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MAKING PART 36 OFFERS – GUIDANCE NOTES (DEFENDANT)

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WHAT ARE PART 36 OFFERS?

A Part 36 offer is a written offer made to settle the matters in dispute. The name 'Part 36' comes from Part 36 of the Civil Procedure Rules which govern the conduct of court disputes in England and Wales. If a Part 36 offer is made and then accepted, it will bring an end to the dispute and court proceedings will not be required to resolve the substantive dispute (although costs may still be subject to separate agreement or court proceedings). For a Part 36 offer to be valid, it must meet all the requirements specified in Part 36 of the Civil Procedure Rules and must be a genuine offer to settle.

Part 36 encourages parties to make and accept early and reasonable offers to settle. Rewards and penalties are offered by the courts for parties that make Part 36 offers in the form of additional costs, interest and damages. Making a Part 36 offer should therefore not be seen as a sign of weakness, but a good way of putting pressure on the parties to settle.

The Part 36 offer can deal with all of the claim, part of it or specific issues. It is therefore possible to tailor it to deal as effectively as possible with your case.

A Part 36 offer is privileged which means the terms of the offer cannot be shown or mentioned to the court until the trial has finished, or you and the defendant have settled. It is only when the question of costs arises that a Part 36 offer can be shown to the court. It therefore has no effect on the outcome of the proceedings should the matter go to trial, but it may alter which party is responsible for the other party's costs, or the basis on which the amount of costs awarded are calculated. Sometimes it is tactically best to make an open offer so that it can be referred to the court during any trial. If we believe this strategy is best for your case, we shall advise that this approach is adopted.

One of the main differences between a Part 36 offer and other types of offer is that Part 36 cost consequences are automatic. To help trigger these automatic cost consequences, and also to help calculate them, any offer must specify a period of 21 days or more within which you are liable to pay costs. This is known as the relevant period. How the relevant period is used to calculate costs and the cost consequences are explained in more detail below.

A Part 36 offer is not usually time-limited. Once made it remains open for acceptance until written notice is sent withdrawing the offer. It is therefore important to keep any Part 36 offers that you make under review at all times and, if circumstances change, to consider whether any of them need to be withdrawn or varied.

CHANGING YOUR MIND - WITHDRAWING OR VARYING A PART 36 OFFER

Provided the other side has not already accepted the Part 36 offer, you can still withdraw it or change its terms to make it less advantageous if you decide it is too generous, or circumstances change resulting in the need to revise the offer.

You may do this at any time after the relevant period has expired (i.e. 21 days after you have made the offer) without the court's permission. It is not as simple to withdraw or vary the offer before the end of the relevant period. As such, when making the offer you should be confident to keep it open for acceptance for a minimum of 21 days.

Once a Part 36 offer is withdrawn it will not have the cost and other consequences set out in this guidance. You will then need to consider whether to make a subsequent offer, having lost the costs protection of the earlier offer.

CONSEQUENCES OF MAKING A PART 36 OFFER

Once you have made your Part 36 offer the consequences will depend on whether, and when, the offer is accepted. The main consequence of rejecting or accepting a Part 36 offer relates to the issue of costs liability. Costs of litigation are often substantial and therefore this consequence can be significant. As such, Part 36 offers have been described as offers with “teeth”.

Set out below are the three basic responses available to you as the defendant on receipt of your Part 36 offer, their potential cost consequences and their impact on the dispute.

Offer Accepted - within 21 days (i.e. within the relevant period)

Where a Part 36 offer is made and accepted before the claim has been issued at court, this brings an end to the dispute.

Where a Part 36 offer has been accepted after court proceedings have started, this action will pause the claim from the date of acceptance.

In cases where children or protected parties are involved the approval of court is needed before a settlement can be binding and any stay or ending will only take effect when that approval is given.

Once the offer is accepted you must follow with the terms of the offer, and meet any deadline for payment set out in the offer. In the event that you default, the claimant can obtain judgment for the amount in the offer, and enforce that judgment without the need to issue a new claim. Part 36 rules do not allow you to make a Part 36 offer to pay a settlement sum in instalments; it requires you to pay the settlement in a single sum within 14 days of the date of acceptance unless the parties can agree otherwise.

As part of accepting the offer, you will have to pay the claimant's costs up to the date of acceptance. This is an automatic consequence of Part 36 offers and is very favourable to claimants. If costs cannot be agreed then they will be assessed by the court. The assessment is carried out on what is called a 'standard basis'. This means you will have to pay all of the claimant's costs provided they were proportionate to the matters in dispute. Any doubt as to whether the costs were reasonably incurred, or reasonable and proportionate in amount, will be resolved your favour, as the paying party. In our experience claimants are unlikely to recover 100% of their costs, but should expect to recover in the region of **60-75%**.

Offer Accepted - after the 21 day period (i.e. after expiry of the relevant period)

Claimant's may still accept the offer after expiry of the relevant period unless you have formally withdrawn the offer. However, if the trial has commenced the court's permission will be required to accept the offer.

The cost consequences are very similar to the above. Unless the court considers it unjust to do so, the court must order that you pay the claimant's costs of the proceedings up to the end of the relevant period and also the costs from the relevant period to the date of acceptance.

In considering whether it would be unjust, the court will take into account "all the circumstances of the case" including the terms of any offer, the stage in the proceedings, the information available to the parties to evaluate any offer, the conduct of the parties and whether the offer was a genuine attempt to settle the proceedings (that is, some compromise has been made).

Offer rejected

If the claimant does not accept your Part 36 offer, the matter will go to trial (unless settled by other means such as negotiation, or a different Part 36 offer).

If the claimant fails to do better than your offer at trial, the claimant will be ordered to pay your legal costs from the date when the relevant period expires and interest on those costs even if they "win" the overall legal argument. This is a significant benefit to you given that it reverses the costs risk from the end of the relevant period to trial and as such claimant's often describe failing to beat a Part 36 Offer as comparable to effectively losing the case.

SUMMARY

Part 36 offers increase the risk on the claimant. As such, making a Part 36 offer is a useful tactic to force a claimant to engage in the dispute and consider making a compromise.