



Navigating the hazards of Part 36 offers **Part 2**

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In our first article we looked at problems associated with settlement offers made in multiparty actions and settlement offers where the intended consequence is unclear. In this article we look at some of the issues that can be caused by the litigation process itself and upon the way the offer is made.

The effect of evidence disclosed after the Part 36 offer was made

Settlement offers are often made well before all the evidence is available. The effect of later disclosure of evidence will always be uncertain, but some guidance has been provided by the High Court.

In [Head v Culver Heating Co Ltd](#) (11 May 2021) the High Court exercised its discretion not to award additional sums and interest despite the Claimant having beaten her Part 36 offer to settle the “lost years” element of a mesothelioma claim.

The parties had disagreed significantly about whether any award should be made for the lost years part of the claim. The deceased was the primary motivator of a successful business. The Defendant argued that as the business had continued

successfully after the death of the deceased, his death had caused no loss of income to his Estate.

The Claimant had originally claimed the loss was £4.4 million. At first instance the High Court agreed with the Defendant and made no award for the lost years part of the claim. The Claimant successfully appealed the decision to the Court of Appeal which then remitted the matter back to the High Court for assessment.

The High Court assessed the lost years claim at £2.45 million. The Claimant had made a relatively late offer to settle the lost years claim at just under £2.25 million. Having beaten the settlement offer the Claimant claimed Part 36.17(4) rewards of additional interest, indemnity costs, and an additional sum.

Although the judge agreed that the Claimant was entitled to claim such rewards, he decided that it would be unjust to award them because the Claimant had only beaten the offer by relying upon witness evidence which had been available before the original trial but had not been disclosed.

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The fact that the Defendant had not objected to the Claimant relying upon the late witness evidence did not mean that the Defendant was prevented from arguing that it had been prejudiced by the late disclosure. The judge reasoned that if the Defendant had objected, the Claimant would have had to apply to the court for relief from sanctions. The delay in disclosing the evidence was clearly serious and significant. Although any prejudice to the Defendant arising from the Part 36 offer could not have been taken into account at the time of an application for relief from sanctions, now that it was known that the Defendant had been prejudiced by the additional evidence being allowed, the judge considered it would be unjust to allow the Claimant to be awarded the usual Part 36 rewards.

This decision suggests that it is not necessary for a party to challenge the introduction of late evidence in order to trigger entitlement to later argue that Part 36 rewards should not be awarded.

However, this decision concerned witness evidence of facts that had always been known to the Claimant but not known to the Defendant and in relation to a difficult quantum issue only. The offer had also been made at a time when almost all legal costs had been incurred. The application of this decision therefore needs to be considered carefully because the determining issues are likely to be fact-sensitive.

The effect of a trial date being moved back upon a Part 36 offer made within 21 days of the original trial date.

In [Reader v SPIE Ltd and another](#) (11 May 2021, High Court) the trial was originally listed to commence on 30 January 2017. On 12 January 2017 SPIE Ltd (“S”) offered to settle its claim against the additional Defendant at £10,000 on a Part 36 basis. The offer stated that if it was not accepted but was beaten at trial, the court would be

asked to exercise its discretion to abridge the relevant period from 21 days to 14 days and award Part 36 rewards.

The trial was postponed by the court and eventually took place in 2018. Judgment was also delayed by illness until 31 January 2020 when S was awarded £38,577.64.

The trial judge rejected a request by S to award Part 36 rewards for beating its offer. The judge decided that the offer did not comply with CPR 36.5(1)(c) which states that the offer must specify a period of not less than 21 days for the Defendant to accept the offer without penalty. As the offer did not specify a period of not less than 21 days for acceptance, and had been made long before the start of the actual trial date (over one year later), the adjournment of the trial had the effect of invalidating the offer as a Part 36 offer.

S appealed to the High Court.

The Appeal judge decided that the approach of the trial judge had been incorrect, and that the offer should be judged according to the knowledge of the parties at the time the offer was made (which anticipated a trial commencing in less than 21 days) rather than after the actual trial much later.

The default position provided for in the CPR is that an offer made less than 21 days before trial does not attract Part 36 rewards unless the court retrospectively allows a shorter period. The offer was made on the basis that an application to the court would be needed for this purpose. The Appeal judge decided that at the time the offer was made the parties would understand this, and that this was the situation that the court should assess.

