Case 112
King

v

City of London Corporation

[2019] Costs LR 2197

Neutral Citation Number: [2019] EWCA Civ 2266
Court of Appeal (Civil Division)
18 December 2019

Before:
Newey, Coulson and Arnold LJJ

Keywords:
interest, Part 36 offers

Headnote

In detailed assessment proceedings in which the claimant had offered to accept £50,000 for costs "exclusive of interest" and the bill had been assessed at £52,470, the offer was not one which complied with the requirements of CPR 36.5(4) (that such offers are to be treated as inclusive of interest). Accordingly, the benefits potentially available under CPR 36.17(4) (an additional sum up to £75,000, indemnity costs and enhanced interest), were not payable. That was so notwithstanding that CPR PD 47 para 19 provided that an offer to settle made under Part 36 should specify whether or not it was intended to include interest, since the Practice Direction could not control Part 36 and it supplemented CPR Part 47 not Part 36. It followed that the decisions of the courts below holding that the offer had not been valid under Part 36 had been correct. Appeal dismissed.

Obiter per Arnold LJ: the issue merited consideration by

the Civil Procedure Rule Committee as there were arguments in favour of permitting Part 36 offers to be made which were exclusive of interest, at least in detailed assessment proceedings.

Editorial note: this decision takes precedence over the judgment of Nicol J in *Horne* v *Prescott* reported at [2019] Costs LR 279.

Cases Cited

C v *D* [2011] 5 Costs LR 773; [2011] EWCA Civ 646; [2012] 1 WLR 1962

Gibbon v *Manchester City Council*; *LG Blower Specialist Bricklayer Ltd* v *Reeves* [2010] 5 Costs LR 828; [2010] EWCA Civ 726; [2010] 1 WLR 2081

Godwin v *Swindon Borough Council* [2001] EWCA Civ 1478; [2002] 1 WLR 997

Hertel and Another v *Saunders and Another* [2018] 4 Costs LR 879; [2018] EWCA Civ 1831; [2018] 1 WLR 5852

Horne v *Prescot (No. 1) Ltd* [2019] Costs LR 279; [2019] EWHC 1322 (QB); [2019] 1 WLR 4808

Hunt v *RM Douglas (Roofing) Ltd* (1988) Costs LR (Core) 136; [1990] 1 AC 398

James v *James and Others* [2018] 1 Costs LR 175; [2018] EWHC 242 (Ch)

Mitchell v *James* [2002] EWCA Civ 997; [2004] 1 WLR 158

Shaw v *Merthyr Tydfil County Borough* [2014] EWCA Civ 1678; [2015] PIQR P8

U v *Liverpool City Council* [2005] EWCA Civ 475; [2005] 1 WLR 2657

Judgment

1. **Newey LJ:** The main question raised by this appeal is whether an offer exclusive of interest can be made under CPR Part 36 either

generally or at least in the context of proceedings for detailed assessment of costs under CPR Part 47. It is a matter on which judges have taken divergent views. In the present case, His Honour Judge Dight CBE, upholding Deputy Master Campbell, concluded that an offer exclusive of interest cannot be a valid Part 36 offer. In contrast, in *Horne* v *Prescot (No. 1) Ltd* [2019] EWHC 1322 (QB); [2019] 1 WLR 4808, Nicol J, dismissing an appeal from Master Nagalingam, held that, at least in the context of detailed assessment proceedings, an offer excluding interest can be an effective Part 36 offer. We were told that differing opinions have also been expressed by other costs judges.

Basic Facts

2. On 15 February 2017, the parties agreed a consent order settling a claim by the appellant, Mr Francis King. The order provided for the respondent, City of London Corporation ("the City"), to pay Mr King £250,000 plus costs "to be assessed if not agreed on the standard basis".

3. Mr King served his bill of costs and detailed assessment proceedings ensued. On 12 December 2017, Pure Legal Costs Consultants made a settlement offer on Mr King's behalf in a letter to the City's solicitors. The letter was headed "Part 36 offer" and said:

> "The claimant hereby offers to accept £50,000.00 in full and final settlement of the costs detailed within the Bill only.
>
> This offer is made pursuant to CPR 36. The offer is open for 21 days from deemed service of this letter. If the offer is accepted in this time the defendant shall be liable for the claimant's costs in accordance with CPR 36.13.
>
> The offer relates to the whole of the claim for costs within the Bill and takes into account any counterclaim, but excludes interest."

4. The City not having accepted that offer, there was a detailed assessment hearing before Deputy Master Campbell on 13 June 2018. Mr King's bill was assessed at £52,470 excluding interest.

5. On the basis that the £52,470 was more advantageous to him than the £50,000 he had offered to accept, Mr King argued that CPR 36.17 applied and, hence, that the costs consequences set out in CPR 36.17(4) should follow. The Deputy Master, however, concluded that the offer of 12 December 2017 was not a valid Part 36 offer and so

that CPR 36.17 was not applicable. The Deputy Master explained as follows in his judgment:

> "4. … [A]s it seems to me …, for [CPR 36.17(4)] to be engaged, the offer itself has to be a valid offer under Part 36.
>
> 5. The authority for that is *James* v *James* [2018] 1 Costs LR 175, His Honour Judge Paul Matthews sitting as a judge of the High Court. In that case the offer, as here, was expressed to be under Part 36. However, it contained terms which were inconsistent with the rule, namely, in that case that the acceptance period could be extended. The judge held that the offer could not be valid under Part 36 because the additional words had introduced a term inconsistent with the rule.
>
> 6. That appears to be the situation here. Rule 36.5 states that the 'offer must (a) be in writing' – it was – '(b) make clear that it is made pursuant to Part 36' – it was – '(c) specify a period of not less than 21 days' and so on – it appears to have been. However, the rule then deals with interest and says that:
>
> > '(4) A Part 36 offer which offers to pay or offers to accept a sum of money will be treated as inclusive of all interest until … '
>
> 7. However the offer of 12 December 2017 states that it is full and final settlement of the costs detailed within the bill only and excludes interest.
>
> 8. So it seems to me that those terms are inconsistent with rule 36.5 in its true form and, accordingly, it is not a valid Part 36 offer. So the benefits which otherwise would be payable under rule 36.17(4) are not payable here.
>
> 9. Mr Farrow [costs lawyer for Mr King] has another string to his bow because he says the Practice Direction makes provision for an offer to deal with interest. But he also accepts, correctly, that the rule prevails over the Practice Direction and, as it seems to me, the provisions of CPR 36.5 prevail over the Practice Direction to that rule and, accordingly, he does not persuade me that the decision I have made is wrong on account of the different wording of the Practice Direction."

