



Part 36 offers: summary

How to settle disputes effectively – and what is Part 36?

This note sets out a very simple overview for non-contentious lawyers of what litigation lawyers mean when they advise about settlement options in relation to an ongoing or potential dispute.

Reasons for making a settlement offer

Settlement is always a commercial choice. It is a form of changing an uncertain risk or benefit into a known liquidated sum or position. Settlement can and should be considered at any time when a potential dispute arises or while it is ongoing.

Very broadly there are three reasons to make a settlement offer (and a combination will be relevant in most cases):

- Because you want to settle at or near the sum proposed;
- Because you want to protect yourself against adverse costs if you lose or improve your costs recovery if you win. The Judge can use his or her discretion to adjust the normal 'loser pays' rule applied by the English Court if there have been offers made prior to the hearing; and
- because you want to send a message (usually of confidence) to your opponent.

Types of Settlement Offer

In English Court proceedings there are two common types of settlement offer:

- The best type of offer is an offer made in accordance with the strict terms of Part 36 of the Civil Procedure Rules. This is known as a Part 36 offer. If the circumstances in that rule apply - this type of offer can give you an enhanced position in relation to costs and consequently will put more pressure on your opponent to settle (and potentially send a stronger message);
- However, if the offer you want to make does not fall within the strict terms of Part 36, it is possible to make any type of proposal as an offer and the Court will consider it in relation to costs after the hearing. This is often described as a 'Calderbank offer,' although there is nothing special in the name.

If you want to use Part 36 - your offer must fit within the permitted scope of such offers and it must be made strictly in accordance with the procedure in that rule.

Part 36 in overview:

When is it available

- Only applies to offers regarding money. If you want anything else e.g. an injunction or return of goods etc it will not be available;
- Must specify whether it is a full settlement of all (or only part) of a claim;
- Must provide for the claimant's costs to be paid up to the date of acceptance (within 21 days of the offer itself)

What effect does it have

- if accepted a part 36 offer is binding in its terms to settle the dispute;
- If a part 36 offer is **declined by a defendant** and the **claimant subsequently wins more** money at the hearing (i.e. in retrospect the defendant should have accepted):
 - the claimant can be paid up to 10% more than his claim;
 - the claimant is entitled to request interest on costs and damages at a higher rate;
 - The defendant will have to pay some of the claimant's legal costs on an indemnity basis.
- If a part 36 offer is **declined by a claimant** and the **claimant subsequently loses or wins less** money at the hearing (i.e. in retrospect the claimant should have accepted the offer) the defendant will generally recover his costs of the proceedings incurred after the offer.

Conclusion

There is no particular magic to the decision to make an offer. In most cases parties should consider whether a part 36 offer can be made. If not, then a 'Calderbank' offer can be made instead. Part 36 offers are almost invariably better, if they are available.

The difficulty comes in ensuring the correct process is used and the offer is fixed at the correct level. This is a difficult commercial decision and a tricky legal process to ensure that Part 36 is fully complied with.

Thomas Webb and David Hall are part of Burges Salmon's dispute resolution team assisting clients with resolving their disputes on a commercial basis by use of legal proceedings and where appropriate alternative dispute resolution and settlements.

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