

Quickguides

Part 36



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Part 36

Part 36 is a procedural rule aimed at encouraging settlement. It can be a useful litigation device but, despite revisions in 2007 and 2015, remains a technical minefield. This Quickguide provides an overview of Part 36, highlighting the issues that can arise in practice and how to deal with them. In particular, it covers:

- What a Part 36 offer is and when it will be appropriate.
- How Part 36 operates and the costs consequences of acceptance and non-acceptance.
- How to make and accept a Part 36 offer.
- Withdrawal of Part 36 offers.
- Frequently asked questions.

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Part 36

Part 36 of the English Civil Procedural Rules (CPR) was introduced to encourage settlement of litigation via the use of financial incentives and sanctions. Part 36 is a useful procedural device as it provides a means of putting pressure on the other side to settle a case and of protecting, to some extent, your own position on costs.

Given its tactical importance, Part 36, and whether to make a Part 36 offer, should be considered throughout any piece of litigation. However, Part 36 does not operate under the usual contractual principles that apply to settlement offers. It is therefore important that those who handle litigation have an understanding of this "self-contained procedural code"¹ and how to maximise its potential benefits.

This guide provides an overview of Part 36 and explains key concepts before going on to look at the issues that commonly arise in practice.

What is a Part 36 offer and when can you make one?

A Part 36 offer is a settlement offer made without prejudice save as to costs. Like other forms of settlement it can be used to settle all or any part of a claim, monetary or otherwise. It can also be used to settle counterclaims and additional claims, and Part 36 offers can be made solely in relation to liability, leaving quantum to be argued over.²

However, for an offer to fall within Part 36 it has to be:

- a genuine offer to settle (as opposed to a tactical offer made purely to attract Part 36 costs consequences),
- made in accordance with the strict requirements of Part 36.

A Part 36 offer can be made at any time, including before the commencement of proceedings.³ However, although an early offer can provide substantial cost benefits and costs protection, a party may not be in a position to make an informed offer until proceedings have been commenced. If not made at the outset, Part 36 should be reconsidered throughout the case. Part 36 offers can also be made in appeal proceedings.⁴

How does Part 36 operate in practice?

The rules on making a Part 36 offer are the same for both claimant and defendant offers, whether made pre-action or after proceedings have commenced. Particular provisions apply to offers made within 21 days of trial but these are not covered in this guide. Part 36 offers have to be made in writing and must state a period of 21 days or more within which the defendant will be liable for the claimant's costs.⁵ This is known as the *relevant period*.

¹ CPR 36.1(1).

² Part 36 offers can also be made in relation to appeals which started in the VAT and Duties Tribunal, even though the CPR costs regime does not apply to the Tribunal. Part 36 offers *cannot* be made in cases on the small claims track.

³ If made within 21 days of trial a Part 36 offer may not retain its costs consequences.

⁴ CPR 36.4. In appeal proceedings a fresh offer needs to be made after the judgment at first instance as a Part 36 offer made before trial will not provide protection against appeal costs.

⁵ The claimant is entitled to standard basis costs, i.e. its reasonable and proportionate costs.

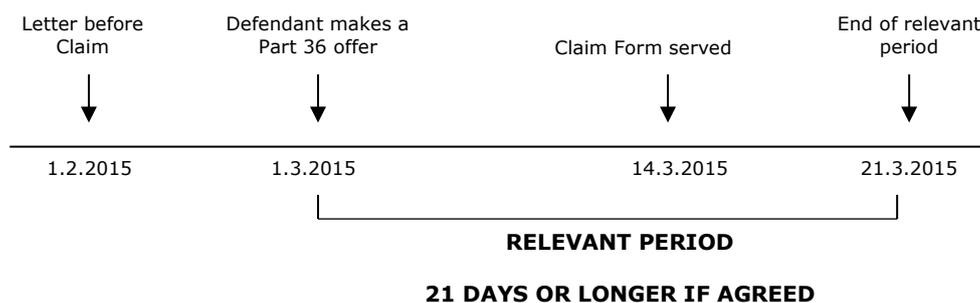
The relevant period is an important date for the purposes of:

- withdrawal and revision: permission may be required to withdraw or revise an offer within the relevant period but not once it has expired;
- costs consequences on acceptance: defendants are only liable for costs incurred up to the end of the relevant period. If accepted after that date, the presumption is that the offeree pays the costs from expiry to acceptance (as a penalty for late acceptance); and
- costs consequences on non-acceptance: these start running from expiry of the relevant period.