6. Mr King appealed, but Judge Dight, sitting with a costs judge as an assessor, dismissed the appeal. Judge Dight concluded that "it is not possible, in respect of ordinary substantive claims, to make an offer that is compliant with Part 36 but which excludes interest" (para 17 of the judgment) and that the position is no different as regards offers

made in detailed assessment proceedings. In the course of his judgment, Judge Dight said the following:

> "14. In my judgment, Part 36.5(4) does contain a mandatory obligation but the obligation is not directed expressly at the offeror but at the offeree and at the court. It is saying, in my judgment, that the recipient of the offer is to treat the offer as including all interest and that the court is to deal with it, having the same approach or in the same way. It is, in my judgment, impossible to construe that provision consistently with sub-rule (1) if it allows an offeror to excise interest but requires the recipient to treat it as including it.
>
> 15. Reading the two provisions, therefore, together, it must mean in my judgment that an offer which contains an offer to pay a sum of money has to include interest, otherwise it will not be capable of being a Part 36 offer. …
>
> 18. As to the Practice Direction in relation to assessment of costs there is an apparent conflict between the wording of Practice Direction 47, para 19 and Part 36 as I have just construed it but it seems to me that the Practice Direction cannot be used, or is not sufficiently strong, if I can put it that way, to alter the proper construction of 36.5 in substantive proceedings, nor to modify 36.5 in costs proceedings themselves.
>
> 19. … The likelihood is, and I do not mean to criticise anybody, that Practice Direction para 19 has been drafted without a sufficient eye on the proper construction of CPR 36.5 or on the issue which has arisen in the current proceedings and, in due course, I would invite the civil procedure rules committee to turn their mind to it again …"

7. Turning to an argument that CPR 36.5(4) "means that whatever the wording used in the offer relating to interest, the party receiving the offer and the court are to treat the offer as including interest" (para 8(3) of the judgment), Judge Dight said in para 25:

> "It is, effectively, a construction argument that requires us to excise the last three words [viz. 'but excludes interest']. For those reasons, therefore, in my judgment, it is not open to the court to treat an offer which purports to exclude interest as included and, therefore, render it a Part 36 compliant offer."

Relevant Rules

CPR Part 36

8. As is stated in CPR 36.1(1), CPR Part 36 contains a "self-contained procedural code" about offers to settle made pursuant to the procedure set out in it. "[G]eneral rules" about such offers are to be found in Section I of Part 36, comprising CPR 36.2 to 36.23. CPR 36.2(2) explains that, while nothing in Section I prevents a party making an offer to settle in whatever way that party chooses, "if the offer is not made in accordance with rule 36.5, it will not have the consequences specified in this Section". CPR 36.2(3) specifies that a Part 36 offer:

> "may be made in respect of the whole, or part of, or any issue that arises in –
>
> (a) a claim, counterclaim or other additional claim; or
>
> (b) an appeal or cross-appeal from a decision made at a trial."

9. CPR 36.5, which is headed "Form and content of a Part 36 offer", provides as follows:

> "(1) A Part 36 offer must –
>
> (a) be in writing;
>
> (b) make clear that it is made pursuant to Part 36;
>
> (c) specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with rule 36.13 or 36.20 if the offer is accepted;
>
> (d) 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; and
>
> (e) state whether it takes into account any counterclaim. …
>
> (2) Paragraph (1)(c) does not apply if the offer is made less than 21 days before the start of a trial.
>
> (3) In appropriate cases, a Part 36 offer must contain such further information as is required by rule 36.18 (personal injury claims for future pecuniary loss), rule 36.19 (offer to settle a claim for provisional damages), and rule 36.22 (deduction of benefits).

(4) A Part 36 offer which offers to pay or offers to accept a sum of money will be treated as inclusive of all interest until –

(a) the date on which the period specified under rule 36.5(1)(c) expires; or

(b) if rule 36.5(2) applies, a date 21 days after the date the offer was made."

10. There follows a rule directed at offers by defendants. CPR 36.6(1) stipulates:

"Subject to rules 36.18(3) and 36.19(1), a Part 36 offer by a defendant to pay a sum of money in settlement of a claim must be an offer to pay a single sum of money."

11. A number of subsequent rules deal with the consequences of a Part 36 offer being accepted. CPR 36.13(1), addressing "Costs consequences of acceptance of a Part 36 offer", states that, subject to certain exceptions, "where a Part 36 offer is accepted within the relevant period the claimant will be entitled to the costs of the proceedings … up to the date on which notice of acceptance was served on the offeror". That, however, is subject to CPR 36.13(4), which reads:

"Where –

(a) a Part 36 offer which was made less than 21 days before the start of a trial is accepted; or

(b) a Part 36 offer which relates to the whole of the claim is accepted after expiry of the relevant period; or

(c) subject to para (2), a Part 36 offer which does not relate to the whole of the claim is accepted at any time,

the liability for costs must be determined by the court unless the parties have agreed the costs."

12. CPR 36.14 is concerned, as its heading indicates, with "Other effects of acceptance of a Part 36 offer". So far as relevant, it provides:

"(1) If a Part 36 offer is accepted, the claim will be stayed.

(2) In the case of acceptance of a Part 36 offer which relates to the whole claim, the stay will be upon the terms of the offer.

(3) If a Part 36 offer which relates to part only of the claim is accepted, the claim will be stayed as to that part upon the terms of the offer. …

(5) Any stay arising under this rule will not affect the power of the court –

(a) to enforce the terms of a Part 36 offer; or

(b) to deal with any question of costs (including interest on costs) relating to the proceedings."

13. CPR 36.17 relates to "Costs consequences following judgment". Where "judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer", then (subject to an immaterial exception) in accordance with CPR 36.17(4):

"the court must, unless it considers it unjust to do so, order that the claimant is entitled to –

(a) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;

(b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;

(c) interest on those costs at a rate not exceeding 10% above base rate; and

(d) provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below to an amount which is –

(i) the sum awarded to the claimant by the court; or

(ii) where there is no monetary award, the sum awarded to the claimant by the court in respect of costs –

Amount awarded by the court	*Prescribed percentage*
Up to £500,000	10% of the amount awarded
Above £500,000	10% of the first £500,000 and (subject to the limit of

£75,000) 5% of any amount above that figure."

Where, however, the court awards interest under CPR 36.17 and also awards interest on the same sum and for the same period under any other power, the total rate of interest must not exceed 10% above base rate: see CPR 36.17(6).

14. A specific rule, CPR 36.20, is in point where a claim "no longer continues under the RTA or EL/PL Protocol pursuant to rule 45.29A(1)" or "is one to which the Pre-Action Protocol for Resolution of Package Travel Claims applies" (see CPR 36.20(1)). That includes this:

"(2) Where a Part 36 offer is accepted within the relevant period, the claimant is entitled to the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 for the stage applicable at the date on which notice of acceptance was served on the offeror.

