

## Chapter 64 Part 36 Offers

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## MAIN PROVISIONS

CPR, Part 36, and PD 36 on offers to settle.

CPR, Part 37, on payments into court.

In this chapter, old Part 36, old Part 37, old PD 36 and old PD 37, refer to the versions of CPR, Part 36 and 37, PD 36 and PD 37, in force immediately before 6 April 2007. Those versions may be viewed at the Companion Web Site for *Blackstone's Civil Practice*, [www.oup.com/blackstones/civil](http://www.oup.com/blackstones/civil). The rules in force before 6 April 2007 are discussed in chapter 64A, which is also at the Companion Web Site. Chapter 64A is a revised version of chapter 64 from *Blackstone's Civil Practice 2006*.

The following procedural checklists, which are at the front of the book, are relevant to this chapter:

**Procedural checklist 29** Offer to settle (from 6 April 2007)

**Procedural checklist 30** Part 36 payment (before 6 April 2007)

## INTRODUCTION

- 64.1** In order to encourage parties to settle their dispute, CPR, Part 36, lays down a system for making formal offers having costs consequences if they are unreasonably refused. It has long been recognised that there is a public interest in parties seeking to settle their disputes rather than allowing their claims to be litigated through to trial. Settlements bring disputes to a swift conclusion, avoid most of the costs involved in protracted litigation, save court time, and avoid a great deal of the antagonism that often underlies litigation. A party who receives a realistic formal offer will ordinarily accept that offer, thereby compromising the claim. If a formal offer is refused, the litigation will continue, but the principle is that the offeror will be awarded its costs from the date the offer expired if the offeree fails to do better than the terms of the offer when the claim is finally determined.

The fundamental function of a Part 36 offer is to put the claimant on risk as to costs if, as a result of the contingencies of litigation, it later transpires that the claimant is unable to beat the terms of the offer (*Matthews v Metal Improvements Co. Inc.* [2007] EWCA Civ 215, LTL 14/3/2007).

As from 6 April 2007, old Part 36 was completely replaced. The new version provides for a unified system of making Part 36 offers, abolishing Part 36 payments and many of the other distinctions drawn by the original provisions. Payments into court survive to the limited extent provided by Part 37 (which replaced old Part 37 also with effect from 6 April 2007). Payments into court are now restricted to money paid into court under court orders, payments into court in support of a defence of tender before claim, and payments under various enactments (for which see PD 37 and 64.48).

This chapter mainly describes the law as it applies to offers to settle made on or after 6 April 2007. A brief description of the pre-6 April 2007 law is given in 64.2. There are detailed transitional provisions dealing with Part 36 offers and payments made up to 5 April 2007, which are described at 64.49 to 64.54. In so far as an application or appeal is governed by the old law, practitioners are referred to chapter 64A and old Part 36, old Part 37, old PD 36 and old PD 37, which may be viewed at the Companion Web Site for *Blackstone's Civil Practice*, [www.oup.com/blackstones/civil](http://www.oup.com/blackstones/civil).

## MAIN FEATURES OF OLD PART 36

With effect from 6 April 2007, the whole of CPR, old Part 36, was replaced with a streamlined system for making formal offers. Between 26 April 1999 and 5 April 2007, old Part 36 provided for:

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- (a) *Part 36 payments*. These involved lodging the sum being offered in court, and sending the offeree a formal notice of payment in (form N242A). They were the required method of making formal offers to claimants in money claims after proceedings were issued. A claimant could accept the offer within 21 days after service of the N242A, the acceptance being made using Form 201.
- (b) *Defendants' Part 36 offers*. These were used where Part 36 payments could not be used (in non-money claims, and in money claims before proceedings were issued). They were offers to settle, expressed to be without prejudice save as to costs, made by letter and containing certain information laid down by old Part 36. Slightly different formalities applied to Part 36 offers made before (old r. 36.10) and after (old r. 36.5) the commencement of proceedings. Part 36 offers were often called *Calderbank* letters, from *Calderbank v Calderbank* [1976] Fam 93, where the practice was first approved. A claimant would be given 21 days from when the offer was made in order to decide whether to accept. An acceptance would be given by letter.
- (c) In mixed money and non-money remedy claims, a defendant making a formal offer was required to make a Part 36 payment in respect of the money remedy, and a Part 36 offer in respect of the non-money remedy. A claimant accepting the Part 36 payment within 21 days was deemed to accept the Part 36 offer as well.
- (d) *Claimants' Part 36 offers*. Whether the claim was for money or other remedies, and whether proceedings had started or not, a claimant was permitted to make a claimant's Part 36 offer. This was made by letter, expressed to be without prejudice save as to costs, and was open for acceptance for 21 days. A claimant using the procedure was essentially challenging the defendant either to compromise the claim on the claimant's terms, or fight the case to trial and seek to restrict the relief granted to something less favourable to the claimant than the terms of the offer. A defendant who failed to do that could be ordered to pay interest at up to 10 per cent above base rate, indemnity basis costs and interest on those costs at up to 10 per cent above base rate from the expiry of the offer.

In addition, there were special rules governing making offers in personal injury claims for future pecuniary loss (old r. 36.2A), claims for provisional damages (old r. 36.7) and where a defendant was awaiting a certificate of recoverable benefits under the Social Security (Recovery of Benefits) Act 1997 (old r. 36.23). These special cases have been carried forward into the new version of **Part 36**. A defendant who made a Part 36 offer before proceedings were issued was required to pay the amount offered into court within 14 days of service of the claim form (old r. 36.10(3)).

The scheme laid down by old Part 36 was undermined by a number of appellate decisions which sought to apply old r. 36.1(2). This provided that if an offer was not made in accordance with the rules in old Part 36, it would only have the consequences specified in old Part 36 if the court so ordered. The final five words were given an undue prominence. *Crouch v King's Healthcare NHS Trust* [2004] EWCA Civ 1332, [2005] 1 WLR 2015, held that it was permissible for NHS Trusts in clinical dispute claims to make formal offers without making Part 36 payments despite the fact these were pure money claims. *Trustees of Stokes Pension Fund v Western Power Distribution (South West) plc* [2005] EWCA Civ 854, [2005] 1 WLR 3595, went further. This held that the court could give full effect to a Part 36 offer in a money claim if it was clear, expressed to be open for 21 days, was genuine, and if the defendant was good for the money. This struck at the



roots of the distinction between Part 36 payments and Part 36 offers, and is the main reason for the complete replacement of **Part 36** with effect from 6 April 2007.

### ADVISING ON PART 36 OFFERS

- 64.3** Advising on the terms to offer under CPR, **Part 36**, requires a great deal of professional judgment. Likewise, advising on whether an offer should be accepted requires a balancing of a number of factors, including risks on liability (including any contributory negligence and counterclaim or set-off) and risks on the amount of damages, as well as considering the likely level of interest that might be awarded. In claims where the prospects turn on whether evidence might be allowed in or disallowed, either in a future application or at trial, assessing the risks is even more difficult. Clients must be fully informed of the costs implications of the offer. This will include the amount that will be deducted by the adviser's firm in respect of costs, how that sum is calculated, and the client's right to the assessment of the firm's costs (Solicitors' Code of Conduct 2007, guidance to rule 2, para. 37). A legal adviser will be expected to give reasons for advice on whether offers should be accepted, and should concentrate on giving clear advice that can be readily understood by the client. Legal advisers are not required, particularly if advice is being given on the day of a trial, to engage in defensive advocacy by giving their clients a catalogue of every factor that might have a bearing on whether an offer should be accepted (*Moy v Pettman Smith* [2005] UKHL 7, [2005] 1 WLR 581).

### NON-DISCLOSURE

#### Non-disclosure of Part 36 offers

- 64.4** There are restrictions on disclosure of Part 36 offers. CPR, r. 36.13(1), provides that a Part 36 offer will be treated as 'without prejudice except as to costs'. The fact that a Part 36 offer has been made is not to be communicated to the trial judge until all questions of liability and quantum have been decided (r. 36.13(2)). Similar restrictions apply to appeals (see r. 52.12(1)) and to old-style payments into court (old r. 36.19(2)). The restriction on disclosure in r. 36.13(2) applies to the trial judge, so does not prevent the offer being referred to the judge dealing with an application for summary judgment or striking out on the question of costs arising from that application, even if remedies have yet to be decided (*Experience Hendrix v Times Newspapers Ltd* [2008] EWHC 458 (Ch), LTL 14/3/2008). If this happens, other without-prejudice correspondence may be referred to in order to ensure the judge is not given a distorted picture (*Experience Hendrix v Times Newspapers Ltd*). In advance of trial a request should be made to the court office to remove all references to any offers to settle under **Part 36** (and interim payments) from the court file to avoid accidental disclosure to the trial judge. However, r. 36.13(2) will not apply where (r. 36.13(3)):
- (a) the defence of tender before claim has been raised;
  - (b) the proceedings have been stayed under r. 36.11 following acceptance of a Part 36 offer; or
  - (c) where the offeror and offeree agree in writing that it should not apply.

The embargo in r. 36.13 on disclosing the existence of Part 36 offers to the judge until the case has been decided means that they are only relevant in deciding orders as to costs. They cannot be used on questions relating to the date for assessing damages or on the amount of interest to allow (*Johnson v Gore Wood and Co. (No. 2)* [2004] EWCA Civ 14, *The Times*, 17 February 2004).

