

Civil Litigation: Using Part 36 Offers To Settle A Dispute Early

25 Feb 2020 Syedur Rahman.

Syedur Rahman of Rahman Ravelli outlines the scope that Part 36 of the Civil Procedures Rules offers to resolve civil litigation before it reaches court, including the recent development of a nil offer.

Part 36 Offer - Nil Damages

In the case of MR v Commissioner of Police for the Metropolis [2019], the High Court recently ruled that an offer to settle for nil damages can be considered a genuine Part 36 offer and subject to the usual costs consequences.

The claimant was arrested on suspicion of harassment but was released without charge. Nonetheless the claimant, upon entering certain countries, would have been required to declare the arrest. This would have caused disruption to his business activities. The claimant issued a claim for false imprisonment and assault. The defendant made an initial Part 36 offer to settle in the sum of £4,000 while also providing a letter of apology. This was rejected as it did not contain an admission of liability.

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Subsequent Part 36 offers were made by the claimant on condition that the defendant admitted liability for the unlawful arrest and removed all information about him from all police records. The defendant rejected these offers.

The relevant Part 36 offer to settle the claim sought no damages, but only an admission of liability, with costs to be assessed. This was not accepted. In response, the defendant offered to provide the claimant with a letter he could use when travelling.

At trial, the claimant was successful and was awarded damages of £2,750. On the issue of costs, the judge found the claimant's whole purpose in the litigation was to establish the unlawfulness of the arrest and that the trial was, therefore, inevitable. Although the claimant was the 'winner', HHJ Baucher made no order as to costs. The Court ruled that it would be unjust for the defendant to recover its costs despite MR not beating its initial Part 36 offer – because MR's motivation was not financial – but also unjust to have to pay MR's costs "when [the defendant] could not, for whatever reason, make the requisite admission".

On appeal, Mrs Justice McGowan found the offer to forgo a financial remedy if the claimant could obtain the liability admission was "a significant concession and therefore is a genuine Part 36 offer". CPR 36.17 had been engaged and meant that MR was entitled to his costs from the expiry of the 21-day offer period.

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So, how do you make a Part 36 Offer?

A Part 36 offer can be made at any time before a judgment is made - including before court proceedings have commenced – although they cannot apply to claims that have been designated as small claims; usually, those involving less than £10,000. Such an offer is made on a without prejudice save as to costs basis, meaning the court will not know of the Part 36 offer until after judgment has been made and before any order has been made regarding the costs of proceedings.

In order to be valid, a Part 36 offer must:

- Be written.
- Say that it is intended to have the consequences of a Part 36 offer.
- Explain whether it is an offer to settle all of the claim or just part of it (in which case it must explain which part).
- Specify a period of not less than 21 days (“Relevant Period”) within which the defendant will be liable for the claimant’s costs.
- State whether it takes any counterclaim into account.

If a defendant is making the Part 36 offer and it involves payment of money, that money has to be paid in a single sum no later than 14 days after the claimant’s acceptance of it.

The Part 36 Process

A claimant or defendant that receives a Part 36 offer can, within seven days of receiving it, ask for clarification of it. If the party does not receive the clarification requested it can ask the court to order the other party to provide it.

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A Part 36 offer cannot be withdrawn or made less advantageous to the party offered it until the Relevant Period has passed, unless permission from the court to do so has been sought and obtained.

When the Relevant Period has passed, the offer can be withdrawn or changed, unless the other party has already accepted it.

A party wishing to accept a Part 36 offer can do so in writing at any time. If one party makes more than one offer, the other party can still accept the earlier offer, providing it has not already been changed or withdrawn. But if the trial has begun, the party needs the court's permission to accept the offer. The court's permission to accept the offer will also be needed if the offer is made by one defendant in a claim of joint liability where the claimant wants to continue the claim against the other defendants.

Accepting a Part 36 offer

If an offer involves the defendant paying an amount of money to the claimant, that amount has to be paid within 14 days of the date of the offer being accepted or by any other date that is agreed between the two parties.

If that does not happen then the claimant can enter judgment against it for that sum. And if an offer is accepted within the Relevant Period, the claimant is entitled to its costs up to the date that the offer is accepted.

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Should the two parties fail to agree on the amount of costs this can be assessed by the court. If the offer is not accepted within the Relevant Period, or the offer is made less than 21 days before trial the court will make an order as to costs if the parties cannot reach agreement on them. Under court rules, if the offer is accepted after the Relevant Period it is presumed that the claimant is entitled to its costs up to the date when the Relevant Period expired - the party accepting the offer is liable for the costs of the party that made the offer from the expiry of the Relevant Period until the date the offer was accepted.

Not Accepting a Part 36 offer

It is possible that a claimant can gain a judgment that is more advantageous than the defendant's Part 36 offer. If this happens, the court will apply the usual principles when considering what order to make as to costs.

If the claimant gains a judgment that is less advantageous than the defendant's Part 36 offer – and that offer was made more than 21 days before trial – then the claimant is liable to pay the defendant's costs from the date the Relevant Period expired, as well as interest on those costs, unless the court considers this to be unjust.

A claimant gaining such a judgment in their favour has to pay a proportion of the defendant's costs, as this is effectively a penalty for not accepting the defendant's Part 36 offer – and could even be regarded as a double penalty, as the judgment for the claimant is less favourable than the Part 36 offer.

If the claimant obtains a judgment that is at least as advantageous as a Part 36 offer (and the offer is made more than 21 days before trial) then the court will order that the claimant is entitled to:

- Interest on all or some of the money awarded for some or all of the period that

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starts from the expiry of the Relevant Period.

- Costs on the indemnity basis (which is more generous than the standard basis) from the date of expiry of the Relevant Period – and interest on those costs.
- An additional amount of up to a maximum of £75,000. This is calculated as being 10% of the money awarded up to £500,000 and 5% above this amount up to £1M. For claims not involving money, this amount is based on the amount of costs ordered.

This is why strategic legal advice can be of vital importance: both for defendants and claimants when considering what offer to make that they think the other party would accept and in whether to accept any offer that they receive, even if it is merely for an apology with nil damages.

This article was also featured on Lexology.com.



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Syedur Rahman is a Legal Director at Rahman Ravelli with a great depth of experience in top-level global investigations and corporate crime. Legal guides have highlighted his achievements in the fields of worldwide asset tracing and recovery, high-stakes commercial and financial disputes and cross-border investigations.

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