THE FUTURE OF PART 36 (PART 10)

Introduction

The previous (ninth) article in this series, which has been reviewing the continued development and future of Part 36 since 2006, considered the significant amendments made to the rule in April 2015.

That article concluded by observing that whilst some revisions to the rule gave greater clarity, incorporating case law which dealt with problems that had arisen in practice, it seemed likely some of the changes introduced would be tested in the courts and generate yet further case law.

Since that rule change there have, as anticipated, been important judgments interpreting key aspects of the new rule as well as very significant decisions interpreting amendments to the rule introduced as long ago as April 2013, the last significant change to Part 36 before April 2015.

Underpinning these decisions, and reaffirmed by some other important caselaw, is the consistent theme of the importance attached by the courts to Part 36, both as a means of ADR in its own right and also an encouragement to embrace ADR. That has been signalled by the willingness of the courts to impose on parties the costs and other consequences provided for in the rule where appropriate.

Recent caselaw has also continued to emphasise the need to regard Part 36 as a self-contained code, so that there is a degree of certainty not just about the consequences of Part 36 offers but also when those consequences will apply. There is a trend towards regarding Part 36 as the pre-eminent rule, when it engages, in circumstances where there might appear to be a conflict between the terms of that rule and other provisions in the CPR.

This, the tenth article in the series, will focus on the making, withdrawing and acceptance of offers. The next in the series, effectively the second half of this article, will deal with costs and other consequences resulting from acceptance of Part 36 offers or on judgment when Part 36 offers have been made.

Recent cases, reviewed in this article, illustrate how the courts are interpreting and applying Part 36 and give important guidance to practitioners.

Making and Reviewing Offers: Form and Content

The rules on form and content has always been a very important consideration when making a Part 36 offer, to ensure the offer will be effective under the rule.

It is just as important when reviewing an offer that has been received to check whether this is an effective Part 36 offer, given the very significant differences between Part 36 offers and non-Part 36 offers.

Whilst the April 2015 amendment to Part 36 was intended, amongst other objectives, to dilute some of the technical requirements necessary to make an effective Part 36 offer the CPRC made clear that it was intended the rule retain a degree of certainty on the terms, and hence the requirements on form and content.

It is, consequently, a mistake to assume that from April 2015 there has been any significant relaxation in the rules on form and content. The only amendment in April 2015 was to replace the requirement an offer must "state on its face that it is intended to have the consequences of S.I of Part 36" with the requirement the offer must "make clear that it made pursuant to Part 36".

Reflecting this, and some other, amendments to the rule an updated Form N242A has been produced which probably remains the safest way of making an offer.

Caselaw has continued to reveal ways in which departures from the terms of the rule may have the effect of invalidating an offer for the purposes of Part 36. That caselaw can usefully be reviewed by reference to specific requirements on form and content found in the rule itself.

Whole of the Claim, Part of the Claim or an Issue in the Claim?

Part 36.5 (d) still replicates the provision formerly found in Part 36.2 (2) (d), that, as a matter of form and content, the offer must 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.

This aspect of the rule was considered in Hertel –v- Saunders [2015] EWHC 2848 (Ch) where the claimant appealed a costs order, that the defendant should pay all the claimant's costs down to the date of acceptance of an offer to settle.

The claimant's claim was for a declaration there had been a partnership or joint venture between the claimant and the defendant and for consequential orders winding up the partnership or joint venture with accounts and inquiries as well as damages for breach of agreement.

On 11 July 2014 at a CMC the claimant indicated a wish to serve amended particulars of claim and directions given for particulars with proposed amendments to be served which, if not agreed by the defendant, should be the subject to a prompt application by the claimant for permission to amend accordingly.

Without any further application by the claimant, for permission to amend, the defendant wrote to the claimant on 17 February 2015. That letter was headed "Part 36 offer" and

made an offer to settle "the claim which your clients are now seeking permission to bring" and which concluded:

> "This offer is intended to have the consequences of Section 1 of CPR Part 36. If accepted within 21 days from the date of receipt, your clients will be entitled to their costs (if any) relating to that part of the claim which, by amendment, they have indicated an intention to plead. It does not relate to any other part of the claim. It does not take into account the counterclaim."

On 10 March 2015 the claimant's solicitors responded and, after noting the offer was expressed to relate only to part of the claim, confirmed the offer was accepted.

Following this development the court heard arguments about costs at the next CMC.

At the CMC the judge ruled:

> "…it seems to me that the consequence of the Defendants making an offer under Part 36 and the Claimants accepting that offer is that the Claimants have succeeded in recovering a significant sum which they are content to accept in settlement of their claim. In those circumstances, and having due regard to all the submissions made to me, I am not persuaded that I should make any different order as to costs from that provided by Part 36.10(2). I therefore conclude that the Claimants are entitled to their costs down to the date of serving notice of acceptance that is 10th March 2015."

On appeal Morgan J noted that, contrary to the position taken at the CMC, the defendant now argued that the defendant's own offer had not been a valid art 36 offer.

Morgan J observed that:

> "…if the offer letter fails to comply with a mandatory requirement of Part 36 it will not be construed as if it had complied just because the offer was headed "Part 36 offer" and was objectively speaking intended to be a Part 36 offer…"

To comply with Part 36.2(2)(d) the offer had to "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 which part or issue".

The offer was plainly not for "the whole of the claim". Furthermore, only if the particulars of claim had been effectively amended to include the new claim could that claim be "part of the claim" for the purposes of Part 36.2(2)(d).

