CPR Part 36 Offers – Problems in Practice

by Dov Ohrenstein

It is well known that CPR Part 36 provides a useful mechanism by which parties are incentivised to make and accept without prejudice save as to costs offers but the fact that the Law Reports are full of cases about Part 36 demonstrates that there is often uncertainty and confusion as to how Part 36 works. This article therefore addresses some of the issues that litigators regularly have to consider when contemplating making or accepting Part 36 offers and when arguing about the effect of such offers.

1. Should a Part 36 offer be made on the standard form?

The standard form **N242A** may be used but it is not obligatory to do so. Using it reduces the risk of error and non compliance with **CPR 36.5** which includes requirements that a Part 36 offer must—

- Be in writing;
- Make clear that it is made pursuant to Part 36;
- Specify (unless the offer is made within 21 days of the start of a trial) 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; Simply specifying the period but not setting out all the detail is a fatal flaw NJ Rickard Ltd v Holloway unreported, Court of Appeal, 3/11/15.
- 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.

2. Are there advantages in making a Calderbank offer instead of a Part 36 offer?

Sometimes, for example:

- As pointed out in Summers v Fairclough Homes [2012] UKSC 26, Part 36 may be of little assistance in protecting defendants who are facing a fraudulent claim, since, on acceptance, they will have to pay the claimant's costs. Lord Clarke suggested that in such a situation the defendant should make a Calderbank offer to pay the genuine part of the claim on terms that the claimant pay the costs of the fraudulent part
- Offers such as "drop hands" cannot be made under Part 36.
- A defendant who cannot pay within 14 days or wishes to pay in instalments should Calderbank.

Radcliffe Chambers,
11 New Square, Lincoln's Inn
London WC2A 3QB
clerks@radcliffechambers.com

T: 020 7831 0081
F: 020 7405 2560
DX: 319 London
www.radcliffechambers.com

3. Is there any advantage in making a claimant's offer rather than a defendant's offer?

A defendant who offers more than a claimant is awarded is usually entitled to his costs and interest on those costs (**CPR 36.17(3).** The maker of a successful claimant's Part 36 offer is in a more advantageous position than the maker of a defendant's Part 36 offer and can usually recover pursuant to **CPR 36.17(4)**.

- An order for interest on damages (up to 10% above base rate)
- Costs on the indemnity basis from the date of expiry of the offer
- Interest on those costs (up to 10% above base rate)
- An additional amount (not exceeding £75,000)

4. Can a defendant with a counterclaim, who succeeds at trial in establishing that it is owed money be treated as claimant for the purposes of any Part 36 offers that it made?

A defendant with a counterclaim can make a claimant's Part 36 offer. See **CPR 36.2(3)** *"A Part 36 offer may be made in respect of…a claim, counterclaim or other additional claim."*

See also **Form N242A** *"This offer is intended to be a [ ] defendant's [ ]claimant's Part 36 offer"*

However, a defendant who succeeds at trial on its counterclaim is not automatically treated as a claimant for the purposes of any Part 36 offers it made. **Van Oord v Allseas UK** [2015] EWHC 3385 (TCC)

5. Can a time limited Part 36 offer be made, and if so what is its effect?

Prior to 2015 it was not possible to make a time limited Part 36 offer and withdrawal of an offer required a separate letter. See **C v D** [2011] EWCA Civ 646. Now the offer itself *"may be automatically withdrawn in accordance with its terms"* see **CPR 36.9(4)(b).**

However, under **CPR 36.17(7)**, the Part 36 costs consequences do not apply to an offer which is withdrawn (or self destructs). A self destructing Part 36 offer may not provide any significant tactical advantage although the existence of the offer might have some relevance (just like a lapsed Calderbank offer) when the court exercises its discretion on costs. See for example **Owners of Samco Europe v Owners of MSC Prestige** [2011] EWHC 1656 (Admiralty) where a Claimant's made a Part 36 offer to settle on a 60/40 liability basis but withdrew the offer 2 months pre trial. The court determined liability on a 60/40 basis and held that the withdrawal of the offer did not make it unjust to order that the claimant should recover all of its costs from 21 days after the offer was made. A contrasting decision is **Gulati & Others v MGN** [2015] EWHC 1805. There a claimant beat her own Part 36 offer but as the offer was withdrawn she was refused indemnity costs. The Court did not consider that the defendant had acted unreasonably.