(3) Where –

(a) a defendant's Part 36 offer relates to part only of the claim; and

(b) at the time of serving notice of acceptance within the relevant period the claimant abandons the balance of the claim,

the claimant will be entitled to the fixed costs in para (2)."

CPR Part 47

15. CPR Part 47 contains rules relating to the detailed assessment of costs.

16. CPR 47.20, which is devoted to the costs of detailed assessment proceedings, nowadays provides for the application of CPR Part 36 (see CPR 47.20(4) and (7)). CPR 47.20 reads:

"(1) The receiving party is entitled to the costs of the detailed assessment proceedings except where –

(a) the provisions of any Act, any of these Rules or any relevant practice direction provide otherwise; or

(b) the court makes some other order in relation to all or part of the costs of the detailed assessment proceedings. …

(3) In deciding whether to make some other order, the court must have regard to all the circumstances, including –

(a) the conduct of all the parties;

(b) the amount, if any, by which the bill of costs has been reduced; and

(c) whether it was reasonable for a party to claim the costs of a particular item or to dispute that item.

(4) The provisions of Part 36 apply to the costs of detailed assessment proceedings with the following modifications –

(a) '*claimant*' refers to 'receiving party' and '*defendant*' refers to 'paying party';

(b) '*trial*' refers to 'detailed assessment hearing'; …

(e) a reference to 'judgment being entered' is to the completion of the detailed assessment, and references to a 'judgment' being advantageous or otherwise are to the outcome of the detailed assessment. …

(7) For the purposes of rule 36.17, detailed assessment proceedings are to be regarded as an independent claim."

17. CPR 47.20 is supplemented by para 19 of PD 47. That is in these terms:

"Where an offer to settle is made, whether under Part 36 or otherwise, it should specify whether or not it is intended to be inclusive of the cost of preparation of the bill, interest and VAT. Unless the offer states otherwise it will be treated as being inclusive of these."

18. There was also reference in submissions to CPR 47.8 and 47.14. The former provides:

"(1) Where the receiving party fails to commence detailed assessment proceedings within the period specified –

(a) in rule 47.7; or

(b) by any direction of the court,

the paying party may apply for an order requiring the receiving party to commence detailed assessment proceedings within such time as the court may specify.

(2) On an application under para (1), the court may direct that, unless the receiving party commences detailed assessment proceedings

within the time specified by the court, all or part of the costs to which the receiving party would otherwise be entitled will be disallowed.

(3) If –

(a) the paying party has not made an application in accordance with para (1); and

(b) the receiving party commences the proceedings later than the period specified in rule 47.7,

the court may disallow all or part of the interest otherwise payable to the receiving party under –

(i) s 17 of the Judgments Act 1838; or

(ii) s 74 of the County Courts Act 1984,

but will not impose any other sanction except in accordance with rule 44.11 (powers in relation to misconduct) …"

CPR 47.14 states:

"(1) Where points of dispute are served in accordance with this Part, the receiving party must file a request for a detailed assessment hearing within 3 months of the expiry of the period for commencing detailed assessment proceedings as specified –

(a) in rule 47.7; or

(b) by any direction of the court.

(2) Where the receiving party fails to file a request in accordance with para (1), the paying party may apply for an order requiring the receiving party to file the request within such time as the court may specify. …

(4) If –

(a) the paying party has not made an application in accordance with para (2); and

(b) the receiving party files a request for a detailed assessment hearing later than the period specified in para (1),

the court may disallow all or part of the interest otherwise payable to the receiving party under –

(i) s 17 of the Judgments Act 1838; or

(ii) s 74 of the County Courts Act 1984,

but will not impose any other sanction except in accordance with rule 44.11 (powers in relation to misconduct) ...."

Antecedents

19. CPR Part 36 has been re-cast more than once since it was first introduced. In its original form, Part 36 distinguished between payments into court ("Part 36 payments") and other offers of settlement ("Part 36 offers"). CPR 36.5(3) and 36.5(2), dealing respectively with Part 36 offers and Part 36 payments, required the details set out in CPR 36.22(2) to be given if a Part 36 offer or payment was "expressed not to be inclusive of interest". CPR 36.22 stated:

"(1) Unless–

(a) a claimant's Part 36 offer which offers to accept a sum of money; or

(b) a Part 36 payment notice,

indicates to the contrary, any such offer or payment will be treated as inclusive of all interest until the last date on which it could be accepted without needing the permission of the court.

(2) Where a claimant's Part 36 offer or Part 36 payment notice is expressed not to be inclusive of interest, the offer or notice must state –

(a) whether interest is offered; and

(b) if so, the amount offered, the rate or rates offered and the period or periods for which it is offered."

20. That version of CPR Part 36 was replaced with effect from 6 April 2007. Part 36 payments were dispensed with. The new CPR 36.1(2) stated that an offer would not have the costs and other consequences specified later in Part 36 if it was "not made in accordance with rule 36.2". CPR 36.2(2) provided that a Part 36 offer:

"must –

(a) be in writing;

(b) state on its face that it is intended to have the consequences of Part 36;

(c) specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with rule 36.10 if the offer is accepted;

(d) 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; and

(e) state whether it takes into account any counterclaim."

The predecessor to what is now CPR 36.5(4) was then to be found in CPR 36.3, headed "Part 36 offers – general provisions", which included this as CPR 36.3(3):

"A Part 36 offer which offers to pay or offers to accept a sum of money will be treated as inclusive of all interest until –

(a) the date on which the period stated under rule 36.2(2)(c) expires; or

(b) if rule 36.2(3) applies, a date 21 days after the date the offer was made."

This corresponded closely to the former CPR 36.22(1), but there was no longer either any reference to the possibility of an offer "indicat[ing] to the contrary" or anything comparable to the old CPR 36.22(2).

21. CPR Part 36 was again the subject of substantial changes with effect from 6 April 2015, when it took on its current form.

22. CPR Part 47 has also been the subject of revision. Until April 2013, there was no mention of CPR Part 36. CPR 47.19 catered for "Offers to settle without prejudice save as to costs of the detailed assessment proceedings", following the *Calderbank* approach. At that time, para 46.2 of the Costs Practice Direction, supplementing CPR 47.19, read:

"Where an offer to settle is made it should specify whether or not it is intended to be inclusive of the cost of preparation of the bill, interest and value added tax (VAT). The offer may include or exclude some or all of these items but the position must be made clear on the face of the offer so that the offeree is clear about the terms of the offer when it is being considered. Unless the offer states otherwise, the offer will be treated as being inclusive of all these items."

