

# Deal or No Deal?

## Part 36 problems and how to avoid them

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Speaker:



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# Scope

- ▶ When Part 36 goes wrong
- ▶ Recent decisions and general principles

# TL; DR – use the form

- ▶ Pepperall J, *Essex County Council v UBB Waste (Essex) Ltd* [2020] EWHC 2387, para 37

“I consider that, as a matter of policy, the responsibility for ensuring that an offer is compliant with Part 36 should lie squarely upon the offeror and his lawyers. There are two very simple answers to the unrelenting stream of cases which, as Coulson LJ observed in King, litter the law reports in which parties seek to obtain the benefits of Part 36 despite making non-compliant offers:

a) As has been repeatedly stressed by the Court of Appeal and as the rules clearly explain, there is no problem with a party making an offer outside Part 36. Such offers will be taken into consideration under Part 44 but will not gain the special advantages of Part 36.

b) 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.”

# Quick reminder – CPR36.5

- ▶ (1) 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 rule 36.13 or 36.20 if the offer is accepted ("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 or issue; and
  - ▶ (e) state whether it takes into account any counterclaim

# Late offers (less than 21 days before trial)

- ▶ No need to specify relevant period under 36.5(1)(c) – period up to the end of trial (but permission needed to accept after start of trial)
- ▶ No automatic order
- ▶ Do not attract usual Part 36 consequences upon judgment unless court abridges time
- ▶ What if adjourned?
  - ▶ *Reader v SPIE Ltd* [2021] EWHC 1221 (QB)

# Can be made in counterclaims and additional claims

- ▶ Even if counterclaim not yet pleaded – *Calonne v Dawnus Southern Ltd* [2019] EWCA Civ 754
- ▶ Make sure offer is clear

# Multiple defendants

- ▶ Limitations of Part 36 in multi-party cases
- ▶ *Re IT Protect Ltd (in liquidation)* [2020] EWHC 3001 (Ch)
  - ▶ C made joint P36 offer to both defendants
  - ▶ Succeeded against D1 (in excess of offer) but failed against D2
  - ▶ D1 could not have accepted it without D2
  - ▶ Far from certain whether CPR36.17(4) engaged in these circumstances
  - ▶ Would proceed on basis that applied, but would be unjust



# You cannot add terms as to costs

- ▶ “The offer is to settle the whole of the counter claim and the claim on the following terms... Your client is to be liable to pay our client’s costs of the claim and the counter claim on the standard basis, to be assessed if not agreed, up to the end of the relevant period or, if later, the date of service of notice of acceptance of this offer.”
- ▶ Not a valid Part 36 offer: *James v James & Ors* [2018] EWHC 242 (Ch)



# You cannot add terms as to costs

- ▶ “We are instructed by the claimant to put forward an offer in the gross sum of £1,702.50 in full and final settlement of their claim for damages, subject to the payment of our cost disbursements incurred to date in proceedings in this matter, to be assessed in default of agreement. In accepting this offer, the gross sum indicated above constitutes the value of the claim, which is exclusive of any agreed position on liability, and consequently the defendant accepts their liability for standard costs exclusive of disbursements and VAT. The offer relates to the whole of their claim and is inclusive of interests as set out in part 36.54 and is made pursuant to part 36 of the Civil Procedure Rules 1998. This offer is open for acceptance for 21 days from the date this letter is received by you. After 21 days the offer can only be accepted if we’re able to reach an agreement on costs or the court gives permission.”
- ▶ Not a valid Part 36 offer: *Flanagan v RSA*, Manchester CC, 16/5/2019

# You can add terms as to interest (but be careful)

- ▶ Part 36 offers must include all interest up to the end of the relevant period
- ▶ A Part 36 offer that excludes interest is not a valid Part 36 offer – *King v City of London Corp* [2019] EWCA Civ 2266
- ▶ You can make provision for accrual of interest after the relevant period ends (CPR 36.5(5) from 6/4/2021, codifying *Calonne Construction v Dawnus Southern Ltd* [2019] EWCA Civ 754)

