Neutral Citation Number: [2026] EWHC 2501 (TCC)

Case No: HT-2025-000061

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

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

Date: 2 October 2026

Before HHJ Stephen Davies sitting as a High Court Judge

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Between:

ESSENDI UK HOTELS 2 LIMITED **Claimant**

- and -

LONDON PROPERTY COMPANY LIMITED **Defendant**

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Mr Martyn Naylor (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**, Cannon Place, 78 Cannon Street, London EC4N 6AF) for the **Claimant**

Mr Nicholas Trompeter KC (instructed by **Ronald Fletcher Baker LLP**, New Derwent House 69-73 Theobalds Road London WC1X 8TA) for the **Defendant**

Hearing date: 18 September 2026

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APPROVED JUDGMENT
(on the preliminary issue as to whether or not a trial judge can be informed of the date of a Part 36 offer)

Remote hand-down

This judgment was handed down remotely at 10:30am on 2 October 2026 by circulation to the parties or their representatives by email and by release to The National Archives.

I direct that pursuant to CPR PD 39A paragraph 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

His Honour Judge Stephen Davies

HHJ Stephen Davies:

1. The question for determination at this initial stage is whether or not the Claimant, which was substantially the successful party in the trial of preliminary issues tried by me from 4 to 12 March 2026, and which was the subject of my judgment handed down on 5 June 2026 – neutral citation [2026] EWHC 1354 (TCC), is entitled to inform me of the date of the earliest offer made by the Defendant under CPR Part 36 with a view to seeking its costs of the proceedings down to the date 21 days after the date of that offer.

2. If the Claimant is not entitled to do so, then it will not be able even to invite the court to award costs over that period, because the end date of the period in respect of which costs are claimed cannot be made known to the court. The Defendant submits that this is, nonetheless, the effect of CPR 36.16 on its proper interpretation, whereas the Claimant submits that it is not.

3. There are two principal reasons why the answer to this point has required detailed and helpful submissions from both counsel.

4. The first is that, whilst rule 36.16(4)(a) expressly permits the trial judge to be told "whether or not there are Part 36 offers", rule 36.16(4)(b) expressly forbids the trial judge from being told "the terms of any such … offers". Neither (a) nor (b) states in clear terms whether the trial judge is, or is not, permitted to be told the date of such offers. I have to decide whether the trial judge can be told of the date of the Defendant's first offer, in circumstances where rule 36.14(4) neither expressly permits it nor expressly forbids it.

5. The second is that there are what are said to be conflicting authorities on the point, two at first instance providing some support for the Defendant's case and one in the Court of Appeal providing some support for the Claimant's case, but in both cases said by the other to be obiter and, with respect, wrong.

6. It should also however be said that this point is likely only to arise in complex and expensive litigation, such as the present, where the successful party at the first trial considers it worthwhile seeking a costs order up to the date of the first Part 36 offer by the other side. The basis for inviting the court to make an order of this kind being the argument that, whatever impact the Part 36 offer may have on the decision as to the costs after that date, it cannot sensibly have any impact on the costs incurred before that date. Accordingly, it is said, the successful party should have its costs up to that date by reference to the well-established general "pay as you go" costs principle established by the CPR and authority.

CPR rule 36.16

7. Rule 36.16 provides (as relevant) as follows:

> **"36.16—**
>
> (1) A Part 36 offer will be treated as "without prejudice except as to costs"."

> (2) The fact that a Part 36 offer has been made and the terms of such offer must not be communicated to the trial judge until the case has been decided.
>
> (3) Paragraph (2) does not apply—
>
> (a) where the defence of tender before claim has been raised;
>
> (b) where the proceedings have been stayed under rule 36.14 following acceptance of a Part 36 offer;
>
> (c) where the offeror and the offeree agree in writing that it should not apply; or
>
> (d) where, although the case has not been decided—
>
> (i) any part of, or issue in, the case has been decided; and
>
> (ii) the Part 36 offer relates only to parts or issues that have been decided.
>
> (4) In a case to which paragraph (3)(d)(i) applies, the trial judge—
>
> (a) may be told whether or not there are Part 36 offers other than those referred to in paragraph (3)(d)(ii); but
>
> (b) must not be told the terms of any such other offers unless any of paragraphs (3)(a) to (c) applies.