The Issues

23. Three issues arise:

i) Can a Part 36 offer generally exclude interest?
ii) If not, can a Part 36 offer nevertheless exclude interest in the context of detailed assessment proceedings?
iii) Is the offer made on Mr King's behalf on 12 December 2017 to be treated as inclusive of interest as a result of CPR 36.5(4)?

24. I shall take these in turn.

Issue (i): The General Position

25. It was common ground between the parties that an offer which fails to comply with the requirements of CPR Part 36 in an essential respect will not take effect as a Part 36 offer even if it is expressed to be one. Authority to that effect can be found in, for example, *Mitchell* v *James* [2002] EWCA Civ 997; [2004] 1 WLR 158, *C* v *D* [2011] EWCA Civ 646; [2012] 1 WLR 1962, *Shaw* v *Merthyr Tydfil County Borough* [2014] EWCA Civ 1678; [2015] PIQR P8 and *James* v *James* [2018] EWHC 242 (Ch); [2018] 1 Costs LR 175. In *Mitchell* v *James* (where an offer had provided for the parties to bear their own costs) and *James* v *James* (where an offer had provided for the offeror's costs to be paid up to the end of the "relevant period" rather than merely the date of acceptance of the offer), offers containing terms as to costs which were inconsistent with Part 36 were held not to be Part 36 offers. In *C* v *D*, the Court of Appeal concluded that "the new Part 36 regime cannot accommodate a time-limited offer", notwithstanding the fact that Part 36 did "not contain an express exclusion of a time-limited offer", the "essence of the matter" being that "a Part 36 offer, to have effect in terms of costs consequences after trial, has to be an offer which has not been withdrawn, but has remained on the table" (Rix LJ at paras 40 and 42). In *Shaw* v *Merthyr Tydfil County Borough*, an offer "did not satisfy the mandatory requirements of Part 36" and so "was not a Part 36 offer, even though the letter described it as one" (Maurice Kay LJ at para 17).

26. However, Mr George McDonald, who appeared for Mr King, argued that the principle seen in these cases has no application where a party makes an offer exclusive of interest. He advanced two key propositions. In the first place, he submitted that CPR 36.5(4) does not impose a mandatory requirement but merely operates as a deeming

provision, so that an offer which says nothing about interest is taken to include it. Secondly, he said that, whether or not his first point was correct, there could be no objection to an offer excluding interest because CPR Part 36 allows an offer to be limited to part of a claim.

27. In support of the first of these contentions, Mr McDonald pointed out that, unlike CPR 36.5(1), CPR 36.5(4) does not use the word "must". Moreover, the version of CPR Part 36 which applied until April 2015 spoke of an offer not made in accordance with *CPR 36.2* not having the costs and other consequences for which Part 36 provided and the present-day CPR 36.5(4) is derived from what was then CPR 36.3, not CPR 36.2. Further, it is implicit in the fact that CPR 36.5(4) opens with the words "A Part 36 offer" that it is dealing with an effective Part 36 offer. That CPR 36.5(4) does not preclude offers exclusive of interest is also, Mr McDonald suggested, apparent from para 19 of PD 47, providing as it does for "an offer to settle … made … under Part 36" to "specify whether or not it is intended to be inclusive of … interest". That could not have been appropriate, Mr McDonald said, if a Part 36 offer necessarily had to be inclusive of interest.

28. I can dispose of the last of these points at once. There can be no question of para 19 of PD 47 controlling the interpretation of CPR Part 36. Practice Directions are, as May LJ observed in *Godwin* v *Swindon Borough Council* [2001] EWCA Civ 1478; [2002] 1 WLR 997 at para 11, "at best a weak aid to the interpretation of the rules themselves". In *U* v *Liverpool City Council* [2005] EWCA Civ 475; [2005] 1 WLR 2657, Brooke LJ, giving the judgment of the court, noted at para 48 that a Practice Direction "has no legislative force" and went on:

> "Practice directions provide invaluable guidance to matters of practice in the civil courts, but in so far as they contain statements of the law which are wrong they carry no authority at all."

29. There are particular reasons for attaching little significance to para 19 of PD 47 in the context of Issue (i). It supplements CPR Part 47, not CPR Part 36 itself. More than that, it dates from 2013 whereas the current version of Part 36 was introduced in 2015 and its predecessor took effect in 2007. The arrival of para 19 of PD 47 can neither have altered the meaning of something that had already been in force for a number of years nor be taken as reliable guidance to the construction

of a text that did not yet exist. On top of that, the terms of para 19 of PD 47 can reasonably be attributed to a less-than-perfect attempt to adapt the old para 46.2 of the Costs Practice Direction to take account of the fact that Part 36 was now to feature in Part 47.

30. I do not think it is important, either, that CPR 36.5(4) begins with the words "A Part 36 offer". It cannot be inferred from this that a valid Part 36 offer need not include interest. CPR 36.5(1) also starts "A Part 36 offer", but there is no doubt that an offer which fails to comply with the requirements set out there does not take effect as a Part 36 offer.

31. Nor, as it appears to me, is it of any assistance to Mr McDonald that predecessors of CPR 36.5(4) and CPR 36.5(1)–(3) were formerly in separate rules (viz. CPR 36.3 and CPR 36.2). To the contrary, the fact that the old CPR 36.2 and 36.3(3) have been now been brought together in CPR 36.5 tends to support the City's case. I agree with Mr Jamie Carpenter, who appeared for the City, that the change is susceptible of the interpretation that the Civil Procedure Rules Committee was trying to make plain that the current CPR 36.5(4), like the remainder of CPR 35.5, *would* be mandatory.

32. Mr McDonald stressed the omission of the word "must" from CPR 36.5(4). It is used in both CPR 36.5(1) and CPR 36.5(3), but not in CPR 36.5(4). The difference, Mr McDonald submitted, was deliberate. CPR 36.5(4) was not meant to be mandatory.

33. However, CPR 36.2(2) draws no distinction between CPR 36.5(1)–(3) and CPR 36.5(4). It states simply that an offer "not made in accordance with rule 36.5" will not have the consequences specified in the Section. There is, moreover, no single way of indicating that something is mandatory. CPR 36.5(4) states that a Part 36 offer "will be treated as inclusive of all interest". That can perfectly well be read as indicating that an offer which is not to include interest cannot be a valid Part 36 offer. Mr Carpenter suggested that CPR 36.5(4) was framed as it was because it performs a double function: both barring offers that leave interest over and also catering for offers that are simply silent as to interest. There is force in this argument, but in any case Mr McDonald is, in effect, seeking to import words such as "unless otherwise stated" into CPR 36.5(4). The version of CPR Part 36 that applied up to 2007 had similar words: "Unless – (a) a claimant's Part 36 offer which offers to accept a sum of money; or (b) a Part 36 payment notice, indicates to the contrary" (CPR 36.22(1),

quoted in para 19 above). The Civil Procedure Rules Committee did not choose to include anything similar in either the next version of Part 36 (see para 20 above) or the current CPR 36.5(4). In the circumstances, it seems to me that CPR 36.5(4) is mandatory.

