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COMMERCIAL DISPUTE RESOLUTION ELECTIVE
GUIDE.

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PART 36

18

OFFERS

BACKGROUND

The purpose of **Part 36** offers is to give financial incentives to encourage settlement of litigation at the earliest possible time, even prior to commencement of proceedings, or before all statements of case have been served. A **Part 36** offer taking account of an unpleaded counterclaim was valid and consistent with the overriding objective in *Calonne Construction Ltd v Dawnus Southern Ltd*.

The principle behind **Part 36** is that a party who tries to be **reasonable** but is dragged to trial should be compensated, while a party who unreasonably insists on trial in the face of a reasonable offer should be penalised. **Part 36** offers may be made at any time. If a **Part 36** offer does not demonstrate a **genuine attempt to settle** it may not have the anticipated costs consequences (*Invista Textiles v Botes*).

Part 36 offers are treated as “*without prejudice, save as to costs*” (**CPR 36.16(1)**), meaning that the any admissions in a **Part 36** offer are **privileged** – an offer may not be put before the court and the judge may not know the offer's terms before the case has been decided (**CPR 36.16(2) & 36.3(e)**), unless **CPR 13.16(3)** applies.

A **Part 36** offer does not prevent the parties from making **other attempts to settle** (note that non-**Part 36** settlement attempts will be considered by the judge when making an order as to costs (**CPR 44.2(4)(c)**), e.g. negotiations with/without prejudice or Alternative Dispute Resolution).

The parties may also make offers that are not governed by **Part 36** – these are referred to as **Calderbank** offers (offers to settle which are headed “*without prejudice, save as to costs*”). The discretion of the courts in respect of such settlement offers is governed by **CPR 44**.

REQUIREMENTS FOR A PART 36 OFFER

Part 36 offers must comply with the formalities set out in the CPR in order to have the automatic costs consequences of a **Part 36** offer.

A PART 36 OFFER NEEDS TO MEET THE FOLLOWING REQUIREMENTS

1:	Be a genuine attempt to settle (CPR 36.17(5)(e)).
2:	Be in writing: the party making the offer can use Form N242A (PD 36A para 1.1) or draft a bespoke letter (CPR 36.5(1)(a));
3:	Be clear that it is made pursuant to Part 36 (CPR 36.5(1)(b)) ;

4:	<p>Give a “<i>relevant period</i>” (“RP”) of at least 21 days (CPR 36.5(1)(c)) after which the other side will become liable for the offeror’s costs if the offeror wins at trial. If no period is stated, the offer remains open until trial.</p> <p>NOTE: a Part 36 offer that is made less than 21 days before trial will not have automatic Part 36 costs consequences – any effect on costs will be at the discretion of the court (CPR 36.17(7)(c)); and</p>
5:	<p>State whether it relates to all or part of the claim and includes any counterclaims (CPR 36.5(1)(d)).</p>

If these formalities have not been fully complied with, the offer might not have **Part 36** consequences (***PHI v Robert West***). It becomes a matter of discretion for the court.

NOTE: be specific about the costs regime underlying any offer. In the event that it is accepted then the agreed costs regime will apply as a matter of contract even if it is different from what might have been ordered ***Seyi Adekun v Siu Lai Ho***.

WITHDRAWAL OR AMENDMENT OF OFFER

BEFORE THE RP HAS EXPIRED:	<p>The offeror may withdraw an offer by serving notice of withdrawal (CPRs 36.9(1)-(3)); or</p>
AFTER THE RP HAS EXPIRED:	<p>The offeror may amend the offer to make it less advantageous to the offeree (i.e. better for the offeror) by serving notice (CPRs 36.9(1)-(3)); then ...</p> <p style="padding-left: 40px;">... any notice of withdrawal or amendment will only have effect at the end of the RP (CPR 36.10(2)(a)) ...</p> <p style="padding-left: 40px;">... unless the offeree has accepted the offer before the end of the RP. It is technically possible for an offeree to agree to a Part 36 offer which the offeror has attempted to withdraw before the end of the RP. To avoid this, the offeror would have to apply to court (CPR 36.10(2)(b)).</p> <p>The offeror may amend the offer to make it more advantageous to the offeree (i.e. worse for the offeror) – but this will be treated as a new Part 36 offer (which will mean the restart of the RP) (CPR 36.9(5)).</p> <p>The offeror may amend the Part 36 offer (upwards or downwards) or withdraw it without the court's permission (CPR 36.9(4)).</p>

A **Part 36** offer may be time-limited (**CPR 36.9(4)(b)**). The time limit cannot be shorter than the RP of at least 21 days (**CPR 36.5(1)(c)**). Once the stated time limit has expired the **Part 36** offer will automatically expire in accordance with its terms – and once it has expired there are no further **Part 36** costs consequences (**CPR 36.17(7)**).

