.2.

26. The rules then move on to consider the various Portal schemes and those cases which drop out:

Costs consequences of acceptance of a Part 36 offer where Section IIIA of Part 45 applies

36.20.—(1) This rule applies where a claim no longer continues under the RTA or EL/PL Protocol pursuant to rule 45.29A(1).

(2) Where a Part 36 offer is accepted within the relevant period, the claimant is entitled to the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 for the stage applicable at the date on which notice of acceptance was served on the offeror.

(3) 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 the fixed costs in paragraph (2).

(4) Subject to paragraphs (5), (6) and (7), where a defendant's Part 36 offer is accepted after the relevant period—

(a) the claimant will be entitled to the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 for the stage applicable at the date on which the relevant period expired; and

(b) the claimant will be liable for the defendant's costs for the period from the date of expiry of the relevant period to the date of acceptance.

(5) Subject to paragraphs (6) and (7), where the claimant accepts the defendant's Protocol offer after the date on which the claim leaves the Protocol—

(a) the claimant will be entitled to the applicable Stage 1 and Stage 2 fixed costs in Table 6 or Table 6A in Section III of Part 45; and

(b) the claimant will be liable for the defendant's costs from the date on which the Protocol offer is deemed to have been made to the date of acceptance.

(6) In a soft tissue injury claim, if the defendant makes a Part 36 offer before the defendant receives a fixed cost medical report, paragraphs (4) and (5) will only have effect if the claimant accepts the offer more than 21 days after the defendant received the report.

(7) In this rule, “fixed cost medical report” and “soft tissue injury claim” have the same meaning as in paragraph 1.1(10A) and (16A) respectively of the RTA Protocol.

(8) For the purposes of this rule a defendant’s Protocol offer is either—

(a) defined in accordance with rules 36.25 and 36.26; or

(b) if the claim leaves the Protocol before the Court Proceedings Pack Form is sent to the defendant—

(i) the last offer made by the defendant before the claim leaves the Protocol; and

(ii) deemed to be made on the first business day after the claim leaves the Protocol.

(9) A reference to—

(a) the “Court Proceedings Pack Form” is a reference to the form used in the Protocol; and

(b) “business day” is a reference to a business day as defined in rule 6.2.

(10) Fixed costs shall be calculated by reference to the amount of the offer which is accepted.

(11) Where the parties do not agree the liability for costs, the court must make an order as to costs.

(12) Where the court makes an order for costs in favour of the defendant—

(a) the court must have regard to; and

(b) the amount of costs ordered must not exceed,

the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 applicable at the date of acceptance, less the fixed costs to which the claimant is entitled under paragraph (4) or (5).

(13) The parties are entitled to disbursements allowed in accordance with rule 45.29I incurred in any period for which costs are payable to them.

27. Rule 36.21 deals with the drop out cases which proceed to judgment:

Costs consequences following judgment where section IIIA of Part 45 applies

36.21.—(1) Where a claim no longer continues under the RTA or EL/PL Protocol pursuant to rule 45.29A(1), rule 36.17 applies with the following modifications.

(2) Subject to paragraphs (3), (4) and (5), where an order for costs is made pursuant to rule 36.17(3)—

(a) the claimant will be entitled to the fixed costs in Table 6B, 6C or 6D in Section IIIA of Part 45 for the stage applicable at the date on which the relevant period expired; and

(b) the claimant will be liable for the defendant's costs from the date on which the relevant period expired to the date of judgment.

(3) Subject to paragraphs (4) and (5), where the claimant fails to obtain a judgment more advantageous than the defendant's Protocol offer—

(a) the claimant will be entitled to the applicable Stage 1 and Stage 2 fixed costs in Table 6 or 6A in Section III of Part 45; and

(b) the claimant will be liable for the defendant's costs from the date on which the Protocol offer is deemed to be made to the date of judgment; and

(c) in this rule, the amount of the judgment is less than the Protocol offer where the judgment is less than the offer once deductible amounts identified in the judgment are deducted.

("Deductible amount" is defined in rule 36.22(1)(d).)

(4) In a soft tissue injury claim, if the defendant makes a Part 36 offer or Protocol offer before the defendant receives a fixed cost medical report, paragraphs (2) and (3) will only have effect in respect of costs incurred by either party more than 21 days after the defendant received the report.

