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# The Strategy of Settlement Offers

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# Topics Covered

- What kind of offer to make?
- Advantages of Part 36 offers.
- Limitations of Part 36 offers.
- Formulating effective offers.

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# Different kinds of settlement offer

- Open offers, that can be disclosed to the court even before judgment in the trial. Worth considering where the claim involves a judicial evaluation or discretion (1975 Act claims, proprietary estoppel, injunctions, etc) to try to communicate who is or is not being reasonable.

- Offers that are without prejudice save as to costs but not made pursuant to Part 36 of the CPR (a "*Calderbank* offer"), and can be disclosed to the court only after judgment. Greater flexibility compared with Part 36. They might or might not be made subject to contract.

- Part 36 offers, which are also without prejudice save as to costs.

- Entirely without prejudice offers, that are intended to be privileged against disclosure to the court at all stages. Be careful with these – if it's something you don't want the court to see in any circumstances, should it be said at all? Bear in mind that the other side might even challenge whether it is actually protected by without prejudice privilege.

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# Why should you make a settlement offer?

It is difficult to imagine a case when it is not advisable to make some kind of offer, even if it concedes little. However, what you are primarily trying to achieve should affect your strategy.

- Offers that the other side is intended seriously to consider accepting.
  - Should be based on a realistic assessment of the merits; erring on the side of generosity or parsimony will depend on the circumstances.
  - Make an attempt to cater for the other side's real concerns, even (and maybe especially) if they won't be addressed in the proceedings.
- Offers intended to prompt further negotiations.
  - Should involve some meaningful concession, or the other side may consider it pointless to negotiate further or incur costs mediating.
  - Leave some room for further concessions.
- Offers intended for deployment before the court.
  - Focus on comparison with possible outcomes at trial. You want to beat the offer.
  - But beware offering terms you don't want accepting!

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# The advantage of an unaccepted *Calderbank* offer

- The starting point on costs is that the successful party in contested litigation will be awarded their costs on the standard basis.
- However, the court can consider offers made outside the Part 36 framework (including intended Part 36 offers that are invalid as such) when exercising its discretion on costs; see CPR r.44.2(4)(c).

- A claimant who has offered to accept less than they got might rely on such an offer in support of an argument for indemnity costs.
- A defendant who has offered more than it turns out they needed to will generally seek to rely on such an offer as meaning that from the time of the offer (or shortly afterwards) the order for costs should be reversed so as to favour them.

- But other factors will also be in play, and be prepared for the question of why a Part 36 offer was not made.

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# The advantages of an unaccepted Part 36 offer

- CPR r.36.17 sets out consequences which apply based on a comparison of whether the judgment is more or less "advantageous" than the offer. The consequences apply with effect from shortly after the offer (usually 21 days).
- Unlike with *Calderbank* offers, the consequences apply by default, and are only to be disapplied where the court considers it "unjust" to make those orders – which is a high threshold and rarely surmounted.

- A claimant who beats their offer is entitled to (1) interest on the whole or part of any sum of money awarded at up to 10% above base, (2) indemnity costs, (3) interest on costs, and (4) up to £75k as a percentage of either the substantive money award, if any, or the costs award.
- A defendant who beats their offer is entitled to (1) costs in their favour, and (2) interest on costs.

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# Key considerations for Part 36 and *Calderbank* offers alike

- Timing. Earlier is better. You can also make multiple offers and have them remain open, so that if you do not beat an early ambitious offer you might still benefit from beating a later offer pitched at a lower level.

- Timing relative to costs. As costs mount, generally the same terms become less attractive for the claimant and more painful for the defendant – beware of the Red Queen's race.

- Comparison with the outcome at trial is key. For Part 36 consequences to apply the outcome must be at least as "advantageous" for your side, and in a less clear cut way much the same applies for *Calderbank* offers too. Including terms that are not part of the proceedings or that cannot realistically be achieved will only sabotage the intended aim.

- The importance of a realistic assessment from the outset is obvious!

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# Why does anyone make *Calderbank* offers?

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# Some limitations on Part 36 offers

- There are various formal requirements, but fortunately there is a standard form (N242A) that can be used to avoid most of the potential pitfalls. It is difficult to imagine any good reason not to use the form.

- If you want to benefit from the consequences of beating an offer that was not accepted, you cannot withdraw it. (But the recipient will need permission to accept once the trial has begun.)

- The terms cannot provide for costs, because Part 36 is prescriptive about the costs position. This can be unattractive for defendants who do not know what the claimant's costs are and want to know how much they would be in for.

- An offer based on a sum of money is generally inclusive of interest to date, although future interest can be provided for; see CPR r.36.5(4), (5).

- A defendant's offer based on a sum of money must be for a single payment within 14 days; see CPR r.36.6.

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# Some more limitations on Part 36 offers

- It is more difficult to make a Part 36 offer that will be effective in cases involving multiple different parties that are not necessarily acting in two unified camps. Some relevant rules are at CPR r.36.15.

- For example, it can be particularly difficult in probate claims or claims under the 1975 Act where the assets comprising the estate are the subject of the dispute and (potential) beneficiaries have divergent views about whether to settle. Consequences may not be applied adversely to defendants who are unable to accept, as that may well appear unjust.
  - Give thought to whether a Part 36 offer can be framed to steer clear of such problems, for example by devising terms that do not impact on every beneficiary or that could properly be accepted by the personal representatives.

- Clients typically prefer a full and final settlement, but including such a provision could potentially weaken the ability to say the offer has been beaten.

# Who can make a claimant's Part 36 offer?

The differences between claimant's and defendant's offers under Part 36 are very dramatic. The way the rules work can mean that making a defendant's offer strikes the client as unattractive.

It is not only the nominal claimant in proceedings who can make a claimant's Part 36 offer. A defendant with a counterclaim can certainly do so (and for this purpose theirs is the claim and the original claim is the counterclaim; the offer can be to settle both).

For a recent example, see *The Huntsworth Wine Company Ltd v London City Bond Ltd* [2022] EWHC 98 (Comm). Interestingly, LCB's claim had not actually been brought but its claimant's Part 36 offer was still valid.

While a valid Part 36 offer does need to be a genuine effort to settle, that will usually not preclude a counterclaiming defendant taking this approach. There might be limits, however, and it is doubtful it would work with a counterclaim lacking substance and relied on for this purpose.

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# Framing the terms of a Part 36 offer

- Keep within the boundaries of the relief claimed within the proceedings, or run the risk of the argument that extraneous points mean the offer was not really beaten.

- Similarly, take care to formulate the terms in a way that is appropriate for the proceedings and can properly be compared with an eventual court order. As a notable example, with 1975 Act claims bear in mind that (ordinarily) a successful claimant is entitled to have the estate assets administered in a particular way but not directly entitled to payment from the beneficiaries.

- Simplicity is important, as it aids the comparison. It may be hard to be clear about whether complicated terms that bear no resemblance to the approach in the judgment have been beaten or not.

- In binary cases, and similar contexts, even small discounts (e.g. 1.15%) have been treated as genuine attempts to settle. But it is probably best not to test the limits, and ensure the concession is not merely nominal.

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