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## **Offers to settle: incentive, coercion, clarity**

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### **INTRODUCTION**

Part 36 of the CPR is designed to provide a formal system for making, considering and accepting offers to settle civil disputes which have defined consequences. There is a strong public policy in favour of encouraging parties to settle their disputes rather than litigating through to trial. Part 36 has to be seen as part of a larger picture that includes negotiation, mediation and all other forms of alternative dispute resolution, as well as adjudicative processes like arbitration and litigation through the courts. Parties have always been able to negotiate settlements, either face-to-face or at arms' length, such as through written communications. A written offer to settle may be made in open correspondence, but that has the disadvantage that any admissions made in the letter may be used in the litigation against the writer or their client. Protection from use in court may be obtained by marking the offer 'Without Prejudice'. While this is desirable, it has the drawback that the offer cannot be used against the offeree if the offer was unreasonably rejected.

Court procedures have existed for a long time allowing formal offers to be made which must not be shown to the judge until all issues on liability and remedies have been decided, but which may be relied upon and will have consequences when the question of costs is considered. There are two basic models: payments into court, and offers to settle. In their early form these were only available to defendants, and the consequences for unreasonable refusal were restricted to having an impact on costs. However, the impact was potentially devastating, often wiping out the damages awarded to a successful claimant. Such a system was one-sided, and a significant innovation was to enable a claimant to make a formal offer to settle. More problematic was finding ways to provide meaningful and fair benefits to a claimant making a successful formal offer to settle.

For a defendant, the traditional benefit of making a successful payment in or formal offer to settle has been making an order that the claimant must pay the defendant's costs from the date of the offer. This is often a very large financial benefit. For a claimant making a successful formal offer to settle, normal costs shifting should apply in any event, because they have won the case. Simply saying the defendant must pay the claimant's costs from the date of a successful claimant's offer to settle gives the claimant nothing. Providing a claimant with alternative benefits that are fair yet valuable has been elusive.

Part 36, like its predecessor in RSC order 22, has a split personality. Its friendly face is its encouragement towards settlement of disputes. It provides a defined system for offers and acceptances, including prescribed forms for offers, and is intended to promote early settlement of claims. Incentives are built into Part 36 to ensure that offers coming within its scope are treated seriously. It is widely regarded as being very successful, as shown by the large number of cases that settle before trial and even before proceedings are issued (see, for example, the *Final Report* at para. 41.1.2). Its less friendly face is revealed in those self-same incentives. Faced with a Part 36 offer, a litigant has a potentially difficult decision to make. Getting it wrong will mean either that the claim is settled on terms which are advantageous to the offeror, or running the risk of having to pay the price in terms of costs and the other benefits to offerors that are set out in Part 36. That price can match or even exceed the value of the claim. For many litigants, the risks of non-acceptance outweigh the desirability of receiving a full remedy from the court.

A system of making formal offers needs to be readily understood by all court users, including litigants in person. Formulating clear and accessible rules on Part 36 offers has, however, proved extremely challenging. Having a system with radical effects on costs shifting has encouraged an increasingly technical approach to Part 36. This is reflected partly in the technicality of the present version of Part 36, and partly in a rapidly expanding case law.

### **PRE-WOOLF PAYMENTS IN AND CALDERBANK OFFERS**

Before 1999 there was an established system of paying money into court under RSC ord. 22 as a means of making formal offers to settle having well-known costs consequences if the offer was not accepted. Payments in were only available to defendants and parties in the position of being defendants. A defendant using the procedure had to part with the money offered, actually paying it into the Court Funds Office. A plaintiff receiving notice of a payment in was left with a difficult decision. If the payment in was accepted, the case was stayed on the terms of the offer, bringing the claim to an end other than for the purpose of taxation of costs. If the payment in was not accepted, the money stayed in court until the final disposal of the claim. At trial the main issue on the costs of the proceedings was whether the claimant could beat the payment in. If the defendant won, costs would follow the event. If the plaintiff won, but failed to beat the payment in, the normal costs rule was that the plaintiff would be awarded its costs up to the date of the payment in, but would have to pay the defendant's costs thereafter. The rule was very clear. Recovering exactly the same amount as the payment in was the same as failing to beat that payment, so the plaintiff would be ordered in such a case to pay the defendant's costs from the date of the payment in (*Roache v Newsgroup Newspapers Ltd* [1998] EMLR 161).

Non-monetary claims were not catered for by traditional payments into court. The practice developed of making offers to settle which were expressed to be without prejudice save as to costs, which was first recognised in *Calderbank v Calderbank* [1976] Fam 93. These offers were privileged until after the court had resolved all issues relating to liability and remedies, but could be referred to on the question of costs. *Calderbank* offers were codified into the RSC in 1986 by adding a rule 14 to the old order 22. An obvious advantage in making a *Calderbank* was that they were made simply by writing a letter, and avoided the need to pay money into court. A further advantage was that they were available to any party, including a plaintiff. They could relate to the whole proceedings, or to any issue in the proceedings. However, they could not be used in money claims as a means of avoiding making a payment into court (*Cutts v Head* [1984] Ch 290).

