THE FUTURE OF PART 36

Introduction

Part 36 provides for a formal system of exchanging offers which will have costs consequences in the event that a party fails to beat a Part 36 offer made by the other party.

Whilst offers, and other attempts to achieve settlement, can be made in any form the parties wish the Civil Procedure Rules envisage that it is principally offers made under Part 36 which will be reflected in costs orders, at least in cases which have gone to trial.

Part 36 was an important aspect of the reforms introduced by the Civil Procedure Rules all designed to narrow issues, promote settlements and save costs.

A number of recent decisions from the Court of Appeal have introduced a degree of uncertainty into the operation of Part 36. Consequently, partly to reflect some of the decisions and partly to overcome problems caused by those decisions, it seems likely there will be significant changes made to Part 36 in forthcoming amendments to the Civil Procedure Rules.

This article reviews considers the effect of case law on some key provisions of Part 36, the practical issues that have arisen as a result and the consequent changes which are likely to be made, dealing with those issues, when future amendments are made to the Civil Procedure Rules.

Key Provisions

There are several key provisions in Part 36 concerning the basic requirements for an offer to comply with that rule and the implications of such an offer.

These provisions are worth noting before considering the issues that have emerged as a result of relevant case law.

- Part 36.1 (2) provides an offer not made in accordance with Part 36 will only have the consequences specified in the rule if the Court so orders.

- Part 36.2 (4) provides that a Part 36 offer or payment may be made at any time after proceedings have started (Part 36.10 deals with the potential effect of a pre-issue offer).

- Part 36.3 requires a defendant, in a money claim, to make a Part 36 payment.

- Part 36.5 (1) requires a Part 36 offer to be in writing.

- Part 36.5 (6) requires a Part 36 offer made not less than 21 days before the start of the trial to be expressed to remain open for acceptance for 21 days from the date it is made and provide that after 21 days the offeree may only accept it if the parties agree the liability for costs or the Court gives permission.

- Part 36.5 (8) provides that if a Part 36 offer is withdrawn it will not have the costs consequences provided for in Part 36.

- Part 36.6 (5) provides that a Part 36 payment may only be withdrawn or reduced if the Court gives permission.

- Part 36.10 allows the Court to take into account an offer made before proceedings are begun, which otherwise complies with the requirements of Part 36. However, if the offeror is a Defendant to a money claim there must be a Part 36 payment, within 14 days of service of the Claim Form, of not less than the sum offered before proceedings began if the offeror is to rely on Part 36.10.

- Part 36.20 provides that if a Claimant fails to better a Part 36 payment or to obtain a judgment which is more advantageous than a Defendant's Part 36 offer the Court will, unless unjust to do so, order the Claimant to pay costs incurred by the Defendant after the latest date on which the payment or offer could have been accepted without needing permission of the Court.

- Part 36.21 provides that if a Defendant is held liable for more, or judgment against a Defendant is more advantageous to the Claimant, than the proposals contained in a Claimant's part 36 offer the Court may award indemnity costs and interest.

Costs Consequences

It is the potential costs consequences of an offer effective for the purposes of Part 36 that are intended to promote settlement by forcing the offeree to take the offer seriously.

However, the costs consequences of a Part 36 offer only apply where the Court makes an order "at trial". For these purposes "trial" is defined as exactly that and a party will not be able to rely on Part 36.20 or Part 36.21 if, for example, the Court is having to determine costs after a summary judgment application or where settlement has been achieved at the door of the Court.

It is important to remember that, in addition to the presumptions provided for in Part 36.20 and Part 36.21, the Court has a general discretion, found in Part 44.3, about whether costs should be payable by one party to another. Accordingly, if the case is not resolved "at trial" the question of costs will be dealt with under Part 44.

Moreover, even if there has been a trial, when relevant Part 36 offers have been made, the Court retains the discretion to make any appropriate order as to costs under Part 44.3.

Part 44.3 (2) gives guidance on the exercise of the Court's discretion on costs by stipulating a general rule that the unsuccessful party will be ordered to pay the costs of the successful party. However, the rule goes on to provide that a different order may be made and in deciding what order to make the Court must have regard to all the circumstances including any admissible offer to settle drawn to the Court's attention, whether or not made in accordance with Part 36.

