THE FUTURE OF PART 36 (PART 4)

Introduction

This is the fourth in a series of articles considering Part 36 of the Civil Procedure Rules.

The first article, in the March 2007 edition of JPIL, assessed the possible implications of the new version of Part 36 then about to be introduced. Subsequent articles have considered some of the important caselaw since decided and, consequently, how Part 36 is operating in practice.

Caselaw continues to explain the terms, and hence practical use, of Part 36. The most far-reaching, but certainly not the only important, decisions since the third in this series of articles was published have been the conjoined appeals of Gibbon -v- Manchester City Council and LG Blower Specialist Bricklayer Limited -v- Reeves [2010] EWCA Civ 726.

Accordingly, after considering the specific terms of the judgment in those appeals this article will assess the significance of that ruling for practitioners when making, reviewing, withdrawing, changing or accepting Part 36, or indeed non-Part 36, offers. Other recent decisions, relating to these Part 36 topics, will be considered on the way.

The article will conclude with a look at the most recent caselaw considering the costs implications of Part 36, and again non-Part 36, offers.

A further important change to Part 36, though outside the scope of this article, is the introduction of a new Section II, which deals with Part 36 offers made specifically for the purposes of the Pre-action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents. The existing Part 36, Parts 36.1 to 36.15, with which this article is concerned now comprises Section I of Part 36. The most significant change to Section I, consequent on the introduction of Section II, is that Part 36.2 now requires the offer to state on its face that it is intended to have the consequences of Section I of Part 36.

The Appeals

Although Gibbon and LG Blower Specialist Bricklayer Ltd had very different factual backgrounds both raised a similar key issue about the operation of Part 36. Additionally, each of the cases considered a number of subsidiary points which also have an important bearing on the way the rule works in practice.

The key issue was identified at the outset of the judgment by Moore-Bick LJ in the following terms:

> "The central question raised on this appeal is whether Part 36 embodies a self-contained code or is subject to the general law of offer and acceptance insofar as it fails expressly to provide otherwise."

The answer to that question had an important bearing on the outcome of each appeal and, more generally, on the operation of Part 36 in practice.

Gibbon

The claimant suffered personal injury in a playground accident for which the defendant admitted liability.

The claimant opened negotiations with a Part 36 offer of £2,500. The defendant responded with a counter offer of £1,500. The claimant rejected that offer and invited an improved offer from the defendant, but did not withdraw the claimant's earlier own Part 36 offer.

The defendant then made a further offer of £2,500 which, again, was rejected by the claimant. The defendant subsequently purported to accept the claimant's Part 36 offer of £2,500.

The claimant contended that earlier offer was no longer open for acceptance. On a contractual basis the claimant could point to the defendant's counter offers in reliance on an argument the claimant's offer could not be accepted. The defendant, however, relied on the terms of Part 36 and on this basis applied to the court for a declaration the offer had been duly accepted bringing the claim to a conclusion.

The district judge allowed the defendant's application. The claimant appealed.

At the hearing of the first appeal the circuit judge dismissed the claimant's appeal, holding that Part 36 required an offeror to take positive steps to withdraw any existing offer, which otherwise remained open for acceptance.

The claimant pursued a second appeal, to the Court of Appeal.

LG Blower Specialist Bricklayer Limited

The claimant had carried out construction work for the defendant. A dispute arose as to the quality of that work and hence what should be paid for it. The claimant claimed £15,793.06, with a counterclaim from the defendant of £9,160.60.

In May 2007 the defendant made a Part 36 offer of £8,023.14. In August 2007 the defendant paid part of the claim, namely £649.36. The defendant then made further, and improved, Part 36 offers but in January 2008 all were withdrawn apart from the May 2007 offer of £8,023.14.

In February 2008 the defendant made a further offer of £8,188.38 which was stated to be inclusive of costs.

In June 2009 the claimant obtained judgment for £8,375.94 exclusive of interest. The district judge, who tried the case, ordered the defendant to pay half the claimant's costs.

On the defendant's appeal to the circuit judge it was contended the judgment obtained by the claimant for £8,375.94 was not "more advantageous" than the May 2007 offer, of £8,023.14.

Dismissing the appeal the circuit judge held the May 2007 offer was superseded by the offer made in February 2008, so it was not necessary to compare the May 2007 offer with the judgment. The claimant had emerged as the winner and the order as to costs made by the district judge was not "seriously wrong", hence should not be interfered with on appeal.

The defendant then pursued a second appeal to the Court of Appeal.

Judgment

Before considering various aspects of the judgment, of particular relevance to specific topics, it is worth considering the general approach the court took to the central issue which had been identified at the outset.

On this key issue Moore-Bick LJ observed:

> "It can be seen from Part 36 as a whole … that it contains a carefully structured and highly prescriptive set of rules dealing with formal offers to settle proceedings which have specific consequences in relation to costs…"

So far as the general, contractual, context was concerned it was noted:

> "Basic concepts of offer and acceptance clearly underpin Part 36, but that is inevitable given that it contains a voluntary procedure under which either party may take the initiative to bring about a consensual resolution of the dispute. Such concepts are part of the landscape in which everyone conducts their daily life. It does not follow, however, that Part 36 should be understood as incorporating all the rules of law governing the formation of contracts, some of which are quite technical in nature. Indeed, it is not desirable that it should do so."

Accordingly, Moore-Bick LJ concluded:

> "In my view, Part 36…….is to be read and understood according to its terms without importing other rules derived from the general law, save where that was clearly intended."

On this basis the arguments advanced in the appeals could not be reconciled with the clear language of Part 36 or the scheme that language embodied. Thus Moore-Bick LJ ruled:

> "Rule 36.9(2) is quite clear: a Part 36 offer may be accepted *at any time* unless the offeror has withdrawn the offer by serving notice of withdrawal on the offeree. Moreover, it may be accepted whether or not the offeree has subsequently made a different offer, a provision which is contrary to the general position at common law. The rules state clearly how a Part 36 offer may be made, how it may be varied and how it may be withdrawn. They do not provide for it to lapse or become incapable of acceptance on being rejected by the offeree. That would be the case at common law, but it is inconsistent with the concepts underlying Part 36, which proceeds on the footing that the offer is on the table and available for acceptance until the offer or himself chooses to withdraw it."

