



Seddon Costs Law

Part 36 Offers and Housing

2<sup>nd</sup> April 2025

Paul Seddon

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Format of Part 36 offers



36.5(1)

A Part 36 offer must—

- (a) be in writing;
- (b) make clear that it is made pursuant to Part 36;
- (c) specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with rule 36.13 .... if the offer is accepted (*unless* it is made less than 21 days before start of trial); A.K.A. "the relevant period"
- (d) state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and if so to which part or issue; and
- (e) state whether it takes into account any counterclaim.

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Format of Part 36 offers



Part 36 and interest – CPR36.5(4)&(5)

CPR 36.5(4)

- Monetary sums offered will be treated as inclusive of all interest until—
  - (a) the date on [the relevant period] expires; or
  - (b) [if made less than 21 days before trial], a date 21 days after the date the offer was made.

36.5(4) is mandatory – Offeror *cannot* provide for exclusion of interest from the monetary offer

Offer can make express provision for interest to continue after above dates - 36.5(5) introduced 6 April 2021 - codifying *Calonne Construction v Dawrus Southern Ltd* [2019] EWCA Civ754

BUT CPR 36.5(5) provides that if no such provision, then the offer is treated as being inclusive of all interest up to date of acceptance if accepted after the dates in 36.5(4)

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## Format of Part 36 offers

Either:

- Check and doublecheck CPR 36.5

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- Use the Form

**Notice of offer to settle: Form N242A**

[https://assets.publishing.service.gov.uk/media/657849210467eb000d55f5b0/N242A\\_0615.pdf](https://assets.publishing.service.gov.uk/media/657849210467eb000d55f5b0/N242A_0615.pdf)

**N.B.** Current N242A still does not include provision for interest to continue after relevant period etc. pursuant to CPR 36.5(5). So, if provision needed then must be expressly drafted

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## If a Part 36 Offer is beaten at trial

### 36.17 Consequences following judgment

Court must, unless it considers it unjust to do so\*

For Defendant beating their own offer:

- Award costs (inc. pre-action costs) from the date relevant period expired
- Interest on costs

\*CPR 36.17(5) sets out some of the circumstances to take into account on whether unjust to make an Order under CPR 36.17(3)&(4)

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## If a Part 36 Offer is beaten at trial

### 36.17 Consequences following judgment

For Claimant beating their own offer:

- Interest up to 10% above the base rate on any monetary award for some/all period starting from expiration of the relevant period
- Additional 10% (max.) of sum awarded (5% on any balance award above £500,000) – limited to £75,000
- Costs incurred after expiration of relevant period
  - Be assessed on the indemnity basis
  - Interest on those costs up to 10% above the base rate

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## If a Part 36 Offer is beaten at trial

### 36.17 Consequences following judgment

Defendant – judgment less advantageous to C than D offered  
Claimant – judgment more advantageous than C's own offer

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## If a Part 36 Offer is beaten at trial

### 36.2 – Counterclaims

(Rules 20.2 and 20.3 provide that counterclaims and other additional claims are treated as claims and that references to a claimant or a defendant include a party bringing or defending an additional claim.)

Where offer solely about counterclaim

- Claimant in counterclaim
- Defendant to counterclaim

Both Claimant/Pt 20 Defendant or Defendant/Part 20 Claimant

Friston on Costs 3<sup>rd</sup> Edition – Where a party makes an offer that encompasses both claim and counterclaim, the party's status as offeror is to be resolved by looking at the matter as a whole and not only by reference to a statement of intent recorded in the offer.

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## If a Part 36 Offer is beaten at trial

CPR 36.17(2) – Money claims/element of claim: more advantageous is better than *any* amount however small

But must be a genuine offer to settle CPR 36.17(5)(e):

- Claimant offering to settle for 99% of the Claim was not a genuine offer - *Yieldpoint Stable Value Fund, LP v Kimura Commodity Trade Finance Fund Ltd* [2023] EWHC 1512
- Beating offer by 7 pence found to be a request to capitulate and not a genuine offer *Gohil -v- Advantage Insurance Company* (County Court at Birmingham, 11th May 2023)

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## If a Part 36 Offer is beaten at trial

### 36.17 Consequences following judgment

Will not apply if:

- Offer withdrawn; or
- Offer was not changed to such that offeree beat those changed terms/proposals; or
- Offer made less than 21 days before trial unless court abridged the relevant period

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## Abridged time

Abridgement for offers less than 21 days before trial may be refused if Offer simply served late - *Henderson & Jones Ltd v Price* [2020] EWHC 3276 (Ch):

