



Neutral Citation Number: [2025] EWHC 3488 (Comm)

Case No: CL-2022-000466

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY DIVISION
BUSINESS LIST

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19 December 2025

Before:

Mr Justice Calver

Between:

Robert Gagliardi
- and -
Evolution Capital Management LLC

Claimant

Defendant

Andrew Legg and Gretta Schumacher (instructed by **PCB Byrne**) for the **Claimant**
Paul Downes KC and Emily Saunderson (instructed by **Hogan Lovells International LLP**)
for the **Defendant**

Hearing dates: **19 December 2025**

JUDGMENT

MR JUSTICE CALVER
(Ex tempore judgment)

1. Mr Gagliardi, through his solicitors, made a part 36 offer to settle the claim and counterclaim on 12 September 2025 in the sum of \$3 million. The defendant did not accept it. The judgment sum of some \$5.38 million awarded against the defendant is, as Mr Downes KC naturally accepts, on behalf of the defendant, at least as advantageous to Mr Gagliardi as the proposals in his part 36 offer within the meaning of CPR 36.17(1)(b).
2. In this case two other offers had been made by Mr Gagliardi on 15 September 2023 in the sum of \$3.75 million and on 22 March 2024, also in the sum of \$3.75 million, although those were not formulated as part 36 offers. The defendant at more than one stage counter-offered much smaller sums of around \$200,000 or so.
3. CPR 36.17(4) provides that:

"Subject to paragraph (7), where paragraph 1(b) applies, the court must, unless it considers it unjust to do so, order that the claimant is entitled to

 - (a) interest on the whole or part of any sum of money (excluding interest), awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;
 - (b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;
 - (c) interest on those costs at a rate not exceeding 10% above base rate; and

(d) [effectively a payment of £75,000]."

4. The defendant accepts that, having lost the proceedings, it should pay the claimant's costs. However, the defendant's position is that the consequences of CPR 36.17(4) do not follow from the offer because:

- (1) it was made less than 21 days before the start of trial and the court has not abridged the relevant period. Accordingly, by reason of the application of CPR 36.17(7)(c), rule 36.17(4) does not apply; and

- (2) without prejudice to the foregoing it would be unjust to make orders further to CPR 36.17(4).

5. I shall address these two issues in turn.
6. As I have said, CPR 36.17(7)(c) provides that CPR 36.17(4) does not apply to a part 36 offer made less than 21 days before trial unless the court has abridged the relevant period.
7. The first issue raises a short but nice point, namely whether, for the purposes of CPR part 36, the phrase "less than 21 days before trial" includes judicial reading days or whether it refers to the first day of the trial where the parties are in actual attendance.
8. The defendant's argument is simple and it is as follows.
9. Upon listing of the trial, the reading day was Thursday 2 October 2025, with the hearing commencing on Monday 6 October 2025 (as indeed it did). Subsequently a further reading day, 1 October 2025, was added on 12 September 2025.

10. This action was brought and heard in the Commercial Court and the Commercial Court Guide provides as follows, in section J3, headed "Start of trial".

J3.1 Various steps are to be taken by or by a defined period prior to the start of the trial. For those purposes, the start of the trial is the first date of the trial listing unless J3.2 applies.

J3.2 If the trial was fixed with allocated pre-trial reading time prior to the first date of the trial listing, then the start of the trial is the first date of that pre-trial reading time.

J3.3 From January 2022 the practice of listing trials to commence on a given date with allocated pre-reading time prior to that date will generally no longer be followed so that, if there is to be any reading time prior to the first sitting day of the trial, that reading time will start on the first date of the trial listing and not before.

11. At the case management conference of this case, the trial was provisionally listed with one day of judicial pre-reading; see paragraph 2 of the directions order made by Mr Justice Foxton on 8 March 2024, which reads:

"2. The provisional estimated length of the trial is 11 to 13 days plus 1 day pre-reading for the court."

12. The judge's order reflects the ordinary use of language. The trial is when the parties attend on the court for 11 to 13 days, plus one day of pre-trial reading.