(5) In this rule "fixed cost medical report" and "soft tissue injury claim" have the same meaning as in paragraph 1.1(10A) and (16A) respectively of the RTA Protocol.

- (6) For the purposes of this rule a defendant's Protocol offer is either—
- (a) defined in accordance with rules 36.25 and 36.26; or
 - (b) if the claim leaves the Protocol before the Court Proceedings Pack Form is sent to the defendant—
 - (i) the last offer made by the defendant before the claim leaves the Protocol; and
 - (ii) deemed to be made on the first business day after the claim leaves the Protocol.

(7) A reference to—

- (a) the "Court Proceedings Pack Form" is a reference to the form used in the Protocol; and
- (b) "business day" is a reference to a business day as defined in rule 6.2.

(8) Fixed costs must be calculated by reference to the amount which is awarded.

(9) Where the court makes an order for costs in favour of the defendant—

- (a) the court must have regard to; and
- (b) the amount of costs ordered shall not exceed,

the fixed costs in Table 6B, 6C or 6D in Section IIIA of Part 45 applicable at the date of judgment, less the fixed costs to which the claimant is entitled under paragraph (2) or (3).

(10) The parties are entitled to disbursements allowed in accordance with rule 45.29I incurred in any period for which costs are payable to them.

28. CRU provisions are found in rule 36.22

Deduction of benefits and lump sum payments

36.22.—(1) In this rule and rule 36.11—

(a)“the 1997 Act” means the Social Security (Recovery of Benefits) Act 1997(5);

(b)“the 2008 Regulations” means the Social Security (Recovery of Benefits)(Lump Sum Payments) Regulations 2008(6);

(c)“recoverable amount” means—

(i)“recoverable benefits” as defined in section 1(4)(c) of the 1997 Act; and

(ii)“recoverable lump sum payments” as defined in regulation 1 of the 2008 Regulations;

(d)“deductible amount” means—

(i)any benefits by the amount of which damages are to be reduced in accordance with section 8 of, and Schedule 2 to the 1997 Act(7) (“deductible benefits”); and

(ii)any lump sum payment by the amount of which damages are to be reduced in accordance with regulation 12 of the 2008 Regulations (“deductible lump sum payments”); and

(e)“certificate”—

(i)in relation to recoverable benefits, is construed in accordance with the provisions of the 1997 Act; and

(ii)in relation to recoverable lump sum payments, has the meaning given in section 29 of the 1997 Act, as applied by regulation 2 of, and modified by Schedule 1 to, the 2008 Regulations.

(2) 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(4)(b) or 1A(5)(b)(8) of the 1997 Act.

(3) A defendant who makes a Part 36 offer must, where relevant, state either—

(a)that the offer is made without regard to any liability for recoverable amounts; or

(b)that it is intended to include any deductible amounts.

(4) Where paragraph (3)(b) applies, paragraphs (5) to (9) will apply to the Part 36 offer.

(5) Before making the Part 36 offer, the offeror must apply for a certificate.

(6) Subject to paragraph (7), the Part 36 offer must state—

(a) the gross amount of compensation;

(b) the name and amount of any deductible amounts by which the gross amount is reduced; and

(c) the net amount of compensation.

(7) If at the time the offeror makes the Part 36 offer, the offeror has applied for, but has not received, a certificate, the offeror must clarify the offer by stating the matters referred to in paragraph (6)(b) and (c) not more than 7 days after receipt of the certificate.

(8) For the purposes of rule 36.17(1)(a), a claimant fails to recover more than any sum offered (including a lump sum offered under rule 36.6) if the claimant fails upon judgment being entered to recover a sum, once deductible amounts identified in the judgment have been deducted, greater than the net amount stated under paragraph (6)(c).

(Section 15(2) of the 1997 Act provides that the court must specify the compensation payment attributable to each head of damage. Schedule 1 to the 2008 Regulations modifies section 15 of the 1997 Act in relation to lump sum payments and provides that the court must specify the compensation payment attributable to each or any dependant who has received a lump sum payment.)

(9) Where—

(a) further deductible amounts 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 amounts paid to the claimant since the date of the offer.

