PART 36 OF THE *CIVIL PROCEDURE RULES 1998* (ENGLAND AND WALES)

A PRACTICAL GUIDE FOR TRUST PRACTITIONERS

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This article provides a practical guide to Part 36 of the *Civil Procedure Rules 1998* (CPR) for the trust law practitioner, focusing particularly on two recent decisions of the Court of Appeal, *C* v *D*[1] and *Howell and others* v *Lees-Millais and others*[2]. These cases provide further assistance in interpreting the practical implications of Part 36 of the CPR (Part 36).

CPR 1.1 sets out the 'overriding objective', which is 'to enable the Court to deal with cases justly'. A crucial element of the overriding objective is that cases should be dealt with proportionately in terms of the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each of the parties[3]. As a result, parties are encouraged to attempt to negotiate disputes without recourse to the courts and, ideally, to settle them before embarking on costly litigation.

One way of precipitating such resolution is by making an offer to settle which is accepted by the other party to the dispute. The tactical use of offers is a valuable tool in any litigator's armoury, and can be put to good effect to bring complex trusts and probate litigation to a successful conclusion. However, it is important that the litigator understands the finer points of the CPR and does not get caught out by potential pitfalls.

Such an offer can be in any form and, to encourage this approach, CPR 44.3 requires the court to consider offers to settle which have been made by either party when making an order as to costs.

WHAT ARE PART 36 OFFERS?

A Part 36 offer is a formal offer to settle an action or part of an action. Part 36 provides 'a statutory procedure for settlement which is complete in its own right and by itself'[4]. It is a code that sets out a system for making and accepting offers of settlement in a prescribed form which encourages the resolution of litigation on reasonable terms. Although an offer can be in any form, Part 36 affords significant costs, interest and tactical advantages if used correctly. It is both a carrot and stick, as it rewards an offeror who makes a sensible offer which is rejected, while penalising the offeree for rejecting that sensible offer.

Although the Court of Appeal has made it clear that Part 36 is not contractual in nature[5], contractual principles need to be taken into account when considering the effect of an offer.

WHAT SORT OF CLAIMS CAN PART 36 BE USED TO SETTLE?

Part 36 offers can be made in most types of dispute or proceedings. Trust practitioners should note that this includes Part 8 claims and non-money claims. The offer can be constructed so as to relate to part of a claim only. It can also be made in relation to counterclaims and third-party claims[6].

REQUIREMENTS OF A VALID PART 36 OFFER

The requirements of a valid Part 36 offer are contained in CPR 36.2. For an offer to be valid, it must:

(a) be in writing
(b) state on its face that it is intended to have the consequences of Part 36
(c) specify a period of not fewer than 21 days within which the offeree may decide to accept it ('the Relevant Period')
(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 of issue; and
(e) state whether it takes into account any counterclaim.

A Part 36 offer by a defendant to pay a sum of money in settlement of a claim must be an offer to pay a single sum of

money and should state that the sum will be paid at a date not later than 14 days following the date of acceptance[7].

Where the claim at issue is a non-money claim, the offer will also need to contain sufficient information to enable the offeree to consider it adequately[8]. It should also be noted that an offer which deals with a money claim will be treated as being inclusive of all interest[9].

An offer which fails to comply with Part 36 can nonetheless be taken into account by the court when considering costs[10]. These requirements were considered in the recent Court of Appeal case of *Howell* v *Lees-Millais*. That case involved an appeal by the appellant trustees against a costs order in relation to an unsuccessful application they had made in the Chancery Division. The trustees had made an application seeking the permission of the court to pursue various claims for breach of trust and professional negligence. When this application came before Lindsay J in May 2008, he did not consent to the trustees pursuing the proposed claims (except the negligence claim). The Judge commented that the claimants had acted in 'an inappropriately partisan way'.

Following the handing down of that judgment, there was a protracted costs dispute in relation to the costs of the Chancery application. The first instance hearing of the costs dispute was held in May 2010 before the trial judge (by then Sir John Lindsay as he had retired).

One of the key questions for the court was whether an offer made by the claimants in April 2009 (the 'April 2009 letter') was a Part 36 offer, so that the trustees would be entitled to their costs in respect of the period from the beginning of May 2009 (when the 21 days referred to in the letter expired).

