THE FUTURE OF PART 36 (PART 5)

Introduction

When the ink of the fourth in this series was hardly dry further cases, looking at the workings of Part 36, began to be reported.

Since then more important rulings, of real significance to practitioners dealing with the issues that turn upon the proper interpretation and working of Part 36, have followed. Accordingly, a further article in this series seems timely. So here it is: The Future of Part 36 (Part 5)!

The fourth in this series of articles concluded with the observation from Moore-Bick LJ in Gibbon -v- Manchester City Council [2010] EWCA Civ 726 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."

It is for those using Part 36 to judge whether the certainty hoped for has been achieved. Practitioners can, perhaps, help to achieve certainty by clarity, which in turn requires an understanding of the way Part 36 has been interpreted by the courts, whenever making, considering or accepting a Part 36 offer.

There is also a the need to understand, particularly on the issues of acceptance and costs consequences, when non-Part 36 offers will operate in a quite different way to offers which are effective under Part 36. That means it is important to distinguish a Part 36 from a non-Part 36 offer (and how the offer describes itself may well not be conclusive on this point).

This review of recent caselaw will focus on how that provides guidance when making offers (including an update on when an offer which describes itself as being made under Part 36 may be no such thing), before turning to consider corresponding issues relating to acceptance.

The next article in this series will review the impact of recent caselaw on the costs consequences of both Part 36 and non-Part 36 offers.

Making Offers

The logical starting point for this review is to consider the making of offers. It is important to be aware that an "offer" may be no such thing, let alone a Part 36 offer.

So far as Part 36 is concerned the courts appear, in a number of recent decisions, to have been taking a strict approach towards the rules as to form and content set out

in Part 36.2, most recently disapproving, in express terms, those cases which have taken a more liberal approach.

That is important given that Part 36.1 (2) provides that an offer does not have the costs consequences found in Part 36 unless made in accordance with Part 36.2. Furthermore, the ability to accept an offer may be determined by whether or not that offer is an effective Part 36 offer.

Whilst the way in which the offeror describes the offer, in particular whether reference is made to Part 36, will certainly be a relevant factor when interpreting the offer that will not be determinative, rather the focus must be on the terms of Part 36.2 (2).

Paradoxically, as a number of cases reveal, an offeror who expressly refers to the rule when making an offer may later seek to argue that proposal never was an effective Part 36 offer!

Form and Content

Before turning to the caselaw it is worth remembering the terms of Part 36.2 (2), which set out key requirements as to form and content that apply to every offer intended to be effective for the purposes of the rule.

Part 36.2 (2) provides that:

> "A Part 36 offer must –
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> (a) be in writing;
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> (b) state on its face that it is intended to have the consequences of Section I of Part 36;
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> (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;
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> (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
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> (e) state whether it takes into account any counterclaim."

The importance of the rule relating to form and content of Part 36 offers was emphasised by the Court of Appeal in PHI Group Limited -v- Robert West Consulting Limited [2012] EWCA Civ 588.

In PHI Group Limited the relevant offer was made by a letter dated 5 February 2010. That letter was headed "Part 36 Offer" and went on to contain the following provisions:

- "…Our client does not wish to expend costs on further legal and expert views and acknowledges that its likely liability (alongside your client's) coupled with the irrevocable costs of defending a claim such as this, make an early settlement preferable. On this basis our client offers to split liability with your client on a 70:30 basis (in your client's favour)"."

- "This offer is made under Part 36 of the Civil Procedure Rules and the offer is intended to have the consequences of Part 36 of the Civil Procedure Rules."

- "Notwithstanding, in light of the pressing timescales in this claim, our client would be grateful if your client's response to this offer could be provided within the next 7 days."

- "If this offer is not accepted and your client fails to obtain a judgment more advantageous than our client's proposals as contained in this offer, our client is entitled to the costs consequences set out in Rule 36.14 (2)."

- "If there is any aspect of this offer which is unclear would you please let us know within 7 days and we will endeavour to provide an appropriate clarification."

The Court of Appeal noted that the offer was plainly intended to be a Part 36 offer, given the references to that rule.

The issue, however, was whether that offer complied with the provisions of Part 36.2 (2). The requirements imposed by the rule are mandatory, hence the court had to decide what was necessary to comply with those terms.

