THE FUTURE OF PART 36 (PART 12)

Introduction

The Civil Procedure Rules ("CPR"), when introduced in 1999, provided a formal mechanism which parties may choose to adopt when making offers to settle. The relevant rules are found in Part 36.

Under previous court rules a defendant might make a payment into court as a formal offer to settle the whole claim, with potential cost consequences for the claimant if not accepted. Part 36 introduced formal offers on particular issues, as well as offers to settle the whole claim, and also opened up the opportunity for claimants to make offers carrying the potential for costs, and related, consequences.

Over the intervening years Part 36 has been substantially re-written, on more than one occasion, but remains of great importance to practitioners, not least with the growing emphasis by the courts on the need for parties to explore Alternative Dispute Resolution ("ADR"). That is because negotiation is, of course, one method of pursuing ADR and the machinery provided by Part 36 for making offers will often be a useful, and straightforward, way in which negotiations can take place.

All the while case law has continued to explain how the rule should be interpreted and applied.

The hallmarks of a Part 36 offer have always been both the need for compliance with the rules setting out the requirements on form and content as well as providing, where such an offer is made, a degree of certainty so far as the potential consequences are concerned. The precise requirements, and consequences, have, however, developed and changed since the rule was first introduced.

Before turning to the current version of Part 36, and guidance from the case law about how the rule can be used in practice, it may be useful to review, by reference to earlier articles in this series, the way Part 36 has, incrementally, developed since its introduction in 1999.

Background

The first article in this series, (2007) 1 JPIL 70-80, was intended to reflect the case law which had already grown up around the original version of Part 36, introduced with the CPR. As the title indicated the article assessed the impact of those decisions on the future use of the rule for the purpose of parties exchanging offers to settle.

The second article in the series, (2007) 2 JPIL 193-198, dealt with the significantly revised version of Part 36 which came into force in April 2007, further case law following that revision being reviewed in the third article, (2009) 3 JPIL 224-236.

In 2010 Part 36 was divided into two sections, with the introduction of fixed costs for certain types of litigated personal injury claim. The fourth article, (2011) 2 JPIL 105-122, as well as picking up further case law, reviewed that amendment.

The fifth article, (2012) 3 JPIL 181-193, reviewed further case law.

A particular focus of the sixth article, (2013) 1 JPIL 52-63, was the distinction between Part 36 and non-Part 36 offers.

Further revisions to Part 36 in both April and July 2013 were reflected by the seventh article, (2013) 4 JPIL261-270, in the series, with the eighth article, (2015) 1 JPIL49-64, looking at case law that followed these revisions.

Yet further significant amendments to Part 36 in 2015 were considered by the ninth article in the series, (2015) 3 JPIL 172-190, with the tenth, (2016) 3 JPIL 164-179, and eleventh, (2017) 3 JPIL 180-194, articles considering the impact of subsequent case law.

There have, since the eleventh article in the series, been further, though relatively minor, revisions to the rule but some important decisions looking at how Part 36 should be interpreted and applied in practice.

It seems timely, therefore, to pick up this series of articles, effectively looking afresh at Part 36 in the light of relevant authorities, to help practitioners know when and how to make effective use of the rule or to respond when a Part 36 offer is received.

Accordingly, and with the focus on Part I of the rule, this twelfth article in the series will, after reflecting on the importance of ADR and the certainty which the rule is intended to provide, consider, on the basis of the current version of Part 36 and in the context of relevant case law, the practical considerations that arise before making an offer to settle. The article will also consider requirements of form and content when an offer is intended, picking up the language of the rule itself, to be made pursuant to Part 36, as well as the need to ensure effective service.

Subsequent articles in this series will consider, again on the basis of the current rule and relevant case law, action required once a Part 36 offer has been made, the consequences, for claimants and defendants respectively, when Part 36 offers are compared with judgment and a review of the way, through Part II, Part 36 operates in cases subject to fixed costs under Part 45.

The number of articles already in this series reflects the case law generated by a rule that is meant to provide a straightforward way of exploring ADR through negotiation. In Fox v Foundation Piling Limited [2011] EWCA Civ 790 Jackson LJ observed that "Part 36 is intended to provide a clear and simply framework within which parties can settle litigation" whilst, more recently, Andrew Smith J described Part 36 as a "complex code" when giving judgment in Reader v SPIE Limited [2021] EWHC 1221.

A useful starting point for this article is to identify the purposes behind the making of a Part 36 offer which are usually linked to the certainty of consequences. That leads into the question an offeror should always consider, namely whether it is intended that those consequences should apply. Only if that is so will Part 36 be the appropriate vehicle for an offer but, where an offer is intended to be made pursuant to Part 36, it is essential to comply strictly with the rules on form and content as well as service.

Part 36: Purpose

The purpose of the offeror when making a Part 36 offer may differ from case to case.

Part 36 offers are, primarily, a way in which parties can explore ADR by negotiation. The certainty provided by the terms of Part 36 makes use of the rule both an effective and proportionate machinery for ADR with the aim of achieving agreement on issues or settlement of the claim as a whole.

The rule is, within the litigation process itself, a way in which ADR can be pursued hence in PGF II SA v OMFS Company 1 Limited [2013] EWCA Civ 1288 Briggs LJ observed:

> "21. Part 36 is itself designed to encourage parties to make, and promptly to accept, realistic offers of settlement. It may fairly be described as lying at the interface between litigation and ADR …"

In OMV Petrom SA v Glencore International AG [2017] EWCA Civ 195 Sir Geoffrey Vos C observed that the thrust of the CPR, in the context of Part 36, was to use "both the carrot and the stick" explaining:

> "39. The culture of litigation has changed even since the Woolf reforms. Parties are no longer entitled to litigate forever simply because they can afford to do so. The rights of other court users must be taken into account. The parties are obliged to make reasonable efforts to settle, and to respond properly to Part 36 offers made by the other side. The regime of sanctions and rewards has been introduced to incentivise parties to behave reasonably, and if they do not, the court's powers can be expected to be used to their disadvantage. The parties are obliged to conduct litigation collaboratively and to engage constructively in a settlement process."

