



CLIENT GUIDE – MAKING A SETTLEMENT OFFER AS A DEFENDANT

It is always better to settle a dispute if possible, as it will be quicker than going to trial which means a saving of time and costs, and you avoid the uncertainty involved in a trial. Even if your opponent does not accept your settlement offer, you could obtain a costs advantage at trial.

MAKING A PART 36 OFFER

Parties in dispute can make an offer of settlement under Part 36 of the Civil Procedure Rules, which has particular advantages over other types of settlement offers, as explained later in this guide.

There is one key drawback of making a Part 36 offer however – you **cannot specify the amount payable for costs**, or make the settlement offer inclusive of costs, or specify that you will not pay any costs. This is because Part 36 offers must specify a period of not less than 21 days (called the ‘relevant period’) within which the defendant will be liable for the claimant’s costs in accordance with certain rules, if the offer is accepted. Under these rules, the court will assess the amount the defendant must pay towards the claimant’s costs (although the parties can agree the amount after the offer has been accepted). There is always a shortfall in what the claimant has incurred and what it can recover, but it means that the amount of that shortfall is not known when the offer is made or accepted. It also means that if the parties cannot agree the costs amount then further time and costs are involved in order to get to a court assessment of those costs. It is possible however for the claimant to ask the court to make an interim payment on account of costs in this situation.

You are not required to make a Part 36 offer, so you could make a settlement offer which specifies the amount you will pay for the claimant’s costs, or offer a global sum inclusive of costs, however you would then lose the particular costs advantages of making a Part 36 offer.

IF THE CLAIMANT ACCEPTS YOUR PART 36 OFFER WITHIN THE RELEVANT PERIOD

If the claimant accepts your offer then you **must pay the whole of settlement sum within 14 days of acceptance** – if you do not do so, the claimant can enter judgment for the unpaid sum. If you include a condition to pay the settlement sum in instalments, or at a later date, then the offer will not be a Part 36 offer.

You must also **pay the claimant’s costs**, which will be assessed by the court on what is called the “standard basis” if you cannot agree with the claimant the amount to be paid.

IF THE CLAIMANT ACCEPTS YOUR PART 36 OFFER AFTER THE RELEVANT PERIOD HAS EXPIRED

You should be aware that your **Part 36 offer will remain 'on the table' for acceptance at any time**, up until judgment is given. This is the case even if the relevant period has long expired, or the claimant had previously rejected the offer or made a counter-offer, or you subsequently made other settlement offers. You can withdraw the offer (although you will need the court's permission to do so if the relevant period has not yet expired), but then you lose the costs advantages set out below.

However there is a costs consequence for a claimant who accepts a defendant's Part 36 offer after the relevant period expired. Unless the claimant can come to a different agreement with you, the court must, unless it considers it unjust to do so, order that while the claimant is awarded costs up to the date on which the relevant period expired, the **claimant must pay your costs for the period from the date of expiry of the relevant period to the date of acceptance**.

The presumption is that you would obtain such a costs order. The court could make a different costs order if it thinks it would otherwise be **unjust**, however the court would have to identify what would make it unjust, and it has to take into account all the circumstances of the case including the terms of any Part 36 offer, when it was made (including in particular how long before the trial started it was made), the information available to the parties when it was made, the parties' conduct in giving or refusing to give information so the offer could be made or evaluated, and whether the offer was a genuine attempt to settle the proceedings.

IF THE CLAIMANT DOES NOT ACCEPT YOUR PART 36 OFFER

If the claimant does not accept your offer, but fails to get a more advantageous judgment than your offer (in money terms this means they fail to beat the amount you offered to accept in settlement), we can then show your Part 36 offer to the court. Unless the court considers it unjust to do so, you will be **entitled to your costs from date on which the relevant period expired, and interest on those costs**. Again the court could make a different costs order if it thinks it would be unjust, but it would have to identify the reasons why with reference to the same factors mentioned above.

Whilst there is always a shortfall in the amount of costs you can recover from your opponent, this may help protect you financially from the claimant proceeding with the claim when it should have accepted your offer (as long as the offer is one that is not beaten at judgment). This could be particularly significant if the offer is made at an early stage in the proceedings, although you do need to know enough about the case in order to decide the best level of offer to make. It also means increased pressure on the claimant to accept a Part 36 offer if they think there is a risk they could fail to do any better than that offer at trial.

MAKING A SETTLEMENT OFFER WHICH IS NOT A PART 36 OFFER

As explained above, you will only obtain the above costs consequences if you make a Part 36 offer. If you decide to make a different type of settlement offer, perhaps because you wish to specify the amount you will pay for costs, or to pay a global sum inclusive of costs, then if it is not accepted but the claimant fails to do better at trial than your offer, then it will be taken into account by the courts when deciding what costs order to make. However the courts will have a much wider discretion on what costs order to make and so there is less certainty over what that might be.

The information contained in this guide is intended to be a general introductory summary of the subject matters covered only. It does not purport to be exhaustive, or to provide legal advice, and should not be used as a substitute for such advice.

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STEVENS & BOLTON

Wey House, Farnham Road
Guildford, Surrey, GU1 4YD

Tel: +44 (0)1483 302264

Fax: +44 (0)1483 302254

DX 2423 Guildford 1

www.stevens-bolton.com