Other terms frequently used are *offeror* and *offeree*. The offeror makes the offer and the offeree is the recipient of the offer.

Part 36 in practice: an example

The easiest way to look at how Part 36 operates is by way of an example.⁶



In this example, if the claimant (C) accepts the offer within the relevant period, C will recover its costs up to acceptance. If the offer is accepted after the 21 days, C is entitled to its costs up to 21 March, but the defendant (D), as offeror, will be entitled to payment of its costs from that date (unless considered unjust in the circumstances – see below). If the offer had been made by C and accepted late by D, C would have been entitled to its costs up to the date of acceptance.

But what if the offer is not accepted and the case goes to trial? This is where the costs consequences of Part 36 have real impact.

Costs consequences of non-acceptance

The costs consequences are different depending on whether the offer was made by the claimant or defendant. In addition, they do not apply to offers that have been withdrawn, or offers that have been revised to be less advantageous and the less advantageous offer is beaten.⁷

Claimant fails to accept the defendant's offer

A defendant will reap the benefit of its Part 36 offer if the claimant fails to obtain a judgment that is "more advantageous" than the offer (see the box: When is a judgment more advantageous?). In other

⁶ The example assumes that the offer relates to the whole claim. If only a part-offer, different costs consequences flow on acceptance.

⁷ CPR 36.17(7).

words, has the claimant recovered a sum that is less than or equal to the offer? In those circumstances, the defendant will recover from the claimant:

- its reasonable and proportionate legal costs from the date on which the relevant period expired; and
- interest on those costs.

If the claim is dismissed or the claimant recovers nothing, the Part 36 offer has not improved the defendant's position on costs – the defendant would have been entitled to its costs anyway.⁸ However, if the claimant recovers something, just not enough to "beat" the offer, Part 36 effectively reverses the costs rule and the defendant is treated as the "successful party" from the date of expiry of the relevant period.

Defendant fails to accept a Part 36 offer

The costs consequences of a claimant Part 36 offer apply where the claimant obtains a judgment which is "equal to or more advantageous" than the offer. In those circumstances, the court will order the defendant to pay:

- the claimant's costs on the indemnity basis⁹ for the period starting from the date on which the relevant period expired, with interest on those costs at up to ten per cent above base rate;
- interest on the whole or part of the sum awarded to the claimant at a rate not exceeding ten per cent above base rate for some or all of the period starting from the date on which the relevant period expired;¹⁰
- the claimant's reasonable and proportionate costs from the beginning of the matter to the date on which the indemnity costs and enhanced interest start running (plus interest on those costs); and
- an additional amount, capped at £75,000, calculated by applying the prescribed percentage on the amount of damages/costs awarded by the court.¹¹

At first glance Part 36 appears quite generous. However, given that the claimant would have recovered its ordinary costs anyway, the CPR had to provide additional incentives to encourage claimants to settle.

Unless unjust to do so

The benefit of Part 36 is that costs consequences are automatic. However, they will not be applied if, in the circumstances, the court considers that it would be unjust to do so. In considering whether it would be unjust, the court will take into account "all the circumstances of the case".¹² Potentially relevant circumstances which it must take into account include:

- the terms of any Part 36 offer;

⁸ Although entitlement to interest on the costs arguably runs from the date of expiry of the relevant period rather than any costs judgment.

⁹ Standard basis costs have historically resulted in a 60-70 per cent recovery, but indemnity basis costs result in a higher rate of recovery, usually around 90 per cent.