In Lomax v Lomax [2019] EWCA Civ 1467 the Court of Appeal went as far as confirming Part 3.1 (2) (m) gave the power to order ADR in the form of an early neutral evaluation.

Whilst an order that there be ADR in a particular format may be rare it is commonplace, and part of the standard directions usually given at the stage of case management, for the court to direct that parties respond to efforts at ADR and explain why if not prepared to do so. The failure to comply with such a direction may be relevant to the exercise of discretion as to costs under Part 44: BXB v Watch Tower and Bible Tract Society of Pennsylvannia [2020] EWHC 156 (QB).

For all these reasons a Part 36 offer may be deployed not just for the purpose of negotiation but because the offeror is mindful of the potential consequences for the offeree if a willingness to engage in ADR is not reciprocated and hence with more tactical considerations in mind. Indeed, Briggs LJ in PGF II SA also said of Part 36 that:

> "21. … It may for example be used by a defendant to encourage its opponent to accept a lower offer than its own valuation of the claim, on account of the claimant's limited appetite for costs risk. It is a procedure frequently used by parties determined to pursue litigation to trial, precisely for the purpose of obtaining one or more layers of insulation against the costs risk arising from an uncertain outcome."

These observations reflect the quite proper use of Part 36 where the focus is on settlement as well as where settlement seems unlikely and when the purpose is largely tactical.

Offers, even if made with a view to protection against costs risk, are still likely to facilitate, or at least encourage, settlement. The settlement of a claim will usually represent the best outcome for all concerned, as it should be a result with which all parties are broadly satisfied whilst determination by the court will usually mean there is a "winner" and a "loser". There is, indeed, the possibility all parties will be dissatisfied with the outcome of a determination by the court.

Furthermore, and given the circumstances in which a claim for personal injuries will have arisen in the first place it is, it is often helpful if the claimant can play an active part in helping achieve a satisfactory resolution of the claim through the settlement process in which the use of Part 36 may play an important role.

Accordingly, whilst the goal of settlement, and the means of achieving a settlement on satisfactory terms, are important in any litigation, use of Part 36 may, at the same time, be a vital tool in securing some "insulation" against the costs risk, as recognised by Briggs LJ in PGF II SA.

Part 36 offers as a way of engaging in ADR, whether the primary focus is negotiation or tactical (or perhaps both), will only work if any offer made is effective for the purposes of the rule and, moreover, is dependent upon certainty of terms and potential consequences, both of which, as already noted, are the hallmarks of a Part 36 offer.

Part 36: Certainty and Consequences

Certainty flows from the requirements in the rule regarding form and content and from those provisions that deal with the consequences, both on acceptance and judgment, where there has been an effective Part 36 offer.

There is, in other words, a linkage between what the rule provides as consequences and the nature of a Part 36 offer as governed by the rules on form and content which ensure those consequences match any such offer.

That degree of certainty is why Part 36 consequences were described as "automatic" by Briggs LJ in PGF II SA and by Arden LJ in Yentob v MGN Limited [2015] EWCA Civ 1292 as the "normal consequences".

In Gibbon v Manchester City Council [2010] EWCA Civ 726 Moore-Bick LJ observed that:

> "4. … In seeking to settle the proceedings, therefore, parties are not bound to make use of the mechanism provided by Part 36, but if they wish to take advantage of the particular consequences for costs and other matters that flow from making a Part 36 offer, in relation to which the court's discretion is much more confined, they must follow its requirements."

Certainty of consequences, when considering the purposes behind a Part 36 offer, will be an important consideration whether looking ahead to the prospect of acceptance or a comparison, for costs reasons, between the offer and any judgment.

Acceptance

It is significant that there will be a degree of certainty in the event a Part 36 offer is accepted. That is because the rule acts as a form of shorthand, saving the parties from having to spell out all the terms which would need to apply if seeking to reach agreement by exchange of offers not made pursuant to Part 36.

Consequently, utilising the mechanics of Part 36 to make offers will save the parties having to set out all those terms provided for under the rule itself. It is in this sense that Part 36 provides a shorthand which can be useful for practitioners, whether acting for the claimant or defendant, seeking to run claims in a proportionate but risk-managed way.

Consequently, cloaking an offer with Part 36, where the offeror is content to propose and the offeree willing to accept, the terms provided for under the rule on acceptance should help to control, if not eliminate, the risk that an error or omission might result in a settlement, following acceptance, which does not fully reflect what one or other party intended.

Judgment

Similarly, it is important, particularly where the focus of the offer may be more about securing "insulation" against costs risks, there is a reasonable degree of certainty that consequences which follow from comparison of the offer with any judgment will, when appropriate under the terms of the rule itself, follow.

In Fox v Foundation Piling Limited [2011] EWCA Civ 790 Jackson LJ said:

> "44. … where one party makes a Part 36 offer and then achieves a more advantageous result than that proposed in his offer, the provisions of rule 36.14 modify the court's general discretion in respect of costs."

Outside of Part 36 there is no such certainty. Whilst a non-Part 36 offer may, in certain circumstances, be relevant to the exercise of the court's discretion as to costs under Part 44 as David Richards J observed in Coward v Phaestos Limited [2014] EWCA Civ 1256:

> "93. … Part 36 and Part 44 are separate regimes with separate purposes. Part 36 is a self-contained code dealing with offers of settlement made in accordance with and subject to the terms of Part 36, which specifies particular consequences in the event that such offers are not accepted. That those consequences include features which go far beyond that which might be ordered by way of costs under Part 44 only serves to underline that it is a separate regime from Part 44."

