

PART 36 OFFERS AND THEIR CONSEQUENCES

JUDITH AYLING KC
March 2026

It is not a Part 36 offer

- Cases on validity rarer but *Henderson & Jones v Salica Investments* [2025] EWHC 838 (Comm) per Calver J
 - The operative C’s Part 36 offer did not define the relevant period, and the Ds contended it could be any period, with no assumption it would be 21 days or any other period.
 - Since both parties had previously made Part 36 offers which had defined the relevant period as 21 days, a reasonable solicitor would have understood the Part 36 offer to refer to a relevant period of 21 days, and so the offer was valid.

Once you make it, you make it

- *Chinda v Cardiff & Vale University Health Board* [2025] EWHC 2692(KB) per Senior Master Cook
 - Court refuses application by C to withdraw Part 36 offer which D had accepted before end of relevant period
 - Change of mind is not a change of circumstances for CPR 36.10(3)
 - There must be some significant alteration in the circs surrounding the case which would justify an offeror departing from the valuation they had placed on the case when making the offer

What is 21 days before trial

- *Gagliardi v Evolution Capital Management LLC* [2025] EWHC 3488 (Comm) per Calver J
 - C makes Part 36 which D does not accept and C beats at trial.
 - D says CPR 36.17(4) does not apply because O made less than 21 days before trial; and unjust
 - Does ‘less than 21 days’ include judicial reading days?
 - *Mate v Mate* [2023] EWHC 806 (Ch): first day is first day attendance is required
 - Calver J agrees. This promotes certainty. As Baker J said in *Reader v SPIE* [2021] EWHC 1221 (QB) ‘*parties, especially offerees, should have as little uncertainty as poss over whether Part 36 consequences will attach*’
- Not unjust for Part 36 to apply (formidable burden, see *Webb v Liverpool* [2016] EWCA Civ 365)

90:10 offers

- *Smithstone v Tranmoor Primary School* [EWCA] Civ 113CA overrules obiter suggestions in *Mundy v TUI* [2023] EWHC 395 (Ch) that a 90:10 liability offer ineffective as matter of principle to engage r.36.17.
- On facts C is unsuccessful because liability had not been determined and case had settled without finding on liability so could not be said outcome at least as advantageous as 90:10 offer

Smithstone

- C traps fingers in door and claims negligence and OLA
- CNF into Protocol portal 31 Oct 2018 and so Low Value Fixed Costs regime
- C makes Part 36 90:10 before serving medical report and D rejects
- C issues and serves, D denies, allo to FT and listed for trial

Smithstone

- C makes WP offer £3,500, never accepted.
- Listed for FTT and on day of trial agree settlement at £2,650 and approved, on basis all to C, DDJ is addressed on whether falls outside FC because of CPR 36.17
- DDJ says FC apply (Dec 2020)
- PTA more than 3 years later, and heard 19 Aug 2024, then to CA 2 Dec 2025 and 16 Jan 2026

Smithstone

- D argued no judgment: CA disagreed.
- Principal Q: can an offer by C to settle liability at 90:10 but not specifying money be effective for CPR 36.17?
 - CA considers *Huck v Robson* [2002] EWCA Civ 398 and *Broadhurst v Tan* [2016] EWCA Civ 94 **and *Mundy v TUI* [2023] EWHC 385 OVERRULED**
 - Insofar as Collins-Rice may have suggested (obiter) that a 90:10 liability offer is ineffective as matter of principle to engage CPR 36.17 I disagree.
 - Court should encourage settlement of specific issues where case as a whole cannot be settled
 - The 90:10 offer was to be treated as a genuine offer to settle, just as 95:5 offer was in *Huck v Robson*.
 - But liability was not determined. If D admitted liability or J found D 100% liable '*there would be a case for awarding C pursuant to CPR 36.17 costs relating to liability from date of C's offer of 90:10*'. CPR 36.17 does not apply.

FRC and Part 36

- *Attersley v UK Insurance Ltd* [2026] EWCA Civ 217
 - In a case where the claim still fell within the scope of Pt 45 s.IIIA on the date of expiry of a Part 36 offer, the consequences of accepting the offer were governed by the fixed costs regime under r.36.20 rather than the standard costs regime under r.36.13, even where the case was subsequently allocated to the multi-track.
 - A workable and straightforward interpretation of CPR r.36.20

FRC and Part 36

- *Executors of estate of Kenneth Collins v Chief Constable Thames Valley Police*[2026] EWHC 117 (SCCO)
- Costs J Whalan
- Is C entitled to costs on std basis or CPR 45 Part 45 fixed costs
- All about destroyed guns
- C accepts D Part 36 offer of £32,500
- J finds within CPR 26.9(10(e) and so FRC do not apply – if claim includes intentional tort that is enough
- But C's Part 8 claim issued 31/12/2024 would have triggered FRC, applying transitional provisions, CP (Amendment No 2) Rules 2023 as issued after 1 Oct 2023
- CPR 45.1(3) FRC do not apply where Ps have expressly agreed – D says that has happened, because C accepts D's Part 36 with standard proviso 'costs in acc CPR 36.13': J disagrees, CPR 36.13(3) simply a right to have those costs determined by CPR, and includes proviso 'except where recoverable costs are fixed by these Rules'

What is more advantageous?