The offer was in writing and stated on its face it was intended to have the consequences of Part 36. It was not essential the offer should refer to Section I of Part 36, as there was nothing in Section II which could have been of relevance to the offer and hence no doubt which section of Part 36 was intended to apply. Accordingly, the requirements of Part 36.2 (2) were met, save for sub-paragraph (c). The issue regarding sub-paragraph (c) arose because the letter failed to specify a period of not less than 21 days. The trial judge considered that was fatal to the offer being a Part 36 offer.

The Court of Appeal confirmed the trial judge was correct in concluding non-compliance with sub-paragraph (c), of Part 36.2 (2), prevented the offer being a Part 36 offer.

The Court of Appeal noted that if the offer did at least refer to a period of not less than 21 days, which could be identified as the relevant period, it was not part of the

mandatory requirements of the rule to state expressly that this was the period "within which the defendant will be liable for the claimant's costs in accordance with Rule 36.10 if the offer is accepted". However, the relevant offer did not specify any period expressly for the purposes of the rule and the only period which was specified was a 7 day period, which was not a valid timescale for the purposes of sub-paragraph (c).

Whilst in C -v- D [2011] EWCA Civ 646 the Couirt of Appeal accepted that any ambiguity in an offer purporting to be a Part 36 offer should be construed, so far as reasonably possible, as complying with Part 36, where no period at all was specified there was no ambiguity which fell to be resolved.

The Court of Appeal, in PHI Group Limited went on to consider the circumstances in which an offer specifying a period of 21 days, but not following the language of Part 36.2 (2) (c) might comply with the rule. After reviewing relevant caselaw Lloyd LJ summarised the position and offered guidance in the following terms:

> "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."

The same, strict, approach to the rules as to form and content was subsequently adopted by the Court of Appeal in F & C Alternative Investments (Holdings) Limited -v- Barthelemy [2012] EWCA Civ 843.

In F & C Alternative Investments (Holdings) Limited the parties were members of a limited liability partnership. The issue was whether the defendant had validly exercised an option, the claimant issuing proceedings for a declaration the purported exercise of the option was invalid whilst the defendant counterclaimed seeking orders giving effect to the option.

The defendant made a number of offers to settle, including an offer expressly made outside the terms of Part 36 but which the defendant contended would be drawn to

the attention of the court on the question of costs under Part 44.3. That was because a rigid application of Part 36.10, if the offer were accepted, would leave the defendant liable for the costs of the proceedings despite the offer requiring the claimant, if accepting that offer, to make a substantial payment, in respect of the counterclaim, to the defendant.

The trial judge held that this was a "sensible and proper" way of making an offer in the prevailing circumstances and that:

> "…where a party makes an offer of settlement which seeks to comply with the requirements of CPR Part 36 while adjusting for the infelicity in the wording of CPR Part 36.10, while explaining why the offer is made outside CPR Part 36 and that the court will be invited to exercise its discretion on costs by analogy with CPR Part 36, it may often be appropriate for the court to do just that."

Allowing an appeal Davis LJ, in the Court of Appeal, concluded that as the offer was not a Part 36 offer the judge had no jurisdiction to make a costs order under Part 36.14. Drawing on the ruling in Gibbon Davis LJ held:

> "… there is no reason or justification, in my view, for indirectly extending Part 36 beyond its expressed ambit. Indeed to do so would tend to undermine the requirements of Part 36 …. Part 36 is highly prescriptive with regard to both procedures and sanctions."

The Court of Appeal also disapproved of the approach in Huntley -v- Simmonds [2009] EWHC 406 (QB), where an offer which did not comply with Part 36 for the "purest technicalities" was given effect by the exercise of discretion under Part 44. Whilst the result in Huntley might have been capable of justification on the special facts of the case Davis LJ concluded:

> "…in my view it is not permissible wholly to discount a number of failures to comply with the requirements of Part 36 as the merest technicality. Perhaps there can be de minimis errors or obvious slips which mislead no one: but the general rule, in my opinion, is that for an offer to be a Part 36 offer it must strictly comply with the requirements."

