

## WHEN IS A PART 36 OFFER NOT A PART 36 OFFER?

### CIVIL WATCH – CASE NOTE

*George Symes of Goldsmith Chambers presents a refresher on Part 36 offers, and an update on why they aren't always as watertight as they seem.*

*George gives a summary of the recent High Court case of Head v The Culver Heating Co Ltd [2021] EWHC 1235 (QB), and explains how it can affect what would otherwise seem a straightforward Part 36 case.*



### INTRODUCTION

1. Making a Part 36 offer can be an excellent way to protect your client's interests when it comes to costs. However, being on the receiving end of one, and refusing it, can be a daunting prospect. Even if you succeed at trial, you could still face a costs order against you. This is especially important if you are acting for a defendant, as the costs order could be made on the indemnity basis, and carry interest and uplifts as well.
2. However, there are some circumstances in which the courts will not uphold the consequences of Part 36 offers. This note aims to provide a brief refresher to Part 36, and examine how and when Part 36 offers may not be followed by the courts.

### BRIEF REFRESHER ON PART 36

3. Part 36 offers are formal offers to settle. If a party refuses to accept such an offer, and fails to match or beat it in the final judgment, this would have adverse costs consequences as a result.
4. The basic consequences of Part 36 offers are outlined in the flowchart below. In essence, once a Part 36 offer is made, the key question in regards to costs is no longer who has won the case, but rather who has succeeded/failed in beating any offer.
5. It is worth noting that, unlike normal offer and acceptance in contract cases, Part 36 offers remain live until they are formally withdrawn by the offeror – counter-offers and subsequent offers do not implicitly or automatically revoke the previous offer. As such, there can be both a Claimant's Part 36 offer and a Defendant's Part 36 offer which are live at the same time. Equally, there can be multiple Part 36 offers from the same party<sup>1</sup>, which can quickly lead to

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<sup>1</sup> Gibbon v Manchester City Council [2010] EWCA Civ 726

confusion. It would be sensible, therefore, to expressly indicate withdrawal of previous offers when making any subsequent or clarifying offers.

