



Part 36 offers

**By Daniel Tivadar;
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3 HARE COURT



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- ❖ Commercial and business law
- ❖ Constitutional law and judicial review
- ❖ Defamation
- ❖ Employment
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- ❖ International arbitration
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- ❖ Property (including landlord and tenant and construction)
- ❖ Public law (including civil liberties and human rights)
- ❖ Sports law
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Additional services

Our practice groups regularly publish articles and provide talks and seminars on all areas of relevance to business and commercial lawyers. Please contact Mika Thom, our Marketing Manager in this regard at mikathom@3harecourt.com or 020 7415 7911.

You may also care to visit our website at www.3harecourt.com, which is regularly updated with news, cases in which members of chambers have appeared and published articles.

SPEAKER PROFILES



Daniel Tivadar

Year of call: 2005

Main Practice Areas

Constitutional Law (including Public Law and Administrative Law), Civil Liberties and Human Rights, Commercial and Business Law, Employment, Personal Injury, Appellate Work (including Privy Council), International Arbitration
Profile

Daniel accepts instructions in a broad range of civil and commercial matters, employment and public law.

Daniel regularly appears in both county courts and the High Court in a range of civil and commercial cases dealing with general common law issues, conflict of laws, misfeasance claims, bankruptcy and insolvency proceedings, property and possession claims as well as equine cases. He also acts in personal injury matters with a particular focus on injuries taking place abroad. Daniel frequently acts in cases relating to the selling of financial products under the Consumer Credit Act and the Financial Services and Markets Act. He has a keen interest in arbitration and has completed the LLM course in comparative international commercial arbitration at Queen Mary University.

Daniel has considerable experience in appearing before employment tribunals on behalf of both claimants and respondents as well as advising and appearing in appeals to the EAT. His practice covers all aspects of employment litigation, including unfair dismissal, discrimination, protected disclosures and contractual claims.

Daniel has a particular interest in Public Law and Human Rights and has appeared in the High Court in cases relating to these matters. Daniel has also advised on and appeared in capital appeals and constitutional challenges before the Privy Council.

Daniel further gained valuable experience in acting as Judicial Assistant to Lord Justice Dyson (as he then was) at the Court of Appeal for two terms.

Publications and Lectures

Daniel contributes to client bulletins produced by Chambers in Employment Law, Public Law and Personal Injury. He regularly gives seminars for client firms on civil and employment law issues.

Memberships

HRLA; ELBA; ALBA

Qualifications

BA (Law), Downing College, Cambridge; BCL, Lady Margaret Hall, Oxford; Postgraduate Award in the Law of Human Rights, Bristol University.

Languages

Hungarian (native); German

PART 36 OFFERS

Introduction

1. Part 36 offers constitute an essential weapon in litigation armoury. Claimants' costs often far exceed the amount of damages at stake, especially in road traffic litigation – whether in the context of credit hire or personal injury – where often claimants' representatives work under a conditional fee agreement.
2. Settlement offers can be made outside the Part 36 regime: e.g. offers made “without prejudice save as to cost” (Calderbank letters). These are contractual offers that the Court would take into account when exercising its discretion as to costs under CPR r. 44.3. They will, however, not attract the consequences of a Part 36 offer. Note that offers made “without prejudice” do not protect a party's position on costs.
3. Part 36 offers can be made even before issue. The earlier an offer is made the more protection it may provide on costs.
4. A party can make a Part 36 offer on claims, counterclaims, additional claims, parts of a claim, on the issue of liability or on appeal.

Form and content

5. The offer must comply with the relevant formal requirements to be a Part 36 offer. All offers must comply with the requirements set out in CPR r. 36.2 and there are additional requirements in certain cases; e.g. PI cases with provisional damages, CRU issues etc.
6. An offer which itself is time-barred cannot be a Pt 36 offer C v D [2010] EWHC 2940 (Ch) principle affirmed in Court of Appeal [2011] EWCA Civ 646. However, the Courts will seek to construe an offer that the offeror calls a “Part 36 offer” in a way that is compatible with it actually being a Part 36 offer – C v D.
7. It is essential to make the offer in the correct form. This can be achieved by simply using the relevant Form N242A. This can be found on internet: <http://hmctsformfinder.justice.gov.uk/courtfinder/forms/n242a-eng.pdf> (and set out below)
8. Part 36 is a self-contained code. General contractual principles do not necessarily apply to it: for example, there is no such thing as an “implied withdrawal” of a Part 36 offer: Gibbon v Manchester City Council [2010] EWCA Civ 726.

9. The Court's permission is needed if a party wishes to withdraw/change its offer during the 'relevant period' of 21 days. For this a Part 23 application is needed and the court retains a discretion on whether to allow it.

Cost consequences

(a) Where an offer is accepted

10. If an offer is accepted within the relevant period (not less than 21 days after the offer is made), the claimant gets all its costs up to the date of service of the notice. Costs will be assessed on the standard basis if not agreed. The Court has no discretion as to the liability for costs; the order is automatically entered irrespective of a party's conduct.
11. There are special considerations if several defendants are pursued. If they are sued jointly or in the alternative, the claimant must discontinue against all the defendants to be able accept the offer and those defendants must give written consent to the claimant accepting the offer. If the defendants are sued severally, the claimant can continue the claim against them. It can be a complicated question whether defendants are sued jointly or severally, the factual situation must be considered carefully – see e.g. Townsend v Stone Toms and Partners [1981] 1 W.L.R. 1153.

