CA on appeal from QBD (Mr Justice Holland) before Potter LJ; Chadwick LJ; Tuckey LJ. 6th February 2003.

LORD JUSTICE CHADWICK:

1. The appellant, Mrs Margaret Neave, is the widow of Mr Tubby Neave who died in March 1983. She was the sole beneficiary under his will. The respondent, Mr Hugh Neave, is their only son. He is a beneficiary under the will of the late Mr George Totty who died in 1987. For many years prior to his death Mr Tubby Neave had been associated in business with Mr Totty, who conducted a breaker's yard at Langley, Hertfordshire, under the name Rush Green Motors. In the course of that business a large number of motor vehicles were acquired, as would be expected. Mr Tubby Neave - but not, I think, Mr Totty - was interested in historic cars as a collector.

2. This unhappy dispute between mother and son relates to eight historic cars and one historic motor cycle. It is common ground that all those vehicles were acquired from their previous owners by Mr Totty or by Mr Tubby Neave. Some may have been acquired by Mr Totty and sold on by him to Mr Tubby Neave. The question in the litigation was which of those vehicles belonged to Mr Tubby Neave at the date of his death. Beneficial ownership of those passed to Mrs Neave under her husband's will. Beneficial ownership of those vehicles which were then, and remained, in the ownership of Mr Totty passed, on his death, to Mr Hugh Neave under the provisions of Mr Totty's will as varied by a deed of testamentary arrangement.

3. Five of the nine vehicles were stored at the family home, Trees, Langley Road, in which Mrs Margaret Neave had continued to live following the death of her her husband. The judge accepted that they had been there since at least 1970. Particulars of those vehicles and their registration numbers were: (a) Ford Model T Float KL 9082, (b) Mors 1912 Tourer LE 8956, (c) Schneider saloon RP 4157, (d) Ford Model T saloon AC 1886, and (e) Rolls Royce VN 2713. The other four vehicles - which were not at Trees at the death of Mr Tubby Neave - were these: (f) Ford drop-side truck BAR 41, (g) Napier SH 294, (h) Norton motor cycle HGN 1 and (i) Morris saloon HAN 1. It will be convenient to refer to those vehicles by the designatory letters (a) to (i) which I have used when describing them.

4. It seems that relations between mother and son had been poor since the mid-1990s; but the present dispute stems from the son's decision in March 1998 to remove the five vehicles (a) to (e) from his mother's possession. He did so on 5 March 1998, in her absence and without her permission. Her response was to demand the return of those five vehicles and delivery up of the other four vehicles - (f) to (i) - which had long been in possession of the son.

5. The proceedings were commenced in about March 2000. Mrs Neave claimed delivery up of all nine vehicles; or, in the alternative, damages. Mr Hugh Neave claimed ownership of all nine vehicles. Those proceedings were commenced in the County Court and pursued to a trial over 10 days in June 2001; when they were adjourned part heard through lack of available court time. At that stage the claimant's evidence was not complete. The hearing was resumed before the same County Court Judge in November 2001; but no evidence was taken and the proceedings were again adjourned after two days. They were eventually transferred to the High Court, where they came before Mr Justice Holland in April 2002. He heard a re-trial over six days and delivered judgment on 26 April 2002. He held the son's intrusion with his employees on to his mother's property in 1998 to have been a trespass. Indeed, the trespass was admitted. He awarded damages of £3,000 under that head. He held that Mrs Neave had established her claim in conversion in respect of the five vehicles (a) to (e) which had been in her possession; and had established title to a sixth vehicle - (g) - the Napier, registration number SH 294, which, throughout, had been in the possession of the son. The judge ordered the son to return those six vehicles to his mother, together with any relevant documentation. Mrs Margaret Neave failed in her claim to the remaining three vehicles - that is, vehicles (f), (h) and (i) which had throughout been in the possession of the son.

6. The judge adjourned questions of costs for argument at a later date. That argument took place before him on 15 May 2002. For reasons set out in the costs judgment which he delivered on that day the judge ordered that the son pay one-third of the mother's costs of the action on a standard basis. Both parties sought permission to appeal to this court. Mr Hugh Neave sought to appeal the substantive order for the

return of the vehicles made on 26 April 2002. Mrs Margaret Neave sought to appeal the costs order made on 15 May 2002. On 2 July 2002 I refused both applications on paper.

