Navigating Pt 36: challenges & pitfalls

Part 36 settlement offers: Helen Armstrong & William Rowell outline how to avoid the pitfalls

IN BRIEF

- Part 36 regime: an influential settlement weapon.
- Recent judgments: outlining the highly complex area for parties and their advisers.

The Pt 36 regime is arguably one of the most influential weapons in the Civil Procedure Rules' (CPR) arsenal for encouraging settlement. It provides a statutory code of prescribed costs, damages and interest enhancements that essentially penalise parties who fail to accept a reasonable settlement offer.

The rules relating to Pt 36 offers are, however, very complex. There are various formal requirements for making an offer. Parties may inadvertently (and unknowingly) fail to make a compliant Pt 36 offer and cannot benefit from the enhanced costs consequences they had envisaged. Even where an offer is compliant, if it would be 'unjust' to award the prescribed benefits, the court can disapply them. The whole regime becomes a procedural minefield.

A series of recent judgments illustrates how difficult this area can be for parties and their advisers. The rules themselves must be viewed against the backdrop of precedents, some of which provide salutary lessons for us all.

Judgments

Telefonica UK Ltd v The Office of Communications [2020] EWCA Civ 1374, [2020] All ER (D) 55 (Nov)

Decision: a claimant who beats its own Pt 36 offer is entitled to the full range of enhanced awards under CPR 36.17, even where it was reasonable for the defendant to reject the offer.

Moral: offerees should carefully weigh up all of the potential financial implications of rejecting an offer and going on to lose at trial.

In this case, it was accepted that the claimant had made a successful Pt 36 offer. The High Court accordingly awarded two of the four Pt 36 automatic enhancements (indemnity costs and a £75,000 uplift in damages), but refused to award the other two (enhanced interest on the judgment damages and costs) on the basis that it would be unjust to do so.

The key factors the court took into account were (a) it was not unreasonable for the defendant to take the claim to trial given it was a binary issue and the offer was only just less than the total amount claimed; and (b) the extra interest would produce a disproportionately high figure of £3.2m.

The Court of Appeal rejected this approach, noting that:

- Pt 36 provides that a successful claimant should receive each of the four Pt 36 enhancements and there is no suggestion that the award of one lessens their entitlement to the others;
- CPR 36.17(2) has been amended to expressly state that 'more advantageous' means 'better in money terms by any amount, however small'; but
- if the amount of the offer was only just less than the total amount claimed, this may justify a finding that it was not a genuine attempt to settle the proceedings and that it would therefore be unjust to award the normal costs consequences.

Re IT Protect Limited [2020] EWHC 3001 (Ch)

Decision: Pt 36 enhancements should not generally be awarded where an offer is made to two parties jointly and cannot be separately accepted.

Moral: when dealing with multiple opponents, carefully consider separate rather than joint Pt 36 offers.

The applicants brought a misfeasance application against two respondents. At trial, the applicants were awarded £114,000 in damages against the first respondent, but the claim against the second respondent was dismissed as extremely weak.

The applicants had made a joint Pt 36 offer of £39,500 to both respondents three months before trial and accordingly sought a costs order including Pt 36 enhancements. The first respondent, however, argued that this would be unjust, since the Pt 36 offer had been made to the respondents jointly rather than severally. As a result, it had not been open to the first respondent to accept it without the second respondent also doing so.

The court agreed, confirming that while the question for the court is not whether the refusal to accept the offer was unreasonable, the reasonableness or otherwise of the refusal was clearly a circumstance to consider when determining whether it would be unjust to award Pt 36 enhancements. The court held that it was entirely reasonable for the second respondent (and therefore the first respondent) to reject the offer given the case against her was very weak. A percentage-based order was accordingly awarded.