8. It is common ground that I fall within the definition of "trial judge", being the judge allocated to conduct the trial of the remaining issues in this case (see the definitions in rule 36.3). Since I have conducted the trial of the preliminary issues, which involved extensive evidence, factual and expert and the production of a lengthy judgment, it is obviously highly desirable that I should try the rest of the case.

9. In the circumstances, it was agreed that it would be sensible for me to determine this point as a preliminary point, since if I decided the point against the Claimant there would be no need for it to incur the time and expense of preparing for and conducting a hearing on the substantive merits of the intended costs application.

A point of pure construction

10. This is a point of pure construction. Thus, the normal principles applicable to construction of statutory instruments apply, subject to the point, emphasised by the Defendant, that CPR Part 36 is a self-contained procedural code: see *Gibbon v Manchester City Council* [2010] 1 WLR 2081, at [5] and [29], per Moore-Bick LJ. It is to be read and understood according to its terms without importing other rules derived from the general law, save where that was clearly intended: *Gibbon*, at [6]. Further, as David Richards J (sitting in the Court of Appeal) said in *Coward v Phaestos* [2014] EWCA Civ 1256 at [94]: "Part 36 is highly prescriptive in its terms, and highly restrictive of the exercise of any discretion by the court in any particular case".

11. The provisions in question were introduced in 2015 by the *Civil Procedure (Amendment No.8) Rules 2014/3299* in response to judicial concerns expressed that under the existing provisions of Part 36 judges who had determined the first trial could not even be told whether or not a Part 36 offer had been made, which had the practical effect that the costs of the first trial had to be reserved. However, given the terms of the rule then in force, in none of the decided cases in which such concerns had been expressed was any particular concern raised that a party could tell the judge the date of any Part 36 offers with a view to persuading the judge to make an order for costs up until that date. That is not surprising, given the then blanket prohibition against telling the judge even that a Part 36 offer had been made.

12. It is true that in *AB v CD* [2011] EWHC 602 (Ch) Henderson J, having been informed by the parties of the date of the relevant Part 36 offer, declined to make an order for costs prior to that date. However, as is apparent, that was a decision based on the exercise of his judicial discretion, rather than a finding that he could not be informed of the date of the Part 36 offer. In those circumstances it is apparent that there was no need for him to express any concern that he could not otherwise be provided with that information, and nor did he do so.

13. It follows that I do not accept the Defendant's submission that the wording chosen by the rule committee represented a deliberate choice to address only the concern about the inability to tell the trial judge of the fact of the offer, in circumstances where they might also have chosen to address any further concern about the fact that the trial judge could not be told about the date of any such offer. Indeed, if the rule committee had made a deliberate decision that trial judges should not be told of the date of a Part 36 offer, it would have been very straightforward to have included that in express terms in the drafting of the amended rule.

14. It may be also observed that there is another important fact which the current rule does not deal with expressly, which is the identity of the party making the Part 36 offer. That is also a fact of relevance to the exercise of the discretion in relation to costs if an application is made for an immediate costs order at the end of the first trial. If, as here, the successful claimant is seeking its costs, then if all that the trial judge can be told is that a Part 36 offer has been made, they will not know who has made the offer. If they can be told that it is the claimant, then it would normally be reasonable to assume that nothing in the terms of that offer could place the claimant in a worse position so far as its case for having its costs is concerned. Yet on the defendant's case they cannot even be told that. I am not asked to determine that point, because the Defendant has already agreed that the court can be told that the Part 36 offer in question was made by itself.

The authorities

15. Before I address further and determine the question of construction, I should refer to the authorities, albeit relatively briefly since, as will be clear, I do not consider that they are determinative of the relatively narrow point of construction of Part 36 which I have to undertake.