If there is an inadvertent disclosure of a Part 36 offer, the judge has a discretion whether to order a new trial, but may continue if satisfied that no injustice will be done (*Millensted v Grosvenor House (Park Lane) Ltd* [1937] 1 KB 717). *Millensted v Grosvenor House (Park Lane) Ltd* was approved by *Garratt v Saxby* [2004] EWCA Civ 341, [2004] 1 WLR 2152. If, after inappropriate disclosure of a Part 36 offer, the judge thinks it proper or necessary for the due administration



of justice, he may refuse to hear the trial any further and direct that it be tried by another judge. However, the judge should not be too ready to adopt this course, and if satisfied that no injustice will be done, may continue with the trial. Matters to consider include the overriding objective, saving expense and dealing with claims justly and proportionately. If a new trial is ordered, the court will almost certainly consider making a wasted costs order against the legal representative at fault.

Disclosure of a Part 36 offer outside the proceedings in a way which will not come to the judge's attention does not harm or infringe the integrity of the court's process and requires no action by the court (*Re a Company (No. 007466 of 2003)* [2004] EWHC 35 (Ch), [2004] 1 WLR 1357).

### Applications and non-disclosure to the trial judge

Much of the activity relating to making and accepting Part 36 offers is done without needing court permission. Applications to the court are necessary for a number of purposes: **64.5**

- (a) where a Part 36 offer is to be accepted by a child or a protected party, where court approval must be sought (see **64.31**);
- (b) where there is an acceptance of an offer made by some of several defendants, or there are further deductible benefits, or an apportionment is required in a Fatal Accidents Act case (see **64.30** and **64.32**);
- (c) where an acceptance is after the start of a trial (CPR, r. 36.9(3)(d); **64.29**);
- (d) where the offeree seeks to withdraw or reduce an offer during the offer period (see **64.18**); and
- (e) where the offeree seeks an order clarifying a Part 36 offer (see **64.22**).

In situation (a) above, if proceedings have not been commenced, the application is made by issuing a Part 8 claim (see **PD 8, para. 3.1**). All other types of application relating to Part 36 offers (including situation (a) after the substantive claim has been issued) are made under the usual interim procedure in **Part 23** or at the trial or other hearing (**PD 36, paras 2.2 and 3.2**). In order to preserve the integrity of the offer in the event that the application is refused, such applications must be dealt with by a judge other than the judge (if any) allocated in advance to conduct the trial, unless the parties agree that such judge can hear the application (**PD 36, paras 2.2 and 3.2**).

### Split trials and Part 36 offers

*HSS Hire Services Group plc v BMB Builders Merchants Ltd* [2005] EWCA Civ 626, [2005] 1 WLR 3158, deals with cases where a claimant wins on liability at a split trial after the defendant has made a Part 36 offer. Other than in the most exceptional case, the question of costs should be reserved until determination of quantum. After the trial on liability the conditions for disclosing the amount of the offer in CPR, r. 36.13(2), have not been met, and it will be only after the determination of quantum that the court can decide whether the Part 36 offer was effective for costs purposes. In *Shepherds Investments Ltd v Walters* [2007] EWCA Civ 292, LTL 3/4/2007, costs were reserved until the outcome of an account for profits in a case where there was a claimant's Part 36 offer. This case goes further than *HSS Hire Services Group plc v BMB Builders Merchants Ltd*, where the offer was made by the losing defendant, rather than the winning claimant. **64.6**

## OFFERS TO SETTLE UNDER THE NEW CPR, PART 36

### Offers to settle

An offer to settle within the meaning of CPR, **Part 36** (a 'Part 36 offer'), must be made in writing and comply with the formalities described at **64.8**. One basic set of formalities applies to all Part 36 offers, although there are additional requirements dealing with particular circumstances. Unlike old Part 36, there is no requirement to pay money into court in **64.7**

money claims. The party making the offer is called the ‘offeror’, and the party to whom the offer is made is the ‘offeree’ (r. 36.3(1)(a) and (b)).

A Part 36 offer may be made at any time, including before the commencement of proceedings (r. 36.3(2)(a)) or in appeal proceedings (r. 36.3(2)(b)). A Part 36 offer only has the consequences set out in r. 36.14 (see 64.36 to 64.45) in relation to the costs of the proceedings in respect of which it is made, and not in relation to any appeal from the final decision in those proceedings (r. 36.3(4)). Parties are not obliged to use the Part 36 format when making an offer to settle, but if they do not, the consequences in rr. 36.10, 36.11 and 36.14 do not apply (r. 36.1(2)). Instead, the fact that a party has made an offer which does not comply with Part 36 is one of the matters that the court is obliged to take into account when having regard to all the circumstances in exercising its general discretion on costs in r. 44.3(4).

Normally, a Part 36 offer should remain open for acceptance for at least 21 days (r. 36.2(2)(c), and see 64.16). If it is withdrawn (see 64.18 to 64.20) the offeror loses the costs and interest effects of a subsisting Part 36 offer (r. 36.14(6)(a)).

### Formalities governing Part 36 offers: basic contents

- 64.8** A Part 36 offer intended to take effect in accordance with Part 36 must comply with the formalities set out in CPR, r. 36.2. Such an offer must:
- be in writing (r. 36.2(2)(a)). Although a Part 36 offer may be made in a letter, it is better to use form N242A (see PD 36, para. 1.1);
  - state on its face that it is intended to have the consequences of Part 36 (r. 36.2(2)(b));
  - if made at least 21 days before trial, specify a period of not less than 21 days within which the defendant will be liable for the claimant’s costs in accordance with r. 36.10 if the offer is accepted (r. 36.2(2)(c) and (3));
  - state whether it relates to the whole of the claim or part of it or to an issue that arises in the claim, and if so, which part or issue (r. 36.2(2)(d)). An offer may relate solely to liability (r. 36.2(5)); and
  - state whether it takes into account any counterclaim (r. 36.2(2)(e)).

In addition, a Part 36 offer needs to state the terms of the proposed compromise, which should be sufficiently precise and certain for an effective contract to be formed if the offer is accepted. In cases involving the enjoyment of land and interests in land, often it is prudent to include a marked-up scale plan as an attachment to the offer. In all cases it is important to be clear whether the offer is in full and final settlement of all matters in dispute between the parties, or defined matters between the parties, and whether the offer takes into account matters such as any cross-claim or previous interim payment.

### Terms as to costs

- 64.9** There is a long-standing distinction, when it comes to costs, between disputes where proceedings have and have not been issued. If proceedings have been issued, the court has jurisdiction to award costs as the court seised of the proceedings. If there are no proceedings, costs can only be payable by agreement (see the **Senior Courts Act 1981**, s. 51(1), and 66.2). In order to ensure that Part 36 offers have effective costs consequences, CPR, r. 36.2(2)(c), provides that a Part 36 offer must specify a period of not less than 21 days within which the defendant will be liable for the claimant’s costs in accordance with r. 36.10 if the offer is accepted. Making express provision for costs in this way overturns the decision in *Mitchell v James* [2002] EWCA Civ 997, [2004] 1 WLR 158, which held under the old Part 36 that a post-issue Part 36 offer should not contain terms as to costs.

A claimant making a Part 36 offer should not include or make any reference to uplift interest under r. 36.14(3), as this is a discretionary consequence of non-acceptance (*Ali Reza-Delta Transport Co. Ltd v United Arab Shipping Co. SAG (No. 2)* [2003] EWCA Civ 811, [2004] 1 WLR 168).

**Money claims: additional requirements**

A Part 36 offer made by a defendant in a claim for money must offer to pay a single sum of money (CPR, r. 36.4(1)). This rule is subject to two exceptions, see 64.12 and 64.13. An offer to pay all or part of a sum of money at a date later than 14 days following the date of any acceptance is not treated as a Part 36 offer unless the offeree accepts the offer (r. 36.4(2)).

The single sum required by r. 36.4(1) is by r. 36.3(3) treated as inclusive of all interest until:

- (a) the end of the period stated in the offer during which the defendant will be liable to pay the claimant's costs if the offer is accepted, in cases where the Part 36 offer is made at least 21 days before the trial; or
- (b) the date 21 days after the date the offer was made if it was made less than 21 days before the trial.

Under the new version of Part 36 there is no need for the detailed terms approved by *Crouch v King's Healthcare NHS Trust* [2004] EWCA Civ 1332, [2005] 1 WLR 2015, for Part 36 offers made by NHS trusts.

**Personal injuries claims: deduction of benefits**

When making a Part 36 offer in a claim for damages for personal injuries, the defendant should state (CPR, r. 36.15(3)) either: 64.11

- (a) that the offer is made without regard to any liability for recoverable amounts; or
- (b) that the offer is intended to include any deductible amounts.

A defendant who makes a compensation payment in a personal injuries claim is liable to pay the Secretary of State the amount of recoverable benefits paid to the claimant (see the Social Security (Recovery of Benefits) Act 1997, ss. 1, 8 and sch. 2) and also any recoverable lump sum payments as defined in the Social Security (Recovery of Benefits) (Lump Sum Payments) Regulations 2008 (SI 2008/1596), regs 4 and 12 (see the Social Security (Recovery of Benefits) Act 1997, s. 1A, the Pneumoconiosis etc. (Workers' Compensation) Act 1979, and the Mesothelioma Lump Sum Payments (Conditions and Amounts) Regulations 2008 (SI 2008/1963)). Recoverable State benefits arise in a great many personal injury claims, but only payments in pneumoconiosis and mesothelioma claims are recoverable lump sum payments (see the Social Security (Recovery of Benefits) Act 1997, s. 1A(2)). The term 'lump sum' in these provisions must not be confused with the same expression used in relation to periodical payments in 64.12. As a result, most offers made by defendants are stated to include deductible amounts (see point (b) above). Before making such a Part 36 offer, the defendant must apply for a certificate which will provide details of recoverable benefits and recoverable lump sum payments (CPR, r. 36.15(5)). Once the certificate is received, the defendant will be able to comply with r. 36.15(6), which requires the Part 36 offer to state:

- (a) the amount of gross compensation;
- (b) the name and amount of any deductible amount which will reduce the gross amount; and
- (c) the net amount of compensation.