David Richards J continued:

> "94. While Part 36 is highly prescriptive in its terms, and highly restrictive of the exercise of any discretion by the court in any particular case, Part 44 confers on the court a discretion in almost the widest possible terms."

The degree of certainty afforded by Part 36 is of particular significance to both claimants and defendants in personal injury litigation, following the reforms introduced in 2013, in the context of costs consequences when comparing offers with any judgment.

For Defendants

For defendants a Part 36 offer, since 1999 and before that a payment into court, has always been the most likely route to recover at least some costs from the claimant despite the claimant recovering damages and, in that sense, being the successful party, hence usually entitled to the recovery of costs.

This tactic has, perhaps, become all the more important following the introduction of QOCS in 2013. Although a claimant might lose QOCS protection in other circumstances it is the failure to obtain judgment which is more advantageous to the claimant than a defendant's Part 36 offer which is most likely to result in costs shifting that is to the defendant's favour. This, in turn, has the potential to influence claimant conduct, for example in Straker v Tudor Rose [2007] EWCA Civ 368 Waller LJ observed:

> "In a case about money a defendant has the remedy in his own hands where a claimant is being intransigent. He can pay into Court the maximum sum he is prepared to pay."

For Claimants

Changes to the legal landscape in 2013 have, similarly, made the potential consequences provided for by Part 36 of real significance to claimants. That is because the loss of recoverable additional liabilities, coupled with a tougher approach to proportionality, the introduction of fixed costs for certain types of personal injury claim and costs budgeting mean that recoverable party and party costs will invariably fall short of the costs actually incurred by the claimant.

In cases otherwise subject to fixed costs the claimant will be entitled to assessed costs, and on the indemnity basis, after the end of the relevant period in any effective Part 36 offer: Broadhurst v Tan [2016] EWCA Civ 94.

Where the court has set a budget the recovery of indemnity costs by a claimant will, again after the end of the relevant period in such an offer, mean that the claimant is not restricted thereafter to such budget set: Lejonvarn v Burgess [2020] EWCA Civ 114.

Similarly, even where there is no budget, indemnity costs will free the claimant of the restrictions imposed by the test of proportionality.

Beyond recovery of costs on the indemnity basis a claimant who is entitled to Part 36 consequences on judgment will also have the benefit of enhanced interest and an additional amount.

Summary

In these circumstances Part 36 can be a very effective tool, for a number of purposes, when exploring ADR through offers to settle whether deployed by the claimant or the defendant, particularly if the other party is perceived to be intransigent or willing to run up potentially disproportionate costs.

Use of Part 36?

There may, nevertheless, be circumstances in which the offeror will not wish to make use of the machinery provided for by Part 36.

Whilst the rule provides for very specific, and largely certain, consequences these may not always be what the offeror would wish, particularly in the event of acceptance.

Accordingly, when contemplating an offer to settle, the offeror should always reflect on whether Part 36 is the appropriate way of making that offer.

Part 36.2 (2) confirms that the terms of the rule do not prevent a party making an offer to settle in “whatever way that party chooses”, but makes clear that if the offer is not made in accordance with Part 36.5, the rules on form and content, it will not have the consequences provided for under Part 36 (but may still be relevant, so far as costs are concerned, under Part 44).

Accordingly, a party who does not wish for the consequences provided for under Part 36 to apply should, obviously, avoid reference to the rule when making an offer whilst where it is intended the offer be made pursuant to Part 36 it will be essential for the offeror to comply with the rules on form and content.

In Fox v Foundation Piling Limited [2011] EWCA Civ 790 Jackson LJ went on to say that:

> "44. … parties who choose to use the Part 36 mechanism in their settlement negotiations need to have a clear understanding of the legal effects of making, accepting and rejecting offers under Part 36."

Where a party makes an offer intending that it should have the consequences provided for under Part 36 it is, accordingly, essential to comply with the requirements on form and content, so the offer does have the potential for those consequences, but, equally, it is important not to inappropriately characterise an offer as being made under Part 36 if the potential consequences are not intended. As Carnwath LJ noted in Onay v Brown [2009] EWCA Civ 775:

> "32. … 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. … 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."

There are a number of circumstances in which a party might not want the usual consequences provided for under Part 36 to apply, which include the following examples.

Acceptance

Part 36 offers are, generally, open for acceptance unless withdrawn, unlike offers subject to the general law of contract where acceptance may be precluded in a number of circumstances. Moore-Bick LJ explained when giving judgment in Gibbon v Manchester City Council [2010] EWCA Civ 726 that:

> "16. … 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 offeror himself

> chooses to withdraw it. There are good reasons for that. 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."

Consequently, if the offeror wishes to make, for example, a time-limited offer that should not be made as a Part 36 offer as these, for the reasons explained in C v D [2011] EWCA Civ 646, are mutually exclusive.

Costs

If a party would not be content with the costs consequences flowing from acceptance of the offer under Part 36 it will, of course, be inappropriate to formulate the offer in that way.

There are a number of circumstances where either the claimant or the defendant may not wish to see terms reached on the basis of the automatic costs provisions, applicable on acceptance, found in Part 36. For example: Onay v Brown [2009] EWCA Civ 775; Summers v Fairclough Homes Ltd [2012] UKSC 26; Ho v Adelekun [2019] EWCA Civ 1988 (observations not overturned by the subsequent appeal to the Supreme Court in Ho v Adelekun [2021] UKSC 43).