¹⁰ There is no guarantee that a successful claimant will get the full ten per cent above base rate – the court will usually specify a rate of interest which it considers just in the circumstances.

¹¹ CPR 36.17(4)(d) sets out the prescribed percentage depending on the value of the amount/costs awarded and whether or not the claim is a money or non-monetary claim. In any claim where the claim or costs exceed £1 million, the additional amount will be £75,000.

¹² CPR 36.17(5).

- the stage in the proceedings when the offer was made including, in particular, how long before the trial started the offer was made;
- the information available to the parties when the Part 36 offer was made;
- the conduct of the parties with regard to giving or refusing to give information which would enable the offer to be made or evaluated; and
- whether the offer was a genuine attempt to settle the proceedings.

The court may also take into account any other settlement offers made and the conduct of the parties generally.¹³ If the court decides that it would be unjust to make the usual order under Part 36, it has wide powers when exercising its discretion as to costs under CPR 44.2.

When is a judgment more advantageous?

When Part 36 was revised in April 2007, the test for determining whether a claimant had beaten an offer was changed. For both monetary and non-monetary claims the court had to determine whether the judgment was "more advantageous" than the offer. Prior to this, courts had decided whether a claimant had beaten offers in monetary claims by applying a strict financial comparison. In other words, had the claimant been awarded more or the same as the sum offered? However, the change in wording was interpreted by the Court of Appeal as requiring a change of approach so that the courts could also take into account other circumstances, including the conduct of the parties, in deciding whether an offer had been beaten.¹⁴

However, the Court of Appeal decision was controversial. Following the decision there was less certainty in relation to when the costs consequences of Part 36 would apply. The Civil Procedure Rules Committee consequently changed the Rules as of 1 October 2011,¹⁵ so that where the offer is for a sum of money, a strict financial comparison will be made in order to calculate whether the offer has been beaten.¹⁶

Costs consequences: an example

Going back to the example above, in that case, C is claiming £100. C offers to settle for £75 plus costs.

D accepts - whether within or outside the relevant period	C gets costs up to the date of acceptance
D doesn't accept and C recovers £75 or more	C has "beaten" its offer and gets: <ul style="list-style-type: none"> • Interest up to 10% • Indemnity costs from the end of the relevant period (21.3.15) • Interest on costs to 10% • Additional amount of 10% of the amount awarded by the court
C recovers less than £75	Normal costs rules apply

¹³ In *Thinc Group Limited -v- Jeremy Kingdom* [2013] EWCA Civ 1306 the claimant's dismissive approach to the defendant's *Calderbank* offer was a factor relied on in finding the Part 36 consequences unjust. Equally, in *Walker Construction (UK) Ltd -v- Quayside Homes Ltd and anr* [2014] EWCA Civ 93 the claimant's conduct, its exaggerated claim, and failure to accept a reasonable *Calderbank* offer were factors which justified not applying the usual Part 36 consequences.

¹⁴ *Lisa Carver -v- BAA PLC* [2008] EWCA Civ 412. There, the claimant had only just beaten the defendant's offer and so the court considered that, bearing in mind the costs that had been incurred since the offer had been made and the stress caused by the trial, she had not obtained a judgment that was more advantageous than the offer.

¹⁵ The Civil Procedure (Amendment No. 2) Rules 2011 (SI 2011/1979).

¹⁶ In calculating whether an offer has been beaten on a strict financial comparison, the court will not take into consideration interest that has accrued since the end of the relevant period.

Claim dismissed	Normal costs rules apply
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Same example, but this time D offers to settle for £75 plus costs.

C accepts	C gets costs up to the date of acceptance if within the relevant period – D recovers costs from expiry (21.3.15) until acceptance
C doesn't accept and recovers £75 or less	C has failed to "beat" the offer. D gets: <ul style="list-style-type: none"> • D's costs from 21.3.15 on the standard basis • Interest on those costs C has to pay its own costs from 21.3.15
C recovers more than £75	Normal costs rules apply
Claim dismissed	Normal costs rules apply

Circumstances when Part 36 will not be appropriate

Part 36 is attractive because the costs consequences are automatic. It is particularly attractive to claimants with all or nothing claims where either the claimant will recover in full or not recover at all. Provided the offer is genuine (i.e. not tactical – see below for a discussion on how to set the level) it can put the defendant in a difficult position.

