CIVIL PROCEDURE NEWS

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175th Edition

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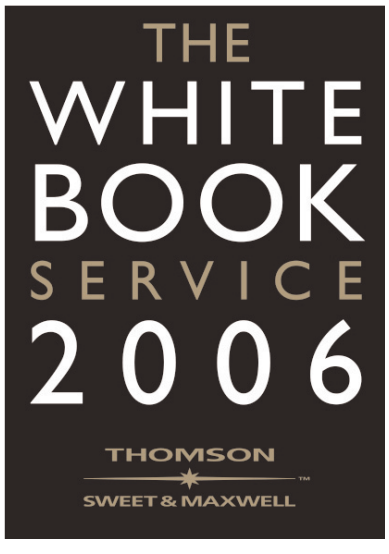

IN BRIEF

Cases

■ **BOYLAND & SON LTD v. RAND** [2006] EWCA Civ 1860; *The Times* January 18, 2007, CA (Ward and Neuberger L.JJ.)

Possession order against trespasser—power to stay warrant

CPR r.55.1, Sched. 1 RSC O. 45, r.3, Housing Act 1980 s.89, Human Rights Act 1998 Sched. 1, Art. 8, Practice Direction (Citation of Authorities), [2001] 1 W.L.R. 1001, para. 6.1—company (C) bringing proceedings in a county court to recover possession of property occupied by trespasser (D)—D occupying the property as his home—court making outright a "forthwith" possession order—district judge dismissing D's application for suspension of warrant for possession, but giving D permission to appeal and suspending warrant in meantime—circuit judge dismissing D's appeal, but suspending warrant pending D's application to make second appeal—single lord justice refusing application—on D's renewed application, held, refusing permission to appeal, (1) a court has no power to grant a stay of possession order obtained against a trespasser, (2) where an order is obtained in certain other circumstances the court does have power to order a stay and should exercise it if particular conditions are met, (3) s.89 applies to some of those other circumstances, and has the effect of reducing the period for which stay might otherwise be granted (unless that would cause exceptional hardship), (4) but s.89 does not apply (by a side-wind, as it were) to the situation where (as here) a possession order is obtained against a trespasser, (5) the court's lack of power in this respect is not inconsistent with Art. 8—court directing that this decision should be released for citation under para. 6.1—***McPhail v. Persons Unknown*** [1973] Ch. 447, CA; ***Kay v. Lambeth London BC*** [2006] UKHL 10; [2006] 2 A.C. 465, HL, ref'd to (see ***Civil Procedure 2006*** Vol.1 paras 2.3.7, 55.4.5, sc45.3.7 and B4–001, and Vol.2 paras 3A–290 and 3D–77)

■ **BROWN v. RUSSELL YOUNG & CO** [2007] EWCA Civ 43, 157 New L.J. 222 (2007), CA (Buxton, Smith and Wilson L.JJ.)

Costs-only proceedings—multiple claimants—generic costs

CPR rr.44.4 and 44.5—six miners (C) instructing solicitors (X) to recover compensation from their former solicitors (D) for professional negligence—C alleging that D had settled their VWP claims against Coal Board at under-value—C entering into CFAs with X—C constituting a small proportion of large group miners making similar claims against D, for some of whom X also acting, but for others of whom other solicitors were acting—X entering into agreement whereby certain costs incurred by them might be shared, not only among C, but also among clients of those other solicitors—X intending to take lead in applying for group litigation order—however, before any claim form issued, D making settlement offers accepted by C and other potential claimants—C then commencing costs only proceedings against D—costs judge holding that X not entitled to any sums at all in respect of generic costs because, in the absence of a GLO, the court could only make an award of such costs if the individual client had agreed with his solicitor that he would be liable to the solicitor for those costs—judge allowing C's appeal—single lord justice granting D permission to appeal—held, dismissing appeal, (1) in the cases brought by C, the CFAs standing alone provided a sufficient basis on which to rest a valid claim to recover from D a share of the costs incurred by X on behalf of the members of the larger group, (2) it was not necessary for C to demonstrate individually that that there was an agreement between them and X specifically relating to generic costs—C conceding that, should D not agree a global sum for the claimed generic costs, an apportionment would have to be made—Court stating that, in circumstances such as these, it would be good practice for a solicitor to mention in a client care letter that some of the costs would be expended for the benefit of other claimants besides himself, but that he would only be asked to pay a share of those costs (see ***Civil Procedure 2006*** Vol.1 para. 48.6A.2, and Vol.2 para. 7A–38)

■ **CAPEWELL v. REVENUE & CUSTOMS COMMISSIONERS** [2007] UKHL 2; January 31, 2007, HL, unrep.

Statutory receivership—receiver's costs

CPR r.69.7(2), Proceeds of Crime Act 2002 Pt 2—individual (C) arrested and charged with VAT fraud—on application of Customs (D) High Court judge (1) making restraint order, and (2) appointing management receiver (R) of C's realisable assets—receivership order stipulating that costs of receivership should be paid out of monies brought in—C's application to discharge the receivership on ground that R's costs were disproportionate and excessive dismissed—on C's appeal, Court of Appeal holding that part of R's remuneration should be paid, not out of the receivership, but by D ([2005] EWCA Civ 964)—held, allowing D's appeal (1) it has always been a basic principle of receivership that the receiver is entitled to be indemnified in respect of his costs and his expenses, and his remuneration if he is entitled to be remunerated, out of the assets in his hands as receiver, (2) that basic principle applies to the statutory type of receiverships in support of restraint and confiscation orders under (what is now) Pt 2 of the 2003 Act, (3) r.69.7 applies to such statutory receiverships, but its provisions

cannot override the scheme inherent in the detailed provisions in that Act, (4) in particular, the rule was not designed to give the court a discretion in relation to receivers' remuneration in circumstances where the basic principle would cause unfairness or hardship—***Hughes v. Customs and Excise Commissioners*** [2002] EWCA Civ 734; [2003] 1 W.L.R. 177, CA, ref'd to (see ***Civil Procedure 2006*** Vol.1 para. 69.7.1)

■ **CRYSTAL DECISIONS (UK) LTD v. VEDATECH CORP** [2006] EWHC 3500 (Ch); December 6, 2006, unrep. (Patten J.)

Interim costs orders unpaid—bar to defending

CPR r.3.4, Human Rights Act 1998 Sched. 1 Art. 6—on interlocutory application, judge ordering defendants (D) to pay costs of claimant (C) and summarily assessing those costs at £15,600—D neither appealing against nor complying with costs order—at subsequent CMC, C applying for order that, unless D paid to C the sum that they had been so ordered to pay, they be debarred from defending the proceedings and that C be entitled to enter judgment without further order of the court—held, granting the application, (1) the CPR do not prescribe any particular procedure or conditions which have to be satisfied on an application of this kind, (2) the consequences of D's failure to pay the costs were a matter to be dealt with under the inherent jurisdiction of the court, (3) as D were not resident within the jurisdiction, other remedies available to C to enforce the costs order (e.g. a charging order) were of limited value, (4) unless there was some overwhelming consideration falling within Art. 6, the normal consequences of a failure to comply with an interim costs order should be an order of the type sort by C in this case—***Oils & Mineral Development Corporation v. Sajjad*** [2002] EWHC 1258 (QB); April 4, 2002 (Gibbs J.), unrep., ref'd to (see ***Civil Procedure 2006*** Vol.1 paras 3.4.4 and 3.4.8, and Vol.2 paras 3D–5.1 and 3D–30)

■ **INDEPENDIENTE LTD v. MUSIC TRADING ONLINE (HK) LTD** [2007] EWCA Civ 111; January 26, 2007, CA, unrep. (Mummery, Rix and Lloyd L.JJ.)

