Room for improvement

David di Mambro provides a masterclass in Part 36

IN BRIEF

- May an offer state that it is to be treated as withdrawn if not accepted within the relevant period?
- Should an existing offer be treated as revoked if a subsequent offer is made or a counter-offer made as would be the case under contract law?

When the CPR came into being many regarded the creation of a claimant's Part 36 offer as being one of the CPR's greatest achievements. The Part was subject to wholesale amendment in April 2007 when the primary driving force was the dispensation with payments into court where:

- vast sums of money were being paid into court by, in effect, the government in relation to clinical negligence cases where the defendant's ability to pay was not in doubt;
- the administration of the account holding the funds and the interest thereon were very expensive.

There was a view that one could not relax the rule in relation to "payment in" simply for the government or some institution ultimately backed by the government and not do so for every defendant. The opportunity was taken to "improve" the rule. This was ultimately done in comparative haste. Recent case law has produced some unexpected results which suggest that the Part was not necessarily improved.

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More advantageous

Carver v BAA plc [2008] EWCA Civ 412, [2008] All ER (D) 295 (Apr): in which it was held that, in the context of Part 36 as revised (in 2006), money claims and non-money claims were to be treated in the same way, "more advantageous" was an open textured phrase. It permitted a more wide-ranging review of all the facts and circumstances of the case in deciding whether the judgment was worth the fight bearing in mind that litigation is time consuming and that it comes at a cost, emotional as well as financial. In relation to money claims, the *Carver* problem has been overcome by an amendment to Part 36 by the insertion of a new rule 36.14(1A). The problem remains, however, as to whether there is some rule which could be devised and which addresses the problem of complex claims: how can a trial judge assess in, for example, a boundary dispute or litigation involving shareholder's agreement whether the relevant party has done better than the Part 36 offer where there were ingredients other than money in the offer?

Multiple offers

Gibbon v Manchester City Council; LG Blower Specialist Bricklayer Ltd v Reeves [2010] EWCA Civ 726, [2010] 1 WLR 2081, [2010] PIQR P16: where the court disapproved of *Carver* but was obliged to follow it and went on to hold that, once made, a Part 36 offer remained open for acceptance until withdrawn: the common law concepts of contractual offer and acceptance did not apply to Part 36.

The court held that if a Part 36 offer is not accepted within the relevant period then, subject to CPR 36.9(3), it may be accepted at any time. Once made, a Part 36 offer remains open for acceptance until withdrawn, and Part 36 displaces the common law. Part 36 does not provide that only one offer may be available for acceptance at any time, nor does it provide that a later offer should be treated as revoking or varying a previous offer: Moore-Bick L.J paras 4, 5 and 6.

Accordingly, where one party makes an offer followed by a further offer, the first one does not automatically lapse. It may remain open for acceptance if the second offer is subsequently withdrawn: *Gibbon v Manchester City Council; LG Blower Specialist Bricklayer Ltd v Reeves* [2010] EWCA Civ 726, [2010] 1 WLR 2081, [2010] 36 EG 120.

Offer stating that withdrawn if not accepted

In *C v D* [2011] EWCA Civ 646, 136 Con LR 109, [2011] NLJR 780 the court held that a Part 36 offer may not state that it will be treated as withdrawn (if not accepted) at the end of the relevant period: an offer which is expressed as lapsing at the end of the relevant period (depending on the precise words used and their context) may well not comply with the strict requirements of Part 36 and will not put the offeree at risk of the costs consequences in CPR 36.14 although the court may nevertheless take the offer into account on the question of costs. Practitioners will all have widely differing experiences of Part 36 offers. It is thought that, pre-*C v D,* a very significant number of offers included some such formula.

In *C v D* the Court of Appeal considered in intense detail both the interpretation and the mechanism of Part 36. In particular, the court considered the meaning and effect of words "open for 21 days" as they appeared

in the offer in question.

"[40] … It is true that Pt 36 does not contain an express exclusion of a time limited offer. However, the essence of the matter is that a Pt 36 offer, to have effect in terms of costs consequences after trial, has to be an offer which has not been withdrawn, but has remained on the table. The initial offer has to specify a period of at least 21 days during which the Defendant remains liable for the Claimant's costs until acceptance (r 36.2(2)(c) and r 36.10(1)). The offer cannot be withdrawn within that period without the permission of the court (r 36.3(5)). After that period has expired, the offeror can withdraw the offer only by serving notice of withdrawal on the offeree (rr 36.3(6) and (7)). In the absence of withdrawal, the offeree can accept the offer at any time (r 36.9(2)). The language of that rule's "unless the offeror serves notice of withdrawal on the offeree" states a pre-condition which has to be fulfilled in order to prevent the offeree having the right to accept "at any time". That critical rule is made subject to a few limited exceptions (r 36.9(3)), one of which is where the trial has commenced, but the expression of those exceptions only serves to emphasise that, in the ordinary way, unless the offer has been withdrawn before the expiry of the relevant period with the permission of the court, or the offer has been withdrawn after the expiry of that period by the service of a written notice of withdrawal, there is no room for an offer which is neither withdrawn before or after the expiry of the relevant period, but lapses as a matter of its own terms. … Although the present issue was not in play in *Gibbon*, the logic of this court's decision there underwrites the conclusion which I, together with the judge below, would favour: and I agree that para 16 of Moore-Bick LJ's judgment there comes very close to expressing the rule applicable in our case.