Applying this approach to the facts in Gibbon meant the defendant's counter offer, which contractually amounted to a rejection of the claimant's offer, did not prevent subsequent acceptance of that offer, given that it was made under the terms of Part 36.

In LG Blower Specialist Bricklayer Ltd, when applying the ruling to the facts, the Court of Appeal held the judge who had heard the first appeal wrongly disregarded the May 2007 offer, as that had remained extant notwithstanding the defendant's subsequent offer. Nevertheless, the judge arrived at the right decision to dismiss the appeal from the district judge (who had taken that offer into account).

Both appeals were, therefore, dismissed.

The Court of Appeal's answer to the central issue in the appeals draws a sharp distinction between offers to settle made under Part 36, where the terms of the rule itself will prevail, and other offers to settle, which will be subject to the general law of contract. Furthermore, an offer must be made under Part 36 to attract the costs consequences found in that rule although other offers may be relevant to costs under Part 44.

Hence the decision is of significance when, first of all, making offers.

Making Offers

Part 36.1 (2) expressly recognises, before confirming an offer does not have the costs consequences found in Part 36 unless made in accordance with Part 36.2, an offer to settle may be made in whatever way the offeror chooses.

Accordingly, when making an offer to settle, it is essential that the offeror, mindful of the potential consequences in relation to withdrawing, changing and accepting the offer as well as the potential costs implications, decides whether or not it is intended the offer should be made under Part 36 and frames the offer so as to reflect that intention.

The question is whether a party wishing to make a Part 36 offer must comply with all the provisions, in the rule itself, as to form and content or if a more general indication of an intention the offer is intended to have the consequences of Part 36 will suffice, even if the offer is, in other respects, inconsistent with the terms of the rule.

Following some earlier cases, reviewed in the earlier articles in this series which appear to offer different answers to that question, the recent approach of the courts seems to have been much stricter so far as compliance with the terms of Part 36 is concerned.

Form and Content of Offers

Part 36.2 sets out the rules as to form and content of a Part 36 offer in the following way:

> "(1) An offer to settle which is made in accordance with this rule is called a Part 36 offer.
>
> (2) A Part 36 offer must –
>
> (a) be in writing;
>
> (b) state on its face that it is intended to have the consequences of Section I of Part 36;
>
> (c) specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with rule 36.10 if the offer is accepted;
>
> (d) 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; and
>
> (e) state whether it takes into account any counterclaim."

When considering the central issue in Gibbon, and the purpose of the rule, Moore-Bick LJ appeared to take a strict approach on the requirements as to form and content when observing:

> "… if (the parties) wish to take advantage of the particular consequences for costs in other matters that flow from making an Part 36 offer … they must follow its requirements."

However, a rather broader view of the rules as to form and content, and hence what would amount to making an offer carrying all the consequences found in Part 36, was taken by the Court of Appeal in Onay -v- Brown [2009] EWCA Civ 775. Here, Carnwath LJ put the matter this way:

> "The moral of this story is that someone who writes a letter headed "part 36 offer", and which is stated as "intended to have the consequence of that rule", should make sure that he knows what those consequences are."

He continued:

> "If the party writing the letter does not want those consequences to apply, he should put his offer in some other way, as is expressly permitted by rule 36.2."

These comments lend support to the view that when deciding whether or not an offer is a Part 36 offer much may depend on whether, when making the offer, the offeror expressly refers to Part 36 as well as, perhaps, to any express observations by the offeree as to the status of the offer at or about the time of its receipt.

Hence, in Seeff -v- Ho [2011] EWCA Civ 401 where an issue arose as to whether an offer complied with the terms of Part 36 it was held relevant, when determining this point, that the offeror had requested, at the time, the offeree indicate if it was considered that offer was in any way defective or non-compliant with Part 36. The offeree did not, at that stage, do so.

Even so, none of this means that a simple reference to Part 36, when making the offer, will inevitably result in that offer carrying the consequences of Part 36. If other express terms of the offer are simply inconsistent with fundamental aspects of the rule, particularly regarding acceptance and costs consequences, that offer may well not be regarded as effective under Part 36.

Time-Limited Offers

An example of an express term appearing inconsistent with the general scheme of Part 36 is when a time limit is imposed on the offer.

One of the fundamental changes to Part 36, in 2007, was to change the rules as to form and content so that these no longer provided the offer had to be expressed to be open for at least 21 days, but simply that there was a "relevant period" of not less than 21 days. The significance of this timescale is just that should the offer be accepted within that period then, usually, the claimant will secure the benefit of the deemed costs order set out in Part 36.10.

In C -v- D [2010] EWHC 2940 (Ch) the relevant offer was made in a letter headed "Offer to settle under CPR Part 36". That letter also made a number of other references to Part 36.

However, the offer was expressed to be "open for 21 days from the date of this letter".

The offer was not accepted within the 21 days referred to. Eventually, nearly a year later, the offeree purported to accept the offer. Whether there had been a valid acceptance of the offer depended upon whether this had been made as a Part 36 offer, and hence had remained open for acceptance in the absence of any withdrawal or change meanwhile.

The judge, whilst recognising general contractual rules should not be incorporated wholesale into Part 36, observed:

> "That is not, however, a warrant for giving the words of an offer a meaning which they cannot properly bear in order to squeeze that offer into Part 36 even if that is to be done to give effect to an expressed intention that Part 36 is to apply. If the words used cannot fit with Part 36, then the result is simply that Part 36 does not apply whatever may have been intended."

The fundamental question was whether the offer was capable of being a Part 36 offer in the first place. Only when an offer had properly been identified as a Part 36 offer would the provisions of Part 36, rather than general contractual principles, prevail.

