Bates Wells Braithwaite

Guide to the without prejudice rule and part 36 offers

About this guide

This guide seeks to answer some of the most frequently asked questions about without prejudice communications and offers, including those made under Part 36 of the Civil Procedure Rules.

What is the "without prejudice" rule and what does it mean?

In the context of Court proceedings, without prejudice communications forming part of a genuine attempt to settle a dispute are privileged. This means they cannot be put in as evidence before a Court except in certain circumstances. The purpose of the rule is to encourage litigants to resolve matters between themselves without risking being embarrassed by an admission and without having to litigate the dispute to an end.

Without prejudice communications can be in the form of letters, emails, telephone discussions and meetings. They can be brought to the Court's attention to explain delay and, where an offer made in a without prejudice communication has been accepted by the other party to the dispute, the act of acceptance can create a legally binding contract, upon which the trail of without prejudice communications becomes "open" and can be entered as evidence to enforce a party's rights.

Further exceptions to the without prejudice rule, and circumstances in which without prejudice communications have been brought to the Court's attention, include:

- where the issue is whether the without prejudice communication has resulted in a concluded settlement agreement;
- as evidence of misrepresentation, fraud or undue influence, perjury, blackmail or other unambiguous impropriety;
- where a statement may have given rise to estoppel;
- as evidence about the reasonableness of a settlement;
- where communications are received in confidence with a view to matrimonial conciliation;
- on certain types of without notice application.

How does it work in practice?

Parties will often open up two lines of communication, one in which they set out their "open" and official position so that there is something "on the record" which the court can be referred to and one "without prejudice" in which the dispute can be discussed frankly and settlement options explored.

Communications (such as letters) which are intended to be part of a genuine attempt to resolve the dispute should be clearly marked "without prejudice". However, it is not strictly necessary that every communication must be marked "without prejudice"- it is the purpose of the communication that is relevant and if the communication is a genuine attempt to resolve a dispute it should be privileged even if it is not clearly marked "without prejudice".

Equally, just because a communication is marked "without prejudice", this does not mean it is part of a genuine attempt to resolve a dispute, and could be brought to the Court's attention.

What is the difference between communications that are "without prejudice" and those that are "without prejudice save as to costs"?

Parties communicating purely on a "without prejudice" basis are deemed to have done so on the understanding that the communications will not be used against them on the issue of costs. This means it is important to make it clear that the party making the offer may bring it to the Court's attention on the issue of costs.

Communications that are not made pursuant to Part 36 (see below) should be marked "without prejudice save as to costs", or it should be made clear in the body of the communication that it is intended that it may be brought to the Court's attention on the issue of costs, otherwise it can only be brought to the Court's attention if both parties agree.

What is a Part 36 offer?

The Civil Procedure Rules ("CPR") are the rules which govern the conduct of litigation in England and Wales. References to "Part 36" are references to Part 36 of the CPR. (http://www.justice.gov.uk/courts/procedure-rules/civil) The Civil Procedure Rule Committee produced a revised version of Part 36, which came into force on 6 April 2015.

A Part 36 offer will be treated as without prejudice save as to costs and can encourage settlement and provide the party making the offer with protection on costs.

In practice the Court will not usually learn of the details of such offers until the end of the trial when it can take them into account when determining who should pay the legal costs of the action.

However a trial judge can be told that a Part 36 offer has been made and can be told the terms of such an offer where, although the case has not been finally decided, any part of or issue in the case has been decided and the Part 36 offer relates only to parts or issues that have already been decided.

Where this occurs, a trial judge may also be told of the existence of a Part 36 offer, whether or not it relates to an issue that has been decided, which would include global offers, but the trial judge cannot be told the terms of any such other offers.

A Part 36 offer can be made at any time, even before proceedings have been issued. In order to qualify as a Part 36 offer, the offer must meet various criteria, including specifying a "relevant period" (not less than 21 days) in which the Defendant will be liable for the Claimant's costs if the offer is accepted, state whether it relates to the whole of the claim or

part of it, and it is clear that the offer is made pursuant to Part 36.

A party to proceedings may make a request for a Part 36 offer to be clarified, provided this is done within 7 days of the offer having been made.

Acceptance and Withdrawal of a Part 36 Offer

A Part 36 offer may be accepted at any time, unless the party making the offer has served a written "notice of withdrawal" which clearly identifies the offer that is being withdrawn. This is the case even if the party who made the offer has made a subsequent offer or if the other party has rejected the offer.

The Court's permission is required to accept a Part 36 offer in certain limited circumstances, including where a trial is in progress. The Court's permission is not required to accept a Part 36 offer where there is a split trial and the case is in between trials.

A Part 36 offer can only be withdrawn, or its terms changed, if the offeree has not previously given notice of acceptance.

After the expiry of the relevant period the offeror may withdraw the offer or change its terms without the permission of the court.

It is possible to withdraw or change the terms of a Part 36 offer to make it less advantageous to the offeree prior to the expiry of the relevant period. However, if this is done and the offeree serves notice of acceptance of the original offer before the end of the relevant period, that acceptance will still take effect unless the offeror applies to Court for permission to withdraw the offer or change its terms within 7 days of the acceptance notice or, if earlier, before the first day of trial.

What are the consequences of making a Part 36 offer?

Where a Defendant's Part 36 offer is accepted by a Claimant within the relevant period, the Claimant is entitled to its legal costs of the proceedings (including their recoverable pre-action legal costs) up to the date on which the notice of acceptance was served. However, where a Claimant has not accepted a Defendant's Part 36 offer and fails to obtain a judgment more advantageous than the offer, the Defendant will be entitled to its costs from the date on which the relevant period expired, and interest on those costs.

If a Claimant accepts a Defendant's Part 36 offer that relates to part only of the claim and the Claimant abandons the rest of the claim, the Claimant will only be entitled to the costs of the relevant part of the claim, unless the Court orders otherwise. Where a Part 36 offer which is not for the whole claim is accepted, the court must decide liability for costs unless the parties have agreed the costs between them.

Where a Defendant has failed to beat a Claimant's Part 36 offer, the Claimant may be entitled to interest on the judgment at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired, costs on an indemnity basis from the date on which the relevant period expired, and interest on those costs at a rate not exceeding 10% above base rate.

In addition, the Defendant may be ordered to pay a percentage of the Claimant's damages (i.e. financial compensation), as a penalty for not accepting a more advantageous offer. In general this penalty will be 10% of damages awarded, up to a maximum of £75,000.

When considering whether it would be just to order the Defendant to make the above payments the court will take into account all the circumstances of the case. This includes whether the Claimant's offer was a genuine attempt to settle the case. This rule was included in the CPR in order to discourage purely tactical offers by Claimants for an amount that is close to the full amount of the claim and which places the defendant at risk of indemnity costs.

About us

Members of our Dispute Resolution Group are experienced litigators and will be happy to discuss with you when and if you should be considering making or accepting an offer.

If you have any questions about this guide or any other matters please do not hesitate to contact one of the following members of our Dispute Resolution Group at disputeresolution@bwbllp.com or

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