7. Both applications were renewed at an oral hearing before me on 24 July 2002. I remained of the view that permission to appeal from the order of 26 April 2002 should not be granted; and I refused that application. I was persuaded on further consideration of the matter that permission should be granted in relation to the order for costs made on 15 May 2002; but limited to a single point. In the course of the judgment which I delivered on that day I said this:

"*30. The judge gave a separate judgment as to costs on 15 May 2002. He reminded himself of the provisions in CPR 44.3; and of the general rule that an unsuccessful party will be ordered to pay the costs of the successful party. That general rule is subject to the power of the court to make a different order if, in the exercise of judicial discretion, it thinks a different order is appropriate. The judge took the view that this was a case in which the circumstances displaced the general rule. It is clear when his costs judgment is read in conjunction with the judgment on the claim - and in particular with that passage in paragraph 41 of the earlier judgment in which he said that the motivation for this litigation was not an interest in historic vehicles suddenly kindled in mother and son, but another chapter in an appalling family rift giving rise to the mutual desire to hurt and wound - that he was indicating why he took the view that the general rule should not be applied in the case before him. If the judge was right to take that view of the parties' conduct, it seems to me he was entitled to direct himself that this was not a case in which he should be bound by the general rule but should look at the matter more broadly. He went through each of the factors listed under CPR 44.3 (4) and (5) in deciding what costs order he should make and came to the conclusion that the claimant should receive one third of her costs.*

31. Had the matter remained there, I would take the view that there was no real prospect that the Court of Appeal would think it right to interfere with the exercise by the judge of the powers entrusted to him. It is immaterial that, had this court been seized of the matter, it might not have reached the same view. The relevant question is whether the judge was entitled to reach the view that he did having regard to the wide margin of discretion which must be allowed in relation to costs.

32. But the point does not rest there. There were, in this case, offers made under Part 36 of the Civil Procedure Rules by solicitors on behalf of the claimant, both on 26 April 2001 and on 26 July 2001. The claimant offered a compromise on the basis that five vehicles should be returned to her and four vehicles should be retained by the defendant. There is no exact correlation between the vehicles which were to be returned under that proposed compromise and the vehicles of which she had had possession until March 1998.

33. .....

34. The judgment in this case had the effect that the claimant recovered four out of the five vehicles that she was seeking under her Part 36 offer, and two more vehicles which she had not been seeking under the Part 36 offer but which she had been prepared for the defendant to retain. There is, therefore, a question whether the judgment was more advantageous than the proposals; a question which may have to be determined by a comparative valuation exercise as at the date when the offers were made."

8. Accordingly, I gave permission to appeal from the costs order of 15 May 2002; but limited to the single question whether the judge ought to have made an order under CPR 36.21.

9. CPR 36.21 is in these terms, so far as material:

"*(1) This rule applies where at trial -*

(a) .....

(b) the judgment against a defendant is more advantageous to the claimant,
than the proposals contained in a claimant's Part 36 offer.

(2) .....

(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."

Sub-rule (5) sets out the matters which the court will take into account when considering whether it would be unjust to make orders under sub-rules (2) or (3).

10. It is important to note in the present context that, where CPR 36.21 applies, the court is required - or at least enjoined - to make an order for costs in favour of the claimant and on the indemnity basis unless it considers it unjust to do so. Where there has been a Part 36 offer the court will fail properly to exercise its powers in relation to costs at a subsequent trial unless (a) it considers whether rule 21 is applicable - that is to say, in the present context, whether the judgment against the defendant is more advantageous to the claimant than the proposals contained in the offer - and, if it is applicable, (b) whether in the circumstances of the case, including in particular the circumstances set out in sub-rule (5), it would be unjust to make an order in favour of the claimant.

11. The judge made no reference in the course of his judgment of 15 May 2002 to the specific provisions of CPR 36.21. He referred, in the context of CPR 44.3, to offers to settle made on behalf of Mrs Neave on 26 April and 26 July 2001. He said this, at paragraphs 5d and 5e of the judgment of 15 May 2002:

"d. On the 26 April 2001 (that is, well before the first hearing of the action started) a Part 36 'without prejudice' offer was made on her behalf by way of a letter of that date. The practical effect of the offer was that if the Defendant were to return to her three of the six vehicles taken from her property (LE 8956, RP 4157, VN 2713), to give up his possession of SH 294 and HGN 1 and to pay her costs then the matter would settle. The offer was expressed to be open for twenty-one days. In the event it elicited no response, not even an acknowledgment.

e. By way of a letter of the 26 July 2001 (that is, after the first hearing in the County Court) this offer was renewed. Again there was no response."