In this context the potential costs implications found in Part 36.14 were an important consideration:

> "The policy of Part 36 can thus be identified, under this argument, as being to encourage a defendant to accept a reasonable Part 36 offer from the claimant but so that, if the offer is not kept open, by being withdrawn or changed detrimentally, the sanction ceases to apply. The successful offeror can take the benefit of the provisions only, as the *quid pro quo,* if he has left it open to the offeree to accept …"

The judge concluded it was not consistent with that policy for a time-limited offer to carry these consequences as that would leave the offeree subject to potential costs

sanctions whilst not obliging the offeror to abide by the terms of the offer. Hence the judge ruled:

> "In my judgment, a time-limited offer, as I have described it, is not capable of being a Part 36 offer. I consider that the structure of Part 36 in general and the provisions of rule 36.2(2) and rule 36.14(6) in particular, establish that an offer must be capable of acceptance unless and until withdrawn by service of a notice within rule 36.9(2), although an offer may also be changed; but if its terms are less advantageous, the costs sanctions under rule 36.14(6) do not apply."

In other words although reference was made to Part 36 the offer, as a whole, was inconsistent with a fundamental precept of Part 36, namely that in return for potential costs benefits the offeror remains willing to agree terms on the basis of the offer. This approach echoes the comments of Moore-Bick LJ in Gibbon where he explained why there were good reasons for the idea that a Part 36 offer should remain on the table unless withdrawn when he said:

> "An offer which appears unattractive when made, and which is therefore rejected, may become more attractive as the proceedings progress and the parties reassess the strength of their respective cases. A defendant who chooses to leave his offer on the table may tempt the claimant into accepting it, with the benefit to himself of the consequences for costs of an offer made at an early stage. Part 36 allows a defendant (or for that matter a claimant) to decide whether to leave his offer open for acceptance or to withdraw it and make another offer later. To import into Part 36 the common law rule that an offer lapses on rejection by the offeree would undermine this important element of the scheme. It could give rise to disputes about whether the offer had been rejected in any given case so as render it incapable of acceptance."

A time-limited offer may expressly state how long it is open for. If a non-Part 36 offer does not expressly state for how long it is to remain open the offeree may wish to seek clarification. The potential uncertainty pending determination by the court of how long the offer remained open, in such circumstances, was illustrated in Wakefield -v- Ford [2009] EWHC 122 (QB).

Costs Inclusive Offers

Another example of apparent conflict between the terms of an offer and the provisions of Part 36 is when the offer is stated to be made inclusive of costs. That is because Part 36.10 makes provision for costs above and beyond the terms of the substantive offer.

An offer which was made inclusive of costs was held not to be a valid Part 36 offer, under the earlier version on that rule, in Mitchell -v- James [2002] EWCA Civ 997.

In LG Blower Specialist Bricklayer Limited the offer made in February 2008 was held not to comply with Part 36, one reason being that this was stated to be inclusive of costs.

Accordingly, it would seem that the decision in Mitchell remains good law.

The same approach, from the courts, seems likely if the usual costs provisions found in Part 36 are otherwise excluded, for example an offer, purported to be made under Part 36, which proposes terms under which there be no order as to costs.

"Total Capitulation" Offers

Can there be a Part 36 offer if the offeror effectively seeks total capitulation by the offeree?

For example, a defendant might propose the claimant simply discontinue the claim (although such an offer might well be ineffective in any event if, as is likely, it seeks to exclude the provisions of Part 36.10 that the defendant pay the claimant's costs if the offer is accepted within the relevant period).

Alternatively, a claimant might, for example, offer to accept 100% on liability~~,~~ (with a view to arguing later that judgment in such terms is "at least as advantageous" as the offer for the purposes of Part 36.14).

The effectiveness of such an offer, for the purposes of Part 36, was considered in AB -v- CD [2011] EWHC 602 (Ch) where Henderson J held:

> "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 the award of 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 (see rule 36.3(2)(a) which provides that a Part 36 offer may be made at any time, including before the commencement 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."

Another way for the court to approach such an offer might be to conclude that it would be "unjust" for the consequences found in Part 36.14 to apply.

Counterclaim

Part 36.2 (2) (e) requires a Part 36 offer to state whether it takes into account any counterclaim.

Accordingly, a Part 36 offer can be effective to conclude both claim and counterclaim if accepted on that basis.

However, the defendant who might wish to make a Part 36 offer faces the potential difficulty that if accepted within the relevant period Part 36.10 will normally result in a deemed costs order in favour of the claimant.

In AF -v- BG [2009] EWCA Civ 757 the defendant sent a letter to the claimant, headed as a Part 36 offer, indicating there was a counterclaim, though not yet pleaded, and offering to settle both claim and counterclaim on the basis of a payment to the defendant.

Although sent by the defendant that letter was expressly stated as intending to have the consequences of a *claimant's* offer to settle under Part 36.

The claimant argued that if the offer was a valid Part 36 offer it only concerned costs of the counterclaim, relying on Part 36.3 (4) which provides a Part 36 offer will have consequences "only in relation to the costs of the proceedings in respect of which it is made".

The court rejected that argument as the counterclaim had not yet been pleaded and therefore did not exist as a claim in the proceedings. The counterclaim was, however, a genuine claim and Part 36 does allow for offers under the rule before commencement of court proceedings.

Furthermore, the offer made clear it was on a net basis and hence Part 36.3 (4), with its reference to "the proceedings in respect of which (the Part 36 offer) is made", applied to both claim and counterclaim. Accordingly, where Part 36.10 (1) spoke of "the costs of the proceedings" it would mean the costs of both the counterclaim and the claim.

Additionally, the court noted that Part 20, which includes counterclaims, provides "an additional claim should be treated as if it were a claim for the purposes of these rules…". Nothing in Part 20, the court held, excepted Part 36 from that provision.

Accordingly, the offer was an effective Part 36 offer such that on acceptance the claimant would have become liable to pay the defendant the costs not only of asserting the proposed counterclaim but also of defending the original claim.