### **PART 36 FROM 1999 to 2007**

Between 26 April 1999 and 5 April 2007, the original Part 36 provided for:

(a) Part 36 payments. These continued to involve lodging money in court, and sending the offeree a formal notice of payment in the prescribed form. They were the required method of making formal offers to claimants in money claims after proceedings were issued. A claimant could accept the offer within 21 days after service of the notice of payment in, the acceptance being made using another prescribed form.

(b) Part 36 offers, which were often still called *Calderbank* offers. These divided into three categories:

(i) Defendants' Part 36 offers. These were used where Part 36 payments could not be used (in non-money claims, and in money claims before proceedings were issued). They were offers to settle, expressed to be without prejudice save as to costs, made by letter and containing certain information laid down by Part 36. Slightly different formalities applied to Part 36 offers made before (pre-2007 r. 36.10) and after (pre-2007 r. 36.5) the commencement of proceedings. A claimant would be given 21 days from when the offer was made in order to decide whether to accept. An acceptance would be given by letter.

(ii) In mixed money and non-money remedy claims, a defendant making a formal offer was required to make a payment in under Part 36 in respect of the money remedy, and a Part 36 offer in respect of the non-money remedy. A claimant accepting the Part 36 payment within 21 days was deemed to accept the Part 36 offer as well.

(iii) Claimants' Part 36 offers. Whether the claim was for money or other remedies, and whether proceedings had started or not, a claimant was permitted to make a claimant's Part 36 offer. This was made by letter, expressed to be without prejudice save as to costs, and was open for acceptance for 21 days. A claimant using the procedure was essentially challenging the defendant either to compromise the claim on the claimant's terms, or fight the case to trial and seek to restrict the relief granted to something less favourable to the claimant than the terms of the offer. A defendant who failed to do that could be ordered to pay interest at up to 10 per cent above base rate, indemnity basis costs and interest on any indemnity basis costs at up to 10 per cent above base rate from the expiry of the offer.

### **PART 36 FROM 2007 TO 2013**

With effect from 6 April 2007, the whole of the former CPR, Part 36, was replaced with a streamlined system for making formal offers. The scheme laid down by the original Part 36 had been completely undermined by a number of appellate decisions. A key source of the trouble was the pre-2007 version of r. 36.1(2). This provided that if an offer was not made in accordance with the rules in Part 36, it would only have the consequences specified in Part 36 if the court so ordered. The final five words were given an undue prominence. *Crouch v King's Healthcare NHS Trust* [2004] EWCA Civ 1332, [2005] 1 WLR 2015 held that it was permissible for NHS Trusts in clinical dispute claims to make formal offers without making Part 36 payments despite the fact these were pure money claims. *Trustees of Stokes Pension Fund v Western Power Distribution (South West) plc* [2005] EWCA Civ 854, [2005] 1 WLR 3595 went further. This held that the court could give full effect to a Part 36 offer in a money claim if it was clear, expressed to be open for 21 days, was genuine, and if the defendant was good for the money. This not only struck at the root of the distinction between Part 36 payments and Part 36 offers, it also meant an offeror often had no means of knowing whether or not a Part 36 offer made in a money claim was going to be treated as effective for the purposes of Part 36. For these and other reasons the Rule Committee completely replaced Part 36 with effect from 6 April 2007.

The main features of the 2007 to 2013 version of Part 36 were:

(a) Payments into court were removed from the main scheme for making formal offers to settle. Payments in survive in an attenuated form to cover orders for payments into court and payment into court in support of a defence of tender before claim in CPR, Part 37, but they disappeared as a means of making a formal offer to settle.

(b) All parties were able to make Part 36 offers to settle. Claimants, defendants, parties to third party proceedings and to appeals can all make Part 36 offers, without lodging money in court, and can do so whether or not the claim seeks a money remedy, and both before and after proceedings are issued.

(c) Defendants making successful Part 36 offers continued to have the benefit of the rule that generally the claimant would pay their costs, but from the expiry of the 'relevant period'. As defined by r. 36.3(1)(c) this was generally 21 days after service of the offer.

(d) A successful claimant's Part 36 offer continued to open up at the least the prospect of enhanced interest on damages, indemnity basis costs, and enhanced interest on any indemnity basis costs.

(e) While the pre-2007 version of r. 36.1(2) was largely reproduced in the 2007-2013 version of r. 36.1(2)), the proviso allowing the court to order that Part 36 should apply to a non-Part 36 offer was removed. Instead, the 2007-2013 version of r. 36.1(2) provided that the key costs consequences of making a Part 36 offer did not apply to non-Part 36 offers.

(f) Complying with the formalities in the 2007-13 version of r. 36.2 has become of crucial importance, because a combination of rr. 36.1(2) and 36.2(1) is to the effect that the costs etc consequences of Part 36 only apply if the offer is made in accordance with the form and content requirements of r. 36.2.

