

Litigators beware! Recent changes to Part 36 Offers

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The Civil Procedure (Amendment) Rules 2021 ('the CPAR 2021') introduces a new Civil Procedure Rule 36.5(5) to clarify the issue of interest after the expiry of Part 36 offers.

Part 36 Offers

A Part 36 Offer is a written offer to settle which must specify a period of not less than 21 days ('the Relevant Period') during which it can be accepted. If it is not accepted within the Relevant Period and the other party does not beat that offer then there will be costs consequences.

Part 36 Offers are one of the most significant tactical steps that parties can take in legal proceedings. They are designed to incentivise parties to settle disputes without going to trial (even if proceedings have not yet been issued). They can be made by either a Claimant or Defendant at any stage in civil proceedings.

The New Rule

The [CPAR 2021](#), which came into force on 6 April 2021, amends Part 36 with the new rule 36.5(5). The new rule enables the party making an offer to include provision for interest to accrue after the expiry of the Relevant Period. The new rule is as follows:

"36.5(5) A Part 36 offer to accept a sum of money may make provision for accrual of interest on such sum after the date specified in paragraph (4). If such an offer does not make any such provision, it shall be treated as inclusive of all interest up to the date of acceptance if it is later accepted".

The new rule has been brought in as a result of the case of [King v City of London \[2019\] EWCA Civ 2266](#). In this case, the Court of Appeal held that a Part 36 Offer that excludes interest is not a valid Part 36 offer as it would not be compliant with the CPR. It found that Part 36 proceeds on the basis that interest is ancillary to a claim, rather than a severable part which can be hived off.

Prior to this decision, there were conflicting lower court decisions on the question of whether an offer that excluded interest could be a valid Part 36 Offer.

Effect of the New Rule

Under the new rule, a party making an offer who constructs it so that they provide for interest to run after the end of the Relevant Period will be compensated should there be any delay by the other party in accepting the offer outside of that period. There is now no doubt that an offer which excludes interest will not be a valid Part 36 Offer. The offer is deemed to include interest up to the 21 days it can be accepted. Thereafter, unless there is a specific provision in the offer, it is deemed to include interest up to the date it is "later accepted". Legal representatives should, as a matter of course, include provisions for interest to accrue if the offer is accepted late.

The rule does not state the level of interest that can be claimed but it is worth bearing in mind that the judgment debt rate is 8% and so legal representatives should consider what would be reasonable. Also, an unrealistic rate of interest may mean that any judgment was not

more advantageous than the offer containing such an interest rate and, as a result, the costs consequences of Part 36 would not apply.

The new rule will inevitably serve as a further mechanism to apply more pressure on any opponents (especially defendants) to accept the offer on the table. A party can no longer assume that they will be entitled to accept the other side's Part 36 Offer after the expiry of the Relevant Period without facing consequences such as the accrual of interest (at a reasonably high rate).

Practical tips

- Include provisions in the Part 36 Offer for interest to accrue if the offer is accepted late but be cautious as to the interest rate;
- Always diarise for the expiry of the Relevant Period; and
- Continually review any Part 36 Offers to see if they (i) still afford sufficient costs protection; and/or (ii) should be withdrawn due to developments in the case.

Contact



Mia Petrou

Associate (FCILEx)

mia.plume@brownejacobson.com

+44 (0)330 045 2182

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