



# PART 36 OFFERS – HOW DO THEY WORK?

This fact sheet explains the principles behind Part 36 offers and their use.

During litigation any party can seek to enter into negotiations to try and resolve the matter and limit costs. The provisions of **CPR Part 36** provide a tool by which damages, costs and interest penalties can confer tactical advantages on a party making offers.

During the course of your claim, we may receive a Part 36 offer from the other side and/or advise you to make a Part 36 offer to them. The fact sheet explains the principles and potential risks and advantages involved.

## WHAT IS A PART 36 OFFER AND WHEN CAN IT BE USED?

A Part 36 offer is a settlement offer exclusive of costs. It can be made to settle the entirety of a claim or a particular issue (such as liability only) or head of loss.

There are certain requirements that need to be met in order for such an offer to be regarded as 'Part 36 compliant' and so carry the prescribed consequences.

These include that it must be:

- a genuine offer to settle;
- made 'without prejudice as to costs' ie the fact and nature of the offer does not form any part of the evidence at trial;
- compliant with the specific requirements set out in CPR Part 36 – some of which include requirements for it to be clear as to what aspects of the claim it refers, that it must be in writing and that the offer must be left open for acceptance for at least 21 days;
- made at least 21 days before trial.

A Part 36 offer can be made by a claimant or a defendant and pre or post issue of proceedings.

## ACCEPTANCE OF A PART 36 OFFER

If either the defendant makes you a Part 36 offer to settle your claim (as a whole) which you accept within the 21 day period or you make a Part 36 offer (for the whole claim) which the defendant(s) accept within the 21 day period, then the following provisions apply:

- the case settles on the basis of the terms of the offer with regards to damages awarded;
- damages will be paid within 14 days;
- you will recover your costs up to the date of acceptance.

If either party seeks to accept a Part 36 offer after the 21 day period, this can still be done if:

- the offer has not been withdrawn (it can be withdrawn at any time after the 21 day period);
- the parties can agree the position as to costs incurred by each side from the expiry of the 21 day period to the date of acceptance - failing which the court will determine this.

## FAILURE TO 'BEAT' A PART 36 OFFER

If one party makes a Part 36 offer and the other side rejects or does not accept it, then the claim continues in the normal way.

If the defendant makes you a Part 36 offer which you do not accept and ultimately you do better than that offer, then it has no effect. Likewise if you make a Part 36 offer which the defendant rejects or does not accept but ultimately you recover less than this, the Part 36 has no effect.

However the 'teeth' of the Part 36 provisions bite if a party rejects or does not accept an offer and ultimately the outcome of the case is less favourable to them than the terms of the offer they received, and that Part 36 offer has remained open for acceptance (the penalties do not apply if it has been withdrawn).

The penalties applicable depend on whether it is the claimant or defendant who has made the offer.



*Claimant fails to beat defendant's offer*

If the defendant makes you an offer to settle which you reject and ultimately your outcome in the claim (by way of negotiated settlement or trial) is less than that offer, then the following penalties apply:

- you must pay the defendant's reasonable costs from the expiry of the 21 day offer period to conclusion. If you have a CFA (no win no fee) with after the event insurance (ATE), then you may be protected against this liability if we and your insurers agreed that the offer should not be accepted;
- you must pay the defendant interest on those costs;
- you must pay your own costs for the same period – and these may come out of your damages depending on the terms of your funding agreement and whether we advised rejection of the offer.

*Defendant fails to beat a claimant's offer*

If we advise you to make an offer to the defendant which they do not accept and you later do better than your own offer (by negotiation or at trial), then there are some significant penalties that can apply. It is for this reason that claimants' Part 36 offers have a great tactical advantage when used well as they apply pressure to the defendant to consider carefully their prospects of beating that offer – because of the significant consequences if they do not. The penalties that apply are:

- as well as paying the claimant's costs to conclusion, rather than paying those costs on the 'standard' basis, provision for 'indemnity' costs applies – this means that if there is a dispute as to whether an item of costs should be recoverable, it will be resolved in favour of the claimant;
- the court can order that the defendant pays interest on those costs;
- an uplift on damages awarded of up to 10% on cases worth up to £500,000 and 5% of damages over £500,000, up to a maximum of £75,000 – so that the claimant receives not just the final sum

awarded or agreed but an additional uplift;

- interest on damages of up to 10%.