Consequently, any Part 36 offer, and indeed any "admissible offer", may be relevant for the purposes of dealing with costs under Part 44.

There are, however, some differences between Part 36 and Part 44, notably that there is no equivalent provision in Part 44 to Part 36.5 (8), which specifically provides a withdrawn offer will not have the costs consequences provided for in Part 36.

It is also notable that, at least for the purposes of Part 36, there is a difference between what a Defendant must achieve, to get the benefit of Part 36.20, and what a Claimant must achieve, to gain the benefit of Part 36.21. That is because if a Claimant matches, but fails to beat, a Defendant's offer the Defendant will usually have the benefit of Part 36.20. A Claimant must, however, do better, rather than just match, the Claimant's own offer to get the benefit of Part 36.21.

A case that illustrates how the Court may use Part 44, even where a trial has taken place and Part 36 offers have been made, is Read -v- Edmed [2004] EWHC 3274 (QB).

In Read the Claimant made an offer of 50% on liability. Following trial of this issue the Court entered judgment for the Claimant at 50%. The Claimant had not obtained a more advantageous order than the Part 36 offer so the Court was unable to award indemnity costs under Part 36.21. However, the Claimant recovered indemnity costs under Part 44 on the basis that the offer had been exactly right and therefore should have been accepted by the Defendant.

Withdrawal

There is an important difference between a Part 36 offer and a Part 36 payment so far as the ability to withdraw the offer is concerned.

In Flynn –v- Scougall [2004] 3 All ER 609 it was held a Part 36 payment will remain open for acceptance throughout the 21 days provided for in the rules, even if the Defendant purports to withdraw it, as the offer is not contractual in essence but derives from the Civil Procedure Rules.

This reflects the terms of Part 36.6 (5) which require the offeror to obtain permission from the Court before withdrawing or reducing a Part 36 payment.

Also in Flynn the Court held that when considering an application to withdraw or reduce a Part 36 payment the traditional approach on applications to withdraw payments into Court was consistent with the overriding objective. This approach requires the Defendant to show there are good reasons for the application such as:

- The discovery of further evidence, putting a wholly different complexion on the case; or
- A change in legal outlook, as the result of a new judicial decision; or
- An obvious mistake, for example the Part 36 Notice stating £100,000 has been paid into Court in circumstances such that it would be clear the Notice was intended to refer to £10,000; or
- Fraud.

In Scammel -v- Dicker [2005] 3 All ER 838 it was held that, in contrast, a Part 36 offer is essentially contractual and as such may be withdrawn at any time until it is accepted, without the need for any permission from the Court.

In Capital Bank plc –v- Stickland [2004] EWCA Civ 1677 the Court of Appeal held that, once the time for which the offer was expressed to remain open had elapsed, the Court had a complete discretion as to whether permission to accept out of time should be given; that discretion was not limited to determining the incidence of costs on the basis late acceptance ought to be allowed. Accordingly, the Court could refuse to allow late acceptance of an offer and, indeed, on the facts of the case did so. However, it was also held that such an offer would not be effective for costs purposes, in favour of the offeror, once it could no longer be accepted by the offeree.

Formalities

The Court does, of course, have discretion, by Part 36.1 (2), to order that an offer which has not been made in accordance with all the formal requirements of Part 36 will nevertheless have the costs consequences provided for in the rule.

In Mitchell –v- James [2002] EWCA Civ 997 the Court held that in the event of a mere technical non-compliance with the requirements of Part 36, for example to expressly state that after 21 days the offer might only be accepted if the parties agreed the liability for costs or the Court gave permission, the Court should exercise discretion under Part 36.1 (2) to treat the offer as effective for the purposes Part 36.

However, the Court also held in Mitchell that any proposal dealing specifically with costs in the offer should be ignored for the purposes of assessing whether or not the offer was subsequently beaten, on the basis that Part 36 is concerned with the substantive issues not costs.

The general approach in Mitchell was adopted in Crouch -v- King's Healthcare NHS Trust [2004] EWCA Civ 1332. The Defendant, in accordance with usual NHSLA practice, made a

Part 36 offer which the Claimant failed to beat at trial. The trial judge held the Defendant should have made a Part 36 payment as required by Part 36.3 and, accordingly, did not penalise the Claimant in costs.

