

CA before Peter Gibson LJ, Potter LJ, Sir Murray Stuart-Smith. 12th July 2002

JUDGMENT : Lord Justice Peter Gibson:

1. This appeal raises points of some general interest on the applicability of CPR Part 36 relating to offers to settle.
 2. They arise in the context of an action brought by the Claimants in effect for specific performance of an oral agreement. The Claimants were in July 1969 the four partners in Edward Mitchell and Son ("Mitchells"), a firm of chartered accountants in Chesterfield. They allege that in July 1969 the First and Second Defendants, Mr. and Mrs. James, orally agreed with the Second Claimant, Mr. Bargh, on behalf of the Claimants that in return for certain consideration to be provided by Mitchells Mr. and Mrs. James would work in a garage business in Matlock Green in Derbyshire and the net profits would be split 50/50 between Mr. and Mrs. James and Mitchells. It became part of the agreement that the business would be incorporated and carried on by a company. The Third Defendant, Matlock Green Garage Ltd., was acquired for that purpose. No shares were issued to the Claimants, who did not wish it to be known that they were taking an interest in a garage business; instead 50 shares were issued to each of Mr. and Mrs. James, each of whom signed a blank transfer of 25 shares and left the transfer with Mitchells. In July 1985 the relationship between the parties broke down. Mr. and Mrs. James contended that no agreement had been made, alternatively that if it had, it should be set aside on a number of equitable grounds. Proceedings were commenced as long ago as March 1986. The Claimants claimed a declaration that they were entitled as beneficial owners to 50 shares and other relief including an account. The Defendants denied the claim and counterclaimed for, amongst other things, an account. The firm of Mitchells, as then constituted, was joined as a Third Party.
 3. On 2 March 2000, that is to say 14 years after the commencement of the action, the Claimants' solicitors sent the Defendants' solicitors what was called a "*Claimant's Part 36 Offer to Settle*". With it was sent a covering letter. The offer dated 2 March 2000 stated:
"1. The Claimants are prepared to compromise this action in respect of the whole of their claim, inclusive of interest, on the following terms:
 - (i) *Payment by the Third Defendant to the Claimants of the sum of £91,410. 00;*
 - (ii) *The Counterclaim be dismissed; ...*
 - (viii) *Each party to bear his own costs (including for the avoidance of doubt, costs in the Third Party proceedings);*
 - (ix) *Each party to bear 50% of the Third Party's costs.**2. This offer will remain open for acceptance for 21 days from the date of this notice."*
- By para. 1(iii) to (vii) the assets of the Third Defendant other than bank deposits were to be sold, and the proceeds and the bank deposits were to be divided 50/50 between the Claimants and Mr. and Mrs. James.
4. In the covering letter an explanation was provided of how the sum of £91,410 had been computed on the basis of information provided by the Defendants.
 5. The offer was not accepted. The action was tried by Park J. In his judgment he held that the Claimants' case succeeded in principle. Counsel were invited to agree an order.
 6. There was a further hearing on 20 November 2001 to settle the order and to consider costs. The order provided for a declaration that the Claimants were entitled to 50 shares and for the dismissal of the counterclaim. Mr. Brunner for the Claimants submitted that the judgment obtained by them was more advantageous than the proposal contained in their offer of 2 March 2000 and that they should be awarded costs on an indemnity basis pursuant to r. 36.21. The Defendants did not dispute that they should pay the costs, but argued that they should be on a standard basis.
 7. The judge in his judgment on costs said: *"I am not sufficiently satisfied that the outcome of this case for the Claimants will be such that they have clearly beaten their Part 36 offer. It is possible that they will have done so, but in terms of the assets of the company (ignoring the point on costs), on balance it seems unlikely that a 50% shareholding in the company as it is today is worth more than £91,410. That would be so even making the assumption which has been adopted in the correspondence that a 50% shareholding can be valued at 50% of the*

value of the entire assets of the company. I think all of us know that that assumption is regarded as incorrect for tax valuations: for example, a 50% shareholding will invariably be valued at considerably less than a 50% aliquot share of the entire net asset value of the company.

