

[2022] EWHC 97 (Comm)

IN THE HIGH COURT OF JUSTICE

Case No. LM-2019-000175

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

THE LONDON CIRCUIT COMMERCIAL COURT (QBD)

SHORTER TRIALS SCHEME

Date:

Before :

HIS HONOUR JUDGE PEARCE SITTING AS A JUDGE OF THE HIGH COURT

Between :

THE HUNTSWORTH WINE COMPANY LIMITED

Claimant

- and -

LONDON CITY BOND LIMITED

Defendant

JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 19 January 2022 at 12:30 pm.

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BACKGROUND

1. In this action, Huntsworth brought a claim for losses sustained as a result of the theft of wine belonging to Huntsworth that was stored at a bonded warehouse owned and operated by London City Bond at Linton in Cambridgeshire. (An issue arises as to whether London City Bond is properly to be considered the claimant for certain reasons relating to its Part 36 offer. For the sake of clarity, I shall therefore not call the parties the claimant and the defendant, but rather their names, abbreviated to Huntsworth and LCB respectively.)
2. The case proceeded under the Shorter Trials Scheme pursuant to CPR PD57AB. Following a trial with oral evidence in July 2021 and written closing submissions thereafter, I handed down judgment on issues of liability and quantum on 22 October 2021.
3. In my judgment, I identified in all 12 issues as follows:
 - 3.1 Liability Issues on the Claim
 - Issue 1: Was there a contract on United Kingdom Warehousekeepers' Association ("UKWA") terms with a £1,000 uplift of liability?
 - Issue 2: Did LCB fail to take reasonable care of the goods?
 - Issue 3: Was the theft carried out with the Defendant's employees' complicity?
 - Issue 4: Is LCB in principle vicariously liable for any complicity by its employees?
 - Issue 5: Is the Defendant's potential liability pursuant to Issues 2 and/or 4 in principle excluded by the UKWA terms?
 - Issue 6: Is any exclusion of liability ineffective because of deviation from the contractual obligations?
 - Issue 7: Was Huntsworth induced to contract by a fraudulent misrepresentation/misstatement by LCB that CCTV was monitored at reasonable intervals?
 - Issue 8: Are the misrepresentation/misstatement claims time barred?
 - 3.2 Quantum Issues on the Claim
 - Issue 9: Is LCB entitled to rely on the limitation of liability?
 - Issue 10: What was the value of the goods stolen?
 - Issue 11: Is Huntsworth entitled to recover VAT?
 - 3.3 Issues on the Counterclaim
 - Issue 12: Is Huntsworth liable to reimburse LCB for excise duty?

4. I gave judgment for Huntsworth on the claim in the sum of £1,000 together with interest of £67.88 and judgment for LCB on the counterclaim in the sum of £3,662.34 together with interest of £243.07. Thus the net sum due from Huntsworth to LCB pursuant to my judgment was £2,837.53.

5. The Shorter Trials Scheme anticipates a summary assessment of the costs of any party in whose favour a costs order is made (see paragraph 22.59 of PD57AB). In order to accommodate this, the order on handing down judgment on 22 October 2021 (made by consent in this respect) provided the following in respect of the determination of costs issues, reflecting the scheme of PD57AB:

“4. Matters of costs and of associated matters arising under CPR Part 36 (if applicable) are reserved and shall be determined summarily pursuant to paragraph 2.59(a) of Practice Direction 57AB and the procedure set out in paragraph 5 below.

5. The apportionment and summary assessment of costs shall be determined by the Court without a hearing as follows:

(a) By 4pm on 12 November 2021 the Claimant and the Defendant shall each file and simultaneously exchange schedules of their costs incurred in the proceedings in the form described in paragraph 2.58 of Practice Direction 57AB.

(b) By 4pm on 26 November 2021 the Claimant and the Defendant shall each file and simultaneously exchange written submissions in respect of:

(i) the apportionment and summary assessment of costs;

(ii) the other party’s schedule of costs; and

(iii) any associated matters arising under CPR Part 36 (if applicable).

