

Offers and Part 36 – Part 1

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When can a Part 36 Offer be made?

- Part 36 offers to settle can be made in the following instances:
 - In both money (including claims for provisional damages) and non-money claims.
 - In respect of the whole or part of the claim or in relation to an issue that arises
 - On appeal or cross-appeal from a decision made at trial (CPR 36.2(3)(b))
 - In respect of liability alone, thus leaving the issue of the amount of any damages to be dealt with later
 - In respect of counterclaims and any additional/third party (Part 20) claim (CPR 36.2(3)(a))

Requirements of a Part 36 Offer: CPR 36.5

- A ‘**Part 36 offer**’ has to be made in a prescribed way and needs to satisfy certain requirements:
 - the offer must be in writing (36.5(1)(a))
 - it must make clear that it is made pursuant to Part 36 (36.5(1)(b))
 - it must specify a period of not less than 21 days within which the defendant will be liable for the claimant’s costs (the “**Relevant Period**”) (36.5(1)(c))
 - it must state whether it applies to the whole or part of the claim (36.5(1)(d))
 - it must state whether it takes into account any counterclaim (36.5(1)(e))
- Fails to comply? *Mitchell v James* [2004] 1 WLR 158
- Still have discretion to consider it? *Huntley v Simmonds* [2009] EWHC 406 (QB)
- **Precedent Form N242A**

Acceptance of Part 36 Offer: Relevant Period

- Part 36 offer to settle is accepted within the **Relevant Period**:
 - The claimant is entitled to costs up to the date of acceptance on the standard basis (CPR 36.13(1))
 - CPR 36.13(7) counterclaim costs?
 - CPR 36.14(6) defendant must pay the claimant within 14 days
 - CPR 36.14(7) claimant can enter judgment
- If the parties cannot agree on the amount of costs, then:
 - If proceedings have been issued, a costs order will be deemed to have been made (CPR 44.9) the costs will be assessed on the standard basis (CPR 36.13(3))

Acceptance of Part 36 Offer: Expiry of Relevant Period

- Part 36 offer to settle is accepted after the expiry of the **Relevant Period**:
 - The parties must agree the liability for costs or failing agreement, the court decides liability (CPR 36.13(4)).
 - CPR 36.13(5) states that in such circumstances, the court must award the claimant costs up to the date that the Relevant Period expired and that the offeree pays the offeror's costs after that to the date of acceptance unless the court considers it unjust to do so.
 - ***Optical Express Ltd & Ors v Associated Newspapers Ltd* [2017] EWHC 2707 (QB)**
 - ***Pallet v MGN Ltd* [2021] EWHC 76**
 - The claim is stayed upon the terms of the offer

Defendant's Part 36 Offer: Non-Acceptance

- If the claimant obtains a more advantageous judgment than the defendant's Part 36 offer, the court will apply the usual principles in making the cost order.
- If the claimant fails to obtain judgment that is more advantageous than the defendant's Part 36 offer, and it 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 date of expiry of the Relevant Period plus interest on those costs.

Claimant's Part 36 Offer: Non-Acceptance

- If the claimant obtains judgment that is not as advantageous as the claimant's Part 36 offer but equal to the defendant's Part 36 offer, the court will apply the usual principles in making the costs order.
- If the claimant obtains judgment that is at least as advantageous as the claimant's Part 36 offer, and the offer is made 21 days before trial, then unless the court considers it unjust to do so, it will order that the claimant is entitled to (36.17(4)):
 - Interest on the judgment at no more than 10% above the base rate from the expiry of the relevant period onwards
 - its costs on the indemnity basis
 - interest on those costs not exceeding 10% above base rate; and
 - an additional amount of up to a maximum of £75,000

Part 36: CPR 36.17(4)

Type of Claim	Amount Awarded	Additional Sanction CPR 36.17(4)(d)
Money (or mixed) claims	Damages of up to £500,000	10% of the damages awarded
Money (or mixed) claims	Damages over £500,000	10% of the first £500,000 awarded (so, £50,000) Plus 5% of any amount awarded over £500,000 Subject to a cap of £75,0000
Non-money claims	Costs award of up to £500,000	10% of the costs awarded
Non-money claims	Costs awarded over £500,000	10% of the first £500,000 awarded (so, £50,000) Plus 5% of any amount awarded over £500,000 Subject to a cap of £75,0000

What does the Court consider to be unjust?