In a case where a defendant makes a Part 36 offer after a certificate has been applied for but before it is received, the defendant must within seven days of receipt of the certificate clarify the offer by stating the details required by r. 36.15(6) (r. 36.15(7)).

Permission is required to accept a Part 36 offer where further deductible benefits have accrued since the date of the offer, see 64.30. The rules relating to success and liability for costs in personal injuries claims with recoverable benefits are discussed at 64.37.

**Personal injuries claims for future pecuniary loss**

Claims for future pecuniary loss in personal injury claims are governed by the Damages Act 1996, s. 2(1), see 61.28. CPR, r. 36.5(3), provides that a Part 36 offer to settle a claim which 64.12

is or includes a claim for future pecuniary loss (whether by the claimant or the defendant) may contain an offer to pay or accept:

- (a) the whole or part of the damages for future pecuniary loss in the form of either:
  - (i) a lump sum (which must be a single sum of money: **rr. 36.5(5) and 36.4**); 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.

**Rule 36.5(4)** lays down a number of compulsory and optional details to be included in a Part 36 offer to settle a personal injury claim involving damages for future pecuniary loss.

Compulsory elements are that the offer must:

- (a) state the amount of any offer to pay the whole or part of any damages in the form of a lump sum (**r. 36.5(4)(a)**);
- (b) state what part of the offer relates to damages for future pecuniary loss to be paid or accepted in the form of periodical payments (**r. 36.5(4)(c)**), and must specify:
  - (i) the amount and duration of the periodical payment;
  - (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 some other named index, or that it is not to vary by reference to any index); and
- (c) state either that any damages in the form of periodical payment will be funded in a way that ensures that continuity of payment is reasonably secure, or how continuity of payment is to be secured (**r. 36.5(4)(d)**).

Optional elements are (**r. 36.5(4)(b)**) that the offer may:

- (a) state what part of the lump sum, if any, relates to damages for future pecuniary loss; and
- (b) state what part relates to other damages to be accepted in the form of a lump sum.

An offer comprising a lump sum and periodical payments can only be accepted as a whole (**r. 36.5(6)**). If the offeree accepts an offer which includes payment of any part of the damages through periodical payments, the claimant must within seven days of the acceptance apply to the court for an award of damages in accordance with **rr. 41.4 to 41.10** and **PD 41B** (see **r. 36.5(7)**).

### Offers in provisional damages claims

- 64.13** Provisional damages are considered at **61.22 to 61.26**. A Part 36 offer made in a claim which includes a claim for provisional damages must specify whether the offer includes an award of provisional damages (**CPR, r. 36.6(2)**). A provisional damages offer must state a single sum in respect of the immediate damages element in respect of the claimant's existing injuries, calculated on the assumption that the claimant will not develop the disease or suffer the deterioration justifying a claim for further damages (**rr. 36.6(4) and 36.4**). The offer must by **r. 36.6(3)** also state:

- (a) that the sum offered is in satisfaction of the claim for damages on the assumption that the claimant will not develop the disease or suffer the deterioration specified in the offer; and
- (b) that the offer is subject to the condition that the claimant must make any claim for further damages within a specified period.

If the offeree accepts a Part 36 offer for provisional damages, the claimant must within seven days of the acceptance apply to the court for an award of provisional damages in accordance with **r. 41.2** and **PD 41** (see **r. 36.6(5)**).

### Defence of tender before claim

A defendant who wishes to rely on a defence of tender before claim must make a payment into court of the amount said to have been tendered (CPR, r. 37.2). The defence of tender before claim is not available until this has been done (r. 37.2(2)). The payment in should be paid at the time of filing the defence (*Greening v Williams* (1999) *The Times*, 10 December 1999). Usually the payment will be made by cheque, which must be made payable to the Accountant General of the Supreme Court (PD 37, para. 1.1(1)(a)). A litigant in person without a current account may, if the claim is proceeding in a county court or a district registry, lodge cash rather than using a cheque (para. 1.2). The payment must be accompanied by a copy of the defence and by Court Funds Office form 100. Notice of the payment in must be served on every other party, and a certificate of service (in form N215) must be filed in respect of each such notice (CPR, r. 37.1). 64.14

Money paid into court in support of a defence of tender before claim may not be paid out without the court's permission, except where a Part 36 offer is accepted without needing permission and the defendant agrees that the sum in court can be used to satisfy the offer (r. 37.1). If the claimant is willing to accept the sum in court, it usually means that the defendant has succeeded on his defence of tender before claim, in which event the claimant should pay the defendant's costs from the date of the pre-claim tender.

The rule that Part 36 offers must not be communicated to the trial judge does not apply to tenders before claim (r. 36.13(3)(a)).

### Date a Part 36 offer is made

A Part 36 offer is made when it is served on the offeree (CPR, r. 36.7(1)). This wording removes the decision in *Charles v NTL Group Ltd* [2002] EWCA Civ 2004, LTL 13/12/2002, which held that the strict rules on service in CPR, Part 6 (see chapter 15), did not apply to Part 36 offers (although they did apply to Part 36 payments). The effect is that provided one of the prescribed methods of service in r. 6.20 is used, there is no need for the offeree to prove receipt because of the irrebuttable presumption of service in r. 6.26. The intention appears to be that the provisions of Part 6 apply even to Part 36 offers made before proceedings are commenced. 64.15

Where the offeree is legally represented, the offer must be served on the legal representative (PD 36, para. 1.2).

### Relevant period for acceptance of a Part 36 offer

A Part 36 offer must specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with CPR, r. 36.10, if the offer is accepted (r. 36.2(2)(c)). There is no provision within Part 36 for suspension of the relevant period while the offeree investigates the offer (*Martin v Randall* [2007] EWCA Civ 1155, LTL 22/10/2007). If the offeree wants more time, a time application should be made (in the absence of consent) under r. 3.1(2)(a) (see 46.22). 64.16

In the case of an offer made not less than 21 days before the trial, the period stated under r. 36.2(2)(c), or such longer period as the parties may agree, is 'the relevant period' for the purposes of Part 36 (r. 36.3(1)(c)).

In the case of a Part 36 offer made less than 21 days before the trial, 'the relevant period' is the period up to the end of the trial or such other period as the court has determined (r. 36.3(1)(c)). In order for a Part 36 offer made less than 21 days before trial to have the full consequences in the event of non-acceptance set out in r. 36.14, it is necessary to obtain an order abridging the relevant period (see rr. 3.1(2)(a) and 36.14(6)(c)).

**Minor defects in a Part 36 offer**

- 64.17** An offer which does not comply with the technical requirements of CPR, r. 36.2, does not have the consequences on acceptance or following judgment set out in rr. 36.10, r. 36.11 and r. 36.14 (see r. 36.1(2)). The requirements referred to in r. 36.2 are the formal requirements which apply to all Part 36 offers (see 64.8), and also the specific requirements which apply in personal injuries claims relating to damages for future pecuniary loss (r. 36.5; see 64.12), provisional damages (r. 36.6; see 64.13), and deduction of benefits (r. 36.15; see 64.11).

A question arises as to whether minor defects in any of these requirements can be put right using the power to cure errors of procedure in r. 3.10. This rule provides that errors of procedure do not invalidate steps taken in proceedings unless the court so orders. It is suggested that this means that r. 3.10 does not apply to a defective offer, because r. 36.1(2) says that nothing in Part 36 prevents a party from making an offer to settle in whatever form he chooses. A defective offer is not therefore without validity in any event. It simply does not have the consequences set out in rr. 36.10, 36.11 and 36.14. As the note to r. 36.1 says, the court still has to take into account an offer that does not comply with r. 36.2 when deciding the question of costs (r. 44.3). The implication is that this will not necessarily be in the same terms as if the offer had complied with r. 36.2. This is discussed further at 64.44.

A party who realises that an offer he has made does not fully comply with Part 36 should replace the offer, before acceptance, with an offer that does comply. The consequences set out in rr. 36.10, 36.11 and 36.14 will then apply from that time.

There is a question whether *Hertsmere Primary Care Trust v Administrators of Balasubramaniam's Estate* [2005] EWHC 320 (Ch), [2005] 3 All ER 274, continues to provide useful guidance in this area. The claimants made a Part 36 offer which failed to state it could only be accepted after 21 days if the parties agreed the liability for costs or if the court gave permission, in breach of one of the requirements under old Part 36. The defendant noticed the defect, informed the claimants that the offer was defective, but declined to say why. The defect was described by Lightman J as an obvious error and a mere technicality (at [10]). As the parties had a duty under r. 1.4(2)(a) to cooperate to rectify technical errors, the judge held that the defendant could not take advantage of its failure to comply with the overriding objective, and the defect could be ignored.

**DEALING WITH THE OFFER****Withdrawing or changing a Part 36 offer before the expiry of the relevant period**

- 64.18** Before the expiry of the relevant period (see 64.16), a Part 36 offer may be withdrawn or its terms changed in a way less advantageous to the offeree only with the court's permission (CPR, r. 36.3(5)). This is a significant variation on the normal rules of offer and acceptance, and to this extent overturns the decision in *Scammell v Dicker* [2001] 1 WLR 631 (which held that the offeror is always free to withdraw a Part 36 offer before acceptance).

Permission to withdraw a Part 36 offer during the relevant period is sought by making an application in accordance with Part 23 (PD 36, para. 2.2(1)).

The court probably has jurisdiction to allow a Part 36 offer to be withdrawn or changed in the 21-day period after service of the Part 36 offer, and even if the claimant serves a notice of acceptance during that 21-day period (*Flynn v Scougall* [2004] EWCA Civ 873, [2004] 1 WLR 3069, a case decided under old Part 36). In *Flynn v Scougall* May LJ said, at [30] and [34], that the court could entertain a defendant's application to withdraw or reduce a Part 36 payment which was made after the claimant had served notice of acceptance. It is submitted that this is pushing the old theory that payments in were not contractual (see [26], where May LJ quotes

Goddard LJ saying this in *Cumper v Potheary* [1941] 2 KB 58 at p. 67) too far, and the better view is that once a Part 36 offer has been accepted the case has been settled.