However, Part 36 is just one way of settling litigation. It is open to parties to use other forms of settlement, e.g. *Calderbank* letters (offers made without prejudice save as to costs). Although Part 36 consequences will not follow, the court's discretion on costs under CPR 44.2 will still be available. There will often be circumstances where a Part 36 offer is inappropriate or another form of settlement offer is more attractive. The following are examples:

All or nothing cases – defendant offers

Whereas Part 36 is attractive to claimants in all or nothing cases, there is little to be gained by a defendant making a Part 36 offer. If the claimant wins, the offer is beaten and the defendant must pay the claimant's costs. If the claim is dismissed, the defendant is paid its costs in any event (although the position on interest on costs may be more attractive under Part 36). However, that should not deter a defendant from making some form of settlement offer. If coupled with attempts to mediate or negotiate settlement, and it can be shown that the claimant unreasonably refused to mediate or engage in settlement negotiations, a defendant may be able to use an offer to argue that a successful claimant is not entitled to all of its costs. The fact of the offer may also help a successful defendant defeat any argument that it should not be entitled to all of its costs, or may assist in securing indemnity costs.

The defendant does not want to pay all of the claimant's costs

When an offer is accepted within the relevant period, a defendant will automatically be liable for the claimant's costs up to the date of acceptance. Part 36 will therefore not be appropriate where a defendant seeks a "drop hands" settlement or only wants to pay a proportion of the claimant's costs.

Lump sum approach

Part 36 offers cannot be made inclusive of costs. A defendant will therefore not want to make a Part 36 offer in circumstances where it wants to know in advance how much it has to pay. For example, the defendant wants a full and final settlement of £100,000. Do you make a Part 36 offer in the region of £90,000 and hope that the claimant's costs do not exceed £10,000? The other side's solicitors could be

asked for their costs to date (on a without prejudice basis). However, the claimant will be entitled to all costs reasonably and proportionately incurred up to the end of the relevant period. If further substantial work is carried out in order to evaluate the merits of the offer, the defendant will be liable for those costs as well.

Where there are multiple defendants

Difficulties arise with Part 36 where there are multiple defendants, particularly if not all of them want to settle. In those circumstances a *Calderbank* offer may be more attractive.

Commercial terms settlements

Part 36 does not provide for settlements on commercial terms, e.g. by offering future business. This will usually arise in the context of wider settlement costs negotiations. However, where settlement is not achieved and a party wants to make an offer for costs protection purposes, a *Calderbank* offer is recommended.

Defendant wants flexibility with the payment

Part 36 is very strict with regard to when and how the defendant has to make payment. Payments have to be made in a lump sum within 14 days of acceptance – payment by instalments is not provided for. Defendants wanting to settle but unable to satisfy these requirements cannot use Part 36 and will instead need to make a *Calderbank* offer.

Making a Part 36 offer: issues to consider

The formalities

For a Part 36 offer to attract Part 36 costs consequences it has to comply with the provisions of Part 36, in particular CPR 36.5, CPR 36.6 and PD 36A.1. The offer must be in writing and can be made in the form of a letter or in Form N242A. It must be clear that it is made pursuant to Part 36.¹⁷

What level should the offer be pitched at?

This will always be a difficult exercise as you need to ensure that the offer is realistic enough to place the other side under pressure. You also need to ensure that the offer is genuine. This can cause difficulties if you consider that you have a watertight claim or defence: what level of discount do you have to give in order to satisfy this Part 36 requirement? Judicial guidance is not that helpful: the offer has to be more than a tactical step in order to secure the benefit of the Part 36 incentives – there must be some "offer to settle in the ordinary sense of the word".¹⁸ But what does that mean in practice?