Essex County Council v UBB Waste [2020] EWHC 2387 (TCC)

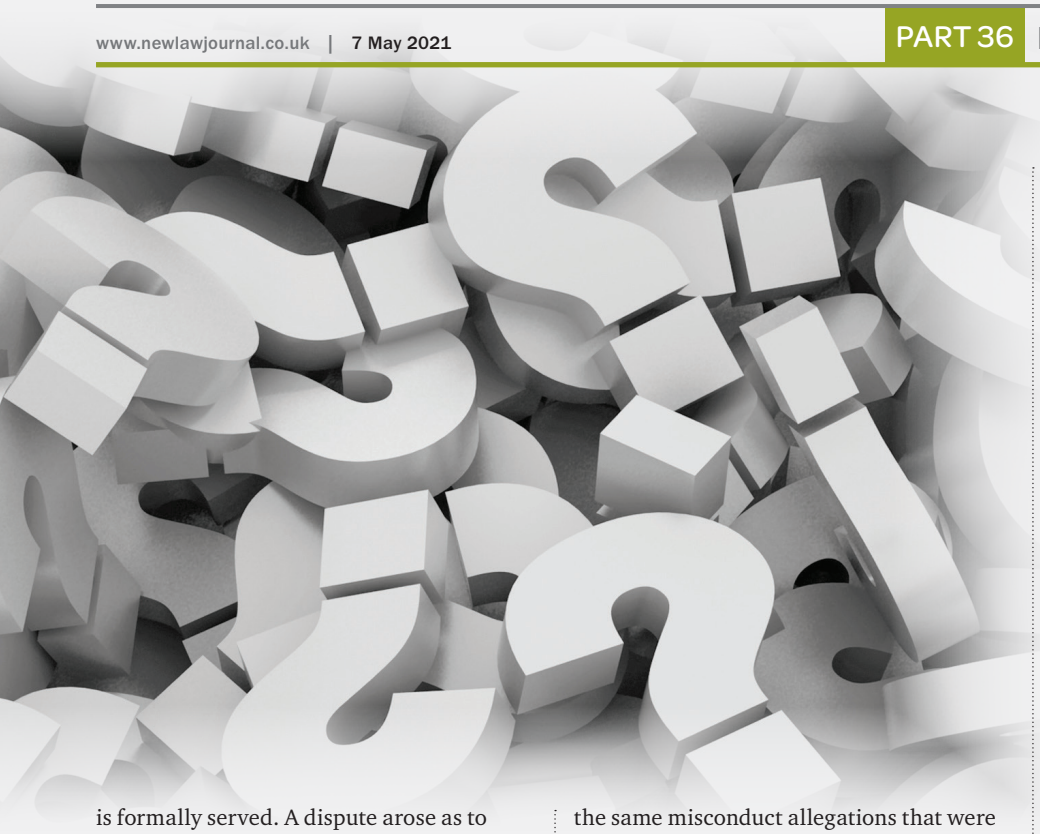
Decision: the court cannot award Pt 36 enhancements if an offer does not comply with the procedural requirements of Pt 36, however small the failure and regardless of any estoppel argument.

Moral: the devil is in the detail—ensure your offer is compliant with all of the technicalities (using the HMCTS form may be the simplest way to minimise room for error).

In this case, the claimant made an offer to settle that stated as follows:

> 'If the Defendant accepts the offer within 21 days of the date of this letter (the "Relevant Period"), the Defendant will be liable for the Claimant's costs of the Proceedings (including pre-action costs) up to the date on which written notice of acceptance of this Offer is received by the Claimant, in accordance with CPR 36.13.'

The claimant therefore clearly intended this offer to be compliant with Pt 36. Despite dating the letter 7 March 2019, it was sent by email at 4.45pm—meaning it was technically served the next day. Under CPR 36.7(2) a Pt 36 offer is made when it



is formally served. A dispute arose as to the whether the offer complied with the requirement under CPR 36.5(1) to specify a period of not less than 21 days from the date of making (ie serving) the offer.

The defendant argued that the 21 days ran from the date stated on the face of the letter (7 March) and the offer therefore did not comply. The claimant argued that the offer was compliant because it was intended to be and should be construed as open for 21 days from the date the offer was served (8 March).

The judge acknowledged that the offer could be construed either way, but ultimately favoured the second interpretation on the basis of the presumption that an instrument is drafted to be effective rather than ineffective.