Whether to grant permission to withdraw or change a Part 36 offer will be considered applying the overriding objective. The following factors, if present, are likely, it is submitted, to render it just to allow a defendant to withdraw or change a Part 36 offer:

- (a) the payment was induced by fraud; or
- (b) a mistake affects the terms of the offer; or
- (c) the discovery of further evidence puts a wholly different complexion on the case; or
- (d) there has been a change in the legal outlook brought about by a judicial decision.

The fact the claimant has given notice of acceptance, if present, was said to be an important factor in *Flynn v Scougall*. Merely receiving an expert's report contradicting the evidence of the claimant's expert is unlikely to be a sufficient change of circumstances to warrant granting permission to the defendant (*Flynn v Scougall*).

### Withdrawing or changing a Part 36 offer after the expiry of the relevant period

After expiry of the relevant period and provided 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 (CPR, r. 36.3(6)). The offeror withdraws or changes a Part 36 offer by serving written notice on the offeree (r. 36.3(7)). If a Part 36 offer is not withdrawn, it may be accepted even after the relevant period (r. 36.9(2)).

A change in the terms of a Part 36 offer (whether it is an improved offer or one which is less advantageous to the offeree) takes effect when written notice of the change is served on the offeree (rr. 36.2(2)(a) and 36.7(2)).

### Effect of a withdrawn Part 36 offer

A withdrawn Part 36 offer does not have the effect on costs and interest (as laid down in CPR, r. 36.14(2) and (3)) of a subsisting Part 36 offer (r. 36.14(6)(a)). A note to r. 36.14 points out that r. 44.3 requires the court to consider an offer to settle which does not have the costs consequences set out in Part 36 in deciding what order to make about costs. This gives the court a wide scope on costs, to be exercised applying the overriding objective. In a suitable case the court can even treat the withdrawn Part 36 offer as having the same costs consequences as if it had not been withdrawn (see *Trustees of Stokes Pension Fund v Western Power Distribution (South West) plc* [2005] EWCA Civ 854, [2005] 1 WLR 3595, discussed at 64.44).

### Rejection of a Part 36 offer

There is no need for the offeree to give an express rejection of a Part 36 offer. In most cases the offeree will keep his options open by not responding to a Part 36 offer (see 64.27). An express rejection will operate in accordance with its terms. Making a counter-offer does not operate as a rejection of a Part 36 offer (CPR, r. 36.9(2), says a Part 36 offer may be accepted at any time 'whether or not the offeree has subsequently made a different offer', thereby reversing the effect of *Hawley v Luminar Leisure plc* [2006] EWCA Civ 30, *The Times*, 14 February 2006, a decision under the old Part 36).

### Clarification of a Part 36 offer

It may happen that a party makes a Part 36 offer, but that its terms are not clear to the offeree. This may occur where the claim raises more than one cause of action, or where there are joint claimants. It may also occur where the Part 36 offer fails to make clear what is included. In such cases, the offeree may request the offeror to clarify the offer, but the request must be made within seven days of the offer being made (CPR, r. 36.8(1)). The time when an offer or

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payment is made is defined as the date it is served (see r. 36.7(1)). If the offeror fails to give clarification as requested within seven days of receiving the request, the offeree may apply for an order that this be done, unless the trial has started (r. 36.8(2)). An application for an order requiring clarification should be made in accordance with Part 23 and the application notice should state the respects in which the terms of the Part 36 offer are said to require clarification.

Where the Part 36 offer fails to make clear what it includes, an order to clarify will almost certainly be made, in accordance with the overriding objective. Cases where the claimant or claimants want a global offer broken down between the respective claimants are less clear-cut. Under the RSC, the court could order a defendant to break down a global payment in on the ground that it was 'embarrassing'. CPR, r. 36.8, uses the term 'clarification', and is almost certainly intended to lay down a different test. It is arguable that the court only has jurisdiction under r. 36.8 where the Part 36 offer is unclear. This would mean that, provided the offer gives the details required by Part 36, and states clearly whether it covers the whole claim, or which parts, and whether it includes interest and any counterclaim etc., no further breakdown can be ordered. The alternative argument that r. 36.8 gives the court a wide discretion to order a more detailed breakdown, for example, into different heads of damages, or to give details of dates and rates applied, is unsustainable given the requirement in r. 36.4(1) that a Part 36 offer in a money claim must be for a single sum of money.

Where the court does order clarification to be given, the order must specify the date when the Part 36 offer is to be treated as having been made (r. 36.8(3)). Where clarification is necessary to enable the offeree to consider the offer properly, the date is likely to be the date of the order as opposed to the date the offer was served. This allows the offeree more time in which to accept the offer without requiring the court's permission, and is therefore not necessarily in the interests of the offeror. It is suggested that offers should be suitably and succinctly drafted in order to avoid clarification applications.

## ACCEPTANCE

### Notice of acceptance of a Part 36 offer

- 64.23** A Part 36 offer is accepted by serving written notice of the acceptance on the offeror (CPR, r. 36.9(1)). It is also necessary to file the notice of acceptance with the court (PD 36, para. 3.1).

The rules distinguish between the following situations on the timing of giving notice of acceptance:

- (a) Normally, the offeror should aim to serve notice of acceptance during the relevant period. In this situation the claimant will be entitled to its costs from the defendant up to the date of notice of acceptance (see 64.24).
- (b) A notice of acceptance served after the relevant period is effective only if the offer has not been withdrawn before service of the notice of acceptance (the intended effect of r. 36.9(2)). Costs in this situation are as discussed at 64.27 below.
- (c) If a notice of acceptance served after the trial has started, the court's permission is required to accept it (r. 36.9(3)(d)).
- (d) A notice of acceptance served after the end of the trial, but before judgment is handed down, is only effective if the parties agree (r. 36.9(5)).

### Costs consequences of accepting a Part 36 offer

- 64.24** **Acceptance within the relevant period relating to the whole claim** Subject to four exceptions (see 64.25 to 64.28), where a Part 36 offer is accepted within the relevant period

(see 64.16) the claimant is entitled to the costs of the proceedings from the date on which notice of acceptance was served on the offeror (CPR, r. 36.10(1)). This applies whether the offer was made by the claimant or defendant. The claimant's costs include any costs incurred in dealing with any counterclaim if the Part 36 offer states that it takes into account the counterclaim (r. 36.10(6)). In a defamation claim the defendant will usually be required to pay the claimant's costs of and relating to a statement in open court following acceptance of a Part 36 offer (*Phillipps v Associated Newspapers Ltd* [2004] EWHC 190 (QB), [2004] 1 WLR 2106).

Costs recoverable under r. 36.10 are assessed on the standard basis (see 68.34) if the amount of costs is not agreed (r. 36.10(3)). There is no discretion to award indemnity-basis costs, even if the Part 36 offer is made by the defendant and is more advantageous to the claimant than a rejected Part 36 made by the claimant (*Dyson Appliances Ltd v Hoover Ltd (No. 3)* [2002] EWHC 2229 (Ch), [2003] FSR 21).

**Acceptance within the relevant period relating to part of the claim** Where a defendant makes a Part 36 offer relating to only part of the claim, the claimant will be entitled to his standard-basis costs of the proceedings up to the date of the notice of acceptance if he accepts the offer within the relevant period and abandons the balance of the claim (CPR, r. 36.10(2)). This rule is stated to be subject to the court otherwise ordering. A claimant accepting a Part 36 offer is only entitled to the costs of the proceedings as of right where the acceptance brings the whole of the proceedings to an end (*Clark Goldring and Page Ltd v ANC Ltd* (2001) *The Times*, 27 March 2001). Where a Part 36 offer relates to part of the claim, and the rest is not abandoned, the effect of rr. 36.10 and 36.11 is that the court has a discretion on the question of costs. 64.25

**Acceptance of Part 36 offers made less than 21 days before trial** Where a Part 36 offer is made less than 21 days before the trial, and is accepted, the parties may agree the liability for costs, but if they do not, the court will make an order for costs (CPR, r. 36.10(4)(a)). 64.26

**Acceptance of Part 36 offers after the relevant period** Where a Part 36 offer is accepted after the relevant period expires, the parties may agree the liability for costs, but if they do not, the court will make an order for costs (CPR, r. 36.10(4)(b)). Where the court makes an order for costs under r. 36.10(4)(b), unless it orders otherwise, the order for costs will provide that: 64.27

- (a) the claimant is entitled to his costs of the proceedings up to the date when the relevant period expired; and
- (b) the offeree will be liable for the offeror's costs for the period from the expiry of the relevant period to the date of acceptance (r. 36.10(5)).

A strong case will be needed before the court will be persuaded to make any other order as to costs. In *Matthews v Metal Improvements Co. Inc.* [2007] EWCA Civ 215, LTL 14/3/2007, the Court of Appeal said it was a fundamental misunderstanding of the function of Part 36 offers to ask whether it had been reasonable for the claimant not to have accepted the offer based on the information available to the claimant at the time it was made. Part 36 offers are designed to put the claimant on risk as to costs if, as a result of the contingencies of litigation, it later transpires that the claimant is unable to beat the terms of the offer. A reduction in the value of the claim after the offer was made due to the onset of a non-accident-related medical condition provided no basis for departing from the position stated in r. 36.10(4).

### Acceptance in Warsaw/Montreal Convention cases

The Warsaw Convention 1929, art. 22(4) (as amended by The Hague Convention 1955), which is set out in the schedule to the Carriage by Air Act 1961, provides: 64.28

The limits prescribed in this article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation

incurred by the plaintiff. The foregoing provision shall not apply if the amount of damages awarded . . . does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

The equivalent provision in the Montreal Convention 2004 is art. 22(6).