The Court of Appeal held that even the NHSLA, who were bound to be good for the money, could not simply stipulate that a Part 36 offer was to be treated as a Part 36 payment. Accordingly, the presumption in relation to costs under Part 36.20 did not apply, though the Court could exercise the discretion to treat such an offer as effective for the purposes of Part 36. In the event, the Court concluded that it was unlikely there would be any difference between the exercise of the discretion as to whether Part 36 should apply and exercise of the general discretion in relation to costs under Part 44.

Under Part 44 the Court was required to consider a number of matters, before exercising any discretion on costs, including any admissible offer of settlement. The Defendant's Part 36 offer was an admissible offer which therefore needed to be taken into account. Once account was taken of that offer the appropriate order was to make the Claimant pay the Defendant's costs after the last date on which the offer could have been accepted without permission from the Court.

Accordingly, although the Defendant's offer was intended to take effect under Part 36 the Court accepted that it could, concurrently or alternatively, be relevant for the purposes of Part 44.

A further, and perhaps more controversial, relaxation of the formal requirements of Part 36 occurred in Trustees of Stokes Pension Fund –v- Western Power Distribution (South West) plc [2005] EWCA Civ 854. The Defendant made a pre-issue Part 36 offer to pay £35,000 which, after issue of proceedings, was not repeated, there being a subsequent Part 36 payment of only £20,000. At trial the Claimant was awarded damages of £25,600. The trial judge held that, the Claimant having beaten the Defendant's Part 36 payment, the Claimant should recover the costs of the action. The pre-issue offer, although more generous in terms than the judgment, did not afford protection because it was not followed by a Part 36 payment and, in any event, the Defendant had made clear, at the time the payment into Court was made, the pre-issue offer had now lapsed.

On appeal the Court had to decide whether a pre-issue offer, not followed by a payment into Court, should be taken into account and, if so, what effect the lapse of that offer had.

On the first question the Court held:

- The Court has a discretion to order an offer not made in accordance with Part 36 (including an offer made before commencement of proceedings not followed by a payment into Court within 14 days of service) shall have the costs consequences of Part 36, by Part 36.1 (2).

- In exercising this discretion a Court should hold that an offer be treated as having the same effect as a payment into Court where:

- The offer is expressed in clear terms so that there is no doubt as to what is being offered in other words whether it relates to the whole or part of the claim, whether it takes account of any counterclaim, whether it is inclusive of interest;

- The offer is open for acceptance for at least 21 days and otherwise accords with the substance of a Calderbank offer;

- The offer is genuine;

- The Defendant was clearly good for the money at the time when the offer was made.

- A Claimant who challenged whether the offer was genuine, or that the Defendant was good for the money, would generally have to do so at the time, and the best way of raising the challenge would be to accept the offer and see if payment was made. Otherwise the Court was likely to infer the Claimant really thought the offer was too low.

On the second question the Court held:

- Although the offer was no longer open for acceptance had that offer been accepted, when it was open, the case would have been concluded at that stage and, in this sense, all further costs could be said to result from the decision not to accept it.

- There was no suggestion the Claimant would have accepted the offer, and reached an agreement on costs, after the 21 days if the offer had remained open.

- The situation might be different where the Court held the Claimant acted reasonably in not accepting the offer within the time the offer remained open for acceptance.

The offer was, therefore, effective for costs purposes and the appeal was allowed.

The Court did not appear to have been referred to, or have considered, the earlier decision in Capital Bank plc.

Once again, therefore, an offer intended for the purposes of Part 36 was held to be relevant for the purposes of Part 44 even though, under the terms of Part 36 itself, that offer, if treated as having been withdrawn, would not be effective for costs purposes (on the basis that it is really semantics to distinguish, in the circumstances, a lapsed offer from a withdrawn offer).

Furthermore, the decision appears to ignore the important distinction between a Part 36 offer, which can be withdrawn at any time until accepted, and a Part 36 payment, which may only be withdrawn or reduced if the Court gives permission.