12. The judge referred to letters dated 1 October 2001 and 17 April 2002 from the son's advisers which, although plainly not Part 36 offers, had put forward proposals for a compromise. At paragraph 13 of his judgment the judge said: *"Again, I regard the respective offers of settlement terms as effectively cancelling each other out. As to this, first, I reject the submission of Mr Graham [who appeared for claimant] that these two emanating from the Defendant are inadmissible because neither in terms cited Part 36. I know of no reason that would serve to inhibit me giving consideration to such and indeed CPR 44.3 (4) (c) requires me to consider offers to settle ' ..... whether or not made in accordance with Part 36'. Second, I can deal with all four offers compendiously: while none faithfully matched my ultimate judgment, all four merited a response for each offered a basis for inter-party discussions. In the event none such elicited any response - hence the effective mutual cancellation. Settlement has, alas, never been on any agenda. However before departing from this topic I have noted that it was the Claimant who made the first offer - and that was before the first hearing got underway."*

13. The judge was invited to identify a successful party by reference to monetary values put on the vehicles recovered and not recovered; but he gave no weight to those submissions. He said: *"Throughout the claim and the defence have respectively reflected sentiment and emotions - not money. The respective values of the claimed vehicles have throughout been immaterial - hence one continuing obstacle to settlement - and it is plainly wrong now to introduce an irrelevant factor, value, to gauge success or failure. Yet further, were I to adopt monetary values as a measure of success it would fly in the face of my continuing contention that this claim in conversion should have been neither prosecuted nor defended."*

14. The judge was, of course, correct to draw attention to the fact that the CPR 44.3 (4) (c) requires the court to take account of all offers to settle even if not made in accordance with Part 36. But, if he thought that that enabled him to disregard the specific provisions of CPR 36.21 in cases where that rule applied, he was plainly wrong. The judge seems to have taken the view - without the contrary having been suggested - that the offers made by Mrs Margaret Neave, as claimant, were Part 36 offers. But he did not address the question whether the outcome had been more advantageous to the claimant than the proposals contained in those offers; nor whether, if so, he should make a costs order in her favour under CPR 36.21 - to which he did not refer in his judgment. Nor did he decide not to make such an order on the grounds that such an order would be unjust, applying the test in sub-rule (4).

15. In my view, it is impossible to avoid the conclusion that the judge's failure to address those matters had the effect that his exercise of discretion as to costs was flawed. We were referred to observations of Lord Woolf MR in **Petrograde Inc v Texaco Ltd** [2001] 4 All ER 853, also reported at [2002] 1 WLR 947. In particular, at paragraphs 82 and 83, Lord Woolf MR had said this:

"82 In my remarks so far, I have indicated the order I would have made, but that does not dispose of the cross-appeal. The question arises as to whether it can appropriately be said that, on the arguments which were advanced before him in the court below, the judge erred in the exercise of his discretion. The argument before the judge was wholly different from the argument which has been advanced in this court. In particular, the applicability of r.36.21 was not raised. It seems to me that it would be wrong to interfere with the judge's decision on questions of discretion as to costs where the judge has not had placed before him the arguments which would, perhaps, have compelled him to take a different view.

83 The fact that the court has power to make the orders to which I have referred in this judgment should not be used as justification for appeals on questions of costs where the judge has done his best, as I believe the judge did in this case, to come to the right answer as a matter of discretion on the material which was before him."

16. Relying on those observations, it was said on behalf of the respondent that this court ought not to interfere with the discretion exercised by the judge in this case on the grounds which were argued before him; notwithstanding that, if other grounds had been argued, he would have been required to consider them. In my view, that is not this case. Counsel for Mrs Margaret Neave had prepared written costs submissions to put to the judge on 26 April 2002, when he gave his judgment on the substantive issues. Those submissions refer specifically (at paragraph 6) to CPR 36.21. It is there said that costs should be awarded in her favour on the indemnity basis because she had obtained judgment which was more advantageous to her than her own Part 36 offer, thereby reflecting the provisions in CPR 36.21 (1) (b) itself. The judge did not deal with costs on that day. He invited further submissions as to costs in writing. In response to that invitation counsel for Mrs Neave prepared supplemental costs submissions dated 7 May 2002. They extend over 51 pages. They make the point that the claimant had beaten her own Part 36 offers and was so entitled to costs on an indemnity basis (see paragraph 4 (13) of those submissions). There is an express reference to the **Petrograde** case as *"a comparable case of a claimant beating its own Part 36 offer"*. It is impossible to argue in this court that the judge's attention was not drawn to the relevant provisions of the Civil Procedure Rules; in particular Part 36.21 and to the leading authority on that rule.