The other element which is relied on by the Claimants in support of their argument for indemnity costs is that under their Part 36 offer they, the Claimants, would have been liable to pay their own costs up to that point. In the event, the offer having been turned down and the Claimants having won, they will recover the costs of the action from the Defendants.

On balance Mr Brunner may be right, that that costs recovery will mean that the Claimants are better off than they would have been had that Part 36 offer been accepted. However, that point is far from certain, and I do feel uncomfortable about the whole principle of taking into account, in the exercise required by the Civil Procedure Rules of comparing a judgment with a Part 36 offer, the costs which are in the event incurred by the trial and dealt with by the judgment.

In all those circumstances, while freely acknowledging that I do not feel confident about this, I have come to the view that the conditions of Part 36.21 of the Civil Procedure Rules are not present. On that basis, I would not be given power by Part 36.21 to order indemnity costs. I would only add that if I did have the power, then even with Rule 36.21.(4) (which certainly gives the court a steer towards ordering indemnity costs where the power exists), I would still regard the matter as so marginal that I would be disinclined to order indemnity costs in this case. I add the observation (in case it is of assistance) that the scope of Civil Procedure Rule 36.21 and in particular the impact on it of terms as to costs in a Part 36 offer is a matter which could very helpfully be considered at some stage by the Court of Appeal.

For all those reasons (good or bad), I will direct costs to be assessed on the standard basis. I do not have huge confidence in the correctness of that conclusion, but, on balance, I believe it is more likely to be the correct conclusion than the reverse."

8. The judge then heard argument on an interim payment. The Claimants submitted that their costs amounted to some £450,000, of which some £150,000 related to an insurance premium. Mr. Brunner suggested discounting that by 50% and that the amount of the interim payment should be £185,000. The judge ordered an interim payment of £150,000. He gave the Claimants permission to appeal against the refusal to order indemnity costs. He explained his reasons in writing as follows: *"Two different questions arose. (1) Costs apart, did the decision (C[laimant]s are owners of 50% of the Company) beat the C[laimant]s' Part 36 offer (D[efendant]s were left with 100% of the company, but would pay C[laimant]s £91,400). (2) One of the elements of the Part 36 offer was that each side paid its own costs. So if it had been accepted the C[laimant]s would have paid their own costs. In the event, the offer not having been accepted the C[laimant]s having won, the D[efendant]s are ordered to pay the C[laimant]s' costs. Can this be taken into account in deciding (under CPR 36.21(1)(b)) whether the judgment is more advantageous to the C[laimant]s than the Part 36 offer?"*
9. At this point it is convenient to set out the material provisions of Part 36.
10. R.36.1 provides:
"(1) This Part contains rules about—
 - (a) offers to settle and payments into court; and*
 - (b) the consequences where an offer to settle or payment into court is made in accordance with this Part.**(2) Nothing in this Part prevents a party making an offer to settle in whatever way he chooses, but if that offer is not made in accordance with this Part, it will only have the consequences specified in this Part if the court so orders."*
11. R.36.2(1) defines "a Part 36 offer" as an offer made in accordance with the requirements of Part 36 if not made by way of a payment into court. By r.36.2(4) a Part 36 offer may be made at any time after proceedings have started.
12. R.36.5 relates to the form and content of a Part 36 offer, and provides (so far as material):
"(1) A Part 36 offer must be in writing.
(2) A Part 36 offer may relate to the whole claim or to part of it or to any issue that arises in it.
(3) A Part 36 offer must—