Time Limited Offers

Even if there is express reference to a period of 21 days, as Lloyd LJ observed in PHI Group Limited that may be construed, unless this is clearly intended to mean the "relevant period" for the purposes of Part 36, as a time limited offer.

In C -v- D [2011] EWCA Civ 646 the Court of Appeal considered the relationship of time limited offer with Part 36, as well as the proper way of interpreting offers which made reference to the rule.

The claimant, in this case, brought a claim for breach of contract against the defendant in relation to a sale of land.

A letter from the claimant to the defendant dated 10 December 2009 was headed "Offer to settle under CPR Part 36" and made a number of other references to Part 36. The proposal was expressed to be "open for 21 days from the date of this letter", which the letter itself defined as the "relevant period".

In the event it was not until 5 November 2010, when the trial of the action was due to commence on 29 November, that the defendant purported to accept the offer.

The issue, therefore, was whether a binding settlement had been reached.

The judge, at first instance, focused on whether a time limited offer could be a Part 36 offer.

Given the potentially severe costs consequences provided for under Part 36.14 the judge held that:

> "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 offer is kept open."

Accordingly, it would not be consistent with that policy for a time limited offer to be a Part 36 offer, making the offeree subject to the potential costs sanction whilst not obliging the offeror to leave the offer open. Hence the judge concluded:

> "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."

Consequently, the offer was not a Part 36 offer at all. It was, however, a perfectly valid time limited offer, but had not been subsisting when the defendant purported to accept it.

The defendant appealed. In the Court of Appeal Rix LJ identified the issue which arose at the outset of his judgment:

> "The critical issue raised by this appeal is what it means in a purported CPR Part 36 offer to say that the offer is "open for 21 days". On one view it means that the offer is *not* open *after* 21 days. On another view it means, in its context, that the offer will not be *withdrawn* for 21 days."

It was agreed that construction of the meaning of "open for 21 days" had to be considered in the context of the offer and of Part 36 as a whole.

The first issue for determination on the appeal was whether a Part 36 offer could be a time limited offer. The Court of Appeal confirmed the judge at first instance was right to conclude a Part 36 offer could not be a time limited offer.

Rix LJ explained:

> "…in my judgment the new Part 36 regime cannot accommodate a time limited offer. The essence of a Part 36 offer is that it lies on the table until formally withdrawn. Only an offer which has not been withdrawn down to the commencement of trial is capable of having the scheme's costs consequences set out in rule 36.14."

That required the Court of Appeal to consider the second issue which arose, namely what, in context, "open for 21 days" meant.

The judge at first instance was held to have been wrong to interpret the documentation subjectively when what mattered was its objective sense.

The Court of Appeal concluded the offer should be read as meaning that it would not be withdrawn for 21 days, hence it was not time limited, and a valid Part 36 offer that remained open for acceptance. Consequently, the defendant had validly accepted the claimant's Part 36 offer.

Rix LJ concluded:

> "Ultimately, it is important for the security of the Part 36 scheme, in countless cases, that it should be clearly understood that if a claimant wishes to make a time limited offer, in the sense that the offer is to lapse of its own accord at the end of a stipulated period, then such an offer cannot be made as a Part 36 offer; that an offer presented as a Part 36 offer and otherwise complying with its form will not readily be interpreted in a way which would prevent it from being a Part 36 offer; and that if an offeror wishes to bring his Part 36 offer to an end, so that it cannot be accepted, then he must serve a formal notice of withdrawal."

It might be thought, on the basis of this ruling from the Court of Appeal, a reference to Part 36, in an offer to settle, would be enough for the court to interpret such an offer as complying with the rule.

Hence, very much the same approach to what might be regarded as ambiguous wording in the offer was adopted in Epsom College -v- Pierse Contracting Southern Limited [2011] EWCA Civ 1449. There the relevant offer was expressed to remain open for acceptance for 21 days but also made reference to "expiry" which, like the phrase "relevant period", was held to pick up the language of Part 36 itself and, as such, was a valid Part 36 offer.

The courts will not, however, always resolve ambiguity by concluding an offer is effective under Part 36. Much will depend on precisely how the offer is worded as illustrated by Thewlis -v- Groupama Insurance Co Ltd [2012] EWHC 3 (TCC).