If not accepted, and judgment was ultimately at least as advantageous to the defendant as the terms of the offer, the court would, unless unjust, confer the benefits outlined in Part 36.14 (3) on the defendant.

Accordingly, this decision suggests that if there is a counterclaim the way the offer is framed, coupled with the identity of the party who would receive a net sum if that offer were accepted, may be significant and in appropriate circumstances the defendant in the original claim may still be able to make use of Part 36.

CRU

Part 36.15 makes specific provision for the information to be given, in a Part 36 offer, where the defendant wishes to include deductible benefits in the gross figure, leaving a net figure the claimant would receive if the offer is accepted.

This aspect of the post-2007 rule follows the approach to CRU taken by the Court of Appeal in the earlier decision of Williams -v- Devon County Council [2003] EWCA Civ 365 where it was held that if a Part 36 offer, seeking to offset deductible benefits, did not provide the information now contained in Part 36.15 it was unlikely to be regarded as an effective Part 36 offer.

In Rosario -v- Nadell Patisserie Limited [2010] EWHC 1886 (QB) the relevant offer was expressed to be made "gross of any recoverable benefits". No point was taken by the claimant, at the time, as to whether the offer complied with Part 36. In the event it was not necessary for the court to rule upon whether this was an effective Part 36 offer. Following Williams, however, that offer would surely not have been effective, although the claimant would have been in a stronger position to make that argument if the point had been taken at the time of the offer.

Practice Form

Difficulties, in complying with the rules as to form and content of Part 36 offers, can be avoided by using Form N242A when making offers intended to have the consequences of Part 36.

Reviewing and Responding to Offers

The rules about form and content of Part 36 offers are as important to the offeree as the offeror, as the offeree needs to know whether or not the offer is subject to the provisions of Part 36.

That is because if an offer is subject to the terms of Part 36 this will give the offeree the potential benefits of the deemed costs order in Part 36.10, if accepted within the relevant period, and the possibility of late acceptance otherwise, unless the offer is

changed or withdrawn meanwhile. However, with a Part 36 offer the offeree faces the potential detriment of adverse costs consequences under Part 36.14.

Accordingly, if there is any doubt about the status of an offer it is wise to raise that, as soon as possible, in correspondence. In J Murphy & Sons Limited -v- Johnston Precast Limited [2008] EWHC 3104 (TCC) the court held that an offer expressly said to have been an offer under Part 36, and having been treated as such by the parties, was how that offer should be treated by the court. Similarly, in Seeff -v- Ho [2011] EWCA Civ 401 the fact the offeree treated the relevant offer as a Part 36 offer appeared to be relevant when considering whether it was appropriate for that offeree to later argue the offer was not compliant with Part 36.

If the offer is a Part 36 offer it is clear, following Gibbon, rejection of the offer will not prevent, unless it is later changed or withdrawn, subsequent acceptance by the offeree. Part 36.9 (2) expressly provides an offer may be accepted at any time, unless changed or withdrawn, notwithstanding that the offeree has subsequently made a different offer, in other words a counter offer.

However, should the offer not be a Part 36 offer then the general law of contract will apply. That would mean that upon rejection of the offer, by counter offer or otherwise, it would no longer remain open for acceptance.

The offeree also needs to be sure about whether the offer is subject to the terms of Part 36 so that a proper assessment can be made about the risks of adverse consequences under Part 36.14, as opposed to a non-Part 36 offer where those consequences should not automatically follow.

For all these reasons the offeree needs to be as certain as possible about the status of the offer and to seek clarification if necessary.

Withdrawing Offers

The decision in Gibbon, that Part 36 is not subject to the general law of offer and acceptance, coupled with the underlying concept that a Part 36 offer should remain on the table makes the provisions for withdrawing such offers, found in the rule itself, important.

Part 36.3 (7) requires withdrawal of a Part 36 offer to be made by written notice. That, the Court of Appeal held in Gibbon, leaves no room for the concept of implied withdrawal by, for example, making a further Part 36 offer.

There is no practice form for use when withdrawing an offer, as there is when making an offer, but the Court of Appeal gave some guidance on what would be required. The court observed that there would need to be express written notice "in terms which bring home to the offeree that the offer has been withdrawn".

On the facts of the case the letter from the claimant's solicitors, rejecting the defendant's offer, was not only irrelevant, in the sense that rejection itself could not affect the status of the Part 36 offer, but could not amount to notice of withdrawal in any event.

Although all aspects of the general law of contract, relating to offer and acceptance, will not apply to Part 36 offers that law may be applicable when responding to the offer, to determine whether the offeree is accepting the offer or making a counter offer.

A particular danger is where the offeror makes a Part 36 offer to settle the whole claim, the offeree makes a counter offer on an issue and this issue is then agreed by the original offeror accepting that counter offer.

This danger was highlighted in Mahmood -v- Elmi [2010] EWHC 1933 (QB). At the outset the claimant made a Part 36 offer of £2,100. The defendant responded stating that "we agree your figure of £2,100 for general damages". The case then subsequently proceeded to trial but at court, immediately before the hearing started, counsel for the defendant handed counsel for the claimant a note stating the defendant accepted the offer of £2,100.

The court held the claimant's offer was an unequivocal offer to settle the whole claim for £2,100, there being no basis for interpreting that offer in the light of subsequent correspondence and conduct. Whilst in contract the counter offer would have amounted to an implied rejection of the original offer the negotiations in this case expressly took place under Part 36. Because the defendant's counter offer related to only part of the claim the claimant's offer remained extant, because the action as a whole had not been compromised. Accordingly, the defendant had been entitled to accept the offer.

That decision highlights the potential consequences of the ruling in Gibbon that a Part 36 offer remains open, if not accepted, until withdrawn or changed.

It is important to remember that if a Part 36 offer is withdrawn then, under Part 35.14 (6), the costs consequences provided for under Part 36.14 will no longer apply.

Consequently, the offeror may prefer to change, rather than simply withdraw, a Part 36 offer.