In *GKN Westland Helicopters Ltd v Korean Air* [2003] EWHC 1120 (Comm), [2003] 2 All ER (Comm) 578, the defendant made an offer within six months of the issue of the claim, then made a Part 36 payment in a slightly larger amount. The Part 36 payment was accepted. It was held that because the Part 36 payment was higher than the Warsaw Convention offer, the normal rule in what is now CPR, r. 36.10, applied, and the defendant was liable to pay the claimant's costs of the claim. It was recognised that there is a latent conflict between r. 36.10 and art. 22 of the Convention where a claimant accepts a Part 36 offer which is less than a previous Warsaw Convention offer. The better view is that in such circumstances the Warsaw Convention should prevail, and the defendant should be awarded its costs from the date of the Warsaw Convention offer.

### Permission to accept

- 64.29 Acceptance after the start of the trial** The court's permission is required for an acceptance of a Part 36 offer after the trial has started (CPR, r. 36.9(3)(d)). It is suggested that the principles enunciated in *Capital Bank plc v Strickland* [2004] EWCA Civ 1677, [2005] 1 WLR 3914, are a useful guide to how the discretion should be exercised under r. 36.9(3)(d). This case concerned the late acceptance of a claimant's Part 36 offer under old Part 36.

In the majority of cases permission will be granted, with the only question being as to costs (*Cumper v Potheary* [1941] 2 KB 58 at p. 67, quoted with approval by Longmore LJ in *Capital Bank plc v Strickland* at [17]). However, the court has a wide discretion in the matter, and may refuse permission, for example, where the acceptance is made very late, where there is a doubt about the availability of the money, or where there has been a change of circumstances (at [16]).

If late acceptance is allowed by consent or with the court's permission, the usual rule is that the claimant recovers costs up to the end of the relevant period, and the defendant recovers costs thereafter. This is subject to the court's discretion, and there may be reasons for making some other costs order. For example, the claimant may have accepted the offer after late disclosure of evidence or late amendment by the defendant which has had a material effect on the claimant's prospects. If the change is just an excuse for late acceptance, the usual costs rule will be applied, but where the change has had a real impact the court may allow the claimant to recover costs of the claim up to some later point, even the date of acceptance (*Factortame Ltd v Secretary of State for the Environment, Transport and the Regions* [2002] EWCA Civ 22, [2002] 1 WLR 2438). In exercising its discretion on costs, the court is not restricted to considering the circumstances surrounding the offer, and should consider all the circumstances relevant under r. 44.3, including the parties' willingness to participate in proposed mediation (*Chaudry v Yap* [2004] EWHC 3380 (Ch), LTL 28/10/2004).

- 64.30 Other cases where permission to accept is required** In addition to the situation where a Part 36 offer is accepted after the start of the trial (see 64.29), permission to accept is required where:

- (a) The Part 36 offer is made by some, but not all, of a number of defendants and CPR, r. 36.12(4), applies (r. 36.9(3)(a), see 64.32).
- (b) The claim is for damages for personal injuries, the offer is intended to include any deductible amounts, and further deductible amounts have been paid to the claimant since the date of the offer (r. 36.9(3)(b)). In this situation the application must state the net amount

offered in the Part 36 offer, the deductible amounts accrued at the date of the offer, and those that have subsequently accrued. The application must be accompanied by a copy of the current certificate of recoverable benefits and any recoverable lump sum (PD 36, para. 3.3). If permission to accept is granted, 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 (CPR, r. 36.15(9)).

- (c) An apportionment is required under r. 41.3A (Fatal Accidents Act claims) (r. 36.9(3)(c)).
- (d) Any of the parties is a child or protected party (r. 21.10, see 64.31).

**Acceptance by or on behalf of a child or protected party** CPR, r. 21.10(1), provides that no settlement or compromise relating to a claim by or on behalf of, or against, a child or protected party shall be valid without the approval of the court. In such a case there is no binding agreement until the proposed settlement is approved by the court under r. 21.10. This means that until that time either party may repudiate the settlement (*Dietz v Lennig Chemicals Ltd* [1969] 1 AC 170; *Drinkall v Whitwood* [2003] EWCA Civ 1547, [2004] 1 WLR 462). 64.31

**Acceptance of Part 36 offer made by some of the defendants** In cases where a claimant wishes to accept a Part 36 offer made by some of a number of defendants, there are three situations that need to be distinguished: 64.32

- (a) If the defendants are sued jointly or in the alternative, the claimant may accept the Part 36 offer if he discontinues the claim against the other defendants and those other defendants give written consent to the acceptance of the offer (CPR, r. 36.12(2)).
- (b) If the defendants are alleged to have a several liability, the claimant may accept the offer and continue his claims against the other defendants (r. 36.12(3)).
- (c) In all other cases the claimant must apply to the court for an order permitting him to accept the Part 36 offer (r. 36.12(4)).

### Other consequences of acceptance

**Stay on acceptance** If a Part 36 offer is accepted, the claim will be stayed (CPR, r. 36.11(1)). The stay will be on the terms of the offer where the Part 36 offer relates to the whole claim (r. 36.11(2)). Where the terms of the acceptance include the disposition of an interest in land, the court has the power to order the parties to sign a single document incorporating the terms of the settlement (*Orton v Collins* [2007] EWHC 803 (Ch), [2007] 1 WLR 2953). If the Part 36 offer only related to part of the claim: 64.33

- (a) the claim is stayed as to that part on the terms of the offer; and
- (b) unless the claimant abandons the balance of the claim (for which see r. 36.10(2)), unless the parties agree costs, the liability for costs shall be decided by the court (r. 36.11(3)).

**Time for payment** Unless the parties agree otherwise in writing, where a Part 36 offer to pay money is accepted, payment must be made within 14 days of the acceptance (CPR, r. 36.11(6)(a)). In the case of provisional damages awards and periodical payments awards, the 14 days run from the date of the court order, unless the court orders otherwise (r. 36.11(6)(b)). If the sum is not paid within these time limits, the offeree may enter judgment for the unpaid sum (r. 36.11(7)). 64.34

**Enforcement of agreed terms** A stay under CPR, r. 36.11 (see 64.33), does not affect the power of the court to enforce the terms of the Part 36 offer, nor to deal with any question of costs or interest on costs relating to the proceedings (r. 36.11(5)). Enforcement of a term for the payment of money is effected by entering judgment followed by use of the normal procedures for enforcing judgments (see 64.31 and chapter 76). Terms other than for the payment of money can be enforced by making an interim application to the court, there being no need to commence a new claim (r. 36.11(8)). 64.35

## COSTS CONSEQUENCES OF NON-ACCEPTANCE

### Failing to obtain a judgment more advantageous than a Part 36 offer

**64.36** The main reason for making a Part 36 offer is to gain the costs and interest benefits set out in CPR, r. 36.14. These consequences apply (r. 36.14(1)) where a Part 36 offer is not accepted and either:

- (a) a claimant fails to obtain a judgment more advantageous than a Part 36 offer made by a defendant; or
- (b) judgment is entered against a defendant which is at least as advantageous to the claimant as the proposals set out in a Part 36 offer made by the claimant.

The consequences in r. 36.14 do not apply where the Part 36 offer has been withdrawn, or changed to terms less advantageous to the offeree than the judgment, or if the Part 36 offer was made less than 21 days before the trial (unless the court abridges time). See r. 36.14(6).

Like must be compared with like. Where a Part 36 offer includes interest, the court must recalculate its award of interest to the date of the Part 36 offer in order to determine whether the judgment exceeds the terms of the offer (*Blackham v Entrepouse UK* [2004] EWCA Civ 1109, *The Times*, 28 September 2004). Consistently with *Mitchell v James* [2002] EWCA Civ 997, [2004] 1 WLR 158, the court should ignore any terms in a claimant's Part 36 offer relating to indemnity-basis costs or enhanced interest (see 64.39) in deciding whether the offer exceeds the judgment (*Ali Reza-Delta Transport Co. Ltd v United Arab Shipping Co. SAG (No. 2)* [2003] EWCA Civ 811, [2004] 1 WLR 168).

In *Hall v Stone* [2007] EWCA Civ 1354, *The Times*, 1 February 2008, Smith LJ at [82] said:

In these days where both sides are expected to conduct themselves in a reasonable way and to seek agreement where possible, it may be right to penalise a party to some degree for failing to accept a reasonable offer or for failing to come back with a counter-offer.

In *Carver v BAA plc* [2008] EWCA Civ 412, [2009] 1 WLR 113, it was held that the post-6 April 2007 version of r. 36.14 made a fundamental change to the concept of beating an offer to settle. The phrase used in r. 36.14(1)(a) is whether the claimant fails to obtain a judgment which is 'more advantageous' than the defendant's Part 36 offer. Ward LJ at [30]–[31], said that the phrase 'more advantageous' is more open-textured than the former phrase 'fails to better' in the pre-2007 version of Part 36. It permits a more wide-ranging review of the circumstances of the case, including taking a view on whether the eventual judgment was 'worth the fight'. The court can therefore consider matters such as the costs incurred after the offer, and the emotional stress of taking the case to trial. On the facts, costs were about £80,000, and the judgment of £4,686 was effectively only £51 more than the Part 36 offer. While the claimant was awarded her costs up to the end of the relevant period (see 64.16), there was no order as to costs thereafter. *Carver v BAA plc* is of general application, see *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd (No. 7)* [2008] EWHC 2280 (TCC), 122 Con LR 88.