At first instance, Sir John Lindsay held that the April 2009 letter was not a Part 36 offer, *inter alia* because it failed to comply with Part 36.2(c). This was appealed by the trustees so that the Court of Appeal, which handed down its decision on 6 July 2011, had to consider whether the April 2009 letter was a Part 36 offer. In his judgment, Lord Neuberger, the Master of the Rolls, said that the April 2009 letter was not a Part 36 offer (because it specifically excluded the possibility of the respondents recovering all of their costs and only gave them the option of recovering a fixed percentage contrary to CPR 36.10). Furthermore, it was time limited (contrary to CPR 36.2(c)). However, in light of the overriding objective and the recent judgment in *C* v *D*, discussed in further detail below, the Court of Appeal took the view that the April 2009 letter should, if possible, be treated as a Part 36 offer.

Lord Neuberger pointed to the fact that 'both the trustees and respondents (a) treated the offers contained in the April 2009 letter as having been made under Part 36 and (b) said in terms that those offers were still in force well after the 21 days therein referred to had passed'[11]. Lord Neuberger went on to say that 'an offer which is expressed to be a Part 36 offer and otherwise appears to comply with the requirements of Part 36, should, in the absence of good reason to the contrary, be given substantially the same effect as a Part 36 offer, when it comes to deciding costs issues[12]'.

REASONS TO USE PART 36

Given the numerous conditions that must be fulfilled for an offer to comply with Part 36, and the fact that the Court may, in its discretion, consider an offer that does not comply with Part 36[13] in any event, what are the advantages of using the Part 36 procedure?

The primary advantage of making an offer in accordance with Part 36 (as opposed to an offer that does not have all the features set out above) is that it may confer a significant costs advantage on the offeror. The costs implications are discussed in detail below.

The other key advantage is that, subject to limited exceptions set out in CPR 36.13, Part 36 offers are 'without prejudice save as to costs', which means that the offer is not admissible in evidence[14] nor can it be disclosed to the trial judge[15]. This ensures that neither party can refer to the fact or details of the offer until the case has been decided.

WHEN IS THE RIGHT TIME TO MAKE A PART 36 OFFER?

A Part 36 offer may be made at any time, including before issue of proceedings, during trial[16] and during appeal proceedings[17]. An offer is deemed to be made when it is served on the offeree[18].

As set out above, as the punitive costs will run from the expiry of the Relevant Period, it obviously makes sense for a claimant to make their offer as early as they can to exert as much tactical pressure on the defendant as possible.

That said, practitioners should be aware that if a pre-action offer is accepted before the issue of proceedings, Part 36 will not apply as it refers specifically to 'costs of the proceedings'[19], and at this point proceedings have not yet been issued. The best way to ensure that pre-action costs are covered is to make this explicit in any pre-action offer.

WHEN CAN A PART 36 OFFER BE ACCEPTED?

Pursuant to CPR 36.9(1), a Part 36 offer is accepted by serving written notice of acceptance on the offeror. The rule makes it clear that an offer can be accepted at any time (even where the offeree has subsequently made a different order) unless the offeror has withdrawn the offer by serving notice of such withdrawal on the offeree. Part 36 offers must be accepted in writing and, provided that the acceptance is not within 21 days of the commencement of the trial, the offer can be accepted without the permission of the court. The

general rule is that Part 36 offers should be made not less than 21 days before the start of trial[20].

Clarification of an offer to settle can be sought within seven days of service to enable the offeree to consider the offer properly[21]. If a Part 36 offer is accepted, the claim will be stayed[22].

The question as to whether a Part 36 offer can be time limited was considered by the Court of Appeal in the recent case of *C* v *D*[23]. At first instance, Warren J concluded that a Part 36 offer cannot be time limited and this was upheld by the Court of Appeal. Rix LJ said: 'The essence of the matter is that a Part 36 offer, to have effect in terms of costs consequences after trial, has to be an offer which has not been withdrawn, but has remained on the table... there is no room for an offer, which is neither withdrawn before or after the expiry of the relevant period, but lapses as a matter of its own terms'[24].

