

## PART 36 OF THE CIVIL PROCEDURE RULES:

### OFFERS TO SETTLE AND PAYMENTS INTO COURT

The London Solicitors' Litigation Association (LSLA) is over 50 years old and represents the interests of a wide range of litigators in London handling a broad range of civil and commercial litigation. Through its 950 solicitor members and strong links with a wide number of professional bodies, it represents nearly all civil litigation practices in London. The LSLA operates through a committee of some 15 members which includes members of the Civil Justice Council, Civil Procedure Rule Committee, Law Society Civil Litigation Committee and local Law Societies. The LSLA has a long track record of responding to consultation papers and has drawn on a wide range of views in response to this paper.

#### Overview

The fundamental purpose of Part 36 is to promote settlement of disputes and in that respect, we consider that it has been one of the successes of the CPR. Any changes to its provisions should therefore be approached with considerable caution. We recognise however that a number of Court of Appeal decisions have highlighted points which ought to be reviewed and we therefore welcome this consultation paper.

We will deal with the specific questions below but in canvassing the opinions of the LSLA's members, a strong preference emerged for all defendants to be permitted to make offers rather than payments into court. It does seem perverse for the rules to be changed so that, in terms, those who can afford to pay in do not have to do so, whereas those who cannot demonstrate financial security have to pay in.

If the Rule Committee considers that Part 36 should move towards a system of offers rather than payments in, whether on a blanket basis as we propose or on a more restrictive basis as the consultation paper proposes, then we consider that the approach to withdrawal of offers should also change. Inevitably in our view a greater freedom to make offers implies a greater freedom to withdraw. We suspect that the presence of money in court actually encourages parties to take more than the prescribed 21 days to consider their position.

In the interests of promoting settlement, we consider that Part 36 should now move to a system in which offers are deemed to lapse automatically at the end of the prescribed period for acceptance, unless stated otherwise. We believe that this would help "concentrate the minds" of both parties. Offerors would have the opportunity to consider whether offers should be left on the table and offerees will have to make prompt decisions as to whether to take the offer.

Such a system would only work if the offer, once withdrawn, still retained consequences in costs. We therefore agree with the Court of Appeal in *Western Power* that withdrawn offers should continue to have effect under Part 36 and amendments will be required to Part 36.5 to address this.

Turning to the individual questions in the consultation paper, we comment as follows:-

**1. Do you agree that defendants who can be assumed to be 'good for the money' should not be required to make actual payments in support of offers as provided in recent case law?**

The strong preference of the LSLA is to move to a system where all offers in prescribed form should have the protection of Part 36, whether or not they are backed by a payment of money into court. If this approach is not favoured, then it must follow that that LSLA supports a more liberal approach to the making of offers as opposed to payments into court and we would therefore agree that defendants who can be assumed to be "good for the money" should no longer have to make a payment.

The proposal risks the contradictory position that those who can afford to pay in will not have to and those who cannot afford to pay in will be obliged to, in order to seek costs protection. There is a real danger that this would lead to "inequality of arms", with the rules arguably favouring those defendants who have substantial funds or backing.

It is fair to say that a number of our members have reservations about this move. There is a long list of insurers, local authorities and other major corporations who have fallen, sometimes very quickly, into insolvency. One of our members cited the example of Polly Peck, who were given a clean financial bill of health but had then collapsed within a matter of weeks. It was suggested that offerors or their solicitors could file a statement detailing why the offeror is good for the money, but this too fails on the Polly Peck example.

There is also the view that the presence of the money in court beyond the 21 day period for acceptance helps to drive the settlement process and therefore meets the main objective of Part 36, which is to promote settlement. There are however others who consider that the availability of the money in Court arguably undermines the effectiveness of the 21 day period for acceptance of Part 36 offers/payments.

A possible compromise could be a provision that money offered must be paid within a short limited period, say 14 days after acceptance of the Part 36 offer, otherwise the offer is of no effect at all.

**2. If so, do you agree that so far as possible those categories of defendant should be defined in the rules to increase certainty for defendants making, and claimants accepting, offers unsupported by payments?**

Our primary position, as explained above, is that there should in fact be no differentiation between any categories of Defendants for the purposes of Part 36 and that we should move to a system of offers only. However if this approach is not accepted, we agree that the rules need to make the position absolutely certain. The need for change in this respect arises from the decision in *Western Power*, where the Court of Appeal concluded that the position was not yet certain (but ought to be).