(b) Cost consequences of Part 36 offer after judgment

12. The relevant question is whether the Claimant secured a “*more advantageous*” judgment than the offer made.
13. CPR r. 36.14(1A) had been added to Pt 36 with effect from 1 October 2011. It provides as follows:

For the purposes of paragraph (1), in relation to any 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.

14. The Court of Appeal in Carver v BAA Plc [2008] EWCA Civ 412 that the question whether an offer is “more advantageous” was to be considered in the light of all the circumstances of the case. The effect - and intention behind- the new r. 36.14(1A) is to reverse the effect of this judgment and introduce more certainty.
15. Where the claimant fails to get a “more advantageous” judgment the defendant is entitled to its costs together with interest from the expiry of the relevant period – unless the court considers that this would be unjust.
16. If the claimant obtains a more advantageous judgment than its offer, the claimant, unless it would be unjust, will be entitled to:

- interest of up to 10% above the base rate on the whole or part of any sum awarded from all or some of the period from the date of the relevant period expiring;
- costs assessed on the indemnity basis; and
- interest on costs at a rate not exceeding 10% above base rate. Note that interest should not be awarded on future losses and expenditure as these would not normally attract interest – Pankhurst v White [2010] EWHC 311 (QB)

17. To decide whether to award all of the above would be ‘unjust’ the court would have to consider all the circumstances, including the terms of the offer, when it was made, the information available to the parties at the time, the conduct of the parties with regard to giving or refusing to give information for the purposes of enabling the offer to be made or evaluated.

18. It is essential therefore for a defendant to seek to obtain the relevant information it needs from the claimant. In Ford v GKR Construction [2000] 1 WLR 1397 the Court of Appeal emphasised the need for parties to be provided with the information that they need in order to be able to assess whether to make/accept an offer.

19. The courts will concentrate on the reality of the situation and should seek to avoid a “trial on costs”. Issues such as one party amending its case may be relevant to the question of whether an offer was reasonable – Factortame v Secretary of State [2002] EWCA Civ 22.

Practical steps for defendants

20. In the light of the above, the following steps should be followed:

- Seek information from the claimant that would allow you to take a view on a reasonable Part 36 offer. Request the information in writing and alert the other side that unless the information is provided you cannot make an informed offer. Consider Part 18 request, specific disclosure requests, notice to admit facts etc;
- Try to make offers as soon as the information has been provided to maximise the potential period of cost protection. If you need advice from Counsel seek this as early as possible;
- Ensure that the offer complies with all the formal requirements – this can be achieved by simply using the correct form N242A (link set out above);
- Consider your position on liability as well as the likely award of damages. Consider whether to make an offer on liability alone or a global offer on the case overall;

- Make realistic Part 36 offers to put pressure on the claimant. Consider reduction of awards in cases where liability has not been admitted;
- Do not set out your reasons for reaching a particular offer amount, this often leads to litigating the case in correspondence;
- Consider the claimant's part 36 offers with speed and within the initial 21 days;
- Accept the claimant's offer with speed to prevent it from being withdrawn or changed.

21. Finally, should you have any questions in relation to the strength of your defence, the likely amount of damages awarded, compliance with Part 36 requirements, tactics etc, please do not hesitate to contact us.

Daniel Tivadar

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Notice of offer to settle (Section 1 - Part 36)

To the Offeree ('s Solicitor) *(Insert name and address)*

Name of court *(If proceedings have started)*

Claim No.
(or other ref)

Claimant
(including ref)

Defendant
(including ref)

Take notice the (defendant)(claimant) offers to settle the claim. This offer is intended to have the consequences of Section 1 Part 36. If the offer is accepted within _____ days (must be at least 21 days) of service of this notice the defendant will be liable for the claimant's costs in accordance with Rule 36.10 of the Civil Procedure Rules.

The offer is to settle:

(tick as appropriate)

- the whole of the claim
 part of the claim *(give details below)*
 a certain issue or issues in the claim *(give details below)*

The offer is:

(Insert details - expand box as necessary)

Note: Rule 36.5 specifies details that must be included in an offer including periodical payments of damages for future pecuniary loss.

Rule 36.11 requires that an offer by a defendant to pay a sum of money (other than periodical payments) must be paid within 14 days of acceptance.

- It (does)(does not) take into account all(part) of the following counterclaim:

(give details of the counterclaim)

Include only if claim for provisional damages

The offer is made in satisfaction of the claim on the assumption that the claimant will not [develop (state the disease)] **OR** [suffer (state type of deterioration)]. But if that does occur, the claimant will be entitled to claim further damages at any time before (insert date).

OR

This offer does not include an offer in respect of the claim for provisional damages.

To be completed by defendants only

This offer is made without regard to any liability for recoverable benefits under the Social Security (Recovery of Benefits Act) 1997.

OR

This offer is intended to include any relevant deductible benefits for which I am liable under the Social Security (Recovery of Benefits Act) 1997.

The amount of [£] is offered by way of gross compensation.

[I have not yet received a certificate of recoverable benefits]

OR

[The following amounts in respect of the following benefits are to be deducted (insert details).

Type of benefit	Amount
-----------------	--------

The net amount offered is therefore [£]]

Signed
Offeror('s solicitor)

Position held
(If signing on behalf of a firm or company)

Date