Admissibility

Part 36 limits, to specified circumstances, the circumstances in which the court may be referred, at appropriate stages, to an offer made in accordance with the rule.

The offeror may wish to reserve the right, more generally, to make reference to the offer and, if so, may prefer not to make the offer pursuant to Part 36: Handyside v Lowery (Newcastle upon Tyne District Registry, 2 April 2015); McKeown v Langer [2021] EWCA Civ 1792.

Offer?

Part 36.1 expressly refers to "offers to settle" with Part 36.3 using the term "offer" to define other terms found in the rule (though not expressly defining the word offer itself).

Whether or not an offer is intended to be made pursuant to Part 36 it will need to be an "offer".

Consequently, at a basic level, there must be an "offer" for there to be a "Part 36 offer" (where the offeror intends there to be such an offer).

Whilst the specific requirements as to form and content, found within the rule itself, will determine what amounts to a Part 36, and in many ways displace a general law of contract, some fundamental precepts do remain important for these purposes.

In Gibbon v Manchester City Council [2010] EWCA Civ 726, reflecting the changes brought about by the 2007 amendments to Part 36, Moore-Bick LJ observed that:

> "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. 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. In my view, Part 36 was drafted with these considerations in mind and 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."

One of those "basic concepts" will be what amounts to an "offer" at all.

In AB v CD [2011] EWHC 602 (Ch) Henderson J (in a passage subsequently described as "succinct and elegant" by Edwards-Stuart J in Jockey Club Racecourse Limited v Willmott Dixon Construction Limited [2016] EWHC 167 (TCC)) observed:

> "22. The concept of an "offer to settle" is nowhere defined in Part 36. I think it clear, however, that a request to a defendant to submit to judgment for the entirety of the relief sought by the claimant cannot be an "offer to settle" within the meaning of Part 36. If it were otherwise, any claimant could obtain the favourable consequences of a successful Part 36 offer, including an order for indemnity costs, by the simple expedient of making an "offer" which required total capitulation by the defendant. In my judgment the offer must contain some genuine element of concession on the part of the claimant, to which a significant value can be attached in the context of the litigation. The basic policy of Part 36 is to encourage the sensible settlement of claims before trial, or even before the issue of proceedings…. The concept of a settlement must, by its very nature, involve an element of give and take. A so-called "settlement" which was all take and no give would in my view be a contradiction in terms."

What amounts to an offer is, perhaps, a distinct question from what will be a "genuine offer", a factor relevant when considering whether costs consequences will be "unjust", but in many circumstances it seems likely that if there is an offer at all then that will be a genuine offer.

It is important, as an offer is exactly that, to take care when framing any offer to settle, as should the offer be accepted that will result in an agreement and it may, at a later stage, be necessary to establish what acceptance would have meant in order to make an effective comparison between the offer and judgment.

The general approach to the interpretation of Part 36 offers was considered by Leggatt J in Marathon Asset Management LLP v Seddon [2016] EWHC 2615 (Comm) when he said:

> "12. It is common ground that the letter containing the defendants' Part 36 offer is to be interpreted by applying the same well established principles of interpretation as are applied to ascertain the meaning of any contractual document. The aim is to identify what the language of the document, in its context, is reasonably understood to mean. The fact that the offer was made under CPR Part 36 is a relevant part of the context, but there are no special rules of interpretation which apply to Part 36 offers or to offers of settlement generally."

Hence, again, general concepts in the law of contract are likely to be relevant. That may mean, should it be necessary for the court to interpret an offer, applying well-established principles such as those set out in: Investors Compensation Scheme Ltd v West Bromwich Building Society [1997] UKHL 28; Wood v Capita Insurance Services Ltd [2017] UKSC 24; and Impact Funding Solutions Ltd v Barrington Support Services Ltd [2016] UKSC 57.

Where a claim has been litigated the statements of case may also be a relevant factor when interpreting an offer. In Seabrook v Adam [2021] EWCA Civ 382 Asplin LJ said:

> "14. It seems to me that the real question here is how these Part 36 offers should be construed. They must be interpreted in the light of the pleadings …
>
> 15. With that context in mind, it seems quite clear that the reasonable reader would have understood both offers to be addressing liability and causation and to relate to both heads of damage."

A Part 36 offer is not, however, a straightforward contractual offer and, accordingly, does not necessarily have to have the certainty that would be demanded under the law of contract: Adams v Options UK Personal Pensions LLP [2021] EWCA Civ 1188.

Consequently, if there is to be a valid Part 36 offer there must be an "offer", given that Part 36 uses this terminology, and whilst this does not necessarily need to have the

certainty of a non-Part 36 contractual offer it must, to be effective under Part 36, comply with the requirements of the rule. For these purposes it is necessary to look at the specific requirements of Part 36.

Part 36 Offer?

An offeror who wishes to make an effective Part 36 offer must be aware of, and comply with, the requirements of the rule itself, remembering that the provisions dealing with form and content are an important element of the certainty which it is intended to apply when the machinery of Part 36 is adopted.

All this reflects the nature of Part 36 as a self-contained code which identifies the types of offer which can be made, subject to these complying with the rules on form and content if, for the purposes of Part 36.1, the offer is to be subject to the rule.

Self-Contained Code

Part 36.1 (1), reflecting the words of Moore-Bick LJ in Gibbon, now confirms that the rule "contains a self-contained procedural code about offers to settle made pursuant to the procedures set out in this Part ("Part 36 offers")".

This rule underpins, and explains, the forensic approach to Part 36 which will involve looking just at the terms of this rule, where this stipulates what should happen. That, in one sense, gives clarity but, in another sense, creates the risk departure from the terms of the rule may result in an offer being ineffective.