- (a) 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;
 - (b) state whether it takes into account any counterclaim; and
 - (c) if it is expressed not to be inclusive of interest, give the details relating to interest set out in rule 36.22(2).
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- (6) A Part 36 offer made not less than 21 days before the start of the trial must—
 - (a) be expressed to remain open for acceptance for 21 days from the date it is made; and
 - (b) provide that after 21 days the offeree may only accept it if—
 - (i) the parties agree the liability for costs; or
 - (ii) the court gives permission.”
13. R.36.8(1) provides that a Part 36 offer is made when received by the offeree. R.36.10 provides for the court to take into account an offer to settle made before the commencement of proceedings. By r.36.12 permission of the court is not needed for the acceptance of a claimant's Part 36 offer made not less than 21 days before the start of the trial, but otherwise such permission is needed.
14. R.36.14 provides: *“Where a claimant’s Part 36 offer is accepted without needing the permission of the court the claimant will be entitled to his costs of the proceedings up to the date upon which the defendant serves notice of acceptance.”*
15. R.36.20 states the costs consequences where the claimant fails to obtain a judgment which is more advantageous than a Part 36 offer: unless it considers it unjust to do so, the court will order the claimant to pay any costs incurred by the defendant after the latest date on which the offer could have been accepted without needing the permission of the court.
16. R.36.21 states the costs and other consequences when the claimant does better than he proposed in his Part 36 offer. The rule provides (so far as material):
“ (1) This rule applies where at trial—
 - (a) a defendant is held liable for more; or*
 - (b) the judgment against a defendant is more advantageous to the claimant, than the proposals contained in a claimant’s Part 36 offer.**(2) The court may order interest on the whole or part of any sum of money (excluding interest) awarded to the claimant at a rate not exceeding 10% above base rate for some or all of the period starting with the latest date on which the defendant could have accepted the offer without needing the permission of the court.*
(3) The court may also order that the claimant is entitled to—
 - (a) his costs on the indemnity basis from the latest date when the defendant could have accepted the offer without needing the permission of the court; and*
 - (b) interest on those costs at a rate not exceeding 10% above base rate.**(4) Where this rule applies, the court will make the orders referred to in paragraphs (2) and (3) unless it considers it unjust to do so.*
(5) In considering whether it would be unjust to make the orders referred to in (2) and (3) above, the court will 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;*
 - (c) the information available to the parties at the time when the Part 36 offer was made; and*
 - (d) the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer or payment into court to be made or evaluated.**(6) Where the court awards interest under this rule and also awards interest on the same sum and for the same period under any other power, the total rate of interest may not exceed 10% above base rate.”*
17. Para. 5 of the Part 36 Practice Direction provides:
“5.1 A Part 36 offer must
 - (1) state that it is a Part 36 offer, and*
 - (2) be signed by the offeror or his legal representative.**5.2 The contents of a Part 36 offer must also comply with the requirements of rule 36.5(3), (5) and (6).”*

18. By para. 7.2 of the Practice Direction: *"The general rule is that a Part 36 offer made more than 21 days before the start of the trial may be accepted within 21 days after it was made without the permission of the court. The costs consequences set out in rule 36.14 will then come into effect."*
19. By para. 7.3: *"A Part 36 offer made less than 21 days before the start of the trial cannot be accepted without the permission of the court unless the parties agree what the costs consequences of acceptance will be."*
20. Paras. 7.4 and 7.5 of the Practice Direction deal with cases where the permission of the court is sought, the latter providing: *"If the court gives permission it will make an order dealing with costs and may order that, in the circumstances, the costs consequences set out in rule 36.14 will apply."*
21. Before us Mr. Brunner accepts that in relation to para. 1(i) to (vii) of the offer of 2 March 2000 the Claimants have not achieved by the judgment a more advantageous result than the offer. He acknowledges that they cannot establish on the evidence that the 50 shares to which they have been held to be entitled were worth more than £91,410. But he says that if one takes into account the costs order which the judge made, it is plain that the judgment was more advantageous to the Claimants than their offer, and he points to the amount of the interim order for costs as demonstrating that fact. He submits that the judge was wrong not to take account of the costs factor, that there was nothing to make it unjust to order indemnity costs and interest in accordance with r.36.21(5), and that the judge exercised his discretion on a basis which was wrong in law or alternatively his conclusion was so plainly wrong that his exercise of discretion should be regarded as flawed. He therefore asks this court to exercise the discretion afresh to order costs on the indemnity basis and interest from 24 March 2000.
22. Mr. Mendoza for the Defendants submits that the Claimants' offer did not comply with the formal requirements of Part 36.5(6) and so was not an effective Part 36 offer, that the offer was not one within the overall scheme of Part 36 and as a matter of policy that part of the offer which relates to costs ought not to be taken into account when deciding whether the judgment is more advantageous than the proposals contained in a Part 36 offer, that in any event the Claimants did not by the judgment beat their offer, and that the judge's decision in the exercise of his discretion was not so plainly wrong that it ought to be varied.
23. The following issues seem to me to arise:
 - (1) Was the offer of 2 March 2000 a Part 36 offer?
 - (2) If so, was the judgment more advantageous to the Claimants than their offer?
 - (3) If so, should the court interfere with the exercise of discretion by the judge?

