

The Pitfalls of Part 36 – a new focus

The purpose of this article is to consider the impact of the relatively recent changes to Part 36 of the Civil Procedure Rules and, thereafter, to provide practical advice on how to avoid the resulting dangers and pitfalls that are now associated with this established area of law.

The Part 36 Code

Part 36 is an important tool within the civil legal system, which when used properly, is a useful way of settling a number of issues including liability¹, contributory negligence, damages and sometimes even costs. Indeed, since the Woolf reforms of it has empowered claimant personal injury lawyers and given them control over the destiny of a case.

It is important to be aware of the modification in this area and the latest judicial interpretation of Part 36 of the Civil Procedure Rules to avoid mistakes, made all too commonly, by those practising in personal injury law.

Of course, it is not prescriptive to reconcile a case by relying on the principles of Part 36. Indeed, it is perfectly possible to reach an agreement with your opponents without ever venturing into such territory. Nonetheless, there are both tactical and cost advantages in making a formal Part 36 offer to settle.

Indeed making a Part 36 offer to settle is very much encouraged by the courts to ensure that cases are run efficiently and concluded expediently.

To be compliant with the rules of court a Part 36 offer to settle a claim must be a genuine offer to settle. It is also by its very nature without prejudice, meaning that Part 36 offers are not made known to the Judge until after damages have been awarded.

¹ Civil Procedure Rule 36.2 (5)

They differ however, from the old style Calderbank letters which required the inclusion of wording such as “without prejudice, save as to costs” to ensure that the content of the letter could not be referred to the Judge until the conclusion of the matter. There is no longer a requirement that “without prejudice” be expressly noted on the offer, it is implicit by the very nature of a Part 36 offer.

When making an offer it is important to ensure that the offer complies with the procedure set out in part 36 of the civil procedure rules. If the offer is not compliant it will fail to trigger part 36 consequences, and allow you to take benefit of the tactical and cost advantages described above. To ensure compliance a part 36 offer must follow the form of Part 36.2.

The courts have, in some circumstances, ordered that the costs consequences still will apply, despite the proposed Part 36 offer containing formal or technical defects. However this is usually only providing that they cause no real uncertainty or prejudice.² Therefore, rather than rely upon the interpretation of the Courts, it is best to adopt good practice in making all Part 36 offers adhere to the provisions of CPR 36.2

Part 36.2 says

(2) A Part 36 offer must –

- (a) be in writing;
- (b) state on its face that it is intended to have the consequences of Section I of Part 36;
- (c) specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with rule 36.10 if the offer is accepted³;
- (d) 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
- (e) state whether it takes into account any counterclaim.

In addition to the required content highlighted above, it may be necessary for further information to be included in a Part 36 offer if it is to cover future pecuniary loss⁴, the deduction of benefits⁵ or if it is an offer to settle provisional damages.⁶

² *Huntley v Simmonds* [2009] EWHC 406 QB

³ Although this rule does not apply if the offer is made less than 21 days before the start of trial CPR 36.2 (3)

⁴ Civil Procedure Rule 36.5

⁵ Civil Procedure Rule 36.15

The wording of a Part 36 offer is important. Ambiguity and a use of confusing or outdated phrasing can result in an offer falling outside the scope of Part 36 and thereby not benefiting from the cost consequences.

Wording that has drawn upon the old formulation of Part 36, for example, where it is stated an offer is not capable of acceptance after the 21 day period is said only to be possible where parties agree costs or with permission of the Court, is not easy to reconcile with the changes to this area and the most recent case law. It is therefore important that Part 36 offers are clear and succinct, incorporating the provisions of Part 36.2. Wording that was used to propose offers prior to the incorporation of Rule 36.9(2) should be forgotten.

It is important to never lose sight of the obvious, which is that the purpose of the part 36 regime is to put pressure on the offeree to accept an offer within the relevant period to avoid the draconian cost consequences if the offer is not accepted and the offeror goes on to obtain a judgment equal to or of more advantageous terms at trial. It is, therefore, worth taking time to ensure that the wording is binding on your opponents. Obviously, these cost consequences do not apply if the offer is withdrawn.

Although the underlying principle of offer and acceptance underpins Part 36 offers the courts have expressly dismissed the idea that they incorporate the rules of law governing the formation of contracts. But rather, the courts have left us in no doubt that Part 36 embodies a self contained code⁷, which is best viewed in isolation.

The newly inserted Part 36.9 (2) highlights that it would be difficult to reconcile this area with contract law. It leaves us in no doubt that an offer made in compliance with Part 36 remains live until expressly withdrawn in writing. Verbal or written rejection of an offer, silence or the proposition of a counter offer does nothing to extinguish or vary the original offer. Only a formal written notification, complying with Rule 36.9(2), to your opponents, confirming the withdrawal of the offer previously made by you can extinguish a part 36 offer. Until that time historic offers remain capable of acceptance; even if they were made at the beginning of a matter; before the case was underpinned by evidence and the severity evolved.

⁶ Civil Procedure Rule 36.6

⁷ *Gibbon v Manchester City Council and LG Blower Speciality Bricklayer v Reeves & Another* [2010] EWCA Civ 726

The above was confirmed in the cases of *Gibbon v Manchester City Council and LG Blower Speciality Bricklayer v Reeves & Another* [2010] EWCA Civ 726. These are two court of appeal decisions which were delivered in one judgement and allowed offers to be accepted out of time; confirming that the only way to withdraw a part 36 offer is to expressly serve notice of the withdrawal, following the code set out in Rule 36.9(2).