In a defamation claim, comparing the terms of an offer with the eventual judgment may, depending on the terms of the offer and the events at trial, involve considering the terms and value of any apology and any damage to the reputation of the claimant arising from the evidence given at the trial (*Jones v Associated Newspapers Ltd* [2007] EWHC 1489 (QB), [2008] 1 All ER 240).

### Personal injuries claims: success and deductible amounts

**64.37** The format of Part 36 offers in personal injuries claims with deductible State benefits and recoverable lump sum payments was discussed at 64.11. CPR, r. 36.14(1)(a), applies for the purpose of determining whether the claimant has failed to obtain a judgment more advantageous than such an offer (including a lump sum offered under r. 36.5, for which, see 64.12).

The question is whether the claimant has failed to recover, after taking away deductible amounts, a sum greater than the net amount stated in the Part 36 offer in compliance with r. 36.15(6)(c). Comparison of the award with the net sum in the Part 36 offer is intended to be compliant with the Social Security (Recovery of Benefits) Act 1997, s. 8 and sch 2. It solves the problem identified in *Williams v Devon County Council* [2003] EWCA Civ 365, [2003] PIQR Q68, where old Part 36 required the court to compare the judgment with the gross sum (old r. 36.23(4)).

In comparing the judgment with the net sum under r. 36.15(8), care still needs to be taken to ensure compliance with the rules in the Social Security (Recovery of Benefits) Act 1997 on recouping benefits against appropriate heads of damages and, in relation to recoverable lump sums, between different dependants.

### Successful defendant's Part 36 offer

Assuming the claimant has won on liability, but fails to obtain a judgment more advantageous than a Part 36 offer made by a defendant, unless the court considers it unjust to do so, the court will order: **64.38**

- (a) the defendant to pay the claimant's costs up to the expiry of the relevant period applying the usual principle that costs follow the event (CPR, r. 44.3(2)(a));
- (b) the claimant to pay the defendant's costs from the expiry of the relevant period (r. 36.14(2)(a)); and
- (c) the claimant to pay interest on the defendant's costs (r. 36.14(2)(b)). There is no power to award interest at an enhanced rate on a defendant's costs (*Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hamer Aspden and Johnson* [2002] EWCA Civ 879, [2002] CP Rep 67; *J. Murphy and Sons Ltd v Johnston Precast Ltd* [2008] EWHC 3104 (TCC), LTL 22/12/2008).

### Successful claimant's Part 36 offer

CPR, r. 36.14(3), provides that unless the court considers it unjust to do so, where judgment is entered against a defendant which is at least as advantageous to the claimant as the proposals set out in a claimant's Part 36 offer, the court will order that the claimant is entitled to: **64.39**

- (a) Interest on the whole or part of the sum of money (excluding interest) awarded at a rate not exceeding 10 per cent above base rate for some or all of the period starting with the date on which the relevant period expired. An order running from the date of the offer rather than the expiry of the relevant period will be corrected on appeal (*Martin v Randall* [2007] EWCA Civ 1155, LTL 22/10/2007). Where interest is also awarded on the same sum for the same period under any other power (such as the **County Courts Act 1984, s. 69**, or the **Senior Courts Act 1981, s. 35A**), the total rate of interest may not exceed 10 per cent above base rate (r. 36.14(5)).
- (b) His costs on the indemnity basis (see **68.38**) from the date on which the relevant period expired and ending with the trial or other final disposal of the claim. It does not extend to post-judgment applications, such as an application for a non-party costs order (see **66.66** and *Chantray Vellacott v Convergence Group plc* (2007) LTL 3/10/2007).
- (c) Interest on those indemnity basis costs at a rate not exceeding 10 per cent above base rate. The purpose of an order for interest on indemnity costs is to compensate for the cost of money, or loss of the use of money, borne before trial in relation to payments made on account of costs (*KR v Bryn Alyn Community (Holdings) Ltd* [2003] EWCA Civ 383, [2003] CP Rep 49; *Chantray Vellacott v Convergence Group plc* (2007) LTL 3/10/2007).

The court should not start with the assumption that it should award the maximum enhanced interest, but must stand back and ensure that the enhanced interest does not provide a disproportionate benefit (*Earl v Cantor Fitzgerald International (No. 2)* (2001) LTL 3/5/2001). Enhanced interest will not be granted in defamation claims, following the usual rule against awarding interest in such claims (*McPhilemy v Times Newspapers Ltd (No. 2)* [2001] EWCA Civ 933, [2002] 1 WLR 934; see **62.17**).

**Unjust to make orders under rule 36.14**

**64.40** In considering whether it would be unjust to make an order under CPR, r. 36.14(2) or (3) (see 64.38 and 64.39), the court will, by r. 36.14(4), 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, and in particular the period between the offer and the start of the trial;
- (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 giving or refusing to give information for the purposes of enabling the offer to be made or evaluated. Conduct includes any failure by the claimant to give adequate disclosure to enable the defendant to assess the validity of the claim (*Mamidoil-Jetoil Greek Petroleum Co. SA v Okta Crude Oil Refinery AD* [2002] EWHC 2462 (Comm), [2003] 1 Lloyd's Rep 42).
- (e) Whether it would be unjust to make orders under r. 36.14(3) because the defendant had a good reason for rejecting the offer, such as a reasonable belief in its prospects of success based on the law as it then stood (*Mamidoil-Jetoil Greek Petroleum Co. SA v Okta Crude Oil Refinery AD*).

The fact that the offeror is funded under a CFA is irrelevant when deciding whether to make an order under r. 36.14(3) (*CEL Group Ltd v Nedlloyd Lines (UK) Ltd* [2003] EWCA Civ 1871, [2004] 1 Lloyd's Rep 388).

Awarding indemnity-basis costs after a successful claimant's Part 36 offer implies no misconduct on the defendant (*McPhilemy v Times Newspapers Ltd (No. 2)* [2001] EWCA Civ 933, [2002] 1 WLR 934), its practical effect being to ensure that the claimant does not recover any less than the costs he has in fact incurred (*Petrotrade Inc. v Texaco Ltd* [2002] 1 WLR 947). Indemnity costs and enhanced interest on those costs can be awarded even where the claimant is publicly funded (*Earl v Cantor Fitzgerald International (No. 2)* (2001) LTL 3/5/2001). The enhanced rate of interest on indemnity-basis costs runs from the date upon which the work was done or liability for disbursements was incurred, and runs until judgment. Thereafter, interest on costs is payable under the **Judgments Act 1838, s. 17**, in the usual way (*McPhilemy v Times Newspapers Ltd (No. 2)*).

In *Huck v Robson* [2002] EWCA Civ 398, [2003] 1 WLR 1340, the claimant in a personal injuries claim made a Part 36 offer to settle a dispute on the basis that the defendant was 95 per cent liable. At trial the judge found for the claimant with no deduction for contributory negligence, and the claimant asked for indemnity-basis costs. It was held that while an offer based on marginally less than full liability might be illusory, that was not so in the present case, and the fact that no trial judge would make a finding of only 5 per cent contributory negligence was irrelevant. It was not unjust for the defendant to have to pay indemnity-basis costs and enhanced interest.

**Failing to exceed a withdrawn Part 36 offer**

**64.41** A withdrawn Part 36 offer does not have the costs consequences set out in CPR, r. 36.14 (see r. 36.14(6)(a)). It may nevertheless have an effect on the orders the court makes on costs (rr. 36.1(2) and 44.3). Where a withdrawn offer made by the defendant is more advantageous than the judgment, according to *Garner v Cleggs* [1983] 1 WLR 862 (approved by Longmore LJ in *Capital Bank plc v Stickland* [2004] EWCA Civ 1677, [2005] 1 WLR 3914, at [21]), the principled approach on costs is:

- (a) for the claimant to be awarded costs up to the end of the relevant period;
- (b) for the defendant to be awarded costs from the end of the relevant period to the date of any relevant change of circumstances affecting the risks in the litigation; and
- (c) for the claimant to be awarded costs thereafter.

It may well be that the new scheme introduced with effect from 6 April 2007 will mean this will no longer be followed. In particular, point (b) above was based on the old position that Part 36 payments could only be withdrawn with the court's permission, whereas under the new provisions there is a right to withdraw a Part 36 offer after the relevant period has expired (r. 36.3(6)).

### Departing from the normal rule on costs

The normal rule on costs described at 64.38 and 64.39 has been departed from where:

64.42

- (a) a party was late in disclosing important evidence (*Ford v GKR Construction Ltd* [2000] 1 WLR 1397);
- (b) a party has been unwilling to participate in proposed mediation (*Re Midland Linen Services Ltd* [2004] EWHC 3380 (Ch), LTL 28/10/2004);
- (c) a claimant has deliberately exaggerated the claim (*Painting v University of Oxford* [2005] EWCA Civ 161, [2005] PIQR Q5).

Traditionally, the courts have taken a strict line that the normal rule should be followed even when the judge had been considering a slightly higher award (*Wagman v Vare Motors Ltd* [1959] 1 WLR 853). In *Jackson v Ministry of Defence* [2006] EWCA Civ 46, LTL 12/1/2006, the Court of Appeal approved a modest percentage reduction in the costs order to reflect the fact the claimant had only just beaten a Part 36 offer. Other factors may persuade a judge to depart from the normal rule, but there is great reluctance in countenancing such departures. Thus, in *Jones v Jones* (1999) *The Times*, 11 November 1999, there had been an offer of £120,000, and the claimant only recovered damages of £111,000. The amount of damages awarded was probably depressed by a third medical report served by the defendant some six months after the offer. These events occurred before the CPR came into force. The Court of Appeal held that the judge erred in principle in awarding the claimant costs up to the disclosure of the last medical report. Translated into CPR terms the Court of Appeal's substituted order would mean that the claimant would only recover her costs to the expiry of the relevant period. This decision may be at variance with the ethos of the CPR, and in particular with r. 44.3, which gives the court wide powers to take into account conduct on questions of costs. The case should be contrasted with *Ford v GKR Construction Ltd*, in which the Court of Appeal affirmed a decision to award the entire costs of the claim to the claimant who was awarded £85,000 despite an offer of £95,000. This was because her award was depressed below the level of the offer by virtue of video surveillance evidence introduced in the period of an adjournment between the first and second days of the trial, which was criticised as being late.