16. The first in time is that of HHJ Pelling QC sitting as a High Court Judge in *Lifestyle Equities CV v Sportsdirect.com Retail Ltd* [2018] EWHC 962 (Ch). In the *Langer* case, to which I refer below, Green LJ summarised Judge Pelling's decision and reasons as "a refusal to determine costs, whether incurred before or after the making of a Part 36 offer, upon the basis that it was manifestly a disproportionate,

inappropriate and unsatisfactory way of proceedings. If there is a Part 36 offer in play, then it is only following the completion of the quantum stages of this case that it would be possible to discern who has been successful and who has not and whether the Part 36 offer has any impact on the costs order that should be made".

17. As is apparent from that summary, and as is confirmed by the decision itself, this was an exercise of the discretion rather than a finding that the judge was not permitted to be told about the date of the Part 36 offer. Indeed, the reasons which Judge Pelling gave were similar to those given by Henderson J in *AB v CD* (above), with which he was doubtless familiar. It follows, in my judgment, that the *Lifestyle* case is of no assistance to me in deciding the narrow issue which I have to decide.

18. The second in time is that of David Stone (sitting as a deputy judge of the High Court) in *Original Beauty Technology Company Ltd v G4K Fashion Ltd* [2021] EWHC 954 (Ch). In *Original Beauty* the successful claimant at the end of the first trial sought an order that they should have their costs to date, notwithstanding the existence of a Part 36 offer by the defendant, the terms of which they accepted the court could not be informed of. It appears from the judgment that the judge was also not told of the date of the Part 36 offer, although there is no indication that there was any dispute about this, and nor does the judgment expressly deal with that point as an issue for determination.

19. However, the Defendant relies on the judgment because, at [14], the judge stated that: "Whilst the court has been informed of the existence of the Part 36 offer, it is expressly prevented from being told of its terms, *when it was made*, what the parties knew at the time, and how the parties exchanged information for the purposes of evaluating the offer" (*emphasis added*). Whilst initially puzzling that the judge should have made express reference to something which does not appear to have been the subject of argument before him, the answer becomes clear when one considers the first part of [14]. There, the judge refers to the five factors specifically mentioned in rule 36.17(5) as being relevant to the exercise of the discretion whether or not the usual consequences of a claimant beating its own offer or failing to beat the defendant's offer apply, where the second factor is "the stage in the proceedings when any Part 36 offer was made". He did so in the context of making the point that "without such information the court cannot take it into account, and so cannot comply with CPR 36.17(5)".

20. It follows, in my judgment, that this decision cannot be relied upon as a considered decision based upon an analysis of the proper construction of rule 36.16(4) such as I have received.

21. The third in time is that of the Court of Appeal in *Langer v McKeown* [2021] EWCA Civ 1792; [2022] 1 WLR 1255, where the substantive judgment, with which Lewison and Nugee LJJ agreed without reservation, was given by Green LJ. The decision in *Lifestyle* was referred to, but not the subsequent judgment in *Original Beauty*, although the report in the Weekly Law Reports states that the case was either cited in argument or referred to in the skeleton arguments.

22. At [1] Green LJ stated that only "a narrow issue arises for determination upon this appeal", which is "where there are split issues (such as liability preceding quantum), where no offer to settle the litigation under CPR Pt 36 has been made, and where one party makes a without prejudice save as to costs offer covering the entirety of the litigation (a "*Calderbank* offer") how might the discretion as to costs under CPR r 44.2 be exercised?". The reason why the case is of potential relevance to Part 36 cases is that, as Green LJ also observed, it raised the particular issue as to "where the judge is aware of the existence

of the Calderbank offer, but unaware of the date it was made, or as to its terms, is the judge, in effect, bound to treat such an offer as equivalent to an offer under CPR Pt 36 and defer a ruling on costs until the conclusion of all stages of the litigation?"

23. The ultimate decision of the Court was that the answer to that specific question was "no". However, in the course of his judgment Green LJ made some observations as to the approach which should be taken in relation to Part 36 offers in such circumstances, which are particularly relied upon by the Claimant.