Accordingly, the question was whether the particulars of claim had effectively been amended by the date of the offer. Morgan J concluded that the answer to this question

was “no” so the proposed claim in the draft amended particulars of claim was not “part of the claim” hence the offer did not conform to the requirements of Part 36.2(2)(d).

Whilst Part 36.3(2) allowed an offer to be made before commencement of proceedings that rule was held not to apply given that proceedings had been commenced and it will be wrong, in a prescriptive and self-contained code such as Part 36, to add in a provision that allowed an offer to be made in respect of claims which it was proposed be added to extant proceedings but which had not yet formally become part of the claim.

The defendant’s offer did, accordingly, not comply with the mandatory requirements of Part 36.2(2)(d) and hence it had not been a valid Part 36 offer.

The order being appealed had approached costs on the basis that, as there had been acceptance of a Part 36 offer within the relevant period, Part 36.10(2) applied. As that was wrong the question of costs should have been approached by applying Part 44.2. Morgan J noted:

> “There is a difference between the operation of r. 36.10(2) and r. 44.2. With the former, there is a presumption in favour of the offeree although the presumption can be overridden and the court can order otherwise. With the latter, there is no such presumption. In many cases, it may be that this difference will not affect the ultimate answer but in some cases it might do so. In the present case, the Deputy Master asked himself whether there were “sufficient grounds to depart from the starting point” i.e. the presumption in favour of the Claimants pursuant to r. 36.10(2). It follows that he did not approach the exercise of his discretion under r. 44.2 on the basis that there was no such starting point under r. 36.10(2). It follows that I now need to exercise my discretion under r. 44.2.”

For the purposes of Part 44.2 it was important to identify who was the successful party. On this basis the claimant was ordered to pay the costs of the defendant, save for the claimant’s costs relating to the part of the claim which, by amendment, the claimant had indicated an intention to plead, given that the offer letter had conceded as much.

Although the issue as to form and content that arose in this case might only happen rarely it is a reminder that it is essential to comply with these rules as, if not, simply referring to Part 36, even though the courts will try to give effect to that intention, will not suffice (see C -v- D [2011] EWCA Civ 646 as analysed in PHI Group Limited –v- Robert West Consulting Limited [2012] EWCA Civ 588 and Shaw –v- Merthyr Tydfil County Borough [2015] EWCA Civ 1678).

Meanwhile, a number of cases (which will be considered more fully by the next article in this series) have recognised the effectiveness of an offer, for the purposes of Part 36 consequences, where that offer relates to the issue of liability, for example: Jockey Club Racecourse Limited –v- Willmott Dixon Construction Limited [2016] EWHC 167 (TCC),

Broadhurst –v- Tan [2016] EWCA Civ 94 and Webb –v- Liverpool Women's NHS Foundation Trust [2016] EWCA Civ 365.

The Relevant Period

Part 36.5 (1) (c) maintains the requirement, previously found in Part 36.2 (2) (c) that a Part 36 offer specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs if the offer is accepted.

A further issue that arose on appeal in Hertel –v- Saunders [2015] EWHC 2848 (Ch) was whether the defendant's offer had sufficiently identified a relevant period.

The judge noted the offer letter did not contain a full description of what the position as to costs would be if the offer was accepted but observed:

> "… the authorities show that it is usually better not to complicate the offer by including detailed terms as to costs as distinct from simply saying, as contemplated by r. 36.2(2)(c), that costs will be dealt with in accordance with r. 36.10."

Recognising the question whether the offer letter complied with this part of the rule was a difficult one Morgan J concluded, by a narrow margin, that it did. This approach reflected, for example, the observations of Lloyd LJ in in PHI Group Limited –v- Robert West Consulting Limited [2012] EWCA Civ 588 when, at paragraph 32 of his judgment, he said:

> "If the offer were to refer to 21 days as the "relevant period", a phrase that is defined in rule 36.3(1)(c) as being the period stated under rule 36.2(2)(c), it seems likely that there would be sufficient compliance with rule 36.2(2)(c), for in such a case the 21 day period for acceptance would be clothed with the costs consequences provided for in CPR Part 36. The specification of the period would be sufficiently clearly linked with the terms of rule 36.2(2)(c). There could be other ways, besides tracking the words of the rule itself or referring in terms to the period as being specified for the purposes of rule 36.2(2)(c), of ensuring that the reader would understand that the period specified is indeed the period referred to in that paragraph of the rule, having consequences for costs, not merely for acceptance of the offer. If the offer were to identify a 21 day period for acceptance, but with nothing more said, it does not seem to me clear that this would suffice for the purposes of rule 36.2(2)(c). At any rate, there does not seem to be a decision to the effect that such words would comply with that requirement of the rule. The safe course must be to be more specific, either by using the words of the rule or by including a reference to the relevant paragraph of the rule, in relation to the stated period."

Consequently, the offer must sufficiently identify a relevant period which complies with the requirements now found in Part 36.5 (1) (c) but, as Morgan J noted, it is not essential to expressly state precisely what the costs consequences on acceptance will be. That is a not unimportant point given that these consequences may now be provided under either Part 36.13 or Part 36.20 (and at the time of the offer it may not always be clear which of those rules will apply so it may be safest not to commit).