In Thewlis the claimant owned a property which was insured by the defendant. The claimant made a claim, under the policy of insurance with the defendant, for subsidence damage. The defendant disputed that claim.

On 24 September 2008 the claimant made an offer to settle by letter which was stated as being:

> "……made pursuant to Part 36 of the CPR and remains open for acceptance for a period of 21 days, from your receipt of this offer letter, thereafter it can only be accepted if we agree the liability for costs or the court gives permission."

It was not until 17 October 2011 that the defendant purported to accept this offer.

Once again the issue between the parties was whether the offer was a valid Part 36 offer, and hence open for acceptance under the terms of that rule.

The parties agreed that at common law the claimant's offer was no longer open for acceptance.

The judge noted that Part 36 had been amended on 6 April 2007 and that the parties had agreed the relevant offer was written with the provisions of the earlier rule in mind.

The judge also noted that in Carillion -v- PHI Group [2011] EWHC 1581 (TCC) (the first instance decision dealt with by the Court of Appeal in PHI Group -v- Robert West Consulting Limited [2012] EWCA Civ 588) an offer was expressed to be made under Part 36 and whilst containing no time limits invited a response within 7 days. That offer was held to be ineffective under Part 36 for non-compliance with Part 36.2.

In Thewlis the judge concluded the decision in Carillion could stand with the decision in C -v- D [2011] EWCA Civ 646, the latter being concerned with how an offer should be interpreted whilst the former dealt with the consequences of failing to comply with the requirements of Part 36.2. Indeed, it was notable that in C Moore-Bick LJ

pointed out that an ambiguous offer which referred to Part 36 must "otherwise comply with its form".

In Thewlis the judge held the reference to costs, after the 21 day period, in the offer was inconsistent with Part 36. The case was distinguishable from C because there the offer did not contain the words "thereafter it can only be accepted if we agree the liability for costs or the court gives permission". If any effect was to be given to that clause the offer could not remain open after the 21 days, and hence was inconsistent with Part 36.

Accordingly, the defendant was not entitled to accept the offer, when purporting to do so, as it was a contractual, not a Part 36, offer.

Terms on Costs Inconsistent with Part 36

A further case referred to in Thewlis, which picks up another aspect of the rules as to form and content in Part 36, is Shah -v- Elliot [2011] EW Misc 8.

Part 36 provides for specific costs consequences in a number of circumstances, including Part 36.10 which deals with costs consequences on acceptance of a Part 36 offer.

The decision in Shah illustrates the relationship between offers stipulating terms on costs inconsistent with Part 36.10 and the rules as to form and content, given that Part 36.2 (2) (c) defines the "relevant period" by reference to Part 36.10.

In Shah the claimant and defendant were involved in a road traffic accident, described by the judge hearing the appeal as a "simple rear end shunt".

Information was exchanged, in accordance with the relevant protocol, resulting in a letter from the defendant dated 20 August 2010 headed "without prejudice save as to costs – Part 36 offer" which made an offer to settle of £3,523 plus "predictive costs".

On 27 August 2010 the claimant issued proceedings. On 3 February 2011 there was a disposal hearing, in those proceedings, when damages were assessed at a total, including interest, of £3,441.81.

Despite the judgment being less advantageous to the claimant than the terms of the defendant's offer the claimant recovered costs of the claim. The defendant appealed.

The judge, hearing the appeal, identified that the preliminary issue for determination was whether the offer made on 20 August 2010 had been a Part 36 offer at all.

The claimant argued the offer was defective in not stating on its face it was intended to have the consequences of Section I of Part 36, indeed the reference to "predictive costs" was incompatible with Part 36.10 which is itself part of Section I of Part 36.

The judge held that whilst the term "predictive costs" was not defined in the CPR, as a matter of construction that was plainly a reference to the fixed recoverable costs regime set out in Section II of Part 45.

The 21 day period applicable to the offer started to run on 23 August 2011 (when the offer was deemed served) but the claimant had meanwhile sent the papers to court on 10 August and the claim form was subsequently issued on 27 August. Hence under Part 36 the claimant would not have been restricted to predictable costs if the offer had been accepted, since proceedings were started within the relevant period of that offer.