- The court must take into account all the circumstances of the case, including (36.17(5)):
 - the terms of any Part 36 offer;
 - the stage in the proceedings when any Part 36 offer was made;
 - the information available to the parties at the time of the Part 36 offer;
 - the conduct of the parties;
 - whether the offer was a genuine attempt to settle the proceedings.
- If the court decides that it would be unjust to make the usual order under Part 36, it has wide powers when exercising its discretion as to costs under CPR 44.2.

Part 36: Key Points to remember

- If making a Part 36 offer, make it as clear as possible – use CPR 36.5 as a checklist.
- Keep a record of Part 36 offers. Offers not withdrawn by notice in writing will remain open to acceptance.
- If making an offer to settle or accepting a claimant's offer, defendants need to bear in mind that payment has to be made within 14 days.
- If not accepted, the important question on costs is not which party has won but whether the eventual judgment is at least as or more advantageous than the offer.

Offers and Part 36 – Part 2

Rupert Cohen

Part 36 tips

- LONDON TROCADERO LLP v PICTUREHOUSE CINEMAS LIMITED [2021] EWHC 3103 (1) [*effective electronic service by email*]
- Adams v Options UK Personal Pensions LLP [2021] EWCA Civ 1188 [*mechanics to be resolved*]
- Telefonica UK Ltd v The Office of Communications [2020] EWCA Civ 1374 [*benefits under CPR 36.17(4)*]
- Essex County Council v UBB Waste (Essex) Ltd (No 3) [2020] EWHC 2387 (TCC) [*asking offeree to point out defect is of no value*]
- Lejonvarn v Burgess [2020] EWCA Civ 114 [*Defendant's part 36 offer*]

Calderbank Offers: The Basics

- What is a Calderbank offer:
 - Settlement offer marked ‘without prejudice save as to costs’.
 - In writing, and can include any terms.
 - Acceptance must be in writing.
 - Parties may specify a period of time for which the offer is open and include an expiry date after which the offer is withdrawn.
 - Calderbank offer will only be brought to the attention of the court at the end of proceedings, and the issue of costs is being considered.

Calderbank Offer: Costs

- There are no set cost consequences when accepting a Calderbank offer, generally, the parties will agree on costs.
- The court has discretion as to the weight to be given (CPR 44.2(c)).
- CPR 44.2(4) requires the court to have regard to ‘all the circumstances’ including:
 - the ‘conduct of all the parties’(CPR 44.2(4)(a))
 - whether a party has succeeded on part of its case, even where not wholly successful (CPR 44.2(4)(b))
 - any admissible offer to settle (CPR 44.2(4)(c))
- CPR 44.2(5)(b) provides that the conduct of the parties includes ‘...whether it was reasonable for a party to... pursue or contest a particular allegation or issue..’”

Calderbank -v- Part 36 Offers

Calderbank	Part 36 Offer
There are set cost consequences when accepting a Calderbank offer. The court exercises discretion under CPR 44.	CPR 36, is a self-contained code, which can be distinguished from the approach under CPR 44.
Allows a party to make an offer in terms which are not permitted by Part 36.	Costs sanctions for failing to beat a Part 36 offer potentially more onerous than the available sanctions under CPR 44.
More appropriate where a party wants to make an offer which is inclusive of costs or on a “drop hands” basis.	Part 36 offer must not include terms as to costs that contradict what is stated in CPR Part 36 i.e. cannot be inclusive of costs.
More likely to be suitable where a defendant wants to settle but considers the merits of the claim weak or the claim is exaggerated, therefore does not want the claimant to recover the amount of costs prescribed by CPR Part 36.	If a Part 36 offer is accepted within the relevant period, it would make the defendant liable for all of the claimant’s costs up to the date of acceptance.
Flexible payment terms.	Under CPR Part 36, an offer to pay a sum of money must be an offer to pay such no later than 14 days following the date of acceptable.
Flexible period for acceptance, i.e. 14 days.	Part 36 offers must specify a period of not less than 21 days.

Thank you for listening

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