(1) Part 36 offer

24. A Part 36 offer is one made in accordance with the requirements of Part 36. Mr. Mendoza is plainly right to point out that the offer of 2 March 2000 failed to comply with r.36.5(6)(b) because it failed to provide that after 21 days the offeree may only accept it if the parties agree the liability for costs or the court gives permission. Para. 5.2 of the Practice Direction repeats that requirement. He now accepts that the court has power under r.36.1(2) to order that an offer be treated as a Part 36 offer notwithstanding a failure to comply with a requirement of Part 36, but he submits that the court should not exercise that power in the present case because of the importance of the function performed by r.36.5(6)(b) in alerting the offeree to the possibility of accepting the offer outside the 21-day period.
25. In my judgment whilst in other circumstances the court might not be prepared to waive the defect of the omission from the offer of words to comply with r.36.5(6)(b), in the present case, with the Defendants having legal advisers and there being no evidence that the Defendants were misled, I cannot accept that this defect in the offer is other than technical. Accordingly, if this had been the only objection, I would have been prepared to use the power in r.36.1(2) to order that in relation to the non-compliance with r.36.5(6)(b) the offer has the consequences specified in Part 36.
26. The more substantial points taken by Mr. Mendoza relate to the inclusion in the offer of a concession as to costs. First, he draws attention to r.36.14 and to the fact that its effect would be displaced by the acceptance of the offer. He says that the offer is inconsistent with the rule and that an offer that precludes a consequence provided for in Part 36 is not one contemplated as a Part 36 offer. He

advances a wider argument based on policy considerations. He submits that whilst parties should be encouraged to compromise their disputes, a compromise should involve a willingness to make concessions rather than a requirement for the offeree to accede to the totality of the offeror's demands in his claim. He says that Part 36 should not allow the recovery of costs on an indemnity basis where a claimant has recovered exactly what he was demanding from the defendant and no more. He argues that if it were otherwise every potential claimant would dress up a letter before action as a Part 36 offer, demanding full payment without any concessions save as to costs and then run the case through to trial knowing that a successful outcome would carry with it indemnity costs. He contends that Part 36 ought not to have those consequences and that the court should leave aside the question of costs in deciding whether a judgment is more advantageous to the claimant than the claimant's Part 36 offer.