Accordingly, this decision, coupled with the ruling in Mitchell that failing to state the offer would remain open after 21 days was a mere technical non-compliance, creates uncertainty if an offer is silent about its status after the time for acceptance has expired. The question which arises is whether such an offer will remain open, subject to obtaining permission from the Court or agreeing terms as to costs (which seems to have been implicit in Mitchell), or will be treated as having lapsed or been withdrawn and no longer open, under any circumstances, for acceptance (which was the approach adopted in Stokes).

Subsequently, a number of cases have followed the approach in Stokes but the potential uncertainty is illustrated by the decision in Brown -v- Mcasso Music Productions [2005] EWCA Civ 1546.

In Brown the Claimant, a rap artist, sought copyright in some lyrics. The Court ultimately held the Claimant had 10% ownership of the copyright and awarded damages, on this basis, of £180.

The Defendant had made an opening offer of £450. That was by a letter which was expressed to be "on a without prejudice basis" and, later on, "on a without prejudice basis save as to costs". The offer was only open for 7 days.

A subsequent offer from the Defendant, made "without prejudice save as to costs", offered a 20% share in the income from publishing royalties but no damages and suggested each party pay its own costs.

At first instance the Claimant was ordered to pay the Defendant's costs following the offers.

On appeal the Court of Appeal held that the offers should not be effective for costs purposes as these failed too many of the requirements set out in Stokes. This was because, so far as the first letter was concerned, its status, certainly to a party who was not represented, was not clear. Moreover, that offer was only open for a short timescale and the subsequent offer included a provision as to costs and did not therefore comply with Part 36 (applying Mitchell).

Admissibility

If an offeror wishes to obtain a costs order under Part 36 or Part 44 it will be necessary to have made an offer which complies with, or is treated as complying with, Part 36 or is an "admissible offer" for the purpose of Part 44.

The decision in Brown illustrates the potential difficulties in relying on an offer where the status of that offer is not clear.

In Jackson -v- Ministry of Defence [2006] EWCA Civ 46 the parties attended a pre-trial joint settlement meeting, in accordance with directions which apply in Manchester and which were stated to be a "confidential process".

At trial the Claimant recovered damages of £155,000, slightly exceeding a Part 36 payment of £150,000.

The Defendant argued that, when dealing with costs, the Court should have taken account of an offer made at the settlement conference. However, this was held to be made wholly without prejudice and, accordingly, was not admissible. The joint settlement meeting scheme envisaged that any offers made would, if necessary, be followed up by admissible offers of settlement.

Practicalities

The case law has inevitably caused some uncertainty about the overlap between Part 36 and Part 44, the status of offers and also the potential costs risks and advantages resulting from such offers.

This, in turn, has raised various practical and tactical considerations.

- Does a Defendant have to pay in?

  Following Stokes it may well not be necessary for a Defendant to make a payment into Court to get the costs benefit from an offer in a money claim.

  However, without such a payment in a money claim the Court has a wider discretion and, depending on how the offer is framed, there is a risk costs consequences will not follow, as in Brown.

  If a Defendant chooses not to make a payment into Court, given the differing rules on withdrawal or reduction, a Claimant might reasonably ask whether the Defendant agrees the offer will not be withdrawn or reduced unless the Court gives permission.

  If the offer, where strictly the rules require a payment in, does not make clear the status of the offer once the time for accept has elapsed the Claimant may seek confirmation whether or not that offer will remain extant, subject to the Court giving permission or agreement on costs.

  Furthermore, if the Defendant is insured it might be reasonable for the Claimant to ask that the insurer confirm there will be an indemnity given, at least up to the amount offered.

- What type of offer might be made?

  Recent cases suggest that there are various types of offer which, potentially, may be relevant for costs purposes.

  To ensure the potential costs benefits of Part 36 a party should make a Part 36 offer, or where required, Part 36 payment.

An offer not made under Part 36 may, nevertheless, be put as a "Calderbank" offer, expressly made "without prejudice except as to costs". Such an offer may be appropriate if it is not intended to meet all the requirements of Part 36, for example that the offer be expressed to be open for at least 21 days or that the offer remain open for acceptance, subject to permission of the Court or agreement on costs, after the period for which it is expressed to remain open has lapsed. Although an offer of this type is not made for the purposes of Part 36 it may be very relevant for dealing with costs under Part 44.