17. While I have every sympathy for the judge - who had plainly formed a clear view as to the futility of this litigation and the motives of the parties - I do not think it is possible to dispose of this appeal on the basis that the reason why the judge did not address the points which are now raised is that those points were not raised before him. They were raised in the written submissions which the judge had an opportunity to consider before delivering a reserved judgment on costs, and the claimant was entitled to expect that they be addressed. We were referred to the well known observations of Lord Justice Griffiths in **Eagil Trust Co Ltd v Pigott-Brown** [1985] 3 All ER 119, 122. But those observations afford the respondent no assistance in the circumstances of the present case. It is impossible to conclude that the judge addressed his mind to the matters which he was required to address under CPR 36.21.

18. In those circumstances it is necessary for this court to address those matters. The first question is whether the claimant made a Part 36 offer. That question must be answered in the light of CPR 36.2 (1) (b) - which explains what is meant by a Part 36 offer for the purposes of the rule - and CPR 36.5 which prescribes the form and content of a Part 36 offer. Rule 5 is in these terms, 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).

(4) .....

(5) .....

(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.

(7) A Part 36 offer made less than 21 days before the start of the trial must state that the offeree may only accept it if
(a) the parties agree the liability for costs; or
(b) the court gives permission.
(Rule 36.8 makes provision for when a Part 36 offer is treated as being made.)

(8) If a Part 36 offer is withdrawn it will not have the consequences set out in this Part."

Those provisions must be read in conjunction with CPR 36.1 (2) which provides - *"Nothing in [Part 36] prevents a party making an offer to settle in whatever way he chooses, but if that offer is not made in accordance with Part 36 it will only have the consequences specified in this Part if the court so orders."*

19. The offers in question in the present case were made in letters from Mrs Neave's solicitors dated 26 April 2001 and 26 July 2001. In the first of those letters the solicitors wrote:
"Dear Sirs
WITHOUT PREJUDICE
Neave - Vintage Cars
Case No LU001630
We believe all who are involved in this case are, and will be, very concerned by the costs in this case involving, as it does, considerable enquiries and preparation.
Mrs Neave was incensed by the forcible removal by your client in March 1998 when she was away of her vehicles under the shed on her property and scandalised by his assertion that the vehicles the subject of this case belong to him. However, having regard to further substantial costs that will be incurred and the Court time required for the trial of the action, Mrs Neave has been advised to consider a compromise which might bring these proceedings to an end.
She has given a good deal of thought to this and we now have instructions that she would agree to your client retaining:
HAN1, the Morris
BAR41, the yellow Ford Model T Truck in the pigsty
AC 1886, the Model T Saloon that was at Trees
KL9086, the Ford Model T Float
provided the remaining vehicles in the case are handed over to her which are -
LE8956, the Mors Tourer
RP4157, the Schneider Saloon
VN2713, the Rolls Royce
SH294, the Napier
HGN1, the Norton Motorcycle.
Mrs Neave would, then, not pursue the claim for damage to the shed or the tree but, if the case is concluded on this basis, she would require her costs to be paid by your client, to be assessed if not agreed.
This offer is open for 21 days from today and is made pursuant to CPR36."

There was no reply to that letter.

20. The trial commenced on 4 June 2001. It follows that the offer made in the letter of 26 April 2001 was made not less than 21 days before the start of the trial so bringing it within rule 5 (6) of Part 36. The trial was adjourned on 15 June 2001. The second letter was written some six weeks later, on 26 July 2001:
"Dear Sirs
RE: NEAVE v NEAVE - CARS
On 26 April 2001 we sent you a Part 36 Offer to conclude this case, expressing concern about the ever increasing substantial costs. You have not acknowledged receipt of that letter apart from a mention in passing during one of our telephone conversations.
Mrs Neave has now been cross examined at great length and some of the evidence of her witnesses concluded. It is our view that the Claimant's case has in no way been weakened by the questioning so far and our belief that her case has only been strengthened.

Our concern as to the costs of this Action are increased now that it will run, quite possibly, in to several more weeks in October.
We must therefore repeat the offer in our previous letter that Mrs Neave would accept a conclusion of the claim if the following vehicles are handed over to her:
LE8956, the Mores Tourer
RP4157, the Schneider Saloon
VN2713, the Rolls Royce
SH294, the Napier
HGN1, the Norton motor cycle
Mrs Neave will agree to your client retaining:
HAN1, the Morris
BAR41, the yellow Ford model T Truck in the pigsty
AC1886, the model T Saloon that was at Trees
KL9086, the Ford model T Float
If this proposal is not accepted, on a successful conclusion of the case for our client there would be an application for indemnity costs which, we believe, would be fully justified in view of the way in which the case has developed.
Again, this offer is made pursuant to CPR36 and is open for 21 days from today."

A query whether that offer was put forward on the basis that Mr Hugh Neave would be required to pay the claimant's costs on the standard basis if he accepted the Part 36 offer was answered in the affirmative by a letter on the following day, 27 July 2001.

