

Part 36 Offers

A Part 36 offer is an offer of settlement that can be made to an opponent, and which can apply significant tactical pressure due to its considerable cost consequences.

WHAT IS A PART 36 OFFER?

Part 36 is a “without prejudice save as to costs” offer with additional benefits permitted by Part 36 of the Civil Procedure Rules (“CPR”) governing disputes in England and Wales. It is a different type of “standard” without prejudice save as to costs settlement offer. The main difference is that a Part 36 offer is limited to settling the claim and does not include the associated costs. Cost consequences then flow from the offeree’s acceptance or rejection of the offer. The court may override this if it feels that the consequences would be unjust.

THE OFFER

A Part 36 offer can be made at any stage of a dispute, either before or after proceedings have started. For it to be valid, it must be in accordance with the stipulations set out at Part 36 of the CPR. These include that it must:

- Be a genuine offer and contain some concession to value of the claim;
- Be in writing;
- Make it clear that the offer is one being put forward on a Part 36 basis;
- Be open for acceptance for at least 21 days (this being the “relevant period”); and
- State whether it relates to the whole or part of the claim.

Any offer is confidential, and the judge will not be told of any offers until the conclusion of the case.

COST CONSEQUENCES

For both parties

The position for both a claimant and defendant if you make a Part 36 offer is that if it is accepted within the relevant period, the other party will have to pay your legal costs (to be assessed if not agreed) on the standard basis up to the date the offer was accepted.

If the party accepts the offer after the expiry of the relevant period, unless the parties agree on costs, the court will usually order that the claimant receives their costs up to the date when the relevant period expires and the party making the offer (this may be the claimant) receives their costs until the date of acceptance.

For a claimant

When a defendant does not accept a claimant's Part 36 offer and the claimant is awarded at trial the same or more than the offer that was made, the court may order the defendant to pay:

- Interest on the whole or part of the sum awarded (excluding interest) 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;
- The claimant's costs including any recoverable pre-action costs on the indemnity basis from the date that the relevant period expired;
- Interest on those costs at a rate of up to 10% above base rate; and
- An additional amount of 10% of the first £500,000 of damages awarded or 10% of the first £500,000 of costs where there is no monetary claim and 5% of any amount above those figures subject to a limit of £75,000.

When a claimant's Part 36 offer is accepted by the defendant, the claimant is entitled to its cost of the proceedings including any recoverable pre-action costs. If such costs are not agreed between the parties, the costs will be assessed by the court on a standard basis up to the date of service of notice of acceptance of the offer by the defendant.

If the Part 36 offer is not accepted by the defendant and the claimant fails to beat its offer at trial, costs will be decided in the usual manner.

For a defendant

If you are the defendant and the claimant does not accept your Part 36 offer, unless it is unjust to do so, the court will order the claimant to pay both:

- The defendant's costs, including any recoverable pre-action costs from the date on which the relevant period expired, on the standard basis; and
- Interest on those costs.

Part 36 operates to reverse the normal starting position that the successful claimant is awarded its costs payable by the defendant.

If a claimant beats a defendant's Part 36 offer, costs will be decided by the court in the usual way.

ACCEPTANCE OF A PART 36 OFFER

If a Part 36 offer is accepted, the claim is brought to an end. If you are a defendant and your offer was to pay a sum of money, once it is accepted, you must pay the agreed sum within 14 days, or any other agreed period between the parties. If you fail to do so, the court can enter judgment against you for the unpaid sum. If you are the claimant and your offer is accepted, the defendant must pay within the agreed time frame or the terms can be enforced.

If the offer has not been withdrawn, it can still be accepted after the expiry of the acceptance period with permission of the court.

There are special rules relating to circumstances where a Part 36 offer is made less than 21 days before trial.

WITHDRAWAL OF A PART 36 OFFER

As long as a Part 36 offer is not time limited, you can withdraw or change its terms at any time, but this must be done in writing. If you wish to do this within the relevant period, the court's permission will be needed, and you must show that it is in the interests of justice to do so.

Important considerations

- Making an appropriate Part 36 offer can apply significant pressure on the opponent as it can shift the cost risk to the opposing party; and
- A Part 36 offer may focus the minds of the parties and promote an early settlement saving time and costs.

Tenet Compliance and Litigation Executive Summaries are designed to provide you with a basic level of understanding of legal issues in England and Wales. They are not intended to be definitive or exhaustive. Tenet Compliance and Litigation provides specialist advice on litigation and compliance issues and will be pleased to advise in detail in any matter where we are instructed.