Doing a disservice to Part 36?

A recent decision shows the importance of strict compliance with service formalities when it comes to accepting or withdrawing Part 36 offers, says **Julian Copeman**

Part 36 starts with a simple aim: encouraging parties to make, and accept, reasonable settlement offers. Beyond that simple premise it has become complicated. Part 36 contains a formal set of rules and requirements. These have to be complied with in order to make a Part 36 offer which is valid and will therefore have the costs consequences provided for if the offer is not accepted and the offeror goes on to achieve a more advantageous result at trial. Recent case law has interpreted these requirements strictly.

CPR 36.9(2) provides that a Part 36 offer may be accepted at any time unless the offeror serves notice of withdrawal on the offeree. The rule expressly states that, unlike a normal contractual offer, a Part 36 offer remains open for acceptance even if there has been a counter-offer in the interim.

In *Gibbon v Manchester City Council* [2010] EWCA Civ 726, the Court of Appeal described Part 36 as "a self-contained code which provides expressly for the manner in which offers may be made, modified and withdrawn" and therefore "displaces the ordinary rules of common law" in relation to offer and acceptance. The Court of Appeal held that the rule means what it says: an offer may be accepted at any time unless the offeror has served notice withdrawing the offer, and the rules do not provide for a Part 36 offer to lapse on being rejected, nor does the requirement for written notice (under CPR 36.3(7)) leave any room for an implied withdrawal. If you want to withdraw an offer you need to do it expressly in writing. Indeed, it is perfectly possible to have a number of Part 36 offers open at the same time. If an offeror does not formally withdraw his first offer when making a later offer, both offers remain open for acceptance and the offeree can decide which to accept.

A recent unreported decision shows that the courts will take an equally strict approach to the form in which a party seeks to accept or withdraw a Part 36 offer, and in particular what amounts to proper service of the requisite written notice. The decision in *Sutton Jigsaw Transport Ltd v Croydon London Borough Council* (QBD, 27 February 2013) shows that an offer will not be validly accepted unless written notice has been served on the offeror in accordance with the usual service rules under CPR Part 6.

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In that case the defendant had made a Part 36 offer shortly before trial, which was not withdrawn. It appears the trial did not get off to a good start from the claimant's perspective, because during the short adjournment on the first day the claimant sought to accept the defendant's Part 36 offer. First, the claimant tried to accept the offer orally. The defendant pointed out that oral acceptance was not sufficient under Part 36. The claimant then handed over a handwritten note purporting to accept the offer. Two minutes later, the defendant sent a fax to the claimant's solicitors giving formal notice that the offer was withdrawn.

The question then was whether the offer had been validly accepted before it was withdrawn. The court's answer was that it had not. CPR 36.9(1) provides that a Part 36 offer is accepted by serving written notice on the offeror. Such notice is a formal court document which has to be served in accordance with the provisions of Part 6. CPR 6.22(3) allows personal service of documents except where an address for service has been provided. By serving the written notice of acceptance personally the claimant had not served it on the defendant's address for service before the offer was formally withdrawn. The court refused the claimant's application to dispense with service or for retrospective substituted service, as this would have given it an unfair advantage over the defendant who had complied with the rules.

In this case the claimant would also have needed the court's permission to accept the offer under CPR 36.9(3) because the trial had started. However, the same principle will apply in the usual case where the court's permission is not required.

The same principle would also work the other way around. If the offeror had handed over a written note of withdrawal at court and the offeree had then faxed formal notice of acceptance to the offeror's current address for service, the acceptance would have been valid despite the attempt to withdraw the offer. (Again, as trial had started, the court would have to give permission to accept the offer. Applying the logic of the case alone, presumably it would have done, although other factors such as the progress of trial would be taken into account.)

The message for practitioners is clear. Whether your client wishes to accept or withdraw a Part 36 offer, you must get the service formalities right. And if you think your opponent might not want you to do so, get your notice in quickly and without giving any advance warning of your intentions. Otherwise, your opponent might be able to get its notice in first and scupper your plans.

Julian Copeman is an executive committee member of the London Solicitors Litigation Association (LSLA) and litigation partner at Herbert Smith Freehills LLP (www.herbertsmithfreehills.com)