In doing so, however, he noted that CPR 36.2(2) makes clear that if the offer does not comply with Pt 36, it will not constitute a valid Pt 36 offer (regardless of whether or not the failure is *de minimis*).

He also held that because Pt 36 is 'itself a self-contained code', estoppel should play no part in the Pt 36 regime. The offer letter had specified a time period within which the recipient should notify the sender of any defects in the offer. It did not do so, and only made submissions on the dating and service point after trial. This was not too late—the failure to raise the point at the time of the offer was not effective to estop the recipient from relying on any defects in the offer in order to avoid the consequences of Pt 36.

Comberg v Vivopower International Services Ltd and Anor [2020] EWHC 2438 (QB)

Decision: acceptance of a Pt 36 offer relating to a counterclaim did not settle the same misconduct allegations that were repeated in the defence.

Moral: beware making Pt 36 offers in respect of part of a claim and clearly express which part(s) are being settled.

The claimant had sued the defendant for various debts as well as for wrongful dismissal. The defendant set out certain misconduct allegations against the claimant in its defence to the wrongful dismissal claim, as well as repeating these allegations in a counterclaim for loss arising therefrom. The claimant made a Pt 36 offer to settle the counterclaim only, which the defendant accepted.

The defendant, however, continued to rely on the alleged misconduct as a defence to the claim of wrongful dismissal. The claimant argued that acceptance of the Pt 36 offer effectively compromised the underlying misconduct allegations in their entirety, rather than just liability arising as a result of the misconduct claims in the counterclaim.

The court disagreed: the scope of what had been settled by way of a Pt 36 offer was a question of contractual construction and the wording of the claimant's offer referred solely to 'the Counterclaim', which was independent of the defence (despite incorporating a number of the paragraphs of the defence by reference). As such, when properly construed the offer settled the claimant's liability in breach of contract arising out of the misconduct allegations, but did not settle the underlying factual misconduct allegations used by way of a defence.

Pallet v MGN [2021] EWHC 76 (Ch)

Decision: the court is entitled to exercise its discretion with regard to costs where a Pt 36 offer is accepted after the relevant period, even where payment of the claimant's costs is an express condition of the offer.

Moral: offerors should pitch their Pt 36 offers at a level they can live with regardless of potential costs recovery. Where a well-pitched offer is not time limited, offerees should consider the potential upside of accepting after the end of the relevant period.

In this case the claimant made a Pt 36 offer to settle her claim, which included a term requiring the defendant to pay the claimant's costs of the claim to be assessed on the standard basis if not agreed. That offer was accepted one day after the relevant period set out in the offer (namely, 22 days after the date of the offer). The claimant accordingly sought her costs of the proceedings up to the date of acceptance of the offer. The defendant, however, requested the court to depart from this on the basis that it would be unjust to award those costs.

If the offer had been accepted within the relevant period, Pt 36 dictates that the defendant would have been liable for the claimant's costs up to the date of acceptance. In contrast, if a Pt 36 offer is accepted after the relevant period, the court has the discretion not to award the automatic consequences under Pt 36 if it is unjust to do so.

The defendant had deliberately accepted the offer 22 days after the offer was made which enabled them to argue that it would be unjust for the court to require them to pay the claimant's costs up to the date of acceptance—submitting that claimant had unreasonably refused to engage in ADR. The claimant argued that acceptance of the offer (which expressly included an agreement to pay the claimant's costs) prevented the defendant from now seeking a different order as to costs.

The court, however, agreed with the defendant. A contractual offer and acceptance analysis was flawed because the Pt 36 regime is a self-contained procedural code. Once an offer is made or accepted, the provisions of Pt 36 alone determine the consequences that flow from the offer. Nevertheless, in this case the court ultimately declined to depart from the normal costs' consequences.

It remains to be seen whether the courts will be similarly reticent to exercise their discretion should tactical acceptance of Pt 36 offers on day 22 become the norm, or whether the wording of Pt 36 will be amended to address this potential loophole. **NLJ**

Helen Armstrong, senior associate and **William Rowell**, trainee, Bryan Cave Leighton Paisner (*www.bclplaw.com/en-US/*).