All this is reflected by the terms of Part 36.2 (1) which provides:

> "Nothing in this Section prevents a party making an offer to settle in whatever way that party chooses, but if the offer is not made in accordance with rule 36.5, it will not have the consequences specified in this Section."

Accordingly, the procedural requirements of the rule must be followed, and anything inconsistent with the requirements of the rule is likely to invalidate the offer, though the offeror can provide for other terms provided these are not inconsistent with the requirements, or terms, of the rule itself.

That is not to say Part 36 is entirely self-contained. Perhaps a better way of analysing matters is to view the rule as self-contained where it has express provisions dealing with a particular situation as these will take precedence over more general law, such as the law of contract. The rule does not, of course, cover every conceivable situation that might arise as Moore-Bick LJ recognised in Gibbon.

Types and Scope of Part 36 Offer

Part 36.2 (3) provides:

"A Part 36 offer may be made in respect of the whole, or part of, or any issue that arises in—

(a) a claim, counterclaim or other additional claim; or

(b) an appeal or cross-appeal from a decision made at a trial."

Type

The distinction between "whole", "part" and "issue" may be significant in relation to costs, particularly costs on acceptance.

The former version of the rule expressly stated an offer could be made solely in relation to liability and whilst there is no corresponding provision in the 2015 rule, case law suggests that offers on liability should still be treated as offers on an "issue": Onay v Brown [2009] EWCA Civ 775; Sonmez v Kebabery Wholesale Limited [2009] EWCA Civ 1386; Sutherland v Turnbull [2010] EWHC 2699 (QB).

An offer dealing primarily with liability might be regarded as an offer on the whole claim, in the sense that it is the whole of the claim necessary to establish an obligation to pay or quantify damages. That seems to have been the approach taken by the Court of Appeal when treating an offer expressed in percentage terms in contribution proceedings as an offer to settle the whole claim in PHI Group Ltd v Robert West Consulting Ltd [2012] EWCA Civ 588. However, it might well be thought that "whole claim" means exactly that, quantum as well as liability and hence a offer that will resolve all aspects of the claim. Such an analysis would fit with the interpretation of similar phraseology found in Part 21 which was made by the Court of Appeal in Drinkall v Whitwood [2003] EWCA Civ 1547.

Scope: Counterclaims

The rule expressly provides for Part 36 offers to be made for, or taking account of, counterclaims.

If there is a counterclaim, or even a prospective counterclaim (where that has been identified in the offer) a defendant may have the option of making an offer to settle the whole claim as a claimant's Part 36 offer: AF v BG [2009] EWCA Civ 757; Van Oord UK Limited v Allseas UK Limited [2015] EWHC 3385 (TCC); James v James [2018] EWHC 242 (Ch); Calonne Construction Ltd v Dawnus Southern Ltd [2019] EWCA Civ 754.

In Hertel v Saunders [2018] EWCA Civ 1831 the defendant had made an offer in respect of a claim which the claimant had not yet pleaded. In these circumstances the court held that the claim could not be a "part of the claim" and, furthermore, that the offer was plainly not formulated as being for "the whole of the claim". Subsequently, in Calonne Construction Ltd v Dawnus Southern Ltd [2019] EWCA Civ 754 the court ruled that an as yet unpleaded counterclaim could be the subject of a valid Part 36 offer, observing that

Hertel had been more concerned with an aspect of the rule (the former Part 36.10) which had since been replaced.

However, a defendant cannot, where there is no counterclaim, simply make a Part 36 offer as though that defendant was a claimant: F & C Alternative Investments (Holdings) Limited v Barthelemy [2012] EWCA Civ 843.

Scope: Appeals

Part 36 offers can be made in appeals but care is necessary, given the terms of Part 36.4, for parties to consider repeating, or renewing as varied, offers made in the proceedings under appeal, as well as any offers that may be required specifically for the purposes of the appeal.

Scope: Detailed Assessment

Part 47.20, although not expressly referred to in Part 36, adopts the Part 36 procedure, including costs consequences, for offers to settle in detailed assessment proceedings.

The absence of reference to Part 47 in Part 36 suggests these are to operate as separate regimes, hence costs will not be regarded as an issue preventing the case being "decided" nor should Part 36 benefits in the substantive claim prevent these being awarded, where appropriate, in subsequent costs proceedings.

Part 36 offers made in detailed assessment proceedings have been effective in carrying costs consequences: Cashman v Mid Essex Hospital Services NHS Trust [2015] EWHC 1312 (QB); W Portsmouth and Company Limited v Lowin [2017] EWCA Civ 2172. However, compliance with the rules as to form and content remains essential: King v City of London Corporation [2019] EWCA Civ 2266.

Timing

Part 36.7 (1) confirms a Part 36 offer may be made at any time, including before the commencement of proceedings.

This rule is reflected in the provisions dealing with costs as both Part 36.13 and Part 36.17 expressly confirm that "costs" will include any recoverable pre-action costs.

Form and Content

Assuming there is an "offer" of the type provided for in the rule and within the scope of Part 36 it remains essential that any offer meets the requirements relating to form and content. That is because Part 36.2 (1) expressly provides that an offer not made in accordance with Part 36.5 will not have the certainty of consequences equivalent to a "Part 36 offer".

That is why, to effectively cloak an offer with the machinery of Part 36, it is essential, as Part 36.2 (2) makes clear, that the requirements of form and content, particularly but not exclusively contained within Part 36.5, are complied with.

Part 36.5 (5) states that a Part 36 offer must:

"(a) be in writing;

(b) make clear that it is made pursuant to 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 Part 36.13 or 36.20 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."

It is notable that this rule, before setting out the specific requirements on form and content of a Part 36 offer, uses the word "must".

The courts have consistently emphasised the linkage which exists between the need to comply with the terms of the rule itself and the consequences which, when appropriate, will then follow.