The authorities on this issue conflict. In a personal injury case a pre-action offer to accept a 95 per cent/5 per cent split on liability attracted Part 36 costs consequences when the claimant recovered in full at trial. But in another case, a 5 per cent reduction was found to be merely tactical given: (1) the late stage at which the claimant's offer was made (three weeks before trial) and (2) the nature of the case.¹⁹

What is genuine will always be dependent on the circumstances and, in particular, the strength of the parties' arguments. A claimant with a cast iron debt claim is in a different position to a claimant with an all-or-nothing claim where the arguments are finely balanced. This is always going to be a difficult decision and requires careful thought.

¹⁷ Prior to the April 2015 revision, an offer was required to state on its face that "It is intended to have the consequences ... of Part 36". In some cases, the omission of this wording meant that a Part 36 offer was non-compliant. This technicality was removed in the April revision and all that is required now is for an offer to make clear that it is made pursuant to Part 36.

¹⁸ *East West Corpn -v- Dampskibsselskabet (No 2)* [2002] Lloyd's Rep 222 per Thomas J.

¹⁹ *Huck -v- Robson* [2002] 3 All ER 263 (CA) and *Fotedar -v- St George's Healthcare NHS Trust (No 2)* [2005] All ER (D) 33 (Jul).

Can the offer be time-limited?

Prior to the April 2015 revisions, an offer that was specified to be open for acceptance for a certain period only could not be a Part 36 offer.²⁰ However, as from 6 April 2015, a Part 36 offer can include a "sunset clause", i.e. one that states that the offer will automatically expire if not accepted by a certain date (provided that date falls after the relevant period). In such circumstances, once expired, the offer will be regarded as withdrawn.

Part 36 was changed to permit automatic expiry in order to avoid parties inadvertently falling foul of the strict Part 36 requirements by making their offers time-limited. Given that offers could be withdrawn after the relevant period in any event, it was considered sensible to remove this technical hurdle. However, careful thought should be given before including a "sunset provision". It may be preferable to leave an offeror's options open as, once withdrawn, the offer cannot attract Part 36 consequences.

Should you extend the relevant period?

The relevant period has to be for a period of not less than 21 days. It is therefore open to the offeror to give the offeree more time in which to consider the offer. However, it will rarely be in a defendant's interests to extend the relevant period as it will also extend:

- the period during which the defendant will be liable for the claimant's costs; and
- the period during which the court's permission to withdraw/reduce the offer may be required.

Dealing with costs

The scheme of Part 36, and the automatic costs consequences that flow from Part 36, mean that a Part 36 offer cannot be inclusive of costs. In addition, it would be difficult for a court to determine whether the offer is beaten at trial. Any costs-inclusive offer cannot therefore be a Part 36 offer and the effect of such an offer will depend on the court's general discretion on costs.

Dealing with interest and future interest

The sum offered should be inclusive of interest up to the date on which the relevant period expires. In addition, any claimant making an offer should consider providing for future interest. Otherwise, the claimant could lose any entitlement to interest on the offered sum after expiry of the relevant period as, on acceptance of the offer, the defendant is agreeing to pay a fixed sum in settlement which does not take into account any interest that has accrued in the meantime. Although not expressly permitted by Part 36, it is difficult to see how providing for future interest would make the offer defective. That said, it may be argued by the defendant, particularly if the interest rate is unreasonable.

The converse is true for defendants: they have nothing to gain by providing for interest after the relevant period and the omission of any future interest mechanism will not make the offer non-compliant. It also encourages the claimant to accept the offer sooner if the value of the offer is diminishing in real terms.

Counterclaims: can a defendant make a claimant Part 36 offer?

There are different ways of dealing with the counterclaim in a Part 36 offer. Claimants will usually want an offer to take into account any counterclaim. That way, the claimant retains the costs benefit of the offer being a claimant offer and the defendant will not be entitled to any of its costs incurred in relation to the counterclaim.