# Service

- ▶ *London Trocadero (2015) LLP v Picturehouse Cinemas Limited & Ors* [2021] EWHC 3103 (Ch)
- ▶ CPR formal service rules apply
- ▶ But can be remedied – CPR3.10

# Dates

- ▶ Letter dated 7/3/2019
- ▶ “If the Defendant accepts the offer within 21 days of the date of this letter (the relevant period) the Defendant will be liable for the Claimant’s costs of the Proceedings (including pre-action costs) up to the date on which written notice of acceptance of this Offer is received by the Claimant, in accordance with CPR36.13”
- ▶ Sent by email at 4.54pm on 7/3/2019

# *Essex Council v UBB Waste* [2020] EWHC 2387

- ▶ Deemed served on 8/3/2019 (CPR6.26)
- ▶ 2 interpretations
  - ▶ 21 days ran from date on letter
  - ▶ 21 days ran from when offer made
- ▶ Latter preferred - offer compliant
- ▶ "Validate if possible"? – *C v D* [2011] EWCA Civ 646 – but there are limits

# And if I'm wrong... (*Essex cont.*)

- ▶ De minimis if failure to comply?
  - ▶ Rule 36.2(2) is clear and there is no possibility of such an offer being treated as a Part 36 offer
  - ▶ Like any settlement offer, the non-compliant offer must be taken into account when exercising general discretion as to costs under Part 44
  - ▶ In exercising that discretion, the court cannot treat a “near miss” offer as if it were a compliant Part 36 offer
- ▶ Estoppel?
  - ▶ Should play no part in the Part 36 regime



## More dates

“This offer is made pursuant to Part 36 of the CPR and is intended to be a Claimant’s Part 36 offer. Accordingly if your client accepts this Offer within 21 days (the relevant period), being by 4pm on 19 July 2019 or any time thereafter, your client will be liable for our client’s costs, in accordance with CPR36.13. This offer will remain open unless and until it is accepted or withdrawn.”

Received by email on 27/6/2019 but service by email not agreed, so served by DX on 1/7/2019

# *Kings v King* [2021] EWHC 653 (Ch)

- ▶ Words in letter were contradictory
- ▶ Reasonable recipient would have realised that intended to refer to 21 day period ending on 22/7
- ▶ Additional words “or at any time thereafter” did not deprive of intended effect

# Mistake

- ▶ 15.51 23/2/21: "The Claimant offers to resolve the issue of liability on an 80/20 basis. For the avoidance of doubt if the Defendant accepts this offer it will only be required to pay 20% of the Claimant's damages."
- ▶ 10.02 24/2/21: D accepts offer by email
- ▶ 10.12 24/2/21: C replied to make clear that offer was meant to be 80/20 in C's favour

# *O'Grady v B15 Group Ltd* [2022] EWHC 67 (QB)

- ▶ Master Thornett: I am satisfied that the doctrine of common law mistake can apply to a Part 36 offer in circumstances where a clear and obvious mistake has been made and this is appreciated by the Part 36 offeree at the point of acceptance... Nothing about Part 36 being a self-contained code excludes it."
- ▶ *OT Africa Line v Vickers PLC* [1996] CLC 722 (QB)
- ▶ What about the Portal? *Harris v Brown*, Bradford CC, 18/6/2019

# What is being offered?

- ▶ RTA, C alleged injury to neck and back
- ▶ Breach of duty admitted, causation denied
- ▶ 2 near identical offers using N242A
  - ▶ To accept on condition that liability is admitted by the offeree, 90% of the claim for damages and interest, to be assessed
  - ▶ To agree the issue of liability on the basis that the Claimant will accept 90% of the claim for damages and interest, to be assessed.
- ▶ C succeeded on neck injury alone – C claimed to have bettered his offers

# *Seabrook v Adam* [2021] EWCA Civ 382

- ▶ Offers should be interpreted in the light of the pleadings and, in particular, in the light of the fact that D had admitted breach of duty but had disputed causation in relation to both heads of damage
- ▶ 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
- ▶ Would make no sense if referred to breach of duty only – already conceded
- ▶ Reasonable reader would construe as reference to the claim in its entirety – no reference to separate heads of loss
- ▶ Ordinary and natural meaning of liability inevitably includes causation
- ▶ D had bettered C's offers