In F & C Alternative Investments (Holdings) Limited v Barthelemy [2012] EWCA Civ 843 Davis LJ observed:

> "56. … 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 and the repeated insistence of the courts that intended Part 36 offers should be very carefully drafted so as to comply with the requirements of Part 36… Part 36 is highly prescriptive with regard to both procedures and sanctions."

In Hertel v Saunders [2018] EWCA Civ 1831 Coulson LJ said:

> "23. … if the offer letter fails to comply with a mandatory requirement of Part 36, it will not be construed as complying with the rule, whatever heading it bears and whatever the objective intention: see Rimer LJ in C v D at paragraph 75, and Carillion JM Limited v PHI Group Limited [2012] EWCA Civ 588 ..."

Subsequently, in King v City of London Corporation [2019] EWCA Civ 2266 Coulson LJ observed:

> "59. My starting point, as it should be for every judge considering the application or otherwise of CPR Part 36, is the warning given by Moore-Bick LJ in *Gibbon v Manchester City Council* [2010] 1 WLR 2081. He described Part 36 as "a carefully structured and highly prescriptive set of rules". He said that parties were not bound to follow those rules but that, if they wanted the benefits which flow from Part 36 - and they are substantial – they had to follow them in every respect. I note that Moore-Bick LJ's warning was given in respect of the previous version of Part 36 but, in my view, it applies with equal (if not more) force to the current, fuller version."

In these circumstances the requirements on form and content of Part 36 offers set out in Part 36.5 (5) must be complied with and, accordingly, each of these needs to be considered in turn.

In Writing

The requirement a Part 36 offer be in writing will not usually be a problem, though it is not unknown for a party to attempt an oral Part 36 offer.

Made Pursuant to Part 36

The 2015 version of Part 36 was intended, whilst retaining certainty, to reduce technicality but the only change to the 2007 wording on form and content is to replace the requirement that the offer "state on its face that it is intended to have the consequences of Section I of Part 36" with the stipulation the offer "make clear that it is made pursuant to Part 36".

Where the 2007 version of Part 36 applies it is essential that the offer recites it is "intended to have the consequences of" the rule: Thewlis v Groupama Insurance Company Ltd [2012] EWHC 3 (TCC); Shaw v Merthyr Tydfil County Borough [2014] EWCA Civ 1678.

Where the 2015 rule applies it will suffice to "make clear" the offer is "made pursuant to Part 36".

Making an offer using the very words that it is "made pursuant to Part 36" would surely put the matter beyond doubt. It remains to be seen whether simply referring to "Part 36" when making an offer will suffice. It is important to note that whilst "make clear" does not require the incantation of certain words, as did the 2007 version of the rule, the continued use of the word "must" means that it remains mandatory to "make clear" the offer is "made pursuant to Part 36".

A question which may arise is whether an offer, following the 2007 version of the rule but made after April 2015, that states on its face it "is intended to have the consequences of Part 36" will "make clear that it is made pursuant to Part 36". It would be ironic if the result of the rule change in 2015 would be to validate the offer in Thewlis (which was made in the very terms now adopted by the 2015 version of Part 36 yet held to be ineffective

under the 2007 rule) yet the offer made in C v D [2011] EWCA Civ 646 and other similar cases (valid under the 2007 version of Part 36) would not now be effective!

The Relevant Period

It remains mandatory for the offer to specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs if the offer is accepted.

Since 2007, and this has caused much difficulty in practice, the requirement is not to identify a period of at least 21 days within which the offer will be open for acceptance (as it was until 2007) but a period of time within which, if accepted, the defendant will pay the claimant's costs.

The first difficulty is that if the offer seeks to exclude this term as to costs that may render such an offer ineffective for the purposes of Part 36.

Secondly, problems can arise where the offeror refers to the 21 day period as the time within which the offer can be accepted, because of the risk that this may be construed as a time limited offer.

There have also been cases where parties have omitted to identify, expressly, a period of time of at least 21 days. For example in PHI Group Limited v Robert West Consulting Limited [2012] EWCA Civ 588 the only timescale identified in the offer was a period of 7 days and the offer was held to be ineffective, for the purposes of Part 36, on that basis. Giving judgment in the Court of Appeal Lloyd LJ observed:

> "It is … not part of the mandatory requirements of the rule, once the period has been specified, to state expressly that this is 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". But this letter did not specify any period for the purposes of the rule."

Consequently, if a relevant period of 21 days is identified in the offer it will not be necessary, to comply with Part 36.5 (1) (c), for the offeror to spell out the precise costs consequences which would follow, on acceptance, under Part 36.10: Procter & Gamble Company v Svenska Cellulosa Aktiebolaget SCA [2012] EWHC 2839 (Ch).

Whilst general principles, as we have seen, will be applied when interpreting the offer the fact that reference is made to Part 36 may help to clarify any ambiguity (but only an ambiguity rather than outright non-compliance with the rule, an issue that seems to arise most frequently in relation to the 21 day relevant period: C v D [2011] EWCA Civ 646; Essex County Council v UBB Waste (Essex) Ltd [2020] EWHC 2387 (TCC); Kings Security Systems Ltd v King [2021] EWHC 654 (Ch)).

Whole, Part or Issue?

It is important to remember the need to identify whether the offer relates to the whole of the claim, part of the claim or an issue in the claim (and if so which part or issue).

Very specific cost consequences, at least where the offer is accepted within the relevant period, are likely to follow, under the terms of the rule itself, where the offer is made in respect of the whole of the claim.