13. The order of Mr Justice Bright at the PTR on 25 July 2025 provided at paragraph 14 that:

"Save as may otherwise be directed by the court, the trial will be conducted in accordance with the trial timetable set out in the schedule to the order."

The schedule provided for a day of judicial pre-reading on Thursday 2 October 2025.

14. In an email on 12 September 2025 at 13:29 hours, my clerk confirmed that there would be an additional day of pre-reading on Wednesday 1 October 2025.
15. The part 36 offer was sent by email on 12 September 2025 at 14:55 hours, being very shortly after the parties had been notified of the additional day of pre-reading.
16. 21 days after 12 September 2025, being the day on which the “relevant period” expired, was accordingly Friday 3 October 2025. If the first day of the trial is taken to be as defined in the Commercial Court Guide, paragraph J.3.2, then that was Wednesday, 1 October 2025 (previously Thursday, 2 October 2025), being the first judicial pre-reading day.
17. If that is so, the offer was made less than 21 days before trial, being made 18 days before trial, and CPR 36.17(7)(c) is engaged and CPR 36.17(4) does not apply to the offer. That is the defendant's case.
18. If, however, 6 October is the start of “the trial”, then the offer was made just in time, being three days before the trial.
19. The claimant takes issue with the defendant's analysis. Mr Legg, on behalf of the claimant, accepts that, if judicial reading days are included for part 36 purposes as “the trial”, then the part 36 offer was made less than 21 days before trial, such that pursuant to CPR 36.17(7)(c) the consequences that would otherwise follow do not apply.

However, he maintains that that is the wrong analysis and instead the following is the correct analysis.

20. Mr Legg submits that a pre-reading day does not signify the start of the trial for the purposes of CPR part 36 for the following reasons:

(1) It has always been clear to the parties that the first day of the trial was Monday 6 October 2025. Whilst the reading days changed, the first day of the trial was fixed:

- a. The listing email from Mr Hull on 10 April 2024 makes clear the trial hearing was due to commence on 6 October 2025;
- b. This reflects the CMC Order of Foxton J on 19 March 2024, that the “*provisional estimated length of trial is 11-13 days, plus 1 day pre-reading for the Court*”.
- c. Numerous orders in proceedings commenced with recitals that read “***UPON the trial of this matter being listed for pre-reading on 2 October 2025 and hearing from 6 October 2025 (with a time estimate of 13 days)***” (emphasis added);
- d. The Judgment cover page refers to the hearing dates as “06-28 October 2025”.

(2) Mr Legg also points to the fact that there is first instance authority in support of the proposition that the first day of trial for the purposes of CPR Part 36 is the first day of the hearing at which attendance of the parties is required. In *Mate v Mate* [2023] EWHC 806 (Ch); [2023] Costs LR 1425, a Part 36 Offer had been made in the context of a trial in the Chancery Division. On the facts, if the trial commenced on 5 September 2022, the Part 36 Offer was made less than 21 days before trial. If the trial commenced on 6 September 2022, it had been made 21 days before the trial. 5 September 2022 had been allocated as a judicial reading day. The deputy

judge rejected the argument that pre-reading days were part of the trial and held as follows:

39. ... The court notice referred to above plainly states that the trial of the claim is to take place on 6 September 2022 and the ensuing six days. It refers to judicial reading having been allocated to 5 September 2022 and the parties not being required to attend on that day. I do not consider that the extract from the Chancery Guide ... [supports the submission] that the trial is deemed to start on the day allocated to judicial reading. In my view the trial started on the day all parties were required by the notice to attend court. The fact that, in advance of the trial, trial bundles and skeleton arguments were prepared and lodged and that provision was made for a day's judicial reading does not override the clear terms of the notice given to the parties.

(3) The Chancery Guide extract referred to in *Mate v Mate* states, “*The timetable should allow a realistic time for pre-reading by the judge, as well as opening and closing submissions, witnesses of fact and experts*”. As the Judge in *Mate v Mate* noted, this did not support the interpretation that merely because pre-reading needed to be properly accommodated in the trial timetable, the trial was taken to have *commenced* on a date allocated to pre-reading for the purposes of CPR 36.