Settlement order—breach of undertakings—contractual remedy

CPR Sched. 1 RSC O. 52, r.1—parties reaching compromise of proceedings brought by copyright holders (C) against retailers (D) for infringement—draft consent orders, in which D gave undertakings to the court, annexed to compromise agreement—Master making orders accordingly—C now bringing new proceedings against D (1) alleging that D (a) had undertaken to C to refrain from certain acts, and (b) had breached those undertakings, and (2) claiming damages based on breach of contract—in ruling on preliminary issue concerning the construction of the agreement, judge giving judgment for C, but granting D permission to appeal ([2006] EWHC 3081 (Ch))—in particular, judge rejecting D's submission that C's remedies were confined to making applications against them in the earlier proceedings to commit them for contempt of court for breach of the undertakings—held, dismissing appeal, (1) the correct construction of the settlement agreement was that D had given undertakings, not only to the court, but also to C, (2) if there are breaches of the undertakings to the court, they are also actionable as breaches of contract with C (as claimants in the first action), (3) if the undertakings were released or modified, D's contractual obligations would by that very same process be released or modified (see ***Civil Procedure 2006*** Vol.1 para. sc52.1.8)

■ **KIRKMAN v. EURO EXIDE CORPORATION (CMP BATTERIES LTD)** [2007] EWCA Civ 66; *The Times* February 6, 2007, CA (Buxton and Smith L.JJ.)

Directions for expert witness—additional expert

CPR rr.1.1 and 35.4, Practice Direction (The Multi-Track) para. 5.3—employee (C) suffering injury to knee at work—on advice of surgeon (X), C undergoing surgery but contracting MRSA in hospital with result that leg amputated above the knee—C bringing personal injury claim against employers (D)—D admitting liability but disputing quantum on basis that surgery made necessary, not by accident, but by pre-existing injury—district judge ordering that issue of causation be tried separately and that each party should be permitted to rely on the evidence of one medical expert—C choosing to rely on the evidence of a non-treating surgeon (Y) and to call X as a witness of fact—D contending that X's witness statement contained opinion evidence and that C's reliance on him would be in breach of the directions as to evidence—district judge further directing that X should attend trial and that question whether his proposed evidence contained expert opinion should be left to the trial judge—circuit judge allowing D's appeal, holding that the parts of X's witness statement challenged by D was opinion evidence and directing that C should not be permitted to rely on it—single lord justice granting C permission to appeal—held, allowing appeal, (1) the challenged evidence was X's statement as to what his advice to C as to treatment would have been, absent the accident at work, (2) that statement was a statement of fact, not further expert evidence tendered by C, (3) in any event, there is no absolute rule that, in every case, parties must be limited to the same number of expert witnesses, (4) although equality of arms in this respect should be the general rule, there may be circumstances in which it should give way for the sale of achieving the overriding objective of dealing with a case justly—***ES v. Chesterfield and North Derbyshire Royal Hospital NHS Trust*** [2003] EWCA Civ 1284, ref'd to (see ***Civil Procedure 2006*** Vol.1 paras 1.3.2, 1.3.3, 1.3.6, 35.2.2 and 35.4.1)

■ **LAHEY v. PIRELLI TYRES LTD** [2007] EWCA Civ 91; 157 New L.J. 294 (2007), CA (Sir Anthony Clarke M.R., Arden and Dyson L.JJ.)

Acceptance of Pt 36 payment—whether costs payable less than 100% assessed costs

CPR rr.3.1(7), 36.13 [r.36.10] and 44.12—in personal injury claim, quantified by claimant (C) at 150,000, C accepting defendant's (D) Pt 36 payment of £4,000 (increased from £2,000)—before proceedings commenced, C rejecting D's offer of £5,000—C commencing detailed assessment proceedings claiming £27,000 (including 75% success fee and disbursements)—D serving points in dispute seeking reductions (1) of C's solicitors' costs of £14,200 and (2) of success fee percentage—at outset of hearing, D applying to district judge for order that C should be awarded only 25% of the assessed costs because (1) the claimed costs were disproportionate to the settlement figure, and (2) C's conduct of his claim was erratic—district judge (1) rejecting this application on ground of lack of jurisdiction, (2) proceeding to conduct detailed assessment, and (3) concluding that C's costs should be assessed at £15,182—circuit judge dismissing D's appeal—single lord justice giving D permission to appeal on question whether district judge lacked jurisdiction to order that C be awarded less than 100% of assessed costs—held, dismissing appeal, (1) a judge has jurisdiction under r.44.3 when making an order for costs to order that a proportion of the successful party's costs should be disallowed to reflect conduct of the kind described in r.44.3(5), (2) where a Pt 36 payment is accepted without needing the permission of the court no costs order is made by the court but an order under which the claimant is entitled to his costs is deemed to have been made, (3) in these circumstances, at an assessment (a) the costs judge has no jurisdiction (i) to disallow costs under r.44.3 or (ii) to vary the costs order that is deemed to have been made, and (b) the effect of r.36.13(1) and (4) [r.36.10(1) and (3)] and r.44.12(1)(b) is that the receiving party is entitled to 100% of his costs as ultimately assessed, (4) no jurisdiction in the hands of the costs judge to order that a proportion of the receiving party's costs should be disallowed can be derived from elsewhere, in particular from r.3.1(7)—Court stating that it is important in any form of proceedings to formulate a preliminary issue with care and precision and then reduce it to writing (para. 5)—***Walker Residential Ltd. v. Davis*** [2005] EWHC 3483 (Ch); December 9, 2005, unrep. (Park J.); ***Lownds v. Home Office*** [2002] EWCA Civ 365; [2002] 1 W.L.R. 2450, CA, ref'd to (see ***Civil Procedure 2006*** Vol.1 paras 3.1.9, 36.13.1, 44.4.3, 44.12.1 and 44.12.2)

■ **PHILLIPS v. RAFIQ** [2007] EWCA Civ 74, *The Times* February 15, 2007, CA (Ward and Latham L.JJ. and Charles J.)

Fatal accident claim—liability of MIB

Fatal Accidents Act 1976 s.1, Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers) Agreement 1999 cl 6:—owner (X) of car allowing compulsory third party insurance for vehicle to lapse—whilst friend of owner (D) driving car with X as his passenger, vehicle involved in accident and X killed—D not insured to drive the car at the time of the accident—X's widow (C) bringing a derivative claim under s.1 against D and MIB as second defendant—C applying for declaration that, notwithstanding that X had allowed himself to be carried in an uninsured vehicle, the MIB would be liable to satisfy any eventual judgment against D—judge granting declaration ([2006] EWHC 1461 (QB))—held, dismissing MIB's appeal, (1) the terms of the 1999 Agreement were different to its predecessor and showed an intention to make different provision for sound policy reasons, (2) the context did not require that the definition of "claimant" in cl 1 should not be applied to cl 6.1(e), (3) the latter clause excludes the MIB from liability where "a claimant" knowingly allowed himself to be carried in an uninsured vehicle, (4) C was a "claimant" within cl 1, being a person who had commenced proceedings, (5) but as it was X, and not C, who had knowingly allowed himself to be carried etc., the liability exclusion in cl 6.1(e) did not operate in the MIB's favour—***White v. White***, [2001] 1 W.L.R. 481, HL, ref'd to (see ***Civil Procedure 2006*** Vol.2 paras 3F–66 and 3F–161)

■ **SPILLMAN v. BRADFIELD RIDING CENTRE** [2007] EWHC 89 (QB); February 6, 2007, unrep. (Langley J.)