Changing Offers

An alternative to withdrawing a Part 36 offer is changing the terms of that offer which, by definition, is then only open for acceptance on the amended terms.

Changing, rather than withdrawing, an offer may be more attractive to the offeree as that may mean the original offer remains relevant for the purposes of Part 36.14 at a

later stage (though it will then be necessary to compare the offer as changed with the judgment entered, given the terms of Part 36.14 (6)).

It is necessary for an offer to be expressly, rather than impliedly, changed. In Gibbon the Court of Appeal confirmed a further Part 36 offer would not amount to implied withdrawal of an earlier Part 36 offer. Similarly, in LG Blower Specialist Bricklayer Ltd the Court of Appeal confirmed a subsequent Part 36 offer would not automatically change a previous Part 36 offer. Although a ruling on this point was not strictly necessary to determine the appeal, as the subsequent offer in question was not held to be a Part 36 offer, the court concluded the ability to make several offers, open for acceptance at any one time, reflected both the language and purpose of Part 36.

Accordingly, there is no reason why a party should not make more than one offer at a time and leave it to the other to decide which, if any, offer to accept.

Alternatively, a party might change the terms of an offer which then continues to stand in its varied form as from the date it was originally made.

Because there may be issues about whether a later offer was intended to vary, or stand alongside, an earlier offer the Court of Appeal recommended parties follow the terms of Part 36 carefully and make their intentions clear. In practice, just as an intention to withdraw an offer effectively demands use of the word "withdraw", it would seem an offeree who wishes to change an offer would be wise to expressly use the word "change" and, for the avoidance of any doubt, to expressly identify both the offer being changed and precisely how that offer has been changed.

Accepting Offers

Part 36.9 (1) provides a Part 36 offer is accepted by serving written notice of acceptance on the offeror.

Generally, unless one of the circumstances identified in Part 36.9 (3) applies, permission of the court will not be necessary to accept the offer, even after the relevant period has expired.

However, there is no practice form for the acceptance of a Part 36 offer so, just as when withdrawing or changing an offer, precision is important. That is particularly so given that, following LG Blower Specialist Bricklayer Ltd, there may be more than one Part 36 offer made by the offeree open for acceptance at any particular time.

Indeed, even if there is only a single Part 36 offer open at the time the offeree wishes to accept, precision is essential in making clear whether the Part 36 offer, as a whole, is accepted as opposed to reaching agreement on a particular issue. If the intentions of the offeror are not made clear it may be necessary for the court to determine whether there has been acceptance or a counter offer (which may lead

on to the further question of whether the original offeror has then accepted that counter offer).

Acceptance or Counter Offer?

These difficulties were considered in Rosario -v- Nadell Patisserie Limited [2010] EWHC 1886 (QB). The claimant was employed as a baker by the defendant. He was diagnosed as suffering from "Baker's Asthma". The claimant brought a claim, accordingly, against the defendant seeking damages.

On 12 November 2009 the defendant wrote a letter, described as a Part 36 offer, which offered £72,887.42.

The claimant's solicitors subsequently wrote on 13 April 2010 stating:

> "Our client has instructions to accept your client's offer of £72,887.42."

That letter enclosed a consent order for payment of the stated sum and included provision for the defendant to pay the claimant's costs. The claimant also reserved the right to refer that correspondence to the court on the question of costs.

On 5 May 2010 a letter was sent on behalf of the defendant confirming a cheque had been requested, and noting terms had been agreed by use of the words:

> "……your client's agreement to accept my client's previous Part 36 offer of £72,887.42."

However, just over a week later the defendant returned the claimant's consent order amended to provide the defendant should only pay the claimant's costs up to end of the relevant period following the Part 36 offer made on 12 November 2009.

The defendant then made application for an order the claimant had accepted the defendant's Part 36 offer after the relevant period and hence the claimant should thereafter pay the defendant's costs.

The judge considered the issue between the parties depended in part upon the true construction of the letters exchanged between the parties and in part upon the meaning of Part 36.

The letter of 30 April 2010 could not reasonably be understood as acceptance of the whole of the offer made in the letter of 12 November 2009.

Essentially, that was because the word "offer" could be used to refer to the whole of an offer, whether contractual or under Part 36, but might also be used to refer to one of a number of parts or items in an offer capable of acceptance.

In that context it was significant there was a complete absence of any words or conduct on the part of the claimant indicative of an acceptance in accordance with Part 36.9 (1).

Consequently, it followed that the letter dated 30 April 2010 was a counter offer. Furthermore, that counter offer had been accepted by the defendant in the letter of 5 May, given that this referred expressly to the figure for damages. That reference was consistent with there having been an agreement on this figure, as opposed to an agreement on the whole of the terms of the defendant's original offer.

Accordingly, the claimant was entitled to the costs of the claim, even after the end of the relevant period.

Similarly, in Mahmood -v- Elmi [2010] EWHC 1933 (QB) the defendant's response to the claimant's unequivocal offer to settle the whole claim for £2,100 that "we agree your figure of £2,100 for general damages" was a counter offer which, in turn, the claimant accepted to agree that issue (leaving, as already outlined, the claimant's offer to settle the whole claim extant).

Mistake

The proper approach to purported acceptance of an offer where the offeree contended the offer contained a mistake was considered in Milton -v- Schlegel (2006) Limited (Cambridge County Court 31 October 2008). The defendant made a Part 36 offer which was stated to be for £4,300. Following acceptance of that offer by the claimant the defendant contended the offer contained a typographical error and should have been for £1,200. The defendant then applied for permission to withdraw the offer.

The judge held that the first key issue for determination was whether the court had jurisdiction to make the order sought. On this point Part 36 clearly allowed the court to permit withdrawal of the offer within the relevant period.

The second key issue was to identify the principles upon which that jurisdiction should be exercised. On this point the court held that where a Part 36 offer had already been accepted it would be a rare case in which it would be appropriate to allow withdrawal. In effect the applicant would have to show "special circumstances", namely circumstances that were so different from those contemplated or intended at the time the offer was made it would be appropriate to give permission.

