The art of the settlement offer: the new Part 36

06 April 2015 will see the introduction of long awaited changes to Part 36 offers to settle litigation, so what will change?

The English judiciary have repeatedly made clear that they expect all parties to seek to settle their disputes without recourse to a trial. In support of this aim, the rules provide for costs consequences to incentivise the making of settlement offers and many judges have commented that they expect such offers to be made in every case.

It is therefore unfortunate that Part 36 of the Civil Procedure Rules, which sets out the regime for settlement offers with costs consequences, is one of the most technical and difficult sections of the CPR. The process of making an offer and the consequences of such offers seem to throw up endless difficulties, as illustrated by the fact that the Court of Appeal has had to consider Part 36 offers no fewer than 32 times in the last 3 years.

All change?

A root and branch overhaul of Part 36 has been on the cards for several years and would probably have happened sooner, had there not been so many other changes to incorporate as part of the Jackson reforms. Now that the dust has at least partly settled on those, the Civil Procedure Rule Committee has published a new draft of Part 36 to take effect from 06 April 2015. So how radical are the changes?

The structure of Part 36 has not been changed. Either party can make a Part 36 offer at any point in the proceedings, including pre-action, in costs proceedings or in appeal proceedings, though the offer must be specific to those proceedings. If the other party accepts it within the “Relevant Period” of at least 21 days, the agreed sum must be paid with 14 days and the defendant must pay the claimant’s costs, to be assessed if not agreed.

Offers remain open unless expressly withdrawn, and if an offer is accepted after the Relevant Period the offeree must pay the costs of the offeror since the Relevant Period expired, regardless of which side made the offer. So if the defendant made the offer, the defendant would pay the claimant his costs up to the end of the relevant period, but the claimant would pay the defendant’s costs since then, to reflect the fact that he should have accepted the offer earlier and costs incurred since have been wasted.

If an offer is not accepted but the offeror obtains a result at least as advantageous at trial, the offeror will gain specified advantages in costs and, if the offeror was the claimant, an additional amount in damages as well. All of this remains the
same in the new Part 36 and it is still not possible to make an offer inclusive of costs.

**What’s new?**

The amendments to Part 36 instead focus on dealing with some of the issues the caselaw has thrown up, sometimes codifying what the courts decided, in other places overturning it.

- Formalities are reduced, so that there is no longer any need to expressly state that the offer is “intended to have the consequences of Section 1 of Part 36”. It will be sufficient to “make clear” that the offer is made pursuant to Part 36.
- It will be permitted to make a time limited offer, as long as it is open for acceptance for at least 21 days. The offer will then be considered withdrawn under its own terms without the need for a separate notice of withdrawal. The benefit of this is unclear, as a withdrawn offer does not achieve the prescribed costs benefits of Part 36 to the offeror. It may be taken into account in a costs assessment, but so may any other settlement offer, so it is effectively not really a Part 36 offer at all.
- In order to deter claimants from making an offer to accept a sum that is almost the whole of their claim, or a defendant offering a derisory sum, the court will now consider, before imposing the usual costs consequences, whether a Part 36 offer “was a genuine attempt to settle the proceedings”.
- Where there is to be a split trial, either of liability and then quantum or of preliminary issues, the parties will now be allowed to refer to the existence of a Part 36 offer after the first trial. If the offer was only in respect of issues that have now been decided (such as an offer on liability only where there has now been a judgment on liability), the parties may also refer to the terms of the offer. This aims to prevent costs orders being made after a first trial in ignorance of relevant Part 36 offers, an issue which arose in *Ted Baker v Axa Insurance*.
- Again where there is a split trial, if a global offer to settle the whole case has been made, it may not be accepted by the offeree in the seven days after judgment is delivered in the first trial. This gives the offeror the chance to withdraw and revise the offer if its case has proved to be stronger than it perhaps thought.
- A defendant who is making a counterclaim can make a claimant’s Part 36 offer that requires the other party to pay its costs. This addresses the issue that arose in *F&C Alternative Investments v Barthelemy* where the party who would logically have been the defendant brought proceedings for a negative declaration, thus making itself the claimant. The “defendant” to this claim was the party owed money and needed to make an offer to receive a sum, but was then faced with an automatic liability for the “claimant”s costs under Part 36. This will no longer be an issue.
- If, under CPR 3.14, a party has been deemed to have filed a costs budget for its court fees only, due to filing its costs budget late, it will still be able to gain some benefit from making a Part 36 offer. Under a new CPR 36.23, its recoverable costs if the offer is not accepted and not beaten at trial, or is accepted after the Relevant Period, will be deemed to be 50% of what they would have been had that sanction not been imposed.

**What needs to be done?**

The changes in the rules do little to simplify Part 36, but do address some of the issues that have arisen with it in specific situations. For anyone thinking of making an offer, but who is unfamiliar with Part 36, the best advice remains to use the Court form N242A, which is currently being revised in line with the new rules.

No existing offers need to be withdrawn or amended as a result of the changes and, unless one of the specific situations outlined above applies, there will be no advantage in making a new offer where an offer has already been made. The new rule will apply only to offers made on or after 06 April 2015 in most respects, though the rules on disclosure and acceptance of offers after a preliminary trial will apply to existing offers as well.