21. I consider that the decision in *Mate v Mate* affords some support for Mr Legg's argument insofar as it refers to the fact that the trial is taken to have started on the day that all parties were required by notice to attend the court (although Mr Downes KC points out that the judge referred in the last sentence of paragraph 39 to the fact that the provision which was made for a day's judicial reading did not override the clear terms of the notice given to the parties and it is unclear as to whether or not that was what influenced the judge).

22. In any event, it seems to me I have to construe the rule here in the light of the Commercial Court Guide and consider whether or not the Commercial Court Guide affects the proper interpretation of the rule.

23. The practice of the Commercial Court has changed in recent years with a view to ensuring that judicial reading time is set aside. As I have said, the Commercial Court Guide addresses the start of trial at section 3 and the change in practice is identified in paragraph J.3.3 (set out above).
24. I agree with Mr Legg's submission that such steps as are referred to in J.3.1 of the Guide are set out in sections J.4 to J.6 of the Guide and encompass such matters as the dates for preparation of trial bundles, filing reading lists, updated trial timetables, authority bundles and in particular service of skeleton arguments, chronologies and dramatis personae. Thus J.6.2 sets out when skeleton opening arguments are to be filed prior to the start of the trial, and that that is to be before the start of judicial reading time.
25. It is "*for those purposes*" that J.3 is aimed - that is, for the deadline specified in the Guide and set to be calculated in accordance with the first reading day.
26. I think Mr Legg is right to submit that the Guide does not purport to and could not affect when a trial commences *for the purposes of the consequences of a part 36 offer*. It would be odd, and contrary to the desirability of certainty as to the effect of a part 36 offer if part 36, which operates as a self-contained code in relation to all civil proceedings in all divisions, were to have a different interpretation as to when a trial *commenced* based upon a particular court guide or practice, particularly where that practice can change from time to time, as indeed it did in 2022 in the Commercial Court.
27. I also put to the parties: "What if the judicial reading time is fitted into the sitting days of the trial?" Say the trial starts on 6 September and the judge chooses to read on 7

September: on the defendant's case the trial starts on 6 September. But if the judge takes his reading day a day before the trial starts, on 5 September, then the trial is no longer said to start on 6 September but on 5 September for the purposes of part 36. I do not consider that to be logical and it leads to uncertainty.

28. The start of the trial, here 6 October, was known to the parties and fixed. That provides certainty. Judicial reading days, on the other hand, can change. If asked when did the trial begin, I consider that a reasonable onlooker would no doubt say "6 October", being the first day when all the parties turned up at court with their legal teams ready to begin the trial. That is how I consider that the rule should objectively be construed. It is the natural meaning of the word, and the fact that, for the purposes of ensuring that the judge has all that he needs to pre-read, the Commercial Court Guide has, for practical reasons, deemed the first day of judicial pre-reading to be the start of the trial should not, in my judgment, lead the court to construe the wording of rule 36.17(7) in an unnatural way.

29. As I have said, this promotes certainty and, as Mr Justice Andrew Baker said in *Reader v SPIE Limited* [2021] EWHC 1221 (QB) at paragraph 23:

"Parties, especially offerees, should have as little uncertainty as possible over whether part 36 consequences will attach."

30. Mr Downes KC argued that, for public policy reasons, his construction of the rule should apply in this case. He refers to the fact that by 21 days before the start of trial, the trial costs are likely to have been incurred, the claimant's costs are likely to be more front-loaded than the defendant's costs and the claimant's costs will effectively

have crystallised by that time. Effectively, he submitted, the die is cast at 21 days, money has been spent and so the defendant may as well take the case to trial.