There was nothing on the face of the offer to suggest a typographical error such as an extra zero or indeed anything else to suggest some other figure was intended.

It was understandable the claimant's solicitor thought that although the offer was on the high side this reflected concerns by the defendant about some of the issues in the case, in other words the amount offered was not an obvious mistake. There

were, therefore, no “special circumstances” and the claimant’s acceptance was effective.

Multiple Defendants

Difficulties can also arise where one of a number of defendants makes a Part 36 offer which is then accepted by the claimant. In Messih -v- McMillan Williams [2010] EWCA Civ 844 the claimant, having settled the claim with one defendant discontinued against the other defendant. At first instance, the claimant was successful in an application that the other defendant should not recover costs.

The Court of Appeal, reversing that decision, concluded that there must be some reason to make it just to depart from the normal rule, found in Part 38.6, that a claimant who discontinues a claim should pay the costs of the defendant.

If several defendants make a collective offer this problem will not arise. Otherwise, however, the claimant may need to seek agreement the offer is made on behalf of all the defendants or aim to agree terms in relation to the costs of those other defendants as a preliminary to acceptance.

Costs Consequences of Part 36 offers

The real significance of an offer to settle which is made under Part 36 will be the potential cost consequences, whether under Part 36.10 (the deemed costs order on acceptance of a Part 36 offer within the relevant period) or Part 36.14 (the costs consequences following judgment).

Part 36.10 and Offers on Liability

Part 36.2 (5) expressly provides that a Part 36 offer may be made solely in relation to liability.

Part 36.10 (1) provides that where a Part 36 offer is accepted within the relevant period there is a deemed costs order the claimant is entitled to the costs of the proceedings up to service of notice of acceptance. However, Part 36.10 (2) provides that where the offer relates to part only of the claim the court has a discretion as to costs.

In Onay -v- Brown [2009] EWCA Civ 775 the parties were involved in a road traffic accident. The defendant admitted primary liability but alleged contributory negligence. Following entry of judgment “with damages and the issues of contributory negligence, if any, to be assessed” the parties exchanged Part 36 offers.

The claimant eventually accepted, within the relevant period, an offer made by the defendant, described as a Part 36 offer and stated to be on the issue of contributory negligence, that there be a 25% deduction for contributory negligence.

The judge, at first instance, held the remaining issue between the parties on liability was contributory negligence so that, on acceptance of the offer, the defendant had effectively won on this issue.

The Court of Appeal held, mindful of the terms of Part 36.2, liability was an issue in the claim. Accordingly, rather than the claimant's entitlement to costs, on acceptance, arising under Part 36.10 (2), as it would where the offer related only to part of the claim, that entitlement arose under Part 36.10 (1). Accordingly, the claimant was entitled to the benefit of the deemed costs order.

That ruling was determinative of the appeal but, in any event, the judge had been wrong to regard the defendant as having "won", as agreement the defendant was 75% to blame meant it was wholly artificial to describe the claimant as anything other than the winner.

The same approach was taken in Sutherland -v- Turnbull [2010] EWHC 2699 (QB) where the relevant offer was to pay a percentage of the damages that would have been assessed on full liability, but only for some of the injuries suffered by the claimant (to reflect issues on causation that arose in relation to other injuries).

On acceptance of that offer, within the relevant period, an issue arose as to whether the offer related to an "issue" in the claim, giving rise to the deemed costs order under Part 36.10 (1), or to "part only of the claim", giving the court a discretion as to the appropriate costs order in accordance with Part 36.10 (2).

The court held rejecting an argument by the defendant Onay was distinguishable because the offer here reflected issues on causation; the offer was on the "issue" of liability. Indeed, if the offer were to be treated as being for only part of the claim Part 36.10 (2) would have required the claimant to expressly abandon the other parts of the claim, which would require a separate act of abandonment not simply an acceptance.

Accordingly, the claimant was entitled to the deemed costs order under Part 36.10 (1) for the costs of the proceedings up to service of the notice of acceptance. Moreover, that was an entitlement to costs generally, not just costs on the issue of liability.

What Will be "More Advantageous" for the Purposes of Part 36.14?

This issue, last considered by the Court of Appeal in Carver -v- BAA plc [2008] EWCA Civ 412, was reviewed in LG Blower Specialist Bricklayer Ltd.

The issue arose because of the need to compare the offer, held to be extant, of £8,023.14 with the judgment of £8.375.94.

In Carver the court concluded that when asking if a judgment was "more advantageous" than the relevant offer all aspects of the case, including emotional

stress and financial factors such as incurring unrecoverable costs, should be taken into account.

However, the Court of Appeal in LG Blower Specialist Bricklayer Ltd recognised the decision in Carver had been criticised, most recently by Lord Justice Jackson in his review of civil litigation costs. There was considered to be much force in that criticism.

The decision in Carver was held to be binding although the court recognised that what might be more important than simply the factors to be taken into account was the weight to be attached to them, which remained a matter for the judge in each case.

In so doing it was important to see things from the litigant's perspective, rather than too readily imposing the court's own view of what was, and was not, to the advantage of that litigant.

That was especially so in money claims because to recover judgment for more than what was offered could legitimately be regarded as success and a party should not have to make a significant allowance for the court's view of factors inherently difficult to value such as the amount of unrecoverable costs and, even more so, the stress likely to be generated by pursuing a case to judgment.

Nevertheless, in a case where the offer was beaten by a very small amount and there was clear evidence the successful party suffered adverse consequences as a result of pursuing the case to judgment, those factors might be sufficient to outweigh success in purely financial terms.

However, such cases were likely to be rare and in most cases obtaining judgment for an amount greater than the offer were likely to outweigh all other factors.

Accordingly, the starting point was that the judgment here was more advantageous to the claimant than the defendant's Part 36 offer.

Carnwath LJ summarised the position:

> "Accordingly, the judgment in Carver should not be interpreted as opening the way to a wide ranging investigation of emotional and other factors in every case, even where the financial advantage is significant. I agree with Moore-Bick LJ that in most cases success in financial terms will be the governing consideration."