# Acceptance

- ▶ "We assume, from the terms of your offer, that our client's costs will be dealt with on post issue fixed costs basis and reasonable disbursements. If this is not correct then please return to us within the next 3 days"
- ▶ Offer is accepted, "This is of course on the basis that our client's post issue fixed costs and reasonable disbursements will be paid in addition."
- ▶ D sent cheque for damages

# Acceptance

- ▶ “There was, in my view, no room for the Claimant unilaterally to seek to vary the Defendant’s offer by way of either letter... the Defendant’s offer was made under Part 36 (which is a self-contained code) and there is no provision within Part 36 for unilateral conditions or qualifications to be attached to offers, less still is there any provision for such conditions or qualifications to be made by offerees, or to be countenances by offerors by mere acquiescence.”
- ▶ *Jiminez v Esure*, SCCO 30/7/21, Deputy Master Friston

# Unjust? An uphill struggle

- ▶ CPR36.17(5) factors:
  - ▶ (a) the terms of any Part 36 offer;
  - ▶ (b) the stage in the proceedings when any Part 36 offer was made;
  - ▶ (c) the information available to the parties at the time when the part 36 offer was made;
  - ▶ (d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and
  - ▶ (e) whether the offer was a genuine attempt to settle the proceedings

# Tough luck

- ▶ *Shah & Anor v Shah v Anor* [2021] EWHC 1668 (QB) – offered £1, received £10. “It has to be acknowledged (and the Judge did so expressly) that the consequences of Part 36 in cases such as this are punishing, but it is a separate question whether they are unjust. The *justice* of Part 36 is that decisions about litigation should be economically utilitarian: it actively discourages litigation on 'points of principle' by making litigation not fought on a commercial basis a high stakes activity.
- ▶ *Elgamal v Westminster City Council* [2021] EWHC 2510 (QB) – FD failed, C beat own offer.
- ▶ *Equitix Eeef Biomass 2 Ltd v Fox & Ors* [2021] EWHC 2781 (TCC): “A well judged Part 36 offer is often based on inspired and educated guesswork, which the other party must also display when deciding whether to accept it.”

# Late disclosure

- ▶ *Head v Culver Heating Co Ltd* [2021] EWHC 1235 (QB)
- ▶ "It would be unjust to the Defendant to allow the Claimant to benefit from Part 36 orders that are only available because she was permitted to rely on evidence which was served late without good reason."

# Genuine attempt to settle?

- ▶ *JMX v Norfolk & Norwich Hospitals NHS Foundation Trust* [2018] EWHC 185 (QB)
- ▶ 90% offer was effective



# If it's a genuine offer to settle, all consequences flow

- ▶ *Telefonica UK Ltd v Office of Communications* [2020]  
EWCA Civ 1374

# Acceptance of offers and protected parties

- ▶ *Wormald v Ahmed* [2021] EWHC 973 (QB)

# Beware deliberate late acceptance of Claimant's offers

- ▶ *Pallett v MGN Ltd* [2021] EWHC 76 (Ch)
- ▶ Effect of CPR36.13(4)
- ▶ Not a contractual compromise

# Is Part 36 the right tool?

- ▶ Close to trial
- ▶ Time bomb (with or without Part 36 alongside)
- ▶ Fundamental dishonesty
- ▶ Flexibility on costs
- ▶ Something other than money

# Dangers of not using Part 36

- ▶ *Global Energy Horizons v Gray* [2021] EWCA Civ 123:  
“Where a defendant is faced with an exorbitant claim which he wishes to defend vigorously but where he is vulnerable to a finding that he is liable for a much smaller amount, there is a clear process provided by CPR Part 36 which he can follow to protect his position.”
- ▶ *Mullaraj v Secretary of State for the Home Department*  
22/04/21, SCCO