



# LAW ANSWERED

SAMPLE CHAPTER FROM OUR CIVIL LITIGATION –  
DISPUTE RESOLUTION ELECTIVE GUIDE.

---

*Law Answered* is a comprehensive, distinction-level set of exam-focused study notes for the law students. This is a sample from our *Civil Litigation – Dispute Resolution elective guide*.

Please visit [lawanswered.com](https://www.lawanswered.com) if you wish to purchase a copy.

Notes for the PGDL, GDL, MA Law, LPC, SQE and LLB are also available via [lawanswered.com](https://www.lawanswered.com).

This chapter is provided by way of sample, for marketing purposes only. It does not constitute legal advice. No warranties as to its contents are provided. All rights reserved. Copyright © Answered Ltd.

# SETTLEMENT AND PART 36 OFFERS

The purpose of Part 36 offers is to give financial incentives to the parties to litigation to consider settlement, 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 set out at CPR1. (*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, and 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*). A holistic view is taken of what is meant by success at trial (*MR v Commissioner of Police*).

Part 36 offers are treated as “without prejudice, save as to costs” (CPR 36.16(1)), 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 judgment (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: 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 sometimes referred to as *Calderbank* offers (offers to settle which are headed “without prejudice, save as to costs”). Where these are made without an end date, they can be accepted even after a hearing has begun.

Non-Part 36 settlement offers are governed by CPR 44.

## FORMALITIES

Part 36 offers have to 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 must:

1:	<b>Be in writing:</b> the party making the offer can use <b>Form N242A (PD 36A para 1.1)</b> or draft a bespoke letter) (CPR 36.5(1)(a));
2:	<b>Be clear that it is made pursuant to Part 36 (CPR 36.5(1)(b));</b>
3:	<b>Give a “relevant period” (“RP”) of at least 21 days (CPR 36.5(1)(c))</b> 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. <b>NOTE:</b> an offer that is made fewer than 21 days before trial will <b>not</b> have automatic <b>Part 36</b> costs consequences – any effect on costs will be at the discretion of the court (CPR 36.17(7)(c)); <b>NOTE:</b> an offer by a Defendant to make a payment will not have <b>Part 36</b> consequences if the offer to pay is for a date more than 14 days after acceptance of that offer.
4:	<b>Must state whether it relates to all or part of the claim and includes any counterclaims (CPR 36.5(1)(d)).</b>

## IMPACT OF THE RELEVANT PERIOD

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.

Any offer which is made expressly **exclusive** of interest is a non-compliant offer and the provisions of **Part 36** do not apply to it (*King v City of London Corporation*).

**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 Adelekun v Siu Lai Ho*.

The offeror may **withdraw or amend the offer:**

BEFORE THE RP HAS EXPIRED:	The offeror may <b>withdraw</b> the offer by serving <b>notice</b> of withdrawal ( <b>CPRs 36.9(1)-(3)</b> ) but only if notice of acceptance has not been served; or	
	The offeror may <b>amend</b> the offer to make it <b>less advantageous</b> to the offeree (i.e., better for the offeror) by serving <b>notice</b> ( <b>CPRs 36.9(1)-(3)</b> ); then ...	... any notice of withdrawal or amendment will only have effect at the <b>end of the RP</b> ( <b>CPR 36.10(2)(a)</b> ) ...  ... <b>unless the offeree has accepted the offer before the end of the RP</b> . It is technically possible for an offeree to agree to a <b>Part 36</b> 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 ( <b>CPR 36.10(2)(b)</b> ).
	The offeror may amend the offer to make it <b>more advantageous</b> to the offeree (i.e. worse for the offeror) – but this will be treated as a <b>new Part 36 offer</b> (which will mean the restart of the RP) ( <b>CPR 36.9(5)</b> ).	
AFTER THE RP HAS EXPIRED:	The offeror may amend the <b>Part 36</b> offer (upwards or downwards) or withdraw it without the court's permission ( <b>CPR 36.9(4)</b> ).	

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*).

**NOTE:** 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.

**Accepting a Part 36 offer brings the case to an end** (the action is stayed (**CPR 36.14(1)**)).

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

- Acceptance of a **Part 36** offer must be **by notice (CPR 36.11(1))**.
- Acceptance must be served on the offeror and filed with the court (**PD 36A para 3.1**).
- 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)** *set out below and overleaf*).
- 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 section*).

