

Advice Note

Part 36 'Offers to Settle' (Court proceedings in England and Wales)

October 2017

Introduction

Whilst there is no prohibition against a party making an offer to settle in any way it chooses, there can be damages, costs, interest and tactical advantages in making a formal offer to settle which complies with the rules of court (a "Part 36 offer to settle").

Part 36 offers to settle in the prescribed form aim to encourage parties to try and settle a dispute. They set out the costs and other consequences that a party will face if it refuses a reasonable offer to settle.

Making a Part 36 offer to settle should not be regarded as a sign of weakness but an appropriate way of putting pressure on an opponent to settle.

What is a Part 36 offer to settle and when can one be made?

To be compliant with the rules of court (Civil Procedure Rules ('CPR')), a Part 36 offer to settle must:

- Be a genuine offer to settle
- Be made "without prejudice except as to costs" (subject to CPR 36.16(3) and the terms of the offer, it cannot be communicated to the Judge having conduct of the proceedings until the matter is decided)
- Comply with the strict requirements of Part 36 of the rules of court.

Part 36 offers to settle can be made in the following instances:

- In both money (including claims for provisional damages) and non-money claims
- In respect of the whole or part of the claim or in relation to an issue that arises
- In respect of liability alone, thus leaving the issue of the amount of any damages to be dealt with later
- In respect of counterclaims and any additional/third party (Part 20) claim
- In respect of a split trial (e.g. liability and quantum).

Part 36 offers to settle can be made by both a claimant and a defendant in a dispute, at any stage of a dispute before or after proceedings have commenced and in appeal proceedings.

Part 36 offers to settle can be made prior to the commencement of court proceedings.

How can a Part 36 offer to settle be made?

If you are a claimant making a Part 36 offer to settle it must:

- Be in writing
- Make clear it is made pursuant to Part 36
- Specify a period for acceptance of not less than 21 days within which the defendant will be liable for the claimant's costs if the offer is accepted (the "relevant period")
- 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
- State whether it takes into account any counterclaim
- In appropriate cases, contain sufficient information to allow the offeree to consider the offer (e.g. as required by CPR 36.18, 36.19 and 36.22).

If you are a defendant making a Part 36 offer to settle, it should also:

- (In the case of an offer to pay a sum of money) state that the offer is to pay a single sum of money
- State that the sum will be paid at a date not later than 14 days following the date of acceptance.

An offer to settle a money claim will be treated as inclusive of all interest until the date on which the relevant period for acceptance expires (CPR 36.5(4)).

Clarification of a Part 36 offer to settle

Clarification within seven days of service of an offer to settle can be sought to enable a party to consider the offer properly.

Accepting a Part 36 offer to settle

- Part 36 offers to settle must be accepted in writing
- Subject to certain circumstances as specified in CPR 36.9, 36.10, 36.11 and 36.12, a Part 36 offer can be accepted at any time, without permission of the court
- If, as defendant, you do not pay the sum offered within 14 days (or such other period as has been agreed) of the date the offer to settle being accepted, the claimant can enter judgment against you for the unpaid sum (i.e. the amount of the accepted offer to settle)
- The cost consequences of accepting a Part 36 offer to settle, and when the court's permission is required for acceptance, are addressed below.

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Costs and consequences of acceptance

Generally speaking, and assuming the claimant has not sought to withdraw or change the terms of the offer, if a Part 36 offer to settle is accepted within the relevant period:

- The claimant is entitled to his costs of the proceedings up to the date of acceptance on the standard basis; and
- The claim is stayed upon the terms of the offer.

If a Part 36 offer to settle is accepted after expiry of the relevant period:

- The parties must agree the liability for costs or, failing agreement, the court decides liability for costs
- The claim is stayed upon the terms of the offer.

The claimant's costs will include costs incurred in dealing with the defendant's counterclaim if the offer to settle states that it takes the counterclaim into account.

Consequences of non-acceptance

The consequences of not accepting a Part 36 offer to settle and the matter proceeding to trial are best illustrated by the following examples.