²⁰ C -v- D [2011] EWCA Civ 646.

However, what if the size of the counterclaim is such that dealing with the two together results in a payment to the defendant? In those circumstances, a defendant would be perfectly within its rights to make a claimant Part 36 offer and claim entitlement to the costs arising from both the claim and the counterclaim.²¹

Or what if the claim and counterclaim are completely separate and it is easy to distinguish the costs arising in respect of the claim and the counterclaim? In those circumstances, a defendant would be justified in making separate offers, i.e. a defendant offer for the claim and a claimant offer for the counterclaim. This runs the risk that one is settled while the other continues to trial. However, the costs consequences may justify it, particularly if the offer is made after substantial legal costs have been generated.

Which approach is adopted will depend on the circumstances; in particular, the nature of the counterclaim and the extent of the legal costs on both sides. The key point to note is to make the basis on which the offer is being made clear. So, if intending the offer to take effect as a claimant offer, say so.

Responding to and accepting a Part 36 offer

If you receive a Part 36 offer, you should be asking yourself the following questions:

- When did the relevant period begin?
- Do I need further information before I can consider the offer?
- How long do I have to accept?
- What are the consequences of accepting the offer and is there any way these can be avoided?
- How do I accept?
- Should I make my own offer?

When did the relevant period begin?

The relevant period will start once the offer is served on the offeree.²² The actual timing will depend on how the offer is served. So, for example, if the offer is posted first class, the deemed day of service is the second day after it was posted, provided that day is a business day or, if not, the next business day. If the offer is faxed or e-mailed before 4.30 p.m. on a business day, the deemed day of service is that day, otherwise it is the next business day.²³

Do I need further information before I can consider the offer?

If, having received a Part 36 offer, you do not have sufficient information to properly consider it, you can ask the offeror to clarify the offer.²⁴ The request should be in writing and made within seven days of receipt of the offer. If the clarification requested is not provided, the offeree can ask the court to order it.

Clarification can be important as, when deciding whether it would be unjust to apply Part 36 consequences, the court will take into account the information available to the offeree at the time the offer was made. Clarification requests are therefore often used tactically, for example to extract

²¹ This approach was endorsed by the Court of Appeal in *AF -v- BG* [2009] EWCA Civ 757, and is now confirmed in CPR 36.2(3). This case provides a useful example of how to draft a claimant Part 36 letter when you are in fact the named defendant on the Claim Form.

²² CPR 36.7.

²³ See CPR 6.26 for more on the deemed service rule.

²⁴ CPR 36.8.

information at the pre-action stage, or as a means of extending the relevant period as you can argue that the date the additional information is provided is the date the relevant period begins.

How long do I have to accept?

A Part 36 offer can be accepted at any time unless the offer has been withdrawn.²⁵ That means that, even if originally rejected or a counter-offer is made, the offer is still open for acceptance until it is withdrawn.

What are the consequences of accepting the offer and can these be avoided?

These are set out above. It is essential that these are fully considered before accepting any offer. If the offer is accepted within the relevant period, the judge has no discretion to make a different costs order – the claimant will automatically be entitled to reasonable and proportionate costs up to the date of acceptance.

There will often be circumstances where an offeree wants to settle but is put off by the automatic costs consequences. For example, a defendant that does not consider that the claimant should recover all its costs in light of its handling of the matter. Or a claimant who, having made an early Part 36 offer, is offered a later offer on better terms by the defendant. If accepted, the claimant will only be entitled to standard costs despite having beaten its earlier offer.

In those circumstances, consider carefully before accepting within the relevant period. It may be better to use the Part 36 offer to re-open negotiations, or accept the offer but on different terms as to costs (so in effect you are making a counter-offer rather than accepting the Part 36 offer).²⁶ Alternatively, accept the offer after expiry of the relevant period as then there will be more scope to argue that the automatic costs rules should not apply, but you will need to establish that the usual costs award would be unjust in the circumstances.

