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Part 36 and Other Offers

with

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Part 36 requirements: CPR Part 36.5

When should you think about making an offer:

- Pre-proceedings?
- With the Particulars of Claim/Defence?
- Disclosure/witness statements?
- On conclusion of the expert evidence?
- Shortly before trial?



Part 36 requirements: CPR Part 36.5

A Part 36 offer must:

- be in writing;
- make clear that it is made pursuant to Part 36;
- specify a period of not less than 21 days within which the Defendant will be liable for the Claimant's costs in accordance with rule 36.13 or 36.20 if the offer is accepted;
- 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
- state whether it takes into account any counterclaim.



Service of the offer

The offer must be formally served:

- Failure to serve the offer in accordance with CPR Part 6 is not fatal - the defect may be remedied by reference to CPR 3.10(b) (*London Trocadero v Picturehouse Cinemas [2022] Costs LR 169* - under appeal).
- Presumably, similarly, a failure to sign the offer would be similarly remediable.



It must be in writing

The form of the offer:

- In order to carry Part 36 consequences the offer must comply fully with Part 36 (*Essex CC v UBB Waste (Essex) Limited [2020] Costs LR 1259*).
“much of the difficulty would be avoided if parties would only use form N242A to make their offers.”
- If the offer purports to impose costs consequences outside Part 36, it will not be a valid Part 36 offer (*James v James [2018] EWHC 242 (Ch)*).
- If the offer excludes interest, it will not be a valid Part 36 offer (*King v City of London Corpn [2019] Costs LR 2197*).



It must specify a period for acceptance

Offers made less than 21 days before trial:

- The time for acceptance need not be specified - the offer may be accepted at any time until the end of the trial (although the permission of the court is needed for acceptance once the trial has started);
- The usual Part 36 consequences will not flow unless the court abridges time for acceptance (rarely done);
- Where the trial is adjourned after the offer has been made, the offeror must apply for abridgement or the offer will not carry Part 36 consequences (*Reader v SPIE Limited [2021] Costs LR 599*) - it's safest to make a further offer.



Knotty problems

Mistake:

- Part 36 is a self contained code (*Gibbon v Manchester CC [2010] 1 WLR 2081*).
- However, the doctrine of common law mistake applies - where a clear and obvious mistake has been made, and the offeree is aware of it, there is no settlement (*O'Grady v B15 Group Limited [2022] EWHC 67 (QB)*, in which the Claimant offered to settle a claim on the basis of an 80/20 apportionment in the Defendant's favour - subsequently reversing the apportionment - and was allowed to withdraw the offer).



Knotty problems

Multiple Defendants:

- Generally where the causes of action overlap, it will be appropriate for separate but identical Part 36 offers to be made against all Defendants at the same time.
- Where a Part 36 offer is made jointly and not severally to both Defendants, and the Claimant succeeds against one but not the other, it is uncertain whether Part 36 consequences will flow, but it would be unjust for them to do so in any event (*Re IT Protect Limited [2020] 10 WLUK 135*).



Part 36 consequences: CPR Parts 36.13 - 36.17

The consequences:

- Costs from expiry of the ‘relevant period’;
- Stay of proceedings;
- Defendant’s offer - costs in the standard basis (unless the case is ‘out of the norm’ - *Excelsior v Salisbury [2002] EWCA Civ 879*) plus interest on costs;
- Claimant’s offer - interest on damages at not more than 10% above base rate; costs on an indemnity basis; interest on costs at not more than 10% above base rate; an additional sum - a percentage of 10% to 5% depending on the amount of damages.



Part 36 consequences

Consequences will be imposed unless it is unjust to do so - the factors:

- (a) the terms of the offer;
- (b) the stage in the proceedings when the offer was made;
- (c) the information available to the parties at the time when the offer was made;
- (d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated;
- (e) whether the offer was a genuine attempt to settle the proceedings.



Part 36 consequences

Consequences will be imposed unless it is unjust to do so - examples:

- Beating an offer as a result of reliance on evidence served late may mean that Part 36 consequences do not flow (*Head v Culver Heating [2021] Costs LR 637*).
- A 90% offer is likely to be effective (*JMX v Norfolk & Norwich Hospitals [2018] 2 Costs LR 285*).
- An offer accepted by a Claimant on his deathbed some six years after it was made did not have Part 36 consequences and could be withdrawn (*Wormald v Ahmed [2021] Costs LR 527*).



The QOWCS and fixed costs regimes

Ho v Adekun [2021] Costs LR 927:

- The Supreme Court found that where QOWCS applies, the parties' costs cannot be set off against each other.
- The Claimant accepted the Defendant's Part 36 offer to settle her claim.
- The Defendant sought to set off against the Claimant's costs order an order in her favour.
- The Supreme Court held that this was not possible.
- The Rules Committee is now consulting on whether to take action in response to the decision.



Other methods of settlement

Sometimes Part 36 offers may not be the tool you need:

- Where the issue is an interim order;
- Where the claim is for something other than money;
- Where the trial is imminent;
- Where it's desirable to maintain flexibility on interest and/or costs;
- Case of fundamental dishonesty (*Summers v Fairclough Homes* [2012] 1 WLR 2004).



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Other methods of settlement

But be careful!

- In *Doyle v M & D Foundations and Building Services Limited* [2022] 7 WLUK 76 the parties agreed a consent order with costs to be subject to detailed assessment - this took the claim out of the fixed costs regime and the Defendant therefore became liable to pay the Claimant's costs on the standard basis.



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Other methods of settlement

RTSM or JSM:

- Stage in proceedings.
- Interplay with offers already made.
- Usefulness in determining offers to be made after the RTSM or JSM.



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Next time....

We're on holiday now!

But we will return on 1st September, when Sarah Prager and Tom Yarrow will be discussing contractual liability in holiday claims:

- brochure descriptions and express terms;
- fairness of terms;
- implied terms;
- supplier contracts;
- airline terms and the Montreal Convention and Denied Boarding Regulations.

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