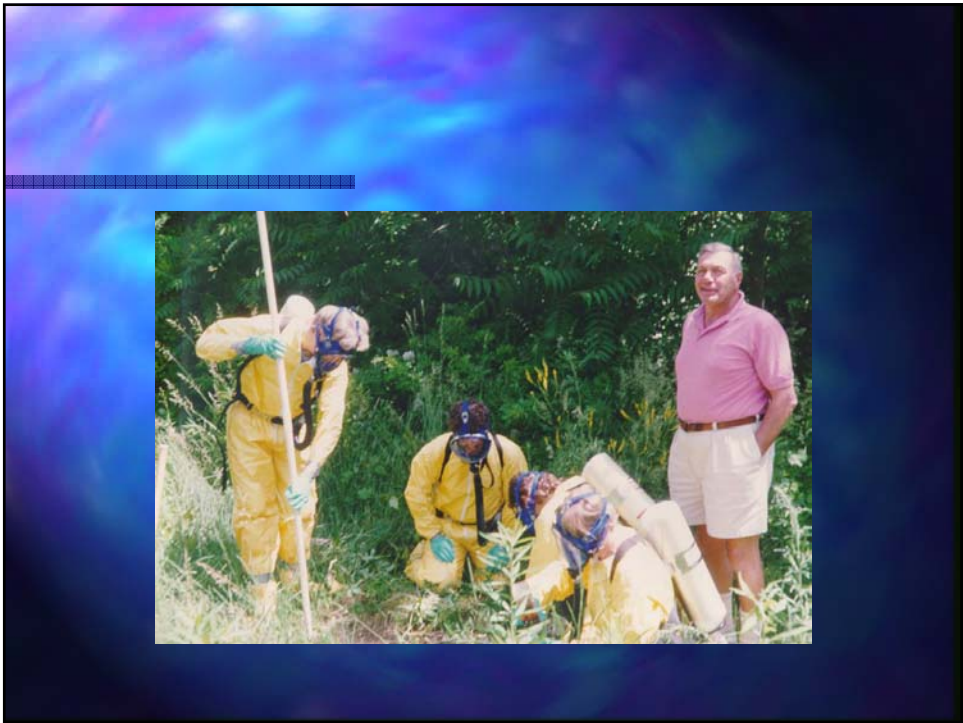


# PART 36

TOWARDS A FAIRER SYSTEM?

Presented by John McQuater  
Atherton Godfrey





## Introduction

Part 36 provides for a formal system of exchanging offers which will have costs consequences in the event that a party fails to beat a Part 36 offer, or where appropriate Part 36 payment, made by the other party.

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Whilst offers, and other attempts to achieve settlement, can be made in any form the Civil Procedure Rules envisage that it is principally offers made under Part 36 which will be reflected in costs orders, at least in cases which have gone to trial.

## Introduction

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Part 36 was an important aspect of the reforms introduced by the Civil Procedure Rules all designed to narrow issues, promote settlements and save costs.

## The Basics

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The basic requirements to comply with Part 36 are very familiar.



## The Basics

Part 36.5(1) requires a Part 36 offer to be in writing.

## The Basics

Part 36.5(3) requires an offer to state whether it relates to the whole of the claim, part of it or an issue (if so to which part or issue).

## The Basics

Part 36.5(6) requires a Part 36 offer made not less than 21 days before the start of the trial to be expressed to remain open for acceptance for 21 days from the date it is made and provide that after 21 days the offeree may only accept it if the parties agree the liability for costs or the Court gives permission.

## The Basics

Part 36.3 requires a defendant, in a money claim, to make a Part 36 payment.

## The Basics

Part 36.10 allows the Court to take into account an offer made before proceedings are begun, which otherwise complies with the requirements of Part 36, though if the offer was made by a Defendant in a money claim there must be an equivalent Part 36 payment within 14 days of service of the Claim Form.

## Costs

The costs consequences, of a Part 36 offer or payment, only apply where the Court makes an order “at trial”.

## Costs

If a Claimant fails to better a Part 36 payment or to obtain a Judgment which is more advantageous than a Defendant's Part 36 offer the Court will, unless unjust to do so, order the Claimant to pay costs incurred by the Defendant after the latest date on which the payment or offer could have been accepted without needing permission of the Court.

## Costs

If a Defendant is held liable for more, or Judgment against a Defendant is more advantageous to the Claimant, than the proposals contained in a Claimant's part 36 offer the Court may award indemnity costs and interest.



## Costs

If the case is not resolved at trial the question of costs will be dealt with under Part 44 and in particular Part 44.3 which provides that the Court has a discretion as to whether costs are payable by one party to another, the amount of those costs and when they are to be paid.

## Costs

Part 44.3(2) confirms the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party but the Court may make a different order and in deciding what order to make the Court must have regard to all the circumstances including any admissible offer to settle drawn to the Court's attention, whether or not made in accordance with Part 36.

## Periodical Payments

Following the coming into force of S.100 Courts Act 2003 a new paragraph was inserted into the Civil Procedure Rules as a Part 36.2A. This deals with the impact, on offers made under Part 36, of the Court having power to order periodical payments as well as a lump sum by way of damages.