*"When the offer was sent on 23 September 2020, the claimant was professionally represented and would have appreciated that, to have the favourable part 36 consequences, it had to be served not less than 21 days before trial. The claimant chose not to avail itself of that opportunity. There is a policy incentive in requiring litigants to make timely part 36 offers to encourage the settlement of claims. A defendant is entitled to time to consider the merits or otherwise of accepting or rejecting an offer"*

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## Acceptance of a Part 36 Offer

### 36.13 – Costs consequences

If offer on whole of the claim is accepted within relevant period then the Claimant is entitled to costs of the proceedings up to the date on which the notice of acceptance is made – CPR 36.13(1)

If C accepts D's offer for part of the claim and abandons the rest of the claim then only entitled costs on the part of claim offered (unless court orders otherwise) – CPR 36.13(2)

C's costs include dealing with D's counterclaim if Part 36 states it takes this into account – CPR 36.13(7)

Deemed costs order – CPR 44.9(1)(b)

But only if accepted *after* proceedings commence - CPR 44.9(2)

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## Acceptance of a Part 36 Offer

Court must determine costs liability if parties do not agree when:

- Offer accepted after relevant period expires – C awarded costs up to date relevant period expires and offeree pays offeror's costs for period thereafter (CPR 36.13(5))
- Offer made less than 21 days before trial commences
- Offer does not relate to the whole of the claim (and C doesn't abandon the rest upon accepting D's offer)

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## Acceptance of a Part 36 Offer

**An order for payment on account pursuant to CPR 44.2 can be made when a Part 36 offer has been accepted within the relevant period.**

In *Global Assets Advisory Services Ltd v Grandlane Developments Ltd* [2019] EWCA Civ 1764 the Court of Appeal overturned the High Court's decision in *Finnegan v Spiers (t/a Frank Spiers Licensed Conveyancers)* [2018] EWHC 3064, disagreeing with Birss J's conclusion that: CPR 44.2 does not apply where a Part 36 Offer is accepted because, in those circumstances, there is only a deemed order.

*Global para.s 18 and 19:*

*"CPR r 44.2(8) applies whether the underlying costs order is made pursuant to the general discretion of the court expressed in CPR r 44.2 or, as in this case, is an order for costs which is deemed to have been made pursuant to CPR r 44.9... A deemed order is no less an order of the court.*

*...the object of CPR r 44.2(8) is to enable a receiving party to recover part of his expenditure on costs before the possibly protracted process of carrying out a detailed assessment"*

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## Acceptance and Tomlin Orders etc.

If offer on whole of the claim is accepted within relevant period then the Claimant is entitled to costs of the proceedings up to the date on which the notice of acceptance is made – CPR 36.13(1)

Paying party Defendant: costs after the acceptance cannot be claimed therefore implementation costs are excluded

Big problem for post-agreement implementation work in disrepair cases

(N.B. CPR 36.14(5) provides that the stay arising from acceptance of a Part 36 Offer will neither affect the power of the court to enforce the terms of that offer nor deal with any question of costs relating to the proceedings.)

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## Acceptance and Tomlin Orders etc.

Court of Appeal decision *Solomon v Cromwell Group plc and Oliver v Doughty* [2011] EWCA Civ 1584 [16] says that pre-action acceptance has the effect of a right to costs in the same terms as CPR 36.13 including the time limit on costs up to acceptance

- However -

The White Book and High Court decision *Falcon Trident Shipping Ltd v Levant Shipping Ltd* [2021] EWHC 2204 (Comm) say that CPR 36.13 has no effect on pre action because it is dependent upon proceedings being commenced - a deemed costs order under CPR 44.9(1)(b) cannot operate unless proceedings have already been issued. The White Book recommends inserting an express statement that CPR 36.13 should apply if the offer is accepted pre-action.

Therefore, for housing condition cases without any term on costs other than CPR 36.13, presumably, it follows that entitlement to costs flows from paragraph 11 of the PAP which, unlike CPR 36.13, does not have a time limit on costs.

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## Acceptance and Tomlin Orders etc.

*Falcon Trident Shipping Ltd v Levant Shipping Ltd* [2021] EWHC 2204 (Comm)

Parties can enter into a settlement agreement after acceptance, with the objective of providing a fuller settlement agreement, not merely memorialising the Part 36 Offer, but it must be construed against the offeror having made the Part 36 Offer that had been accepted.

*Falcon* arose from a dispute about the definition of the settled claim and the unquantified legal costs, following pre-action acceptance of a Part 36 Offer and a subsequent Settlement Agreement.

