

# IN PRACTICE

The London Disputes Newsletter

October 2012



## Settlement and Part 36 Offers — Technicalities Matter

Settlement is a fundamental part of litigation, and parties should be alive to the potential costs advantages (and pitfalls) of making the right offer. This article provides a brief refresher on the Part 36 settlement process, and considers a recent English Court of Appeal case that in a party losing the right to extensive benefits on costs because the settlement offer did not comply with the technical requirements of Part 36.

Part 36 of the Civil Procedure Rules offers parties valuable costs protection, and can put pressure on them to settle. The recent Court of Appeal case of *F&C Alternative Investments (Holdings) Ltd v Barthelemy & Anor* [2012] EWCA Civ 843 is a reminder that parties need to be aware of the technical requirements of Part 36.

This article examines Part 36, and analyses the impact of the *F&C Alternative Investments* case.

### Settlement Offers and Costs — A Brief Refresher

The Civil Procedure Rules allow any party to make a settlement offer at any point during litigation (or indeed, before litigation commences). The costs consequences of such an offer are dealt with in the normal way under Part 44 of the Civil Procedure Rules; that is, the Court will “have regard” to an offer of settlement that is *not* a Part 36 offer when exercising its discretion on costs.

If a party chooses to make a settlement offer in the form of a Part 36 offer, then special costs consequences result if that offer is accepted or rejected, which can impact on settlement decisions. The table on the following page summarises the key costs consequences of making a Part 36 offer of settlement which is then accepted or rejected:

**LW.com**

**Matthew Evans**

Tel +44.20.7710.3046

matthew.evans@lw.com

If you have any questions about this article, please contact the author or any one of the editorial team in our London office, John Hull, Philip Clifford, Oliver Browne or Jumana Rahman, or the solicitor or attorney whom you normally consult.

### **LONDON OFFICE**

99 Bishopsgate

London EC2M 3XF

United Kingdom

Tel +44.20.7710.1000

Fax +44.20.7374.4460

LW.com

## IN PRACTICE

The London Disputes Newsletter

Accept or Reject?	Costs
Part 36 offer for the whole claim accepted within the prescribed time period.	Claimant is entitled to the costs (up to the date of service of notice of acceptance) of the proceedings on the standard basis (if not agreed by the parties). Essentially, these are costs which are “proportionately and reasonably incurred” as argued by the party claiming its costs.
Part 36 offer for the whole claim accepted after expiry of prescribed time period.	Claimant is entitled to the costs of the proceedings up to the date when prescribed time period expired. Costs from expiry of prescribed time period to date of acceptance payable by offeree.
Claimant beats defendant's offer at judgment.	Costs decided at the court's discretion under Part 44.
Claimant fails to beat defendant's offer at judgment.	Unless it considers it “unjust” to do so, Court will order claimant <b>to pay defendant's costs</b> from date when relevant period expired <b>and interest on those costs</b> .
Claimant equals or beats its own offer at judgment.	Unless it considers it “unjust” to do so, Court will order defendant: a) to pay claimant's costs <b>on the indemnity basis</b> (essentially, these are all costs incurred by the winning party, save for those which are unreasonably incurred or unreasonable in amount) from the date the prescribed time period expired, <b>with interest on those costs of up to 10% above base rate</b> ; and b) <b>interest on the whole or part of any sum awarded at up to 10% above base rate for some or all of the period starting from the same date</b> .
Claimant fails to equal or beat its own offer at judgment.	Costs decided at the court's discretion under Part 44.

## IN PRACTICE

### The London Disputes Newsletter

In summary, the consequences (for both claimant and defendant) for failing to accept a Part 36 offer are significant. For a claimant, rejecting and failing to beat, a defendant's offer could lead to a large costs penalty. For a defendant, there is the risk that it may have to pay indemnity costs and interest on those costs, together with a punitive rate of interest on any damages awarded to the claimant, in cases where the claimant equals or beats its offer at judgement.

