

A CLIENT GUIDE TO PART 36- OFFERS TO SETTLE

Part 36 is a provision in the Civil Procedure Rules (“CPR”) designed to encourage parties to settle disputes without going to trial.

Under Part 36, both claimants and defendants can inform the other side what they will accept or offer to resolve a dispute. If a party does not accept an offer made under Part 36 (a “Part 36 offer”), it risks being made liable to pay more in interest and/or costs on a judgment than if no offer had been made. These costs consequences and the circumstances in which they will apply are set out in more detail below. This financial risk encourages parties to make Part 36 offers and to seriously consider Part 36 offers made to them.

Part 36 offers are made without prejudice

As Part 36 offers are made on a ‘without prejudice save as to costs’ basis, the court is not made aware of a Part 36 offer until after it has reached judgment, but before it has made an order in relation to the costs of the proceedings.

Timing of Part 36 offers

Part 36 offers can be made at any time up to the time of judgment, and even before court proceedings are issued. However Part 36 does not apply to claims which have been allocated to the small claims track (the usual track for claims for less than £10,000).

Part 36 offer requirements

A Part 36 offer must be in writing, state that it is intended to have the consequences of Part 36, state whether the offer is made to settle the whole claim or only part of it (and if so which part) and whether it takes into account any counterclaim.

If a Part 36 offer is made 21 days or more before the start of trial, it must also specify a period (the “Relevant Period”) of not less than 21 days within which the defendant will be liable for the claimant’s costs if the offer is accepted. This is based on the principle that a claimant is entitled to be paid its costs upon settlement of the claim.

Although the rules allow for the Relevant Period to be longer than 21 days, it is unlikely in practice that any longer period would be used in any Part 36 offer.

If the Part 36 offer is being made by a defendant and the offer is to pay a sum of money in settlement of a claim, then the offer must be to pay a single sum (not a series of instalments). Also the defendant must offer to pay the sum no later than 14 days after acceptance by the claimant, otherwise the offer will not be treated as a Part 36 offer (unless the claimant accepts the offer).

Offers which are not made in accordance with Part 36 will not have those consequences, although the court will take such offers into account when considering what order to make about costs.

Clarification of Part 36 offers

A party can within 7 days of receiving the offer request clarification of the offer to enable it to consider the offer properly, and if it does not receive such clarification it can ask the court to make an order requiring the party making the offer to supply it.

Withdrawn or changing Part 36 offers

A Part 36 offer cannot be withdrawn or changed to be less advantageous to the other party until the Relevant Period (referred to above) has expired, unless the court's permission to do so is obtained. Once the Relevant Period has expired, however, it can be withdrawn or changed at any time (unless the other party has already accepted the offer), although if this happens then the Part 36 costs consequences will be lost.

Accepting Part 36 Offers

A party who wants to accept a Part 36 offer can do so in writing at any time. Note that if a party makes more than one offer, the other party can still accept an earlier offer, as long as that earlier offer has not been withdrawn or changed.

If the trial has already started, however, then the court's permission to accept the offer is required. Also if the offer is made by one defendant to a claim of joint liability and the claimant wishes to continue the claim against the other defendants, it will again need the court's permission to accept the offer.

Consequences of accepting a Part 36 offer

If the offer involves the defendant paying a sum of money to the claimant, it must pay that sum within 14 days of the date of acceptance (or any other date agreed between the parties), as

otherwise the claimant can enter judgment against it for that sum. So a defendant must make sure that it can pay the settlement sum within 14 days, before making or accepting a Part 36 offer.

If the offer is accepted within the Relevant Period, the claimant is entitled to its costs up to the date it accepts the offer. If the parties cannot agree the amount of costs, they will be assessed by the court on what is called the standard basis, which normally means that the claimant recovers about 60-70% of the actual costs he has incurred.