Interim payment—tests for determining whether order should be made

CPR r.25.7(4)—infant (C) bringing personal injury claim—defendants (D) accepting liability at 70% and court approving settlement of liability on that basis—in respect of C's disability, serious disputes emerging between parties' experts on diagnosis, causation and prognosis—parties agreeing that, as C's injuries not stabilised (making it difficult to determine extent and effect of any continuing disability), trial of quantum not likely to take place for at least two years—D making voluntary interim payment of £50,000—on C's application for a further interim payment of £400,000 (principally for purpose of providing special accommodation for C), Master ordering payment of £30,000—held, allowing C's appeal (1) as the Master had not in terms addressed the conditions of r.25.7(4) it was necessary to exercise the discretion afresh, (2) the court must consider those conditions and any other matters it considers material to the exercise of its overall discretion, (3) the gap between the parties as to the value of the claim was very wide (£1.4m plus general damages v. £260,000) but (4) in the circumstances (a) the court could safely conclude that, after apportionment, £180,000 was the "likely amount of the final judgment", and (b) a "reasonable proportion" would be 75% of that amount (£136,000) from which payments already made (£80,000) should be deducted (yielding a payment of £56,500), (5) in arriving at a "reasonable proportion", the time already elapsed since the accident and yet to elapse until trial were significant factors—***Dolman v. Rowe*** [2005] EWCA Civ 715, ref'd to (see ***Civil Procedure 2006*** Vol.1 paras 25.7.6, 25.7.15 and 25.7.21)

TOTAL E & P SOUDAN S.A. v. EDMONDS

[2007] EWCA Civ 50; January 31, 2007, CA, unrep. (Tuckey, Jacob and Moore-Bick L.JJ.)

Pre-action disclosure—anticipated proceedings—standard disclosure

CPR r.31.16—oil exploration company (C) falling into dispute with other interests (D) over rights to exploration and development of resources in Sudan—C claiming entitlement to rights on basis of agreement with Government of Southern Sudan (GOSS)—C seeking and obtaining from D certain information concerning basis upon which D claimed to be entitled—upon their efforts to obtain further information and documents not succeeding, C applying under r.31.16 for order requiring D to disclose eleven documents or classes of documents relevant to certain identified issues—judge granting application—Court of Appeal granting D permission to appeal—C clarifying that causes of action upon which they might rely were that D interfered with their economic interests and rights (1) by persuading GOSS to enter into agreements with them, and (2) by inducing GOSS to breach its agreements with C—held, generally dismissing D's appeal, (1) the disclosure of documents in all categories would facilitate the fair disposal of the anticipated proceedings and was desirable for the purposes stated in r.31.16(3)(d), (2) however, if proceedings were started, it was doubtful whether the respondent's duty by way of standard disclosure of documents would extend to the documents in one of the categories, (3) in any event, in the exercise of discretion, the documents in that category should be excluded (and D's appeal should be allowed to that limited extent), (4) the anticipated proceedings raised difficult issues of law, including jurisdiction, justiciability and the mental element required to establish certain economic torts, (5) applications under r.31.16 are in the nature of case management decisions, and generally the court does not need to embark upon a consideration of the arguments relating to such issues—***Black v. Sumitomo Corporation*** [2001] EWCA Civ 1819; [2002] 1 W.L.R. 1502, CA, ref'd to (see ***Civil Procedure 2006*** Vol.1 para. 31.16.3)

Practice Directions

PRACTICE DIRECTION (ALTERNATIVE PROCEDURE FOR CLAIMS) TSO CPR Update 44

CPR Pt. 8—substitutes with additions existing supplementing practice direction—incorporates Practice Direction (Pt 8), now omitted—stipulates claims and applications that may or must be made under Pt 8—includes statutory proceedings under certain CPR Schedule rules (notably RSC Ords 17, 109, 115 and 116) and other such rules recently revoked (particularly in RSC Ord. 93, 94 and 95) concerning applications and appeals to the High Court—in force April 6, 2007 (see ***Civil Procedure 2006*** Vol.1 paras 8PD.1 and 8BPD.1)

PRACTICE DIRECTION (OFFERS TO SETTLE) TSO CPR Update 44

CPR Pt. 36—substitutes former practice direction—reflects new Pt 36 rules—formalities of Pt 36 offers (Form **N242A** (as modified)) and other notices under this Part—applications for permission to withdraw offer—acceptance of offer—in force April 6, 2007 [Ed.: in para. 2.1, "Rule 36.3(4)" should read "Rule 36.3(5)"] (see ***Civil Procedure 2006*** Vol.1 para. 36PD.1)

PRACTICE DIRECTION (PART 36) TSO CPR Update 44

CPR Pt. 36—new additional supplementing practice direction—explains how new Pt 36 provisions will apply to offers and payments into court made before those provisions came into effect—in force April 6, 2007 (see ***Civil Procedure 2006*** Vol.1 para. 36BPD.1)

PRACTICE DIRECTION (MISCELLANEOUS PROVISIONS ABOUT PAYMENTS INTO COURT) TSO CPR Update 44

CPR Pt 37—substitutes former practice direction—in part reflects abolition of Pt 36 payments—payment into court under an order, etc (para. 1)—applications relating to funds in court (para. 2)—payment out of court (para. 3)—paras 4 to 8 replicate, respectively, paras 7 to 11 of former practice direction—in force April 6, 2007 (see ***Civil Procedure 2006*** Vol.1 para. 37BPD.1)

Protocol

PRE-ACTION PROTOCOL FOR CONSRUCTION AND ENGINEERING DISPUTES TSO CPR Update 44

Practice Direction (Protocols)—introduces new pre-action protocol—follows structure of previous protocol for construction and engineering disputes, but amplifies it in various respects (e.g. contains new paragraph on proportionality, and stipulates that, normally, pre-action meeting should take place within 28 days)—in force April 6, 2007 (see ***Civil Procedure 2006*** Vol.1 paras C1–001, C1–005 and C5–001)

Forms

New versions of the following forms (modified to take account of recent changes in rules and practice directions) will be made available:

N16 (General form of injunction)

N16A (General form of application for injunction)

N110A (Anti-social behaviour injunction—power of arrest)

N242A (Notice of payment into court (in settlement)

IN DETAIL

175th edition

The first edition of the ***Supreme Court Practice News***, the predecessor to ***Civil Procedure Rules***, was published in January 1990. Throughout, 10 issues a year of the SCP News and CP News have appeared, with the exception of 1999 which (for obvious reasons) was a bumper year when twelve issues were published. The result is that this issue of CP News is the 175th. Throughout, the Editor has remained the same. The Editor would not wish this milestone to pass without expressing his thanks to the many subscribers to the ***White Book*** who over the years have been kind enough to pass on legal intelligence to him and who have given him useful comments on the material appearing in this publication. The database from which the several issues have been complied has more than 7,000 entries on it, indicating that only about quarter of the material received has actually ended up being referred to in print.