Radcliffe Chambers,
11 New Square, Lincoln's Inn
London WC2A 3QB
clerks@radcliffechambers.com

T: 020 7831 0081
F: 020 7405 2560
DX: 319 London
www.radcliffechambers.com

6. What amount of discount does a claimant have to give for its offer to be effective?

Discounts of 5% has been held to be sufficient but this is fact sensitive.

The consequences of not beating a Defendant's or Claimant's offer follow *"unless [the court] considers it unjust to do so"* **CPR 36.17(3), 36.17(4)** and the Part 36 consequences (indemnity costs etc) may be unjust if a claimant only offered a trivial discount.

CPR 36.17(5) provides: *"In considering whether it would be unjust to make the orders referred to in paragraphs (3) and (4), the court must take into account all the circumstances of the case including (e) whether the offer was a genuine attempt to settle the proceedings"*

"If it was self evident that the offer made was merely a tactical step designed to secure the benefit of the incentives provided by the rule (eg and offer to settle for 99.9% of the full value of the claim) I would agree … that the Judge would have a discretion to refuse indemnity costs" **Huck v Robson** [2002] EWCA Civ 398 per Tuckey LJ

"whether it is a genuine offer at all, or merely a lightly disguised request for total capitulation … In my judgment the offer must contain some genuine element of concession on the part of the claimant, to which a significant value can be attached in the context of the litigation." **AB v CD** [2011] EWHC 602 (Ch), per Henderson J.

In **Jockey Club Racecourse Ltd v Willmott Dixon Constructions Ltd** [2016] EWHC 167 (TCC), [2016] 4 WLR 43 a 95% offer of damages to be assessed on a claim with a value of over £5 million was effective in an open and shut case.

Modest defendant's Part 36 offers are less likely to be ineffective than modest discounts by claimants as the defendants' offers will include an offer to pay the claimant's costs. For example, it has been held that a defendant's Part 36 offer to give each of two daughters £5,000 plus costs in an "all or nothing" case about a £4 million estate was effective. Since the costs (including the daughters' CFA uplift and ATE) came to c.£200k, it was not derisory. *"The concept is not an easy one to apply. All Part 36 offers are tactical in the sense that they are designed to take advantage of the incentives provided by Part 36."* **Wharton v Bancroft**, [2012] EWHC 91 (Ch) per Norris J

7. What is the effect on a Part 36 offer of a subsequent payment on admission ?

A payment made pursuant to an admission by the defendants does not have the effect of increasing the value of a Part 36 offer which they had made.

An admitted payment on account of a claim, following a Part 36 offer in a higher amount, has, in the absence of agreement to the contrary, to be taken as being made as much on account of the Part 36 offer as on account of the claim itself. See **Littlestone v MacLeish** [2016] EWCA Civ 127

8. If a claim is excessive but a claimant's Part 36 offer is reasonable should the Claimant be deprived of its uplift on costs?

No.

In **Cashman v Mid Essex Hospital** [2015] EWHC 1312 (QB) the Claimant served a costs bill claiming £262,000 but made a Part 36 offer to accept costs of £152,000. The bill was assessed at £173,693 so the Claimant had beaten his own offer and claimed an additional sum of £17,000 by way of uplift. The costs master awarded the costs of the assessment on the indemnity basis plus interest on the bill and the assessment costs at 10.5% but did not provide any uplift on the grounds that there had been a significant reduction in the bill. This was overturned on appeal. The approach of the costs judge had wrongly penalised the appellant for making what turned out to be a reasonable Part 36 offer. It was the terms of the Part 36 offer, not the level of the sums claimed in the bill of costs, which were to be considered.

9. If a Part 36 offer has been rejected can it later be accepted?

Yes.

Part 36 is a self contained code which does not incorporate all the features of contract law. Part 36 provides for how offers can be withdrawn or (post 2015) lapse. There is no provision that offers (which have not been withdrawn or lapsed in accordance with the rules) become incapable of acceptance after rejection so a rejected offer can subsequently be accepted. See **Gibbon v Manchester CC** [2010] EWCA Civ 726

However, where an offer is made which is not under Part 36, a counter offer under Part 36 can amount to a rejection of the earlier offer so that the earlier offer cannot be accepted subsequently. **DB UK Bank Ltd (t/a DB Mortgages) v Jacobs Solicitors** [2016] EWHC 1614 (Ch)

10. Can an offer be accepted after it has been withdrawn?

If after the relevant period (usually 21 days from the date of the offer) an offer is withdrawn then it cannot be accepted. However, an offer can be accepted within the relevant period even if notice of withdrawal has been served first.