## **PART 36 AFTER JACKSON**

As from 1 April 2013, CPR Part 36 retains the same structure as in the period between 2007 and 2013, and most of the rules remain unchanged. However, there are five areas of change that stem from the Jackson Reforms:

- (a) Obtaining a judgment 'more advantageous' than the terms of a Part 36 offer in a money claim has been defined by the new r. 36.14(1A) to mean better in money terms by any amount, however, small.
- (b) Claimants making successful Part 36 offers will potentially be awarded an additional 10 per cent on their claim for damages (new r. 36.14(3)).
- (c) Adverse costs orders against claimants protected by qualified one-way costs shifting will be subject to the limit prescribed by the new r. 44.14(1).
- (d) There is a technical change to r. 36.10 on the costs consequences of accepting a Part 36 offer before proceedings are commenced (new r. 44.9(2)).
- (e) Additional provisions dealing with Part 36 offers in detailed costs assessments have been added to the new rules on costs in Part 47.

## **INCENTIVE OR COERCION**

### **More Advantageous**

One of the issues discussed in the *Final Report* was the effect of *Carver v BAA plc* [2008] EWCA Civ 412, [2009] 1 WLR 113, which had been decided in the year before the Review. This case had attracted a great deal of criticism. The 2007 version of CPR, r. 36.14(1), had changed the wording used by the rules in describing the difference between successful and unsuccessful Part 36 offers to settle to whether the claimant had failed to 'obtain a judgment more advantageous' than the defendant's Part 36 offer. Before *Carver v BAA plc* it had always been held that exceeding a payment in, taking into account post-offer interest, by any margin no matter how small, was enough from the claimant's point of view to avoid incurring adverse costs consequences. Beating a payment in by a penny would technically be enough.

*Carver v BAA plc* held that obtaining a more advantageous judgement as required by the post-6 April 2007 version of r. 36.14(1) was a more open-textured concept than the pre-6 April 2007 phrase, which was 'fails to better'. *Carver v BAA plc* appeared to hold that the court is entitled to decide that a judgment that exceeds a Part 36 offer by a small margin might not be more advantageous to a claimant given factors such as the costs of litigating a claim through to trial and the emotional stress of taking a case to trial. On the facts the court upheld a decision that obtaining a judgment only £51 higher than the defendant's Part 36 offer was not more advantageous than the offer, being more than set-off by the irrecoverable cost incurred by the claimant in continuing to contest the case. After the *Final Report*, *Gibbon v Manchester City Council* [2010] EWCA Civ 726, [2010] 1 WLR 2081, said that *Carver v BAA plc* was binding on all courts up to the Court of Appeal.

Almost all the comments received in the Costs Review about *Carver v BAA* asked for its reversal. The dominant reason was the uncertainty it introduced. While the judiciary might welcome the flexibility it gave in deciding questions of costs, for litigators it was almost impossible to give accurate advice. Not only did they have to advise on the likely level of damages if the case went to trial, but also predict how much leeway would be needed above that level to ensure, given the history of the case, that the likely award would be

more advantageous than the offer in the *Carver* sense. The *Final Report* concluded at para. 41.2.9 that *Carver v BAA plc* should be reversed because of the uncertainty it introduced into the process of advising upon Part 36 offers.

For money claims, and for the money element of a claim, where the Part 36 offer is made on or after 1 October 2011, a judgment is 'more advantageous' where it is better than the Part 36 offer in money terms by any amount, however small (CPR, r. 36.14(1A)). Rule 36.14(1A) is intended to provide a clear-cut dividing line (*Fox v Foundation Piling Ltd* [2011] EWCA Civ 790, [2011] 6 Costs LR 961). If the judgment is even by the smallest margin better than a Part 36 offer then, subject to the discretion in what is now r. 44.2, the claimant should be awarded its costs. This is so, particularly in personal injuries claims, even where the judgment is substantially lower than the amount claimed. In these cases the defendant should have protected itself by making a realistic, albeit modest, Part 36 offer (*Morgan v UPS* [2008] EWCA Civ 1476, [2009] 3 Costs LR 384). *Fox v Foundation Piling Ltd* recognised in this context that there is a distinction between:

- (a) cases where the reduction is as a result of surveillance or medical evidence, even if that shows the claimant's injuries have been exaggerated, where r. 36.14(1A) applies and the claimant should be awarded all their standard-basis costs; and
- (b) cases where the claimant has been dishonest, where consideration should be given to depriving the claimant of the protection given by Qualified One-way Costs Shifting ('QOCS') under the new r. 44.16(1).

While r. 36.14(1A) overrules the decision in *Carver v BAA plc* [2008] EWCA Civ 412, [2009] 1 WLR 113, it only does so with effect from 1 October 2011. This means that *Carver v BAA plc* is binding on all courts up to the Court of Appeal in relation to Part 36 offers made from 6 April 2007 until 30 September 2011.

### **Claimants' Part 36 Offers**

The *Final Report* also considered the arguments for increasing the rewards for a claimant who makes a successful Part 36 offer. There was an marked imbalance in the existing system. Under r. 36.14(2) (which remains unchanged by the Jackson Reforms), a defendant making a successful Part 36 offer would generally be awarded its costs from the end of the relevant period. This often has a dramatic effect, and can potentially wipe out the entirety of the damages awarded (as recognised by the *Final Report* at para. 41.3.4).