6. The “Relevant Period” for acceptance of a Part 36 offer is 21 days after it is

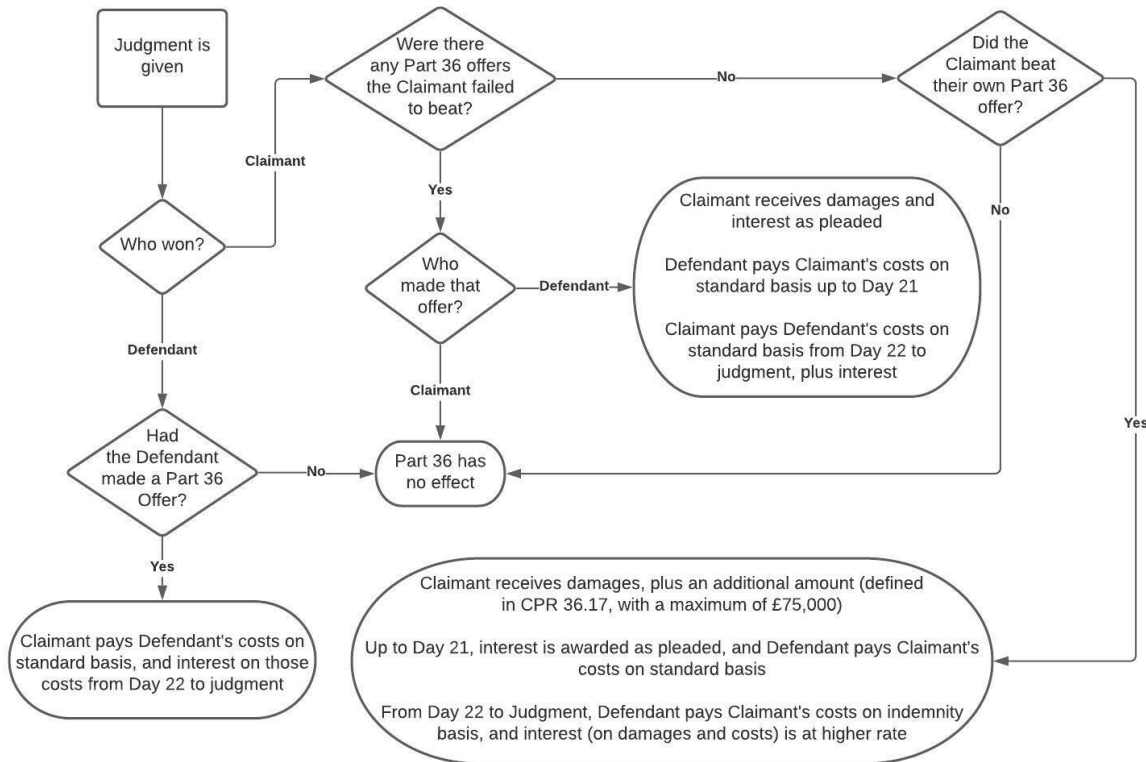


Figure 1 - Flowchart showing consequences of Part 36

made, during which time the offeror would require permission from the court to withdraw the offer. After 21 days, the offeror can withdraw the offer without permission, but if it is not withdrawn, the enhanced consequences of the offeree failing to accept a Part 36 offer are engaged (for example, higher interest and costs on the indemnity basis).

**WHEN IS A PART 36 OFFER NOT A PART 36 OFFER?**

- 7. There are, of course, formalities which Part 36 requires. Any offer must be in writing, state that it intends to bear the consequences of Part 36, state the duration of the relevant period, and cannot be time-limited on its face. However, the court may correct any minor defects in Part 36 offers so long as they are consistent with the purpose of Part 36<sup>2</sup>.
- 8. Nevertheless, there are scenarios in which you may have made a Part 36 offer, only to be surprised on the day of judgment when the consequences are not

<sup>2</sup> See, for example, *Hertsmere Primary Care Trust v Balasubramaniam's Estate* [2005] 3 All ER 274

honoured. Alternatively, you may have failed to beat a Part 36 offer and are looking for a way in which to avoid paying increased costs.

9. Under Part 36.17, the CPR allows for valid Part 36 offers to be disregarded in circumstances when it would be unjust for the usual consequences to be ordered. Under CPR 36.17(5), when deciding whether it would be unjust, the court must consider the following:
- (a) the terms of any Part 36 offer;
  - (b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;
  - (c) the information available to the parties at the time when the Part 36 offer was made;
  - (d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and
  - (e) whether the offer was a genuine attempt to settle the proceedings.

10. Those either making, or attempting to resist the consequences of, a Part 36 offer should bear the above in mind. “It is a ‘formidable obstacle’ to show that the imposition of Part 36 orders would be unjust”<sup>3</sup>, however, there has been some recent caselaw which sheds some light on how these factors are considered.

#### HEAD v THE CULVER HEATING CO LTD

11. This was a case, before Johnson J, in which the Claimant had been exposed to asbestos whilst he was employed by the Defendant, and was diagnosed with (and later succumbed to) resultant mesothelioma. After the initial assessment of damages and a month before the Court of Appeal hearing in relation to the “lost years” claim, the Claimant had made a Part 36 offer in excess of £2 million, which was not accepted by the Defendant. By way of judgment, the Claimant was granted in excess of the amount he had offered as a settlement figure. As such, it was argued (on his behalf) that he was entitled to the usual Part 36 costs consequences<sup>4</sup>.
12. The Judge began by explaining “The fact that orders under CPR 36.17(4) might result in the Defendant paying (and the Claimant receiving) considerably more than the amount required to compensate for the losses sustained does not

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<sup>3</sup> *Head v The Culver Heating Co Ltd* [2021] EWHC 1235 (QB), citing *Smith v Trafford Housing Trust* [2012] EWHC 3320 (Ch) per Briggs J at [13(d)]

<sup>4</sup> If following along on the flowchart above, you can see he would be arguing that he was entitled to an uplift of £75,000, costs on the indemnity basis (after the expiry of the Relevant Period), and interest on his damages and costs at a higher rate (in this case arguing the maximum 10% above the base rate).

render such orders unjust”. Practitioners should be aware that this alone will not be a sustainable argument in favour of not making a Part 36 Order.