Example 1: a claimant is claiming £750,000 but makes a Part 36 offer to settle for "£500,000 plus costs"

Result after trial	Consequence of not accepting the claimant's Part 36 offer
Claimant awarded £600,000	The claimant has won. Normally the defendant would expect to pay the claimant's costs on the standard basis, and to bear its own costs. However, as the claimant has beaten its Part 36 offer to settle, the court may also order that the claimant be entitled to: <ul style="list-style-type: none"> • an increase in damages of £55,000 (£500,000 x 10% and £100,000 x 5%) • interest on the £600,000 sum awarded at a rate not exceeding 10% above base rate, for some or all of the period starting on the date the relevant period expired • costs on the indemnity basis from the date the relevant period expired • interest on those costs at a rate not exceeding 10% above base rate.
Claimant awarded £500,000	Claimant has equalled its offer – the consequences set out above will normally apply; the claimant has obtained a judgment at least as advantageous as the terms of its own offer.
Claimant awarded £250,000	Claimant has not beaten its Part 36 offer to settle – the offer will normally be disregarded and the defendant will pay the claimant's costs on the standard basis, and bear its own costs.

Costs of the proceedings will include recoverable pre action costs.

If a party makes an offer to settle inclusive of costs, such offer will not be in accordance with Part 36, and it will be in the court's discretion (not pursuant to Part 36) as to whether any costs or other advantages will be given to the party making the offer if the offer is unreasonably rejected.

Claimant's Part 36 offers and enhanced damages

If a claimant's Part 36 offer made after 31 March 2013 is not accepted and at trial the claimant obtains a judgment at least as advantageous as the terms of its own offer, the claimant will be able to claim an additional sum for damages in respect of a money claim or an additional sum for costs in respect of a non money claim. Such additional sum being 10% on damages or costs up to £500,000 and 5% on damages or costs above £500,000 up to £1m; equating to a maximum enhancement of £75,000 on damages or costs (depending upon whether the claim is a money claim or non money claim).

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The claim is dismissed	The defendant has won – the Part 36 offer to settle will be disregarded. The claimant will normally be ordered to pay the defendant's costs on the standard basis, and the claimant will bear its own costs.
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Example 2: a claimant is claiming £750,000 but the defendant makes an offer to pay "£275,000 plus costs"

Result after trial	Consequence of not accepting the claimant's Part 36 offer
Claimant awarded £350,000	Claimant has beaten the defendant's Part 36 offer to settle – the defendant's offer has no effect. The defendant will normally pay the claimant its costs on the standard basis and will bear its own costs.
Claimant awarded £275,000	Although the claimant has won at trial, it has equalled, but not beaten the defendant's offer. The claimant may be awarded costs on the standard basis up to the last date the relevant period for acceptance of the offer to settle expired, and the court may order the claimant to pay any costs incurred by the defendant, and bear its own costs, from the last day of the relevant period on the standard basis. However, where a claimant proceeds to trial and fails to achieve a more advantageous position than a defendant's earlier offer to settle, the court may be inclined to take a wide ranging view of the facts and circumstances of the matter when determining who should pay costs.
Claimant awarded £200,000	Although the claimant has won at trial, it has failed to beat the defendant's Part 36 offer to settle. The claimant may be awarded costs on the standard basis up to the last date the relevant period for acceptance of the offer to settle expired, and the court may order the claimant to pay costs incurred by the defendant, and bear its own costs, from the last day of the relevant period on the standard basis.
The claim is dismissed	The defendant has won. The claimant will pay the defendant's costs on the standard basis and bear its own costs. There is no extra benefit in Part 36 to the defendant from having made the offer to settle.

The above is intended to provide a general guide only as to the costs consequences of non acceptance of a Part 36 offer to settle, and does not address all costs scenarios and potential orders at the end of trial.

How to accept a Part 36 offer to settle

- A Part 36 offer to settle is accepted by serving written notice of the acceptance on the offeror
- Service should be made on the offeror's legal representative, if he has one, and the notice filed with the court (where proceedings are underway)

- There are no formal requirements for the notice of acceptance. A letter identifying the claim number and title (where proceedings have been commenced) and the offer to settle to which it relates should be sufficient.

Date of acceptance

Although the Rules do not state when acceptance will be effected, date of acceptance should be taken to be the date the acceptance notice was served on the offeree or his legal representative.

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When can an offer to settle be accepted?

Provided that the offer has not been withdrawn or its terms changed (see below), an offer to settle can be accepted at any time, subject to circumstances when permission of the court is required or where there has been a "split trial".

When is the court's permission for acceptance required?

Examples of when permission of the court will or may be required to accept a Part 36 offer to settle, include:

- Where prior to acceptance of the offer, in the relevant period the offeror has served notice of withdrawal or change of terms to be less advantageous
- Where the claimant wishes to accept an offer to settle made by one or more, but not all, of a number of defendants and certain requirements are not satisfied
- Where the trial has started
- In other limited circumstances, in particular relating to personal injury claims.