How to accept

You accept by serving notice of acceptance on the offeror. The CPR are silent on timing but the rules on service that apply to making Part 36 offers should apply to acceptance. You should also file a copy of the acceptance with the court. There are no formal requirements as to format: a letter identifying the Part 36 offer to which it relates (and the claim number and title if proceedings are underway) will be sufficient. Generally, the court's permission will not be required but there are some circumstances (for example, where there is more than one defendant or the trial has started) where permission will need to be sought for acceptance to be effective.²⁷

Effect of acceptance

Once accepted, any proceedings are stayed in the sense that the case is effectively over except for the assessment of costs and any subsequent enforcement.

²⁵ Note that in certain circumstances, for example, once a trial is in progress or where there is more than one defendant, permission of the court may be required.

²⁶ This is what happened in *Joao Rosario -v- Nadell Patisserie Ltd* [2010] EWHC 1886 (QB). There, because the claimant had accepted on different terms as to costs, the terms of acceptance fell outside Part 36 and the automatic costs consequences (which would have operated in the defendant's favour) did not apply.

²⁷ The procedure for requesting permission is set out in PD 36A.3.2.

Withdrawal

Is permission required?

An offer can not be withdrawn or varied once accepted. Subject to that, it can be withdrawn or varied but permission of the court may be required. Permission of the court will be required if, during the relevant period, the offeror serves notice of withdrawal or revision (and revision here means revising a Part 36 offer so that it is less advantageous to the offeree) and, after notice of withdrawal/revision has been served, the offeree then tries to accept it before expiry of the relevant period. A court is unlikely to grant permission unless the offeror can show a sufficient change of circumstances so that it is in the interests of justice to grant permission, such as the discovery of new evidence which puts a wholly different complexion on the case.²⁸ Once the relevant period has expired, an offer can be withdrawn or revised without permission.²⁹

How to withdraw

An offer can be withdrawn either on its terms (which provide for automatic expiry after a certain date), or by the offeror serving a written notice of withdrawal on the offeree.³⁰ A letter clearly referring to the Part 36 offer (by including a reference to the date and the terms of the relevant offer), making it clear that the offer has been withdrawn, will be sufficient.³¹ As with Part 36 offers in general, if the offeree is legally represented, the notice must be served on the legal representative.

As a result, it is particularly important to keep Part 36 offers under review at all times.

Rejections and counter-offers do not mean that the offer is withdrawn

A Part 36 offer remains open until withdrawn. Even if the offeree rejects the offer, or makes a counter-offer, this does not mean that the offer cannot be accepted at a later date.

Effect of withdrawal

If a Part 36 offer is withdrawn, it will not have the usual Part 36 costs consequences. However, the court will still be able to consider the offer when exercising its costs discretion.

Part 36 in practice

How do the courts treat defective offers?

The Rules suggest that if an offer does not comply with the strict requirements of Part 36, the court will have no discretion and the Part 36 offer will be invalid.³² However, the formal requirements are less prescriptive as a result of the April 2015 revision so, provided the offer is clearly intended to be a Part 36 offer, and it does not include a defect that takes it outside Part 36, it is likely to be regarded as Part 36 compliant.

²⁸ CPR36.10(3). The procedure for applying for permission is set out in PD 36A 2.2.

²⁹ The rules on withdrawal were revised as part of the April 2015 revision. It was thought that, where the offeree does not want to accept the offer in any event, there was no harm in allowing an offeror to withdraw or vary its terms without the need to apply for permission. The position is obviously different where an offeree attempts to accept the offer during the relevant period. In those circumstances, the offeror then has seven days from the date of acceptance to apply to the court for permission.

³⁰ CPR 36.9.

³¹ *Gibbon -v- Manchester City Council* [2010] EWCA Civ 726.

³² CPR 36.2(2) specifies that "if the offer is not made in accordance with rule 36.5, it will not have the consequences specified in this Section".

What is the best way to repeat a defendant offer?