"[46] It is common ground that the offer was intended to be made and understood as a Pt 36 offer. It is disputed, however, what the meaning of "open for 21 days" means in that context. The Claimant submits that it means that the offer lapses at the end of 21 days… ie that the offer is not open for acceptance after 21 days. The Defendant submits that it means that the offer is open for 21 days as an expression of the relevant period but that after those 21 days it may be withdrawn.

"[53] In my judgment, there is an entirely feasible and reasonable construction of the offer letter which avoids it being construed as a time limited offer … (Rix LJ) [and that was the construction which the court accepted on the basis of the wording of the particular letter in its particular context].

"[54] In the context of Part 36, it seems to me to be entirely feasible and reasonable to read the words "open for 21 days" as meaning that it will not be withdrawn within those 21 days. Part 36 permits withdrawal within the 21 day relevant period, but only with the permission of the court. It seems to me that "open for 21 days" is an obvious way of saying that there will be no attempt to withdraw within those 21 days. It is also a warning that after the expiry of those 21 days, a withdrawal of the offer is on the cards. Such a construction would save the Part 36 offer as a Part 36 offer and would also give to both parties the clarity and certainty which both Part 36 itself, and the offer letter with its reference to "open for 21 days", aspire to. It would leave the offeror entirely free to withdraw the offer immediately upon expiry of the stated period, or to let it roll on for as long as it wished. At the same time it would assure the offeree that it had 21 days to consider what it wanted to do, but was at risk if it had not accepted within that period. There might be an issue, had the offeror wished to withdraw within the relevant period, as to whether the court would permit it to do so where it had stated that it was open for 21 days: but that issue does not affect the current question …

"[68] . . . Ultimately, it is important for the security of the Part 36 scheme, in countless cases, that it should be clearly understood that if a Claimant wishes to make a time limited offer, in the sense that the offer is to lapse of its own accord at the end of a stipulated period, then such an offer cannot be made as a Part 36 offer; that an offer presented as a Part 36 offer and otherwise complying with its form will not readily be interpreted in a way which would prevent it from being a Part 36 offer; and that if an offeror wishes to bring his Part 36 offer to an end, so that it cannot be accepted, then he must serve a formal notice of withdrawal. It seems to me that, although the precise point raised in this appeal is new, all the jurisprudence on Part 36 cited above contributes to these conclusions" (Rix LJ).

There is a presumption that the court will try to resolve ambiguity so as to preserve the intention of the offeror to make a Part 36 offer: Stanley Burnton LJ also in *C v D* [2011] EWCA Civ 646:

"[84] Any ambiguity in an offer purporting to be a Part 36 offer should be construed so far as reasonably possible as complying with Part 36. Once it is accepted that a time-limited offer does not comply with Part 36, one must approach the interpretation of the offer in this case on the basis that the party making the offer, and the party receiving it, appreciated that fact.

"[85] I agree that the normal effect of the

Part 36: cracking the code

Part 36 is a self-contained code which, as a whole, contains a carefully structured and highly prescriptive set of rules dealing with formal offers to settle proceedings which have specific consequences in relation to costs in those cases where the offer is not accepted, and the offeree fails to do better after a trial.

In cases where there has been no Part 36 offer, the judge has a broad discretion in dealing with costs within the framework provided by CPR Part 44, and in exercising its discretion, the court will have regard to the general rule that the unsuccessful party should pay the costs of the successful party, but will also have regard to the conduct of the parties and any payment into court, or admissible offer to settle made by one party or another which falls outside the terms of Part 36.

In seeking to settle proceedings, parties are not bound to use the mechanism provided by Part 36, but if they wish to take advantage of the particular consequences for costs and other matters that flow from making a Part 36 offer, in relation to which the court's discretion is much more confined, they must follow its requirements. 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.