34. There remains to be considered, however, Mr McDonald's other principal contention on this part of the case: that there can be no objection to an offer excluding interest because CPR Part 36 allows an offer to be limited to "part" of a claim. In that connection, Mr McDonald relied on CPR 36.2(3), which states in terms that a Part 36 offer may be made "in respect of the whole, or part of, or any issue that arises in" a claim, counterclaim, additional claim, appeal or cross-appeal. Interest, Mr McDonald argued, must be capable of representing a "part" of a claim, and so too must the *balance* of a claim, excluding interest. Further, there is no inconsistency with CPR 36.5(4) since that applies only to offers to pay or accept "a sum of money" and an offer exclusive of interest is more than that. On top of that, there are, Mr McDonald submitted, good reasons why parties should be able to make Part 36 offers exclusive of interest. They should be encouraged to settle as much as they can and, he said, issues in relation to interest should not be allowed to be barriers to settlement.

35. I cannot myself accept these submissions. In the first place, while it is undoubtedly desirable for disputes to be resolved by agreement, the "self-contained procedural code" comprised in CPR Part 36 is "carefully structured and highly prescriptive" (to quote Moore-Bick LJ in *Gibbon* v *Manchester City Council* [2010] EWCA Civ 726; [2010] 1 WLR 2081, at para 4). The regime is, designedly, relatively inflexible. A party wishing to make an offer which does not meet the requirements of Part 36 is free, however, to do so outside that code.

36. Secondly, it seems to me that an offer of "£x exclusive of interest" would naturally be regarded as one of "a sum of money" within CPR 36.5(4). The offeror is, after all, offering nothing other than a sum of money.

37. Thirdly, CPR 36.6 lends support to that view. That stipulates that an offer by a defendant to pay a sum of money in settlement of a claim "must be an offer to pay a single sum of money". If an offer of "£x exclusive of interest" were not one of "a sum of money" within the meaning of CPR 36.5(4), it could hardly be one of "a single sum

of money" and so someone wishing to make such an offer could not comply with CPR 36.6. It is true that CPR 36.6 is limited to offers by defendants, but it would be very odd if a claimant were free to make an offer exclusive of interest while a defendant could not.

38. Fourthly, there is a further respect in which the structure of CPR Part 36 indicates that an offer exclusive of interest cannot be regarded as an offer in respect of "part" of a claim. CPR 36.13(4) provides that, where a Part 36 offer "which does not relate to the whole of the claim is accepted", "the liability for costs must be determined by the court unless the parties have agreed the costs". If, therefore, an offer excluding costs were taken to be one in respect of part of a claim, acceptance would not bring any automatic entitlement to costs and, absent agreement, costs would have to be the subject of a court decision. To a significant extent, Part 36 would have failed to achieve the simplicity and certainty that the Civil Procedure Rules Committee appears to have been seeking.

39. Fifthly, the history of CPR Part 36 suggests that an offer exclusive of interest is not one in respect of "part" of a claim. Under the version of Part 36 which was in force until 2007, a Part 36 offer could equally relate to just part of a claim (see the old CPR 36.5(2)), but it is plain, I think, that it was not possible to make an offer leaving interest at large. An offer had to be inclusive of interest, to state that no interest was offered, or to give the particulars specified in CPR 36.22(2)(b). When in 2007 reference to an offer being treated as inclusive of interest "unless" indicated "to the contrary" was excised, together with what had been CPR 36.22(2), the Civil Procedure Rules Committee's intention is unlikely to have been to allow "£x exclusive of interest" to be seen as part of a claim, and so potentially the subject of an offer under which interest would remain entirely open, when that had not previously been the case. It is much more plausible that the Committee was aiming to produce a simpler, but more prescriptive, code under which it would not be proper to provide for interest to be determined in the future at all, even with the benefit of the CPR 36.22(2)(b) particulars. There is, moreover, no reason to suppose that any change in this respect was intended when Part 36 was re-cast again in 2015.

40. In my view, an offer of "£x exclusive of interest" would not have been one relating to "part" of a claim under the original version of CPR Part 36 and is no more to be seen as one in respect of "part"

of a claim for the purposes of the present-day Part 36. Part 36 proceeds on the basis that interest is ancillary to a claim, not a severable part of it. Just as a party cannot make a Part 36 offer providing for costs consequences other than those prescribed by Part 36, so a Part 36 offer must, if it offers to pay or accept a sum of money, be inclusive of all interest, as CPR 36.5(4) says. Interest cannot be hived off. True it is that, on occasion, there may be room for substantial dispute as regards interest and that the amount at stake could be large, but the same could be said about costs.

41. In short, it seems to me that a Part 36 offer cannot generally exclude interest.

Issue (ii): Detailed Assessment Proceedings

42. Is the position different where an offer is made in the context of detailed assessment proceedings?

43. When a party has obtained a judgment in his favour, interest will be payable at 8% a year under s 17 of the Judgments Act 1838 (in the case of a High Court judgment) or s 74 of the County Courts Act 1984 (in the case of a county court judgment). If costs have been awarded, the right to interest will extend to those and, unless the court orders otherwise, the interest will run from the date of the judgment and not merely from that on which the costs are assessed (see *Hunt* v *RM Douglas (Roofing) Ltd* [1990] 1 AC 398). If, however, the receiving party is late commencing detailed assessment proceedings, the court may disallow all or part of the interest otherwise payable on the costs pursuant to CPR 47.8(3). Similarly, CPR 47.14(4) allows the court to disallow interest if the receiving party is slow to file a request for a detailed assessment hearing.

44. Pre-judgment, a claimant who is seeking interest is required by CPR 16.4 to include a statement to that effect in the particulars of claim. There is no such obligation as regards a notice of commencement initiating a detailed assessment, though a note included in the relevant practice form states, "Interest may be added to all High Court judgments and certain county court judgments of £5,000 or more under the Judgments Act 1838 and the County Courts Act 1984". Nor need the bill of costs itself provide details of interest claimed, though the receiving party or his representative must certify either that "No rulings have been made in this case which affects my/the receiving party's entitlement (if any) to interest on costs" or

that "The only rulings made in this case as to interest are as follows". Sometimes, Mr McDonald told us, arguments that interest should be disallowed under CPR 47.8 are included in paying parties' points of dispute. In contrast, contentions founded on CPR 47.14(4) are not found in points of dispute because a receiving party's obligation to request a detailed assessment hearing arises only after points of dispute have been served (see CPR 47.14(1)).