A wholly "without prejudice" offer is quite different from a "Calderbank" offer, as issues may arise as to admissibility.

- What will be an "admissible offer"?

This may be important as, leaving aside the circumstances in which an offer will be relevant for Part 36, the Court can only take account of an admissible offer for the purposes of Part 44.

If an offer is expressed to be a Part 36 offer that will automatically, under the terms of Part 36, be deemed to be "without prejudice except as to costs" and thus an admissible offer.

A "Calderbank" offer should also be admissible, as it is expressly made "without prejudice except as to costs".

Offers made on a wholly without prejudice basis should not, however, be admissible. That is because it is a long established principle that parties who negotiate on a wholly "without prejudice" basis do so on the understanding that what is said cannot be used against them even on the question of costs: Walker v- Wilsher (1889) 23 QBD 335, approved following the introduction of the Civil Procedure Rules in Reed Executive plc –v- Reed Business Information Limited [2004] EWCA Civ 159. It is only when a binding compromise has been reached that such wholly "without prejudice" communications may be referred to, if necessary, as evidence of that compromise.

An offer which, apparently, is made in open correspondence may, nevertheless, be treated as negotiations and thus wholly "without prejudice" as, in determining what should be treated as being "without prejudice", the Court will look at the substance of the communication rather than simply the form and whether it is expressly stated to be sent as such: Belt –v- Basildon & Thurrock NHS Trust [2004] EWHC 785 (QB).

Similarly, the offer made at a confidential settlement conference was held not to be admissible in Jackson.

Accordingly, given the potential costs implications under Part 36, if the offer is or is treated as being effective under that rule, or Part 44, if the offer is an "admissible offer", the offeror needs to be clear about the basis on which the

offer is made and the offeree needs to carefully assess, and where necessary seek to clarify, the nature of the offer.

- Can an offer be withdrawn/Will an offer lapse?

  Whilst a Part 36 payment cannot be withdrawn or reduced, unless the Court gives permission, any other offer can always be withdrawn, even within the time for which it is expressed to remain open, unless and until it is accepted in accordance with usual contractual principles.

  Whilst an offer made under Part 36 should be expressed to remain open for acceptance, subject to permission from the Court and perhaps terms as to costs after the 21 day period has elapsed, there may be a stage at which the Court would no longer allow the offer to be accepted, even on terms as to costs, as in Capital Bank plc.

  An offer not made under Part 36, which is simply expressed to remain open for a specified period of time, seems likely to elapse and/or be treated as withdrawn once that time has expired.

  A further potential complication is whether a counter offer has the effect of rejecting an offer so that offer no longer remains open, even with permission from the Court or as to terms on costs. In Pitchmastic plc -v- Birse Construction Limited (2000) The Times June 21 it was held a Part 36 offer, once rejected, could no longer be accepted. However, in Scammell –v- Dicker [2005] EWCA Civ 405 doubts were expressed about that view and it was observed, in any event, correspondence passing between the parties would not readily be construed as the rejection of a Part 36 offer. Given these conflicting views it is, perhaps, safest not to formally reject an offer; it should suffice simply not to accept the offer.

- Does an offer remain open for acceptance after the specified time has elapsed?

  Once the time, for acceptance, has elapsed then, unless the offer goes on to state the basis on which it may be accepted thereafter, that offer is likely to be treated as having lapsed or having been withdrawn.

  Although Part 36 specifically provides that a withdrawn offer will not carry costs consequences the decision in Stokes suggests such an offer may nevertheless be effective for the purposes of Part 44.

  However, the effectiveness of the offer seems likely to turn upon whether or not it was reasonable for the offeree to have accepted the offer within the time for which it was expressed to be open for acceptance. Even with this proviso the way may presently still be open for purely tactical offers from any party; offers which are no longer open (through lapse, withdrawal and/or rejection) but which are contended to remain effective for costs purposes.