CRU

It is important to remember that in addition to the rules dealing expressly with form and content in Part 36.5 (1), formerly Part 36.2 (2), there are additional requirements imposed on the defendant if, in the event of a Part 36 offer being accepted, there will be a "compensation payment" for the purposes of the Social Security (Recovery of Benefits) Act 1997. If so there will be additional requirements on form and content as set out in Part 36.22, formerly Part 36.15.

Consequently, a defendant making a Part 36 offer (though not a claimant making such an offer) must, if the payment on acceptance would be a "compensation payment" for the purposes of the1997 Act, either:

- state that the offer is made without regard to any liability for recoverable amounts; or

- that is intended to include any deductible amounts.

A number of issues concerning the impact of the 1997 Act on Part 36 offers were considered in Crooks –v- Hendricks Lovell Limited [2016] EWCA Civ 8. Giving judgment in the Court of Appeal Lindblom LJ explained that:

> "This appeal concerns the meaning of a defendant's offer to settle a claim for damages for personal injury under CPR Part 36, and the consequences of that offer for costs once judgment had been given for the claimant and a revised certificate of recoverable benefits issued by the Compensation Recovery Unit ("CRU")."

The defendant had made an offer to settle using form N242A and, in the box on the first page of that form, stated the offer to be:

> "£18,500 net of CRU and inclusive of interim payments in the sum of £18,500."

On the second page of the form, in the section headed "To be completed by defendants only", the box against the statement "This offer is made without regard to any liability for recoverable benefits under the Social Security (Recovery of Benefits Act 1997" was ticked. (The alternative would have been to tick the box against the statement "This offer is intended to include any relevant deductible benefits for which I am liable under

the Social Security (Recovery of Benefits Act) [sic] 1997"). No figure was entered in the space left for stating an "amount … offered by way of gross compensation".

The Court of Appeal had to deal with a number of issues arising out of the judgment on costs but on the question of form and content Lindblom LJ held:

> "I am in no doubt that this was a valid Part 36 offer. I see no contradiction between the concept of the offer being made "net of CRU" and its being made "without regard to any liability for recoverable benefits". This was plainly an offer made under CPR 36.15(3)(a), and therefore it was not required to state the amount of gross compensation under CPR 36.15(6)(a)."

Lindblom LJ went on to ask:

> "What then does the Part 36 offer mean? More particularly, what do the words "net of CRU" mean? The natural meaning of the expression "net of" in a context such as this is familiar. It is that the amount stated to be "net of" something else is the amount that remains after a deduction of tax or other contributions. The appropriate definitions in the New Shorter Oxford English Dictionary (4th edn.) is "(of an amount, weight, etc.) free from or not subject to any deduction, remaining after all necessary deductions have been made; (of a price) to be paid in full, not reduceable; …". Construing the expression "net of CRU" as "remaining after all necessary deductions of benefit [under the statutory scheme administered by the CRU]" seems to me to make good sense in an offer under CPR 36.15(3)(a) – an offer "made without regard to any liability for recoverable amounts". This, I believe, is the meaning of the words "net of CRU" in Hendricks Lovell's Part 36 offer. They cannot sensibly be read in any other way. "

The trial judge had, accordingly, been correct to treat the offer as an effective Part 36 offer. Lindblom LJ confirmed that:

> "In my view the recorder was clearly right to regard Hendricks Lovell's Part 36 offer as an offer made under CPR 36.15(3)(a). One can only make sense of the offer in that way, giving the words "net of CRU" their natural meaning and the meaning they must bear in the context of Hendricks Lovell's election that the offer was one "made without any regard to liability for recoverable benefits …". But if, in paragraph 57 of his judgment, the recorder was intending to interpret the offer as meaning "£18,500 net of CRU plus a payment to CRU for £16,262.76 and inclusive of interim payments in the sum of £18,500", he was in my view mistaken. The offer was not made in those terms. It was for £18,500, leaving aside any liability in respect of recoverable benefits once such liability had crystallized. So far as Mr Crooks was concerned, the words "net of CRU" meant that the £18,500 already paid to him by Hendricks Lovell would not

> be reduced by their liability for recoverable benefits, whatever that liability might turn out to be. The final amount of recoverable benefit was at that stage unknown. When it was made, the offer did not seek to anticipate the result of the CRU process, after any review or appeal. It did not identify a hypothetical gross sum, including any notional deductible amounts. It did not set any level or limit to repayments that might in due course fall to be made under the statutory scheme. It acknowledged the statutory scheme only in stating that it was made "net of CRU". That is how Hendricks Lovell chose to express their offer, and that is how it had to be read when the time came for the court to consider whether, after trial, Mr Crooks had secured a more advantageous result."

This part of the judgment emphasises how important it is for an offer, where there is any CRU, to be clear about what the claimant is to receive. The offer should, ideally, recite one or other of the alternatives provided for in Part 36.22.

The judgment in this case suggests the term "net of CRU" may suffice to comply with the requirement on form and content prescribed by Part 36.22. That may, however, be dependent upon the defendant also expressly stating, as occurred in this case by completion of form N242A, the offer is "made without regard to any liability for recoverable amounts".

Conversely if an offer is expressed simply as being "gross of CRU" that is unlikely to meet the requirements of Part 36.22 and be likely to justify a request for clarification. The difficulty, without such clarification, is establishing, with clarity, the net figure being offered which is crucial not just for giving the claimant proper advice but also, at a later stage if necessary, comparing the net offer with the net figure in any judgment.

Other Problems on Form and Content

Even an offer which notionally complies with the rules on form and content may still be an ineffective Part 36 offer if it contains terms inconsistent with the proposal being an "offer" at all or has a term which is inconsistent with the fundamental precept of the rule.