Defendants who just want to remind a claimant that an offer is still open for acceptance need to ensure that the offer cannot be interpreted as being a new Part 36 offer. To do that, a defendant should make it clear that the original offer still stands and should set out the costs consequences of accepting that offer. In other words, tell the claimant that if the offer is now accepted, the claimant will be liable for all legal costs incurred by both parties since the end of the relevant period. Although not strictly required under Part 36, parties have been criticised in the past for not making the costs consequences clear, particularly where the claimant is a litigant in person.³³

What happens if both the defendant and claimant have made offers and the case goes to trial?

This will depend on what the offers are and what the judge orders. Each offer will be considered separately. So, for example, a claimant makes a Part 36 offer for £100,000 and the defendant makes a Part 36 offer for £50,000. Judgment is given in the claimant's favour for a sum falling between the two offers, e.g. £75,000. In those circumstances both offers fall away as neither has been beaten and normal costs considerations will apply.

What should I do if I want to change the terms of my Part 36 offer?

Whether you want to change the terms so that they are more advantageous or less advantageous to the offeree, it is important not to withdraw the original offer.

If a more advantageous offer is made, CPR Part 36 treats it as a new offer which gives rise to a new relevant period. So, if a defendant increases its offer, the claimant has another 21 days to consider it and if accepted within that period, is entitled to its reasonable and proportionate costs up to the date of acceptance. However, if both offers are not accepted and prove effective at trial, (i.e. neither are beaten), then as the original offer has not been withdrawn, the defendant remains entitled to seek Part 36 consequences from the date of expiry of the relevant period of the first offer.³⁴

It is even more important to ensure that the original offer is not withdrawn where a defendant makes a subsequent offer on terms that are less advantageous to the claimant. Otherwise, if the offer is withdrawn and a second offer made, that will be regarded as a new offer which will give rise to a new relevant period. If accepted within that period, the claimant will automatically be entitled to its costs up to acceptance. That may result in the claimant recovering more than if it had accepted the original offer late (as the claimant would ordinarily have been penalised in costs for late acceptance). Instead, the defendant should make it clear that the intention is to revise the original offer so that the offer is now only available for acceptance on the revised, less advantageous terms. As such, if it is accepted, costs consequences are likely to be applied from the end of the original relevant period.³⁵ If not accepted, and the claimant fails to beat both offers, any costs consequences can be applied from the end of that original relevant period. If the claimant does go on to beat the less advantageous offer, Part 36 costs consequences will not apply.³⁶

How does Part 36 work in a split-trial?

One of the issues addressed by the April 2015 revision was the confusion over how Part 36 operated in split-trials. The rules now provide that where an offer relates only to parts of the claim or issues that have already been decided (e.g. where the offer is on liability alone), then once that part of the case has

³³ *Kunaka -v- Barclays Bank* [2010] EWCA 1035 illustrates how important it is to ensure that the claimant understands the costs consequences of accepting a repeated offer.

³⁴ CPR 36.9(5).

³⁵ This was the approach adopted by the Court in *Burrett-v-Mencap Ltd* [2014] WL4355036].

³⁶ CPR36.17(7)(b).

been decided, the offer can no longer be accepted. However, where the offer is a global offer, once a judgment has been given, the offer can only be accepted after a period of seven days. In other words, the offeror has seven days in which to consider whether to withdraw the offer.³⁷ As regards disclosure of Part 36 offers in a split-trial, if the offer only relates to that particular aspect of the case that has been decided, the offer can be disclosed. If it is a global offer, the judge can be told of the fact of the offer but not its terms.³⁸

What happens if a party's costs have been limited to court fees?

As part of the April 2015 revision new rules were added to deal with cases where a party's costs had been limited to court fees only. Those drafting the revised rules wanted to make sure that there remained an incentive for that party to make a Part 36 offer. The rules therefore now make it clear that in those circumstances, for the purposes of Part 36 costs consequences, "costs" mean 50 per cent of the costs that would have been ordered but for the limitation, plus any other recoverable costs.

³⁷ CPR36.12.

³⁸ CPR36.16(4).

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