Part 36 Offers

KINGS CHAMBERS

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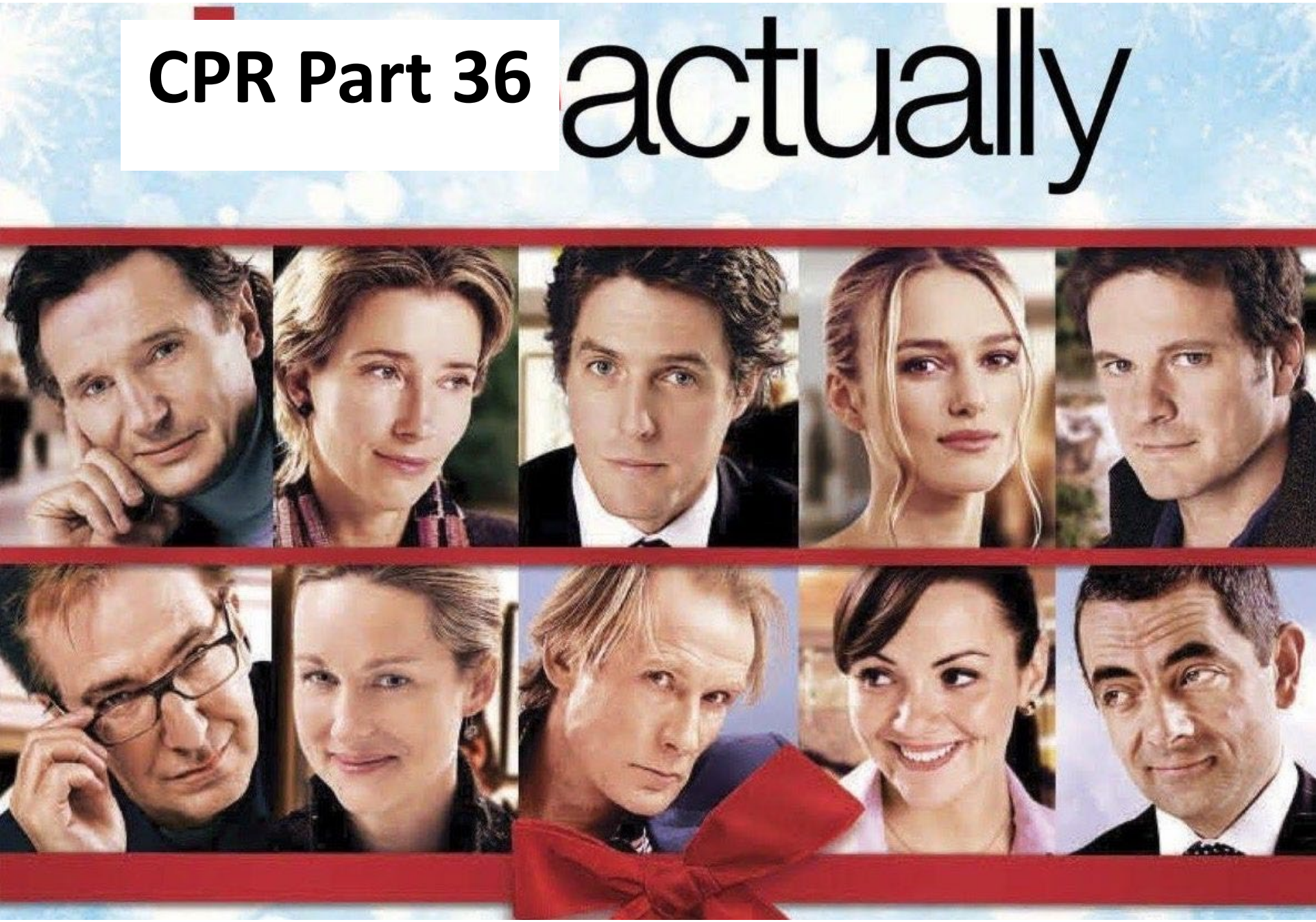
CPR Part 36



Working Example

Claimant claims £100,000 from the Defendant on the basis that the Defendant supplied window frames which were not fit for purpose.

The Offer

C makes an offer in the following terms:

(a) D pays C £99,950

(b) C will only seek 50% of its costs

(c) Alternatively, C would accept D attending site and remedying issues and installing a further 100 windows free of charge

(d) Offer is made under CPR Part 36 and is open for acceptance for at least 21 days

Issue One

Knight v Knight [2019] EWHC 1545 (Ch)

The offer contains terms as to costs! Not a Part 36 offer.