## Periodical Payments

It is important to note that this power applies to any personal injury claim which includes a claim for future pecuniary loss. Whilst periodical payments are generally contemplated in very substantial claims such an award might, in theory, apply in any claim with future losses, even if those are modest.

## Periodical Payments

The significance of this, in relation to Part 36, is that the option of periodical payments will potentially complicate the making of offers.

## Withdrawal

There is an important difference between a Part 36 offer and a Part 36 payment so far as withdrawal is concerned.

## Withdrawal

Part 36.6(5) provides that a Part 36 payment may be withdrawn or reduced only with the permission of the Court. When considering an application for permission the Court will apply the overriding objective: Marsh –v- Frenchay Healthcare NHS Trust QBD (Curtis J) 01.02.2001.

## Withdrawal

A Part 36 payment will remain open for acceptance throughout the 21 days provided for in Part 36.11, even if the Defendant purports to withdraw it, as the offer is not contractual in essence but derives from the Civil Procedure Rules: Flynn –v- Scougall [2004] 3 All ER 609.



## Withdrawal

In Flynn the Court also held that the traditional approach on applications to withdraw payments into Court was consistent with the overriding objective. This approach requires the Defendant to show there are good reasons for the application such as:

## Withdrawal

- The discovery of further evidence, putting a wholly different complexion on the case; or
- A change in legal outlook, as the result of a new judicial decision; or
- An obvious mistake, for example the Part 36 Notice stating £100,000 has been paid into Court in circumstances such that it would be clear the Notice was intended to refer to £10,000; or
- Fraud.

## Withdrawal

A Part 36 offer, however, is, essentially, contractual and, accordingly, may be withdrawn at any time until it is accepted without the need for permission from the Court: Scammel -v- Dicker [2005] 3 All ER 838.

## Withdrawal

Part 36.5 (8) provides that if a Part 36 offer is withdrawn it will not have the costs consequences provided for in Part 36.

Crouch -v- King's Healthcare NHS Trust  
[2004] EWCA Civ 1332

The Defendant, in accordance with usual NHSLA practice, made a Part 36 offer which the Claimant failed to beat at trial. The trial judge held the Defendant should have made a Part 36 payment and, accordingly, did not penalise the Claimant in costs.

Crouch -v- King's Healthcare NHS Trust  
[2004] EWCA Civ 1332

The Court of Appeal held that even the NHSLA, who were bound to be good for the money, could not simply stipulate that a Part 36 offer was to be treated as a Part 36 payment. Accordingly, the presumption in relation to costs under Part 36 did not apply though the Court could exercise the discretion to treat an offer as effective for the purposes of Part 36. In the event, the Court concluded that it was unlikely there would be any difference between the exercise of the discretion as to whether Part 36 should apply and exercise of the general discretion in relation to costs under Part 44.

Crouch -v- King's Healthcare NHS Trust  
[2004] EWCA Civ 1332

Under Part 44 the Court was required to consider a number of matters, before exercising any discretion on costs, including any admissible offer of settlement. The defendant's Part 36 offer was an admissible offer which therefore needed to be taken into account. Once account was taken of that offer the appropriate order was to make the claimant pay the defendant's costs after the last date on which the offer could have been accepted without permission from the Court.

Trustees of Stokes Pension Fund –v-  
Western Power Distribution (South  
West) plc [2005] EWCA Civ 854

The Defendant, in accordance with usual NHSLA practice, made a Part 36 offer which the Claimant failed to beat at trial. The trial judge held the Defendant should have made a Part 36 payment and, accordingly, did not penalise the Claimant in costs.



Trustees of Stokes Pension Fund –v-  
Western Power Distribution (South  
West) plc [2005] EWCA Civ 854

The Defendant made a pre-issue Part 36 offer to pay £35,000 which, after issue of proceedings, was not repeated, there being a subsequent Part 36 payment of only £20,000.

Trustees of Stokes Pension Fund –v-  
Western Power Distribution (South  
West) plc [2005] EWCA Civ 854

At trial the Claimant was awarded damages of £25,600. The trial judge held that, the Claimant having beaten the Defendant's Part 36 payment, the Claimant should recover the costs of the action. The pre-issue offer, although more generous in terms than the judgment, did not afford protection because it was not followed by a Part 36 payment and, in any event, the Defendant had made clear, at the time the payment into Court was made, the pre-issue offer had lapsed..

Trustees of Stokes Pension Fund –v-  
Western Power Distribution (South  
West) plc [2005] EWCA Civ 854

On appeal the Court had to decide whether a pre-issue offer, not followed by a payment into Court, should be taken into account and, if so, what effect the lapse of that offer had.

Trustees of Stokes Pension Fund –v-  
Western Power Distribution (South  
West) plc [2005] EWCA Civ 854

On the first question the Court held:

Trustees of Stokes Pension Fund –v-  
Western Power Distribution (South  
West) plc [2005] EWCA Civ 854

The Court has a discretion to order an offer not made in accordance with Part 36 (including an offer made before commencement of proceedings not followed by a payment into Court within 14 days of service) shall have the costs consequences of Part 36, by Part 36.1 (2).