## COSTS CONSEQUENCES

**Part 36** offers have unusual cost consequences – which are set out in the diagrams below and overleaf. 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. Proportionality between the costs incurred and value of the claim is not a consideration (**DSN v Blackpool Football Club**) and the court has the discretion to consider the behaviour of the parties in all cases and to vary the cost consequences if it is fair and just to do so (**CPR 45.13**). Consider the scenarios below and overleaf.

### AN OFFER IS MADE BY EITHER CLAIMANT OR DEFENDANT AND ACCEPTED



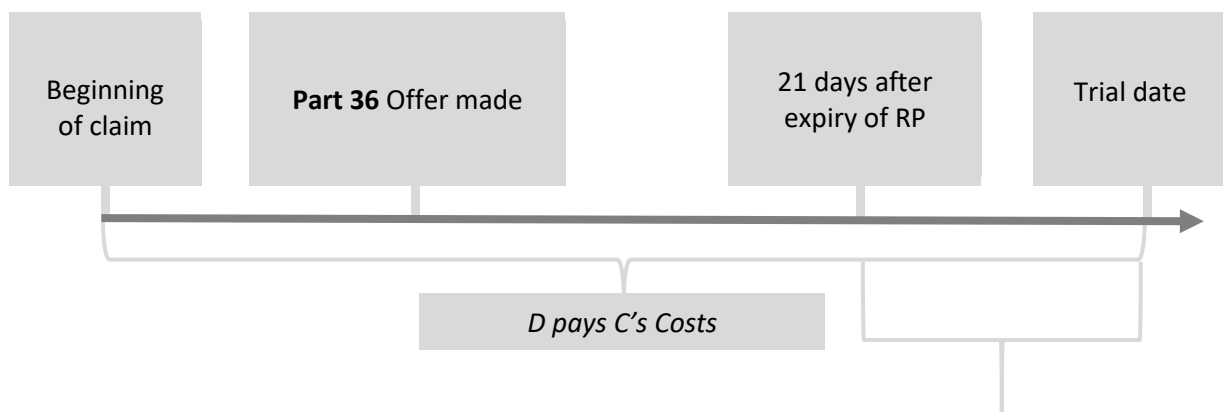
*The claim is stayed – D pays C's costs to the date of acceptance on the standard basis (CPR 36.13(1)).*

**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. The law had been unclear on this, but the Court of Appeal has recently clarified the position (Hislop v Perde).*

## 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><b>D pays C's costs</b>, plus penalties (interest, costs on the indemnity basis and/or a further amount up to 10% (to be increased to 35% see below) of the amount awarded) <b>from the expiry of the RP at 21 days up to the trial date</b> – as set out in the diagram below.</p> <p><b>NOTE:</b> these are the <b>maximum</b> possible penalties at the court's discretion – it will not award them if it considers that it would be <b>unjust</b> to do so (CPR 36.17(4)).</p>



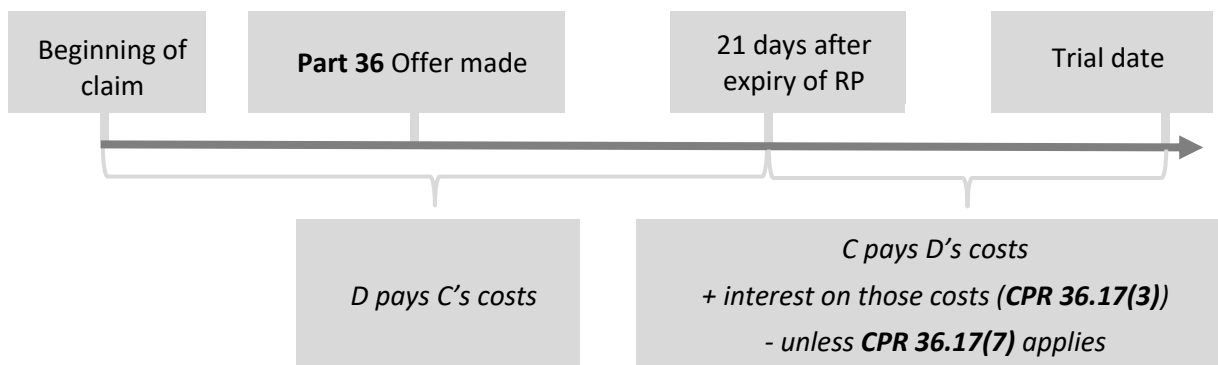
- + interest on all or part of the sum at up to 10% (plus base rate) (CPR 36.17(4)(a))
- + costs on the indemnity basis (+ interest on those costs at up to 10%) (36.17(4)(b)-(c))
- + up to 10% of the amount awarded at trial (to a maximum of £75,000) (36.17(4)(d))
- unless CPR 36.17(7) applies