Consequently, the defendant was attempting to achieve the protection of Part 36 without at the same time accepting the burden of the costs consequences provided for in that rule. The offer on costs was materially different to Part 36 and less favourable to the claimant, moreover made a time when the defendant was on notice proceedings might be issued at any moment.

The ruling in Mitchell –v- James [2004] 1 WLR 158, when the Court of Appeal concluded an offer did not comply with Part 36 where the proposed costs consequences were inconsistent with those specified in the rule, was held to be indistinguishable.

Whilst the judge did go on to allow the appeal that was only to the extent the offer should be taken into account under Part 44.3 (4), resulting in a restriction of the claimant's costs from 23 September 2010. The defendant was unable to recover costs, through being at fault in not making what the judge described as a "proper Part 36 offer".

The same approach, to offers purportedly made under Part 36 which restrict the operation of Part 36.10, was taken by the Court of Appeal in Howell -v- Lees-Millais [2011] EWCA Civ 786.

In Howell the claimant sought sanction from the court to pursue various claims for breach of trust and other relief. The court refused to sanction any of the proposed claims, save for a negligence claim against a firm of solicitors.

There was then a dispute about how the costs of the application should be allocated, leading to directions for a costs hearing.

Meanwhile, there were negotiations on costs, expressed to be "without prejudice save as to costs" or, as the Court of Appeal observed, more accurately "without prejudice save as to the costs of post-judgment matters".

In April 2009 the defendant made what was described as a Part 36 offer offering alternatives in relation to costs, the claimant ultimately accepting one of those options.

The Court of Appeal, when dealing with a number of issues that arose for determination, made some observations about the scope of Part 36.

Whilst the judge at first instance concluded it was impossible for an offer to be within Part 36 after the action to which it related had concluded, and the only issue concerned costs, the Court of Appeal would not have necessarily gone that far, suggesting Part 36 may be used in costs proceedings.

However, the proposal was not, in any event, a Part 36 offer because it could not, by its terms, comply with Part 36.10(1). That was because the letter specifically excluded the offeree from recovering all costs, the options being to recover only a proportion of costs or a fixed sum in respect of those costs.

In French -v- Groupama Insurance Company Ltd [2011] EWCA Civ 1119 the Court of Appeal, similarly, concluded an offer expressed to be inclusive of costs could not be a Part 36 offer, approving Mitchell.

What is an Offer?

Some doubt may be cast on the decision in AB -v- CD [2011] EWHC 602 (Ch), that to be an "offer" there must be an element of concession "to which a significant value can be attached in the context of the litigation", at least in the context of appeals, given the Court of Appeal ruling in Blue Sphere Global Limited -v- Revenue & Customs Commissioners [2010] EWCA Civ 517. Giving judgment in that case Moses LJ observed:

> "It is of note that Rule 36.14(1) draws a contrast between the failure of a *claimant* to obtain a judgment *more advantageous* than a defendant's Part 36 offer (36.14(1)(a)) and a judgment obtained against a defendant which "is at least as advantageous" to the claimant as proposals contained in a claimant's Part 36 offer (36.14(1)(b)). It should not be forgotten that where a claimant's Part 36 offer is refused the claimant is compelled to continue in order to recover at least the sum for which the claimant is prepared to settle. In those circumstances it is to be expected that the Rule would acknowledge the predicament of a claimant whose only choice is either to abandon the appeal or to press on."

The observation of Moses LJ must also be seen, more generally, in the context of the comparison between a claimant's offer, rather than a defendant's offer, and judgment.

However, Henderson J in AB -v- CD must surely have been correct to observe a demand for total capitulation cannot properly be construed as an offer.

Similarly the making of an interim payment or any other step not intended to achieve finality, even if that is finality only on an issue, ought not usually to be construed as an offer, let alone an offer complying with the requirements of Part 36, as illustrated by the decision in Ali -v- Stagecoach [2011] EWCA Civ 1494.

In Ali the judge, at first instance, treated an interim payment as an offer to which costs consequences should be applied. The Court of Appeal ruled that, certainly where there was no indication the claimant could keep the money irrespective of the outcome, an interim payment should not be characterised as an offer. Longmore LJ held:

> "An offer is intended to achieve finality if it is accepted. This was not an offer which was capable of being accepted and thus achieve finality."