(Rule 36.11(3)(b) states that permission is required to accept an offer where the relevant period has expired and further deductible amounts have been paid to the claimant.)

29. Some new provisions are tucked away under the heading of miscellaneous, dealing for example with the “Mitchell” problem.

MISCELLANEOUS

Cases in which the offeror’s costs have been limited to court fees

36.23.—(1) This rule applies in any case where the offeror is treated as having filed a costs budget limited to applicable court fees, or is otherwise limited in their recovery of costs to such fees.

(Rule 3.14 provides that a litigant may be treated as having filed a budget limited to court fees for failure to file a budget.)

(2) “Costs” in rules 36.13(5)(b), 36.17(3)(a) and 36.17(4)(b) shall mean—

(a) in respect of those costs subject to any such limitation, 50% of the costs assessed without reference to the limitation; together with

(b) any other recoverable costs.

60. Section II is devoted to the cases dealt with under the Protocols and in the Portals:

SECTION II RTA Protocol and EL/PL Protocol Offers to Settle

Scope of this Section

36.24.—(1) Where this Section applies, Section I does not apply.

(2) This Section applies to an offer to settle where the parties have followed the RTA Protocol or the EL/PL Protocol and started proceedings under Part 8 in accordance with Practice Direction 8B (“the Stage 3 Procedure”).

(3) A reference to the Court Proceedings Pack Form is a reference to the form used in the relevant Protocol.

(4) Nothing in this Section prevents a party making an offer to settle in whatever way that party chooses, but if the offer is not made in accordance with this Section, it will not have any costs consequences.

Form and content of a Protocol offer

36.25.—(1) An offer to settle which is made in accordance with this rule is called a Protocol offer.

(2) A Protocol offer must—

(a) be set out in the Court Proceedings Pack (Part B) Form; and

(b) contain the final total amount of the offers from both parties.

Time when a Protocol offer is made

36.26.—(1) The Protocol offer is deemed to be made on the first business day after the Court Proceedings Pack (Part A and Part B) Form is sent to the defendant.

(2) In this Section “business day” has the same meaning as in rule 6.2.

General provisions

36.27. A Protocol offer—

(a) is treated as exclusive of all interest; and

(b) has the consequences set out in this Section only in relation to the fixed costs of the Stage 3 Procedure as provided for in rule 45.18, and not in relation to the costs of any appeal from the final decision of those proceedings.

Restrictions on the disclosure of a Protocol offer

36.28.—(1) The amount of the Protocol offer must not be communicated to the court until the claim is determined.

(2) Any other offer to settle must not be communicated to the court at all.

Costs consequences following judgment

36.29.—(1) This rule applies where, on any determination by the court, the claimant obtains judgment against the defendant for an amount of damages that is—

(a) less than or equal to the amount of the defendant's Protocol offer;

(b) more than the defendant's Protocol offer but less than the claimant's Protocol offer; or

(c) equal to or more than the claimant's Protocol offer.

(2) Where paragraph (1)(a) applies, the court must order the claimant to pay—

(a) the fixed costs in rule 45.26; and

(b) interest on those fixed costs from the first business day after the deemed date of the Protocol offer under rule 36.26.

(3) Where paragraph (1)(b) applies, the court must order the defendant to pay the fixed costs in rule 45.20.

(4) Where paragraph (1)(c) applies, the court must order the defendant to pay—

(a) interest on the whole of the damages awarded at a rate not exceeding 10% above base rate for some or all of the period starting with the date specified in rule 36.26;

(b) the fixed costs in rule 45.20;

(c) interest on those fixed costs at a rate not exceeding 10% above base rate;
and

(d) an additional amount calculated in accordance with rule 36.17(4)(d).

Deduction of benefits

36.30. For the purposes of rule 36.29(1)(a) the amount of the judgment is less than the Protocol offer where the judgment is less than that offer once deductible amounts identified in the judgment are deducted.

("Deductible amount" is defined in rule 36.22(1)(d).)"

30. In broad terms, the new part 36 is to be welcomed. However, I am prepared to confidently predict, that it will generate case law, as there are a number of issues which will need clarification and because, as before lawyers will find themselves in needless difficulty, through *not reading the rules*.

My website is at www.costsbarrister.co.uk and I welcome people subscribing to that website and linking with me on Linked In.