Offers to settle

In the Supreme Court Act 1981 s.51 it is stated that, subject to the provisions of that Act or any other enactment and to rules of court, the costs of and incidental to all proceedings "shall be in the discretion of the court" and the court shall have "full power to determine by whom and to what extent the costs are to be paid". To a lawyer from Mars, or even to one from one of the majority of legal systems in the world, the meaning of that section is not self-evident. CPR r.44.3 states that, if the court decides to make an order about costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. If the attention of an inquiring lawyer from Mars was directed to CPR r.44.3 he or she (assuming they have either or both on that planet) might begin to understand that, in English law, a person who brings civil proceedings and is successful would generally be entitled, not only to a judgment for the substantive remedy he sought, but also for an enforceable court order requiring the losing party to compensate him for the costs he incurred in pursing his successful proceedings.

If the lawyer from Mars was keen to find out more, he would have to be given a tutorial on many aspects of the English law of costs. Anyone who has attended an international law conference at which English lawyers have struggled earnestly to instruct foreign colleagues on those matters will know that it is almost certain that, as the tutorial goes on, first slowly the Martian lawyer's jaw will drop in disbelief and then, well before his instructor reaches the intricate rules under which a defendant may protect his position as to costs by making an offer to settle or a payment into court, he will glaze over entirely and will start absent-mindedly jingling the keys to his spaceship.

Well, enough of this seriousness; it is time to be more light-hearted. Practitioners and judges will be delighted to know (and most will already be well aware) that CPR Pt 36 (Offers to settle and payments into court) has been entirely substituted by new rules enacted in the Civil Procedure (Amendment No. 3) Rules 2006 (S.I. 2006 No. 3435). As a consequence of this substitution a number of amendments have been made to other CPR provisions. Further, by TSO CPR Update 44, the practice direction supplementing Pt 36 has been replaced by Practice Direction (Offers to Settle).

The new provisions come into effect on April 6, 2007. Transitional provisions in the statutory instrument take care of Pt 36 offers and Pt 36 payments made before that date. The transitional provisions are elaborated in Practice Direction (Pt 36) issued for the purpose of explaining how those provisions will work in practice.

The full text of the new Pt 36, and the texts of the two practice directions are set out in the CPR Update section of this issue of CP News.

The most striking feature of the new provisions is that they remove the requirement (presently found in CPR r.36.3) that a defendant wishing to protect his position as to costs by making an offer to settle a money claim must not only make the offer in the appropriate manner but must also actually put up the money by paying it into court. Under that requirement the offer was secured. The offeree knew that the money was in the hands of a trustworthy stakeholder (the court) and that, if he accepted the offer, he could have the money without being put to any further trouble. (In some common law systems the offer is secured, not by payments into court, but by commercial bonds taken out by the offeror.)

There have been times in the past when the rule enabling a defendant to protect his position as to costs by making a payment into court, thereby exposing the claimant to serious costs consequences if he does not accept the offer and in the event fails to better the payment in, has been criticised on the ground that it is unfair to claimants because it places them under undue pressure to settle. However, in modern times, by elaborating the rules relating to offers to settle in certain respects and by other means, the extent of any such unfairness that an economically weak claimant may suffer at the hands of economically powerfully defendant has been reduced. As a result, nowa-

days such criticism is muted.

There is, of course, much else in Pt 36 besides rules about payments into court by defendants in money claims. However, the consultation exercise initiated by the DCA in January 2006 (and which has culminated in the enactment of a new Pt 36) came about mainly because of concerns that had arisen as a result of decisions by the Court of Appeal in which the Court departed from a strict application of r.36.3, thereby enabling certain categories of defendant (e.g. hospital trusts in clinical negligence claims) to have their written offers treated in the same way as a payment in. The advantage of this approach is that it enables insured and public sector organisations who find themselves habitually defending claims to avoid having large such sums of money permanently tied up in court. Another advantage is that, insofar as it reduces the number of payment into court transactions, it takes pressure off the banking and investment function that has to be maintained in order to enable the courts to deal with money flowing in and out. Other issues that lay behind the mounting of the consultation exercise related to offers by claimants as well as by defendants and included such questions as whether parties should be able to accept or withdraw offers after the time limit for acceptance without the need for the court's permission and whether the court or the offeror should be able to extend the time limit for acceptance. In addition, there were a number of suggestions for miscellaneous amendments aimed at simplifying and clarifying the rules in Pt 36 that had come to the attention of the rule committee.

As indicated above, the whole of the new Pt 36 is set out in the CPR Update section of this issue of CP News. Those well-versed in the existing rules will find much that is familiar. The total number of rules in the Part is reduced from 23 (including r.36.2A) to 15. The new Part re-enacts the rather more specialised of the rules in the old Part (but not always in exactly the same terms and sometimes with significant changes in effect) as follows:

r.36.1 (Scope of this Part) former r.36.1

r.36.5 (Personal injury claims for future pecuniary loss) former r.36.2A

r.36.6 (Offer to settle a claim for provisional damages) former r.36.7

r.36.8 (Clarification of a Part 36 offer) former r.36.9

r.36.10 (Costs consequences of acceptance of a Part 36 offer) former rr.36.13 and 36.14

r.36.11 (The effect of acceptance of a Part 36 offer) former r.36.15

r.36.12 (Acceptance of a Part 36 offer made by one or more, but not all, defendants) former r.36.17

r.36.13 (Restriction on disclosure of a Part 36 offer) former r.36.19

r.36.14 (Costs consequences following judgment) former rr.36.20 and 36.21

r.36.15 (Deduction of benefits) former r.36.23

Although those well-versed in the existing rules will find much that is familiar, they will also find many things in the new rules that are significantly different. As indicated above, the most striking feature of the new provisions is that they remove the requirement that a defendant wishing to protect his position as to costs by making an offer to settle a money claim must make a payment into court. It might have been expected that the doing away with payments into court would have been restricted to certain classes of defendant (e.g. insured and public sector defendants). In the event no such restriction has been imposed. Now a defendant wishing to settle a claim with a money offer will simply make a written offer (r.36.4). An accepted offer must be paid within 14 days or the claimant will be able to enter judgment and the defendant will lose the costs protection afforded by the making and acceptance of the offer (r.36.11).

In the new Pt 36, r.36.3 is a key provision. It introduces the concept of "the relevant period" during which an offer (whether made by a defendant or a claimant) will remain open for acceptance. That concept plays a prominent role in later provisions in the Part, notably in r.36.9 (Acceptance of a Part 36 offer), r.36.10 (Costs consequences of a Part 36 offer), and in r.36.14 (Costs consequences following judgment) and r.36.15 (Deduction of benefits). It should be noted that r.36.3 states that, (1) before expiry of the relevant period, a Pt 36 offer may be withdrawn or its terms changed to be less advantageous to the offeree, only if the court gives permission (para. (5)), but (2) after expiry of the relevant period, and provided that the offeree has not previously served notice of acceptance, the offeror may, without the permission of the court and simply by serving written notice on the offeree, withdraw the offer or change its terms to be less advantageous to the offeree (paras (6) and (7)). Para. 2 of Practice Direction (Offers to Settle) deals with applications to withdraw and offer and para. 3 with applications to the court to accept an offer. As would be expected, it remains the case that the fact that an offer has been made must not be communicated to the trial judge (r.36.13, previously r.36.19). However, paras 2 and 3 state that the parties may agree that an application for permission to withdraw an offer or to accept an offer may be heard by the judge allocated in advance to conduct the trial.

Doubtless the changes brought about by the new Pt 36 provisions will effect improvements in the law and practice relating to offers to settle. However, it has to be said that, if one of the objectives of the reforms was to simplify

the law, they have failed in that respect. Practitioners will still have great difficulty in explaining to their clients (if not to visiting Martians) just how the scheme works. It is a very sophisticated scheme, perhaps necessarily so.

