Part 36—a move towards greater flexibility?

Is the 'self-contained code' of the Part 36 regime showing signs of opening up? Stephen Burns & Emilie Brammer examine some recent developments

IN BRIEF

- Strategic considerations to bear in mind when making pre-action Part 36 offers.
- The extent to which common law principles might now impact the Part 36 regime.

Making a Part 36 offer can be an effective tool in the hands of a litigator, given the significant cost consequences that can follow. This 'highly prescriptive' 'self-contained procedural code', as it was described by the Court of Appeal in *Gibbon v Manchester City Council* [2010] EWCA Civ 726, [2010] All ER (D) 218 (Jun), can focus minds on settlement and help mitigate the (often substantial) costs of litigation. However, the use of this code can be a double-edged sword, with a poorly timed or unclear offer having the ability to trigger significant litigation and related costs.

Taking this into account, there has unsurprisingly been no shortage of cases so far this year considering the Part 36 regime. The scope and effect of pre-action Part 36 offers has been subject to some clarification, while practitioners have also been offered a degree of comfort in the event that they present an overtly inaccurate Part 36 offer which fails to reflect the offeror's intentions. This has however in turn triggered questions regarding the extent to which Part 36 will be a strictly 'self-contained' code moving forwards.

'Fictional proceedings' or a considered pre-action tactic?

In *Huntsworth Wine Company Ltd v London City Bond Ltd* [2022] EWHC 97 (Comm), the aforementioned wine company ('Huntsworth') brought an action for losses arising out of the theft of wine from warehouses owned by London City Bond Ltd (London City). As the claimant, Huntsworth claimed the costs of the wine at circa £125,000, while London City brought a counterclaim for unpaid excise duty. At trial, Huntsworth was awarded £1,000 plus interest (on the basis that London City's liability was contractually limited), while London City received judgment for £3,622.34 plus interest resulting in there being a net sum due from Huntsworth to London City (the defendant in these proceedings) of £2,837.53.

It is however the pre-action exchanges and events that are of particular interest in this case. In advance of issuing the above proceedings:

i) Huntsworth contacted London City setting out the basis of its claim and providing draft particulars. An accompanying claimant Part 36 offer was made.
ii) London City subsequently made its own pre-action Part 36 offer, which it also framed as a claimant Part 36 offer in the context of threatened proceedings in the Aldershot County Court (which were never in fact issued, superseded by Huntsworth's claim). This offer was for London City to accept a net payment of £2,000 from Huntsworth in settlement of all matters. The judgment obtained was accordingly more advantageous to London City than this offer previously made.

With reference to this Part 36 offer, London City sought to obtain the CPR 36.17(4) benefits for a claimant's Part 36 offer. A considerable debate arose regarding:

i) whether the offer made by London City was a valid Part 36 offer; and
ii) whether this should be deemed a 'claimant's offer' (with reference to the threatened Aldershot proceedings) or a 'defendant's offer' (in light of the position of the parties in the proceedings judgment was obtained in).

Question (ii) was significant given the differing cost consequences that attach to a claimant's Part 36 offer when compared to a defendant's Part 36 offer. Of particular relevance on the facts of this case:

i) If a claimant does not accept a *defendant's* Part 36 offer and then fails to obtain a more advantageous judgment, the offeror will typically be entitled to its costs on the standard basis from the expiry of the relevant period.
ii) On the other hand, if a defendant does not accept a *claimant's* Part 36 offer and the claimant then obtains a judgment that is equal to or more advantageous than its offer, it will usually be entitled to costs on an indemnity basis from the expiry of the relevant period (with additional sums by way of interest/an uplift on the judgment).

Huntsworth argued that London City was not entitled to make a claimant's Part 36 offer given it was not the claimant in the issued proceedings. At the time London City's Part 36 offer was made, Huntsworth had already served draft particulars

and made a Part 36 offer based on those envisioned proceedings. Huntsworth contended that the Aldershot County Court proceedings were 'fictional' and that an offeror cannot simply declare whether an offer is a claimant's Part 36 offer. In short, Huntsworth claimed the offer had no effect whatsoever and the court should make an issues-based costs order.

A party's 'perceived status'

On the facts, it was held that London City's offer was a valid claimant's Part 36 offer, despite the fact it was made with reference to proposed proceedings that did not eventually take place. It was emphasised that it would be 'a most unfortunate interpretation of the rules if the question as to who could make a claimant's Part 36 offer was determined simply by who made the first such offer or who issued proceedings where a counterclaim was probable'. The judge highlighted that at the time the offers were made, the claim brought by Huntsworth was no less 'fictional' than the claim threatened by London City in the sense that the proceedings had not yet been brought. While setting out some helpful guidance on the features 'necessary or at least desirable' for an offer to be interpreted as a claimant's Part 36 offer, the court concluded that the emphasis is on a party's role or perceived status when making a Part 36 offer, rather than its particular title within the issued litigation. As a result, London City was entitled to recover its costs on the standard basis until the expiry of the relevant period under its Part 36 offer, and thereafter on an indemnity basis.

