



# Normanton CHAMBERS

EQUALITY | EXCELLENCE | EQUITY

## Shoshana Mitchell Part 36 Offers - Article

📅 May 2021

☎ 0300 0300 218

✉ Email Shoshana:

shoshana.mitchell@

normantonchambers.com or

clerks@normantonchambers.com



## THE DOS AND DON'TS OF PART 36 OFFERS

Part 36 offers are a powerful tool that facilitate settlements and enable strategic litigation. If a Part 36 offer is rejected, and a party does better than their Part 36 offer then costs consequences will follow. These self-contained provisions mean that these costs consequences automatically apply if triggered and external considerations are irrelevant as long as there is a *valid* Part 36 offer.

### THE FORMALITIES REQUIRED FOR A VALID PART 36 OFFER

The Civil Procedure Rules Part 36.5 states the requirements of a valid part 36 offer:

(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 or 36.20 if the offer is accepted;
- (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 of the issue; and
- (e) state whether it takes into account any counterclaim.

(4) A Part 36 offer, which offers to pay or offers to accept a sum of money will be treated as inclusive of all interest until -

- (a) the date on which the period specified under rule 36.5(1)(c) expires; or
- (b) if rule 36.5(2) applies, a date 21 days after the date the offer was made.

Further clarification is found in Practice Direction 47:

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, interest and VAT. Unless the office states otherwise it will be treated as being inclusive of these.

The formalities appear clear and unambiguous. Therefore, it is astonishing how many offers, claiming to be valid Part 36 offers, are

simply invalid. Even more remarkable is the multitude of conflicting case law in relation to the validity of Part 36 offers.

### OFFERS THAT EXCLUDE INTEREST

The following cases involved 'Part 36' offers stating that interest was excluded:

Case	Judge	Valid Part 36 offer?
<i>Potter v Sally Montague Hair and SPA</i> (2016)	DJ Douce	✓
<i>Potter v Sally Montague Hair and SPA</i> (2016)	HHJ Owen QC	✗ †
<i>Maclean v South East Coast Ambulance Service NHS Foundation Trust</i> (2016)	Master Campbell	✓
<i>Maclean v South East Coast Ambulance Service NHS Foundation Trust</i> (2016)	HHJ Dight	✗ †
<i>King v City of London Corporation</i> (2018)	Master Campbell	✗ †
<i>Ngassa v Home Office</i> (2018)	Master Rowley	✗ †
<i>King v City of London Corporation</i> (2018)	HHJ Dight	✗ †
<i>Horne (as executrix of the estate of Edward Horne deceased) v Prescott (No 1) Ltd</i> (2019)	Nicol J	✓
<i>King v City of London Corporation</i> [2019] EWCA Civ 2266	Court of Appeal	✗ †

*The moral of the cases:* When drafting a Part 36 offer you must ensure that the offer is either (a) inclusive of interest or (b) silent as to interest.

## RELEVANT PERIOD

The Civil Procedure Rule 36.13(1) states:

*Subject to paragraphs (2) and (4) and to rule 36.20, where a Part 36 offer is accepted within the relevant period the claimant will be entitled to the costs of the proceedings (including their recoverable pre-action costs) up to the date on which notice of acceptance was served on the offeror.*

Whilst seemingly relatively straight-forward, those drafting Part 36 offers still fall short of this rule. In the case of *James v James* [2018] EWHC 242 (Ch), the Part 36 offer stated the other party would be liable to pay costs “up to the end of the relevant period, or, if later, the date of service of notice of acceptance of this offer”. This contradicts the clear wording of 36.13(1) and indeed HHJ Matthews held that the Part 36 offer was invalid.

In *Essex County Council v UBB Waste (Essex) Limited (No 3)* [2020] EWHC 2387 (TCC) the Claimant had a lucky escape. A Part 36 offer dated 7 March 2019 was sent on that day but was effectively served on 8 March 2019. The offer stated the relevant period to be “21 days of the date of this letter”. The Defendant argued that the relevant period was only 20 days, rather than the required 21 days. However, the Court held that there were two feasible and reasonable interpretations of the offer: (1) the wording might mean that the 21 days ran from the date of the offer (7 March 2019) in which case the Part 36 offer was not valid or (2) the wording meant the 21 days ran from the date on which the offer was made (8 March 2019) and would be a valid Part 36 offer. The Court considered that there was “no doubt” that the Claimant’s interpretation was a Part 36 offer and held that it was valid. However, would you want to risk it?

*The moral of the cases:* Do not risk going beyond the wording of Part 36; use the form N242A.

## TYPOGRAPHICAL ERRORS

Typographical errors are common; most of the time the person reading the error will simply laugh, roll their eyes or not notice it. However, the typographical error in *SPF v Sykes Seafoods Limited and Subsidiary Co* (2020) had severe consequences. The Claimant made a valid Part 36 offer to settle the claim for £0.00, on the proviso that costs were payable on the appropriate basis. The Defendant accepted the offer. The Claimant then issued proceedings claiming that the Part 36 offer was a mistake. DJ Metcalf held that Part 36 are a self-contained rule, and the doctrine of unilateral mistake could not be relied upon. Therefore, the Court found in favour of the Defendant and the claim was stuck out.

*The moral of the case:* The rule of three - check, check, check again!

**Shoshana Mitchell and Tara-Lynn Poole**

**Pupil Barristers**

**Normanton Chambers**