Withdrawal of admissions

At present, CPR r.14.1(5) states that the court "may allow a party to withdraw or amend an admission". As is explained below, that provision has been substituted by the Civil Procedure (Amendment No. 3) Rules 2006 (S.I. 2006 No. 3435) with effect from April 6, 2007. As amended the rule states: "The permission of the court is required to amend or withdraw an admission". What was permissive is now mandatory. A question that immediately arises is this: to what kind of admission does r.14.1(5) apply? The Court of Appeal answered that question in the case of ***Sowerby v. Charlton*** [2005] EWCA Civ 1610; [2006] 1 W.L.R. 568; CA, explained in Issue 1/2006 of ***CP News***.

There were two parts to the answer. First the Court held that Pt 14 and its supplementing practice direction are restricted to admissions made in a certain class of claim; that is to say, admissions made in response to money claims. As Brooke L.J. explained, that Part deals with the way in which judgment may be entered as of right (on the claimant's application) once such an admission has been made. His lordship noted that these provisions "enable a vast amount of court business to be conducted without any need for judicial involvement, culminating in the entry of judgments that pave the way to enforcement procedure". His lordship further explained that the procedure which regulates the conduct of a defendant who is prepared to make admissions and to defend part only of a claim is contained in Pt 15 (Defence and Reply) and its supplementing direction and in general provisions relating to statements of case found in Pt 16 (Statements of Case). His lordship added that an admission made in accordance with these provisions "may open the way for judgment to be entered on the admission under Pt 14".

The second part of the answer given by the Court was that an admission made before proceedings were commenced does not come within the ambit of the scheme prescribed by Pt 14, because such an admission cannot be equated with an admission "of the whole or any part of another party's case" within r.14.1(1). It followed that a defendant who made an admission did not require the court's permission under r.14.1(5) to withdraw it.

The claim brought by the claimant in ***Sowerby v. Charlton*** was not a money claim but a personal injury claim; further the admission made by the defendant, and to which the claimant wished to hold the defendant, was an admission made, not after, but before any proceedings had been commenced. So both parts of the answer given by the Court of Appeal concerning the application of r.14.1(5) went against the claimant.

Were the same facts to arise after April 6, 2007, the recent amendment to r.14.1(5), that is to say, the making mandatory of what was permissive, would not help a claimant similarly placed. But there is more.

The Civil Procedure (Amendment No. 3) Rules 2006 (S.I. 2006 No. 3435) have not only substituted r.14.1(5), in addition they have inserted in Pt 14 a new provision, r.14.1A, dealing specifically with admissions made before the commencement of proceedings. Rule 14.1A(1) states that a person may, by giving notice in writing, admit the truth of the whole or any part of another party's case before commencement of proceedings (a 'pre-action admission'). The immediate comment that may be made is: well, of course he may! Surely English civil procedure has not reached the stage where express provision needs to be made in the CPR before a person threatened with a civil claim may do just that. But that is an unfair comment because all that r.14.1A(1) does is to set the scene for the sub-rules that follow. They are concerned with the withdrawal of pre-action admissions. And what do they say and do?

There are three main points to notice. The first point is that r.14.1A applies only to admissions made after April 6, 2007. That is the effect of r.5 of the statutory instrument.

The second point is that they apply to certain types of claims only. Rule 14.1A(2) states that those provisions apply to a pre-action admission "made in the types of proceedings listed in paragraph 1.1(2) of the Practice Direction to this Part". A reader who has followed what has been said above closely would be pardoned for thinking that, as the Court of Appeal made it clear in ***Sowerby v. Charlton*** that Pt 14 applies to money claims, then surely money claims will be among the types of claim to which r.14.1A will be applied by operation of para. 1.1(2); right? Wrong. The new provision, though it is parked in a Part that is concerned with money claims, has nothing to do with such claims. Paragraph 1.1(2) of the Practice Direction (Admissions), as substituted by TSO CPR Update 44, states that r.14.1A applies only to proceedings in which one of the following pre-action protocols apply; viz., (a) personal injury claims, (b) resolution of clinical disputes, or (c) disease and illness claims.

The third point is that r.14.1A proceeds on the assumption that a person making a pre-action admission may not unilaterally withdraw it. It stipulates circumstances in which such an admission may be withdrawn, either with the agreement of the person to whom it was made, or with the permission of the court. It might be argued that r.14.1A builds on r.14.1(5) (as substituted), so there was no need for an express statement in the rule generally

prohibiting withdrawal. The weakness in that argument is that (assuming the holding in ***Sowerby v. Charlton*** is right) r.14.1(5) applies only to money claims and only to admissions made after proceedings have been commenced.

Paragraph 7.1 of the Practice Direction, as inserted by TSO CPR Update 44, deals with the withdrawal of admissions. It is a curious provision. Paragraph 7.1 declares: "An admission made under Part 14 may be withdrawn with the court's permission". It is necessary to ask: what is an admission "made under Part 14"? It would seem that there are two types of admission that may be made "under Part 14" and which may not be withdrawn without the court's permission. First there is an admission to which r.14.1(5) (as substituted) applies; that is to say, an admission made after proceedings have been commenced in (again assuming the holding in ***Sowerby v. Charlton*** is right) a money claim (but not in any other type of claim, not even a personal injury claim). Secondly, there is a pre-action admission made in the limited jurisdictional circumstances provided for by r.14.1A. Paragraph 7.2 of the Practice Direction states that, in deciding whether to give permission to withdraw the court will have regard to all the circumstances of the case including certain particular circumstances. (They are listed in a hideous seven point checklist that makes dear old r.3.9(1) look positively principled and sensible by comparison.)

It is submitted that, although the policy considerations underlying the new rules and practice directions dealing with admissions may be clear enough (as the consultation process that preceded the recent amendments showed), the implementation of them is not satisfactory. A particular problem is that sufficient account has not been taken of what Brooke L.J. meant in ***Sowerby v. Charlton*** when he stated that the procedure which regulates the conduct of a defendant who is prepared to make admissions and to defend part only of a claim is contained, not in Pt 14, but in Pt 15 (Defence and Reply) and its supplementing direction and in general provisions relating to statements of case found in Pt 16 (Statements of Case). Pt 15 and Pt 16 apply to proceedings generally (including personal injury claims). The new provisions seem to introduce the concept of "a Part 14 admission" without it being made clear what this means. An intelligent person coming to these provisions for the first time would have difficulty with them, in particular with r.14.1(5) (as substituted). Does it apply to all admissions, whether pre- or post-action? What does is add to Pt 15 and Pt 16 and to the framework provided therein for the making of admissions? More particularly, to what type of proceedings does it apply? Is it still restricted to money claims? Or does it extend to proceedings of the type embraced (as far as pre-action admissions are concerned) by the new r.14.1A? Or does it apply to all proceedings? If the preferred answer to either of the last two questions is, yes, then that could surely have been made clearer. For a number of reasons it is important that the answers be clear; not the least of which is that it is necessary to know when and when not para. 7.2 of the Practice Direction is triggered.