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

**AN OFFER IS MADE BY THE DEFENDANT AND REJECTED BY THE CLAIMANT**

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

<p><b>If C loses at trial</b></p>	<p>C is likely to have to pay <b>all of D's costs</b> under <b>CPR 44.2(2)</b> but <b>not</b> generally on the indemnity basis, although the court has wide discretion and may consider this, generally only if C has behaved unreasonably (<i>Philip Warren &amp; Sons v Lidl</i>).</p>
<p><b>If C wins at trial, and wins more than D's Part 36 Offer</b></p>	<p><b>no Part 36 consequences (CPR 44.2)</b>, although the court retains the discretion to take D's offer into account and make a reduced cost order against D (<i>Sugar Hut v AJ</i>).</p>
<p><b>If C wins at trial, and wins less than (or equal to) the Part 36 Offer</b></p>	<p>a "split order" whereby:  <b>D pays C's costs</b> up to the end of the RP,  <b>but C pays D's costs plus interest</b> from then on (<b>CPR 36.17(3)</b>), in both cases on the standard basis – <i>as set out in the diagram below:</i></p>



**NOTE:** a defendant who offered 96% of the amount claimed was denied the benefit of the Part 36 regime on the basis that allowing the defendant to benefit would be unjust (*Yieldpoint v Kimura*).

**WHERE EACH PARTY HAS REJECTED AN OFFER MADE BY THE OTHER SIDE**

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

<p><b>If C is awarded the same as or more at trial than their own offer</b></p>	<p>C's offer applies and D was wrong to reject it; and Part 36 regime applies. D faces costs sanctions (<b>CPR 36.14(2)</b>).</p>
<p><b>If C loses at trial or gets less than D's offer:</b></p>	<p>D's offer applies and C was wrong to reject it (<b>CPR 36.17(1)(a)&amp;(3)</b>).</p>
<p><b>If C gets more than D's offer but less than their own offer</b></p>	<p>there are no <b>Part 36</b> consequences.</p>

**NOTE:** a party making a counterclaim can make a Claimant's **Part 36** offer in respect of that counterclaim. (*Huntsworth Wine Company v London City Bond*).

The doctrine of common mistake can apply. Here the offer specified that the Claimant would accept 20% of their costs but all correspondence made clear that 80% was intended and this was what the Defendant intended to accept. (*O'Grady v B15 Group Ltd*).

## PART 36 CONSEQUENCES IN FIXED COSTS REGIME ("FCR")

There are different rules for cases which fall within the FCR, this applies for personal injury cases where the cause of action arose after 1 October 2023 and for disease cases where the letter of claim was sent after that date.

The **Fixed Recoverable Costs** ("FRC") will be calculated on the settlement amount (**CPR 36.23 (6)**).

LITIGATION OUTCOME	COSTS OUTCOME
C accepts <b>Part 36</b> offer during the RP	C Recovers FRC specified under <b>CPR PD 45</b> .
C accept <b>Part 36</b> offer outside the RP	C Recovers FRC under <b>CPR PD 45</b> less the FRC due to the defendant by reason on the late acceptance of the <b>Part 36</b> offer.
Where a <b>Part 36</b> offer is not accepted, and the amount awarded on judgment <u>does not exceed</u> the <b>Part 36</b> offer.	C is entitled to FRC under CPR PD 45 less the defendant's FRC under CPR 36.24
Where C's <b>Part 36</b> offer is not accepted, and the amount awarded on judgment <u>is equal to or exceeds</u> the <b>Part 36</b> offer.	C Recovers fixed costs specified under <b>CPR PD 45</b> . Plus: <ul style="list-style-type: none"> <li>• 35% additional costs for the period between the expiry of the RP and the judgment date; and</li> <li>• Interest at a rate not exceeding 10% above base rate for the period from the expiry of the RP to judgment date; and</li> <li>• Interest on the FRC at a rate not exceeding 10% above base rate; and</li> <li>• An additional amount not to exceed £75,00 calculated according to <b>CRP 36.17</b></li> </ul>