While the pre-Jackson rules in Part 36 sought to provide real benefits for a claimant making a successful Part 36 offer, the *Final Report* concluded that such a claimant has been insufficiently rewarded (para. 41.3.9). Under the pre-Jackson version of r. 36.14(3), unless the court considered it unjust to do so, it had the power to order interest on the whole or part of any sum of money (excluding interest) awarded at a rate not exceeding 10 per cent above base rate for some or all of the period starting with the date on which the relevant period expired, costs on the indemnity basis, and interest at up to 10 per cent above base rate on any indemnity basis costs. These benefits were not always awarded, and were far less valuable than the split costs orders available to defendants. The result has been that claimant's Part 36 offers have not always been treated seriously by defendants (for example, at para. 41.3.5).

To ensure there are adequate benefits for a claimant who makes a successful Part 36 offer, the *Final Report* proposed that there should be an uplift of 10 per cent on the damages awarded to claimants in such cases (para. 41.3.10). It was recognised that this might produce a disproportionate benefit in high value cases, and so it was suggested that further consultation should be undertaken over whether a taper in the additional damages would be appropriate for claims of over £500,000. It was also recognised that non-monetary claims

also needed a similar incentive. The suggestion made in the *Final Report* was that in these cases there should be a rough and ready summary assessment of value in money terms of the non-monetary relief granted (para. 41.3.12), so that an award of 10 per cent of that assessed value could be made.

These proposals, together with the taper, have been implemented by CPR, r. 36.14(3), which says:

'Subject to paragraph (6), where rule 36.14(1)(b) applies, the court will, unless it considers it unjust to do so, order that the claimant is entitled to –

- (a) interest on the whole or part of any sum of money (excluding interest) awarded at a rate not exceeding 10 per cent above base rate for some or all of the period starting with the date on which the relevant period expired;
- (b) costs on the indemnity basis from the date on which the relevant period expired;
- (c) interest on those costs at a rate not exceeding 10 per cent above base rate; and
- (d) an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below to an amount which is -
  - (i) where the claim is or includes a money claim, the sum awarded to the claimant by the court; or
  - (ii) where the claim is only for a non-monetary claim, the sum awarded to the claimant by the court in respect of costs.'

The additional amount that may be awarded is prescribed by the Offers to Settle in Civil Proceedings Order 2013, SI 2013/93. For mixed money and non-money relief claims the additional amount is computed by reference to the money part of the judgment. For non-money claims it is computed by reference to the costs awarded. For pure money claims it is computed by reference to the following table:

<i>Amount awarded by the court</i>	<i>Prescribed percentage</i>
up to £500,000	10 per cent of the amount awarded;
above £500,000, up to £1,000,000	10 per cent of the first £500,000 and 5per cent of any amount above that figure
above £1,000,000	7.5% of the first £1,000,000 and 0.001% of the amount awarded above that figure

The additional amount in CPR, r. 36.14(3)(d) was seen by Lord Justice Jackson as being an integral part of the reforms that included abolishing the recoverability of CFA success fees and other additional liabilities. As stated in the tenth implementation lecture, *Why Ten Per Cent*, IBC Conference, 29 February 2013, abolition of success fees, increasing damages by 10 per cent, and the ability of claimants to augment their damages by a further 10 per cent by making an effective Part 36 offer, are parts of a balanced package. The balance in the package of reforms will only be maintained if the courts are ready to impose awards of the additional amount where the claimant has made a successful claimant's Part 36 offer.

The opening words of the revised r. 36.14(3) remain unchanged. They allow the court to depart from the usual consequences in r. 36.14(3) where the court considers these unjust. Guidance on situations where it would be unjust to impose the orders authorised by r. 36.14(3), is given by r. 36.14(4) (which remains unchanged). This provides that in considering whether it would be unjust to make the orders referred to in r. 36.14(2) or (3), the court will take into account all the circumstances of the case including :

- (a) the terms of any Part 36 offer;

- (b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;
- (c) the information available to the parties at the time when the Part 36 offer was made; and
- (d) the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer to be made or evaluated.

Before the Jackson Reforms were brought into effect the courts regularly found reasons why it would be unjust to make full use of the powers available under what used to be r. 36.14(3)(a) to (c). It was held that the court should not start with the assumption that it should award the maximum enhanced interest, but must stand back and ensure that the enhanced interest did not provide a disproportionate benefit (*Earl v Cantor Fitzgerald International (No. 2)* (2001) LTL 3/5/2001). Although full 10 per cent above base rate interest was awarded on occasions, such as *Blue Sphere Global Ltd v Commissioners of HM Revenue and Customs* [2010] EWCA Civ 1448, LTL 16/12/2010, it was more common for some lower rate to be applied. For example, in *Pankhurst v White* [2010] EWHC 311 (QB), [2010] 3 Costs LR 402, enhanced interest on damages in a personal injuries claim was awarded at 10 per cent per annum on past losses (instead of the then current 6 per cent special account rate), and at 4 per cent per annum (instead of 2 per cent) on damages for pain, suffering and loss of amenity. While higher than the interest rates normally applied in personal injuries claims, these rates were below 10 per cent above base rate.