CPR UPDATE

Offers to settle

As is noted in the "In Detail" section of this issue of CP News, CPR Pt 36 has been entirely substituted by Civil Procedure (Amendment No. 3) Rules 2006 (S.I. 2006 No. 3435) r.7(1) and Sched.1. Previously, that Part was titled "Offers to Settle and Payments into Court", but as substituted, the title is "Offers to Settle". The Part is supplemented by Practice Direction (Offers to Settle). The texts of the new Part is set out below and of the practice direction. They will be included with appropriate commentary in the 2007 edition of the ***White Book*** to be published on April 19, 2007.

The new Pt 36 applies to offers to settle made on or after April 6, 2007. Paras (2) to (7) of r.7 of the recent statutory instrument contains transitional provisions to take care of the handling in accordance with the new provisions of offers to settle and payments into court made before that date. The effect the transitional provisions is recited in, and directions as to how they will operate in practice are set out, in Practice Direction (Pt 36). The full text of that practice direction is also given below.

PART 36—OFFERS TO SETTLE

Scope of this Part

36.1—(1) This Part contains rules about—

(a) offers to settle; and

(b) the consequences where an offer to settle is made in accordance with this Part.

(2) Nothing in this Part prevents a party making an offer to settle in whatever way he chooses, but if the offer is not made in accordance with rule 36.2, it will not have the consequences specified in rules 36.10, 36.11 and 36.14.

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

Form and content of a Part 36 offer

36.2—(1) An offer to settle which is made in accordance with this rule is called a Part 36 offer.

(2) A Part 36 offer must—

(a) be in writing;

(b) state on its face that it is intended to have the consequences of Part 36;

(c) specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with rule 36.10 if the offer is accepted;

(d) state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and if so to which part or issue; and

(e) state whether it takes into account any counterclaim.

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

(3) Rule 36.2(2)(c) does not apply if the offer is made less than 21 days before the start of the trial.

(4) In appropriate cases, a Part 36 offer must contain such further information as is required by rule 36.5 (Personal injury claims for future pecuniary loss), rule 36.6 (Offer to settle a claim for provisional damages), and rule 36.15 (Deduction of benefits).

(5) An offeror may make a Part 36 offer solely in relation to liability.

Part 36 offers—general provisions

36.3—(1) In this Part—

(a) the party who makes an offer is the 'offeror';

(b) the party to whom an offer is made is the 'offeree'; and

(c) 'the relevant period' means—

(i) in the case of an offer made not less than 21 days before trial, the period stated under rule 36.2(2)(c) or such longer period as the parties agree;

(ii) otherwise, the period up to end of the trial or such other period as the court has determined.

(2) A Part 36 offer—

(a) may be made at any time, including before the commencement of proceedings; and

(b) may be made in appeal proceedings.

(3) A Part 36 offer which offers to pay or offers to accept a sum of money will be treated as inclusive of all interest until—

(a) the date on which the period stated under rule 36.2(2)(c) expires; or

(b) if rule 36.2(3) applies, a date 21 days after the date the offer was made.

(4) A Part 36 offer shall have the consequences set out in this Part only in relation to the costs of the proceedings in respect of which it is made, and not in relation to the costs of any appeal from the final decision in those proceedings.

(5) Before expiry of the relevant period, a Part 36 offer may be withdrawn or its terms changed to be less advantageous to the offeree, only if the court gives permission.

(6) After expiry of the relevant period and provided that the offeree has not previously served notice of

acceptance, the offeror may withdraw the offer or change its terms to be less advantageous to the offeree without the permission of the court.

(7) The offeror does so by serving written notice of the withdrawal or change of terms on the offeree.

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

Part 36 offers—defendants' offers

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

(2) But, an offer that includes an offer to pay all or part of the sum, if accepted, at a date later than 14 days following the date of acceptance will not be treated as a Part 36 offer unless the offeree accepts the offer.

Personal injury claims for future pecuniary loss

36.5—(1) This rule applies to a claim for damages for personal injury which is or includes a claim for future pecuniary loss.

(2) An offer to settle such a claim will not have the consequences set out in rules 36.10, 36.11 and 36.14 unless it is made by way of a Part 36 offer under this rule.

(3) A Part 36 offer to which this rule applies may contain an offer to pay, or an offer to accept—

(a) the whole or part of the damages for future pecuniary loss in the form of—
  (i) a lump sum; or
  (ii) periodical payments; or
  (iii) both a lump sum and periodical payments;
(b) the whole or part of any other damages in the form of a lump sum.

(4) A Part 36 offer to which this rule applies—

(a) must state the amount of any offer to pay the whole or part of any damages in the form of a lump sum;
(b) may state—
  (i) what part of the lump sum, if any, relates to damages for future pecuniary loss; and
  (ii) what part relates to other damages to be accepted in the form of a lump sum;
(c) must state what part of the offer relates to damages for future pecuniary loss to be paid or accepted in the form of periodical payments and must specify—
  (i) the amount and duration of the periodical payments;
  (ii) the amount of any payments for substantial capital purchases and when they are to be made; and
  (iii) that each amount is to vary by reference to the retail prices index (or to some other named index, or that it is not to vary by reference to any index); and
(d) must state either that any damages which take the form of periodical payments will be funded in a way which ensures that the continuity of payment is reasonably secure in accordance with section 2(4) of the Damages Act 1996 or how such damages are to be paid and how the continuity of their payment is to be secured.

(5) Rule 36.4 applies to the extent that a Part 36 offer by a defendant under this rule includes an offer to pay all or part of any damages in the form of a lump sum.

(6) Where the offeror makes a Part 36 offer to which this rule applies and which offers to pay or to accept damages in the form of both a lump sum and periodical payments, the offeree may only give notice of acceptance of the offer as a whole.

(7) If the offeree accepts a Part 36 offer which includes payment of any part of the damages in the form of periodical payments, the claimant must, within 7 days of the date of acceptance, apply to the court for an order for an award of damages in the form of periodical payments under rule 41.8.

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

Offer to settle a claim for provisional damages

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

(2) Where he does so, the Part 36 offer must specify whether or not the offeror is proposing that the settlement shall include an award of provisional damages.

(3) Where the offeror is offering to agree to the making of an award of provisional damages the Part 36 offer must also state—

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

(4) Rule 36.4 applies to the extent that a Part 36 offer by a defendant includes an offer to agree to the making of an award of provisional damages.

(5) If the offeree accepts the Part 36 offer, the claimant must, within 7 days of the date of acceptance, apply to the court for an order for an award of provisional damages under rule 41.2.

Time when a Part 36 offer is made

36.7—(1) A Part 36 offer is made when it is served on the offeree.

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

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

Clarification of a Part 36 offer

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

(2) If the offeror does not give the clarification requested under paragraph (1) within 7 days of receiving the request, the offeree may, unless the trial has started, apply for an order that he does so.

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

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

Acceptance of a Part 36 offer

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

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

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

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

(a) rule 36.12(4) applies;
(b) rule 36.15(3)(b) applies, the relevant period has expired and further deductible benefits have been paid to the claimant since the date of the offer;
(c) an apportionment is required under rule 41.3A; or
(d) the trial has started.

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

(Rule 36.15 deals with recoverable benefits and deductible benefits)

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

(4) Where the court gives permission under paragraph (3), unless all the parties have agreed costs, the court will make an order dealing with costs, and may order that the costs consequences set out in rule 36.10 will apply.

(5) Unless the parties agree, a Part 36 offer may not be accepted after the end of the trial but before judgment is handed down.

Costs consequences of acceptance of a Part 36 offer

36.10—(1) Subject to paragraph (2) and paragraph (4)(a), where a Part 36 offer is accepted within the relevant period the claimant will be entitled to his costs of the proceedings up to the date on which notice of acceptance was served on the offeror.