Even so the interim payment had some relevance to the incidence of costs given that, ultimately, the outcome meant the claimant giving money to the defendant, to reimburse that interim payment, rather than vice versa.

Practice Form

The last article in this series noted that difficulties complying with rules as to form and content of Part 36 offers can be avoided by using Form N242A. Indeed, this observation has since been echoed by HHJ Platt in Shah when he concluded, at the end of his judgment, that:

> "If this sad story has any moral it is first that the use of form N242A will enable insurers and solicitors to make offers which enjoy the protection of Part 36 and to concentrate the mind so that offers do have the foreseeable consequences which are intended."

Considering Offers

In the same way an offeror must take care to ensure an offer intended to have the consequences of Part 36 complies with that rule an offeree will need to carefully assess the terms of any offer given the significance, in relation to the ability to accept and potential costs consequences, if the offer turns out not to be what it purports.

That leads on to issues which relate to the acceptance of offers.

Accepting Offers

The failure to make an offer which is effective under Part 36 may prejudice the offeror if that party later wishes to rely on the offer when seeking the costs consequences found in Part 36.14.

However, the offeree may be prejudiced, where an offer is not effective under Part 36, if that party wishes to accept the offer in circumstances when, outside of Part 36, it is no longer capable of acceptance.

That is because in Gibbon -v- Manchester City Council [2010] EWCA Civ 726, reviewed in the fourth in this series of articles, the Court of Appeal made the

important ruling that Part 36 was a self-contained code so the general law of contract, concerning offer and acceptance, would not necessarily apply.

Away from Part 36 any offer will be subject to the general law of contract. Consequently, the ability of the offeree to accept the offer may be restricted. For example, the law of contract prevents acceptance of an offer which has been rejected, either expressly or impliedly by the making of a counter offer, and when the offer has lapsed, because the time limit for acceptance has expired or, if there is no time limit, a reasonable time has elapsed since the offer was made.

A Part 36 offer, however, will remain available for acceptance unless expressly changed or withdrawn by the offeror. Even so, Part 36.9 (3) stipulates a number of circumstances in which court permission to accept will be required. This rule provides:

> The court's permission is required to accept a Part 36 offer where –
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> (a) rule 36.12(4) applies;
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> (b) rule 36.15(3)(b) applies, the relevant period has expired and further deductible amounts have been paid to the claimant since the date of the offer;
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> (c) an apportionment is required under rule 41.3A; or
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> (d) the trial has started.

A further potential complication is that where the offeree purports to accept an offer but this step is ineffective (because the offer was not made under Part 36 and no longer remains open for acceptance or was a Part 36 offer and permission to accept is required but not obtained) the purported acceptance may be viewed as a counter offer. That, in turn, might be accepted by the original offeror and may, in any event, be relevant to costs under Part 44.

Consequently, while the initial issue may concern whether or not an offer has been validly accepted further issues, if it is not, may arise. One issue may be whether an ineffective acceptance will amount to a counter offer. Another issue might be identifying the circumstances in which the court will give permission to accept an offer where this is required under the terms of Part 36 itself.

Valid Acceptance?

The answer to the question of whether there has been a valid acceptance may turn on the status of the offer, in particular if that is effective under Part 36.

In C -v- D [2011] EWCA Civ 646 as well as in Epsom College -v- Pierse Contracting Southern Limited [2011] EWCA Civ 1449 the offers were held to be valid Part 36 offers. Consequently, unless or until withdrawn or changed under the rule, those offers were capable of valid acceptance at the relevant time.

However, in both Thewlis -v- Groupama Insurance Co Ltd [2012] EWHC 3 (TCC) and Shah -v- Elliot [2011] EW Misc 8 the offers were not effective under Part 36. Consequently, the offeree had to show that acceptance was effective under the general law of contract. In Shah that was not an issue but in Thewlis application of the general law prevented acceptance (despite the irony that it was the offeror, who had expressly referred to the rule when making the offer, arguing the proposal was not an effective Part 36 offer).

Recent cases have also looked at the potential impact of procedural developments on the ability of the offeree to accept a Part 36 offer where the rule itself does not expressly deal with the situations considered.

Joyce -v- West Bus Coach Services Limited [2012] EWHC 404 (QB) required the court to decide whether non-compliance with an "unless order", resulting in strike out of the claim, prevented subsequent acceptance of a Part 36 offer.