If the offer is not accepted within the Relevant Period, or the offer is made less than 21 days before trial, then if the parties do not agree the liability for costs, the court will make an order as to costs. The court rules make it clear that if the offer is accepted after the Relevant Period, then the presumption is that the claimant is entitled to its costs up to the date on which the Relevant Period expired, and the party accepting the offer is liable for the costs of the party making the offer for the period from the date of expiry of the Relevant Period to the date of acceptance. Again, costs will be assessed on the standard basis if not agreed.

Although the court rules only apply if court proceedings have been commenced, if a Part 36 offer is accepted before proceedings have been commenced then as long as the Part 36 offer was properly worded, the above consequences should apply on the basis of a contract between the parties.

Consequences of non-acceptance of a defendant's Part 36 offer

If the claimant obtains a more advantageous judgment to it than the terms of a defendant's Part 36 offer, then (assuming that it has not matched or beaten its own Part 36 offer), all that will happen is that the court will apply the usual principles when considering what order as to costs to make.

If claimant fails to obtain a more advantageous judgment than a defendant's Part 36 offer, and the offer is made more than 21 days before trial, then unless the court considers it unjust to do so, the claimant will be liable to pay the defendant's costs from the date of expiry of the Relevant Period and interest on those costs. This means that even though the claimant may get a judgment in his favour, it will have to pay some of the defendant's costs as a 'penalty' for not accepting the defendant's Part 36 offer which would have disposed of the claim earlier and on more generous terms to itself.

Therefore defendants need to pitch their offers carefully as claimants will not accept offers which they consider so low that the risk of adverse costs consequences is acceptable to them.

Claimants need to assess the risks of not beating a defendant's Part 36 offer upon receipt of that offer and (if the offer is not accepted at the time), as the claim progresses in case the risk assessment changes in the light of subsequent developments in the litigation process.

Consequences of non-acceptance of a claimant's Part 36 offer

If the claimant obtains a judgment that is not as advantageous to it than the terms of the claimant's Part 36 offer, then (assuming that he has not failed to beat a defendant's Part 36 offer), all that will happen is that the court will apply the usual principles when considering what order as to costs to make.

If the claimant obtains a judgment that is at least as advantageous if not better than the terms of the Part 36 offer, and the offer is made more than 21 days before trial, then unless the court considers it unjust to do so, it will order that the claimant is entitled to:

- interest on the whole or part of any money awarded at not more than 10% above base rate for some or all of the period starting with expiry of the Relevant Period;
- its costs on the indemnity basis (which is more generous than the standard basis) from the date of expiry of the Relevant Period;
- interest on those costs not exceeding 10% above base rate; and
- an additional amount of up to a maximum £75,000 (calculated as being 10% of the money awarded up to £500,000 and 5% above this amount up to £1m; if it is a non-money claim, this additional amount is calculated on the amount of costs ordered instead).

This means that the defendant will have to pay an additional amount and more in terms of costs and interest than it would have had to if the claimant had not made the Part 36 offer, as a 'penalty' for not accepting the claimant's Part 36 offer which would have disposed of the claim earlier and on more generous terms to itself.

Therefore claimants need to decide carefully what offers to make, as defendants will not accept offers that are so high that the risks of adverse costs consequences are acceptably low; and defendants need to carefully assess the risks that a claimant will match or beat its Part 36 offer when it is made and, if not accepted at the time, to re-assess those risks as the claim progresses.

How the court decides whether the above costs consequences are unjust

The court will take into account the terms of any Part 36 offer, when the offer was made, the information that was available to the parties when the offer was made, and the conduct of the parties with regard to the giving or refusing to give information to allow the offer to be made or evaluated.

When the above costs consequences do not apply

The above costs consequences do not apply to offers made less than 21 days before trial, unless the court allows the Relevant Period to be shortened. It also does not apply to offers that are withdrawn, or changed to be less generous to the party to whom the offer is made.

This information is necessarily brief and is not intended to be an exhaustive statement of the law. It is essential that professional advice is sought before any decision is taken

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