(2) Where—

(a) a defendant's Part 36 offer relates to part only of the claim; and
(b) at the time of serving notice of acceptance within the relevant period the claimant abandons the balance of the claim,

the claimant will be entitled to his costs of the proceedings up to the date of serving notice of acceptance unless the court orders otherwise.

(3) Costs under paragraphs (1) and (2) of this rule will be assessed on the standard basis if the amount of costs is not agreed.

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

(4) Where—

(a) a Part 36 offer that was made less than 21 days before the start of trial is accepted; or
(b) a Part 36 offer is accepted after expiry of the relevant period,

if the parties do not agree the liability for costs, the court will make an order as to costs.

(5) Where paragraph (4)(b) applies, unless the court orders otherwise—

(a) the claimant will be entitled to his costs of the proceedings up to the date on which the relevant period expired; and
(b) the offeree will be liable for the offeror's costs for the period from the date of expiry of the relevant period to the date of acceptance.

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

The effect of acceptance of a Part 36 offer

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

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

(3) If a Part 36 offer which relates to part only of the claim is accepted—

(a) the claim will be stayed (GL) as to that part

upon the terms of the offer; and
(b) subject to rule 36.10(2), unless the parties have agreed costs, the liability for costs shall be decided by the court.

(4) If the approval of the court is required before a settlement can be binding, any stay (GL) which would otherwise arise on the acceptance of a Part 36 offer will take effect only when that approval has been given.

(5) Any stay (GL) arising under this rule will not affect the power of the court—

(a) to enforce the terms of a Part 36 offer;
(b) to deal with any question of costs (including interest on costs) relating to the proceedings.

(6) Unless the parties agree otherwise in writing, where a Part 36 offer by a defendant that is or that includes an offer to pay a single sum of money is accepted, that sum must be paid to the offeree within 14 days of the date of—

(a) acceptance; or
(b) the order when the court makes an order under rule 41.2 (order for an award of provisional damages) or rule 41.8 (order for an award of periodical payments), unless the court orders otherwise.

(7) If the accepted sum is not paid within 14 days or such other period as has been agreed the offeree may enter judgment for the unpaid sum.

(8) Where—

(a) a Part 36 offer (or part of a Part 36 offer) which is not an offer to which paragraph (6) applies is accepted; and
(b) a party alleges that the other party has not honoured the terms of the offer,
that party may apply to enforce the terms of the offer without the need for a new claim.

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

36.12—(1) This rule applies where the claimant wishes to accept a Part 36 offer made by one or more, but not all, of a number of defendants.

(2) If the defendants are sued jointly or in the alternative, the claimant may accept the offer if—

(a) he discontinues his claim against those defendants who have not made the offer; and
(b) those defendants give written consent to the acceptance of the offer.

(3) If the claimant alleges that the defendants have a several liability (GL) to him, the claimant may—

(a) accept the offer; and
(b) continue with his claims against the other defendants if he is entitled to do so.

(4) In all other cases the claimant must apply to the court for an order permitting him to accept the Part 36 offer.

Restriction on disclosure of a Part 36 offer

36.13—(1) A Part 36 offer will be treated as 'without prejudice (GL) except as to costs'.

(2) The fact that a Part 36 offer has been made must not be communicated to the trial judge or to the judge (if any) allocated in advance to conduct the trial until the case has been decided.

(3) Paragraph (2) does not apply—

(a) where the defence of tender before claim (GL) has been raised;
(b) where the proceedings have been stayed (GL) under rule 36.11 following acceptance of a Part 36 offer; or
(c) where the offeror and the offeree agree in writing that it should not apply.

Costs consequences following judgment

36.14—(1) This rule applies where upon judgment being entered—

(a) a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer; or
(b) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer.

(2) Subject to paragraph (6), where rule 36.14(1)(a) applies, the court will, unless it considers it unjust to do so, order that the defendant is entitled to—

(a) his costs from the date on which the relevant period expired; and
(b) interest on those costs.

(3) Subject to paragraph (6), where rule 36.14(1)(b) applies, the court will, unless it considers it unjust to do so, order that the claimant is entitled to—

(a) interest on the whole or part of any sum of money (excluding interest) awarded at a rate not exceeding 10% above base rate (GL) for some or all of the period starting with the date on which the relevant period expired;
(b) his costs on the indemnity basis from the date on which the relevant period expired; and
(c) interest on those costs at a rate not exceeding 10% above base rate (GL).

(4) In considering whether it would be unjust to make the orders referred to in paragraphs (2) and (3) above, the court will take into account all the circumstances of the case including—

(a) the terms of any Part 36 offer;
(b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;
(c) the information available to the parties at the time when the Part 36 offer was made; and
(d) the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer to be made or evaluated.

(5) Where the court awards interest under this rule and also awards interest on the same sum and for the same period under any other power, the total rate of interest may not exceed 10% above base rate (GL).

(6) Paragraphs (2) and (3) of this rule do not apply to a Part 36 offer—

(a) that has been withdrawn;
(b) that has been changed so that its terms are less advantageous to the offeree, and the offeree has beaten the less advantageous offer;
(c) made less than 21 days before trial, unless the court has abridged the relevant period.

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

Deduction of benefits

36.15—(1) This rule applies where a payment to a claimant following acceptance of a Part 36 offer would be a compensation payment as defined in section 1 of the Social Security (Recovery of Benefits) Act 1997.

(2) In this rule, and in rule 36.9—

(a) 'recoverable benefits' means any of the benefits referred to in section 1, sub-section (1)(b) of the 1997 Act; and
(b) 'deductible benefits' means any benefits by the amount of which damages are to be reduced in accordance with section 8 and Schedule 2 to the 1997 Act.

(3) A defendant who makes a Part 36 offer should state either—

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

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

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

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

(a) the amount of gross compensation;
(b) the name and amount of any deductible benefit by which that gross amount is reduced; and
(c) the net amount after deduction of the amount of benefit.

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

(8) For the purposes of rule 36.14(1)(a), a claimant fails to recover more than any sum offered (including a lump sum offered under rule 36.5) if he fails upon judgment being entered to recover a sum, once deductible benefits identified in the judgment have been deducted, greater than the net amount stated under paragraph (6)(c).

(Section 15 of the Social Security (Recovery of Benefits) Act 1997 provides that the court must specify the compensation payment attributable to each head of damage)

(9) Where—

(a) further deductible benefits have accrued since the Part 36 offer was made; and
(b) the court gives permission to accept the Part 36 offer,

the court may direct that the amount of the offer payable to the offeree shall be reduced by a sum equivalent to the deductible benefits paid to the claimant since the date of the offer.

(Rule 36.9(3)(b) states that permission is required to accept an offer where the relevant period has expired and further deductible benefits have been paid to the claimant)

PRACTICE DIRECTION (OFFERS TO SETTLE)

This Practice Direction supplements CPR Part 36

Formalities of Part 36 offer and other notices under this Part

1.1 A Part 36 offer may be made using Form N242A.

1.2 Where a Part 36 offer, notice of acceptance or notice of withdrawal or change of terms is to be served on a party who is legally represented, the document to be served must be served on the legal representative.

Application for permission to withdraw Part 36 offer

2.1 Rule 36.3(4) provides that before expiry of the relevant period a Part 36 offer may only be withdrawn or its terms changed to be less advantageous to the offeree with the permission of the court.