This case provides a helpful confirmation that the question of who is entitled to make a claimant's Part 36 offer is not determined simply by reference to the party's respective roles in issued proceedings. This is a logical position which is consistent with the entitlement of parties to make pre-action Part 36 offers—the utility of this would be undermined if the impact of a claimant's pre-action Part 36 offer could be eroded by the offeree simply issuing proceedings first. It is clear that the perceived status of the offeror will be considered, alongside the substance of the offer. This is in line with the prior Court of Appeal decision, *AF v BG* [2009] EWCA Civ 757, [2009] All ER (D) 249 (Jul), in which it was held that a defendant with a counterclaim can be viewed as a claimant even if the counterclaim has not yet been pleaded (with Part 36 subsequently being formally amended to clarify that a Part 36 offer can be made in respect of a counterclaim). Given the substantial cost benefits available, potential defendants with a valid counterclaim should carefully consider whether it is possible to frame an offer as a claimant's Part 36 offer.

> *"This provides confirmation that the question of who is entitled to make a claimant's Part 36 offer is not determined simply by reference to the party's respective roles in issued proceedings"*

Sidestepping overt errors

While providing helpful guidance on strategic considerations to bear in mind *before* deploying a Part 36 offer, case law has also offered some comfort in the event that a Part 36 offer does not in fact accurately reflect the offeror's intentions *after* being made—and indeed accepted.

In *O'Grady v B15 Group Ltd* [2022] EWHC 67 (QB), [2022] All ER (D) 52 (Jan), the claimant brought a damages claim under the Fatal Accidents Act 1976 after her husband was killed in a road accident involving a lorry driven by an employee of the defendant. In February 2021, the defendant admitted primary liability, but the question of contributory negligence remained. Later that month, the claimant's solicitor sent a Part 36 offer to the defendant which was intended to concede contributory negligence of 20% but incorrectly stated 80%: 'The Claimant offers to resolve the issue of liability of on 80/20 basis. For the avoidance of doubt if the Defendant accepts this offer it will only be required to pay 20% of the Claimant's damages.'

This offer was (unsurprisingly) promptly accepted by the defendant's solicitor. On quickly realising the error, the claimant's solicitor replied ten minutes after the offer was accepted, clarifying that the offer was for settlement at 80/20 in the claimant's favour. The defendant subsequently required the claimant to make a formal application for permission to withdraw the offer and/or vary its terms. An error had clearly been made—the defendant had admitted primary liability and also previously made an offer of 60/40 in the claimant's favour. The claimant highlighted this and also made an application to cross-examine the defendant's solicitor regarding whether he was aware of or suspected the error.

Shortly before a preliminary hearing on the second application, the defendant set out its view that the common law doctrine of mistake did not apply to the Part 36 'self-contained code'. The claimant countered that neither Part 36 or case law precedent prevented the doctrine from applying and Part 36 should allow for the correction of an obvious error.

The key issue to be considered was therefore whether the common law doctrine of unilateral mistake applied to Part 36. It was held that this doctrine could apply to a Part 36 offer in circumstances where:

i) a clear and obvious mistake had been made; and
ii) the offeree appreciated this at the time of acceptance.

A flexible 'self-contained code'?

Importantly, it was held that the fact Part 36 was a 'self-contained code' did not exclude the application of this doctrine, with the master emphasising that Part 36 was not 'hermetically sealed'. In short, while it was acknowledged that Part 36 was intended to have clear results and consequences, this should not be at the expense of correcting obvious injustice, particularly as the overriding objective applied to Part 36.

The previous trend of recent decisions had been to strictly apply the Part 36 'code' notwithstanding it could lead to unfair results. However, *O'Grady* perhaps gives practitioners a way to break the code in circumstances where an overt error has been made in a Part 36 offer. It will however be interesting to see how broadly and to what extent this precedent is applied moving forwards. The findings were reached on the particular facts of this case in which the error made was immediately obvious, based on the preceding facts and offers exchanged. This gives rise to the obvious question of what the position will be when less overt errors are made.

On a broader level, this case introduces a common law principle into the Part 36 regime, despite its prior description as a purely 'self-contained code'. A further question therefore arises regarding whether this case will encourage wider arguments and attempts to amend the (historically strict) application of the Part 36 regime with reference to common law rules. At this stage, when taken together, the developments in *O'Grady* and *Huntsworth* seem to broadly point towards an increasing degree of flexibility in the application of the Part 36 regime. NLJ

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