45. Mr McDonald argued that such matters mean that a Part 36 offer can be made exclusive of interest in the context of detailed assessment proceedings even if that it not possible more generally. He cited and endorsed Nicol J's analysis in *Horne* v *Prescot (No. 1) Ltd*. In that case, as in this one, a receiving party had made an interest-exclusive offer to dispose of detailed assessment proceedings. Nicol J held this to be a valid Part 36 offer.

46. Nicol J considered that the offer in question before him was one in respect of the *whole* of the claim. He noted in para 56 that the case was "not one where the claimant unduly delayed either in commencing the detailed assessment proceedings or in requesting a detailed assessment hearing" and in para 57 that, "[s]o far as this case was concerned, there were no issues regarding interest which the master had to decide" before saying in para 58:

> "Consequently, it seems to me that the offer which Fieldfisher llp made on 5 March 2018 was indeed for the whole of the claim in the detailed assessment proceedings."

In para 66, Nicol J said:

> "In my judgment, the right analysis is as follows:
>
> (i) The bill of costs would not have included interest. The bill of costs and the notice to commence the detailed assessment proceedings had been served well within time. No application had been, or could reasonably have been, made under rule 47.8 to disallow part of the period on which Judgment Act 1838 interest would run. Interest was simply no part of what the master would have to decide. Interest did not feature in the claim which was the detailed assessment proceedings.
>
> (ii) Accordingly, the offer of 5 March 2018 was rightly described as relating to the 'whole of the claim', that is the whole of the claim in

the detailed assessment proceedings. There was no severable part of that claim which concerned interest.

(iii) Interest would be payable on the costs and the costs of the detailed assessment proceedings, but that would be added automatically by virtue of the Judgments Act 1838: it did not need to be claimed.

(iv) Because of para 19 of Practice Direction 47 it was prudent for the solicitors to specify that the offer was exclusive of interest, otherwise the effect of the practice direction would be that the offer would be treated as being inclusive of interest (at least until the conclusion of the relevant period).

(v) But this qualification did not alter the fact that interest was no part of the claim and so the offer to settle was of the whole of the 'claim'.

…

(ix) The validity of the offer as a Part 36 offer was not affected by the inclusion of the words 'exclusive of interest'."

47. It is not entirely clear whether Nicol J considered the offer with which he was concerned to be one in respect of the whole of the claim (a) because, on the particular facts, the receiving party had "not … unduly delayed either in commencing the detailed assessment proceedings or in requesting a detailed assessment hearing" and so "there were no issues regarding interest which the master had to decide" or (b) because, as a general matter, interest "would be added automatically by virtue of the Judgments Act 1838" and "did not need to be claimed". Mr McDonald, however, argued for the latter while also pointing out that no issue as to disallowing interest under either CPR 47.8 or CPR 47.14 arose in the present case.

48. Mr McDonald further sought support for his submissions in *Hertel* v *Saunders* [2018] EWCA Civ 1831; [2018] 1 WLR 5852. That case concerned an offer made by defendants in respect of a new claim which had been indicated by the claimants by way of a proposed amendment to the particulars of claim, but which had not yet been the subject of a court order granting permission. The Court of Appeal concluded that CPR Part 36 did not apply because "the words 'claim', 'a part of a claim' or 'an issue' should be construed as meaning claims, parts of claims or issues which can be identified in or which arise from the pleadings" and do not "also include claims, parts of claims or issues which have not been pleaded but which, for example, may have

been mentioned in correspondence or in an informal conversation between solicitors". Coulson LJ explained in para 31:

> "In civil proceedings, claims/parts/issues can only properly be defined by reference to the pleadings. Indeed, that is the principal purpose of pleadings. It would introduce unnecessary and unwelcome uncertainty if claims/parts/issues were given a wide definition that did not seek to anchor them to the pleadings which the parties have exchanged."

"A new claim which has been intimated, but which is not part of the pleadings, is not therefore caught by rule 36.2(2)(d) (current rule 36.5(1)(d))", Coulson LJ said in para 33.

49. In the present case, Mr McDonald argued, Mr King did not need to claim interest in the notice of commencement and did not in fact do so. For good measure, interest did not feature in the City's points of dispute either. No "claim", "part of a claim" or "issue" could therefore be identified from the "pleadings" and, consistently with *Hertel* v *Saunders*, interest could not be regarded as comprised within Mr King's claim.

50. Mr Carpenter, however, argued that the fact that the offer at issue was made in the context of detailed assessment proceedings does not matter and that it is no more possible to have a valid Part 36 offer exclusive of costs in that context than others. I agree. My reasons include these:

i) CPR 47.20(4) provides for CPR Part 36 to apply to the cost of detailed assessment proceedings subject to certain modifications. None of the specified modifications bears on the present dispute;
ii) CPR 36.5(4), which as I have said I consider to be mandatory, states that an offer to accept a sum of money is to be treated as inclusive of "all interest". I can see no reason why those words should not extend to interest payable under s 17 of the Judgments Act 1838 or s 74 of the County Courts Act 1984. They are surely apt to apply to every species of interest, whether, say, awarded under s 35A of the Senior Courts Act 1981 or s 69 of the County Courts Act 1984, due as of right contractually, or arising under s 17 of the Judgments Act 1838 or s 74 of the County Courts Act 1984;
iii) That point is confirmed by CPR 36.17(6). The reference to "interest" there must encompass interest under s 17 of the

Judgments Act 1838 and s 74 of the County Courts Act 1984. The same word could be expected to bear the same meaning elsewhere in Part 36;

iv) *Hertel* v *Saunders* strikes me as something of a red herring. CPR 36.5(4) states in unequivocal terms that an offer to accept a sum of money "will be treated as inclusive of all interest". On any view, the interest which Mr King sought to exclude from his offer of 12 December 2017 was interest on the money that he was offering to accept. Whether or not, therefore, the interest is to be seen as "a claim", "part of a claim" or "issue", the offer had to include it if it was to satisfy CPR 36.5(4);

v) In any case, *Hertel* v *Saunders* involved a very different situation. Absent an amendment to the particulars of claim, the claimants simply could not assert entitlement to the new relief. In contrast, there is no doubt that Mr King was in a position to claim interest and to do so without raising the point in the notice of commencement. It is, in the circumstances, unrealistic to suppose that his claim did not encompass interest; and

vi) Nicol J does not seem to me, with respect, to have provided a satisfactory explanation of how CPR 36.5(4) could be reconciled with his approach. Certainly, there is no mention of CPR 36.5(4) in para 66 of his judgment.