2.2 The permission of the court must be sought—

(1) by making an application under Part 23, which 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 may hear the application;

(2) at a trial or other hearing, provided that it is not to the trial judge or to the judge (if any) allocated in advance to conduct the trial, unless the parties agree that such judge may hear the application.

Acceptance of Part 36 offer

3.1 Where a Part 36 offer is accepted in accordance with rule 36.9(1) the notice of acceptance must be served on the offeror and filed with the court where

the case is proceeding.

3.2 Where the court's permission is required to accept a Part 36 offer, the permission of the court must be sought—

(1) by making an application under Part 23, which 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 may hear the application;

(2) at a trial or other hearing, provided that it is not to the trial judge or to the judge (if any) allocated in advance to conduct the trial, unless the parties agree that such judge may hear the application.

3.3 Where rule 36.9(3)(b) applies, the application for permission to accept the offer must—

(1) state—

(a) the net amount offered in the Part 36 offer;
(b) the deductible benefits that had accrued at the date the offer was made;
(c) the deductible benefits that have subsequently accrued; and

(2) be accompanied by a copy of the current certificate of recoverable benefits.

PRACTICE DIRECTION (PART 36)

From 6th April 2007, new rules came into force concerning offers to settle, and Part 36, as it was in force immediately before 6th April 2007, was substituted by a new Part 36.

Rule 7 of the Civil Procedure (Amendment No.3) Rules 2006 that brought those new rules into force and replaced the previous rules contained some provisions that dealt with how the rules are to apply to offers and payments into court made before 6th April 2007.

This Practice Direction explains how those provisions will operate.

Offers and payments made before 6th April 2007

1.1 Paragraph (2) of rule 7 provides that where a Part 36 offer or Part 36 payment was made before 6th April 2007, if it would have had the consequences set out in the rules of court contained in Part 36 as it was in force immediately before 6th April 2007, it will have the consequences set out in rules 36.10, 36.11 and 36.14 after that date.

1.2 This provision makes clear that a Part 36 offer or Part 36 payment that was valid before 6th April 2007, will continue to be a valid Part 36 offer under the rules in force from 6th April 2007, and will have the consequences set out in those rules, specifically in relation to costs and the effect of acceptance.

Permission of the court

2.1 Paragraph (3) of rule 7 provides that where a Part 36 offer or Part 36 payment was made before 6th April 2007, the permission of the court is required to accept that offer or payment, if permission would have been required under the rules of court contained in Part 36 as it was in force immediately before 6th April 2007.

2.2 This provision preserves the requirement to obtain the permission of the court to accept an offer as it existed under the rules in force immediately before 6th April 2007. Therefore, if permission would have been required before 6th April 2007, it will be required after that date. But, if permission would not have been required because the parties have been able to agree liability for costs, or if a further offer has been made triggering a new period for acceptance, permission will not be required after 6th April 2007.

Payments into court made before 6th April 2007

3.1 Paragraph (4) of rule 7 provides that rule 37.3 will apply to a Part 36 payment made before 6th April 2007 as if that payment into court had been made under a court order.

3.2 Rule 37.3 applies to all payments under Part 37, including payments into court under order, and permission is required to take the money out of court.

3.3 By applying rule 37.3 to payments into court made before 6th April 2007, this provision preserves in particular the requirement that permission be obtained to withdraw such payment.

3.4 But, rule 37.3 also provides that money may be taken out of court without the court's permission where a Part 36 offer (including an offer underlying a Part 36 payment) is accepted without needing the permission of the court and the defendant agrees that the sum may be paid out in satisfaction of the offer. Paragraph 3.4 of the Practice Direction to Part 37 makes provision about how to take money out of court.

3.5 This exception to the permission requirement preserves the right under rule 37.2, as it was in force immediately before 6th April 2007, to treat a payment into court made under order or by way of a defence of tender before claim as a Part 36 payment.

3.6 This provision has the effect that a Part 36 payment made before 6th April 2007 may be taken out of court simply by filing a request for payment if the offer underlying the Part 36 payment is accepted without needing permission. In those circumstances, it may be assumed that the defendant agrees to the money being used in satisfaction of the sum offered, and the requirement in paragraph 3.4 of the Practice Direction to Part 37 to file a Form 202 will not apply.

Offers remaining open for acceptance

4.1 Paragraph (5) of rule 7 provides that the rules of court contained in Part 36 as it was in force immediately before 6th April 2007 shall continue to apply to a Part 36 offer or Part 36 payment made less than 21 days before 6th April 2007.

4.2 This provision preserves those rules in their entirety in relation to offers and payments made less than 21 days before 6th April 2007 for the period that they are expressed to remain open for acceptance.

4.3 Paragraph (6) of rule 7 provides that paragraph (5) ceases to apply at the expiry of 21 days from the date that the offer or payment was made, unless the trial has started within that period.

4.4 This provision has the effect that once the 21 day period has expired, the new regime (including the modifications at paragraphs (2), (3) and (4) of rule 7) will apply to the offer or payment.

4.5 If the trial has started within the 21 day period, the rules that were in force before 6th April 2007 will continue to apply to the offer or payment.

Offers made before commencement of proceedings

5.1 Paragraph (7) of rule 7 deals with the position where, before 6th April 2007, a person made an offer to settle before commencement of proceedings which complied with the provisions of rule 36.10 as it was in force immediately before 6th April 2007.

5.2 The court will take that offer into account when making any order as to costs. This preserves the discretion of the court to take into account an offer made before commencement of proceedings as it existed before 6th April 2007.

5.3 The permission of the court will be required to accept such an offer after proceedings have been commenced. This preserves the position under rule 36.10(4) as it was in force immediately before 6th April 2007.

5.4 If proceedings are commenced after 6th April 2007, the requirement to pay money into court in respect of a defendant's money offer under rule 36.10(3)(a) (as it was in force before 6th April 2007) will not an apply [sic] to a defendant's money offer made before the proceedings were commenced.

Pre-action admissions

Rule 4 of the Civil Procedure (Amendment No. 3) Rules 2006 (S.I. 2006 No. 3435) inserts in CPR Pt 14 (Admissions) a new rule, r.14.1A (Admissions made before commencement of proceedings). Para. (5) of r.14.1, which states that "the court may allow a party" to amend or withdraw an admission, is substituted and now states that "the permission of the court is required" to amend or withdraw an admission. Rule 14.1A comes into effect on April 6, 2007, but will not apply to an admission made before that date. The terms of the new rule are set out immediately below.

Admissions made before commencement of proceedings

14.1A—(1) A person may, by giving notice in writing, admit the truth of the whole or any part of another party's case before commencement of proceedings (a 'pre-action admission').

(2) Paragraphs (3) to (5) of this rule apply to a pre-action admission made in the types of proceedings listed at paragraph 1.1(2) of the Practice Direction to this Part if one of the following conditions is met—

(a) it is made after the party making it has received a letter of claim in accordance with the relevant pre-action protocol; or
(b) it is made before such letter of claim has been received, but it is stated to be made under Part 14.

(3) A person may, by giving notice in writing, withdraw a pre-action admission—

(a) before commencement of proceedings, if the person to whom the admission was made agrees;
(b) after commencement of proceedings, if all parties to the proceedings consent or with the permission of the court.

(4) After commencement of proceedings—

(a) any party may apply for judgment on the pre-action admission; and
(b) the party who made the pre-action admission may apply to withdraw it.

(5) An application to withdraw a pre-action admission or to enter judgment on such an admission—

(a) must be made in accordance with Part 23;
(b) may be made as a cross-application.

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