27. Mr. Brunner submits that it would be wrong to infer from r.36.14 that a claimant could not include as a term of his offer that he will forgo costs. He argues that one of the most significant concessions that a claimant can make in order to induce a defendant to settle is to agree to bear his own costs. He says that the wording of r.36.21(1)(b), "the judgment is more advantageous", is very broad and is apt to include a costs order made at trial. He contends that if claimants seek to achieve indemnity costs by making Part 36 offers at the outset of litigation and demanding what they have claimed without making any concession save as to costs, the court can properly take the view that the award of indemnity costs and interest would be unjust and refuse to award costs on that basis pursuant to r.36.21(4).
28. Like the judge, I have found this a difficult question. In a case such as the present where the offer was made 14 years after the action commenced, it is likely that at the time of the offer considerable costs will already have been incurred by the Claimants although we have been given no details of such costs at that point. Thus the offer, if accepted as, with hindsight, it should have been, would have included a not insignificant concession by the claimant. It might well be said that the encouragement of claimants to make such an offer by the prospect of obtaining the advantages set out in r.36.21(2) and (3) was within the policy of Part 36.
29. However, I have come to the conclusion that the draftsman of Part 36 did not intend terms as to costs to be included in a Part 36 offer for the following reasons.
30. First, r.36.14 is worded as applicable whenever a claimant's Part 36 offer is accepted without needing the permission of the court. It does not say "unless a claimant's Part 36 offer indicates to the contrary" (cp. r.36.22(1)) or other wording to indicate that the parties can agree otherwise. Similarly, para. 7.2 of the Practice Direction indicates that on acceptance of the Part 36 offer "the costs consequences set out in rule 36.14 will then come into effect." So too in a case where the court's permission is needed for the defendants to accept a Part 36 offer, if permission is given, para. 7.5 envisages that the court may order that the costs consequences set out in r. 36.14 will apply. These provisions are inconsistent with a term as to costs being part of the Part 36 offer.
31. Second, r.36.21 is applicable where at trial either a defendant is "held liable" for more, or "the judgment" against a defendant is more advantageous to the claimant, than the offer. The words "held liable" and "the judgment" both appear to me to connote what the trial judge holds or decides on the substantive issues in the case as distinct from the ancillary issue of costs to be determined after the substantive issues are decided. Mr. Brunner accepted that that was so in relation to "held liable", though not in relation to "judgment". For my part, I cannot see why there should be such a difference.
32. Third, the rule is intended to apply universally at the end of the trial when the judge is required to make an order for costs. Save in a case where the judge can make a summary assessment or the rare case where the costs at that point are agreed, there will have been no assessment of the costs, the figure for which would therefore be uncertain. Yet the rule contemplates that merely by reference to that for which the defendant is held liable or by reference to the judgment the judge will be able to decide whether r.36.21 applies because the defendant has been held liable for more, or the judgment against a defendant is more advantageous, than the offer. I find it hard to believe that the draftsman contemplated that a Part 36 offer is one which includes a term as to costs, so that the judge might have

to evaluate the quantum of his costs order. That is normally the function of a costs judge, not the trial judge.

33. Fourth, there would be a real risk of abuse if a term as to costs could be included in a Part 36 order. Every well-advised claimant would make a Part 36 offer containing the terms sought in his claim plus an offer as to costs in the hope that if he succeeded in his substantive claim he would obtain indemnity costs in place of the ordinary award of costs on the standard basis. Merely to win on his substantive claim and to obtain an order for costs under the general rule (see CPR 44.3(2)) will cause r.36.21 to be applicable, so that the court "will" make the orders referred to in r.36.21(2) and (3) unless it considers it unjust to do so. Injustice in the eyes of the court is therefore the only basis on which the court could refuse to make an order for indemnity costs and interest. That does not confer a general discretion on the court.
34. I therefore conclude that a term as to costs is not within the scope of a Part 36 offer. That does not of course mean that a claimant cannot make an offer which includes a term as to costs; the court will have regard to that in exercising its usual discretion in relation to inter partes costs at the end of the case. As r. 36.1(2) states, nothing in Part 36 prevents a party making an offer to settle in whatever way he chooses. However, nothing in r.36(1)(2) permits a party to include a term as to costs as part of a Part 36 offer for the purpose of obtaining an order for costs on an indemnity basis.

Issues (2) and (3)

35. These issues therefore do not arise.

Conclusion

36. Mr. Brunner indicated that if the term as to costs was not part of a Part 36 offer, he did not contend that the court should exercise its general discretion under r.44.3 (despite the requirement under r.44.3(4)(c) to have regard to any admissible offer) to make an order similar in effect to r.36.21(3). That, he explained, was because, outside r.36.21 the making of an order on the indemnity basis requires some element of the paying party's conduct which deserves some mark of disapproval and he accepted that that was not present in this case.
37. For these reasons I would dismiss this appeal.

Potter L.J.:

38. I agree.

Sir Murray Stuart-Smith:

39. I also agree.

Order: the appellant's appeal will be dismissed with costs summarily assessed in the sum of £9,277.98 (Order does not form part of the approved judgment)

Mr. Peter Brunner (instructed by Messrs Cleaver Thompson of Alfreton) for the Appellants

Mr. Neil Mendoza (instructed by Messrs Ward Hardaway of Newcastle upon Tyne) for the Respondents