If an offeror is faced with the situation where it wants to withdraw an offer that has been accepted then an application must be made under **CPR 36.10** within 7 days of the notice of acceptance.

CPR 36.10 provides that permission to withdraw an offer may be granted if the court is satisfied that *"there has been a change of circumstances since the making of the original offer and that it is in the interests of justice to give permission"* .

In **Flynn v Scougall** [2004] EWCA Civ 873 a defendant unsuccessfully applied to reduce an offer within the 21 day period, having received expert evidence undermining the claim. The claimant tried to accept the offer after the attempted withdrawal. The Court of Appeal refused to allow the withdrawal of the offer. The defendant had deliberately made an offer before receiving expert

Radcliffe Chambers,
11 New Square, Lincoln's Inn
London WC2A 3QB
clerks@radcliffechambers.com

T: 020 7831 0081
F: 020 7405 2560
DX: 319 London
www.radcliffechambers.com

evidence and there had been no substantial or surprising change in circumstances. However, there is a suggestion that mistake may be a good reason for withdrawal of an offer. The principles that had applied pre CPR to payments into court applied to Part 36 ie there must be *"a sufficient change of circumstance since the money was paid to make it just that the defendant should have an opportunity of withdrawing or reducing his payment",*

In **Milton v Schlegel** Cambridge Cty Ct, unreported, 31/10/08 a defendant's offer of £4,200 was accepted. Subsequently the defendant asserted that there was a typographical error (repeated 3 times in the offer) and the offer should have been £1,200. There was nothing obvious to indicate that there was an error (although the Claim Form limited the claim to £3,000). The county court held that it had the jurisdiction to allow the withdrawal of the offer if *"special circumstances"* existed but in the light of the facts, it refused to exercise that jurisdiction.

Erghani v Sauflong Pharmaceuticals Ltd ChD , unreported 19/7/10 a defendant was permitted to withdraw its offer within the relevant period where there had been a *"radical change in stance"* by the Claimant who had abandoned a number of part of its claim. If the defendant had not been allowed to withdraw its offer then the claimants would have recovered there costs as of right for those abandoned claims.

Evans (Jayne) v Royal Wolverhampton Hospitals NHS Foundation Trust [2015] WLR 4659 it was held that it was not appropriate for the defendant to have applied without notice to the claimant for permission to withdraw its offer within the 21 day period. Any application needed to be on notice and defendant would have to disclose the evidence and arguments that it intended to rely on.

Most recently in **Cumberland Mills v Sellars**, unreported, Clerkenwell Cty Ct, 2016 a defendant with a counterclaim who offered to accept £1 damages but wrongly ticked the box *"defendant's offer"* on the N243 Form was allowed to withdraw the offer where the claimant only tried to accept it after notice of withdrawal was served and the error was highlighted.

11. <u>Can you avoid the usual consequences if you don't beat an offer?</u>

Yes, if it is shown that it would be unjust for the usual consequences to follow.

In **SG v Hewitt** [2012] EWCA Civ 1053 the Claimant had been seriously injured in 2003 when he was 6 years old. In 2009 the defendants made a pre action Part 36 offer of £500,000. At that stage the claimant's advisors considered that it was not possible to advise on the reasonableness of the offer until further investigations had been carried out when the child reached adolescence as to the likely consequences of the injury. It was eventually accepted in 2011 and there was a dispute about who should pay the costs from the date of the offer. The Court of Appeal held that the claimant should have its pre and post offer costs paid by the defendant. This overturned the decision of the 1st instance judge (who had approved the compromise but had awarded the defendant its post offer costs). The Court of Appeal emphasised that the decision was extremely fact sensitive and that the mere fact that a claimant is a child is insufficient basis for ignoring the usual consequences of Part 36. However, here it would have been difficult for anyone to have advised acceptance of the offer, still less to have obtained the approval of the court on behalf of the minor in 2009.