(c) By 4pm on 10 December 2021 the Claimant and the Defendant shall each file and simultaneously exchange their responses to the other party’s written submissions.

(d) The written submissions referred to at paragraphs 5(b)(NB: a formatting error occurred here in the order, but the meaning is clear) and 5(c) above shall in each case be limited to no more than 8 pages.

(e) The court file shall thereafter be referred to HHJ Pearce for determination of the issues.”

6. It follows that this judgment is concerned both with the incidence and the amount of costs. Matters are further complicated by the fact that LCB contends that it has obtained a better result than an offer that it had made during the course of the proceedings and therefore is entitled to the benefit of the provisions of CPR Part 36.

7. For the purpose of dealing with these issues I have the following documents/bundles:

7.1 From Huntsworth:

A summary of incurred costs dated 12.11.21

Costs submissions comprising 8 pages prepared by Mr Benedyk of counsel and dated 26 November 2021

A single page document containing two tables proposing an apportionment of costs on the basis that Huntsworth recover 55% of the total costs

A draft order relating to costs

A bundle headed "Correspondence Bundle"

A statement of costs totalling £16,428.27 relating to the Claimant's application to transfer to the shorter trials scheme

A statement of costs totalling £9,440 relating to the Claimant's specific disclosure application

Reply submissions comprising 8 pages prepared by Mr Benedyk of counsel and dated 14 December 2021

Bundle entitled "costs bundle" comprising 18 pages of extracts from Costs and Funding following the Civil Justice Reforms Questions and Answers, 7th Ed, Zuckerman on Civil Procedure Principles of Practice and Friston on Costs

7.2 From LCB:

Statement of costs in the form of Precedent H

Costs submissions comprising 45 paragraphs over 8 pages, neither signed nor dated

A draft order

A bundle comprising 327 pages headed "Bundle Index for Defendant's Costs Submissions"

Costs submissions comprising 32 paragraphs over 8 pages, again neither signed nor dated but clearly prepared in reply

A copy of the judgment in Pallet v MGN [2021] EWHC 76

8. The bundle prepared by the Defendant contains a copy of the draft judgment that I sent out. It should not do. The draft is clearly marked confidential. I shall refer not to the draft of the judgment in the bundle but rather the finalised judgment as handed down.

9. I also have available the trial bundle and the court file, which it has been necessary to access in order to check earlier version of the Statements of Case prior to amendment.

HUNTSWORTH'S POSITION

10. In summary, Huntsworth contends as follows:

10.1 This is a paradigm case for an issue-based costs order;

10.2 The Claimant won on issues 2, 3, 5, 9 and 10 as identified above;

10.3 The costs referable to those issues are in all about 55% of the total costs of the claim;

10.4 Accordingly Huntsworth should recover 55% of its costs of the claim, a total of £94,482;

- 10.5 Alternately Huntsworth should recover a proportion of its costs of the claim, namely 55% or £94,482;
- 10.6 The Defendant did not make a valid Part 36 offer to which the court can or should give effect;
- 10.7 The Defendant unreasonably approached the issue of mediation;
- 10.8 In so far as it obtains a costs order in its favour, the Defendant's costs in its schedule are excessive;
- 10.9 The costs to which LCB is entitled on an issues based costs order in respect of issues where Huntsworth was not successful (that is to say all other issues other than 2, 3, 5, 9 and 10 as defined above) is 45% of its reasonable and proportionate costs, that is £87,592.50.
- 10.10 Alternatively LCB should recover a proportion of its reasonable and proportionate costs of the claim, namely 45% or £87,592.50;
- 10.11 There have been several costs orders made during the course of proceedings to which effect needs to be given by determination of the incidence of costs and assessment of the amount of such costs, namely:
 - (a) The order of HHJ Pelling QC of 16 July 2020 at E266 providing that Huntsworth shall pay the reasonable costs of and occasioned by the amendment to the Particulars of Claim;
 - (b) The order of HHJ Pelling QC of 16 July 2020 at E267 providing that LCB shall pay the reasonable costs of and occasioned by amending the defence which are not occasioned by responding to amendments to the Particulars of Claim;
 - (c) The order of Mr Philip Marshall QC of 30 October 2020 at E274 providing that LCB shall pay the Claimant's costs of and occasioned by Huntsworth's application to transfer the claim to the Shorter Trials Scheme;
 - (d) The order of HHJ Pelling QC at E245 providing that the costs of Huntsworth's application for specific disclosure are reserved to the Trial Judge.