Trustees of Stokes Pension Fund –v-  
Western Power Distribution (South  
West) plc [2005] EWCA Civ 854

In exercising this discretion a Court should hold that an offer be treated as having the same effect as a payment into Court where:



Trustees of Stokes Pension Fund –v-  
Western Power Distribution (South West)  
plc [2005] EWCA Civ 854

- The offer is expressed in clear terms so that there is no doubt as to what is being offered ie whether it relates to the whole or part of the claim, whether it takes account of any counterclaim, whether it is inclusive of interest;
- The offer is open for acceptance for at least 21 days and otherwise accords with the substance of a Calderbank offer;
- The offer is genuine;
- The Defendant was clearly good for the money at the time when the offer was made.

Trustees of Stokes Pension Fund –v-  
Western Power Distribution (South  
West) plc [2005] EWCA Civ 854

A Claimant who challenged whether the offer was genuine, or that the Defendant was good for the money, would generally have to do so at the time, and the best way of raising the challenge would be to accept the offer and see if payment was made. Otherwise the Court was likely to infer the Claimant really thought the offer was too low.



Trustees of Stokes Pension Fund –v-  
Western Power Distribution (South  
West) plc [2005] EWCA Civ 854

On the second question the Court held:

Trustees of Stokes Pension Fund –v-  
Western Power Distribution (South  
West) plc [2005] EWCA Civ 854

Although the offer was no longer open for acceptance had that offer been accepted, when it was open, the case would have been concluded at that stage and, in this sense, all further costs could be said to result from the decision not to accept it.

Trustees of Stokes Pension Fund –v-  
Western Power Distribution (South  
West) plc [2005] EWCA Civ 854

There was no suggestion the Claimant would have accepted the offer, and reached an agreement on costs, after the 21 days if the offer had remained open.

Trustees of Stokes Pension Fund –v-  
Western Power Distribution (South  
West) plc [2005] EWCA Civ 854

The situation might be different where the Court held the Claimant acted reasonably in not accepting the offer within the 21 days the offer remained open for acceptance.

Trustees of Stokes Pension Fund –v-  
Western Power Distribution (South  
West) plc [2005] EWCA Civ 854

The offer was, therefore, effective for costs purposes and the appeal was allowed.

Read -v- Edmed [2004] EWHC 3274  
(QB)

The Claimant made an offer of 50% on liability. Following trial of this issue the Court entered judgment for the Claimant at 50%.

## Read -v- Edmed [2004] EWHC 3274 (QB)

The Claimant had not obtained a more advantageous order than the Part 36 offer so the Court was not able to award indemnity costs under that rule. However, the Claimant recovered indemnity costs under Part 44 on the basis that the offer had been right.

## Proposed Changes

Because of the degree of uncertainty caused by recent cases the Department for Constitutional Affairs has carried out a consultation about changes to Part 36. Having undertaken that consultation a response has now been issued by the Department and some amendments proposed to Part 36.



## Proposed Changes

There are a number of key proposals.

## Proposed Changes

Part 36 offers will remain but Part 36 payments will be replaced, where appropriate, with “payments in support” of Part 36 offers.

## Proposed Changes

In a money claim, to be effective for Part 36, one of the following conditions will have to be satisfied:

## Proposed Changes

- The offer must be made by a Government or Health Service body; or
- The offer must be made by an indemnified Defendant who has supplied a written statement from the indemnifier confirming it is accepted the Defendant has valid insurance or indemnity cover at least up to the sum offered and that this sum will be paid if accepted by the Claimant; or
- A payment in support, equal to the amount offered, is paid; or
- There has been an interim payment of the amount offered.

## Proposed Changes

After the time for which the offer is expressed to remain open for acceptance has expired the offer may be withdrawn or its terms changed without having to seek permission of the Court.

## Proposed Changes

Until formal notice of withdrawal or change of terms has been given the offer will remain open for acceptance (but, unless the Court otherwise orders, the party accepting the offer out of time will be liable for the costs of the other party from the expiry of the relevant period).

## Proposed Changes

Where there are recoverable benefits, and further benefits have accrued since the offer was made, the Court may direct the amount of the offer shall be reduced by a sum equivalent to any further recoverable benefits.

## Proposed Changes

If an offer is withdrawn it will either have no costs consequences under Part 36 or those consequences will be limited to the time the offer remained open for acceptance.



## Proposed Changes

Cost consequences, under Part 36, will be applicable not just “at trial” but “upon Judgment being entered”.

## Proposed Changes

Costs consequences will follow if either party equals or obtains judgment on more advantageous terms than his or her own Part 36 offer.

## Proposed Changes

If there are recoverable benefits the question as to whether judgment equals or is more advantageous than an offer will be determined on the net basis, once recoverable benefits identified under the judgment have been deducted.

## Proposed Changes

Part 44 is likely to be amended so that Part 36 is a self-contained code.

Tactics?











Part 36