NOTE: before 6 April 2015, under the old rules, it was not possible to time-limit **Part 36** offers, so do not be confused by any references to this in the case law (e.g. **C v D**).

SOME SPECIFIC POINTS TO REMEMBER:

- 1) Ordinary contractual rules (e.g. lapse, counter-offer rejection, postal rule) do **not** apply to **Part 36** offers (**Gibbon v Manchester CC**), so do not apply any rules about acceptance and withdrawal of offers that you may have learnt elsewhere – **Part 36** is a self-contained set of rules requiring particular notices and content.
- 2) The offer is made “*without prejudice except as to costs*” and must not be disclosed to the trial judge before the conclusion of the court proceedings.
- 3) These rules apply to offers made **on or after 6 April 2015** – the rules are different for offers made before then.

Accepting a Part 36 offer brings the case to an end (the action is stayed (**CPR 36.14(1)**)). Acceptance can be at any time provided that the offer has not been withdrawn but the permission of the court is needed if the purported acceptance is within 21 days of the trial date.

Acceptance of a **Part 36** offer **requires a notice to be served**.

- Acceptance of a **Part 36** offer must be **by written notice** (**CPR 36.11(1)**).
- Acceptance must be served on the offeror and filed with the court.
- If the offer is accepted **after expiry of the RP**, the parties must agree liability for costs between themselves, and if they cannot do so the court will make an order (**CPR 36.13(4)**).
- Other (**non-Part 36**) negotiated settlements are effectively contracts between the parties and will need a court order to bring the proceedings to an end (*see following chapter*).

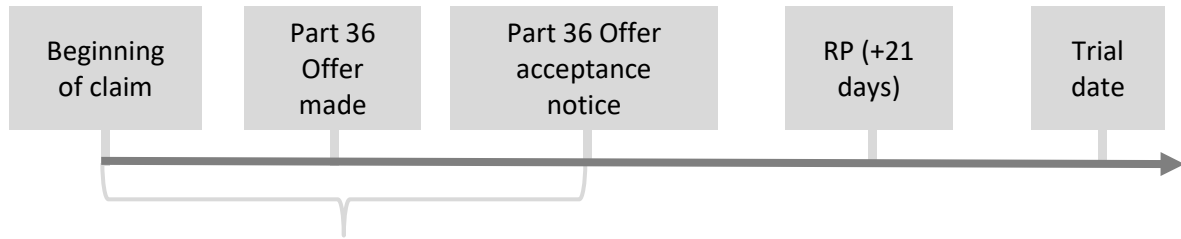
COSTS CONSEQUENCES

Part 36 offers have specific cost consequences – which are set out in the diagrams overleaf. **REMEMBER** when considering costs, the court must take into account whether the offer was a “*genuine attempt to settle*” (**CPR 36.17(5)(e)**). For example, an offer made by the claimant for a very high percentage of the claim's value for tactical reasons might not be considered a genuine attempt to settle (**AB v CD**) and so the typical **Part 36** costs consequences might not be ordered. A party cannot rely on a **Part 36** offer to run any defence it chooses in the confident expectation that it will be protected on costs, but it is a “*formidable obstacle*” to try to demonstrate that **Part 36** consequences should not apply (**Ted Baker v Axa**).

The precise costs consequences of a **Part 36** offer will depend upon the circumstances.

Consider the scenarios overleaf.