LCB'S POSITION

11. LCB's position in summary is:
 - 11.1 It made a valid Part 36 offer which was not accepted by Huntsworth and which should have the consequences set out in part 36;
 - 11.2 Huntsworth is the loser in the matter, having recovered only a small proportion of what it claimed, such award in any event being exceeded by the counterclaim, and should not be the beneficiary of an issues based costs order

- 11.3 In any event an issue based costs order, at least in respect of costs incurred subsequent to the making of the Party 36 offer, would be inconsistent with the scheme of Part 36;
- 11.4 Huntsworth's conduct in pursuing a claim for a trivial sum in an aggressive and disproportionate fashion;
- 11.5 Huntsworth's costs within its schedule are not adequately particularised and in any event are disproportionate and/or unreasonable in so far as they may in principle be recoverable;
- 11.6 LCB's own costs are, so far as recoverable, both reasonable and proportionate;
- 11.7 Huntsworth should recover only the court fee or at best a much more modest amount than that claimed in respect of the application to transfer to the Shorter Trials Scheme;
- 11.8 The costs of the specific disclosure application should be in the case;
- 11.9 The costs claimed by LCB in respect of amendments and reamendments are reasonable and proportionate.

THE RELEVANT LAW

12. The first matter to bear in mind is that this assessment of costs is a summary assessment. Accordingly, the Guide to the Summary Assessment of Costs is the appropriate starting point.
13. In so far as the court is concerned with costs pursuant to CPR 44:
 - 13.1 The general rule is that the unsuccessful party will pay the costs of the successful party, but the court may make another order (CPR44.2(2));
 - 13.2 Unless the court order otherwise, costs are to be assessed on the standard basis (CPR44.3(4));
 - 13.3 In assessing costs on either the standard or the indemnity basis, the court will not allow costs which have been unreasonably incurred or are unreasonable in amount (CPR44.3(1));
 - 13.4 Where costs are assessed on the standard basis the court will only allow costs that are proportionate to the matters in issue and will resolve any doubt as to whether costs were reasonably or proportionately incurred or reasonable or proportionate in amount in favour of the paying party (CPR44.3(2));
 - 13.5 Where costs are assessed on the indemnity basis, the court will resolve any doubt about whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party (CPR44.3(3)).
14. In determining the issue of proportionality, the court must have regard to whether the costs incurred bear a reasonable relationship to:

- 14.1 The sums in issue in the proceedings;
 - 14.2 The value of any non-monetary relief in issue in the proceedings;
 - 14.3 The complexity of the litigation;
 - 14.4 Any additional work generated by the conduct of the paying party;
 - 14.5 Any wider factors involved in the proceedings, such as reputation or public importance;
 - 14.6 Any additional work undertaken or expense incurred due to the vulnerability of a party or any witness.
15. The court will also have regard in deciding the amount of costs to the circumstances listed in CPR44.4:
- 15.1 the conduct of all the parties, including in particular –
 - a) conduct before, as well as during, the proceedings; and
 - b) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;
 - 15.2 the amount or value of any money or property involved;
 - 15.3 the importance of the matter to all the parties;
 - 15.4 the particular complexity of the matter or the difficulty or novelty of the questions raised;
 - 15.5 the skill, effort, specialised knowledge and responsibility involved;
 - 15.6 the time spent on the case;
 - 15.7 the place where and the circumstances in which work or any part of it was done; and
 - 15.8 the receiving party’s last approved or agreed budget.
16. CPR Part 36 sets out what is described at CPR36.1(1) as “*a self-contained procedural code about offers to settle made pursuant to the procedure set out in this Part (“Part 36 offers”).*” The form and content of a Part 36 offer are set out at CPR36.5. No issue arises here as to the form of the purported Part 36 offer made by LCB, but rather whether in fact it is entitled to the benefit of Part 36 on all of the circumstances.
17. As to the consequences of an effective claimant’s Part 36 offer, in so far as relevant CPR 36.17 provides:
- “(1) *Subject to rule 36.21, this rule applies where upon judgment being entered—*
- ...
- (b) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant’s Part 36 offer.*

(2) For the purposes of paragraph (1), in relation to any money claim or money element of a claim, “more advantageous” means better in money terms by any amount, however small, and “at least as advantageous” shall be construed accordingly.

...

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

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

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

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

(d) 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 ...

(7) Paragraphs (3) and (4) do not apply to a Part 36 offer—

(a) which has been withdrawn;

(b) which has been changed so that its terms are less advantageous to the offeree where the offeree has beaten the less advantageous offer;

(c) made less than 21 days before trial, unless the court has abridged the relevant period.”

THE PROPER APPROACH

18. The question as to whether LCB has made an effective Part 36 offer is the obvious starting point on the issues before the court since, if it has done so, other issues may fall away, at least in respect of costs incurred after the effective date of the offer, that is to say the expiry of the relevant period for acceptance of the offer. In respect of the period prior to the relevant period and otherwise in considering costs that are not awarded pursuant to Part 36, CPR Part 44 would have the court start from the position that the unsuccessful party should pay the successful party’s costs, but to consider whether a different order ought to follow, having regard in particular to the conduct of the parties, whether a party has succeeded on part of its case even if not wholly successful and any admissible offers to settle which do not have the costs consequences of Part 36. This will lead to determining the costs order(s) in principle in respect of the costs of the claim. The court then needs to quantify costs pursuant to that order, before dealing with the various interlocutory orders that have been made. Finally, if the Part 36 offer is found to have been effective, the court needs to consider the other potential consequences of CPR 36.16.

19. This points to dealing with the issues as follows:

19.1 The alleged Part 36 offer:

19.2 Success;

19.3 The conduct of the parties;

- 19.4 Admissible offers to settle;
- 19.5 The appropriate costs order in respect of the costs of the claim;
- 19.6 Quantification of costs under the costs order;
- 19.7 Interlocutory costs orders:
 - a) Order of 16 July 2020 that LCB shall pay the reasonable costs of and occasioned by amending the defence which are not occasioned by responding to amendments to the Particulars of Claim;
 - b) Order of 30 October 2020 that LCB shall pay the Claimant's costs of and occasioned by the Claimant's application to transfer the claim to the Shorter Trials Scheme and certain case management costs;
 - c) Order reserving the costs of the Claimant's application for specific disclosure to the Trial Judge.

THE ISSUES

A. THE ALLEGED PART 36 OFFER

20. The offer upon which LCB seeks to rely as having effect under Part 36 is contained in a letter of 20 August 2019 at D4/90, which states:

“We enclose with this letter our client's Part 36 Offer to settle (1) its claim against your client for £3,662.34 in excise duty paid on behalf of your client for which it is entitled to be reimbursed, and (2) also all aspects of your client's counterclaim against ours arising from or in connection with the theft of its wine from our client's possession; under the terms of the contract between our clients, the maximum liability on the part of our client (if it exists) is limited to £1,000. The offer is to accept a net payment of £2,000 by your client to ours in settlement of all these matters.”