51. In the circumstances, an offer exclusive of costs cannot, in my view, be a valid Part 36 offer even if made in respect of detailed assessment proceedings.

Issue (iii): The Offer

52. The last issue is whether, notwithstanding its terms, the offer of 12 December 2017 should be taken to have been inclusive of interest.

53. Mr McDonald's argument on this issue was based on CPR 36.5(4). Since, he said, that states that a Part 36 offer "will be treated as inclusive of all interest", the offer of 12 December 2017, which was expressly described as a "Part 36 offer", must be "treated as inclusive of all interest" regardless of the words "The offer … excludes interest".

54. To my mind, however, it is inconceivable that CPR 36.5(4) was meant to turn an offer specifically stated to be exclusive of interest into one including interest. That would grossly distort the offeror's intentions. Had the City accepted the offer, Mr King would have found

himself unable to claim interest even though he had said in terms that interest was to be excluded. Further, if on detailed assessment Mr King had been awarded, say, £49,000, he could have claimed to have beaten his £50,000 offer on the footing that the £50,000 was to be taken as representing a lesser figure plus interest even though the December 12 letter had said otherwise.

55. In my view, the true position is not that Mr King's offer is to be treated as inclusive of interest but that it did not comply with CPR 36.5(4). As Mr Carpenter said, the effect of CPR 36.5(4) is not to deem non-compliant offers to be compliant. It is to lay down a requirement of a compliant offer.

Conclusion

56. I would dismiss the appeal. In my view, it is not possible to make a valid Part 36 offer exclusive of interest either generally or in the context of detailed assessment proceedings. Further, I do not consider that there can be any question of taking the offer of 12 December 2017 to have been inclusive of interest when it stated precisely the opposite.

57. I should like, finally, to pay tribute to the quality of the submissions of both counsel.

58. **Coulson LJ:** I agree that, for the reasons given by Newey LJ, this appeal should be dismissed. It is appropriate to emphasise one or two points in my own words, principally because we are taking a different approach to Nicol J in *Horne* v *Prescot*. I set out my analysis briefly, under Issues (i) and (ii) only. Issue (iii) was unarguable, for the reasons explained by Newey LJ at paras 52–55 above.

Issue (i)

59. My starting point, as it should be for every judge considering the application or otherwise of CPR Part 36, is the warning given by Moore-Bick LJ in *Gibbon* v *Manchester City Council* [2010] 1 WLR 2081. He described Part 36 as "a carefully structured and highly prescriptive set of rules". He said that parties were not bound to follow those rules but that, if they wanted the benefits which flow from Part 36 – and they are substantial – they had to follow them in every respect. I note that Moore-Bick LJ's warning was given in respect of the previous version of Part 36 but, in my view, it applies with equal (if not more) force to the current, fuller version.

60. Rule 36.2(2) provides in the clearest language that "if the offer

is not made in accordance with rule 36.5, it will not have the consequences specified in this Section". The reference to rule 36.5 is unqualified: it is not a reference to some (but not other) parts of that rule; neither is it a reference which requires a careful parsing of rule 36.5 to see what might be regarded as a requirement and what not. If the offer is not in accordance with the entirety of rule 36.5, it cannot be a Part 36 offer.

61. Rule 36.5(4) specifies that any offer to pay a sum of money "will be treated as inclusive of all interest". That too is unqualified. It is not expressed to be (for example) a rule that applies "unless the offer says otherwise", the absence of which wording was fatal to the similar argument run by the unsuccessful offeror in *Mitchell* v *James* (see para 30 of the judgment in that case). Instead, the rule applies to every offer that wants to be treated as a Part 36 offer.

62. Mr McDonald spent some time arguing that, because the word "must" was not used, this was not a mandatory provision. He said that the words "will be treated as" gave rise to some form of rebuttable presumption. I reject that submission. The word "must" is not always required to convey a mandatory meaning. The words used in rule 36.5(4) in my view are sufficient to convey a mandatory requirement: that all sums offered by way of a valid Part 36 offer are deemed to be inclusive of interest. I note that in *Godwin* v *Swindon Borough Council* [2001] EWCA Civ 1478, this court construed the words "shall be deemed to be" in the old rule 6.7(1) as conveying a mandatory requirement to which there were no qualifications. I reach the same conclusion here.

63. In the present case, the appellant made an offer which was not in accordance with rule 36.5(4) because, for whatever reason, it excluded interest. That was not an offer within the terms of rule 36.5(4) and it was therefore not an offer which had the consequences of Part 36 (as spelt out in rule 36.2(2)).

64. The law reports are over-full of cases in which parties made offers outside the scope of Part 36 and then unsuccessfully sought to obtain the Part 36 benefits later. Thus, in *Mitchell and Others* v *James and Others* [2002] EWCA Civ 997, the terms in the offer as to costs were inconsistent with Part 36 (although they were not in breach of the mandatory requirements set out in rule 36.5(1)). This court held that the offer was therefore not in accordance with Part 36. And in both *C* v *D and Another* [2011] EWCA Civ 646, and *Shaw* v *Merthyr*

Tydfil County Borough [2014] EWCA Civ 1678, this court held that offers that sought to amend the time for acceptance stipulated by rule 36.5 were also outside Part 36.

65. The only contrary argument put forward by Mr McDonald which gave me some pause for thought was the submission that, if this approach was right, a party could not make an offer for a part of the claim, if that part was the principal claim excluding interest. He said that would be in contravention of rule 36.2(3), which permits Part 36 offers for "a part of a claim". However, I have concluded that argument is erroneous for two reasons.

66. First, I consider that an offer which seeks to compromise the principal claim, but which excludes interest, cannot be an offer within rule 36.2(3). The claim for interest is not truly a part of the principal claim for this purpose, but a separate issue which, for purposes of convenience, simplicity and certainty, is deemed to have been taken account of in the offer of the single sum. In that way, interest can be regarded in a similar way to costs: it may be very much in issue in any given case, but it is subservient to the principal claim, and is therefore dealt with separately under Part 36.

67. Secondly, if the proposition (that the offer can exclude interest because it is an offer for only part of the claim) is tested by reference to the rule, it leads to an uncertain result. If an offer is made for the part of the claim which *excludes* interest, that does not stop that same offer being deemed to be *inclusive* of interest by operation of rule 36.5(4). So how would the recipient know whether it includes interest (which is what the rule requires) or excludes interest (which is what the offer may say)? Certainty and clarity are vital in the proper operation of Part 36, and this interpretation would make for neither.