31. Furthermore, he says that 21 days before the trial the parties are focused on their trial preparation; the defendant does not want to be distracted by negotiations on settlement. I do not consider these to be good reasons to construe the rule in the way suggested by Mr. Downes. Every case is different and it may be that very substantial costs are incurred after 21 days before the start of the trial.
32. Moreover, contrary to Mr. Downes' submission, it seems to me that at that stage the defendant is in a position to make a judgment about any settlement offer because by that stage the defendant will no doubt be up to speed with the critical issues in the case, the evidence for and against the claim and factors which bear on the merits of the claim.
33. In any event, it seems to me that neither of Mr. Downes' reasons provide strong public policy reasons why the ordinary wording of the rule should not apply, namely that the first day of the trial is the first day that the parties attend on the court with their lawyers.
34. I accordingly agree with Mr Legg that the clearest, most certain and straightforward interpretation of "the start of trial" for CPR rule 36 is that it is the date on which the parties are required to attend court with their lawyers and the trial actually commences.
35. It follows from that that Mr Gagliardi's part 36 offer was not made less than 21 days before trial and the consequences pursuant to CPR 36.17(4) should follow unless the

court considers that it is unjust to order that those consequences should apply. As to that, the recipient of the part 36 offer, the defendant, bears what has been called a "formidable burden" of establishing that it would be unjust for the consequences of CPR 36.17 to follow: see *Webb v Liverpool Women's NHS Foundation Trust* [2016] 1 WLR 3899 (CA) at [38] and *Smith v Trafford Housing Trust* [2012] EWHC 3320 (ch) per Briggs J at [13(d)].

36. In determining that question, CPR 36.17(5) provides that the court must take into account all the circumstances of the case including:

- (a) the terms of any Part 36 offer;
- (b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;
- (c) the information available to the parties at the time when the Part 36 offer was made;
- (d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and
- (e) whether the offer was a genuine attempt to settle the proceedings.

37. Mr Downes KC points out that the procedural position as at 12 September 2025 was as follows:

- a. The Claimant's third firm of solicitors had come off the record shortly after the PTR, on 4th August 2025. The Defendant's solicitors sought to correspond directly with the Claimant given the rapidly approaching trial but correspondence went unanswered. The Claimant's current solicitors first wrote to the Defendant's solicitors on 14th August 2025.
- b. The Defendant had been ordered to take carriage of the trial bundle in place of the Claimant, and the electronic trial bundle was to be made available to the parties

and the Court by 4pm on 12th September 2025: see paragraph 5 of the order dated 20th August 2025.

- c. Pleadings were not closed. The Claimant's very late application to amend his Particulars of Claim and Amended Reply and Defence to Counterclaim, dated 23rd July 2025 had been heard on 4th September by Waksman J. The Defendant had agreed to some amendments. The Judge dismissed the Claimant's application insofar as the Defendant had not agreed to it. The Claimant's Amended Particulars of Claim was dated 15th September 2025 (and included new arguments on contractual construction) and his Re-Amended Reply and Defence to Counterclaim was dated 25th September 2025.
- d. Written witness evidence was not closed. At the date of the PTR on 25th July 2025, the parties had been scheduled to exchange supplemental witness statements by 4pm on 31st July 2025, see the order of Bright J dated 1st July 2025. The Claimant sought more time, and this already delayed date was pushed back by consent further to orders dated 4th August 2025 (to 22nd August 2025), 20th August 2025 (to 5th September 2025), 1st September 2025 (to 11th September 2025), 12th September 2025 (to 19th September 2025); 22nd September 2025 (to 4pm on 22nd September 2025); and 23rd September 2025 (to 6pm on 22nd September 2025).
- e. When the Claimant's supplemental witness statements were served on 22nd September 2025, just over a week before the start of trial, they were not simply responsive to the Defendant's statements. They were longer and more detailed than his main trial witness statements, meaning that the written evidence was in fact far from being closed when the Offer was made:

- (i) 4th Gagliardi, 4th July 2025: 36 pages. 6th Gagliardi, 22nd September 2025: 43 pages.
- (ii) 1st Murphy, 4th July 2025: 22 pages. 2nd Murphy, 22nd September 2025: 24 pages.
- (iii) 1st Jones, 4th July 2025: 5 pages. 2nd Jones, 22nd September 2025: 17 pages.

38. As a result, Mr Downes KC submits that it would be unjust, taking into account all the circumstances of this case, to make the orders referred to in CPR 36.17(4).

