

PART 36 OFFERS – GUIDANCE NOTES CLAIMANT

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WHAT ARE PART 36 OFFERS?

A Part 36 offer is a written offer made to the defendant 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 defendant 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.

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 the defendant will be liable for your 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 to the defendant 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 defendant has not already accepted the Part 36 offer, you can still withdraw it or change its terms to make it less advantageous to the defendant 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 defendant accepts the offer. 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 the defendant on receipt of your Part 36 offer, their potential cost consequences and their impact on your claim.

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

Where a Part 36 offer is made and accepted before you have issued your claim in court, this brings an end to your claim.

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 the defendant must follow with the terms of the offer, and meet any deadline for payment set out in the offer. In the unlikely event that the defendant fails to comply with the terms you can obtain judgment for the amount in the offer, and enforce that judgment without the need to issue a new claim.

As part of accepting the offer, the defendant will have to pay your costs up to the date of acceptance. This is an automatic consequence of Part 36 offers and is very favourable to claimants. If your 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 the defendant will have to pay all of your costs provided they were proportionate to the matters in issue in your claim. Any doubt as to whether the costs were reasonably incurred, or reasonable and proportionate in amount, will be resolved in favour of the defendant, as the paying party. In our experience you are unlikely to recover 100% of your costs, but should hope to recover in the region of **60-75%**.

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

The defendant 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 are awarded the costs of the proceedings up to the end of the relevant period and also your 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 defendant 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).

The consequences will depend upon the outcome of the trial and whether you obtain a judgment which is 'at least as advantageous' to you as the terms of your offer. Where the offer is for a sum of money, this means you need to obtain a sum that either equal or exceed the offer.

If you obtain judgment the same as or better than your offer

The normal consequences would be for the defendant to pay your costs on a standard basis. However because you made a Part 36 offer you are rewarded with additional cost, interest and other amounts which in effect also penalise the defendant for not accepting your Part 36 offer. The defendant is penalised because the court will consider that the defendant should (with the benefit of hindsight) have accepted your offer and brought matters to a conclusion before the costs of a full trial were incurred.

In summary, the court must, unless it considers it unjust to do so, order the defendant to pay you:

- the value of your claim (as determined by the court)
- interest on the whole or part of your claim at a rate not exceeding 10% above base rate for some or all of the period starting from the date on which the relevant period expired;
- your legal costs. These will be assessed on an indemnity basis. This means the defendant will have to pay all your costs that were reasonably incurred, with any doubt in relation to those costs being resolved in your favour. Indemnity costs usually result in a much higher rate of recovery than standard costs, around 90%;
- interest on those costs at a rate of up to 10% above base rate for the same period;
- an additional amount, capped at £75,000, calculated by applying set percentages on the amount of damages/costs awarded by the court.

If your judgment is not as advantageous to you as your offer

Even if you win, if the sum awarded to you is less than the amount of your offer, then Part 36 costs consequences will not apply. This is because the Defendant was justified in not accepting your offer.

Provided there are no Part 36 offers from the defendant to take into account, costs will be decided in the usual way. This normally means that the unsuccessful party will be ordered to pay the successful parties costs on the standard basis, to be assessed if not agreed. The court has

discretion to make a different order depending on the circumstances of your case. Relevant circumstances include conduct and whether the defendant has succeeded on part of its case.

If you lose at trial

If you lose at trial, then you do not get any protection for making your offer.

You should note that if you lose at trial, it is likely that you will be ordered to pay the defendant's costs as well as having to pay your own. Generally the defendant's costs will be assessed on the standard basis, but again the court has discretion to make a different order.

SUMMARY

Part 36 offers increase the risk on the defendant. As such, making a Part 36 offer is a useful tactic to force a defendant to engage in the dispute and consider making a compromise. If the event the matter proceeds to court and you beat or match your offer, then your position in respect of the sum you walk away with and your recovery of your costs significantly increase.