

Getting Part 36 offers right

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Summary

There are clear advantages to Claimants and Defendants in making Part 36 offers. Put very simply, if a Claimant's Part 36 offer is accepted then the Claimant will be entitled to his costs up to acceptance and, if it isn't accepted and later the Claimant beats his own offer at court, then the Claimant will be entitled to his costs up to expiry of the offer with indemnity costs thereafter and penalty interest as well as a 10% damages bonus (CPR Rules 36.17(1)(b) & 36.17(4)).

If a Defendant beats her own offer then she will pay the Claimant's costs up to the expiry of the offer and will recover her costs (on the standard basis) thereafter as well as interest on those costs. Those costs can be enforced up to the amount of damages that a Claimant recovers (CPR Part 44.14(1)).

With those benefits in mind it's important to ensure that Part 36 offers are made properly and in accordance with the rules so that they take effect and the above consequences are applied. A few recent decisions serve to remind litigators of some of the rules within the regime and this article sets those out here.

The importance of getting everything in writing

Part 36 offers must be made in writing and they must be accepted in writing. Any withdrawal of an offer must also be in writing.

When drafting a Part 36 offer, if not using the pro forma (Form N242a), remember to be clear in your wording and consistent with Part 36. In *James v James & Ors* [2018] EWHC 242 the Court found a purported Part 36 offer could not be classed as an offer which fell within the scope of Part 36 as there was an inconsistent term by which the offeror would pay the Offeree's costs up to the end of the relevant period whereas CPR 36.13 provides that the Offeror is only responsible for costs up to the date of acceptance within the relevant period.

It followed that the Court did not award the Offeror part 36 consequences even though the offer otherwise made sense and purported to be more generous than Part 36.

Withdrawn offers don't have automatic consequences

In *Ballard v Sussex Partnership NHS Foundation Trust* [2018] EWHC 370 (QB) an appeal was allowed where the lower court had erroneously taken into account a withdrawn Part 36 offer. The Offeror had in fact made two Part 36 offers, the first of which had been withdrawn. At trial the Offeree failed to beat both offers and the Judge held that the second (non-withdrawn) offer was irrelevant to the question of costs and ordered the Offeree to pay the Offeror's costs from the expiry of the first offer. The decision was plainly wrong as CPR 36.17(7)(a) provides that Part 36 consequences do not apply to an offer which has been withdrawn and so the Offeree's appeal was allowed.

Offers must be genuine

The Court has previously held that a 100% offer is not a genuine attempt to settle as offers must contain some genuine element of concession (*AB v CD & Ors* [2011] EWHC 602 (Ch)). Recently, in *JMX v Norfolk & Norwich Hospitals* [2018] EWHC 185 (QB), the Court has reaffirmed that a 90% offer can be a genuine offer such that it would not be unjust to apply part 36 consequences. In this case the Defendant had attempted to argue that the Claimant's assessment of the litigation risk at 10% was a significant under-evaluation however, the Court said that was an argument which could hardly ever succeed and that a discount of 10% was not a token amount particularly in a claim where damages were very high. Part 36 consequences applied.

Payments on account

If, after making a Part 36 offer, an Offeror makes a payment on account, the effect of that payment results in a corresponding reduction in the amount the Part 36 offer unless the paying party clearly stated that it was not to be treated as having that effect (*El Gamal v Synergy Lifestyle Limited* [2018] EWCA Civ 210).

Checklist

- Everything from making to accepting the offer must be done in writing.
- A withdrawn offer does not have any automatic consequences.
- Offer must be a genuine attempt to settle.
- Payments on account made after a Part 36 offer is made reduce the amount of that Part 36 offer unless otherwise stated.
- Beating, or “more advantageous” means in money terms... however small – 36.17(2).
- Don't forget to claim your Part 36 consequences under CPR 36.17!

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