#### The Court of Appeal in *F&C Alternative Investments*

F&C Alternative Investments made a settlement offer of £5.8 million. The offer did not comply with the formalities of Part 36. Barthelemy & Anor rejected that offer, and, following trial, F&C Alternative Investments were awarded £7.8 million at judgment. Barthelemy & Anor were ordered to pay F&C Alternative Investments' costs on the indemnity basis, plus interest on those costs, which cumulatively amounted to between 22 and 40 per cent. per annum. This was ordered on the basis that the judge at first instance had concluded that the settlement offer made by F&C Alternative Investments was "akin" to a Part 36 offer, thus attracting the consequences of Part 36 as regards costs.

The Court of Appeal, in rejecting this conclusion, was clear that a Part 36 offer had to comply with the strict formal requirements in Part 36, namely that it has to:

- a) Be in writing
- b) State on its face that it is intended to have the consequences of Part 36 as regards costs
- c) Specify a 21 day (or longer) period within which a party will be liable for the other party's costs, in accordance with Part 36, if the offer is accepted
- d) State whether the offer relates to the whole or part of a claim
- e) State whether it takes into account any counterclaim

The Court of Appeal noted that the offer in question did not comply with these requirements (indeed the offer was never expressed to be a Part 36 offer), and, as such, F&C Alternative Investments were not entitled to the costs protection afforded by Part 36. Instead, the normal rules on costs (in Part 44 of the Civil Procedure Rules) should apply. The Court of Appeal thus reduced significantly the rates of interest awarded on F&C Alternative Investments' costs payable by Barthelemy & Anor.

#### Lessons

Making a Part 36 offer is an important step in litigation. To maximise the impact of the offer, it is crucial to make sure that it is in the correct technical form, lest the costs protection be lost.

Matthew Evans

Abu Dhabi	Moscow
Barcelona	Munich
Beijing	New Jersey
Boston	New York
Brussels	Orange County
Chicago	Paris
Doha	Riyadh*
Dubai	Rome
Frankfurt	San Diego
Hamburg	San Francisco
Hong Kong	Shanghai
Houston	Silicon Valley
London	Singapore
Los Angeles	Tokyo
Madrid	Washington, D.C.
Milan	

*In Practice: The London Disputes Newsletter* is published by Latham & Watkins as a news reporting and briefing service to its clients and other friends. Nothing in this publication constitutes, or is intended to constitute, legal, commercial or financial advice. This publication should not be construed, or relied upon, as legal or other professional advice or opinion on any specific facts or circumstances. Always consult a solicitor or attorney in respect of any specific legal problem or matter and take appropriate advice from qualified professionals in relation to other problems or matters. Latham & Watkins assumes no responsibility for information contained in this publication and disclaims all liability in respect of such information. A complete list of our publications can be found on our Web site at [www.lw.com](http://www.lw.com).

Latham & Watkins retain the copyright in this publication and each article within it. However, with our prior permission, and the full acknowledgement of the authorship of the article, individual articles may be re-published.

If you wish to update your contact details or customise the information you receive from Latham & Watkins, please visit [www.lw.com/LathamMail.aspx](http://www.lw.com/LathamMail.aspx) to subscribe to our global client mailings program.

Latham & Watkins is the business name of Latham & Watkins (London) LLP, a registered limited liability partnership organised under the laws of New York and regulated by the Solicitors Regulation Authority (SRA No. 203820). A list of the names of the partners of Latham & Watkins (London) LLP is open to inspection at its principal place of business, 99 Bishopsgate, London EC2M 3XF, and such persons are either solicitors, registered foreign lawyers or European lawyers. We are affiliated with the firm Latham & Watkins LLP, a limited liability partnership organised under the laws of Delaware. © Copyright 2012 Latham & Watkins. All Rights Reserved.

\* In association with the Law Office of Salman M. Al-Sudairi