With this in mind, the Court then considered whether the offer, as expressed in that case, was, in fact, time limited and, in particular, the interpretation of the meaning of the words 'open for 21 days'. The Court of Appeal applied the general principle of construction that 'words should be understood in such a way that the matter is effective rather than ineffective'[25]. On the basis of this approach, the Court concluded that the express time limit contained in the offer letter in question was not the equivalent of a Part 36 withdrawal and that on the contrary, the parties had all been concerned with the extension of the 21-day period.

Rix LJ, bringing some much needed clarity to the question of time limited offers, went on to say[26]: 'Ultimately it is important for the security of the Part 36 scheme... 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 the stipulated period, then such an offer cannot be made a Part 36 offer, and that and 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.'

COSTS CONSEQUENCES OF PART 36 OFFERS

The costs consequences of Part 36 offers are complex and will vary depending on the timing of the offer and of its acceptance. These are set out in CPR 36.10 and here follows an attempt to summarise the position below by reference to whether:

- the offer is accepted within the Relevant Period, or
- the offer is accepted after the Relevant Period but is accepted before judgment, or
- an offer is made but is not accepted before judgment.

Where an offer is accepted within the Relevant Period, the following costs consequences will flow.

Offer by a claimant

Defendant accepts offer within 21 days.

Where the offer has been made pre-action and no proceedings have been issued:

- the defendant will pay the amount offered within 14 days, and
- the defendant will pay the claimant's costs on the standard basis (to be assessed if not agreed).

Where the offer is accepted after proceedings have been issued:

- the defendant will pay the amount offered within 14 days
- proceedings will come to an end, and
- the defendant will pay the claimant's costs on the standard basis (to be assessed if not agreed).

Offer by a defendant

Claimant accepts within 21 days of offer by filing written acceptance at court and serving a copy on defendant's solicitor:

- proceedings are stayed
- defendant pays money to claimant within 14 days, and
- defendant pays claimant's costs up until acceptance on the standard basis (to be assessed if not agreed).

Where an offer is accepted after the Relevant Period but before judgment, the following costs consequences will flow.

Offer by a claimant

- Offer accepted by defendant after the Relevant Period,
- unless costs are agreed by the parties, defendant will pay the claimant's costs of the proceedings up to that date.

Offer by a defendant

- Offer accepted by claimant after the Relevant Period,
- pursuant to rule 36.10, the court will usually order that:
  - the defendant pays the claimant's costs of the proceedings up to the date on which the Relevant Period expired, and
  - the claimant pays the defendant's costs from the date of expiry of the Relevant Period to the date of acceptance of the offer.

The costs consequences following judgment where an offer has been made but not accepted are set out in CPR 36.14. In essence, these can be summarised as follows:

Offer by a claimant

Claimant makes an offer which is not accepted by defendant and the case goes to trial:

(i) Claimant wins the action and is awarded same as or more than their offer. Claimant will receive:
  - the damages awarded by the court
  - interest at the court's discretion on the damages awarded (provided these are claimed in the Particulars of Claim) (normally from when the loss was sustained to and the end of the Relevant Period)
  - enhanced interest on the damages at a maximum rate of 10 per cent over base rate from the day after the end of the Relevant Period to judgment
  - costs on the standard basis potentially from when first incurred by the claimant until the end of the Relevant Period
  - costs on the indemnity basis from the end of the Relevant Period to judgment,
  - interest on the indemnity basis costs from the end of the Relevant Period to the date of judgment at a maximum of 10 per cent above base rate.

(ii) Claimant wins the action and is awarded the same or less than their offer:
  - The judge will usually award the claimant the costs of the claim on the standard basis.

(iii) Claimant loses the action:
  - Claimant ordered to pay the defendant's costs from the Relevant Period on the standard basis.

Offer by a defendant

Defendant makes an offer which is not accepted by claimant and the case goes to trial:

'Beating a money offer from a defendant will not always result in a judgment more advantageous to the claimant'

(i) Claimant wins the action and is awarded more than defendant's offer:
- claimant awarded the costs of the claim to be paid by the defendant on the standard basis.

(ii) Claimant wins the action and is awarded the same or less than the defendant's offer:
- The judge will make two orders as to costs:
  - costs in favour of claimant to a date within 21 days of the Relevant Period, and
  - costs in favour of the defendant from the Relevant Period plus interest.