24. He also made some observations as regards general policy considerations, including the "pay-as-you go" approach to costs in civil litigation but, whilst these are of relevance to any exercise of the discretion which I may ultimately have to make, they are not directly relevant to the particular point of construction which I now have to decide.

25. Of most apparent relevance to this case are Green LJ's observations at [47], where he made two additional points about the case law. The first related to *Lifestyle*, where he expressed his disagreement with the judge's view that in general terms courts should not make costs orders even in respect of costs incurred prior to the making of a Part 36 offer. His reasoning was that: "Nothing in CPR Pt 36 precludes a costs order being made in relation to costs incurred prior to a CPR Pt 36 offer. Given that this is a power that exists in law it would be wrong in principle for a court to fetter its discretion and refuse even to consider whether to exercise that power". He added: "In a case such as the present, for instance, substantial costs were incurred prior to the making of the *Calderbank* offer. Had it been necessary the judge could, in my view, have made an order about these costs". Mr Naylor suggested, and I agree, that the reference there to a *Calderbank* offer is explained as a reference to the facts of the *Langer* case, where the amount of incurred costs incurred prior to that date justified the court considering whether or not to exercise the discretion, but which Green LJ also plainly considered would have been a relevant factor had the offer been a Part 36 offer.

26. Nonetheless, as Mr Trompeter KC submitted, this passage cannot be read as a finding based on any express consideration of the question whether the judge would have been permitted to have been told of the date of the Part 36 offer as a matter of construction of rule 36.16. There is no indication that this point was argued, and it appears unlikely that it would have been, given that it was not a point which actually arose in that case. It is not possible for me to conclude one way or another whether Green LJ expressly considered this point, let alone whether he reached a decided view one way or another. The position is even less clear so far as the other members of the Court are concerned. The most that can be said is that, if the members of the court had considered that the wording of rule 36.16 prohibited the court from being told this information unless the parties agreed, Green LJ would not have expressed himself in the unqualified terms that he did and the other judges would not have expressed their unqualified agreement in the way that they did.

27. In the circumstances, I am unable to place any real weight on *Langer* in relation to the narrow construction point which I have to decide.

The proper construction of rule 36.16

28. This then brings me back to rule 36.16, where rule 36.16(1) provides that a Part 36 offer will be treated as "without prejudice except as to costs". I agree with Mr Naylor that this must mean that the starting point is a presumption that a Part 36 offer will, in principle, be admissible when the court is dealing with costs.

29. However, I also agree with Mr Trompeter that rule 36.16(2) then operates as an immediate derogation from that starting point, so that both "the fact that a Part 36 offer has been made and the terms of such offer must not be communicated to the trial judge until the case has been decided". The definition of "decided" in rule 36.3 is "when all issues in the case have been determined whether at one or more trials". It follows that, until that point is arrived at, the starting point is that nothing about any Part 36 offer must be communicated to the trial judge.

30. Both Mr Naylor and Mr Trompeter submitted that it is an obvious conclusion that rule 36.16(2) must be intended to prohibit the communication to the trial judge of absolutely any information to do with the existence of a Part 36 offer. It followed, submitted Mr Naylor, that all such information must either fall within the phrase "the fact that a Part 36 offer has been made" or "the terms of [a Part 36] offer". He submitted that no such information should fall outside the scope of both.

31. To take an example, the absurdity of which itself demonstrates in my judgment that Mr Naylor is right, the whole purpose of rule 36.16(2) would be undermined if a party could tell the trial judge, for example, "on X date party Y sent a communication to party Z of a kind provided for by Part 36". If this did not fall within the definition of "the fact that a Part 36 offer has been made and the terms of such offer" then strictly speaking it would be permitted. It must follow from the wide terms of rule 36.16(2) that the prohibition on disclosing the fact that a Part 36 offer has been made must necessarily include a prohibition on communicating the date of any Part 36 offer (as well as who has made it).

32. It must follow in my judgment that on a purposive construction of rule 36.16(4) everything which might reveal such matters is included within "the fact that a Part 36 offer has been made and the terms of such offer".