If, unusually, the court does take account of factors other than success in financial terms, this approach will apply equally to a claimant when deciding whether judgment is at least as advantageous as the claimant's own offer, as it does to a defendant: Diageo North America Inc -v- Intercontinental Brands (ICB) Ltd [2010] EWHC 172 (Pat).

Whilst recognising this approach was most appropriate when dealing with money claims, the general principle that an offeree ought to be entitled to evaluate an offer on the basis of a "rational assessment" ought to apply equally to non-money offers, such as liability, where a straightforward comparison between the offer and judgment is possible.

What will be "Unjust" for the Purposes of Part 36.14?

Following early decisions on Part 36, particularly Huck -v- Robson [2002] EWCA Civ 398, the courts have taken a strict view on what would be "unjust" for the purposes of Part 36.14, making clear that this is a distinct concept from reasonableness.

Most subsequent cases, with one notable exception, have followed this approach.

Examples of the court taking a firm line, that Part 36 must have effective sanctions if it is to play a proper part in helping achieve settlement of claims are Blue Sphere Global Limited -v- Revenue & Customs Commissioners [2010] EWCA Civ 1448, Crema -v- Cenkos Securities Plc [2011] EWCA Civ 10 and Seeff -v- Ho [2011] EWCA Civ 401.

The notable exception to this approach is the Court of Appeal decision in Pankhurst -v- White & MIB [2010] EWCA Civ 1445. When refusing to allow interest on costs the court took account of the arrangements made for funding the case by the claimant. That is a rather curious approach as that consideration would appear to be well outside the general ambit of the factors identified in Part 36.14 (4). Moreover, as the concept of what would be "unjust" applies equally to claimant and defendant under Part 36.14 the approach taken by the Court of Appeal would appear to suggest that an unsuccessful claimant could ask the court to scrutinise the funding arrangements made by the defendant, where the claimant has failed to beat the defendant's Part 36 offer, before determining whether the costs consequences set out in Part 36.14 (2) should apply. With arrangements such as "no win-reduced fee" agreements, carrying success fees, now used by defendant lawyers, this approach could generate much satellite litigation.

Where the claimant is entitled to interest on damages and those damages include both a lump sum award and future periodical payments, interest seems likely to be awarded only on the lump sum element: Andrews -v- Aylott [2010] EWHC 597 (QB).

Late Acceptance

The third in this series of articles expressed some reservation about the correctness of the decision in Fitzpatrick Contractors Limited -v- Tyco Fire & Integrated Solutions (UK) Limited (No 3) [2009] EWHC 274 (TCC), that a defendant who accepted a claimant's offer after the end of the relevant period should not have to pay indemnity costs and enhanced interest. That was because the judge received submissions, based on the former version of Part 36, that these benefits would

follow "trial", whilst the current version of Part 36 simply provides for comparison of the offer with "judgment".

Hence in Andrews -v- Aylott [2010] EWHC 597 (QB) the defendant accepted the claimant's offer on liability outside the relevant period but, crucially, judgment was then entered in those terms. Rejecting the defendant's argument the claim was thereby stayed the court gave, in principle, the claimant the benefits provided for under Part 36.14 (3), although subsequently it was ruled interest on damages did not extend to the capitalized value of future periodical payments.

The same approach was taken in Bunch -v- The Scouts Association and Guides Association (QBD 3 December 2009).

Other Consequences

The fact a party has made a Part 36 offer, or indeed a non-Part 36 offer, in excess of the judgment eventually obtained does not mean that offer can or should be used against the offeror.

In Rolf -v- De Guerin [2011] EWCA Civ 78 the judge at first instance made an adverse costs order on the basis the claimant made a Part 36 offer in excess of the sum for which judgment was entered. That, the Court of Appeal held, was wrong because it simply failed to have regard to the fact the claimant had "won" the case.

Similarly, when the claimant failed to make any offers on the issue of contributory negligence, which was denied outright, even where the defendant established an element of contributory negligence but for less than the defendant's Part 36 offer on this issue, the court did not deprive the claimant of costs: Sonmez -v- Kebabery Wholesale Limited [2009] EWCA Civ 1386.

Costs Consequences of Non-Part 36 Offers

A party does not have to make an offer to settle under Part 36 and may choose not to do so.

A non-Part 36 offer will, provided it is an admissible offer to settle, be relevant to the exercise of the court's discretion as to costs found in Part 44.3.

That does not mean, however, such an offer will, or even should, have the costs consequences that would have applied under Part 36.14, had it been a Part 36 offer.

With a Part 36 offer the consequences found in Part 36.14 will follow unless that would be "unjust". Under Part 44, however, the court must undertake a more wide-ranging review of all the circumstances amongst which the relevant offer will be just one factor.

The proper approach to the exercise of discretion under Part 44, including the significance of offers to settle, was considered by the Court of Appeal in Widlake -v- BAA plc [2009] EWCA Civ 1256.

The case concerned a claimant who at trial was found by the judge to have deliberately concealed a history of low back pain from the medical experts to try and increase the damages she might recover. On this basis, despite an award of damages totalling £5,522.38 which comfortably beat the defendant's Part 36 offer of £4,500, the judge ordered the claimant to pay the defendant's costs of the claim.

The Court of Appeal started by observing the general rule about costs set out in Part 44.3 is that the unsuccessful party pays the costs of the successful party but the court may make a different order having regard to all the circumstances. Those circumstances include conduct, success even on part of the case and any admissible offer to settle.

The need to take all the circumstances of the case into account meant that every case would depend upon its own facts, although some points of principle were held to emerge from decided cases.

For example, in Painting -v- University of Oxford [2005] EWCA Civ 161 the court accepted the two day hearing was concerned overwhelmingly with the issue of exaggeration on which the defendant won. Furthermore, the claimant never manifested a willingness to negotiate or put forward a counter offer to the defendant's Part 36 offer. To contest and lose an issue of exaggeration without ever having made a counter offer was held to be a matter of some significance in that kind of litigation.