While there was more appetite for making orders for indemnity basis costs, that was not seen as particularly valuable given the not unreasonable approach usually taken on standard basis assessments. In considering whether to order interest on indemnity basis costs, much of the impact intended by r. 36.14(3)(c) was lost by decisions like *KR v Bryn Alyn Community (Holdings) Ltd* [2003] EWCA Civ 383, [2003] CP Rep 49 and *Chantrey Vellacott v Convergence Group plc* (2007) LTL 3/10/2007. The latter case held that the purpose of an order for interest on indemnity costs is to compensate for the cost of money, or loss of the use of money, borne before trial in relation to payments made on account of costs.

The underlying problem was that the courts tended to regard the consequences in r. 36.14(3) as primarily compensatory in nature. They are not. They are intended to be rewards for claimants who have made successful Part 36 offers, and the new powers are intended to provide benefits equivalent to the costs orders available under r. 36.14(2) to defendants making successful Part 36 offers. It is essential that the courts readily allow claimants who have made successful Part 36 offers the additional 10 per cent as a reward, and break with the restrictive approach to r. 36.14(3) that was prevalent before 2013.

### **Qualified One-Way Costs Shifting and Part 36 Offers**

By CPR, r. 44.13(1), the provisions on QOCS in rr. 44.14 to 44.16 apply to proceedings which include a claim for damages:

- (a) for personal injuries;
- (b) under the Fatal Accidents Act 1976; or
- (c) which arises out of death or personal injury and survives for the benefit of an estate by virtue of section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934.

There is an extended definition of 'claimant' for the purposes of the rules on QOCS in r. 44.13(2), which covers a person bringing a personal injuries claim, or an estate on behalf of which such a claim is brought, and includes a person making a counterclaim or an additional claim for damages for personal injuries.



QOCS will not apply to proceedings in which the claimant has entered into a pre-commencement funding arrangement as defined by CPR, r. 48.2 (see r. 44.17), which means that if the claimant, for example, entered into a CFA before 1 April 2013, QOCS will not apply. There is a proviso to r. 44.13(1) which excludes applications for pre-commencement disclosure under pursuant to the Senior Courts Act 1981, s. 33, or the County Courts Act 1984, s. 52, from the scope of QOCS.

The inter-relation between QOCS and Part 36 offers was considered in the *Final Report* at paras 41.4.1 to 41.4.3. The conclusion reached in the *Final Report* was that if a defendant makes a successful Part 36 offer in a case where the claimant has the benefit of QOCS, the claimant should forfeit, or, depending on the circumstances, substantially forfeit, the benefits of QOCS. One-way costs shifting is achieved by CPR, r. 44.14(1), in a somewhat obscure fashion. This provides:

‘Subject to rr. 44.15 and 44.16, orders for costs made against a claimant may be enforced without the permission of the court but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for damages and interest made in favour of the claimant.’

While r. 44.14(1) is a general provision defining the nature of costs protection for all claimants in personal injuries claims, its detailed wording has been designed to give effect to the principle laid down in the *Final Report* at paras 41.4.1 to 41.4.3 for cases with successful defendant's Part 36 offers.

Where a claimant with the benefit of QOCS has succeeded on liability and obtained a money award, but has failed to achieve a judgment more advantageous than the defendant's Part 36 offer, r. 36.14(2) says that unless the court considers it unjust to do so, it will award costs to the claimant up to the end of the relevant period (as defined by r. 36.3(1)(c)), and the defendant its costs thereafter. The partial costs orders in favour of the claimant and in favour of the defendant can be set-off against each other under r. 44.12. The net effect, especially if the Part 36 offer was made in the early stages of the claim, is that there is often a net costs liability due from the claimant to the defendant under an order made under r. 36.14(2)). By virtue of r. 44.14(1), that net costs liability can be enforced without permission against the awards in favour of the claimant for damages and interest, but must not exceed those awards. Where the net liability for costs is less than the money judgment, r. 44.14(1) allows the defendant to reduce the amount it pays to the claimant by the net liability for costs. Where the net liability for costs equals or exceeds the money judgment, r. 44.14(1) allows the defendant to reduce the money judgment to zero.

## **CLARITY**

Payments into court under the RSC were well understood, and caused few problems for many years. Its replacement in CPR Part 36 caused so many difficulties and unforeseen areas of controversy that the whole of Part 36 had to be replaced in 2007. The replacement version of Part 36 is to be construed as a self-contained code (*Gibbon v Manchester City Council* [2010] EWCA Civ 726, [2011] 2 All ER 258, per Moore-Bick LJ at [5]). In theory it contains a carefully constructed and highly prescriptive set of rules dealing with formal offers to settle which have specific consequences. Consequently, the general law of contract does not necessarily apply to offers and acceptances under Part 36. As explained by Moore-Bick LJ at [6]:

‘Certainty is as much to be commended in procedural as in substantive law, especially, perhaps, in a procedural code which must be understood and followed by ordinary citizens who wish to conduct their own litigation. In my view, Part 36 was drafted with these

considerations in mind and is to be read and understood according to its terms without importing other rules derived from the general law, save where that was clearly intended.'