**3. If so, do you agree that the categories defined in the draft rule are appropriate? What other categories would you include or exclude and why?**

We do not agree that the categories in the draft rule are appropriate. The draft rule is much more restrictive than the judgment of the Court of Appeal in *Western Power*. If the Committee does proceed with some form of distinction between categories of defendant, the description should be wider.

It is worth comparing the position under Part 36 with the changed position under Part 25 for interim remedies (where any stated restriction as to the status of the defendant has been removed).

We accept that a wider definition may be difficult to draft. That is one of the reasons that the LSLA favours the blanket removal of the requirement to make payment to support the offer. By making an offer in the prescribed terms, the Defendant could be assumed to be certifying that it is in a position to meet that offer.

The procedure of certification proposed is too cumbersome. There should be a simple statement by the party/representative making the offer.

**4. Should the court be allowed to (a) extend and /or (b) abridge the time for accepting a Part 36 offer? If so, what factors or criteria would be relevant?**

Whilst LSLA members believe that the courts' powers to extend or abridge time apply equally to Part 36 as to other time limits within the CPR, we agree that the Court should be allowed to extend or abridge time and that this should be made clear in the rules for the avoidance of doubt. However we do believe that there are certain principles that should apply:-

- The 21 day limit should normally be a minimum. Thus if a party (presumably the offeror) wishes to abridge time, they will need to show good reasons and to make the application promptly.
- As indicated under 5 below, we consider that the parties should retain the freedom to extend time as they wish. However, as the purpose of the provisions is to promote settlement, we consider that the Court should be slow to extend time where the parties will not agree this. (Some members consider that the Court should not have the power at all to extend time if the offeror objects, otherwise the Court is imposing a bargain on an unwilling offeror)
- Any application to extend time must be made within the 21 day time limit. It should not be possible for the receiving party to extend time outside the 21 days as this will undermine the effectiveness of Part 36.
- As the primary purpose of Part 36 is to promote settlement and to enable one party to put the other at risk as to costs and other consequences, the court will need to be satisfied that there are good reasons for the extension. Subject to this point and to the other factors identified above, we do not believe that the court's discretion should be fettered by identifying factors or criteria which should apply.

**5. If the court has the power to extend then should the offeror also have the right to make the offer beyond 21 days in the first instance?**

The LSLA agrees that the parties should retain the freedom to extend time as they wish, both within the offer itself and once the offer has been made. The existing rules already provide for both these options. We anticipate that unless the power to extend time is restricted to situations in which there is good reason to request an extension, there will be a rash of applications for extension of time. Accordingly it is important that the power to grant extensions is limited to those cases in which good reason is shown.

**6. Do you agree that the requirement to obtain the court's permission to accept a Part 36 offer out of time should no longer apply? If you disagree, please explain what purpose permission serves?**

This is a difficult area and needs to be seen in the context of any decision on when and in what circumstances a party can withdraw an offer made. Some of our members believe that the ability of parties to accept offers out of time risks undermining the effectiveness of Part 36, as it makes less likely that the receiving party will take real notice of the 21 day period.

It will also depend on the effect of an offer once withdrawn. The position of the Court of Appeal in *Western Power* on this was quite clear: that the Court should always take into account the fact that an offer to resolve the case had been made and rejected. We deal with this point further under question 8 below.

We believe on balance that the right approach is for Part 36 offers to be treated as limited in time and then to lapse for contractual and other purposes, save for the continuing effect in costs. On that basis it would not normally be possible for the receiving party to accept an offer out of time.

If the Rule Committee disagrees with this position, then the LSLA's secondary position would be that the formal permission requirement should remain. We consider that the consultation paper may not clearly have understood the costs position, as there seems to be some confusion between the entitlement to costs as opposed to the assessment of the actual figures for the costs themselves. Unless the parties can agree terms, the entitlement to costs will have to be determined by order of the court and could be dealt with under the permission requirement. The parties will not be able to enforce their respective entitlement to costs without an appropriate Order.

**7. Should parties refusing an offer be required to give reasons?**

We did not detect any real enthusiasm amongst our membership for requiring the refusal of an offer to be accompanied by reasons. It is quite clear that if such a proposal were introduced, the responses used would rapidly become formulaic and therefore meaningless.

