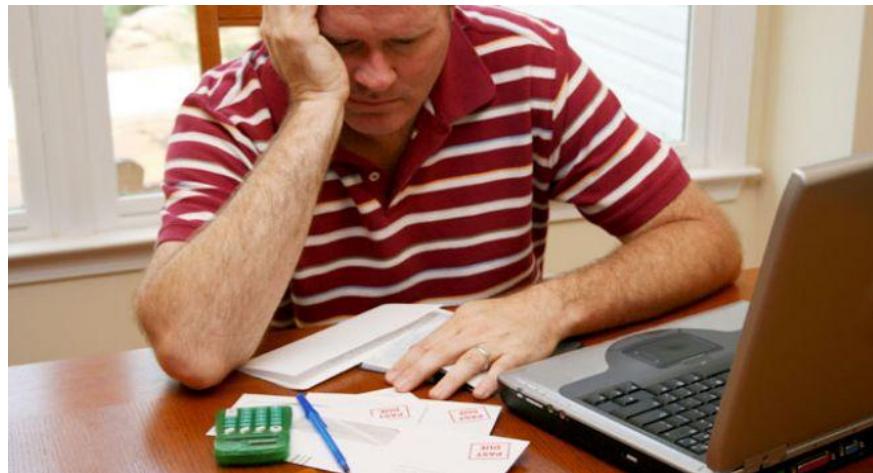


# UNDERSTANDING PART 36

Hylton Armstrong



*'a procedural code which must be understood and followed by ordinary citizens who wish to conduct their own litigation'*



# What is a Part 36 offer?

1. It is a special kind of offer
2. It is an offer that complies with CPR 36.2(1)
3. It has its own code
4. It has cost consequences

# P36: A special kind of offer

- It is a self contained statutory & procedural code which governs the courts discretion
- See *Gibbon v Manchester City Council [2010] ewca Civ 726:*
  - ‘Basic concepts of offer and acceptance clearly underpin Part 36, but that is inevitable given that it contains a voluntary procedure under which either party may take the initiative to bring about a consensual resolution of the dispute.
  - Such concepts are part of the landscape in which everyone conducts their daily life. It does not follow, however, that Part 36 should be understood as incorporating all the rules of law governing the formation of contracts, some of which are quite technical in nature.
  - Part 36 was drafted with these considerations in mind and is to be read and understood according to its terms without importing other rules derived from the general law, save where that was clearly intended.’

# P36: Must comply with 36.2(1)

- It 'must':
  1. Be in writing
  2. Say that it is a Part 36 offer
  3. Specify a period of not less than 21 days within which the Defendant will be liable for the Claimant's costs if the offer is accepted
  4. State whether it relates to whole or part of the claim, or to an issue.

# P36: Its own code

1. It can be made at any time
2. Once made, it can't be withdrawn or changed (to be less advantageous) for 21 days without the courts permission
3. Unless it has been withdrawn, it can be accepted at any time
  - Rejected or superseded offers
  - Time limited offers
    - *C v D [2010] EWHC 2940*
    - *Howell & Others v Lees Millas [2011] EWCA 786*

# P36: C v D (16/11/10)

- ‘The offer will be open for 21 days from the date of this letter (the relevant period)...Both offers are intended to have the consequences set out in Part 36 of the Civil procedure Rules’
  - The new Pt 36 regime cannot accommodate a time-limited offer
  - However, there was an entirely feasible and reasonable construction of the offer letter which avoided its being construed as a time-limited offer
  - It was entirely feasible and reasonable to read the words "open for 21 days" as meaning that the offer would not be withdrawn within those 21 days.
  - It is also a warning that after the expiry of those 21 days, a withdrawal of the offer was on the cards

# P36: Howell v Lees-Millas (06/07/11)

- A letter should if possible be treated as a Part 36 offer
- The Justness of that conclusion was supported by the fact that all parties:
  - Treated the offers as having been made under Part 36; and
  - Said in terms that those offers were still in force after the expiry of 21 days
- The overriding objective and common sense dictated that in those circumstances an offer, which was expressed to be a Part 36 offer and which otherwise appeared to comply with Part 36, had to be given substantially the same effect as a Part 36 offer.

# P36: Cost consequences

- CPR 36.14 – Cost consequences following Judgment
- Operative word used to be ‘advantageous’
- As of 01/10/11 the rule in Carver v BAA does not apply
- New CPR 36.14(1A):
  - ‘In relation to a money claim or money element of a claim ‘more advantageous’ means better in money terms by any amount however small, and ‘at least as advantageous’ shall be construed accordingly’

# P36: Cost Consequences

- Unless it is unjust:
  - If the Claimant's beats its offer, the court will award:
    - Interest on all or part of the award at a rate no about 10% above base for some or all of the period after the date on which the relevant period expired.
    - Interest on costs not exceeding 10% above base
    - Costs on the indemnity basis
  - If the Defendant beats its offer, the court will award:
    - Costs from date relevant period expired
    - Interest on those costs
  - Different in practice (see *Pankhurst v MIB* [2010] EWCA 1445)

# P36: Cost Consequences

- Discretion: when considering what is just the court will have regard to:
  - The information available to the parties at the time
  - The conduct of the parties with regard to the giving or refusing to give information for the purpose of enabling an offer to be made or evaluated
- Not easy (see *Lumb v Hampsey*)

# P36: Lumb v Hampsey (11/10/11)

- Claimant argued:
  1. At the time of the offer Claimant undergoing neurological rehabilitation – reasonable to wait to see if treatment successful
  2. Any settlement needed approval from the COP – which was unlikely on the basis of the medical evidence
  3. Later decision to accept the offer had been prompted by improvement in the Claimant's condition and his capacity to conduct proceedings.
- Court said no: Claimant not taken steps to seek extension

# P36: Summary

1. If you don't want to accept, reject
2. If you are going to accept, do so within 21 days
3. Clarify any ambiguous (potentially time limited offers)
4. Emphasise your intention to seek indemnity costs
5. Set yourself up a costs argument early on

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# THE END