SCENARIO 1: AN OFFER IS MADE BY EITHER CLAIMANT OR DEFENDANT AND ACCEPTED



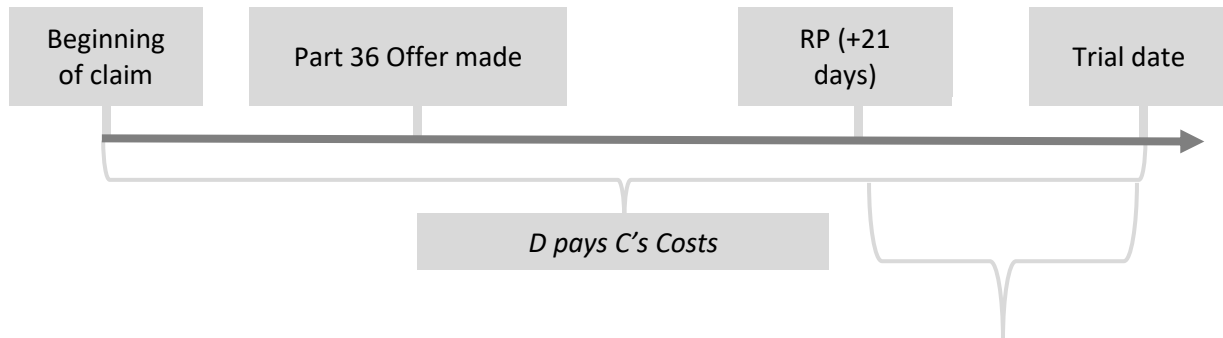
The claim is stayed – D pays C's costs to the date of acceptance on the standard basis (CPR 36.13(1)).

NOTE: if accepted **after** the RP, liability for costs will be (unless the parties agree otherwise) determined by the court (CPR 36.13 (4)). As a general rule in those circumstances, **D pays C's costs up to expiry of the RP and then the offeree pays the offeror's costs from the expiry of the RP up to acceptance, unless the court considers it unjust to do so (CPR 36.13(5)).** Late acceptance will normally see a costs order against the accepting party on the standard rather than the indemnity basis (*Hislop v Perde*).

SCENARIO 2: AN OFFER IS MADE BY THE CLAIMANT AND REJECTED BY THE DEFENDANT:

ASK: was D right to reject C's Part 36 offer?

If C loses at trial	no Part 36 consequences (C will probably pay D's costs under CPR 44.2).
If C wins at trial, but wins less than the Part 36 Offer	no Part 36 consequences (CPR 44.2).
If C wins at trial, and wins as much or more than the Part 36 Offer	<p>D pays C's costs, plus penalties (interest, costs on the indemnity basis and/or a further amount up to 10% of the trial awarded) from the expiry of the RP at 21 days up to the trial date – as set out in the diagram overleaf.</p> <p>NOTE that these are the maximum possibly penalties at the court's discretion – it will not award them if it considers that it would be unjust to do so (CPR 36.17(4)).</p>



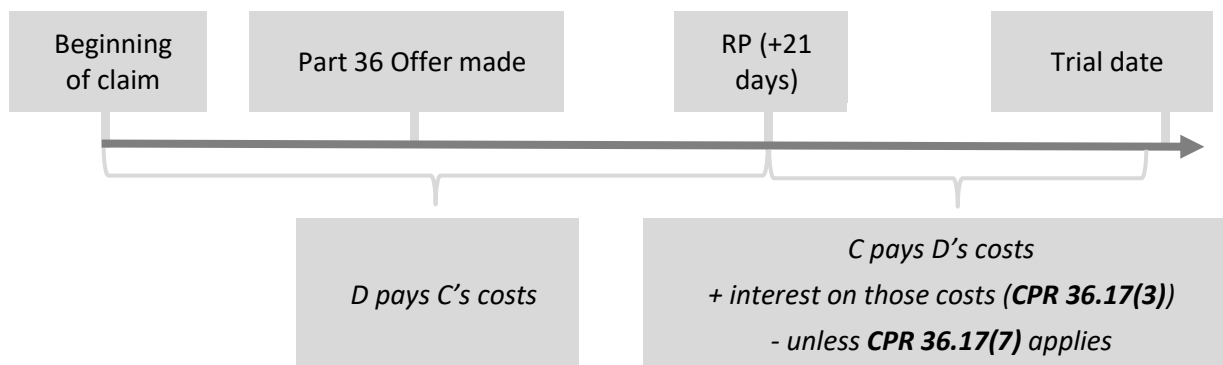
+ interest on all or part of the sum at up to 10% (plus base rate) (CPR 36.17(4)(a))
 + costs on the indemnity basis (+ interest on those costs at up to 10%) (36.17(4)(b)-(c))
 + up to 10% of the amount awarded at trial (to a maximum of £75,000) (36.17(4)(d))
 – unless CPR 36.17(7) applies

NOTE: The 10% uplift is discretionary. In deciding whether to award it the court will take into account how early the offer was made and the amount by which it was beaten (*JLE v Warrington & Halton Hospitals NHS Trust*).