33. Mr Naylor argued that if, as he submitted, neither the date of a Part 36 offer nor, for that matter, the identity of the maker falls within "the terms of [a Part 36] offer" then they must fall within "the fact that a Part 36 offer has been made".

34. Mr Trompeter however submitted that the flaw in this submission was that, on a proper analysis, the date of the Part 36 offer was part of the terms of the offer.

What is encompassed within the phrase "the terms of a Part 36 offer"?

35. It is common ground that there is no definition in Part 36 of the phrase "the terms of [a Part 36] offer". However, rule 36.5, headed "Form and content of a Part 36 offer", identifies at (1) five things of which three, namely: (a) the period for acceptance; (b) whether it relates to the whole of the claim; and (c) whether it takes into account any counterclaim, are clearly terms of the offer. In contrast, rule 36.7 headed "Time when a Part 36 offer is made", states that a Part 36 offer "may be made at any time" and "is made when it is served on the offeree". These provisions indicate that Part 36 draws a distinction between the terms of a Part 36 offer and the date of the offer.

36. Additionally: (i) rule 36.9(1) states "a Part 36 offer can only be withdrawn, *or its terms changed*, if the offeree has not previously served notice of acceptance" (emphasis added); and (ii) rule 36.9(2) states that this is done by the offeror "serving written notice of the withdrawal or change of terms on the offeree". As Mr Naylor submits, it is obvious that the date when a Part 36 offer is made cannot be "changed" in the same way as can its "terms".

37. Further, rule 36.14(2) and (3) make clear that where a Part 36 offer is accepted the consequential stay of the claim will be "upon the terms of the offer" which, again, does not make sense if the date of the offer is a term, and similarly rule 36.14(8) allows a party to "apply to enforce the terms of the offer without the need for a new claim".

38. Finally, rule 36.17(5) refers consecutively to "the terms of any Part 36 offer" and to "the stage in the proceedings when any Part 36 offer was made", with the clear intention being in my view that these are intending to refer to separate things.

Discussion and conclusions

39. These provisions in my judgment are all consistent with what one would expect on the footing that Part 36 offers are intended to operate along broadly the same lines as a contract, with an offer on terms capable of acceptance or not albeit, in either case, having the consequences specified in Part 36. Like any other contract, there is a normal and well-understood difference between the date of an offer on the one hand and its substantive terms on the other. That would doubtless explain why the rule committee did not feel it necessary to define what was meant by "the terms of an offer".

40. It follows, in my judgment, that the date on which a Part 36 offer is made is not something which can fall within the "terms" of a Part 36 offer. It also follows in my judgment that it must be something which is part and parcel of the "fact that a Part 36 offer has been made", for the reason, identified above, that since 36.16(2) is intended to operate as a blanket prohibition, the fact that a Part 36 offer has been made includes all of the relevant facts about that Part 36 offer other than its terms, which are the only other thing specifically included in 36.16(2).

41. This conclusion also explains why in my judgment Mr Trompeter's further submission must be rejected. His submission is that the restrictions in rule 36.16(4) apply in accordance with their express terms and, since the date of an offer falls into neither the permitted category of "whether or not there are Part 36 offers" nor – if he is wrong on what the terms of the offer include - the prohibited category of "the terms of any such other offers", the conclusion must be that what is not expressly permitted is prohibited.

42. Of course, that submission is premised on the argument that within rule 36.16(4) there is some category of facts about a Part 36 offer which do not fall into either category. If he is right, and if I am wrong in my conclusion that the date of a Part 36 offer falls within the scope of "the fact that a Part 36 offer has been made" in rule 36.16(2), then it must logically follow either that the rule committee decided to exclude the date of a Part 36 offer (and indeed the identity of the offeror and offeree) from the express scope of rule 36.16(4) for some apparently good reason, or that it simply never occurred to them that there was this intermediate category, which did not fall within rule 36.16(2) and, thus, needed to be expressly provided for in rule 36.14(4).