The Appeal judge decided that the offer could only become a Part 36 offer with Part 36 rewards when the court agreed to a shorter period for accepting the offer being applied. Because no application to allow a shorter period for accepting the offer had been made, and because

the court had therefore not permitted a shorter period to be applied, the offer did not comply with the requirements of Part 36 and accordingly was not a valid Part 36 offer.

Counsel for S maintained that an informal application had been made at the hearing on 31 January 2020 when judgment had been delivered. The Appeal judge said there was no record of this in the Appeal papers or in the judgment by the trial judge.

This case is an example of the need to keep settlement offers under review. The options available to S upon the original trial date being adjourned were to either make an application - by consent or otherwise - to the court asking for the shortened time in the offer to be permitted (thus validating the offer as attracting Part 36 benefits) or to make a new Part 36 offer allowing the usual 21 days for acceptance, or to do both. Which course to take might be influenced by whether any significant costs have been incurred after the expiry of the shortened time for accepting the offer.

The provision for interest in Part 36 offers

In [Francis King v City of London Corporation](#) (18 December 2019) the Court of Appeal upheld the decision of a costs Master that the Claimant’s offer to settle the costs claimed in the Bill of Costs at £50,000 excluding interest was not a valid Part 36 offer because it did not comply with CPR 36.5(4) which stated that the offer will be treated as inclusive of all interest.

After assessing the Bill at £52,470 excluding interest, the Master decided that the offer could not be treated as having been made under Part 36 because the offer introduced an element – exclusion of interest - that was incompatible with the wording of Part 36.

At the initial Appeal the Claimant’s costs lawyer referred the court to Practice Direction 47.19 which provided for the

option for costs offers to include or exclude interest. The Appeal judge decided that as a rule prevails over a Practice Direction, it was not possible for a Part 36 offer to exclude interest and for it to be then accepted on the basis that Part 36.5(4) will treat the offer as including interest.

The Appeal judge said that he would invite the civil procedure Rules Committee to consider this again. In the meantime, his decision that the offer was not a valid Part 36 offer was appealed to the Court of Appeal which decided, reluctantly and with a further recommendation for the Rules Committee to look at this, that an offer to settle which excluded interest did not comply with the rules and thus was not an offer made under Part 36.

Following consideration by the Rules Committee, CPR Part 36.5 was revised and from 1 April 2021 states:

36.5 (4)

A Part 36 offer which offers to pay or offers to accept a sum of money will be treated as inclusive of all interest until

(a) the date on which the period specified under rule 36.5(1)(c) expires; or

(b) if rule 36.5(2) applies, a date 21 days after the date the offer was made.

36.5 (5)

“A Part 36 offer to accept a sum of money may make provision for accrual of interest on such sum after the date specified in paragraph (4).”

(This is the date when the time allowed for accepting the offer expires, normally 21 days after the offer was made).

“If such an offer does not make any such provision, it shall be treated as inclusive of all interest up to the date of acceptance if it is later accepted.”

Note that this revision still does not allow a Part 36 offer to exclude interest. An offer to settle at a sum which excludes interest will continue to be treated as falling outside

the scope of Part 36. However, the revision means that the offer, which must include interest, may provide for further interest to be added to the sum offered in settlement after the period allowed for acceptance has expired.

Practice Direction 47.19 has also been revised and now says:

“Costs of detailed assessment proceedings – rule 47.20: offers to settle under part 36 or otherwise

19. Where an offer to settle is made, whether under Part 36 or otherwise, it should specify whether or not it is intended to be inclusive of the cost of preparation of the bill and VAT. An offer which is made otherwise than under Part 36 should specify whether or not it is intended to be inclusive of interest. Unless the offer states otherwise it will be treated as being inclusive of all of these. (A Part 36 offer is treated as inclusive of interest: see CPR 36.5(4).)”

Thus, it is now perfectly clear that a Part 36 offer to accept or pay a sum of money in settlement of a claim must include interest. If the offeror wants to maintain a claim for further interest after the offer has expired, the offer can refer to this but the offer must include interest and any reference to the offer excluding interest will be fatal to its claimed status as a Part 36 offer with accompanying potential benefits.