In Joyce the judge recognised there was a tension between the terms of Part 36.9 (2) (which provide a Part 36 offer may be accepted at any time unless the offeror serves notice of withdrawal on the offeree) and the terms of Part 36.11 (1) (which provide that if a Part 36 offer is accepted the claim will be stayed), as the latter implies a Part 36 offer cannot be accepted where there is in substance no claim left to be pursued because the stay would then be redundant.

The judge concluded, however, that the tension between those rules was reduced by the claimant's recognition that a Part 36 offer could not be accepted after a claim was dismissed or judgment entered, as the claim was to all intents and purposes then at an end, given that this was also the position where a statement of case or claim had been struck out under an "unless" order.

It was then necessary to consider whether this approach to the CPR would promote, or militate against, the overriding objective. There was, the judge held, no injustice with such an approach as the claimant's own conduct brought about the consequence that the Part 36 offer could not be accepted.

Accordingly, a Part 36 offer could not be accepted following breach of the "unless order" because, then, the claim was already at an end.

Hadaway -v- Raza (Central London County 12 May 2011) involved the court considering whether a stay on the action prevented acceptance of a Part 36 offer. The judge, relying on the observations in Gibbon that a Part 36 offer was on the table and available for acceptance until withdrawn, concluded such an offer could be accepted even during the time the claim was stayed. That approach prevailed even though it was envisaged further evidence on the claimant's condition would be

obtained during the stay. Accordingly, that ruling emphasises the need for parties to consider whether any Part 36 offers need to be withdrawn or changed notwithstanding a stay, let alone any less formal arrangement reached between the parties whilst further evidence is obtained.

Counter Offer?

Where the offeree purports to accept an offer, but the acceptance is invalid either because common law rules apply or any necessary permission under the terms of Part 36 is not obtained, the "acceptance" may, on proper analysis, be a counter offer.

In such circumstances the original offeror may, in turn, accept the counter offer. If not, however, that counter offer may be an offer which is taken into account by the court when deciding what order to make about costs, under Part 44.

In Rowles-Davies -v- Call 24-7 Limited [2010] EWHC 1695 (Ch) a number of Part 36 offers were made by the parties, including an offer by the defendant of £200,000 made on 15 September 2009.

During the trial of the action, which commenced on 25 March 2010, the judge indicated a provisional view the claimant's primary claim was unsustainable. Subsequently, the claimant purported to accept the offer made on 15 September 2009. As the trial had started permission from the court was required for a valid acceptance, under Part 36.9 (3) (d), but no such application was made. The trial continued and judgment was entered for the claimant in the sum of £243,668.61.

When the issue of costs was being dealt with the claimant argued the purported acceptance of the part 36 offer should, itself, be regarded as a Part 36 offer. The judge held that this would not be appropriate, as such an offer did not comply with Part 36.2 (2), but the purported acceptance was held to be an offer the court had to take into account under Part 44.3 (4) (c) when dealing with costs.

Permission to Accept?

There is, perhaps, a qualitative difference between the circumstances envisaged in sub-paragraph (d) of Part 36.9(3), acceptance of an offer after the trial has started, and the circumstances identified in the remaining sub-paragraphs of that rule.

That is because the complexion of, and risks associated with, a case can quickly change as soon as a trial starts.

In Sampla -v- Rushmoor Borough Council [2008] EWHC 2616 (TCC) the principal issue was whether a Part 36 offer could be accepted after the trial had started.

The judge noted there was no implied term an offer could not be accepted once the trial had started, as that would inconsistent with the terms of Part 36.9 (3) which

makes plain the court can give permission to accept an offer after the trial has started.

The judge held that whenever exercising the discretion to give permission to accept an offer once the trial had started the relevant test was that set out in Flynn -v- Scougall [2004] 1 WLR 3069, namely whether there had been a sufficient change of circumstances such that it would now be just to refuse permission.

