

**Part 36 offers: It's all in the timing**  
**16 September 2011, Rachel Barnes**

Most people with some acquaintance of construction litigation (or indeed any litigation) will have heard of a Part 36 offer. It is a type of offer that one litigant can make to the other to settle the litigation. Both the claimant and the defendant can make Part 36 offers, although they are more commonly made by defendants. A Part 36 offer made by a defendant to the claimant must include an offer to pay the claimant's costs up to a minimum period of 21 days after the offer is made. Thereafter, however, if the offer is not accepted and the claimant fails to obtain a judgment more advantageous than the defendant's Part 36 offer, the claimant will have to pay the defendant's costs. So, for example, if a defendant makes a Part 36 offer to pay a certain sum, which is more than the amount later awarded to the claimant at judgment, the claimant will be ordered to pay the defendant's costs as from the end of 21 days after the offer was made.

This 21-day period does not, however, constitute a time limit within which the offer is open for acceptance. A Part 36 offer can be accepted at any time. If it is accepted after the end of the 21-day period, the court will have to rule on the question of costs from the end of the period, if this cannot be agreed. Normally, the Part 36 consequences will apply. If, therefore, in the example given above, the claimant accepts the defendant's offer a few weeks after the end of the 21-day period, it will have to pay the defendant's costs over those few weeks.

Nor does it make any difference if the offeree has rejected the Part 36 offer. The common law rules on offer and acceptance do not apply. The offeree can change its mind and accept it later, unless the party making the offer has in the meantime withdrawn it.

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If therefore a party makes an offer under Part 36 that later it considers to be too generous, it should formally withdraw the offer, in accordance with Part 36, if it wishes to prevent the other party from being able to accept it. However, withdrawing the offer would mean that the party making the offer would not gain the benefit under Part 36: it would be treated as if it had never been made. There is nothing to prevent a party from making as many Part 36 offers as it wants, without withdrawing any of them.

In a recent case, a party made an offer, which was stated to be a Part 36 offer and was stated to be "open for 21 days". Many months after the end of the 21-day period, quite close to trial, the other party, perhaps having reassessed its prospects, decided to accept the offer. The party that had made the offer, maybe for the same reason, argued that it was too late to accept it, because it had only been open for 21 days.

The judge agreed with the party that had made the offer and held that it could not now be accepted. However, this meant that the offer, having been time-limited, was never a Part 36 offer. Describing it as a Part 36 offer had been incorrect. The party that had made the offer would not therefore enjoy the Part 36 benefits from having made it (though that probably was of less importance than preventing it from being accepted).

The Court of Appeal took a different view. The wording of the offer has to be interpreted in accordance with proper legal principles. This means that it has to be interpreted objectively and in context.

To you and me, if an offer is expressed to be "open for 21 days", that presumably means that it can not be accepted after 21 days. But in this case, as these words were used in the context of an offer intended to be under Part 36, which does not permit time-limited offers, the words had to be interpreted differently. The Court of Appeal held that they should be interpreted as meaning that the

offer would not be withdrawn within the 21-day period and as a warning that it may be withdrawn thereafter, but not that it would lapse at that stage. As it was not withdrawn, it could be accepted at the time the party did so.

One cannot help suspecting that the party that had made the offer intended to limit it to 21 days but had not appreciated that this would take it outside of Part 36. However, legal interpretation does not generally admit evidence of subjective intentions; the intentions of the parties have to be inferred objectively on the assumption that they acted as reasonably well-informed people (which, in this case, would include being aware of the rules of Part 36).

The Court of Appeal's judgment is a striking example of how legal interpretation turned the natural meaning of words on its head. The objective, contextual approach can succeed in giving a sensible meaning to a document where something has gone wrong with the drafting. However, here it may have given rise to a meaning that was not intended at all.

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