SCENARIO 3: AN OFFER IS MADE BY THE DEFENDANT AND REJECTED BY THE CLAIMANT:

ASK: was C right to reject D's **Part 36** offer?

If C loses at trial	C is likely to have to pay all of D's costs under CPR 44.2(a) .
If C wins at trial, and wins more than D's Part 36 Offer	no Part 36 consequences (CPR 44.2) , although the court retains its discretion to take D's offer into account and make a reduced costs order against D (<i>Sugar Hut v AJ</i>).
If C wins at trial, and wins less than (or equal to) the Part 36 Offer	a "split order" whereby: D pays C's costs up to the end of the RP, but C pays D's costs plus interest from then on (CPR 36.17(3)), in both cases on the standard basis – as set out in the diagram below:



SCENARIO 4: WHERE EACH PARTY HAS REJECTED AN OFFER MADE BY THE OTHER SIDE:

CONSIDER: who won at trial and was each party right to reject the other's offer?

If C is awarded the same or more at trial as their own offer

C's offer applies and D was wrong to reject it; and D faces costs sanctions (**CPR 36.14(1)(b)&(4)**).

If C loses at trial or gets less than D's offer:

D's offer applies and C was wrong to reject it (**CPR 36.17(1)(a)&(3)**).

If C gets more than D's offer but less than their own offer

there are no **Part 36** consequences.

PROBLEM QUESTION: SUGGESTED STRUCTURE FOR ANSWERING A QUESTION ON PART 36

STEP 1: What section of CPR 36 applies? Who is the offeror and who is the offeree?

Identify who made the offer and at what stage in the proceedings the offer was made.

STEP 2: Was the offer accepted or rejected by the offeree?

If the offer was not accepted, who won at trial and what were they awarded?

STEP 3: How does the trial award compare to the Part 36 offer?

What are the two figures? Assuming that the offeree rejected the offer, was it right to do so, or would it have been better to have accepted the offer?

STEP 4: Conclude – who will the court penalise?

Identify the likely outcome and state a likely range of figures (£) that either C or D will be awarded.

PART 36 APPLIED TO COMPLEX CASES

Generally the losing party will be ordered to pay the winner's reasonable costs **CPR 44.2(2)(a)**. However, in complex cases there may be several issues to decide and it may be difficult to ascertain who is the winner in relation to each separate issue before the court. This can cause challenges in determining which costs consequences should apply where a **Part 36** offer has been made in respect of one or more specific issues.

Some guidelines were set out in *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd*:

This case involved a complex construction dispute with many issues between the parties. Both parties won and lost on several distinct issues. When balancing the final damages awards between both parties the defendant was ordered to pay the claimant £6.154m.

The court then derived the following 8 principles for determining how costs should be awarded:

1:	In commercial litigation where each party has claims and asserts that a balance is owing in its own favour, <u>the party which ends up receiving payment should generally be characterised as the overall winner.</u>
2:	In considering how to exercise its discretion the court should take as its starting point the general rule that the successful party is entitled to an order for costs.
3:	The judge must then consider what departures are required from that starting point, having regard to all the circumstances of the case.
4:	Where the circumstances of the case require an issue-based costs order, that is what the judge should make.
5:	In many cases the judge can and should reflect the relative success of the parties on different issues by making a proportionate costs order.
6:	In considering the circumstances of the case <u>the judge will have regard not only to Part 36 offers made but also to each party's approach to negotiations and general conduct of the litigation.</u>
7:	If one party makes a Part 36 offer and the other party rejects that offer without any attempt to negotiate, then it might be appropriate to penalise the second party in costs.
8:	In assessing a " <i>proportionate costs order</i> " the judge should consider which costs relate to each issue and what costs are common to several issues. It will often be reasonable for the overall winner to recover not only the costs of specific issues but also common costs.