The danger, in allowing tactical offers to remain effective, is that the offer will no longer be likely to lead to a settlement, as it is not open for acceptance, but may continue to cast a shadow, so far as costs are concerned, over the case. This may even result in the case being litigated to a conclusion simply to avoid potential costs consequences. That is hardly consistent with the key objective of Part 36, to facilitate settlement.

- Does the Claimant have to make a Part 36 offer under the award by the Court to get indemnity costs?

  Under Part 36 the Claimant would need to make an offer such as £4,999 or 49% in order, in these examples, to get the benefit of Part 36.21 if the Court awarded £5,000 or 50% on liability. However, it seems likely that if the Claimant gets the outcome exactly right the Court will elect to award indemnity costs under Part 44, as in Read.

- What effect will transition to a new Part 36 have?

  It is not yet clear what effect any future amendments to Part 36 may have on pending offers, either those which are not strictly currently effective for the purposes of Part 36 or those which, under current case law, are treated as effective by use of Part 44.

  This may be a further reason for sticking to the precise terms of Part 36 whatever current case law suggests might now be effective for costs purposes.

Proposed Changes

Because of the degree of uncertainty caused by recent cases the Department for Constitutional Affairs has carried out a consultation about changes to Part 36. Having undertaken that consultation a response has now been issued by the Department and some amendments proposed to Part 36.

There are a number of key proposals.

- Part 36 offers will remain but Part 36 payments will be replaced, where appropriate, with "payments in support" of Part 36 offers.

- In a money claim, to be effective for Part 36, one of the following conditions will have to be satisfied:

  - The offer must be made by a Government or Health Service body; or

  - The offer must be made by an indemnified Defendant who has supplied a written statement from the indemnifier confirming it is accepted the Defendant has valid insurance or indemnity cover at least up to the sum offered and that this sum will be paid if accepted by the Claimant; or

- A payment in support, equal to the amount offered, is paid; or
- There has been an interim payment of the amount offered.

Accordingly, a Defendant who is treated as being "good for the money" will no longer need to make a payment into Court.

- A Defendant who has to make a payment in support of a Part 36 offer will need to do so, backing up any pre-action offer, within 28 days of service if the earlier offer is to be effective for costs purposes.

- If a Defendant makes a Part 36 offer which is accepted, but not paid promptly, the Claimant will be entitled to proceed with the action and pursue a debt claim for the unpaid offer.

- After the time for which the offer is expressed to remain open for acceptance has expired the offer may be withdrawn or its terms changed without having to seek permission of the Court.

- However, until formal notice of withdrawal or change of terms has been given the offer will remain open for acceptance (but, unless the Court otherwise orders, the party accepting the offer out of time will be liable for the costs of the other party from the expiry of the relevant period).

- If an offer is withdrawn it will either, depending upon the final views of the Rules Committee, have no costs consequences under Part 36 or those consequences will be limited to the time the offer remained open for acceptance.

- Costs consequences, under Part 36, will be applicable not just "at trial" but "upon judgment being entered".

- Costs consequences will follow if either party equals or obtains judgment on more advantageous terms than his or her own Part 36 offer.

- Where there are recoverable benefits, and further benefits have accrued since the offer was made, the Court may direct the amount of the offer shall be reduced by a sum equivalent to any further recoverable benefits.

- If there are recoverable benefits the question as to whether judgment equals or is more advantageous than an offer will be determined on the net basis, once recoverable benefits identified under the judgment have been deducted.

- Part 44 is likely to be amended so that Part 36 is a self-contained code. This will avoid overlap, and uncertainty between, the two rules once Part 36 has been extended to cover situations which presently have to be dealt with under Part 44.

Summary

Part 36 continues to be one of the most effective reforms introduced by the Civil Procedure Rules. However, if the rules are to encourage settlement, and dealing with matters in proportionate ways, it is imperative these rules give simplicity and certainty. Whilst some of the cases considered in this article have achieved these objectives others perhaps have conspicuously failed to do so. Hence the need for a substantial re-write of the rule.

The proposed changes to Part 36 should restore greater certainty and simplicity which, in turn, should avoid technical arguments and satellite litigation which only increase the risk of unnecessary costs being incurred and prevent, rather than encourage, settlement.

Part 36 still has an important future in helping to promote the agreement of issues and settlement of claims.