21. At first sight the offer contained in the letter of 26 July is an offer which would fall within rule 5 (7) of Part 36 - the trial having already started at the time when it was made. But it must be borne in mind that it was made before the trial resumed in November 2001. It is significant in my view that both offers are expressed to be made pursuant to CPR Part 36. That is not a requirement of rule 5; but it is required under paragraph 5.1 (1) of the Practice Direction issued by way of supplement to Part 36 - noted 36PD-005 in Civil Procedure Autumn 2002.

22. Notwithstanding the offeror's obvious intent that the offers made in the two letters to which I have referred should be treated as Part 36 offers, it is said on behalf of Mr Hugh Neave that that intent cannot be given effect. It is said that the offers - and each of them - failed to comply with the mandatory requirements in rules 5 (3) (a), 5 (6) (a) and 5 (6) (b); and that they were defective in any event because they contained a provision as to costs.

23. Rule 5 (3) (a) requires that a Part 36 offer must state whether it relates to the whole of the claim or to part of it. It is said that neither letter complies with that requirement. I have found it impossible to understand that submisssion. The letter of 26 April 2001 makes it clear that the purpose of the offer is to effect a compromise which will bring the proceedings to an end. It is clear that, if the proposals as to the division of the vehicles are agreed, the claimant will not pursue her other claims. The letter of 26 July 2001 repeats the previous offer and contains an express statement that Mrs Neave would accept a conclusion of her claim if the five vehicles there listed were handed over to her. The relevant claim, in that context, is the claim made in the particulars of claim; that is to say, a claim to delivery up, with a claim for damages for conversion in the alternative.

24. Rule 5 (6) (a) requires that, in a case to which that sub-rule applies, the offer must be expressed to remain open for acceptance for 21 days from the date it is made. Both letters provide expressly that the offer made is open for 21 days "from today". What is said on behalf of the respondent is that a Part 36 offer is not made until it is received by the offeree - that is what rule 8 (1) provides - and that the letter of 26 April 2001 was received by fax transmission on the following day, 27 April 2001. So, treating the expression "21 days from today" as meaning 21 days from the date of the letter (26 April) the time for acceptance prescribed by the letter was one day short of the time required by the rule.

25. In my view there is nothing in that point. First, as a matter of construction, the phrase "21 days from today" ought to be given the meaning which it would convey to a reasonable recipient of the letter having knowledge of the purpose for which it was sent and the relevant provisions of CPR 36.5 (6) (a) - see the observations of Lord Steyn and Lord Hoffmann in **Mannai Investment Co Ltd v Eagle Star Life**

Assurance Co Ltd [1997] AC 749, at pages 768 and 774. It would, in my view, be plain to a reasonable recipient that a letter which contains the sentence: *"This offer is open for 21 days from today and is made pursuant to CPR 36"* is intended to comply with rule 5 (6) (a) and should be read accordingly. So "today" in that context should be construed as the day on which the letter is received, not, if different, the date which the letter bears.

26. Second, a letter which is received by fax transmission will ordinarily bear two dates - the date typed on the letter and the date of transmission supplied automatically by the sender's fax machine. If the dates differ, then "today" is more likely to mean, in the context of a letter which purports to contain a Part 36 offer, the date upon which the letter is sent and received, that is to say, the date of the fax transmission.

27. Third, if the offer does fail to meet the requirements of CPR 36.5 (6) (a) as a result of a mistake, that is a mistake which would have been obvious to the recipient in the circumstances. The court has power under CPR 36.1 (2) to relieve the offeror from the consequences of that mistake. In the present case I have no doubt that the court should exercise that power, as this court did in **Charles v NTL Group Ltd** (13 December 2002; [2002] All ER (D) 196 (Dec)).

28. Similar points are made on behalf of the respondent in relation to the letter of 26 July 2001. But that is not an offer to which CPR 36.5 (6) can have any application. It was not made *"not less than 21 days before the start of the trial".*

29. Rule 5 (6) (b) requires that a Part 36 offer, in a case to which that provision applies, must provide that after 21 days the offeree may only accept it if the parties agree liability as to costs or the court gives permission. The letter of 26 April 2001, which is the only offer to which rule 5 (6) (b) could have any application, does not so state in terms.