- *Cooper v Ludgate House* [2026] EWHC 484 (Ch)
 - What is more advantageous? Not just a financial claim: Cs establish D's liability; establish more substantial sums by way of damages than D had offered tho much less than had claimed; but failed to obtain injunctive relief had primarily sought
 - D failed to show Mr Cooper did not obtain judgment more advantageous than its offer

How to calculate?

- *Power Projects v Star Assurance Co* [2026] EWHC (Comm), Christopher Hancock KC as HCJ
- Q of enhanced interest on principal sum for period after P36 offer
- PP offers to settle and relevant period expires on 8 May 2025
- Correct approach to asst of whether PP beats that offer is to calculate what it would have obtained at relevant time on the terms of the judgment, see *Lonestar Communications v Kaye* [2023] EWHC 732 (Comm) at [28], a Calderbank case but in my judgment equally relevant to this point in a Part 36 context
- So comparator is principal sum + interest on 3-month LIBOR basis, and PP has beaten its offer by ref to CPR 36.17(2), more advantageous/better in money terms by any amount, however small.
- PP seeks enhanced interest but J concerned no jurisdiction because had dealt with interest in initial judgment.

Power Projects

- J concludes does have jurisdiction because judgment 1 dealt with contractual interest and now different jurisdiction, super-added interest pursuant to CPR 36, a statutory discretionary jurisdiction designed to promote settlement of disputes. Awards 10% above base rate.
- Also awards additional sum.
- Also awards interest on costs at 14% from 9 May 2025 to judgment.

Unjust to apply

- *Chassy v Left Shift It Ltd and others* [2025] EWHC 1701 (KB); [2025] Costs L.R. 1107; Bruce Carr KC sitting as deputy judge of the High Court.
 - C succeeded against the D1 but failed against D2 and D3
 - Tho C had beaten his Part 36 offer, that offer had been in respect of all Ds and not just the D1, and so it had not been unreasonable to refuse it, as D2 and D3 would have been liable to pay costs had it been accepted.
 - Accordingly it would be unjust for the CPR r.36.16⁷(4) benefits to be awarded.

NB section 70 and Part 36

- Part 36 has no application to an assessment under section 70 Solicitors Act 1974
 - *Clare Griffin v Kleyman Solicitors Ltd* [2026] EWHC 257 (Costs J Leonard)
 - No binding authority but applying own decision of *Zuhri v Vardags Ltd* [2023] EWHC 3050 (SCCO) and neither P wished to re-open that decision
 - Key part of rationale is Part 36 (secondary legislation) not compatible with costs provisions (ss70(9) and (10) SA (primary legislation)
 - But there is no obstacle to an offer that does not have P36 consequences being accepted so as to create binding offer of settlement and that is what a purported P36 offer when accepted did.

Section 70 and Part 36

- P36 might offer a ground for finding there are special circs (para 32) but did not do so on the facts.
- C's offer misconceived attempt to reverse effects of s70(9) through operation of Part 36; not possible and so not a realistic offer, and if D had accepted it, would not have left D in a better posn than it was at end of DA.
- Do not accept that D should be deprived of right under 1/5 rule by virtue of offer that sought to defeat that rule via Part 36 and which required that D pay C's costs to date.
- NB D awarded 80% of costs, not 100%, because D did not produce a cash account for 3 years, and should never be necessary for C to engage in DA to find out has been overbilled

Lessons

- Make a sensible offer: emphasised in final para of *Smithstone*
- If P makes a compliant Part 36 offer, then the Part 36 consequences will apply; formidable burden to show unjust
- No other offer is as likely to be effective

Questions?

- What about the effect of the new CPR 44.2(5)(e) from 1 Oct 2024 (regard to all circs ... including whether a P failed to comply with an order for ADR or unreasonably failed to engage in ADR):
 - Difference between failing to comply with O and failing to engage
 - D or C has made what they consider to be an effective Part 36 offer but refuses to mediate or take part in other form of ADR
 - Serve a statement saying we have made Part 36
 - Risks have increased...