These problems often arise in three specific situations, all of which are considered in recent cases, namely: time limits; costs conditions; and what might be termed "total capitulation" offers.

Time Limits

An offer which does not properly identify the relevant period runs the risk of being construed as a time-limited offer.

The judgment in Hertel –v- Saunders [2015] EWHC 2848 (Ch) is a reminder of the risks associated with a time limit which does not amount to a valid relevant period and of the

ruling by the Court of Appeal in C –v- D [2011] EWCA Civ 646 that a time-limited offer cannot be a Part 36 offer.

A time limit may be expressly stated or implied into the offer by surrounding correspodence as illustrated by the judgment in The Former Owners of the Motor Vessel "Melissa K" -v- The Former Owners of the Motor Tanker "Tomsk" [2015] EWHC 3445 (Admlty)

These proceedings followed a collision, on 18 April 2012, between the claimants' vessel then called "Melissa K" and the Defendants' vessel then called "Tomsk" which occurred in fog at the entrance to the Port of Tuapcs in the Black Sea whilst "Tomsk" was entering the port and "Melissa K" was departing that port.

As Males J observed:

> "The principal issue on these applications is whether liability for a maritime collision has been compromised by the claimants' acceptance of the defendants' offer to settle liability on the basis that each party was 50% to blame, leaving quantum now to be determined. In outline, the claimants say that it has been so compromised because, despite the expiry of an agreed extension for the issue and service of a claim form, the defendants' offer remained open for acceptance. The defendants say that it has not because the offer only remained open for acceptance if proceedings had been issued and served before expiry of the extension and, as this did not happen, the offer lapsed and no valid service of proceedings has been or could now be effected."

Shortly before the two year limitation period expired the parties agreed a mutual extension of time. The claimants subsequently requested a further extension of time which was agreed by the defendants but on the basis of a deadline for service, as well as issue, of any claim form, namely 28 April 2015.

On 26 March 2015 the defendants sent the claimants a letter making an offer to settle liability which was expressed to be made "in accordance with CPR Part 61.4(10) – (12) and/or Part 36". That proposed liability be dealt with on a 50/50 basis and stated:

> "This offer will remain open for acceptance for 21 (twenty one) days following receipt of this letter. On the expiry of that period, unless the Court orders otherwise, the offer will remain open for acceptance on the same terms except that, in addition, your clients shall pay all of our Members' costs from the date of expiry until acceptance."

The offer was sent under cover of an email which stated:

> "We are also instructed to advise you that unless this offer is accepted, no further time-extensions will be granted. If this offer is accepted before expiration of the present time extension on 28th April 2015 then we are

> instructed to agree a mutual three-month time extension until 28th July 2015 during which time the parties can address the quantum of each claim."

On 24 April 2015 the claimants made a counter offer indicating liability could be agreed 50/50 but on the basis of a further extension of time, to 28 July, to reach a deal on quantum, failing which any agreement on liability would no longer be effective.

As Males J subsequently observed:

> "The defendants were not to know from this message, even if it was the case, that nobody on the claimants' side had appreciated that the deadline was a deadline for service as well as issue of proceedings. If that was so, it can only have been because (the claimant's representatives) had not read the documents with sufficient care."

The claimants issued, but did not serve, a claim form by 28 April 2015.

After elapse of the 28 April deadline the defendants wrote to the claimants on 12 May 2015, noting the deadline had expired, which the claimants responded to on 15 May 2015 stating:

> "This letter constitutes formal acceptance on behalf of the Melissa K interests of the Part 36 Offer served on behalf of your Member on 26 March 2015."

The defendants responded to the purported acceptance of the offer on 20 May 2015 in terms which Males J noted:

> "…was expressly on the basis that the letter had not been effective because the claim was now barred."

The first issue before the judge, when determining the various applications then made was whether liability had been settled by effective acceptance of the offer.

On the basis Part 61 is the rule which deals with offers in Admiralty collision actions the claimants' argument the offer was effective under Part 36 was rejected, and so the construction of the offer had to be approached on the basis it was intended to be made in accordance with the provisions of Part 61.

By analogy that meant applying the decision of the Court of Appeal in C -v- D [2011] EWCA Civ 646. In that case this meant where an offer was stated to be made in accordance with Part 36 it should, so far as reasonably possible, be construed as complying with that rule, here the same approach would be adopted but by reference to Part 61. As Males J observed:

> "Thus the true meaning of an offer is to be ascertained applying ordinary principles of construction without attempting to shoehorn it

> into some particular category, at any rate if the shoe would then pinch unacceptably. Those principles include the importance of taking account of the relevant background and context, including where appropriate the fact that an offer is intended to be effective in accordance with CPR 36 or CPR 61.4(10) to (12) and should if reasonably possible be given such effect. Ultimately, however, the question is how the reasonable person would read the offer, taking account of the background and context."

As the offer had to be approached on the basis of how a reasonable person would have understood that offer when it was made it was important to recognise that, at that stage, there was still plenty of time to not just issue but serve proceedings, so the offer assumed both valid issue and service. In any event Males J went on to observe:

> "But even if that is wrong, and the continuing validity of the deadline is not consistent with the requirements of CPR 61.4(10) to (12), it is so clear here that the defendants intended the deadline to continue in force that to construe the Offer as not having that effect would indeed constitute unacceptable shoehorning."

Consequently, the effect of the offer was that it would no longer be open for acceptance after 28 April 2015 if no proceedings had been served.