However, Part 36 does not incorporate all the rules of law governing the formulation of contracts, and it is undesirable that it should do so: *Gibbon v Manchester City Council; LG Blower Specialist Bricklayer Ltd v Reeves [2010] EWCA Civ 726, [2010] 1 WLR 2081, [2010] 36 EG 120*, Moore-Bick LJ paras 4, 5 and 6.

phrase "the offer will be open for 21 days" is that the offer is not open for acceptance after 21 days. However,...the use of that phrase is consistent with a warning that the offer will be withdrawn after 21 days. Given the clear express intention of the respondent to make an offer complying with Part 36, it should be so construed."

21 day period essential / multiple inconsistent offers / construction of offer in context of the words of rule and not in isolation

In *Carillon JM Ltd v PHI Group Ltd* [2011] EWHC 1581 (TCC) the court was concerned with the construction of an offer to split liability on a 70:30 basis. The offer was expressed to have been made under Part 36 of the CPR and that it was intended to have the consequences of Pt 36. It contained no time limits but invited the offeree to respond within the next seven days. Akenhead J held that the offer did not comply with Part 36 because it did not comply with the prescriptive requirements of r 36.2. At para 15 he said: "The first exercise in this case therefore is to determine whether or not, on a proper reading of the letter of 5 February 2010, it was a Part 36 offer which complied with the provisions of Part 36. I have formed the view that it did not comply for the simple reason that it did not, as prescriptively required by Part 36, "specify a period of not less than 21 days within which [RWC would] be liable in accordance with rule 36.10 if the offer is accepted". Although paragraph 4.5 of the letter said that the offer was "made under Part 36 . . . and the offer is intended to have the consequences of Part 36 . . .", this does not, in my judgement, begin to comply with the prescriptive requirements of rule 36.2. A court should be cautious about seeking to introduce purely contractual interpretation and construction principles into the exercise of determining whether an offer is compliant with Part 36. It should however be clear that it is compliant. The failure to spell out a 21 day period is an important one because it provides not only a timetable within which the offeree needs to accept the offer but also points the offeree to the cost consequences of accepting it."

The case went to appeal: *sub nomine: Phi Group Limited v Robert West Consulting Limited [2012]* EWCA Civ 588 (Rix, Lloyd and Stanley Burnton LJJ). The lead judgment was given by Lloyd LJ (with whom the other two LJJ agreed). The judgment contains a very helpful summary of the case law on this point:

"[27]…[T]he letter did not specify a period of not less than 21 days, or any period, in compliance with paragraph (c). The judge considered that this was fatal, and I agree with him. It has been held that an offer was sufficient which specified a period of 21 days as "the relevant acceptance period" (see *Onay v Brown* [2009] EWCA Civ 775, [2010] 1 Costs LR 29) or which said "this offer will be open for 21 days from the date of this letter" and identified that period as "the relevant period" (see *C v D* [2011] EWCA Civ 646, [2012] 1 All ER 302). It is therefore not part of the mandatory requirements of the rule, once the period has been specified, to state expressly that this is the period "within which the defendant will be liable for the claimant's costs in accordance with rule 36.10 if the offer is accepted". But this letter did not specify any period for the purposes of the rule. The only period which was specified was a seven day period...

"[29]…Stanley Burnton LJ said this at paragraph 84: "Any ambiguity in an offer purporting to be a Part 36 offer should be construed so far as reasonably possible as complying with Part 36."

"[30]…The requirement in the rule that a period of not less than 21 days must be specified requires some explicit identification of a period of 21 or more days. Ambiguity may come in, and with it the principle of construction described, if a period is specified but there is some doubt as to the purpose for which it is specified. Here no period was specified at all, so there is no ambiguity which falls to be resolved.

"[31] If an offer letter were to specify a period of 21 days, but not to follow the language of the relevant paragraph of the rule, the question might arise as to whether that was in itself a sufficient compliance with rule 36.2(2)(c). I have mentioned above in summary terms the phrases used in *Onay v. Brown* and in *C v. D.* Rix LJ said in *C v. D* at paragraph 56: "A point may perhaps have been taken that the offer did not comply with rule 36.2(2)(c). But no such point has been taken, and the judge was satisfied that the rule had been complied with."

"In *Epsom College v. Pierse Contracting Southern Limited* [2011] EWCA Civ 1449 the offer stated: "This offer will remain open for acceptance 21 days …" without reference to a relevant period. The present point was not in issue, only the *C v D* point about what "open for acceptance" meant. It was in that context that Rix LJ said (at paragraph 66) that there was no sufficient difference of language to take the case outside the rationale of *C v D*.