(iii) Claimant loses the action:
- claimant ordered to pay the defendant's costs from the Relevant Period on the standard basis plus interest from the date of judgment.

In the *Howell* v *Lees-Millais* decision discussed above, the appeal was rejected on the basis that the respondents 'beat the offer'. As a result, the allocation of liability for costs for the period between expiry of the 21 days for which the offer was stated to be open and acceptance was a matter for the discretion of the judge without the presumption in favour of the trustees (as offer-making claimants) inherent in CPR 36.10(4) and (5). As a result, the Court ordered that each party should pay its own respective costs.

It is also worth noting that beating a money offer from a defendant will not always result in a judgment more advantageous to the claimant. In the case of *Carver* v *BAA* plc[27], Ward LJ said that 'more advantageous' was 'an open-textured phrase' which 'permits a more wide-ranging review of all the facts and circumstances of the case in deciding whether the judgment which is the fruit of the litigation was worth the fight'. This was a personal injury case where Miss Carver, who had injured her ankle when she fell into a defective lift on premises for which the respondent was responsible, only succeeded in beating the respondent's offer by GBP166.26.

Miss Carver submitted that a claimant did not fail to obtain a judgment more advantageous than the defendant's Part 36 offer so long as the judgment was for a penny more than the offer. Ward LJ, in rejecting this argument, said: 'The Civil Procedure Rules and Part 36 in particular, encourage both sides to make offers to settle. Compromise is seen as an object worthy of promotion for compromise is better than contest, both for the litigants concerned, for the court and for the administration of justice as a whole. Litigation is time-consuming and it comes at a cost, emotional as well as financial. Those are, therefore, appropriate factors to take into account in deciding whether the battle was worth it. Money is not the sole governing criterion[28].'

The decision in *Multiplex Construction (UK) Limited* v *Cleveland Bridge*[29] makes it clear that the rationale expounded in the Carver case is not confined to personal injury actions and that decision sets out 'how the court ought to approach the matter in circumstances where: (a) one party has made an offer which was nearly but not quite sufficient, and (b) the other party has rejected that offer outright without any attempt to negotiate'.

In *Ford* v *GKR Construction Limited*[30], Lord Woolf made it clear the Court may take into account bad conduct on the part of the litigants, such as, for example, late disclosure, and said that this would be a material factor for the Court to consider when making an order in relation to costs.

READ THE SMALL PRINT

Part 36 is a useful device in the negotiation of disputes but to use it, it is important that practitioners 'read the small print' and understand the detail of how it works. The recent decisions in *Howell* v *Lees-Millais* and *C* v *D* have assisted in clarifying the interpretation of Part 36 and provide useful assistance for practitioners. These decisions add to the growing body of case law which demonstrates the Court's somewhat pragmatic approach whereby it will try to construe an offer as complying with Part 36 and/or as having its consequences with regard to costs. In both decisions, the Court of Appeal was at pains to point out that in interpreting the application of Part 36, the court will not only consider the facts of the case before it and the wording of Part 36 itself, but will also give a great deal of weight to 'the overriding objective, and indeed common sense'[31].

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[1][2011] EWCA Civ 646
[2][2011] EWCA Civ 786
[3]CPR 1.1(2)(c)
[4]*The White Book*, p1,092
[5]*Gibbon v Manchester City Council* [2010] EWCA 726
[6]*The White Book*, p1,089
[7]CPR 36.4
[8]CPR 36.2(4)
[9]CPR 36.3(3)
[10]CPR 36.1(2)
[11]Para 26
[12]Para 27
[13]CPR 44.3
[14]CPR 36.13(1)
[15]CPR 36.12(2)
[16]CPR 36.3(2)(a)
[17]CPR 36.3(2)(b)
[18]CPR 36.7
[19]CPR 36.10
[20]Further details in *The White Book*, pp1,093-1,094
[21]CPR 36.8
[22]CPR 36.11(1)
[23][2011] EWCA Civ 646
[24]At para 40
[25]Per Rix LJ at para 55
[26]At para 68
[27][2008] EWCA Civ 412
[28]At para 31 (in the context of the *Civil Procedure (Amendment No.3) Rules 2007*
[29][2008] EWHC 2280 TCC
[30][2001] 1 WLR 1397
[31]Howell – per Lord Neuberger at para 27