Under CPR, r. 36.9(2), a Part 36 offer '... may be accepted at any time (whether or not the offeree has subsequently made a different offer)'. Consequently, the general rule that a contractual offer is taken to be rejected by making a counter-offer does not apply to Part 36 offers. By r. 36.3(5)-(7), a Part 36 offer may be withdrawn, but only by serving a written notice of withdrawal or change of terms on the offeree. *Gibbon v Manchester City Council* interpreted this as a comprehensive statement of how a Part 36 offer can come to an end in the absence of an acceptance. There is no such thing as an implied withdrawal of a Part 36 offer, and even an express rejection by the offeree has no effect in the absence of a written withdrawal complying with r. 36.3(7). This means that a Part 36 offer may be accepted, and has the effect of settling the claim, even after it has been rejected or been the subject of a counter-offer. Also, unless expressly withdrawn or changed, the effect of the offeror making another Part 36 offer is that there are then two live Part 36 offers from the same party, each with its own effects on costs depending on its terms and the date it was made. Rather than aiding certainty, this approach of having parallel, but different, systems of offer and acceptance for the general law of contract and Part 36, has to be regarded as being a source of confusion, particularly for litigants in person who are likely to understand the general law of land, rather than the precise terms of Part 36.

The decision in *Gibbon v Manchester City Council* places a premium on establishing that an offer is technically an offer to settle within Part 36. The costs consequences of accepting such an offer under r. 36.10, flow from making an offer complying with the requirements of Part 36. Where an offer is not a Part 36 offer, failing to accept it will not have the consequences set out in r. 36.14. That is the starting position, as affirmed by *F & C Alternative Investments (Holdings) Ltd v Barthelemy* [2012] EWCA Civ 843, [2012] 4 All ER 1096. It is therefore wrong in principle to apply what are deliberately swingeing costs sanctions from r. 36.14 by analogy to a case where an offer fails to comply with the formal requirements of Part 36 in a number of respects. Instead, in such a case costs have to be considered applying the normal costs rules in Part 44. All that the new r. 44.3(4)(c) requires is that the offer has to be taken into account, but there are no normal results as there are in r. 36.14.

## FORMALITIES

An offer to settle within the meaning of CPR, Part 36 must be made in writing and comply with the formalities set out in r. 36.2. One basic set of formalities applies to all Part 36 offers, although there are additional requirements dealing with particular circumstances, as follows:

- (a) It must be in writing (r. 36.2(2)(a)). Although a Part 36 offer may be made in a letter, it is better to use form N242A (see PD 36A, para. 1.1).
- (b) It must state on its face that it is intended to have the consequences of Part 36 (r. 36.2(2)(b)).
- (c) If made at least 21 days before trial, it must specify a period of not less than 21 days (the relevant period) within which the defendant will be liable for the claimant's costs in accordance with r. 36.10 if the offer is accepted (r. 36.2(2)(c) and (3)).
- (d) It must state whether it relates to the whole of the claim or part of it or to an issue that arises in the claim, and if so, which part or issue (r. 36.2(2)(d)). It may relate solely to liability (r. 36.2(5)). A defendant's offer to settle liability with a stated percentage deduction for contributory negligence is an offer on liability within r. 36.2(5) and is not an offer on part of a claim under either r. 36.10(2) or r. 36.11(3) (*Onay v Brown* [2009] EWCA Civ 775, LTL 10/8/2009).
- (e) It must state whether it takes into account any counterclaim (r. 36.2(2)(e)).

(f) If the Part 36 offer is made in a personal injuries claim there may be further formalities to comply with (r. 36.2(4)). These apply where the claim includes damages for future pecuniary loss (see r. 36.5); provisional damages (see r. 36.6); and where recoupment of State benefits applies (see r. 36.15).

It is these requirements, which are all either within or referred to in r. 36.2, that define whether the offer complies with Part 36. Any Part 36 offer must also state the terms of the proposed compromise, which should be sufficiently precise and certain for an effective contract to be formed if the offer is accepted. While essential for the purpose of reaching a binding compromise, this is not strictly a requirement laid down in r. 36.2.

There are also a number of other provisions in Part 36 that operate in a similar way to implied terms in a contract, although they are not described in that way in Part 36. These other provisions cover:

- (a) Offer of a single sum of money. Where a Part 36 offer made by a defendant is of a sum of money in settlement, the offer must be of a single sum of money (r. 36.4(1)).
- (b) Interest. If the offer relates to a money claim, by r. 36.3(3) it will be treated as inclusive of all interest until the end of the relevant period (or to 21 days after the offer if it is made within 21 days of the start of the trial).
- (c) Payment within 14 days. Unless the parties agree otherwise, where an offer to pay a single sum of money is accepted, the agreed sum must be paid within 14 days of the acceptance (r. 36.11(6)). An offer that includes a term to the effect that payment will be later than this 14 day period is not a Part 36 offer unless the offer is accepted (r. 36.4(2)).
- (d) Withdrawal of the offer. A Part 36 offer can only be withdrawn in the circumstances laid down by r. 36.3(5) to (7). Before the expiry of the relevant period court permission is required to withdraw or reduce a Part 36 offer. Thereafter, any withdrawal or change in the offer has to be made in writing.
- (e) Stay on acceptance. If a Part 36 offer is accepted, the claim is stayed (r. 36.11(1)).