The court held that an implied withdrawal is not sufficient; until it is formally withdrawn an offer remains open for acceptance.

The latest case, which adopted this view, is the Court of Appeal case of *C v D* [2011] EWCA Civ 646. The court concluded that there is no room for the notion of an implied withdrawal of an offer within Part 36. It confirmed that the initial offer has to specify a period of at least 21 days during which the defendant remains liable for the claimant's costs until acceptance. But until formally withdrawn an offer would remain capable of acceptance.

In the above case it was confirmed that if a party wishes to make a time limited offer, in the sense that the offer is to lapse of its own accord at the end of the stipulated period, then the parties were free to do so, however, such an offer will not be a Part 36 offer and, therefore, the cost consequences will not bite.

The Practical Advice

Accordingly, it is of paramount importance that we are conscious to the fact that if a series of offers have been proposed, by either or both parties, an offeree may accept any of those offers out of time unless the offeror has withdrawn it formally in writing.

It has been recognised that difficulties may arise as to whether a later offer was intended to vary an earlier offer, suggesting that only the varied form can be capable of acceptance or whether the later offer was meant to be a stand alone offer, separate to the earlier ones, each being capable of acceptance.

The practical advice must be that it is vital that files are constantly reviewed and the merits of the case and outstanding offers are considered, and withdrawn if it is appropriate to do so. When making a new offer it is important to consider whether outstanding offers, previously made,

should be withdrawn.

The trigger points for such reviews could be when further medical evidence is received, especially if such evidence increases the value of the claim.

This process should be repeated at key stages in the case. Such stages may include the receipt of the opponent's first and subsequent medical reports; upon receipt of the claimant's medical or financial evidence; when detailing the client's past financial losses; if future loss occurs, or if the evidence causes consideration of disadvantage in the labour market.

It would also be sensible to formally withdraw all previous offers before you receive your opponent's medical evidence or a joint statement from the experts. At that point, the defendant's representatives might seek to accept an offer out of time; especially if their evidence is less favourable than they expected it to be. This may result in your client being forced to settle at an undervalue. This is especially true in respect of any offers proposed in the early life of the claim.

A further scenario where previous offers should be considered, and possibly withdrawn, is when your client needs treatment as a result of the accident.

A final file audit of previous offers should always be made as you prepare to issue proceedings.

It is clear, from the above, that throughout the currency of the claim there will, more likely than not, be a steady flow of offers; which although appropriate at the time they are made, may turn out to be inadequate as the case evolves.

Therefore, building a structured review into the case management system, which occurs at regular intervals and spans the life of the case; either at regular periods or trigger points would be good practise and may prevent a negligence claim against your firm.

The structured review could be organised during the regular file audits. Or, perhaps colleagues could swap a number of files each month and review them; so that any offers which disadvantage the claimant could be identified and withdrawn.

Alternatively, in view of the immortality of an offer, and the possible significant consequences of the same, it could be justified to mark proposed or received offers on the front of the file in the same way that you would when providing an undertaking. In this way the history of offers

would be clear for all to see.

When withdrawing offers, a letter should be drafted which formally withdraws the offer; pursuant to part 36.9(2).

The changes to part 36 should not discourage you from proposing part 36 offers of settlement. Indeed, as I have indicated above, the Court encourages such intervention by the parties. It is useful, therefore, to consider when it might be appropriate to propose such an offer.

In my opinion you should consider proposing an offer when:-

- to do so would achieve the best damages, costs and interest on costs;
- to focus the opponents mind, narrow the issues and increase awareness of risks and thereby to avoid the delay and cost of proceeding to trial
- before proceedings are issued

Conclusion

In conclusion it is important to remember that Part 36 is a wholly procedural tool and is subject to the rule of the Court.⁸ It operates in isolation and should not be associated with or thought subject to other areas of law, including contract.

Part 36 offers are formal offers of settlement which have costs consequences. To avoid any ambiguity; a Part 36 offer made should be as clear as possible, outdated or complicated phrasing should be avoided and the offer should be made in accordance with Part 36.2.

Whilst nothing in respect of Part 36 prevents a party making an offer to settle outside of the principles of Part 36, if the offer is not made in accordance with the prescribed form and content (CPR 36.2), the costs consequences of Part 36 will not apply.

There is no room for the notion of an implied withdrawal of an offer within Part 36. If an offer is not formally withdrawn it will remain capable of acceptance. Rejection, a counter offer or silence does not extinguish an offer and it can be accepted even if the specified period has elapsed. A withdrawal must be in writing and should adhere to CPR 36.9.

⁸ *Cumper v Pothcary* [1941] 2 K.B. 58

By failing to formally withdraw an offer it may have an adverse effect on the outcome of the case. A prudent solicitor should keep a record of Part 36 offers made and frequently consider whether offers made are still applicable and ensure that the existing offer will not result, by virtue of evolving evidence, in your client's case being settled at an undervalue. Formal written withdrawals should then be made, immediately, if it is appropriate to do so, or if there is doubt as to whether or not an existing offer is sufficient. If you are unsure about the sufficiency of an offer it is safer to withdraw it. You could always make a further offer once you have had chance to consider the adequacy. Far better that than running the risk of your client receiving inadequate compensation.

It is not in a client's best interests for his or her solicitor to propose an offer and lose sight of it. Therefore, files must now frequently be reviewed for offers. The use of case management systems, reminders and regular review of files should assist in this process which could, without such technical advances, be quite time consuming.

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