"[32] If the offer were to refer to 21 days as the "relevant period", a phrase that is defined in rule 36.3(1)(c) as being the period stated under rule 36.2(2)(c), it seems likely that there would be sufficient compliance with rule 36.2(2)(c), for in such a case the 21 day period for acceptance would be clothed with the costs consequences provided for in CPR Part 36. The specification of the period would be sufficiently clearly linked with the terms of rule 36.2(2)(c). There could be other ways, besides tracking the words of the rule itself or referring in terms to the period as being specified for the purposes of rule 36.2(2)(c), of ensuring that the reader would understand that the period specified is indeed the period referred to in that paragraph of the rule, having consequences for costs, not merely for acceptance of the offer. If the offer were to identify a 21 day period for acceptance, but with nothing

more said, it does not seem to me clear that this would suffice for the purposes of rule 36.2(2)(c). At any rate, there does not seem to be a decision to the effect that such words would comply with that requirement of the rule. The safe course must be to be more specific, either by using the words of the rule or by including a reference to the relevant paragraph of the rule, in relation to the stated period."

In relation to multiple extant offers, Lloyd LJ said at paragraph 53: "There is no inherent reason why a party should not make two different offers to the opposing party to settle litigation, either of them being capable of acceptance, though not both. It is not uncommon to see a party put forward alternative offers in the same letter of offer, as between which the opponent may choose which to accept. Normally, of course, with offers made at the same time, the economic substance of the two is likely to be the same or comparable. But if two different offers, inconsistent with each other in that both could not be accepted, can be made in one offer document, there is no reason in principle why one party should not make different offers successively, leaving it open to the opposing party to choose which (if either) to accept. It is not altogether unusual to find a party making successive and different offers in money terms, leaving each on the table, whether under Part 36 or not, each being capable of acceptance, but having different consequences as regards costs if not accepted and not beaten, because the special rules as to costs would aply as from different times in relation to different successive offers. One of the cases at issue in *Gibbon v Manchester City Council*, cited above, involved successive offers, of which several were open for acceptance at the same time: see Moore-Bick LJ's discussion at paragraph 32.

"[55] In those circumstances it seems to me that although the two offers were inconsistent, so that RWC could not accept them both, it does not follow that because the latter was put forward the former was necessarily withdrawn."

21 day period essential

In *Thewlis v Groupama Insurance Co Ltd* [2012] EWHC 3 (TCC), [2012] All ER (D) 09 (Jan) (Mr Behrens sitting as a judge of the High Court) the relevant letter was headed: "OFFER MADE PURSUANT TO PART 36 OF THE CPR" and then continued: "… this offer is made pursuant to Part 36 of the CPR and remains open for acceptance for a period of 21 days, from your receipt of this offer letter, thereafter it can only be accepted if we agree the liability for costs or the court gives permission..."'

The judge held that, applying the reasoning of Rix LJ in *C v D* (at para 68) quoted above, the offer was one which was expressly stated to be incapable of acceptance after the 21 day period had elapsed and, accordingly, did not comply with Part 36. If an offeror – after the 21 day period – wishes to bring his Part 36 offer to an end, so that it cannot thereafter be accepted, he must serve a formal notice of withdrawal: he may not in the offer itself make a statement to the effect that this is what he will do.

The draftsman of any offer should be astute to include clear words to the effect that the offer: (i) is a Part 36 offer; and that (ii) it is intended to have the consequences of Part 36. The draftsman should similarly be astute to ensure that the offer is plainly open for 21 days.

If the offeror is minded to withdraw the offer at the end of the 21 day period then there should be no reference to that intention in the offer letter. The offeror should wait 21 days and then serve a notice withdrawing the offer.

Offeree may accept an offer which he had previously refused provided not withdrawn or lapsed

Sampla v Rushmoor Borough Council [2008] EWHC 2616 (TCC), [2008] All ER (D) 335 (Oct) (Coulson J) (see [28] and [36] of the judgment). There is no direct analogy between contract law and CPR 36 in relation to offers that had been initially rejected and there is no analogous principle that would prevent an offeree from ever being allowed to accept an offer that he had originally refused; provided that it has not in the meantime either lapsed or been withdrawn, a Part 36 offer that has been refused may nevertheless be accepted at a later stage:

This decision is reinforced by *Gibbon v Manchester City Council; LG Blower Specialist Bricklayer Ltd v Reeves* [2010] EWCA Civ 726, [2010] 1 WLR 2081, [2010] PIQR P16, paras 4, 5 and 6 where Moore-Bick LJ stated that, once made, a Part 36 offer remains open for acceptance until withdrawn, and Part 36 displaces the common law in such respects. Part 36 does not provide that only one offer may be available for acceptance at any time, nor does it provide that a later offer should be treated as revoking or varying a previous offer.

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