A change in the perception of the parties on the likely outcome of the trial would be a material change of circumstance. However, it was not necessary for there to be a "knock out blow" (for example the cross-examination of the claimant revealing a "somewhat murky background" in Proetta -v- Times Newspapers [1991] 1 WLR 337). As Coulson J observed in Sampla:

> "There will always be cases, indeed they may be in the majority, where the individual events during the trial are not particularly dramatic or of themselves determinative of the eventual result, but where, as a result of an accumulation of small things - an unexpected answer here, an admission there, a judicial intervention that might not have been expected - the tide of battle during the days of the hearing flows resolutely one way."

This topic was explored more recently in Nulty -v- Milton Keynes Borough Council [2012] EWHC 730 (QB), though in a slightly different context.

Nulty involved two claims. In the first claim, ("the liability dispute"), the claimant was Milton Keynes Borough Council ("Milton Keynes") and the defendant National Insurance and Guarantee Corporation Limited ("NIG").

In the second action, ("the coverage dispute"), the claimant was NIG and the defendant Michael Nulty ("Mr Nulty").

On 6 December 2010 Milton Keynes made a Part 36 offer to accept £1.5m in respect of the claims in both actions. On 18 July 2011, the day before the trial started, Milton Keynes withdrew that offer.

At trial Milton Keynes recovered £1.7m. Milton Keynes then sought an order that costs be assessed on the indemnity basis, along with enhanced interest, from the end of the relevant period in the offer made on 6 December 2010.

The judge held that because the relevant offer was withdrawn the potential significance to costs of that offer would only be in relation to the court's discretion under Part 44.3.

However, given that the offer, if not withdrawn, could only have been accepted after the trial started with permission of the court it was necessary to consider the criteria that would have been taken into account by the court in dealing with an application for permission to accept the offer at that stage.

The judge observed that a Part 36 offer is directed to a contingency, namely the outcome of the trial. Consequently, once the trial starts the contingency has started to happen. For example, a case may go disastrously wrong form one party right from the outset or a judge may make observations indicating a fairly strong provisional view has been formed on the merits. In such circumstances a court would usually refuse permission to accept the offer.

The judge went on to observe that if, however, there had been a material change of circumstances, unconnected with the course of the trial (for example late disclosure of relevant documentation), which might have caused the offeree to have accepted the offer when it was originally being considered then the court might give permission.

Applying this approach where the offeree wishes to accept a Part 36 offer outside the relevant period, but before the trial has started, the court might generally take the view permission ought to be granted, certainly without the sort of "knock-out blow" analogous to the type of event envisaged in Proetta. Such an approach is, perhaps, reflected in the series of cases which have considered the proper costs consequences where a Part 36 offer has been accepted late and, notably, no substantive issue has arisen, where such permission has been required, about the ability of the offeree to accept at that late stage (for example Thompson -v- Bruce [2011] EWHC 2228 (QB) and Lumb -v- Hampsey [2011] EWHC 2808 (QB)).

Consequently, where permission to accept an offer is required under sub-paragraphs (a), (b) or (c) of Part 36.9(3) it seems likely the court will usually follow the approach in Gibbon, namely that a Part 36 offer should be treated as "on the table" until changed or withdrawn.

Conclusion

The number of cases considered in this article, and the complexity of the issues they raise, does raise questions as to whether the certainty, hoped for by Moore-Bick LJ when giving judgment in Gibbon, has been achieved.

The words of Jackson LJ, giving judgment in Fox -v- Foundation Piling Limited [2011] EWCA Civ 790, have particular resonance in this context:

> "A large number of authorities have accumulated around the provisions of Part 36 and their interrelationship with rule 44.3. This is not a welcome development, since Part 36 is intended to provide a clear and simple framework within which parties can settle litigation."

The watchword for the practitioner in any dealings with Part 36, or indeed offers outside the scope of Part 36, must be clarity. From the courts it is not, perhaps, unreasonable for the parties to expect certainty and, in this respect, the straightforward approach endorsed by Jackson LJ, in case after case in which he has given judgment, has much to commend it. It is notable that recent key decisions by

the Court of Appeal have endorsed the need to comply precisely with the terms of the rule which, of course, helps to give a degree of certainty.

Many of the topics dealt with in this article, focussing on the making and accepting of Part 36 offers, are of equal importance when considering the costs consequences of offers make under Part 36, or indeed outside the rule. That topic will be taken up by the next in this series of articles looking at the future of Part 36.