

Part 36 Offer (October 2015)

Key Statutes and Authorities

- *CPR Part 36; CPR 44.2 (4)(c); CPR 27.2(1)(g)*
- Case Law: *Huck v Robsen* [2002] EWCA Civ 398: “realistic attempt”; *Lahey v Pirelli Tyres Ltd.* [2007] EWCA Civ 91: consequences of acceptance

Introduction

Part 36 is a formal written “offer to settle”:

- The aim of Part 36 is to encourage parties to attempt to settle a dispute;
- It does this by establishing the framework for making an offer; and
- It establishes the costs consequences that each party will face should the offer be accepted or declined
- It can be made pre- and post-issue, and during appeals

Either party can make a Part 36 offer, and it can be viewed as a legitimate way of encouraging settlement, and is not an indication of a weak case.

What is a Part 36 offer to settle?

- It must be a genuine offer to settle;
- It must be made “without prejudice save as to costs”; and
- Must comply with the appropriate Part 36 rules of the Court

Making a Part 36 offer (CPR 36.5)

A Part 36 offer must:

- Be in writing;
- Make clear it is made pursuant to *CPR 36*;
- Specify a relevant period for acceptance, not less than 21 days, within which the

Defendant will be liable for the Claimant’s costs up to the date of acceptance;

- Indicate whether it relates to the whole claim or merely part of it, or to an unrelated issue that arises within it, and if so which part or issue;
- Indicate whether it includes any counterclaim;
- Contain sufficient information to allow the offeree to properly consider the offer, which will be necessary in instances of non-money claims

Under what conditions can Part 36 offers be made?

- In both money and non-money claims, including claims for provisional damages;
- For the whole or part of the claim, or with respect to an unforeseen issue;
- For liability alone, with the amount of damages to be decided at a later point. If a split trial occurs, the Judge can be shown offers relating to the determined issues, even if there are outstanding issues (*CPR 36.16(3)(d)*);
- For counterclaims and any additional/ third party (Part 20) claim

When should a Part 36 offer be made?

- Part 36 offers should always be an option in order to achieve the most favourable costs and interest on costs situation should the matter go to trial;
- It can possibly lead to a commercial settlement, even if the offer is not accepted, by influencing the other side to take action due to the increased risk;
- An accepted Part 36 offer can actually work in a positive way by avoiding the

time and potential non-recoverable costs which can result from litigation

If it is accepted after expiry, costs consequences apply (*CPR 36.13(4) & (5)*):

When should a Part 36 offer not be made?

- A Part 36 offer should not be made if the Defendant does not want to pay the Claimant's costs;
- When a case is on the Small Claims Track (*CPR 27.2(1)(g)*)

- The Claimant is usually entitled to his costs up to the date the relevant period expired, with the offeror entitled to their costs from that date to the date of acceptance
- The parties must reach an agreement regarding the liability for costs, or else the Court decides;

Defendant's Part 36 offer (*CPR 36.6*)

The Defendant must also state that the offer relates to paying a single sum of money; which will be paid within 14 days of acceptance.

Consequences of non-acceptance (*CPR 36.17*)

If at trial the Claimant is awarded a sum that is less advantageous than his own Part 36 offer, the general rules about costs will apply

Clarification of a Part 36 offer (*CPR 36.8*)

If a party needs an offer to be clarified to properly consider it, this must be done within 7 days of service of the offer.

If the Claimant obtains a judgment which is "at least as advantageous" than his own Part 36 offer, the Court can order the Defendant to pay the Claimant (*CPR 36.17(4)*):

Acceptance of a Part 36 offer (*CPR 36.11*)

The offer must be accepted in writing, and as long as it has not been withdrawn, the offer can be accepted without the Court's permission unless the trial has not started or the offer is not made by all Defendants.

- Indemnity Basis costs from the expiry of the relevant period;
- Interest on those costs at a rate of up to 10% above the base rate;
- Interest on the award at a rate of up to 10% above the base rate from the expiry of the relevant period; and
- An "additional amount" up to £75,000 (this falls outside the *CPR 63.17A* IP claim cap (*OOO Abbott v Design & Display Ltd.* [2014] EWHC 3234 (IPEC))

A Part 36 offer is accepted by serving written notice of the acceptance on the offeror's legal representative, with the notice filed at Court.

Costs consequences of acceptance (*CPR 36.13*)

If the Defendant offers to settle part of the claim, with the Claimant accepting the offer and abandoning the rest, the Claimant is only entitled to costs of that part of the claim, unless ordered otherwise.

If the Claimant fails to beat Defendant's offer, the Defendant is entitled to costs plus interest from expiry of the offer (*CPR 36.17(3)*).

If the offer is accepted in the relevant period:

- The Claimant is entitled to his costs of the proceedings on the Standard Basis up to the date of acceptance

Withdrawing a Part 36 offer

- Part 36 offers can be withdrawn or amended any time after the initial period for acceptance expires, by giving the other side written notice (*CPR 36.9(1)*);

- Withdrawn offers no longer carry Part 36 costs consequences (*CPR 36.17(7)*);
- The Court may take into account withdrawn offers under its general costs discretion (*CPR 44.2(4)(c)*)

What if a Part 36 offer is altered during the acceptance period?

If an offer is altered to improve its terms, it is equivalent to a new offer (*CPR 36.9(5)*).

If an offer is altered to provide for worse terms, if the original offer is not accepted within the acceptance period, the alteration takes effect after the period expires (*CPR 36.10(2)(a)*).

If the original offer is accepted, this is binding unless the offeror applies to the Court for permission to alter the terms within 7 days of acceptance (*CPR 36.10(2)(b)*).

What if a Part 36 offer is varied?

The 21-day period for acceptance runs from the date of the original offer, not the variation (*Burrett v Mencap Ltd.* [2014] EW Misc B50 (CC); Northampton County Court).

When is the Court's permission required?

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Disclaimer:

This guidance note should not be considered formal legal advice or legal opinion and should not be relied upon. Appropriate legal advice should be sought before entering into any legal proceedings.

- If a party tries to withdraw an offer or make the terms “less advantageous” within the initial 21-day period (*CPR 36.3(5)*). Any such application must be on notice (*Evans v Wolverhampton NHSFT* [2014] EWHC 3185 (QB));
- Where the Claimant wishes to accept an offer made by some, but not all, Defendants, and certain requirements are not satisfied (*CPR 36.15*);
- Where the trial has already commenced (*CPR 36.11(3)(d)*);
- In a few other circumstances, especially in relation to fatal accident claims (*CPR 41.3A*)

Executing and enforcing a Part 36 offer (*CPR 36.14*)

- An offer to pay a single sum of money must usually be paid within 14 days of the date of acceptance, unless the parties have specified otherwise in writing;
- If the single sum fails to be paid within 14 days or the period agreed to, the offeree may enter judgment for the unpaid sum