**8. Should withdrawal of offers be permitted:**

- a. during the period for acceptance with the court's permission and thereafter by serving a notice of intent to withdraw ; or**
- b. at any time by serving a notice to withdraw ; or**
- c. at any time only with the court's permission ; or**
- d. only after the end of the period for acceptance, and with the court's permission ; or**
- e. only after the end of the period for acceptance, without requiring the court's permission?**

As stated above, the LSLA's preferred option is for offers to be truly limited in time and to lapse at the end of the period for acceptance. This is a difficult subject, but any system which permits greater freedom to make offers rather than payments into court must also imply greater freedom to withdraw.

If the Rule Committee does not accept our primary position then our preference would be for Option a, under which notice to withdraw could be served at any time but only after the period prescribed for acceptance.

In reaching our decision on this option, we have had particular regard to the primary intention of Part 36, namely to promote settlement of disputes. The limited period for acceptance is in our view a protection for both offerors and offerees. The offeror knows that he will only be exposed to limited costs beyond the date of the offer and at the same time the offeree knows that he has a short period of grace in which to take stock. We believe that the latter is particularly important and that therefore the right to withdraw within the period for acceptance should be restricted.

We would recommend that in order to avoid confusion, there should be a prescribed format for the withdrawal of Part 36 offers, in the same way that there is a prescribed format for the giving of offers. This would avoid any question of dispute over whether an offer has or has not been withdrawn.

The consultation paper does not address the effect of withdrawal of an offer. Part 36.5(8) currently indicates that an offer once withdrawn loses its costs consequences. However the Court of Appeal in *Western Power* ruled that the offer was relevant to behaviour at the time and can therefore still sound in costs. We agree with the Court of Appeal's reasoning in this respect and therefore agree that an offer once withdrawn should still have an effect in costs. Part 36.5 will therefore require amendment.

**9. Should defendants normally be entitled to (a) indemnity costs and (b) enhanced interest where a claimant fails to beat the defendant's offer at trial?**

There were a range of views within the LSLA's membership on this point. Some of our members considered that there should be no provisions within the CPR at all which could be regarded as imposing a penalty on one party at the expense of the other, as opposed to being purely compensatory. However we recognise the need for some artificiality in the incentive for Claimants to make offers and we therefore support the current provisions entitling Claimants to indemnity costs and enhanced interest.

Defendants already have incentives to make offers and it is not clear that further incentive is needed. However on balance we would favour the defendant being entitled to indemnity costs and enhanced interest on those costs. It is not of course possible to provide for the defendant to receive enhanced interest on damages, as there is no equivalent entitlement to damages. Some imbalance between the parties will therefore inevitably remain, but we consider that the change would at least reduce the imbalance.

**10. Should Part 36 offers and notices be served or simply given?**

We would point out that the question posed is not necessarily the question addressed in paragraph 53 of the consultation paper. The first question is whether there should be a single rule applicable to all notices under Part 36. We agree with the consultation paper that there should be a single rule in this respect. If such questions were left to the law of contract, then there would be scope for confusion and satellite litigation.

Whilst we have reservations about any system that artificially assumes that a document has been served, particularly where both parties have addresses for service on the Court record, we agree that a requirement for service should be the relevant trigger, so as to avoid arguments about whether the relevant notice has been received.

We understand that the provisions as to service are to be reviewed generally and we would welcome this, as it appears that the application of the rules for deemed service is becoming increasingly artificial.

**11. Do you agree that the requirement to file a notice of a Part 36 payment with the court should be removed?**

We agree that there is no benefit in filing the notice of payment with the relevant Court. Indeed there is a real danger, by retaining the requirement, that payment details may accidentally come to the attention of the Trial Judge. The parties are perfectly able to draw any such payment to the Judge's attention and to the appropriate point at the end of the trial and there is unlikely to be any dispute about the fact of payment in.

**12. Do you have any views on these proposals or do you have any other amendments to Part 36 that you feel are necessary? If so, please specify.**

Some of our members have a concern regarding the provisions of Part 36.22. Recent cases have shown that there is scope for satellite litigation about the applicable rate of interest and that where the court has to rule on interest before being told of the Part 36 offer/payment, the "counting back" to see whether an offer has been beaten may become complex. Some members felt it was therefore necessary for offers to detail precisely the composition of the offer, whilst others felt that a statement as to whether or not the offer included interest would suffice. We raise this point for consideration, although it is fair to say that other members believe that the current provisions are sufficiently clear and flexible enough to permit an offeror to break down the offer into its component parts if he so chooses.

London Solicitors Litigation Association

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