

Part 36 Offers

1. Introduction

There is no restriction as to the way in which a party to a dispute can make an offer to settle. However, the Court rules provide a tactical procedure whereby offers to settle can have certain consequences.

Such offers are called “Part 36” offers – so called as they are made pursuant to Part 36 of the Civil Procedure Rules.

Part 36 offers can be made by either side to a dispute, in relation to both money and non-money claims, and in relation to all or part of a claim. They can also be made at any stage of a dispute – even before Court proceedings have commenced. Part 36 offers do not, however, apply to small claims proceedings.

2. How to Make a Part 36 Offer

In order to comply with Part 36, there are a number of formalities. In particular, the offer must:

- Be in writing and specify a period of at least 21 days within which the Defendant will be liable to pay the Claimant’s costs if the offer is accepted.
- State whether it relates to the whole of the claim or to a particular part of the claim.
- State whether it takes into account any counterclaim.

If the party making the offer is the Defendant then the offer must also (if it is a money claim) state that, if accepted, the sum offered will be paid within 14 days following acceptance.

3. Accepting Part 36 Offers

Part 36 offers must be accepted in writing and can be accepted within 21 days without the permission of the Court. However, the 21 day period is somewhat misleading, as Part 36 offers can generally (with some limited exceptions) be accepted after the 21 day period has expired without the permission of the Court. The main exception to this rule is if the trial of the case has started. The consequence is that Part 36 offers can often be accepted many months after they have been made unless they have been withdrawn (as to which see later).

It should also be noted that the right to accept a Part 36 offer after the 21 day period has expired can be exercised even if the recipient of the offer has subsequently made their own Part 36 offer.

4. Consequences of Acceptance

If the Defendant accepts a Claimant’s Part 36 offer within the 21 day period then he will normally be liable to pay the Claimant’s costs of the proceedings up to the date of the acceptance and the case is stayed (ie, brought to a halt).

If the recipient of the Part 36 offer accepts the offer after the 21 day period has expired, then the parties must try and agree the liability for costs, and failing agreement, the Court must decide who is to pay them. However, the recipient would normally be liable to pay the other party’s costs for the period after the 21 days expired until the date of acceptance of the offer.

5. Consequences of Non-Acceptance

This is where the tactical benefit of a Part 36 offer has particular relevance.

It is necessary to consider the position where the offers have been made by the Claimant or the Defendant respectively.

(i) Claimant's Part 36 Offer

Looking first at a Claimant's offer, if the Claimant is awarded at trial a judgment which is "at least as advantageous" to him as the amount of his Part 36 offer, then the Defendant will be ordered to pay:

- Interest on the amount of any sum of money awarded at a rate not exceeding 10% above base rate, for some or all of the period since the 21 days expired.
- The Claimant's costs on an "indemnity" basis since the 21 days expired, together with interest on those costs at the same rate. The indemnity costs principle means that the Court will resolve any doubt it has as to whether the costs claimed were reasonably incurred in favour of the party receiving the costs (the Claimant in this instance).

If the Claimant fails to obtain a judgment at least as advantageous to him as the amount of his Part 36 offer, then normally his Part 36 offer will simply be disregarded.

(ii) Defendant's Part 36 Offer

Turning to a Defendant's Part 36 offer, if the Claimant obtains judgment at trial which is at least as advantageous to him as the Defendant's Part 36 offer, then again the Defendant's offer will normally be disregarded.

However, if the Claimant succeeds in his claim at trial but fails to obtain a judgment which is at least as advantageous to him as the Defendant's Part 36 offer, then the Claimant:

- Will normally still be entitled to payment of his costs by the Defendant up to the end of the 21 day period after the offer was made; however
- The Claimant will normally be ordered to pay the Defendant's costs since the end of the 21 day period and interest on those costs. Those costs can be substantial, as they will include the cost of the trial itself.

6. Withdrawing Part 36 Offers

A Part 36 offer cannot be withdrawn during the initial 21 day period, unless the Court grants permission to do so. However, after the 21 days have expired, a Part 36 offer can be withdrawn at any time without the permission of the Court, providing it has not been accepted. A party might wish to withdraw his Part 36 offer where, for example, new evidence has come to light, which changes his perceived merits of the case.

Once withdrawn, a Part 36 offer is of no effect.

7. Other Matters

It is important not to be too simplistic in the approach to Part 36 offers. In particular,



- Part 36 itself makes it clear that, when considering the appropriate costs order to make, the Court will take into account the wider picture. This includes the stage at which the Part 36 offer was made, the information available to the parties at the time it was made and the conduct of the parties in giving information to enable the offer to be evaluated.
- Judges are in general now much more willing to exercise their discretion on costs and have regard to other matters. Such matters might include the extent to which each party has shown a genuine attempt to settle the case (by using the Part 36 procedure or otherwise) and which issues the respective parties have succeeded on at trial. The Court will also consider the parties' conduct of the case generally.
- In relation to Part 36 offers made by the Defendant, the Courts appear to be expanding the definition of whether the Claimant "fails to obtain a judgment more advantageous" than the amount of the offer. Generally speaking, it is not now enough for a Claimant to "scrape home" by only just beating a Defendant's Part 36 offer. The Claimant will need to beat it by a significant margin, although by precisely how much is a very grey area.

Conclusion

As can be seen, there is a certain complexity to the Part 36 regime. However, Part 36 offers should be considered in almost all cases to try to provide some costs protection should the case proceed to trial.

Making a Part 36 offer can also help focus your opponent's mind and, even if not accepted, can kickstart negotiations which may lead to a settlement.

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