21. The Part 36 offer itself is in Form N242A (the standard court form for a Part 36 offer) and is stated to relate to proceedings in the County Court in Aldershot. The claimant is named as LCB and the defendant as Huntsworth. It is stated to be a claimant's Part 36 offer made by LCB to settle the whole of the claim and counterclaim, on terms that *“London City Bond Ltd will accept the sum of £2,000.00 in aggregate settlement of (1) its claim for reimbursement of excise duty paid by it and (2) all aspects of Huntsworth Wine Company Ltd's counterclaim for damages arising from loss of its wine from London City Bond Ltd's possession”* and is said to take into account all of *“Huntsworth Wine Company Ltd's claims as set out in Keystone's letter of 13 June 2019 and draft particulars of claim enclosed with Keystone's letter of 12 July 2019.”*

22. Prior to the making of this offer, Huntsworth had:
 - 22.1 by letter dated 19 March 2019, intimated a claim relating to the theft of the wine:
 - 22.2 served draft Particulars of Claim, describing itself as claimant and LCB as defendant on 12 July 2019;
 - 22.3 served a Claimant's Part 36 offer on 24 July 2019.
23. Huntsworth contends that the result of this was that it was no open to LCB to make a Part 36 offer as if it were a claimant because it was not in fact the claimant. This is of significance because a claimant's Part 36 offer has a different consequence than a defendant's Part 36 offer:
 - 23.1 If the court is considering the question of the consequences upon an offer having not been accepted but thereafter been beaten by a sum awarded on judgment, a defendant's Part 36 offer will usually result in the offeror who obtains a judgment that is at least as advantageous to it as the offer being entitled to its costs on the standard basis from the expiry of the relevant period, whereas a claimant's Part 36 offer will usually result in the offeror who obtains a judgment more advantageous than the offer being entitled to its costs on the indemnity basis, with additional sums by way of interest and an uplift on the judgment itself;
 - 23.2 On the other hand, when looked at from the consequences of the offer being accepted, the acceptance of a defendant's Part 36 offer will usually lead to the offeree being entitled to its cost up to the date of acceptance, whereas the acceptance of a claimant's Part 36 offer will lead to the offeror being entitled to its costs on the standard basis up to the date of acceptance.
24. CPR36.7 makes clear that a Part 36 offer may be made at any time, including before the commencement of proceedings. This opens the possibility that, as here, there may be a dispute as to whether a party is entitled to avail itself of the benefits of a claimant's Part 36 offer since at the time of the offer being made there may be no clarity about who is the claimant.
25. Let us consider hypothetical circumstances, not far removed from those of this case, to examine the implications of the parties' submissions. X and Y are in a contractual relationship in which each deliver services to the other. Liabilities to pay for those services are constantly arising between the parties and it is common ground that each is entitled to set off the other's indebtedness to it against any claim by the other. The parties reach a position where X contends that Y owes it £80,000, whereas Y concedes that it owes £50,000. On the other hand, Y contends that X owes it £90,000, whereas X contends that its indebtedness is only £25,000. The net effect of this is that, if X is right in both respects, the balance due from Y to it is £55,000 (£80,000 less £25,000), whereas if Y is right in both respects, the balance due from X to it is £40,000 (£90,000

less £50,000). X makes a claimant's part 36 offer to settle the cross claims pursuant to which Y is required to pay £55,000. Various possibilities then arise:

- 25.1 Y accepts that offer. It is obliged to pay £55,000 plus X's costs up to the date on which notice of acceptance is served.
- 25.2 Y does not accept the offer, the matter goes to trial and the judge finds for X on the amounts due. Y would be obliged to pay £55,000, together with such of the costs consequences of CPR 36.17 as were applied, which unless the court considered it unjust to do so would include costs on the indemnity basis from the date on which the period for accepting the offer applied, interest at a rate not exceeding 10% above base rate on some or all of the judgment sum and the indemnity costs from the date on which the period for accepting the offer applied and an additional amount of £5,500;
- 25.3 Y does not accept the offer, the matter goes to the trial and the judge finds that a net sum is due to X but less than that of its offer. All things being equal (and absent any other Part 36 or admissible offers) X would be likely to be ordered to pay Y's costs on the standard basis.
- 25.4 Y does not accept the offer, the matter goes to trial and the judge finds that a net sum is due to Y. All things being equal (and again absent any other Part 36 or admissible offers), Y would expect to recover its costs on the standard basis.