39. Mr Legg takes issue with that and points out that the consequences of the late making of a part 36 offer, which nonetheless complies with CPR 36.17, are already taken into account in the rules, in that the offer will have more limited effects in terms of the consequences set out in subparagraph (4) of rule 36.17. Moreover, he relies upon the fact that there were other offers made by Mr Gagliardi to settle the litigation at an earlier stage, as I have already indicated, in the sum of some 3.75 million, and so the defendant had had plenty of time to consider settling the matter at that sort of level but it flatly refused to negotiate at that level. Moreover, the main issues between the parties were questions of construction, which is something that the defendant could form a view upon from a relatively early stage, unaffected by any late service of witness evidence or indeed pleadings. I consider these all to be persuasive points.

40. Mr Legg also makes the point that it is frequently the case that there is a late flurry of activity prior to trial in commercial litigation. The fact is that, if the part 36 offer that is made complies with the terms of 36.17 and does not fall foul of 36.17(7)(c), then there is no reason not to give it effect, albeit, as I say, its effect is necessarily limited by reason of its late issuance.

41. Bearing in mind, as I have said, that the defendant bears the formidable burden of establishing that it would be unjust for the consequences of CPR 36.17 to follow and

bearing in mind the importance of the 36.17 regime in the scheme of facilitating settlements of actions before trial, it seems to me that the defendant has failed to discharge that burden and that the limited effects of 36.17(4) in this case, which Mr Legg has indicated may make the difference of something like \$200,000, should be enforced by the court. Accordingly, I do not consider that it is unjust to give effect to CPR 36.17 in this case.

42. However, Mr Legg does not stop there. He seeks an order for indemnity costs against the defendant because, he submits, the conduct of the defendant and the content of its defence and counterclaim is such that this case is out of the norm, being something outside the ordinary and reasonable conduct of proceedings and constituting unreasonable litigation behaviour. He relies upon a number of features of the case for that submission, which he sets out in paragraph 15 of his skeleton argument.

43. Mr Downes KC took a threshold point in relation to this aspect of the application, which is that the defendant was not given notice, he submits, until yesterday of the reasoning for the bringing of an application for indemnity costs and that that is unfair and, as a result, the court should not entertain the application.

44. I have some sympathy for Mr Downes' submission, but in the event I do not need to decide whether or not I should refuse to hear the matter at all because I am not minded to order indemnity costs in this case, save in one respect which it is not unfair for the court to determine today. The one respect is in relation to the counterclaim, and it seems to me, in relation to the counterclaim, Mr Downes can have no complaint that that particular point is taken by Mr Legg in view of the terms of my judgment that that aspect of the defendant's case was without merit and effectively abusive. Obviously

that is a short point that can easily be dealt with on any consequential hearing and it must have been apparent to the defendant that it was exposed to a possible order for indemnity costs in this discrete respect.

45. This aspect of the claim concerns paragraphs 69(a) to 69(e) and 71(g) together with the counterclaim itself and it relates to the allegation that the “impression” given by the behaviour of Mr Gagliardi in his dealings with Mr Passi amounted to disreputable conduct on Mr Gagliardi's part which would have allowed him to be dismissed immediately for cause and not to be paid his new issue bonus or salary. I have set out in the judgment why, in my judgment, that pleading was effectively abusive, and it seems to me that, in those circumstances, an award of indemnity costs just in relation to that aspect is undoubtedly warranted.

46. Mr Downes KC did not put up too much resistance to that suggestion, save to say that it would be difficult to extract those costs from the overall costs of the action. That may be so, but it does not seem to me that that is a reason for the court not to order it, and that will be a matter for the taxing judge in due course.

47. So far as the other points taken by Mr Legg in relation to the conduct of the litigation as a whole are concerned, this was hard-fought Commercial Court litigation on both sides and both sides, it seems to me, can have complaints from time to time about the way in which the case was run by each party - although I do not suggest for one minute that the lawyers behaved other than in a straightforward manner. But that is frequently the case with hard-fought commercial litigation. As I said in my judgment, the parties adopted somewhat entrenched positions, but I do not think it is right for the court to then pore over its judgment, seeking to identify instances of where it could be

said that one party advanced a point which could be criticised and another did the same at another stage. That seems to me to be the wrong approach.