30. I was, at first, inclined to think that the fact the letter of 26 July 2001 is expressed to be made pursuant to CPR 36 might have the effect of incorporating the provisions of that sub-rule, in so far as they are not inconsistent with the express terms of the letter itself. In the present case there is nothing in the letter which is inconsistent with the provisions of rule 6 (5) (b). But that was not the approach of this court in **Mitchell v James** [2002] EWCA.Civ 997 (12 July 2002) - see paragraphs 24 and 25. And it could be said to be inconsistent with the requirement in paragraph 5.2 of the Practice Direction that the contents of a Part 36 offer must also - that is to say, also in addition to stating that it is a Part 36 offer - comply with the requirements of Part 36.5 (3), (5) and (6). After further consideration I prefer to put my judgment on the basis that, if there is a technical defect under rule 5 (6) (b), this is plainly a case for the exercise of the power under CPR 36.1 (2). It is pertinent to have in mind that rule 5 (6) (b) states the position for which CPR 36.12 (2) (b) makes specific provision. An offer which is not accepted within the 21-day period cannot be accepted thereafter without either an agreement between the parties as to costs or an order of the court. That is made clear by the provisions of Part 36. A party who is legally advised and receives an offer which purports on its face to be a Part 36 offer would reasonably understand that those provisions were incorporated in it unless there was something which suggested that they were not.

31. The respondent places no reliance on rule 5 (7) - which applies to the letter of 26 July 2001 - but, for similar reasons to those already set out, the rule would not have assisted him.

32. In his skeleton argument counsel for the respondent suggested that the inclusion in the offer letter of 26 April 2001, and the confirmation given in the letter of 27 July 2001, of a requirement that the defendant should pay costs on the standard basis up to the date upon which the offer was accepted (if it were accepted) took the offers outside rule 5 of Part 36; and, indeed, outside Part 36 itself. In support of that submission we were referred to the decision of this court in **Mitchell v James** [2002] EWCA.Civ 997 (unreported 12 July 2002). But it i simportant to have in mind that the statement in the letter of 26 April 2001 that the defendant would be required to pay the costs up to the date on which he accepted the offer merely reflects the provisions that would apply in any event under CPR 36.14. The submission amounts to this: that a letter which spells out what the consequences of accepting the offer will be under the relevant rules has the effect of taking the offer out of the rules altogether. I can find nothing in **Mitchell v James** which comes anywhere near to providing authority for that proposition. It is, to my mind, a

proposition which needs only to be stated to be rejected. I should record that it was urged, if at all, with no enthusiasm; and it may have been withdrawn in the course of argument.

33. I would conclude, therefore, that the offer made on behalf of Mrs Margaret Neave in the letter of 26 April 2001, and in the letter of 26 July 2001 - which I would regard as repeating the same offer but with effect from a later date - is a Part 36 offer for the purposes of CPR 36.21.

34. The second question, therefore, is whether the judgment against the defendant is more advantageous to the claimant than the proposals contained in the offer. That requires a comparison between the proposals and the judgment. The proposals were that there be returned to Mrs Neave three out of the five vehicles which had been removed from her home on 5 March 1998 - those were vehicles (b), (c), and (e) - and two of the four vehicles which had been in the possession of her son - that is to say, vehicles (g) (the Napier) and (h) (the Norton motor cycle). The order required delivery up to her of six vehicles; the five which had been removed from her home - vehicles (a) to (e) - and the Napier - vehicle (g). Of the five vehicles which she had sought to recover by the proposals - vehicles (b), (c) (e), (g) and (h) - she recovered four under the judgment, (b), (c), (e) and (g). She did not recover the fifth - vehicle (h) the Norton motor cycle. But she did recover two vehicles which she had not sought by her proposals - vehicles (a) and (b) (the Ford model T Float and a Ford model T saloon). She also recovered damages for trespass in the sum of £3,000 which she had not sought by her proposals.

35. In order to decide whether the judgment was more advantageous to her than the proposals it is necessary, as it seems to me, only to ask whether the recovery of the two vehicles which she had not sought by her proposals - vehicles (a) and (d) - together with £3,000 by way of damages, was more advantageous than the recovery of the single vehicle - vehicle (h), the Norton motor cycle - which she had sought by the proposals but had not recovered by the judgment. On a simplistic level it might be thought that to recover £3,000 and two vehicles was likely to be more advantageous to the person making the recovery than recovering no money and one vehicle. But, if the matter is to be dealt with on a more refined basis then it is necessary to attribute some value to the two vehicles which Mrs Neave did recover under the judgment and the one vehicle which she had sought and did not recover under the judgment.

