

# Updating the Civil Procedure Rules

Significant changes to CPR Parts 36 and 14 took effect on 6 April this year.

**Prior to the Civil Procedure Rules, a defendant's monetary offer to settle following service of proceedings had to be paid into court to obtain cost benefits. The position persisted following the Woolf reforms. A defendant could make a Part 36 offer but had to back this up with a payment into court 14 days after the service of proceedings to ensure full Part 36 costs advantages.**

The Maersk Colombo [2001] EWCA (Civ) 717 case suggested that the court maintained a discretion to treat a financial offer as having Part 36 costs benefits depending on the particular circumstances of the case. In Crouch v Kings Healthcare NHS Trust [2004] EWCA (Civ) 1332 and The Trustees of Stokes Pension Fund v Western Power Distribution (South West) Plc [2005] EWCA (Civ) 854, the Court of Appeal went further and confirmed an offer could be treated as a payment in if the defendant satisfied the following criteria:

- the offer was in writing;
- the offer was stated as being open for a period of not less than 21 days;
- it was a genuine offer; and
- the defendant was 'good for the money'.

## Changes to Part 36

In the light of these decisions, the Department of Constitutional Affairs conducted a consultation to explore which categories of defendant might be deemed 'good for the money'. The obvious categories of defendant were public sector and insured defendants. There was also consultation over the possibility of removing the requirement to make any payment into court. This was the preferred option and, as from 6 April 2007, defendants will no longer be required to make payments into court to obtain the costs benefits of Part 36, provided some essential criteria are followed. As well as being in writing and open to acceptance for at least 21 days as previously (see previous paragraph), the proposal must:

- be called a Part 36 offer, and
- refer to which aspect of the claim it relates and whether it includes any counterclaim.

The new Rules are different in that:

- The defendant no longer has to make a payment into court following service of proceedings.

- A Part 36 offer can be stated to be open for acceptance for more than 21 days.
- The offer cannot be withdrawn or varied prior to expiry without the court's permission.
- The offer must state payment will be made within 14 days of acceptance if it is to be treated as a valid Part 36 offer.

## **Other changes**

- The Part 36 offer can be withdrawn in writing after the 21-day acceptance period (or such other period as the offer is said to be open for acceptance) without recourse to the court. However, the automatic Part 36 cost consequences cannot be assumed with a withdrawn offer, although the court may use its overriding discretion.
- A new Part 36 offer will not extinguish a defendant's previous Part 36 offer. If circumstances change – for example, if the defendant obtains more favourable evidence and a reduced offer is made – the previous (higher) offer must be withdrawn in writing to avoid it remaining open for acceptance.
- A Part 36 offer is treated as being made at the moment when it is served on the recipient of the offer rather than at the point when it is received.
- Before making a Part 36 offer, the offeror must apply for a certificate of recoverable benefits. The Part 36 offer must set out the gross compensation, the name and the amount of the benefits that will be deducted from that gross sum, and the net amount of compensation payable to the recipient of the offer following deduction of the benefits.
- If the certificate of recoverable benefits is delayed, the offeror must provide the above details within seven days of receipt of the certificate.

## **Costs consequences**

A major change is that claimants will enjoy costs benefits if, at trial, they match their previous Part 36 offer; they do not have to beat that offer, though. In addition, the revised provisions assume that, on winning, a claimant is entitled to interest and costs on an indemnity basis unless the court considers that such an award would be 'unjust in all the circumstances of the case' (the previous provision merely said that the court may order interest and indemnity costs).

## **In summary**

As from 6 April 2007, for any Part 36 offer to be valid and to secure Part 36 costs benefits, a defendant must ensure that their offer:

- is made in writing;
- confirms the particular aspect of the claim covered by the offer;
- is expressed to be a Part 36 offer;

- remains open for at least 21 days; • is stated to be payable within 14 days of acceptance;
- confirms the position regarding the certificate of recoverable benefits; and
- explains what benefits (if any) are to be deducted from the gross compensation and states how much the recipient will receive.

## **Pre-action admissions and subsequent retraction**

Under CPR 14, a claimant can enter judgment where the defendant in a monetary claim makes a written admission of liability following service of proceedings. The one exception is where the claimant is a child or under a disability, in which case court approval will be required.

Before the Civil Procedure Rules came into force, pre-action admissions were treated in a similar way under RSC Order 27. To start with, no-one was quite sure what impact the new Civil Procedure Rules had on this practice. Lord Woolf made it clear, however, that the previous rules should not be a guide to interpreting the new procedures.

In *Sowerby v Charlton* [2005] EWCA Civ 1610, the Court of Appeal concluded that the wording of the CPR was never intended to incorporate pre-action admissions in multitrack claims. However, the court recognised an important exception when it came to personal injury claims involving damages of less than £15,000. In such cases, there was (the court said) a presumption in the personal injury preaction protocol that a defendant was bound by any admissions made in a letter of response.

In *Stoke on Trent City Council v Walley* [2006] EWCA Civ 1137, the Court of Appeal confirmed that CPR Part 14 only applied to admissions made in the course of proceedings and that a defendant who wished to withdraw a pre-action admission did not need the court's permission to do so. While claimants could apply to strike out a subsequent defence, their success in that application would turn on whether they could establish bad faith on the part of the defendant and that a fair trial might be prejudiced by the defendant's actions. In the *Walley* case, Lord Justice Brooke (who had also given the leading judgment in *Sowerby*) expressed his concern about how CPR Part 14 dealt with pre-action admissions, and he proposed that the Civil Justice Council should conduct a review. He recommended that greater weight should be given to pre-action admissions made within a protocol letter of response.

His recommendations have been adopted in the 44th Update to the Civil Procedure Rules. As from 6 April 2007 – which is when the new rules came into force – a claimant may (once proceedings have started) apply for judgment on a defendant's pre-action admission provided that admission:

- is in writing and is made after 6 April 2007; and
- is made following receipt of a letter of claim, or (if made before such receipt) is said to be a Part 14 admission.

The new provisions will also prevent such a preaction admission being withdrawn before the service of proceedings, unless the claimant agrees. Once proceedings have been served, a

defendant will have to obtain either the consent of the other parties or the court's permission to resile from its pre-action admission.

**Tom Armstrong** *London* [t.armstrong@kennedys-law.com](mailto:t.armstrong@kennedys-law.com)

**Christopher Malla** *London* [c.malla@kennedys-law.com](mailto:c.malla@kennedys-law.com)