As these provisions they are not in r. 36.2 they are ought not to be essential. As discussed below, sometimes inserting terms into a Part 36 offer that are inconsistent with these provisions can result in the court deciding the offer is not a Part 36 offer at all.

A failure to comply with any of the requirements in r. 36.2 is fatal (*Huntley v Simmonds* [2009] EWHC 406 (QB); *Carillion JM Ltd v PHI Group Ltd* [2011] EWHC 1581 (TCC), [2011] BLR 504). So, for example, in *Thewlis v Groupama Insurance Co Ltd* [2012] EWHC 3 (TCC), [2012] BLR 259, a letter that purported to be a Part 36 offer said it would remain open for acceptance for 21 days, but after which it could only be accepted if costs were agreed or the court gave permission. It was held the letter did not to comply with r. 36.2 in that while it referred to some of the consequences of Part 36 it did not comply with them all. Accordingly, the letter was not a Part 36 offer.

Determining whether there has been a departure of such a nature to move the offer outside Part 36 is often a complex exercise. As mentioned above, one requirement is that a Part 36 offer must specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with r. 36.10 if the offer is accepted (r. 36.2(2)(c)). Under r. 36.10(1), where a Part 36 offer is accepted within the relevant period the claimant is entitled to the costs of the proceedings up to the date of the notice of acceptance. By virtue of r. 36.9(2), a Part 36 offer can also be accepted after the expiry of the relevant period (with some exceptions where permission is granted as set out in para (3)) unless the offeror has served notice of withdrawal on the offeree. This means that Part 36 offers need to be phrased so that they remain open for acceptance even after the 21-day relevant period.

In *C v D* [2011] EWCA Civ 646, [2012] 1 All ER 302 a written offer was expressed to be "open for 21 days from the date of this letter". The offeree purported to accept the offer well after the expiry of the 21 day period. The offeror argued that the purported acceptance was ineffective because the offer had lapsed through effluxion of time. The Court of Appeal held, in accordance with the framework laid down by Part 36, that a time-limited written offer cannot be an offer to settle within the meaning of Part 36 because time-limiting an offer is inconsistent with the scheme of Part 36. Under the CPR, the only way a Part 36 offer can cease to have effect is if it is withdrawn by service of a written notice of withdrawal under r. 36.3(7), and an offer purporting to provide its own machinery for terminating the offer is therefore one that operates outside of Part 36.

The critical question in *C v D* was whether the term that the offer was "open for 21 days" amounted to a time-limit on the offer. This has to be answered by asking how a reasonable solicitor would have understood the offer in the context of the rules in Part 36 and the context of the dispute as it stood at the time of the offer (*Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98; *Onay v Brown* [2009] EWCA Civ 775). The Court of Appeal seemed to accept that the traditional and well understood meaning of the words was that the offer would remain open for 21 days, but would then lapse (at paras [48] and [72]). If that was so, the offer would not have been a Part 36 offer. That did not however dispose of the point. As Lord Hoffmann said in *Investors Compensation Scheme Ltd v West Bromwich Building Society* at 115, the meaning which a document would convey to a reasonable man is not the same thing as the meaning of its words. Looking at the background may result in deciding between different ambiguous meanings, or even lead to a conclusion that the parties must have used the wrong words or syntax.

As Rix LJ said at [48], what the court had to decide was what the words used meant in the context of Part 36, given that the offer expressly stated it was an "offer to settle under CPR Part 36", and in the light of the fact that Part 36 does not permit time-limited offers. Applying the principle that the court will seek to bring rational sense and consistency to the whole of the relevant document (*Pagnan SpA v Tradax Ocean Transportation SA* [1987] 1 All ER 81), the words "open for 21 days" could rationally be construed to mean that the offer would not be withdrawn within that 21-day period (at [54]). Adopting that construction harmonised the offer with the scheme of Part 36, and was also consistent with the principle that words should if possible be read in a manner that makes the document effective rather than ineffective.

The court also considered the subsequent email correspondence between the solicitors to see whether at any stage the offeror had withdrawn the offer for the purposes of r. 36.3(7). Although the emails seemed to assume the offer was time-limited, the real effect of the emails was to discuss whether an extension of the 21-day period would be given. None of the emails amounted to a notice of withdrawal of the offer. As a result the offer remained open for acceptance 11 months after it was made, so the offeree's acceptance at that point meant that the claim was settled in the terms of the offer, with costs being the only issue left to be decided.

*C v D* is one of a whole welter of cases on whether particular offers come within Part 36. There are a number of problems when it comes to certainty and clarity of Part 36 offers:

(a) With a list of six basic requirements, and in personal injuries claims, several more (r. 36.5 for example has 4 additional requirements in r. 36.5(4) that extend to 16 lines of text in the rule), it is all too easy to miss out one of the requirements, or to set it out in a way that does not or may not fully comply with r. 36.2. The problem is exacerbated by the fact the requirements are spread over four rules (rr. 36.2, 36.5, 36.6 and 36.15).