Where the offer expressly relates to part of the claim the rule itself, in Part 36.13 (2) provides the claimant will only be entitled to the costs of such part of the claim, unless the court orders otherwise. A similar approach, although Part 36.17 does not spell this out, may be appropriate if the court has to consider whether the cost consequences provided for in that rule would be "unjust", when comparing judgment with an offer for part of the claim: London Trocadero (2015) LLP v Picturehouse Cinemas Ltd [2021] EWHC 2591 (Ch).

By default an offer which relates to an issue in the claim (and as already noted that is likely to encompass offers on liability) will be governed by the terms of Part 36.13 (4) (c) so that liability for costs will have to be determined by the court, unless agreed by the parties. An offer on liability, for example, should be made, and treated, as an offer on an issue in the claim.

Counterclaim

If there is a counterclaim the offer must state whether it takes that counterclaim into account.

If there is no counterclaim it may be better to expressly state as much as the wording of the rule is not expressed to be applicable only where there is a counterclaim.

If there is a counterclaim, or potential counterclaim, that will make clarity as to whether the offer is a claimant's offer or defendant's offer all the more important.

Personal Injury Claims for Future Pecuniary Loss

Part 36.18 deals with personal injury claims which include a claim for future pecuniary loss, allowing any such Part 36 offer to be for a lump sum, periodical payments or both a lump sum and periodical payments.

Provisional Damages

Part 36.19 deals with Part 36 offers in claims which include a claim for provisional damages.

Defendant's Offer

Additional rules on form and content apply to Part 36 offers made by a defendant concerning the need for payment of a single sum within a defined timescale and the impact of state benefits under the Social Security (Recovery of Benefits) Act 1997 ("CRU").

Single Sum

Part 36.6 (1) requires a Part 36 offer by a defendant (unless it includes periodical payments and/or provisional damages) to pay a sum of money in settlement of a claim to be an offer to pay a single sum of money.

Timescale

Part 36.6 (2) requires a defendant's Part 36 offer to, in effect, provide for payment within 14 days of acceptance, as if it states otherwise that offer will not be treated as a Part 36 offer unless the offeree accepts the offer (and there may be good reason to do this – for example to acquire a deemed costs order in appropriate circumstances – even if that does then involve awaiting payment).

CRU

Part 36.22 imposes additional rules about form and content with a defendant's Part 36 offer where, on acceptance, a payment to a claimant would be a "compensation payment" for the purposes of the Social Security (Recovery of Benefits) Act 1997.

Part 36.22 (3) provides that a defendant who makes a Part 36 offer must state either:

- that the offer is made without regard to any liability for recoverable amounts; or
- that is intended to include any deductible amounts.

Where the defendant opts for the latter, and includes deductible amounts, then the offer must state:

- the gross amount of compensation;
- the name and amount of any deductible amounts by which the gross amount is reduced; and
- the net amount of compensation.

Part 36.22 (7) provides that if, at the time of the offer, the offeror has applied for, but not received, a CRU certificate then the offeror must clarify the offer by stating the information on gross amount, deductible benefits and net amount not more than 7 days after receipt of the certificate.

Identification of the net sum payable on acceptance of the offer, whether the offer is made without regard to recoverable benefits or intended to include deductible benefits, is important because Part 36.22 (8) provides:

> "For the purposes of rule 36.17(1)(a), a claimant fails to recover more than any sum offered (including a lump sum offered under rule 36.6) if the claimant fails upon judgment being entered to recover a sum, once deductible amounts identified in the judgment have been deducted, greater than the net amount stated under paragraph (6)(c)."

The reason for the importance of this rule is that, ultimately, whether the claimant obtains a judgment which is "more advantageous" than the offer will depend upon a comparison between the net figure in the judgment and the net figure in the offer, as Part 36.22 (8) makes clear.

In Fox v Foundation Piling Ltd [2011] EWCA Civ 790, where the defendant made an offer inclusive of deductible benefits, the court held comparison had to be made between the net figure in the offer and the net judgment (after any adjustment to deductible benefits).

In Crooks v Hendricks Lovell Limited [2016] EWCA Civ 8 the defendant made an offer expressed to be "net of CRU" which the Court of Appeal held to be synonymous with the term "without regard to any liability for recoverable benefits" found in Part 36 and that the approach adopted in Fox should be applied when determining whether judgment, allowing for any appeal against CRU after that judgment, was "more advantageous" than the offer.

Additionally, 36.22 (5) requires the offeror to apply for a certificate of recoverable benefits before making the offer. If when the offer is made the certificate has not been received the information in 36.15(6) must be given within 7 days of receiving the certificate.

The failure to comply with the rules relating to CRU may, under the current version of the rule, render the offer ineffective for the purposes of Part 36 as under earlier versions of the rule: Williams v Devon County Council [2003] EWCA Civ 365.

Interest

Part 36.5 (4) makes clear a Part 36 offer is treated as inclusive of all interest until the end of the relevant period (except where the offer is made less than 21 days before the start of a trial).

Accordingly, a Part 36 offer must be inclusive of interest up to the end of the relevant period. The failure to comply with this requirement, as with other essential elements of the rule, will render the offer ineffective under Part 36: King v City of London Corporation [2019] EWCA Civ 2266.

It is important to note, however, this provision does not restrict the offeror from including a provision regarding payment of interest after the end of the relevant period and it does not seem unreasonable to suggest that this be the judgment debt rate of 8%: Calonne Construction Ltd v Dawnus Southern Ltd [2019] EWCA Civ 754.

From April 2021 Part 36 has been amended so that Part 36.5 (5) provides:

> "A Part 36 offer to accept a sum of money may make provision for accrual of interest on such sum after the date specified in paragraph (4). If such an offer does not make any such provision, it shall be treated as inclusive of all interest up to the date of acceptance if it is later accepted."