However, in Jackson -v- Ministry of Defence [2006] EWCA Civ 46 the defendant made a Part 36 offer of £150,000, the claimant recovering £155,000 at trial. On the basis the Judge found the claimant was involved in a significant degree of exaggeration, when giving evidence, the defendant was order to pay 75% of the claimant's costs. The defendant appealed, arguing the case was essentially the same as Painting, but that appeal was dismissed as the defendant was perfectly able to protect itself against the risk of an exaggerated claim by making an early, and adequate, Part 36 offer. In any event Painting was regarded as an exceptional case.

Similarly, in Hall -v- Stone [2007] EWCA Civ 1354 the Judge awarded the claimants on 60% of their costs on the basis that, although not dishonest, there was some exaggeration and the injuries less serious than alleged. The Court of Appeal held the claimant should recover costs in full as the successful party. This was not a case like Painting in which the defendant could claim to have won on such an important issue he could properly regard himself as the victor even though the claimant had beaten a Part 36 offer. Smith LJ did not think the Judge could cut down the costs of a successful party where that party had not done quite as well as he hoped:

> "The mere fact that the defendant has succeeded in keeping the damages down below the sum claimed by the claimant will not necessarily make him the victor or even a partial victor. Of course, where, as in Painting, the main issue in the case was whether the claimant had grossly exaggerated the claim and that issue had important costs consequences, it will be open to the judge to hold that the defendant was the victor. But if the claimant's exaggeration was no more than to put his case rather high, it does not seem to me that a defendant who has not made an effective and admissible offer can be regarded as the victor."

Additionally, in Straker -v- Tudor Rose [2007] EWCA Civ 368 the court agreed with the approach in Barnes -v- Time Talk UK Limited [2003] EWCA Civ 402 where Longmore LJ said:

> "… the most important thing is to identify the party who is to pay money to the other."

Applying these general principles the Court of Appeal in Widlake confirmed the first question for a judge was to determine who had been the unsuccessful party. On that crucial issue the most important thing, in personal injury cases as well as commercial cases, was to identify the party who was to pay money to the other. The paying party would be the unsuccessful party. The court might, nevertheless, regard misconduct as so egregious that an offending party should be deprived of costs.

On the basis that the trial judge had misdirected himself the Court of Appeal needed to exercise discretion afresh.

Whilst there might appear to be some difference in the approach between Painting, on the one hand, and Jackson and Hall, on the other, Ward LJ preferred the approach in the latter cases. That was because the claimant had been successful in the sense of establishing a claim for damages and beating the payment into court. Moreover, although it was a case set in a commercial context, Waller LJ in Straker was surely right to endorse the view that the most important thing, even in a case of personal injury, was to identify the party who was to pay money to the other as the successful party.

Here the claimant came to court to establish her claim and judgment in her favour was an indication of that stance.

However, Part 44.3 (4) (a) did require the court to have regard to conduct, but in the context of "a particular allegation or issue". This helped to reconcile the apparently conflicting authorities, by regarding exaggeration as an "allegation" relevant to the "issue" of quantum. That was because it was then not necessary to determine who was the "winner" but only to establish whether it was unreasonable for the claimant to pursue a particular allegation. If it was then that was conduct the court had to take into account.

The way in which regard should be had to that conduct was principally to enquire into its causative effect, in other words to cause the incurring or wasting of costs.

The court held that similar consequences apply under Part 44.3 (5) (d) which asks whether a claimant has exaggerated.

In any event the court was entitled in an appropriate case to say misconduct was so egregious a penalty should be imposed on the offending party by depriving that party of costs. However, despite recognising the findings of dishonesty by the trial judge Ward LJ observed:

> "I sound a word of caution: lies are told in litigation every day up and down the country and quite rightly do not lead to a penalty being imposed in respect of them. There is a considerable difference between a concocted claim and an exaggerated claim and judges must be astute to measure how reprehensible the conduct is."

Importantly, the Court of Appeal noted the shield available to defendants when dealing with false or exaggerated claims was Part 36. Whilst coming close to such an offer might sometimes have an impact on costs the fact the defendant did not make a sufficiently high offer counted against it. Ward LJ summarised the position:

> "The basic rule is that the claimant gets his (or her) costs if the defendant fails to make a good enough Part 36 offer …"

A factor which counted against the claimant was the failure to negotiate, as whilst not obliged to do so the refusal could impact on costs that otherwise might be recovered.

Having taken all these factors into account it was then necessary for the court to see where the balance would lie.

The starting point was the claimant should recover costs because she was the successful party and beat the defendant's offer.

Making an exaggerated claim, with the result the case became heavily contested, was a relevant factor but an order for costs against the claimant less justified where the defendant failed to make an adequate Part 36 offer. The claimant's dishonestly also had to be penalised. Additionally, the claimant's failure to negotiate was a relevant factor.

When all these factors were balanced the right order was that there should be no order for costs.

The approach in Widlake was followed by the Court of Appeal in Gregson -v- Hussein & CIS Insurance [2010] EWCA Civ 165 and at first instance in Morton -v- Portal Limited [2010] EWHC 1804 (QB).

Conclusion

The caselaw reviewed in this article provides some welcome clarification of Part 36 but, at the same time, illustrates how wary the practitioner must be whenever making, reviewing, withdrawing, changing or accepting Part 36, or indeed non-Part 36, offers to settle given the potential costs consequences, both favourable and unfavourable, when taking any such step.

Perhaps Moore-Bick LJ was being a little optimistic when he observed, giving judgment in Gibbon, that:

> "Certainty is as much to be commended in procedural as in substantive law, especially, perhaps, in a procedural code which must be understood and followed by ordinary citizens who wish to conduct their own litigation."

Lawyers experienced in litigation, let alone ordinary citizens, may, as many of the cases reviewed in this article suggest, experience difficulties discerning the hoped for certainty. Nevertheless, these further cases do help in understanding how Part 36 should operate in practice.