In *Painting v University of Oxford* the claimant pleaded loss and damage in excess of £400,000 on the basis that she suffered a long-term debilitating injury, and the defendant made an offer of £10,000. The judge found that the claimant had intentionally exaggerated her injuries, and awarded her £23,331. The Court of Appeal held that the essential question at trial was whether the claimant was exaggerating her injuries. The claimant's intentional exaggeration, combined with her failure to negotiate, justified making an order for the defendant to pay the claimant's costs to the expiry of the relevant period, and for the claimant to pay the defendant's costs thereafter, despite the judgment exceeding the amount in court.

Cases involving exaggeration are very fact-sensitive, as shown by *Allison v Brighton and Hove City Council* [2005] EWCA Civ 548, LTL 22/4/2005. Here the claim was for £45,000, but judgment was for £4,000. The claimant was awarded only 25 per cent of his costs in the period prior to an effective offer. Percentage costs orders of this type have been increasingly common since the introduction of the CPR.

In *Daniels v Commissioner of Police for the Metropolis* [2005] EWCA Civ 1312, *The Times*, 28 October 2005, the claimant was a serving police officer who was injured when thrown from her horse in a training session. She made a number of claimant's Part 36 offers, but the defendant

refused to negotiate. At trial the claim was dismissed. The question on appeal was whether the refusal to negotiate was ‘unreasonable’ conduct in the *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 1 WLR 3002, sense (see 66.19). The Court of Appeal said it was difficult to imagine circumstances where rejecting a Part 36 offer could be characterised as unreasonable if the party who rejected the offer then won the case. That was particularly so on the facts, where the defendant routinely faced unmeritorious claims.

A decision illustrating the point that r. 44.3 rarely overrides the usual rule where there has been a Part 36 offer exceeding the damages awarded is *Burgess v British Steel* (2000) *The Times*, 29 February 2000. In this case the Court of Appeal overturned a decision to award the claimant costs to the final date for accepting the offer (which was in the sum of £220,000), and to award no costs thereafter. Before making the offer the defendant had disclosed a medical report which asserted that the claimant was malingering and which implied the claimant was pursuing a bogus claim. At trial the claimant established that the claim was genuine, but only recovered £161,000. On appeal it was held this did not justify departing from the usual rule, and the second part of the costs order was altered so that the defendant recovered costs from the expiry of the relevant period.

Subject to the discussion at 64.36, where the award at trial exceeds a Part 36 offer the court should not depart from the usual rule by examining whether the Part 36 offer was reasonable, nor by reason of the claimant having made a claimant’s Part 36 offer which was higher than the award at trial (*Quorum AS v Schramm* [2002] CLC 77). In *Johnsey Estates (1990) Ltd v Secretary of State for the Environment* [2001] EWCA Civ 535, LTL 11/4/2001, the defendant made a first Part 36 offer of £200,000, followed by a second Part 36 offer of £250,000. At trial the judge awarded £200,000 plus interest of £36,000 to the date of the first Part 36 offer. The Court of Appeal overturned the judge’s award of costs to the defendant from the date of the first Part 36 offer because this failed to take into account the award of interest, and substituted an award (apart from on one issue) to the claimant of its costs to the date of the second Part 36 offer, with the defendant recovering costs thereafter.

#### Awarding a defendant indemnity-basis costs

- 64.43** A defendant making a successful Part 36 offer will usually be awarded costs on the standard basis. An award of costs on the indemnity basis is normally reserved to cases where the court wishes to show its disapproval, but may extend to some cases where an offer has been made and rejected. Indemnity-basis costs may be appropriate where the claim is dismissed at trial, if the court also finds that the case was going to fail from the outset of the trial (*Reid Minty v Taylor* [2001] EWCA Civ 1723, [2002] 1 WLR 2800). In *Kiam v MGN Ltd (No. 2)* [2002] EWCA Civ 66, [2002] 1 WLR 2810, the Court of Appeal said that *Reid Minty v Taylor* decided no more than that conduct falling short of conduct deserving moral condemnation could still be so unreasonable as to justify an order of indemnity-basis costs. In *Kiam v MGN Ltd (No. 2)* it was held that such conduct needed to be unreasonable to a high degree, and the refusal of a settlement offer (not being a claimant’s Part 36 offer) would rarely attract such an order.

#### Costs where the offer fails to comply with Part 36

- 64.44** By CPR, r. 36.1(2), nothing in Part 36 prevents a party from making an offer to settle in whatever way he chooses, but if that offer is not made in accordance with Part 36, it will not have the consequences set out in Part 36. As mentioned at 64.17, the note to r. 36.1 says the court still has to take into account an offer that does not comply with r. 36.2 when deciding the question of costs (r. 44.3). The implication is that this will not necessarily be in the same terms as if the offer had complied with r. 36.2. The following discussion is based on cases decided under old r. 36.1(2). This allowed the court to give full Part 36 effect to an offer that did not comply with old Part 36, so these cases probably disclose a rather over-indulgent approach to non-compliance.

In *Amber v Stacey* [2001] 1 WLR 1225 the defendant made a written offer that did not comply with old Part 36, but which was more generous than the award eventually made by the court. It was held to be wrong in principle to treat the offer in the same way as if it had been a Part 36 offer for the purposes of costs. However, it was taken into account when considering costs, with the result that the defendant was awarded half his costs from the date of the offer, the court being influenced by the claimant's intemperate response to the written offer. In *Mitchell v James* [2002] EWCA Civ 997, [2004] 1 WLR 158, a claimant's Part 36 offer failed to comply with old r. 36.5(6)(b) in that it did not state that after 21 days the defendant could only accept it if costs liability was agreed or if the court gave permission. It was said that if this had been the only defect in the offer, the court would have waived it as a mere technicality (see r. 3.10).

In *Hardy v Sutherland* [2001] EWCA Civ 976, LTL 13/6/2001, the defendant made a Part 36 offer and, some time later, a Part 36 payment. The claim was for money, so the earlier Part 36 offer did not comply with old r. 36.3. It was held that proper recognition of the offer would be accorded by depriving the claimant of a percentage of his costs up to the date for acceptance of the Part 36 payment (after which the defendant recovered costs from the claimant).

Perhaps the most radical decision is *Trustees of Stokes Pension Fund v Western Power Distribution (South West) plc* [2005] EWCA Civ 854, [2005] 1 WLR 3595. This was a claim for damages of £780,000. The defendant made a written offer before proceedings of £35,000, but did not pay in after proceedings were started as required by old r. 36.10. The defendant later paid in £20,000 and informed the claimant that the earlier offer was withdrawn. At trial the claimant recovered £25,000. On appeal the £35,000 written offer was treated as a payment in because the following four conditions were satisfied:

- (a) the written offer was expressed in clear terms, stating whether it took into account any counterclaim and interest, in line with old r. 36.5(2);
- (b) it was expressed to be open for acceptance for at least 21 days and generally accorded with the form of Part 36 offers;
- (c) it was a genuine offer, not a sham; and
- (d) the defendant was clearly good for the money when the offer was made.

The fact the defendant withdrew the £35,000 offer was held to be irrelevant because there was no evidence the claimant would have accepted the offer at a later stage if it had remained open. The Court of Appeal substituted an order that the claimant had to pay the defendant's costs from 21 days after the written offer.

Cases such as *Trustees of Stokes Pension Fund v Western Power Distribution (South West) plc* are instances of the court using its discretion under old r. 36.1(2) to treat offers which do not comply with the strict requirements of old Part 36 as if they were Part 36 offers. Being discretionary, the court had a wide ambit in deciding on the appropriate consequences. It is an error of principle to treat an offer which does not comply with **Part 36** as having either full or no effect, without considering intermediate positions (*Codent Ltd v Lyson Ltd* (2005) LTL 8/12/2005). In *Farag v Commissioner of Police of the Metropolis* [2005] EWCA Civ 1814, LTL 1 5/12/2005, the claim raised eight causes of action against the police. An offer to settle was refused, then withdrawn two years before the trial. All but one of the causes of action failed. The Court of Appeal took the offer into account in deciding to make no order as to costs. In *Codent Ltd v Lyson Ltd* an offer was made less than 21 days before trial and in the form of a Part 36 offer, whereas it should have been a Part 36 payment. The claimant was awarded 70 per cent of its costs up to the first day of the trial, and the defendant was awarded its costs thereafter.

### Incomplete or unclear offers

An offer to settle made before the commencement of proceedings in *Phyllis Trading Ltd v 86 Lordship Road Ltd* [2001] EWCA Civ 350, [2001] 2 EGLR 85, did not refer to costs. Thorpe LJ said that an offeree takes a real risk in rejecting such an offer out of hand, and has an obligation to



state what is acceptable and to seek clarification. It was held that the offeree had to pay the costs from the date of the offer.

What is required is a 'clear and concise' offer to settle (*Amber v Stacey* [2001] 1 WLR 1225), so the judge is entitled to disregard a letter which is only an offer to negotiate (*Press v Chipperfield* [2003] EWCA Civ 484, LTL 25/3/2003). There were complex proceedings in *Rio Properties Inc. v Gibson Dunn and Crutcher* [2005] EWCA Civ 534, LTL 22/4/2005. The claimant purported to make a claimant's Part 36 offer in respect of the costs of various interim applications. It was held that it was open to the judge to decide the offer was difficult to evaluate and therefore should be disregarded on the question of costs.