36. The judge, for the reasons which I have indicated, did not attempt that task. If he had done so, he would have been assisted by a Scott schedule which had been prepared by the parties following an order made in the County Court on 10 November 2000. The form of the Scott schedule prescribed by the court included columns for the estimate of value put on each vehicle by each of the parties. The schedule was prepared accordingly. It is now said that the values which appear in the schedule do not include the value to be attributed to the number plates; in particular, to the number plates of those three vehicles which have distinctive plates - BAR 41, HGN 1 and HAN 1. But that is plainly not the case in relation to the claimant's estimates of value - see the Brook valuations made on 5 October 1999 which do include the value attributable to the relevant number plates. It is by including the values of the distinctive plates that the plaintiff's estimate of values are in the range that appears in the Scott schedule. I accept that the defendant did not attribute a value to the number plates in his column of the Scott schedule - as can be seen from the valuation (nil) put against the Morris HAN 1. That is a number plate which might be expected to have some value. But that is because the defendant, when complying with the court order to prepare the Scott schedule, chose not to include that element in his estimate of value. It may well be that he was right not to do so: the vehicle appears - from photographs in the trial bundle - to be incapable of being made roadworthy.

37. It is now sought to introduce new evidence as to the value which vehicle (h) - the motor cycle registration HGN 1 - would have with its registration plate, so as to inflate that value in the scales which have to be weighed under CPR 36.21. For my part, I resist an attempt to turn decisions as to costs into satellite litigation requiring further evidence after trial. The parties were ordered in this case to prepare a Scott schedule and to include in it their estimate of value. Each did so on the basis which he or she thought appropriate. They should be held to that estimate for the purposes of the exercise to be conducted under CPR 36.21. In the absence of some other evidence, or some attempt at the time when

the judge was being asked to deal with other matters to make an amendment to the schedule, that is the material on which they each chose to rely.

38. On that basis the highest value placed on vehicle (h) - the motor cycle - in the Scott schedule is £6,000. Taking that value in favour of the defendant it may be compared with the lowest values placed on the two vehicles (a) and (d) in the schedule. The lowest value placed on vehicle (a) is £2,000 and the lowest value placed on vehicle (d) is £3,500. So, making all assumptions in favour of the defendant, on the figures which appear in the Scott schedule the value of the two vehicles which Mrs Neave did recover (but had not sought in her proposals) is £500 less than the value of the motor cycle which she had sought in the proposals (but did not recover). But, in addition to the vehicles, she was awarded £3,000 damages. On the basis of the material that was before the judge, what Mrs Neave recovered under the judgment was at least £2,500 more advantageous to her than what she had been prepared to accept under the proposals made in 2001.

39. In those circumstances this is a case in which CPR 36.21 is engaged. The remaining question, then, is whether it is unjust to make the order for which CPR 36.21 provides?

40. In that context it is relevant to have in mind the observations of Lord Woolf MR in **Petrograde,** at paragraph 55, and observations of my own in **McPhilemy v Times Newspapers Ltd and Others (No 2)** [2001] All ER 861, at paragraph 19: *"19 It is plain, as Lord Woolf MR pointed out in the Petrograde case, that paras (2) and (3) of r 36.21, in conjunction with para (4), are intended to provide an incentive to a claimant to make a Pt 36 offer. The incentive is that a claimant who has made a Pt 36 offer (which is not accepted) and who succeeds at trial in beating his own offer stands to receive more [by way of costs] than he would have received if he had not made the offer. Conversely, a defendant who refuses a Pt 36 offer made by a claimant and who fails to beat that offer at trial is at risk of being ordered to pay more than he would have been ordered to pay if the offer had not been made ....."*

41. The purpose of CPR 36.21 is to encourage a claimant to make a Part 36 offer. CPR 36.20 serves the same purpose in relation to a defendant. The benefit to a party in making a Part 36 offer lies in the costs consequences which follow if the offer is not accepted. The risk, of course, is that if the offer is accepted the party will lose the opportunity to argue the case; but that is the nature of compromise. In making the offer the party risks doing worse than if no offer were made. It is important, therefore, that where the claimant's offer is not accepted, the claimant should not be deprived of the benefit which has been held out to him as an inducement to make the offer, without good reasons. If claimants and their advisers come to think that Part 36 offers will not have the costs consequences for which rule 21 provides, they will be that much the less likely to make such offers. The making of Part 36 offers - which, if accepted, lead to the settlement of the litigation and the saving of costs - is to be encouraged, as the authorities to which I have just referred make clear. It is for that reason, as it seems to me, that CPR 36.21 (4) enjoins the court to make an order under rule 21 unless satisfied that it is unjust to do so. An order under the rule should be the usual consequence where a Part 36 offer has been made; has not been accepted; and has been beaten at trial.