Execution and enforcement

- An offer to pay a single sum of money must, unless the parties have otherwise agreed in writing, be paid within 14 days of the date of acceptance. If not paid within 14 days or the period agreed, the offeree may enter judgment for the unpaid sum
- For any other type of offer (e.g. an agreement to vacate premises, deliver up documents etc), the Rules provide that where such an offer is accepted and a party alleges that the other party has not honoured its terms, that party may apply to enforce the terms of the offer without the need for a new claim.

Can a Part 36 offer to settle be withdrawn and what are the consequences?

- A Part 36 offer can only be withdrawn, or its terms changed, if the offeree has not accepted the offer
- Withdrawal or a change in terms is affected by serving written notice to that effect on the offeree/his legal representative. Unless withdrawn by written notice the offer will not be deemed withdrawn and will remain open for acceptance. An opponent making a counter offer will not affect an offeree's ability to accept a previous Part 36 offer, if it has not been withdrawn by written notice
- Once withdrawn, a Part 36 offer will **not** attract the Part 36 costs and other consequences, although it may be possible to argue that some costs benefits apply under the court's general costs discretion
- Part 36 includes specific provisions relating to the withdrawing of offers or changing of terms during the initial relevant period
- After expiry of the relevant period the offer may be withdrawn or its terms changed without permission of the court, or automatically withdrawn in accordance with its terms (a so called "sunset" clause).

Does a Part 36 offer have costs consequences in a subsequent appeal?

- No, a Part 36 offer may have consequences in the proceedings in respect of which it is made, and not in relation to the costs of any appeal from a decision in those proceedings
- A Part 36 offer can be made in "appeal" proceedings.

In what circumstances should you consider making a Part 36 offer to settle?

- They should at least be considered in all cases in order to achieve the best costs and interest on costs scenario if the matter has to proceed to trial
- Claimants should consider making early Part 36 offers in order to resolve disputes and to potentially recover an enhancement on damages or costs of up to £75,000 if the offer is not accepted and the matter proceeds to trial (for offers made from 1 April 2013)
- The making of a Part 36 offer to settle can focus an opponent's mind and, even if not accepted, may lead to a commercial settlement of the dispute. They increase the risk of proceeding with the litigation for the opponent
- If accepted, a Part 36 offer to settle can avoid the time and potential irrecoverable costs associated with court proceedings
- A Part 36 offer to settle will not be appropriate where a defendant does not wish to pay a claimant's costs, or in respect of claims being dealt with on the small claims track
- A Part 36 offer should be considered by a party if all or part of its recoverable costs have been limited to court fees only (e.g. as a consequence of CPR 3.14). A "successful" Part 36 offer, as against the result at trial, means that in respect of costs subject to such limitation, 50% of costs assessed by the court without reference to the limitation will be recoverable.

10 Key Points to Remember

1. Part 36 offers do not incorporate all the rules of law governing the formation of contracts. Part 36 embodies a self-contained code
2. Part 36 offers to settle are formal offers which have costs and other consequences if not accepted
3. Whilst nothing in respect of Part 36 prevents a party making an offer to settle in whatever way it chooses, if the offer is not made in accordance with the prescribed form and content, it will not have the consequences prescribed in Part 36 as referred to above
4. If making a Part 36 offer to settle, make it as clear as possible
5. Keep a record of Part 36 offers made and constantly monitor and re-evaluate the position. Offers not withdrawn by notice in writing will remain open to acceptance, and rejection or any offeree's silence may not prevent later acceptance of a Part 36 offer

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6. If making an offer to settle or accepting a claimant's offer, defendants need to bear in mind that payment has to be made within 14 days, failing which judgment can be entered against them. Therefore, ensure that payment can be made or try and agree an extension of time for payment
7. Claimant Part 36 offers to settle can result in enhanced damages, recoverable costs and interest on costs. Defendant Part 36 offers to settle can result in a period of costs protection and a recovery of costs from the claimant
8. If not accepted, the important question in respect of Part 36 is not only which party has won, but whether the eventual judgment is at least as or more advantageous than the offer
9. Subject to CPR 36.16(3), Part 36 offers to settle must not be communicated to the trial judge until after all questions of liability and quantum are decided
10. If a Part 36 offer to settle is not made, or is made but is not successful at trial, in deciding what order (if any) to make about costs, the court will have regard to all the circumstances of the matter, including the conduct of the parties, the failure of a party to be wholly successful in respect of its claim, a party's failure in respect of specific issues, and any other relevant factors. Following a successful Part 36 offer to settle, a party should obtain the Part 36 benefits outlined above, unless the court considers it unjust to so order.

For further information, contact your usual legal adviser or:



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