This issue might, of course, have arisen had the claimant validly issued and served proceedings, proceeded with the claim but failed to obtain judgment "more advantageous" than the offer. In those circumstances there might well have been an argument by the claimants that, at least under Part 36 had that been the prevailing rule, the offer would have been ineffective as it was time-limited, even though that condition was imposed in a covering email.

Costs Conditions

Where an offer contains a term as to costs inconsistent with the relevant terms of Part 36 that is likely to invalidate the offer for the purposes of the rule.

Such an offer may, nevertheless, have potential costs consequences under Part 44, but that rule does not give the certainty provided for under Part 36 as another recent case illustrates.

In Burrell –v- Clifford [2016] EWHC 578 (Ch) the claimant (who was employed by the Royal Family latterly as butler to the late Diana, Princess of Wales) was awarded damages of £5,000 in the substantive claim for breach of confidence and misuse of private information by the defendant (for many years a prominent and successful public relations consultant).

On the issue of costs the defendant relied on the terms of an offer made without prejudice save as to costs to pay the clamant damages of £5,000 and also make payment

of the claimant's reasonably incurred legal costs and disbursements up to £5,000 inclusive of VAT.

The judge held that the proposal for the costs in the offer did not reflect the incurred costs and disbursements up to the date of that offer, a point confirmed by the costs budgeting exercise which had allowed significantly more for the costs pre-action when allowance was also made for the issue of the claim and that sum of the incurred costs for the pleadings at the date of the budget would have been incurred at the date of the offer. For these reasons the judge concluded costs, at the time of the offer, were "well in excess of the sum offered by that without prejudice save to costs letter". Accordingly, the judge concluded:

> "So, dealing with that letter, it seems to me that it was an inadequate offer. It did not give the defendant protection. (Counsel for the defendant) is fully entitled to invoke the last paragraph of the letter, and refer me to it. But the position is that, in my judgment, Mr. Burrell has done better than that settlement offer at trial, and Mr. Clifford's appropriate remedy was to offer the £5,000 in respect of damages that he happens, in my judgment, to have got right, and the costs incurred down to that date subject to detailed assessment in the usual way."

<u>"Total Capitulation" Offers</u>

If what purports to be an offer is, in reality, a request for total capitulation this is unlikely to be regarded by the court as an "offer", and hence cannot be a Part 36 offer.

In <u>Jockey Club Racecourse Limited</u> –v- <u>Willmott Dixon Construction Limited</u> [2016] EWHC 167 (TCC) the defendant had been engaged by the claimant to design and construct a new grandstand at Epsom Racecourse. Problems subsequently arose with the roof of the grandstand. In high winds, which were not unexpectedly high, the roof was damaged in two places. The claimant claimed the costs of those repairs and consequential losses.

The claimant made the defendant an offer to settle:

> "….the issue of liability for losses arising out of the defects in the roof . . . (including losses arising out of storm damage occurring in January 2012 and December 2013)"

This offer was on the basis that the defendant would:

> "…accept liability to pay 95% of our client's claim for damages to be assessed."

The defendant subsequently conceded liability and the claimant sought the benefits, upon judgment on that issue being entered, provided for under Part 36.17 (4).

The defendant raised a number of issues including an argument that the "offer" was tantamount to a request for total capitulation.

Edwards-Stuart J considered the most relevant authority to be AB –v- CD [2011] EWHC 602 (Ch) where Henderson J had observed:

> "The concept of an "offer to settle" is nowhere defined in Part 36. I think it clear, however, that a request to a defendant to submit to judgment for the entirety of the relief sought by the claimant cannot be an "offer to settle" within the meaning of Part 36. If it were otherwise, any claimant could obtain the favourable consequences of a successful Part 36 offer, including an order for indemnity costs, by the simple expedient of making an "offer" which required total capitulation by the defendant. In my judgment the offer must contain some genuine element of concession on the part of the claimant, to which a significant value can be attached in the context of the litigation. The basic policy of Part 36 is to encourage the sensible settlement of claims before trial, or even before the issue of proceedings . . The concept of a settlement must, by its very nature, involve an element of give and take. A so-called "settlement" which was all take and no give would in my view be a contradiction in terms."

Adopting this "succinct and elegant" explanation of what is meant by an offer Edwards-Stuart J concluded that, although hardly generous, the claimant's offer could not be described as "all take and no give".

Clarification

The right of the offeree to seek clarification, now provided for by Part 36.8, remains important and should be utilised, whenever necessary, to guard against any ambiguity.

The offeree is not, however, always entitled to interrogate the offeror about the thinking behind an offer, as the judgment in UWUG Limited –v- Ball [2015] EWHC 74 (IPEC) illustrates.

This was the judgment on costs following judgment on an inquiry as to damages in intellectual property proceedings.

The parties had exchanged a number of Part 36 offers. On the issue of costs, following judgment, the defendant argued that the original offer made by the claimant had not contained sufficient information to allow the claimant to assess whether that offer should be accepted. Whilst, in support of this argument, the defendant placed reliance on the observations of Lord Woolf in Ford -v- GKR Construction Limited [2000] 1 WLR 1397 HHJ Hacon held:

> ",,,there is no obligation on a party making a Part 36 offer to spell out his reasons – he is entitled to pluck a figure from the air. However for the reasons given by Lord Woolf, this may count against him in relation to costs if the opposing party is left unreasonably in the dark as to how the offer

> was calculated and why, and therefore is not able to reach a view as to whether to accept the offer. Lord Woolf had in mind Part 36 offers made before the commencement of litigation but it seems to me that the same applies to all Part 36 offers. Moreover, reasoned offers to and fro are more likely to promote a settlement, which is a desirable consequence of the Part 36 process."