## PART 36 OFFERS IN APPEALS

### Part 36 and appeals

- 64.46** A Part 36 offer which is made before trial has effect in relation to the costs of the proceedings up to the final disposal of the proceedings at first instance (CPR, r. 36.3(4)). A party intending to obtain costs protection for appeal proceedings needs to make a separate Part 36 offer in the appeal proceedings (rr. 36.3(2)(b) and 36.3(4), confirming *East West Corporation v Dampskibsselskabet af 1912 A/S* [2003] EWCA Civ 174, [2003] 1 Lloyd's Rep 265; *Various Claimants v Bryn Alyn Community (Holdings) Ltd* [2003] EWCA Civ 383, LTL 24/3/2003).

A respondent in an appeal who makes an offer to accept all but a small fraction of the amount awarded by the court below will generally be regarded as having made a genuine offer to settle, and will usually be awarded indemnity costs (and possibly also enhanced interest) under r. 36.14(3). As discussed in *CEL Group Ltd v Nedlloyd Lines (UK) Ltd* [2003] EWCA Civ 1871, [2004] 1 Lloyd's Rep 388, a respondent cannot reasonably be expected to give up a substantial part of the judgment under appeal, particularly where the appeal raises an all-or-nothing point.

## PAYMENT UNDER COURT ORDER

- 64.47** CPR, r. 37.1, deals with payments into court under court orders. The party making the payment in must send the payment to the Court Funds Office. Usually the payment will be made by cheque, which must be made payable to the Accountant General of the Supreme Court (PD 37, para. 1.1(1)(a)). A litigant in person without a current account may, if the claim is proceeding in a county court or a district registry, lodge cash rather than using a cheque (para. 1.2). The payment must be accompanied by a sealed copy of the court order and by Court Funds Office form 100. Notice of the payment in must be served on every other party, and a certificate of service (in form N215) must be filed in respect of each such notice (CPR, r. 37.1).

By r. 37.3, permission is in most cases required for the payment out of money paid into court under a court order. Permission is obtained by making an application in accordance with Part 23 (PD 37, para. 3.2). The application notice must state the grounds on which the order for payment out is sought, and it is often necessary to file a witness statement in support. Where the court gives permission, it will include a direction for the payment out of the money in court, including accrued interest (para. 3.3).

Permission for payment out is not required where:

- (a) a Part 36 offer is accepted without needing the permission of the court (which is governed by CPR, r. 36.9, see 64.29 to 64.32); and
- (b) the defendant paid the sum in court and agrees that such sum should be used to satisfy the whole or part of the offer.



Where permission is not required for payment out of money in court, the requesting party should file a request in Court Funds Office form 201 with the Court Funds Office, which must state the details set out in **PD 37, para. 3.5**). The request must be accompanied by a statement that the defendant agrees to the money being used to satisfy a Part 36 offer, using Court Funds Office form 202 (**para. 3.4**). Interest on the money in court up to the date of acceptance is paid to the defendant (**para. 3.6**). The principal sum is in most cases paid by bank transfer to the legal representative of the party making the request (**para. 3.8(1)**). Exceptions are that payments in cases of unrepresented parties with public funding are made to the Legal Services Commission (**para. 3.8(2)**), and that parties can request payment out by cheque (**para. 3.7**).

## PAYMENTS INTO COURT PURSUANT TO STATUTE

There are special provisions (made under **CPR, r. 37.4**) for payments into court pursuant to: **64.48**

- (a) the Life Assurance Companies (Payment into Court) Act 1896 (**PD 37, paras 4.1 to 5.2**);
- (b) the Trustee Act 1925, s. 63 (**PD 37, paras 6.1 to 7.2**); and
- (c) the Vehicular Access across Common and Other Land (England) Regulations 2002 (SI 2002/1711) (**PD 37, paras 8.1 to 8.5**).

## TRANSITIONAL PROVISIONS

Part 36 offers and Part 36 payments made before 6 April 2007 (together referred to in this section as 'old Part 36 offers') are governed by the transitional provisions in the Civil Procedure (Amendment No. 3) Rules 2006 (SI 2006/3435), r. 7, as explained by **PD 36B**. The basic principle is that old Part 36 offers will continue to have effect from 6 April 2007, and will continue to have costs and other Part 36 consequences (**PD 36B, para. 1.2**). **64.49**

### Acceptance of an old Part 36 offer from 6 April 2007

If permission to accept an old Part 36 offer would have been necessary under CPR, old Part 36, permission continues to be necessary from 6 April 2007 (SI 2006/3435, r. 7(3); **PD 36B, paras 2.1 to 2.2**). Situations where permission was required under CPR, old Part 36, to accept a Part 36 offer were: **64.50**

- (a) Defendants' Part 36 offers and payment made less than 21 days before the trial where the parties did not agree the liability for costs (old r. 36.11(2)).
- (b) Acceptances of defendants' Part 36 offers and payments given more than 21 days after the offer or notice of payment in where the parties did not agree the liability for costs (old r. 36.11(2)).
- (c) Claimants' Part 36 offers made less than 21 days before the trial where the parties did not agree the liability for costs (old r. 36.11(2)).
- (d) Acceptances of claimants' Part 36 offers given more than 21 days after the offer where the parties did not agree the liability for costs (old r. 36.12(2)).
- (e) Some acceptances where Part 36 offers or payments were made by some but not all of the defendants in a claim (old r. 36.17).
- (f) Acceptances by or on behalf of children and protected parties (r. 21.10 and old r. 36.18(1)).

### Stay, costs and interest consequences of old Part 36 offers from 6 April 2007

If an old Part 36 offer would have been effective under CPR, old Part 36, as from 6 April 2007 it will have the consequences set out in the new **CPR, rr. 36.10, 36.11 and 36.14** (SI 2006/3435, r. 7(2)). The relevant provisions under old Part 36 were: **64.51**

- (a) the proceedings would be stayed if a Part 36 offer or payment relating to the whole claim was accepted (old r. 36.15(1));

- (b) the defendant would be liable for the claimant's costs of the proceedings if a Part 36 offer or payment was accepted without the court's permission (old r. 36.13);
- (c) the defendant would be liable for the claimant's costs of the proceedings if a claimant's Part 36 offer was accepted without needing the court's permission (old r. 36.14);
- (d) unless it was unjust, the court would order the claimant to pay the defendant's costs from the last date for acceptance of a Part 36 offer or payment if the claimant failed to better the terms of the offer or payment (old r. 36.20); and
- (e) the court had a discretion to award enhanced interest and indemnity basis costs (and enhanced interest on such costs) from the expiry of a claimant's Part 36 offer which was more advantageous for the defendant than the result at trial (**old r. 36.21**, which applied only to cases resolved at trial: *Petrotrade Inc. v Texaco Ltd* [2002] 1 WLR 947).

#### Payment out of court of old Part 36 payments

- 64.52** Payment out of court of old Part 36 payments is governed, from 6 April 2007, by the new CPR, r. 37.3 (SI 2006/3435, r. 7(4)). This preserves in particular the requirement that permission is needed to withdraw such a payment (**PD 36B, para. 3.3**). CPR, r. 37.3, is discussed at 64.47.

#### Old Part 36 offers made less than 21 days before 6 April 2007

- 64.53** Where an old Part 36 offer is made less than 21 days before 6 April 2007, the rules in CPR, old Part 36, apply to that offer up to the expiry of the 21-day offer period, or the start of the trial, whichever is the sooner. For these old rules, see chapter 64A, which may be viewed at the Companion Web Site for *Blackstone's Civil Practice*, [www.oup.com/blackstones/civil](http://www.oup.com/blackstones/civil). Thereafter, the new regime, with the modifications on permission to accept, consequences and payment out, provided by the transitional provisions outlined in 64.50 to 64.52, apply (SI 2006/3435, r. 7(5) and (6); **PD 36B, para. 4.4**).

#### Old Part 36 offers made before proceedings and before 6 April 2007

- 64.54** An old Part 36 offer, complying with CPR, old r. 36.10, which was made at a time before proceedings were issued, will be taken into account on costs, and the court's permission is required to accept the offer once proceedings are commenced (SI 2006/3435, r. 7(7)). If proceedings are commenced after 6 April 2007, there is no need to fortify the pre-claim offer by paying money into court (**PD 36B, para. 5.4**).

To comply with CPR, old r. 36.10, an offer had to be expressed to be open for at least 21 days after the date it was made and, if it was made by a person who would be a defendant if proceedings were commenced, had to include an offer to pay the costs of the offeree incurred up to the date 21 days after the date it was made (old r. 36.10(2)). The offer was required to comply otherwise with old Part 36 (old r. 36.10(2)(c)). An offer under old r. 36.10 was 'made' when it was received by the offeree (old r. 36.10(5)).

If proceedings were started after a pre-commencement offer complying with old r. 36.10 had been made, the offer could not be accepted without the court's permission (old r. 36.10(4)) and, whether or not the offer was accepted, the court would take it into account when making any order as to costs (old r. 36.10(1)). If, however, proceedings were not started, the court had no jurisdiction to make any orders.

If a defendant to a money claim made a pre-commencement offer, and proceedings were then commenced, the defendant was required, in order to obtain the costs advantages provided by old Part 36, to make a Part 36 payment within 14 days of service of the claim form and the amount of the payment had to be not less than the sum offered before proceedings began (old r. 36.10(3)). This payment could not be accepted by the offeree without the court's permission

(old r. 36.10(4)). A defendant who needed more time than the 14 days allowed by old r. 36.10(3) could apply for permission to extend time under r. 3.1(2)(a), see *Walker Residential Ltd v Davis* [2005] EWHC 3483 (Ch), LTL 9/12/2005. The power to extend time under r. 3.1(2)(a) could not be used once money in court had been accepted without permission, because such an extension would overreach the mandatory costs order in favour of the claimant provided by old r. 36.13(1).