



Why a well-judged Part 36 Offer is such a powerful negotiating tool in litigation

The Court Rules provide a Claimant with an important tactical tool when suing to recover a sum of more than £10,000: the Part 36 Offer. A well-judged Part 36 Offer puts a Defendant under considerable pressure in respect of costs and can focus its mind on settling the claim early. This is what makes a Part 36 Offer such a powerful negotiating tool.

In this article I will be focusing on the Claimant's Part 36 Offer. However, a Defendant can also make such an offer as a way of reducing its own cost liability, whilst making the Claimant potentially liable for its costs in the future.

A Part 36 Offer can be made at any time, even pre-action. For the offer to be a Part 36 Offer, it must be made in the specific way set out in Part 36 of the Civil Procedure Rules. Failure to do this may result in the offer not having the desired costs consequences.

The cost consequences, if a Part 36 Offer is rejected by the Defendant and at trial the Claimant equals or beats its offer, are as follows:

1. Unless the court considers it unjust, the court must order the Defendant to pay the Claimants costs, including recoverable pre-action costs on a standard basis until the date specified in the Part 36 Offer for acceptance of that offer and then on an **indemnity basis**. In the normal course of events a losing party must pay the winner's costs on a standard basis (i.e the costs must be reasonably incurred and proportionate to the claim). However, with a well-judged Part 36 Offer, the successful Claimant is awarded indemnity costs. This means there is no requirement for those costs to be proportionate to the claim and any doubt about whether the costs were reasonably incurred or reasonable in amount will be resolved in favour of the receiving party. As a result, the Defendant will be required to pay more of the costs that the Claimant has incurred in the action, reducing the Claimant's irrecoverable costs liability.
2. Interest on those costs of up to 10% above base rate.
3. Interest on the whole or part of any sum of money awarded (excluding interest) at up to 10% above base rate for some or all of the period starting from the date when the relevant period to accept the Part 36 Offer expired.
4. An additional amount of 10% of the first £500,000 of damages awarded and 5% of any amount above those figures, subject to a limit of £75,000. In other words, money over and above the amount claimed by the Claimant.

The level at which to make a well-judged Part 36 Offer must be decided on a case-by-case basis. However, the Claimant needs to consider its case carefully. It needs to consider the strengths of its case and its weaknesses. It must then decide which elements of its claim it is

most likely to be awarded by the court and which elements could possibly be refused. It should then aim to make its offer at a figure that is slightly less than the amount that it believes that it is reasonably likely to be awarded by the court, so as to be in a position, with reasonable certainty, to equal or beat its own offer at trial.

For example, Company A has a claim for £100,000 against Company B. Company A is confident that if this matter goes to trial it would be awarded £95,000. Therefore, it would aim its well-judged Part 36 Offer at slightly less than £95,000. If Company B fails to accept the Offer and Company A is awarded £95,000 or more, then the costs and other consequences referred to above kick in. If, however, Company B accepts Company A's Part 36 Offer, the litigation will end at an early stage and Company B is likely to be liable to pay Company A's costs, on a standard basis, up to the date of acceptance of the Part 36 Offer.

As you can see, a well-judged Part 36 Offer is an excellent way of bringing considerable pressure to bear on a Defendant to consider settling a claim at an early stage in the dispute. It risks facing stringent costs orders and other consequences if it is later found liable to pay a sum equal to or more than the sum specified in the Claimant's Part 36 Offer.

If you have any queries in relation to Part 36 offers, please contact Christopher Park at christopher.park@bracherrawlins.co.uk.