This judgment implies that a party is not obliged to adopt any science in making a Part 36 offer, and may "pluck a figure from the air". Where that happens, however, the offeree may be able to argue it would be "unjust" for the usual cost consequences under Part 36 to apply as that party cannot reach a view as to whether to accept the offer.

It follows that absence of information on the thinking behind the offer may well be relevant when assessing whether the consequences would be "unjust", on the basis of information available to the offeree, but would not appear to justify a request for clarification on the basis that the offer may, quite literally, have been on the basis the offeror chose to "pluck a figure from the air". That chimes with the approach in cases such as Factortame Limited –v- The Secretary of State for Transport [2002] EWCA Civ 22 where Waller LJ said, commenting on the judgment of Lord Woolf in Ford, that:

> "I do not understand Lord Woolf MR to be signalling a change in the law which permits a party to seek to interrogate another party as to its thinking behind the part 36 payment; but rather he was emphasising that if the other party was at an unfair disadvantage, because the party had failed to disclose documents or information that it was required to disclose, that was a material matter that the court should take into account."

Clarification, more significantly, may be very important in determining what the offer to settle actually was, which in turn may be significant for the incidence of costs. This point was reflected by the judgment in Bailes –v- Bloom (QBD 23/11/2015).

The claimant and defendant in that case were parties to a settlement agreement. The defendant had made a Part 36 offer of £200,000, the offer letter stating that it did "not take into account any counterclaim". The claimant requested clarification whether the defendant intended to bring a counterclaim.

The claimant then issued proceedings. The defendant defended the claim and brought a counterclaim for a declaration that what was said in the defence was correct.

Following the issue of proceedings the claimant made a Part 36 offer to accept £185,000, on the basis this "took account of the entire claim and counterclaim".

The defendant accepted that offer after expiry of the relevant period.

The defendant then sought an order that the claimant pay the defendant's costs from 21 days after the date of the defendant's Part 36 offer, whilst the claimant sought an order that the defendant pay costs up to the date of acceptance of the claimant's offer.

Allowing an appeal against an order the defendant pay the claimant's costs of the claim, Simler J held that when construing the defendant's Part 36 offer the subsequent clarification had to be taken into account. On this basis had the claimant accepted the defendant's Part 36 offer the defendant would have been bound by the clarification (and hence not able to pursue a counterclaim).

The Master had, accordingly, wrongly construed the defendant's Part 36 offer as excluding any counterclaim without having regard to the whole of the correspondence which confirmed that offer had been modified so as to encompass any counterclaim.

It was, accordingly, unjust for the defendant to pay the claimant's costs after the end of the relevant period in the defendant's offer.

Withdrawing Offers

The 2015 version of Part 36 provided, by the terms of Part 36.9 (4) (a) that, provided this takes effect after expiry of the relevant period, a Part 36 offer may automatically be withdrawn in accordance with its terms.

This is not, perhaps, as significant an amendment as might be though given that, if withdrawn the usual costs consequences provided for under Part 36.17 do not, under the terms of Part 36.17 (7) (a), apply.

The ineffectiveness, for costs purposes, of a Part 36 offer which contains a provision for automatic withdrawal are highlighted by the judgment in Gulati –v- MGN Limited [2015] EWHC 1805 (Ch).

On 22 December 2014 the claimant had made a Part 36 offer to settle which, after identifying a relevant period, went on to state:

> "After 21 days, this offer is withdrawn."

The eventual judgment was "at least as advantageous" to the claimant as that offer.

The claimant sought indemnity costs in two ways.

- The defendant's failure to beat the Part 36 offer.
- The defendant's conduct of the litigation.

Mann J confirmed that, given the automatic withdrawal of the offer, what he described as the "semi-automatic" consequences of Part 36.7 did not apply.

The claimant contended, nevertheless, the failure to accept or beat the Part 36 offer was a further factor relevant to the defendant's conduct and hence the court's general discretion on costs, in particular given the terms of Part 44.2 (4) (c). For these purposes

the claimant relied on The Trustees of Stokes Pension Fund –v- Western Power Distribution (South West) plc [2005] EWCA 854 where the Court of Appeal held an offer which did not comply with Part 36, which at that time required a Part 36 payment, and which was subsequently withdrawn had the same effect as a Part 36 payment would have had.

Mann J held that this had to be seen in the context of the Part 36 regime and concluded:

> "To make such an order in those circumstances, absent any other unreasonable behaviour which goes sufficiently beyond the norm in litigation, would in my view be novel. It is well established that the court has jurisdiction to award indemnity costs for serious unreasonable behaviour, and in other limited circumstances, but to award them on the basis that a claimant's offer has been beaten by the claimant (absent compliance with the Part 36 regime) would be new. It would involve the introduction of an award of indemnity costs for behaviour which was not necessarily unreasonable, or unreasonable to a sufficient extent beyond the norm. I do not consider that, without Part 36, it would be correct to formulate that principle."