12. I therefore understand Hildyard J to be saying that it is still possible to comply with Part 36 by including in the offer a term as to costs, provided that the term concerned *reduces* the burden on the offeree that would otherwise be imposed as a consequence of accepting the offer, rather than *increases* it. As it seems to me, that is strictly inconsistent with the decisions in *Mitchell v James* and *French v Groupama* , that no term as to costs should be included in a Part 36 offer. The first of these decisions concerned an offer which would have altered the cost consequences otherwise flowing from a Part 36 offer. The second of them concerned the offer of a sum to cover the entirety of the claimant's claims, "inclusive of interest and costs". That is very similar to the wording of the offer in the present case, which (so far as material) reads "to pay [to the offerees] … the sum of £35,000 … inclusive of your clients' costs…" It might have been argued that all that means is that the total sum to be paid is £X, and it will not be increased to take account of any offerees' costs already incurred. Yet the Court of Appeal held that the similar wording used in that case introduced a term as to costs and therefore could not amount to a Part 36 offer.

Issue Two – going off piste

Woodgate v Woodgate [2023] EWHC 1640 (Ch)

The Offer advances an alternative basis for settlement which is outside of the pleaded case.

9. Subject perhaps to arguments about certainty of terms, such an offer is a perfectly valid offer of settlement, but it is not a Part 36 offer. CPR r. 36.2(3) provides that "A Part 36 offer may be made in respect of the whole, or part of, or any issue that arises in (a) a claim, counterclaim or other additional claim …". Further, CPR r. 36.5(1) sets out the form and content of a Part 36 offer, including that such an offer must 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 …". The Court of Appeal's decision in *Hertel v Saunders* is authority for the proposition that the words "claim", "part of a claim" and "issue" are referring to pleaded claims, parts of claims or issues, and not other claims or issues which may have been intimated in some way but never pleaded: see at [33].

Issue Three

CPR 36.5(1)(c)

“At least 21 days”

Issue Four – Genuine attempt?

Yieldpoint Stable Value Fund v Kimura [2023] EWHC 1512 (Comm)

> 2. The issue is whether the Part 36 Offer was a " *genuine attempt to settle the proceedings* " against the Defendant (Kimura) within the meaning of CPR 36.17(5)(e) . If not, this in turn may render it " *unjust* " to award a successful claimant such as Yieldpoint any of the post-judgment enhancements set out in CPR 36.17(4)(a)-(d) .

9. Turning then to the Part 36 Offer:

(i) Yieldpoint sought the sum of US$4,950,000 (defined as the "*Settlement Sum*") inclusive of interest. This represented 99% of the principal claim.

(ii) When accrued interest - calculated at the expiry of the 21 day acceptance period (30 January 2023) - is factored in, this proportion drops a few percentage points. Quite how far it drops depends on whether (and, if so, how) interest at the contractual rate in clause 11.5 of the MPA should be compounded. That was one of the disputed matters resolved - in favour of Kimura, as it happens - at the consequentials hearing. On this basis, the Part 36 Offer represented about 96% of the claim value as at 30 January 2023.

19. The fact that a judge in another case upheld a 99.7% offer (*Rawbank SA v. Travelex Banknotes Ltd. [2020] EWHC 1619 (Ch); [2020] Costs L.R. 781*) or a 95% offer (*Jockey Club Racecourse Ltd. v. Willmott Dixon Construction Ltd. [2016] EWHC 167 (TCC); [2016] 4 WLR 43*) or a 90% offer (*JMX v. Norfolk & Norwich Hospitals NHS Foundation Trust [2018] EWHC 185 (QB); [2018] 1 Costs L.R. 81*) does not inform, still less dictate, how I should approach my evaluation of the Part 36 Offer in the present case. These decided cases provide illustrative guidance, no more.

20. One theme that emerges from the decided cases, however, is that a very high claimant offer may only be vindicated where the claim itself was obviously very strong and could be so characterised at the time of the relevant offer: see *Rawbank* (above) at [30] (" *clearly no defence* " / " *near-certainty* "); *Omya UK Ltd. v. Andrews Excavations Ltd. & another [2022] EWHC 1882 (TCC); [2022] Costs L.R. 1295 at [19]-[20]* (" *the defence put forward lacked credibility* ").

21. The approach is necessarily objective and needs to be conducted free from the hindsight gifted by a trial and its known outcome, so far as possible. A marked disconnect between the discount element of an offer, on the one hand, and the offeror's reasonable contemporary perception of the strength of their case, so far as discernible, on the other hand, may well be telling against it being a genuine attempt at settlement. The trial judge is attuned to this evaluation.