43. The first argument makes no sense in the context of the purpose of rule 36.14(4); it begs an answer to the rhetorical question - why would the rule committee appreciate that there was this further category of information but then decide to leave it open as to whether or not it could be referred to?

44. The second argument is unlikely but, no doubt, possible. However, if I then had to decide which construction is more consistent with the overall purpose of, and wording used in, Part 36 as a whole, I would favour a construction which permits all information to be disclosed related to the fact that Part 36 offers have been made, other than their terms, to be disclosed. That is because the mischief against which the partial disclosure provisions in rule 36.16(4) are in my view intended to guard are, first, the vice that under the old rule even the existence of Part 36 offers could not be disclosed and, second, the vice that judges might be influenced, even if only subconsciously, by the terms of an inclusive Part 36 offer when proceeding to determine the substantive rights of the parties at the stage two trial. Disclosing the date of Part 36 offers or the identity of their makers does not reveal the terms of any such offers.

45. Arguing against the latter proposition, Mr Trompeter submitted that the date of a Part 36 offer was information which the rule committee must be taken to have understood should not be disclosed because it is information, especially if coupled with the identity of the maker, from which a shrewd judge may reach a conclusion about that party's views of the merits. He gave as an example that if a judge is aware that a defendant has made an offer at an early stage of the litigation the judge may conclude that it cannot have a genuine belief in the strength of its case.

46. I am not convinced of this argument. That is because many defendants make early Part 36 offers for many reasons, not all of which reflect a pessimism about their case. For example, they may make an early low Part 36 offer in an attempt to test a claimant's willingness to take the case all the way, or to avoid incurring irrecoverable costs if the case goes to trial, or because they are worried about liability but confident about quantum. Furthermore, the particular case under consideration is where the first trial has already happened, where the trial judge for the second trial may be told that a global offer has been made but not its terms. I fail to see what the trial judge could gain from knowing about when the global offer was made or, for that matter, who made it, which might cause them to speculate unjustifiably. By that stage it is likely that the trial judge will already have formed a pretty shrewd view of the parties from presiding over the stage one trial, which is likely to be far more illuminating than knowledge of the date or identity of any Part 36 offer maker.

47. Further, I must bear in mind two further things. The first is that I can and should presume that judges generally do not speculate, certainly not when it comes to deciding the substantive issues on a second trial, based on some hunch about what a Part 36 offer may say. Second, judges can usually be trusted to decide cases fairly even if they are made aware of the terms of a Part 36 offer: see the commentary at 16.16.3 of the current Civil Procedure which notes – in relation to disclosure of a Part 36 offer in breach of the restriction, that "the general rule is directory and upon breach the judge has a discretion whether to continue hearing the trial or to recuse himself. Usually, a judge will continue where to do so will cause no injustice (*Garratt v Saxby (Practice Note*) [2004] EWCA Civ 341; [2004] 1 W.L.R. 2152, CA, referring to earlier authority)".

48. Finally, it seems to me that there is no compelling reason to conclude that the rule committee must have intended that the default position was that unless disclosure was expressly permitted it should not

be permitted. If, instead, the reason for the amendment was to permit judges who have presided over stage one trials and are docketed to preside over stage two trials to be told about the fact that a Part 36 offer has been made in order to be satisfied that it may be appropriate to proceed to determine the costs of the stage one trial in advance of the stage two trial, then it would plainly not make sense for them to be prohibited from being told who had made a Part 36 offer. Whilst the same argument does not apply with quite the same force to the date of a Part 36 offer: (a) it would make no sense to have a presumption against communication which only applied to one piece of information but not the other; and (b) the pay-as-you-go philosophy identified by Green LJ in *Langer* would support a conclusion that judges should be allowed to receive that information in order to enable them to decide whether or not they should even consider exercising the discretion to make a costs order up to the date for acceptance of the first Part 36 offer, since without it they would not even be able to embark on that enquiry.

Decision.

49. For all of these reasons I conclude that I may be told the date of the first Part 36 offer made by the Defendant.