Mann J also noted that in French –v- Groupama Insurance Company Ltd [2011] EWCA Civ 1119 Rix LJ said of Stokes:

> "Thus there appears to be a new determination in the amended rules to specify carefully what does or does not count as a Part 36 offer with Part 36 consequences. All other admissible offers are relevant to the Part 44 discretion, but they do not carry with them the costs consequences of Part 36. It seems therefore rather harder to formulate a principled approach to the Part 44 discretion that some offers which are not Part 36 offers should nevertheless, in certain circumstances which are not the circumstances of the rules, be treated as though they were Part 36 offers for the purposes of applying Part 36 consequences under Part 44. It is noticeable that Stokes has currently dropped out of the notes in The White Book under Part 36. It may be, therefore – but I do not have to decide this issue because, as stated above, the offers in question in this case could not in any event count as quasi Part 36 offers for the purposes of Stokes – that Stokes should be regarded as dealing primarily with the specific problem of the absence of a Part 36 payment in a context where that was a formal requirement which in certain circumstances added nothing to the value of the offer."

Mann J went on to observe that whilst the claimant argued the offer was very like a Part 36 offer and differed only in that it had been withdrawn:

> "This way of looking at it overlooks the fact that the precise factor which distinguishes the offer, at the date of the trial, from a proper Part 36 offer is something which the rules say should disqualify it. To ignore that factor

> would be contrary to the principles underlying the rule (whatever they may be) and contrary to the approach suggested in French –v- Groupama."

Consequently, Mann J concluded

> "It therefore seems to me that, as a beaten offer, Ms Frost's one-time Part 36 offer has no great significance. It could play a part in a general assessment of the reasonableness or unreasonableness of the defendant's conduct, but it cannot be elevated to a position comparable to a living Part 36 offer merely because it has been beaten."

Accepting Offers

Part 36.14 (formerly Part 36.11) deals with the effect acceptance of a Part 36 offer will have and some recent decisions have considered this rule which, in a sense, return to the starting point of this article namely the need to be clear about what exactly is being offered whether viewing that from the perspective of the offeror or the offeree.

In Littlestone -v- Macleish [2016] EWCA Civ 127 the claimant, as landlord, brought a claim against the defendant seeking damages for breach of repairing obligations in a lease.

The claimant annexed to the particulars of claim, served with the claim form on 30 January 2013, a fully costed Schedule of Dilapidations, supporting a claim of £74,820.93.

On 13 February 2013 the defendant made a Part 36 offer which read:

> "The Defendants offer to pay the Claimant the sum of £35,000 in full and final settlement of this claim.
>
> Payment will be made in full within 28 days of the defendants receiving written acceptance of this offer and an invoice from the Claimant.
>
> This offer is intended to have the costs consequences set out in Part 36 of the Civil Procedure Rules.
>
> The period within which the Defendants will be liable to pay the Claimant's costs in accordance with Rule 36.10 if the offer is accepted, is 28 days from the date of service of this letter ("the relevant period")."

Prior to the expiry of the relevant period in the offer, on 15 March, the defendant, on 1 March, served the defence which admitted liability in the aggregate sum of £17,504. On 12 March the defendant paid that sum to the claimant.

In October 2013 the claimant made a Part 36 offer to accept the sum of £54,000, less the £17,504 already paid, in settlement of the claim.

The defendant then suggested this offer was very close to the defendant's Part 36 offer on the basis that offer of £35,000 had been available for acceptance without the claimant having to give credit for the £17,504 already paid.

The claimant contended this approach was disingenuous. The point, as Briggs LJ subsequently observed in the Court of Appeal, "continued to fester away" and "bedevilling attempts to settle" so that the action ended up being tried.

At trial the judge entered judgment for the claimant with an award of damages for dilapidations of £48,409.40. With interest of £3,091.90 the total sum payable by the defendant was £51,501.30.

The judge rejected an argument by the defendant the Part 36 offer should be aggregated with the £17,504 payment following admissions, hence the claimant had not failed to obtain judgment "more advantageous" than the defendant's Part 36 offer and the defendant was ordered to pay the claimant's costs of the action, to be assessed on the standard basis.

The defendant appealed, on the basis the claimant had failed to obtain judgment "more advantageous" than the Part 36 offer made on 13 February 2013.

In the Court of Appeal the defendant argued that the value of the Part 36 offer should be taken as including the admissions payment, Briggs LJ setting out the analysis behind this on behalf of the defendant when he quoted:

> "The best way of addressing the Part 36 issue was to ask what payment would have been due to the claimant if he had accepted the Part 36 offer on or after 15 March, following the making of the admissions payment on 12 March.
>
> Part 36 is a statutory code, not to be subjected to contractual analysis, such as implied revocation, and takes effect strictly in accordance with its terms. It does what it says on the tin."

Briggs LJ rejected this analysis for a number of reasons.

First, Briggs LJ held:

> "In my judgment the true analysis of the relationship between the Part 36 offer and the admissions payment is as follows. First, the Part 36 offer was, from start to finish, an offer to settle the entirety of the claimant's claim for £35,000, no more and no less. Nothing in the correspondence about, or the making of, the admissions payment made any reference to the Part 36 offer."

Secondly, Briggs LJ held:

> "Secondly, the admissions payment was plainly made, and indeed accepted, on the basis that it was a payment on account following admissions, against the claimant's entire claim. It did not cease to be the same claim for damages for dilapidations and interest which had been originally pleaded, merely because part of it was admitted, and a payment made in accordance with those admissions. Thus it would, plainly, fall to be taken into account as a part payment of any larger sum awarded by way of damages, as indeed it later was."