68. For these reasons, I would reject the appellant's case on Issue (i).

Issue (ii)

69. The question then becomes whether, if an offer excluding interest is outside Part 36 generally, can such an offer be regarded as within Part 36 when it is made in costs assessment proceedings? In my view, the right answer to that question is No. There are two main reasons for that.

70. The first is an application of the straightforward principle that the same words in the same part of the CPR cannot have two opposite

meanings, depending on the stage that the litigation has reached. That would be contrary to all the usual rules of construction.

71. The second reason is that I do not agree with the proposition that it is somehow impossible for interest to be in issue in costs assessment proceedings, because the rate and therefore the total amount due has been fixed by way of the underlying judgment. I accept that in most costs assessments, there will not be a dispute about interest. That was the case in *Horne* v *Prescot*. But it is not uncommon for the parties to argue about the period for which interest can apply, with the paying party taking a point about the delay on the part of the receiving party in producing its bill, and arguing that, in consequence, the claim for interest on those costs should be disallowed in whole or in part.

72. I accept that it is important that Part 36 continues to operate in a way that promotes settlements and provides proper protection for a party taking a realistic view of its position at the outset. But in costs assessment proceedings, that can easily be achieved by an offer letter that, in addition to the offer for costs, expressly addresses the interest on those costs, and (for example) identifies the period for which such interest is offered.

73. As to the other points that arise in respect of Issue (ii), I respectfully agree with the analysis at para 50 of the judgment of Newey LJ.

74. For these reasons, I too would dismiss the appeal.

75. **Arnold LJ:** I have not found this appeal easy to decide. There are two main points which have troubled me.

76. The first concerns issue (i). Rule 36.2(3), which forms part of a rule headed "Scope of this Section", is explicit that a Part 36 offer "may be made in respect of the whole, or part of, or any issue that arises in … a claim". That is why one of the mandatory requirements for a valid Part 36 offer specified in rule 36.5(1)(d) is that the offer must state "whether it relates to the whole of the claim or to part of it or an issue that arises in it and if so to which part or issue".

77. On the face of it, a claim for a principal sum and a claim for interest on that principal sum are both parts of a claim within the meaning of rule 36.2(3), or at very least, interest is an issue that arises in a claim. Indeed, rule 16.4(2) specifically requires a claimant who seeks interest to plead in their particulars of claim whether interest is

sought under the terms of a contract or under an enactment, and if so which, or on some other basis, and if so what; and if the principal claim is for a specified sum of money, to set out details of the interest claimed on that sum. Moreover, issues may arise in relation to a claim for interest which are entirely distinct from the issues between parties concerning the principal sum claimed. Such issues may be significant and substantial. For example, there may be a claim for compound interest in certain circumstances. In addition, there are circumstances in which the claimant may plead to recover interest as damages and in the alternative to recover the same sum as interest.

78. Accordingly, if considered in isolation, rules 36.2(3) and 36.5(1)(d) would appear to have the effect that a Part 36 offer may be made in respect of the principal sum claimed, but not in respect of the interest claimed, leaving the latter to be agreed separately or determined by the court.

79. I turn then to consider the effect of rule 36.5(4). The first point to note is that rule 36.2(2) is explicit that "if the offer is not made in accordance with rule 36.5, it will not have the consequences specified in this Section". That embraces sub-rule (4) as well as sub-rules (1), (2) and (3). The second point is that sub-rule (4) is a part of a rule headed "Form and content of a Part 36 offer". The third point is that sub-rule (4) is expressed in unqualified and mandatory terms ("will be"), albeit those mandatory terms appear to be directed at the court rather than the offeror. In those circumstances I agree that, in order to be a valid Part 36 offer, the offer must not be inconsistent with rule 36.5(4) applying the reasoning in cases such as *Mitchell* v *James*.

80. The critical question is whether this means that a valid Part 36 offer cannot be made in respect of the principal only and excluding interest. If rule 36.5(4) is interpreted in that way, it would appear to be in conflict with rules 36.2(3) and 36.5(1)(d). In my view it would be desirable, if possible, to interpret rule 36.5(4) in a manner which avoids such a conflict. It should also be interpreted, if possible, in a manner that promotes the objective of Part 36, which is to encourage settlement, at least of parts of claims if not the whole of claims.

81. In the end, however, I have been persuaded that, for the reasons given by Newey LJ, it is not possible to interpret rule 36.5(4) as permitting a Part 36 offer which is exclusive of interest, and therefore rules 36.2(3) and 36.5(1)(d) must be read as being subject to that limitation.

82. Turning to issue (ii), in this case, as in *Horne* v *Prescot*, the claimant did not claim interest, nor was interest otherwise in issue, in the assessment proceedings. Rather the claimant's entitlement to interest had already been established by virtue of the consent order dated 20 February 2017 and the Judgments Act 1838. Thus the rate of the interest payable was fixed. The only possible issue was as to the period in respect of which interest was payable, but only if the claimant delayed and the defendant raised the issue under rule 47.8 or rule 47.14. But in this case the claimant did not delay and no issue was raised by the defendant. Accordingly, all that was in issue between the parties was the amount of the costs to which the claimant was entitled on assessment on the standard basis, to which interest would automatically be added. That will have been reflected in the notice of commencement and the points of dispute.

83. Accordingly, the offer dated 12 December 2017 was, as it said, an offer in respect of "the whole of the claim for costs within the Bill". The words "exclusive of interest" were evidently added to avoid PD47 para 19 deeming interest to be included.

84. In those circumstances I agree with much of the reasoning of Nicol J in *Horne* v *Prescot*. As Newey LJ points out, however, the problem with Nicol J's analysis is that it does not really address rule 36.5(4). Although I cannot help feeling that rule 36.5(4) is not intended to apply in these circumstances, there is nothing in its wording which prevents it from doing so. Nor is there anything in rule 47.20 which does so.

85. By contrast with issues (i) and (ii), issue (iii) causes no difficulty. I agree with Newey LJ that the offer cannot possibly be interpreted as meaning the opposite of what it said so far as interest is concerned.

86. Accordingly, I have reluctantly come to the conclusion that I agree that the appeal should be dismissed. It seems to me, however, that the issue merits consideration by the Civil Procedure Rules Committee. In my opinion there are arguments in favour of permitting Part 36 offers to be made which are exclusive of interest, at least in assessment proceedings if not in the general run of claims. If the Committee decides, however, that offers exclusive of interest should not be permitted, then I would suggest that rule 36.5 be amended to say so in terms. At the very least, PD47 para 19 should be revised.

George McDonald (instructed by Pattinson & Brewer) appeared for the appellant.

Jamie Carpenter (instructed by BLM) appeared for the respondent.