In **Yentob v MGN Ltd** [2015] EWCA Civ 1292 a claim was made against a newspaper for misuse of private information. The Claimant failed to beat the terms of the newspaper's Part 36 offer. The Court of Appeal held that it was not enough for the party who failed to beat an offer to show that the decision not to take up the offer was a perfectly reasonable one. He had to show that it would be unjust were the normal consequences to apply. On the facts it would have been unjust for those consequences to apply- the newspaper group had made limited admissions and had until shortly before the trial denied any liability, the respondent therefore had *"some form of justification for pursuing the matter to trial"*. Accordingly, the judge was entitled to make no order as to costs.

12. <u>What happens when currency movements changes an offer's value?</u>

The critical date to determine whether an offer has been beaten or not is the date of judgment but currency fluctuations may make it unjust for the usual Part 36 consequences to apply.

In a case where a claimant offered under Part 36 to accept £3.7m (worth $6.3 million at the date of offer) and the trial judge awarded $5.4 million (worth £4.1m at the date of trial) the issues were whether the claimant had beaten its offer or not and (if the offer had been beaten what the consequences should be. It was held that whilst the offer had been worth US$6.3m at the time that it had been made, the relevant time at which the comparison in money terms was to be made was upon judgment being entered. At that stage the claimant had beaten its own offer. However, the only reason why the claimant had beaten its Part 36 offer was that sterling had fallen against the dollar. In those circumstances, it was unjust to make orders under **CPR 36.14(3)** for any part of the period between the date on which the time for accepting the offer had expired and the date of judgment. **Novus Aviation Ltd v Alubaf Arab International Bank** [2016] EWHC 1937 (Comm)

13. <u>Does the Court have a discretion under CPR 3 to extend time to make payments under CPR Part 36?</u>

No.

The court has no discretion under **CPR Pt 3** to extend the 14-day time limit provided for under **CPR r.36.14(6)** for payment of a Part 36 offer. Part 36 was a self-contained code with clear rules designed to encourage out-of-court settlements, and that certainty would be undermined if Part 3 allowed the court to extend the time for payment. **Titmus v General Motors UK Ltd** [2016] EWHC 2021 (QB)

Further, a defendant's offer that includes an offer to pay all or part of the sum at a date later than 14 days following the date of acceptance will not be treated as a Part 36 offer unless the offeree accepts the offer. See **CPR 36.6**

14. <u>Can a defendant rely on an offer which the claimant only just beats?</u>

No, not for the purposes of Part 36, although a "*near miss*" may have relevance to the general discretion on costs.

Radcliffe Chambers,
11 New Square, Lincoln's Inn
London WC2A 3QB
clerks@radcliffechambers.com

T: 020 7831 0081
F: 020 7405 2560
DX: 319 London
www.radcliffechambers.com

CPR 36.17 provides that the rule applies where *"a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer"* or where *"judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer"*.

In **Carver v BAA** [2008] EWCA Civ 412 a defendant had offered £4,520 which fell just £51 short of the damages award. The Judge and Court of Appeal were of the view that the Claimant had not succeeded in obtaining a judgment which was more advantageous than the Defendant's offer "*the extra £51 gained was more than offset by the irrecoverable cost incurred by the claimant in continuing to contest the case for as long as she did."*

Carver was overturned by amendment of the CPRs in 2011 (now in **CPR 36.17(2)** that said *"more advantageous"* means better in money terms by any amount, however small, and *"'at least as advantageous' shall be construed accordingly."*

Accordingly, an offer which is beaten cannot have the consequences prescribed by Part 36. However, the offer can be relevant as part of the general discretion on costs under **CPR 44.2(4)(c)** – "*all the circumstances"* includes *"any admissible offer to settle which is drawn to the court's attention, and which is not an offer to which the consequences under CPR Part 36 apply"*.

15. <u>Can a Part 36 offer made before trial be relevant to the costs of an appeal?.</u>

No.

Where a defendant made a Part 36 offer which the claimant failed to beat at trial the claimant had to pay the trial costs. The claimant appealed and the award of damages was increased but was still less than the amount of the offer. The claimant remained liable for the trial costs as the offer had not been beaten. However the defendant was liable for the appeal costs. The offer was irrelevant to the appeal as it could not be accepted post trial. The defendant, if it wanted protection against having to pay the costs of the appeal, should have made a new Part 36 offer for the purposes of the appeal. See **Pawar v JSD Haulage** [2016] EWCA Civ 551

Dov Ohrenstein
Radcliffe Chambers
11 New Square
Lincoln's Inn
London
WC2A 3QB