Next Briggs LJ stated:

> "Thirdly, the admissions payment was, for the same reason, liable to be taken into account as a part payment in advance of the £35,000 that would have been due and payable to the claimant if, thereafter, he accepted the Part 36 offer. This does no violence to Rule 36.11(6) which is plainly not intended to deprive the defendant of the benefit of a part-payment made on account, after admissions, between the making of a Part 36 offer and its acceptance, at least if (as here) both the offer and the payment were made in respect of the same claim. The result is that, had the claimant accepted the Part 36 offer on or after 15 March, the net sum payable would only have been £17,496."

Finally, in rejecting the defendant's analysis, Briggs LJ observed:

> "Fourthly, the judge was correct to award damages and interest in the full sum of £51,501.30 (ignoring the adjustments for service charges and insurance premium rebate), treating the admissions payment as something to be taken into account, rather than as reducing the quantification of the damages payable. Plainly, therefore, the claimant obtained a judgment more advantageous than the value of the Part 36 offer, within the meaning of rule 36.14(1)(a) so that she was correct to award the claimant his costs of the proceedings."

Briggs LJ also observed:

> "I consider that the critical flaw in the defendants' primary case is that it fails to address the obvious reality that an admitted payment on account of a claim, following a Part 36 offer in a higher amount must, in the absence of any agreement to the contrary, be taken as being made as much on account of the Part 36 offer to settle the claim as it is made on account of the claim itself."

Briggs LJ continued by recognising that:

> "The general thrust of the CPR, and of Part 36 in particular, is both to encourage parties to make sensible offers to settle the claim and also to take sensible steps to limit the issues between them. These are separate

> objectives. Part 36 serves the first, while admissions serve the second. Payment following admissions may stop interest running, and will avoid the cost of the claimant having to obtain interim judgment on the admissions."

Accordingly, Briggs LJ went on to hold that:

> "There is nothing inconsistent in a defendant both wishing to encourage settlement by making an offer to settle the whole claim, then making one or more smaller payments outright pursuant to admissions, while leaving the Part 36 offer open for acceptance throughout. The continuing offer encourages settlement while the admissions payment narrows the issues. There is no reason why the admissions payment should be intended to improve the value of the offer to settle the whole claim. It is made for a different purpose."

In the context of a personal injury or clinical negligence claim this issue might arise where an interim payment, on account of damages, is made or in costs proceedings where there is a Part 36 offer but a payment is made on account of costs.

A curious feature of the case is that the offer stipulated that, if accepted, payment would be made within 28 days of acceptance. Whilst this did not rule out payment in 14 days it was, perhaps, arguable this term of the offer did not comply with Part 36.6 (2).

The terms of Part 36.11 were also considered in Bingham –v- Abru Limited (County Court at Sheffield 13 November 2015). This was an appeal by the claimant against an order made, dealing with costs, following acceptance of a Part 36 offer.

The claimant had brought a personal injury claim against the defendant after suffering injuries in a workplace accident.

On 15 August 2013 the defendant made a Part 36 offer of £2,000. On 13 October 2014 the claimant accepted that offer.

The issue between the parties was when the sum of £2,000 should be paid by the defendant to the claimant. That turned upon the proper interpretation of Part 36.11 (6) which provided:

> "(6) Unless the parties agree otherwise in writing, where a Part 36 offer by a defendant that is or that includes an offer to pay a single sum of money is accepted, that sum must be paid to the offeree within 14 days of the date of:
>
> (a) acceptance; or
> (b) the order when the court makes an order under rule 41.2 (order for an award of provisional damages) or rule 41.8 (order for an award of periodical payments), unless the court orders otherwise".

HHJ Robinson noted the key issue in the appeal was whether the words "unless the court orders otherwise" applied to the whole of Part 36.11 (6) or only to sub-paragraph (b) of that rule.

The judge noted, applying Gibbon –v- Manchester City Council [2010] EWCA Civ 726 that Part 36 was to be treated as prescriptive so as to give certainty, without importing other rules from the general law.

The judge also noted that in Cave –v- Davey [2013] EWHC 4246 (QB) the judge had held Part 36.11 (6) meant that a claimant who accepted a Part 36 offer was entitled to be paid within 14 days of the date of acceptance, but agreed with the district judge the particular point raised in the appeal had not been fully considered in that case.

The judge went back to the statutory instrument creating Part 36.11 (6), namely the Civil Procedure (Amendment No 3) Rules 2006 (SI 2006/3435). Even though, in that statutory instrument, the key phrase began on a new line HHJ Robinson concluded the district judge had been wrong as:

- There was a semi-colon at the end of the word "acceptance" in sub-paragraph (a).
- There was a comma immediately before the word "unless" in sub-paragraph (b), indicating that the sentence was not concluded.
- Consequently, the concluding words in sub-paragraph (b), "unless the court orders otherwise" clearly belonged only to sub-paragraph (b).

The appeal was, accordingly, allowed.

This may seem a somewhat technical point but is of some importance where the defendant contends the right to set off costs on the basis QOCS does not apply. Because defendant's costs are not fixed there is no identifiable sum to set off at the stage payment of the damages is due, even though the sum involved may be limited to those damages under the rules relating to QOCS. There is the risk of that resulting in some difficulty for the defendant later recovering sums paid over to the claimant.

CONCLUSION

The cases reviewed in this article reveal the practical importance of Part 36 and some of the issues which the courts are continuing to resolve.

There have been further, very significant, decisions relating to the costs implications of Part 36 offers which will be reviewed by the next article in this series.