48. Similarly, I do not consider that the claimant's costs should be reduced by 10%, as suggested by Mr Downes (in paragraphs 23 to 25 of his skeleton argument) in relation to disclosure. Again it seems to me that there are points that can be taken both ways about disclosure in this case. Mr Downes says that Mr Gagliardi was not straightforward in terms of the disclosure he gave in relation to his mobile phone; Mr Legg points to the fact that there was nothing on the mobile phone that was of any real relevance to the case. The DOJ, he suggests, did not think there was, otherwise they would not have refused to bring proceedings against Mr Gagliardi. So, again, whilst one can make points for and against the parties in relation to disclosure, it does not seem to me to be right to start deducting costs in all the circumstances.

49. So in conclusion I consider that in respect of this hard-fought commercial litigation the costs should be paid by the defendant on the standard basis, save that, in relation to the discrete point of the allegations in the counterclaim that I have identified, those costs should be paid by the defendant on the indemnity basis.

50. Finally I turn to permission to appeal. Mr Downes raises four grounds of appeal. He sets those out in paragraph 26 of his skeleton argument. The first point is a question of construction. I do not consider that I should grant permission to appeal in relation to that. I have taken a clear view on construction and Mr Downes will have to seek permission from the Court of Appeal if he wishes to challenge that.

51. The second ground, which is that it is said that the court erred in finding that the claimant had pleaded a cause of action for failing to award a prorated discretionary

bonus where the facts necessary for such a claim had not been pleaded, again, that was a question of construction and I dealt with that in paragraphs 324 to 325 of my judgment and I do not consider that to be an arguable ground of appeal.

52. The third ground is that the court erred in finding that no reasonable employer would have regarded the existence of the SEC/DOJ investigation as being material to assessment of the trading profits of the EARMF. This is Mr Downes' "hay in the barn" point and it is suggested I have failed to take into account the risk of disgorgement of profits. But, again, I dealt with this at paragraphs 418 to 420 of my judgment and I dealt with the risk of the fine in paragraph 409(2), which cross-refers to paragraph 71(d) of the defence. I formed a clear view on this and again I do not consider that there is an arguable point there.

53. Finally, on the fourth ground of appeal, which is that the court is said to have erred in relation to its interpretation of "profit", again, that is a pure construction point and I reached a clear conclusion on that, which, again, if Mr Downes wishes to challenge, he will have to seek permission from the Court of Appeal to do so in view of my clear finding at paragraph 330 onwards of my judgment.

54. So in all those circumstances, I do not grant permission to appeal.

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55. The claimant seeks interest at the rate of 10% enhanced interest under CPR 36.17 and has referred the court to *OMV Petrom v Glencore International* [2017] 1 WLR 3546, in which the court referred to the fact that the rejection of a part 36 offer led to a lengthy trial. The objective of CPR 36.17 is of course to encourage good practice, to

encourage settlements before trial, if at all possible. Mr Downes objects to the full 10% being awarded although he does not suggest an alternative figure.

56. As Mr Legg points out, the enhanced rate of interest is for a relatively short period of time and so, in terms of the quantum of any enhanced interest, depending upon the rate, one is looking at a relatively small differential. It seems to me in the circumstances that the 10% rate --

57. MR DOWNES: My Lord, I'm so sorry to interrupt. It's not 10%. It's 10% above base rate.

58. MR JUSTICE CALVER: Sorry, I am using it as a shorthand. You are quite right.

59. 10% rate above base rate is the appropriate figure to take, bearing in mind the points that I have already made about the part 36 offer in this case, the fact that there had been previous offers in 2023 and 2024 of \$3.7 million or so which were rejected and the fact that the defendant could form a view from a relatively early stage about the construction questions. It took the risk, by rejecting the offer that was made within time, that its construction would turn out to be incorrect, which is what has happened. In view of the relatively short period which the enhanced rate will apply for, it seems to me that the 10% figure above base is the correct figure, and that is what I order.