- 13.** In considering 36.17(5)(a), the Judge found that the terms of the offer were clear. The amount stated was unambiguous, and the terms would not make it unjust to apply Part 36 consequences.
- 14.** The Judge accepted for the purposes of 36.17(5)(b) that the offer was late. It was made after the initial assessment of damages was made, and at this point, the parties’ litigation positions were “entrenched”. However, as it was made sufficiently in advance of the Court of Appeal hearing, the Judge found that the delay alone was not sufficient to render imposition of Part 36 consequences unjust. Those who seek to argue lateness of offers as a basis on which to disregard them should take note of this assessment, as a simple reading of the CPR may give a false impression as to the chances of success of such a submission.
- 15.** The Judge looked, under 36.17(5)(c), at the information available to the parties. Given both parties had sufficient information to value the claim, and the Defendant had not requested further information when they received the offer, the Judge came to the conclusion that there was no basis to consider this unjust. Advisors should be careful to note here that it seemed as though inaction by the Defendant’s representatives (i.e. their failure to request further information) was seen as being part of the consideration.
- 16.** Notwithstanding both parties were making a “litany” of complaints against the other, the Judge found no real reason of conduct to make the imposition of Part 36 consequences unjust under 36.17(5)(d).
- 17.** Finally, the Judge found (under 36.17(5)(e)), that there was no reason to believe the offer was anything but genuine.
- 18.** However, the Part 36 offer was ultimately disregarded. Rule 36.17(5) only outlines those factors which must be taken into account, but does not comprise a complete list. In this case, it was important that the Claimant produced three additional witness statements, which had not been served until extremely late in the proceedings.
- 19.** The key point here is that the additional witness statements made the Claimant’s case much stronger, and was capable of making a difference in the ultimate success of their claim. However, at the time the Defendant was presented with the Part 36 offer, “it would have been natural to assess whether the evidence supported that offer, as opposed to whether the offer was less than the amount of the pleaded case”.

20. As such, the Judge found that it would have been unjust to impose Part 36 costs consequences against the Defendant, notwithstanding the Claimant had beaten the offer they had made.
21. It is important to note, therefore, that it was not the lateness of the offer, but the lateness of the evidence which led to the disapplication of Part 36. Equally, it was not the lateness of the evidence alone, but the fact that it would have had a bearing on the likelihood of success of the Claimant's claim.
22. Interestingly, the Defendants took a very pragmatic approach and did not oppose the late introduction of the witness statements by the Claimant. In fact, the Defendant took the view that it would not have a material impact on the value of the case at all. But the Judge confirmed that this should not bar them from taking the position that Part 36 consequences would be unjust after the finding that the statements did indeed have a bearing on the outcome of the case.
23. Of course, it was open to the Defendants to accept the Part 36 offer after the admission of the additional evidence, but the Judge found that it was extremely late in the proceedings to do so, almost all the costs had been incurred at this point, and as such, it did not change the decision that it was unjust to impose Part 36 consequences in this case.

## CONCLUSION

24. Even when a valid Part 36 offer has been made, there is always a chance that the costs consequences it carries may be disapplied. The considerations in Rule 36.17(5) are not an exhaustive list, and the court may take into account all the circumstances of the case when deciding what is or is not unjust.
25. Those arguing that Part 36 consequences are unjust should bear in mind how difficult it is to succeed. The case of *Head v Culver Heating Co* shows some of the arguments which would not hold much weight. However, it also identifies one factor (not explicitly named in 36.17(5)) in which the court would disapply Part 36 costs.
26. When arguing that late service of documents renders the costs consequences of a Part 36 offer unjust, practitioners should focus on the difference that material would have made to the consideration of the offer. Even if they took the view that it did not make a material difference when the additional material was introduced, that position can be altered if it transpires the evidence had a bearing on the overall outcome.
27. When arguing any alternative grounds for being 'unjust', practitioners should not feel restricted to those grounds identified in Rule 36.17(5). However,



success in showing that an order would be unjust is difficult, even when arguing one of the explicitly established grounds.

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