

Part 36 and Protection of Property Disputes



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REFRESHER – THE TECHNICALITIES



Requirements (1/2)

- CPR r. 36.5(1):
 1. In writing
 2. Make clear pursuant to Part 36
 3. Specify a period of no fewer than 21 days within which D will be liable for C's costs if accepted (the "Relevant Period") – save for where fewer than 21 days before trial
 4. Make clear whether covers whole or part of the claim and/or counterclaim
- Cannot be withdrawn or changed (to be less advantageous) until after expiry of the Relevant Period (CPR r. 36.9(4))
- The Part 36 offer may be time-limited (i.e., it is automatically withdrawn on a certain date)



Requirements (2/2)

- Form N242A – Pepperall J in *Essex CC v UBB Waste (Essex) Ltd (No. 3)* [2020] EWHC 2387 (TCC):

“...much of the difficulty would be avoided if parties would only use form N242A to make their [Part 36] offers.”

- General discretion to disapply the Part 36 regime where “*unjust*”.
- CPR r. 36.13(6) and 36.17(5) require that the Court take into account “*all of the circumstances of the case*” when considering whether or not it would be unjust to apply/disapply any of the Part 36 costs consequences.



Costs consequences – if accepted

Accepted <u>within</u> the Relevant Period	Accepted <u>outside</u> the Relevant Period
<p>C is entitled to costs up to acceptance</p> <p>(CPR r. 36.13(1))</p>	<p>C is entitled to costs up to expiry of the Relevant Period</p> <p>The offeree pays offeror's costs from expiry of the Relevant Period up to acceptance</p> <p>(CPR r. 36.13(4)(b) and (5))</p>



Costs consequences – if rejected

C makes Part 36 offer. D does not accept.	D makes Part 36 offer. C does not accept.
<p>C fails to obtain more advantageous terms</p> <p>Usual costs rules apply</p>	<p>C fails to obtain more advantageous terms</p> <p>C liable to pay D's costs from expiry of the Relevant Period, plus interest (CPR r. 36.17(3))</p>
<p>C wins and obtains at least as advantageous terms</p> <ol style="list-style-type: none"> 1. Interest on damages up to 10% (from expiry of the Relevant Period) 2. Additional amount of up to 10% of damages (max. £75k) 3. Costs on indemnity basis (from expiry of the Relevant Period) 4. Interest on costs up to 10% (CPR r. 36.17(4)) 	<p>C wins and obtains more advantageous terms</p> <p>Usual costs rules apply</p>



PRACTICAL POINTERS



A law unto itself...

- The Part 36 machinery is a self-contained regime. It therefore escapes some of the ordinary rules applicable to contracts.

- Two of the most important aspects:
 1. The level of certainty required to constitute a valid Part 36 offer is not the same as that under the law of contract.
 2. The requirements of s. 2 of the Law of Contract (Miscellaneous Provisions) Act 1989 do not apply.



Certainty of terms (1/2)

- *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 1188
- C made short Part 36 offer to settle the claim on terms that D:
 - (a) pay £63,124 to the Claimant;
 - (b) take ownership of certain storage pods in issue; and
 - (c) pay the Claimant's reasonable costs, to be assessed if not agreed.
- PoC stated full particulars of C's loss would be given in a Schedule of Loss – had yet to be provided.
- D claimed it could not properly consider the Part 36 offer and C could not rely on the costs consequences in Part 36.



Certainty of terms (2/2)

- Court confirmed C had beaten the Part 36 offer, as the Court awarded damages of £92,375.22.
- Newey LJ on extent of certainty required:

“... a Part 36 offer can potentially leave more to be resolved than a contractual offer could. While contractual principles can be relevant to the interpretation of a Part 36 offer ... CPR 36.1 explains that Part 36 contains a "self-contained code" and Part 36 nowhere stipulates that a Part 36 offer must have the certainty that a contractual offer requires.

Further, the facility which CPR 36.8 provides for asking for clarification of an offer tends to confirm that something can be a Part 36 offer while yet needing to be clarified. I do not doubt that an "offer" can be so lacking in certainty as not to represent a Part 36 offer, but, on the other hand, a valid Part 36 offer can still, as I see it, leave some matters (especially of mechanics) to be further defined.”



Application to property interests (1/3)

- *Orton v Collins* [2007] 1 WLR 2953 - partnership dispute in respects of a law firm.
- C served a notice of dissolution and commenced proceedings.
- C made a Part 36 offer, which included an obligation on Ds to pay C to dispose of his interests in a law firm and its premises.
- Offer was accepted.
- C later sought to argue that there was no settlement agreement, as the Part 36 offer and its acceptance concerned the disposition of an interest in land, but failed to comply with s. 2 of the Law of Property (Miscellaneous Provisions) Act 1989.