In the absence of an offer containing any provision for the accrual of interest no interest will be recoverable, under Part 36 itself, after the relevant period down to the date of acceptance. If, however, such provision is made then interest should be payable, under the rule, in those circumstances.

The rule does not stipulate the provision of further detail on how the interest should be calculated, only that there should be "provision for accrual of interest".

Claimant's or Defendant's Offer?

Whilst not a formal requirement to state whether an offer is a claimant's offer or a defendant's Part 36 offer it is prudent to make this clear as these carry very different cost consequences and there are times when it may not be obvious what the offer is intended to be, particularly in cases which involve counterclaims.

Whether or not an offer under Part 36 is a claimant's offer is an important consideration when considering potential costs consequences, both on acceptance and following judgment.

Where the defendant has a counterclaim this can be an important point as in such cases the defendant may be able to make a claimant's offer provided, of course, it is an offer which takes account of both claim and counterclaim: AF v BG [2009] EWCA Civ 757, Calonne Construction Ltd v Dawnus Southern Ltd [2019] EWCA Civ 754.

Getting Offers Right

The prospect of getting form and content in a Part 36 offer right will be increased by use of the relevant practice form, N242A.

Use of the form should ensure compliance with the rules on form and content. The form also, and helpfully, has a box to complete confirming whether the offer is intended to be a defendant's offer or a claimant's offer.

Use of form N242A is encouraged by the terms of para 1.1 of the Practice Direction to Part 36, which expressly refers to that form. There has also been judicial encouragement to utilise the practice form when making offers.

In Shah v Elliott [2011] EW Misc 8 HHJ Platt observed 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."

Pepperal J giving judgment in Essex County Council v UBB Waste (Essex) Ltd [2020] EWHC 2387 (TCC) added:

> "37. … As the commentary in *Civil Procedure* (the White Book) makes clear at paragraph 36.5.2, much of the difficulty would be avoided if parties would only use form N242A to make their offers."

Use of the form will, as well as incorporating all essential matters, avoid the provision of superfluous information. Such information might be deployed with a view to emphasise the potential consequences of the offer but later come back to haunt the offeror if, in the event, the court has to exercise the more general discretion as to costs under Part 44 as occurred, for example, in Ballard v Sussex Partnership NHS Foundation Trust [2018] EWHC 270 (QB).

Service

Effective service is an integral aspect of making an effective Part 36 offer, as Part 36.7 (2) provides that a Part 36 offer is made when it is served on the offeree.

Part 36 makes express reference to Part 6 and the application of Part 6 for the purposes of service, in what is otherwise the self-contained code of Part 36, was explained by Master Yoxall in Thompson v Reeve [2017] 3 WLUK 478 when he said that Part 36 is "not completely freestanding".

The specific rules applicable to service of a Part 36 offer are those found in Section III Part 6, dealing with the service of documents other than the claim form, specifically Parts 6.20 to 6.27.

Part 6.20 sets out available methods of service, Part 6.26 confirms the deemed date of service (according to the method adopted) whilst Part 6.23 deals with, at least once the claim form has been served, the requirement for any party to the proceedings to give an address for service.

Additionally, para 1.2 of PD Part 36 confirms that where there is a legal representative a Part 36 offer, notice of acceptance or notice of withdrawal or change of terms must be served on that representative. This may be particularly relevant pre-issue of court proceedings. If, at that stage, a party is legally represented any Part 36 offer must be sent to that legal representative. There is, however, no requirement, as there is prior to service of the claim form, for the address of that legal representative to be given as the address for service. Where a party is represented, but not legally represented (for example by an insurer), it may be prudent to seek agreement that the address of such representative will be the address at which any pre-issue offer to settle under Part 36 may validly be served.

The rules relating to service are important under Part 36 as it may be critical for a party to establish the fact and/or precise timing of a Part 36 offer being made, changed or withdrawn. For these purposes it is essential to remember that time will be calculated by reference to the provisions as to deemed service set out in Part 6.26 and not on the basis of when the claimant took the "step required" to effect service. That is because the relevance on timing of the "step required" is only applicable under Part 7.5 when serving the claim form: Diriye v Bojaj [2020] EWCA Civ 1400.

Whilst Part 6.20 sets out available methods of service these are subject to the further requirements, when serving within the United Kingdom, set out in PD 6A, in particular the limitations on service by electronic means found in paras 4.1 and 4.2 of PD 6A.

The terms of Part 6, in the context of a Part 36 offer, were strictly applied in Sutton Jigsaw Transport Ltd v Croydon London Borough Council [2013] EWHC 874 (QB). In Thompson v Reeve [2017] 3 WLUK 478 the court accepted the terms of Part 3.10 could be applied to Part 6, even in the context of Part 36. However, in Serbian Orthodox Church – Serbian Patriarchy v Kesar & Co [2021] EWHC 1205 (QB) Part 3.10 was viewed as having to give way to more specific provisions and hence not available to validate service by electronic means outside the scope of agreement under PD 6A. This approach was expressly endorsed by Court of Appeal in Ideal Shopping Direct Ltd v Mastercard Incorporated [2022] EWCA Civ 14. Accordingly, whilst the judgment meanwhile in London Trocadero (2015) LLP v Picturehouse Cinemas Ltd [2021] EWHC 2591 (Ch) lent support to the use of Part 3.10, to remedy any procedural defect in service of a Part 36 offer, that decision may now need to be viewed with caution.

Conclusion

Part 36, since 1999, has provided an accessible mechanism for parties to explore ADR through formal offers to settle. It is, however, essential that parties, before making use of the rule, understand the potential consequences and, where these are intended, ensure that the offer will be effective for the purposes of Part 36.

The next article in this series will look at the considerations which arise on receipt of an offer, picking up on the impact of an offer that may be ineffective for the purposes of the rule and what that means for the offeree.