(b) Following the prescribed form does not prevent mistakes. For example, while form N242A does refer, for example, to r. 36.5, it does so only in general terms in a box under a heading indicating it is a note, and with no text box to set out the requirements specified by r. 36.5(4).

(c) Even if a conscious effort has been made to set out wording to comply with all the requirements in r. 36.2 and the rules referred to in r. 36.2(4), there have been an increasing number of cases where the free text used for setting out the terms of the offer has resulted in litigation over whether the effect of the free text renders the offer non-compliant with Part 36. The most common problems relate to terms as to costs, permission to accept after the relevant period, and whether the offer remains open for acceptance after the relevant period.

It is obviously unsatisfactory that a party can use a prescribed form for the purpose of making a Part 36 offer only to find that, through some defect, the offer does not come within Part 36. It is not much better if the same thing happens to a solicitor's letter clearly headed as a Part 36 offer. It is equally unsatisfactory for an offeree to be left in any doubt over whether an offer is or is not a formal Part 36 offer. Having satellite litigation over whether an offer is or is not compliant with r. 36.2 is just as damaging to civil justice as satellite litigation over funding.

Technical arguments over whether offers technically qualify as Part 36 offers is only one of a range of issues under Part 36 that are open to doubt. Others include:

(a) The extent to which the general principles of contract law apply to Part 36. As discussed above, *Gibbon v Manchester City Council* says Part 36 is a self-contained code, which explains why the normal rules on offer and acceptance do not apply. *C v D* on the other hand used the general principles of contractual interpretation to construe whether the terms of the particular offer complied with Part 36.

(b) Whether Part 36 really is a self-contained code. New provisions on Part 36 offers in other Parts of the rules, such as rr. 44.9(2) and 47.20(4), (7) and PD 47, para. 19, damage this idea.

(c) How pre-action Part 36 offers should deal with costs. Technically, costs incurred in a dispute that never results in court proceedings are non-contentious costs, whereas they become contentious costs when a claim form is issued. The new r. 44.9(2) says r. 36.10(1) and (2), which say that where a Part 36 offer is accepted within the relevant period the claimant will be entitled to the costs of the proceedings up to the date of the acceptance (and which by r. 36.10(3) will be assessed on the standard basis) do not apply where the Part 36 offer is accepted before the commencement of proceedings. There is nothing in the CPR or the Practice Directions to fill this gap.

(d) The effect of multiple 'live' offers created by the concept (from *Gibbon v Manchester City Council*) that because a Part 36 offer can only be withdrawn in writing under r. 36.3(7) it is possible for a party to have made several Part 36 offers, all of which are 'on the table' at the same time.

(e) The approach of the courts to when it is unjust to apply the usual costs and other consequences provided for by r. 36.14. There are significant variations in different decisions.

(f) The approach of the courts on costs in cases where there are offers that do not comply with Part 36. As mentioned above, under r. 44.2 the offer, if admissible, is in this situation just one of the factors the court should take into account.

(g) Whether a non-compliant offer is even admissible on the question of costs. A Part 36 offer is admissible on costs as is apparent from r. 36.14, and because r. 36.13(1) says it will be treated as 'without prejudice' save as to costs. A true *Calderbank* offer has the same effect. However, the wording of r. 36.13(1) means there is no need to use the words 'without prejudice save as to costs' in an effective Part 36 offer because it will be treated as such. But r. 36.13(1) does not apply if the offer does not comply with Part 36. Unless the words were used in the particular offer, strictly a non-compliant offer ought not to be admissible on costs.

(unless it was not a genuine attempt to settle, in which case it would not be relevant on costs in any event).

## **CONCLUSION**

Part 36 seems to have a shelf-life of about eight years. As long as there are no or few appellate decisions on whichever way it is worded it seems to operate reasonably well. Given a number of years of scrutiny by the Court of Appeal, the inconsistencies, ambiguities and technical arguments start multiplying. Satellite litigation over Part 36 is just as damaging as satellite litigation over funding. The reason why Part 36 generates satellite litigation is that the consequences of failing to obtain a more advantageous judgment are too severe. There is therefore a major incentive to challenge the result, whether it is one laid down in rr. 36.10 or 36.14, or a costs decision by a judge. While removing the uncertainty generated by *Carver v BAA* was definitely a step in the right direction, the new r. 36.14(3) on claimant's Part 36 offers will mean there is an increased incentive to challenge the orders made in favour of claimants. Placing a cap of approximately £75,000 on the additional award is probably wise, in that it keeps the value of the reward to the claimant down to a reasonably proportionate figure, and limits the incentive to mount further challenges.

It may well be time to replace Part 36 completely in any event. The fact it is possible to point to a wide range of areas of uncertainty, almost all of which stem from Court of Appeal decisions since 2007, points in that direction. If Part 36 is reformed, the key must be to keep it simple. This is the burden of recommendation 2 in the *Final Report*, and the reason is that the more the rules say about a subject, the greater the scope for mounting challenges of a technical nature. Any reform of Part 36 should be accompanied by simple prescribed forms which comply fully with any technical requirements, and which if necessary make separate provision for money claims, personal injury claims, non-money claims, mixed money and non-money claims, and pre-action offers.