The application of the Part 36 penalties is not completely automatic – the court can be asked to consider whether / to what extent they should apply and may disregard them if they feel it would be 'unjust' to impose them, looking at the conduct of the case and the circumstances of the offer and outcome.

### WORKED EXAMPLES OF COSTS CONSEQUENCES

*C claims £10,000 in damages against D. C offers to settle the claim for £8,000.*

- C recovers £7,000 at trial – no implications of offer;
- C loses – no implications of offer;
- C recovers £10,000 at trial – D has to pay:
  - damages of £10,000;
  - interest of up to 10% (£1,000) on damages;
  - additional amount of up to 10% of damages (£1,000);
  - costs of the claimant and indemnity costs from the end of the 21 day period.

*C claims £10,000 in damages against D. D offers to settle the claim for £8,000.*

- C recovers £10,000 at trial – no implications of offer;
- C loses – no implications of offer;
- C recovers £7,000 at trial:
  - C recovers £7,000 but
  - C has to pay their own costs from the expiry of the 21 day offer period to conclusion;
  - C has to pay the defendant's costs for the same period;
  - C has to pay interest on D's costs.



## CONSIDERATIONS WHEN RECEIVING A PART 36 OFFER

A defendant may make a Part 36 offer to you for a number of reasons:

- liability is admitted or they intend to settle the claim and they are seeking to conclude the claim without incurring significant further costs;
- liability is disputed but they recognise there is a risk of losing and want to seek to settle the claim without incurring costs and taking the risk of losing;
- they consider it likely they will win but wish to see if an early commercial settlement can be achieved to avoid costs;
- they consider the claim / aspects of the claim weak and that by applying pressure by way of a Part 36 offer the claimant will accept a low amount to avoid the risks associated with failing to beat the offer / secure some recovery of damages.

In deciding whether or not to accept an offer, there are various points to consider and that we will advise you on. In essence the points are:

- what are your prospects of success in the case? If there are real risks of losing, then a settlement at a lower value may be better than taking the risk of getting nothing;
- if you win the case, what damages will you recover? Are you likely to beat the offer or is there a risk you could recover less and end up with costs deductions from your damages?
- can we assess the offer and the risk on the basis of the information available?

We will seek to advise you on these points and give you our views as to whether you should accept the offer, reject the offer, leave it open whilst we investigate further, or seek to engage in further negotiations. We will advise you of the relative risks / benefits of each option.

## WHY MAKE A PART 36 OFFER?

As set out above, there are various pressures applied to a defendant by the claimant making a well-placed Part 36 offer. If the defendant does not accept it and the claimant 'beats' their own offer, then there will be significant additional cost to them. It is therefore well worth considering Part 36 offers throughout the case.

Situations in which we may advise you to make a Part 36 offer include:

- we can quantify (value) the claim relatively early and by submitting an offer to settle the claim when we present the claim to the other side, it enables them to know their potential liability and have the option to resolve the case early;
- early conclusion of the claim / recovery of some damages is a priority for you due to personal circumstances;
- where the value of the claim is relatively limited and you may have difficulties in recovering the costs of pursuing the claim if it is disputed. Claimants are required to keep costs proportionate to the damages that they seek. If we make a sensible Part 36 offer, the defendants will know the prospects of you continuing and recovering costs are increased;
- where there are real risks that you may lose, we may advise on an offer that reflects the litigation risk – for example if we think you have a 60% chance of winning, we may advise an offer at 60% of the value of the claim. It is less than you will receive if you win but 60% of the value in your hand is better than a 40% risk of receiving nothing and may encourage the other side to settle;
- in response to a Part 36 offer by the defendant;
- to try and resolve a particular aspect of the case where others are in dispute;
- simply to apply pressure to the defendant – if we make an offer at a level where we are confident you will 'beat' the offer if you win the case, the defendants have to think carefully about the risk to



them of continuing in the face of that offer;

- to show to the court a willingness to engage / negotiate when it comes to the issue of assessing who should pay costs at the end;
- to reduce your costs in the case and therefore any success fee for which you will be liable;
- where the case is disputed and we anticipate that if the defendants do not accept, you will win and beat the offer to secure your recovery of costs, an uplift on damages and interest.

We will advise you on any Part 36 offer received and as to the appropriate time to consider making one yourself.

If you have any queries on this fact sheet or any aspect of Part 36 offers, please do contact the fee earner conducting your claim.

## FIND OUT MORE

For further information or to discuss your potential claim with an experienced solicitor, please contact:

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