Settlement Agreement in *Falcon*:

- Had fresh wording
- Included an Entire Agreement Clause
- Set out a clearer basis for recovery of costs (recitals referring to clarifying Scott Schedule about same. It was found that this was because pre-action Part 36 does not itself give rise to the consequences of CPR 36.13 and would require proceedings to be issued to obtain a costs order.

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## Acceptance and Tomlin Orders etc.

### Post-acceptance Settlement Agreement

Ask D to enter into a post-acceptance Settlement Agreement with express term that costs of implementation work are included.

Arguably, if D does not agree then this undermines the PAP, and/or the obligations under the overriding objective in issued proceedings, to achieve settlement of a claim for which the effect is to get the work done and the tenant ought to recover reasonable costs of achieving the same. A point highlighted, regarding the PAP, by the findings in *Birmingham City Council v Lee* [2008] EWCA Civ 891 [53] & [54]\*. Possibly a particular requirement on pre-action acceptances because CPR 36.13(1) & (2) does not apply.

\*N.B. In *Lee* there was specific provision for the court to make an order removing the application of fixed costs under the CPR (including what is now CPR 46.13(1)). Whereas there seems no similar provision for CPR 36.13(1); for example, the 'unless unjust' provision only applies to post-judgment consequences under CPR 36.17 and 'out-of-time jurisdiction' under CPR 36.13(5).

On a case where implementation costs can be significant if D does not comply, then if D refuses to agree liability for them, does this indicate that they are not making the offer in good faith? Could this mean that if C failed to beat D's offer then it would be unjust to make an order with consequences of CPR 36.17?

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## Acceptance and Tomlin Orders etc.

### Accepted Part 36 Offers with no superseding settlement agreement

- Pre-action acceptances – CPR 36.13 does not apply, and, arguably, intention of parties was for costs to be paid under para 11 of the PAP; a time limit preventing liability for implementation costs on such a case as this was not the intention
- Post-issue acceptances - Ultimate Order (including Tomlin with Schedule thereto) must simply memorialise the terms of the Offer for CPR 36.13 to apply; any change or addition departing from the terms of the offer means it supersedes the offer and, arguably, the time limit under CPR 36.13 could not remain as an intended term when work was carried out after acceptance to change the terms of the agreement
- Orders that simply memorialise the Part 36 Offer:
  - Demand specific agreement that D agree to pay for further costs post-acceptance due to non-compliance?; or
  - Apply to restore proceedings and have a decision made?

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## Detailed Assessment proceedings

### CPR 47.20

- (1) The receiving party is entitled to the costs of the detailed assessment proceedings except where –
- (a) the provisions of any Act, any of these Rules or any relevant practice direction provide otherwise; or
  - (b) the court makes some other order in relation to all or part of the costs of the detailed assessment proceedings.

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## Detailed Assessment proceedings

### CPR 47.20

- (4) The provisions of Part 36 apply to the costs of detailed assessment proceedings with the following modifications –
- (a) 'claimant' refers to 'receiving party' and 'defendant' refers to 'paying party';
  - (b) 'trial' refers to 'detailed assessment hearing';
  - (c) a detailed assessment hearing is "in progress" from the time when it starts until the bill of costs has been assessed or agreed;
  - (d) for rule 36.14(7) substitute "If such sum is not paid within 14 days of acceptance of the offer, or such other period as has been agreed, the receiving party may apply for a final costs certificate for the unpaid sum.";
  - (e) a reference to 'judgment being entered' is to the completion of the detailed assessment, and references to a 'judgment' being advantageous or otherwise are to the outcome of the detailed assessment.

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## Detailed Assessment proceedings

### Practice Direction paragraph 19

"Where an offer to settle is made, whether under Part 36 or otherwise, it should specify whether or not it is intended to be inclusive of the cost of preparation of the bill and VAT. An offer which is made otherwise than under Part 36 should specify whether or not it is intended to be inclusive of interest. Unless the offer states otherwise it will be treated as being inclusive of all of these.

(A Part 36 offer is treated as inclusive of interest: see CPR 36.5(4).)"

Underlined inserted in 127<sup>th</sup> Update to PDs – 6<sup>th</sup> April 2021

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## Detailed Assessment proceedings

36.5(4) is mandatory – Offeror cannot provide for exclusion of interest from the monetary offer, including when offer is made in detailed assessment proceedings - *King -v- City of London Corporation* [2019] EWCA Civ 2266

*Calonne Construction v Dawnus Southern Ltd* [2019] EWCA Civ 754 followed *King* and found that there can be express provision for interest to continue after relevant period etc. – codified in 36.5(5) introduced 6 April 2021

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