42. In considering the question whether it is unjust to make an order under CPR 36.21 the court must have regard to the obvious injustice in disappointing expectations held out to the claimant by the rules to encourage him to make an offer on the terms on which it was made. There are no factors in the present case - either arising from the particular matters which the court is required to take into account under rule 21 (5) or, more generally - which would make it unjust to make the orders for which rule 21 applies. Sub-rule (5) requires the court to take account of all the circumstances of the case; but that requirement must be read in context. The context is the consequences which should follow from the making of a Part 36 offer which is not accepted, and then beating that offer.

43. The judge expressed the view - in strong terms - that this was litigation which should never have been brought or defended. That view should have led him to conclude that steps taken to bring the litigation to an end should be encouraged and not discouraged; should be rewarded and not disappointed. The view that litigation should not have been brought at all may, perhaps, lead to the conclusion that the defendant could not reasonably have been expected to accept an offer to end it without a judgment in his favour. But that is not this case. If the litigation should never have been brought, then steps taken to

bring it to an end should be encouraged. Those steps bring to an end the vice which the court has identified; and it cannot be held unjust to recognise that, as the rule requires.

44. For those reasons I would allow this appeal and make an order under CPR 36.21. I would make an order for the payment of the claimant's costs on the indemnity basis from 17 May 2001 - that being the latest date on which the defendant could have accepted the Part 36 offer contained in the letter of 26 April 2001 without needing the permission of the court. I would order that interest be paid on those costs at 4 per cent over base rate in accordance with the formula which appears in paragraph 25 of my judgment in **McPhilemy** [2001] 4 All ER 861 at 874. I would not disturb the judge's order in relation to the costs prior to 17 May 2001, that being a matter on which permission to appeal was not granted. I would not order interest on the £3,000 of damages for the period from 17 May 2001 to date of judgment; that, again, being a matter which the judge was not asked to address and which is not the subject of any appeal before this court.

45. **LORD JUSTICE TUCKEY:** I agree. It is obvious that the judge thoroughly disapproved of this litigation; I can well understand why, and, in general terms, endorse the trenchant comments he made about it. What he overlooked, probably because it was much obscured by the morass of more general submissions made to him, was the significance of the fact that in a sensible moment Mrs Neave, no doubt as a result of good advice from her solicitors, made her son a Part 36 offer. The express purpose of this offer was to put an end to the litigation backed by the sanctions in Part 36.21 in the event that he did not accept the offer.

46. The judge did not specifically consider the effect of this rule on the order for costs which he made. Had he done so he would have appreciated that this rule, like the other provisions of Part 36, is designed to discourage parties from pursuing unreasonable litigation. The judge would obviously have agreed that these parties should have been strongly discouraged from pursuing this litigation. The son had the way out. He could have accepted the offer but chose to ignore it altogether. From that moment he continued to litigate at risk if his mother bettered her offer. In the event she did so for the reasons given by Lord Justice Chadwick.

47. Mr Mathias complains that the consequences spelt out in CPR 36.21 are draconian; so they are. If the judge had made the order which we propose to make he would have made that clear to these parties. If, as Mr Mathias contended, the judge's comments were intended to discourage litigation of this kind such an order would have made that clear also. If the son had accepted the mother's reasonable offer this case would have come to an end well before trial. The fact that he did not do so has had draconian consequences for him and ought to discourage litigation by any party who chooses to ignore a reasonable Part 36 offer.

48. **LORD JUSTICE POTTER**: I agree with the judgments of Lord Justice Chadwick and Lord Justice Tuckey. I would only add that it seems to me clear that the offer in the letter of 26 April 2001 did not comply with CPR 36.5 (6) (b) by simple use of the statement that the offer was made pursuant to CPR 36 which, of course, includes the clear provisions of CPR 36.12 (2) (b) as to the effect of the offer. In my view CPR 36.5 (6) (b) is unambiguous in its requirement. It also seems to me that the reason why the claimant is required to set out what might appear obvious to a lawyer acquainted with the rationale as well as the detailed provisions of Part 36, and in particular CPR 36.12 (2), is that the CPR anticipate that a defendant may be a litigant in person to whom effect of the offer should be spelt out without the need for him to resort to the full text of Part 36.

49. I consider therefore there was a failure to comply in that respect. However, I have no doubt that on the basis of the decision in **Mitchell v James** the non-compliance was of no material significance, led to no prejudice of any kind and plainly falls to be dealt with under CPR 36.1 (2), so that the offer has the consequences specified in Part 36.

Order: Appeal allowed with the costs. Permission to appeal was refused

MR THOMAS GRAHAM (instructed by Williams & Co of Luton) appeared on behalf of the Appellant
MR DAVID MATHIAS (instructed by Brignalls Balderstone Warren of Baldock) appeared on behalf of the Respondent