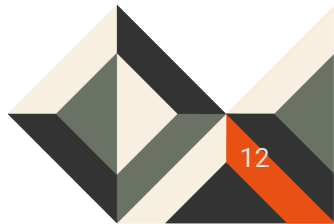
Application to property interests (2/3)

- The issue:

“... what I have to decide is whether a Part 36 acceptance that, for some reason, creates no contract can nevertheless be enforced by application to the court.

- Determination:

“61. In my judgment, if parties who are before the court choose to employ machinery prescribed by the court's rules in order to settle their dispute, they must be taken to submit to the consequences. Namely, that if the offer is accepted the court may enforce it. A party who makes a valid Part 36 offer, or one who accepts it, must be taken to be binding himself to submit to those consequences.”



Application to property interests (3/3)

“62. ... I therefore hold that it need not be a contract that is being enforced and that the regime of Part 36, while it may well give rise to a contract under the general law touching offer and acceptance, does not depend upon contract law, Infringement of human rights there is none. Nobody is forcing a party to make or accept a Part 36 offer. The obligation that arises is not primarily contractual. It is sui generis. It is part of the court's inherent jurisdiction, now regulated and clarified in CPR Part 36, “to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner”. The administration of justice includes addressing the settlement of disputes.



OTHER PRACTICAL POINTS



Service of Part 36 offer by email (1/4)

- CPR r. 36.7(2) confirms that a Part 36 offer is made when it is served.
- Part 6 permits service by way of personal service, first class post, leaving it at a particular place, and fax or or other means of electronic communication (in accordance with PD 6A).
- Practice Direction 6A, para. 4.1 provides that a party must have indicated in writing that they are willing to be served by email and identify the email addresses to which it must be sent.
- NB: para. 4.2 requires the serving party to ask the receiving party whether there are any limitations to their agreement to accept service by email (e.g., format or file size).



Service of Part 36 offer by email (2/4)

- So, what happens if a party fails to comply with PD6A but purports to serve by email anyway?
- *London Trocadero (2015) LLP v Picturehouse Cinemas Ltd* [2021] 4 WLR 143.
- C purported to serve Part 36 offer by email, without complying with PD6A. Ds argued that it was not validly made and therefore of no effect.
- C relied upon CPR r. 3.10 - where there has been an error of procedure, it will not invalidate any steps taken in proceedings unless the court so orders.



Service of Part 36 offer by email (3/4)

Robin Vos (sitting as a Deputy Judge of the High Court) said an order invalidating the offer would be "*a triumph of form over substance*" :

"it is clear that the defendants' solicitors received the Part 36 offer on 15 December 2020. ... No complaint was made about the method of service of the Part 36 offer until shortly before the hearing on 3 November. No suggestion has been made that there is any prejudice to the third defendant in the Part 36 offer having been sent by email rather than having been served in some other way, for example by post. In these circumstances, it would in my view be *a triumph of form over substance* if the court were to make an order invalidating the Part 36 offer."



Service of Part 36 offer by email (4/4)

- *London Trocadero* followed in *Coldunell Ltd v Hotel Management International Ltd* [2023] TCLR 1.
- Any consequences flowing from the defective service? Maybe ...
- In *London Trocadero*, At [45], Vos held:

“45. In my view, a further relevant factor to take into account is the defective service of the Part 36 offer. Although I have concluded that it is not in accordance with the overriding objective to invoke CPR Rule 3.10(a) and make an order that the Part 36 offer has not been validly made, this is in my view a reason why it would be unjust to award the claimant the maximum available under CPR Rule 36.17.”

- But approach was not followed in *Coldunell* - judge refused to disapply any of the costs consequences due to defective service, noting that Dknew about the offer, suffered no detriment and should have challenged validity at the time.



Pleaded issues (1/2)

- CPR r. 36.2(3)(a) - a Part 36 offer may be made in respect of the whole, or part of, or any issue that arises in a claim, counterclaim or other additional claim.
- *Hertel v Saunders* [2018] EWCA Civ 1831:

“... I construe [that] as referring to pleaded claims, parts of claims or issues, and not other claims or issues which may have been intimated in some way but never pleaded. Once proceedings have started, the certainty required for Part 36 to operate properly can only be achieved by this interpretation. A new claim which has been intimated, but which is not part of the pleadings, is not therefore caught by r.36.2(2)(d) (current r.36.5(2)(d)).”



Pleaded issues (2/2)

- *However*, see *AF v AB*[2010] 2 Costs LR 164 - the fact of a counterclaim not being “*formulated or pleaded does not of itself matter*”.
- See also *Calonne Construction Ltd v Dawnus Southern Ltd*[2019] 1 WLR 4793 - early offer to settle proposed claim which had yet to be pleaded:





“in the light of the fact that a party is entitled to make a Part 36 offer at any time, including before commencement of proceedings (r 36.7), it cannot be correct that a Part 36 offer cannot be made in relation to a counterclaim before that claim has been pleaded.”



Thank you

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