## SUGGESTED STRUCTURE FOR A PART 36 QUESTION

**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.

## ENFORCING A SETTLEMENT

Accepting a **Part 36** Offer will bring the claim to an end by means of a stay. Otherwise, to enforce a settlement which is **not** a **Part 36** Offer, the settlement must be **on the face of a court order** (which will generally be a consent order).

Ordinary settlements are effectively contracts between the parties – to enforce such a settlement the innocent party would have to commence further proceedings for breach of contract and then apply for summary judgment. If the settlement is contained in a court order, then the innocent party can simply apply to enforce the terms of the order (*see the Enforcement section*). Court orders make any enforcement issues easier and formally bring court proceedings to an end.

## POSSIBLE COURT ORDERS FOLLOWING A NON-PART 36 SETTLEMENT

<b>STAY THE PROCEEDINGS</b>	Until such time as the court may direct.
<b>DISMISSAL</b>	The claim is dismissed, and the Claimant can never bring proceedings again on the issue. There are no automatic costs consequences, as costs will be agreed beforehand between the parties.



<b>DISCONTINUANCE</b>	This is not really a court order, as it is <b>the Claimant who discontinues</b> their claim. This is an advantage for the Claimant, as they may later be able to bring fresh proceedings. The presumption is that the Claimant pays the Defendant's costs, but costs are often agreed beforehand between the parties.
<b>CONSENT ORDER</b>	Either simply an order laying out the terms of the contract between the parties for evidential purposes (A.K.A. a " <b>settlement agreement</b> "), or an order drawn up by the court with terms that the parties then agree to. Only the latter can be varied by the court. The parties may apply to court to enforce the terms of a consent order if another party is, or will be, in breach of its terms.
<b>"Tomlin order"</b>	This is a consent order under which the court orders a stay of proceedings on terms which have been agreed in advance between the parties (like a settlement agreement above). These terms will be included in a <b>schedule</b> to the order. The schedule itself does not form part of the order, so can remain <b>confidential</b> .

#### DIFFERENCES BETWEEN TOMLIN AND OTHER CONSENT ORDERS

<b>TOMLIN ORDERS</b>	<b>CONSENT ORDERS</b>
Agreed terms are included in a separate schedule	Lists the agreed terms of the settlement.
Agreed terms can be kept confidential	Open to inspection
Agreed terms can go beyond what a court could have awarded	Used where the agreed terms of the settlement are straightforward.
Used where the terms are complex and require confidentiality	
Can deal with issues which were not part of the claim	

**NOTE: *Bostani v Pieper*** held that the enforcement of an obligation in the schedule to a Tomlin Order was exactly like a normal contract in being subject to the six-year limitation period.

*An example Tomlin order is set out below:*

**IN THE HIGH COURT OF JUSTICE**

**2023 HC 456**

**KING'S BENCH DIVISION**

**B E T W E E N**

**Thomas Smith**  
**(trading as Tom's Café)**

**Claimant**

**- and -**

**(1) Suma Partners**  
**(2) Tabia Partners**

**Defendants**

**ORDER BY CONSENT**

**UPON** the parties having agreed terms of settlement

**BY CONSENT IT IS ORDERED THAT:**

1. All further proceedings in this action shall be stayed upon the terms set out in the attached schedule, except for the purpose of enforcing those terms.
2. Each party shall have liberty to apply to the Court to enforce the terms of the schedule if the other party does not give effect to the terms of the schedule.
3. [Payment of money out of court]
4. [Costs order, if appropriate]

Dated: .....

Signed .....

Signed .....

[Name]

[Name]

Solicitors for the Claimant

Solicitors for the Defendant

**SCHEDULE**

**Set out the terms of the agreement here. The terms can be in this schedule or in an annexed agreement or separate document.**