26. Let us now assume that Y had confidence in its case as to the sums due and wished to do its best to force settlement. It could make an offer to settle. If however the fact that X had already made a claimant's offer to settle meant that Y could not equally do that, X would be limited either to making a defendant's offer to settle or to making some other offer that it sought to pray in aid on a costs argument, broadly speaking what is usually called a Calderbank offer. It is however not easy to see that any such offer could give anything like the comfort that a claimant's Part 36 offer made by Y could, nor the incentive to X to settle the claim. A defendant's Part 36 offer does not in any circumstances give a presumptive right to indemnity costs. Whilst an appropriately worded offer other than under Part 36 might have that effect, it is difficult to see how such an offer could give the other benefits of CPR36.17.

27. Thus, on Huntsworth's argument, by being the first to make its Part 36 offer, X has gained the potential advantage of the application of CPR 36.17, whilst simultaneously depriving Y of that advantage. If the consequence of X making such an offer is that Y cannot do so, X could choose tactically to make an early Part 36 offer requiring payment by Y of a sum of money then later, if that offer were not accepted, make a further offer to pay a sum to Y, at all times being confident that Y could not take advantage of making a claimant's Part 36 offer.

28. Alternatively, if the ability to make a claimant's Part 36 offer is dependent on being the party named as the claimant in proceedings (whether issued before or after the making of the offer), it might be a matter of chance who was entitled to take advantage of the features of a claimant's Part 36 offer. As Lloyd LJ pointed out in AF v BG [2009] EWCA Civ, referred to further below, it would be odd if the nominal defendant could only make a claimant's Part 36 offer by bringing separate proceedings for what in fact it claimed by way of counterclaim.
29. In my judgment, it would be a most unfortunate interpretation of the rules if the question as to who could make a claimant's Part 36 offer was determined simply by who made the first such offer or who issued proceedings where a counterclaim was probable. It is from this starting point that I examine Huntsworth's arguments.
30. Huntsworth's first point is that the proceedings in which LCB purported to make a Part 36 offer were "*fictional*". The offer assumed a claim for excise duty by LCB issued in the County Court at Aldershot with Huntsworth counterclaiming for losses as a result of the theft.
31. I find it puzzling to say that the offer was made in "*fictional proceedings*". It is true that the Part 36 offer contained details of a claim in the County Court at Aldershot that was never made. Presumably LCB contemplated that, if a claim were made, it would be suited to the County Court (which is clerly correct given the amounts in issue on LCB's case) and it would appear that Aldershot was named as the Court purely because it was the first in an alphabetic drop down menu. Equally, it seems that Huntsworth, by its draft Particulars of Claim stated to be in the London Circuit Commercial Court, had intimated a claim to be brought when it made its Part 36 offer. But that claim was no less "*fictional*" than the claim intimated by LCB in the sense that it had not yet been brought. The only difference is that Huntsworth's claim in the London Circuit Commercial Court came to pass whereas LCB's in the County Court did not. Given the amounts in issue on LCB's analysis of the case, it is hardly surprising that they did not in fact issue proceedings before making a Part 36 offer and even then contemplated issuing in the County Court, but I do not see that this detracts from the point that, on their case, they were owed a net sum and were entitled to bring a claim.
32. Second, Huntsworth draws attention to the comment of Flaux J as he then was in SuperGroup plc v JustEnough Software Corp [2014] EWHC 3620 (Comm) that "*Part 36 offers are made in respect of proceedings which are extant.*" That comment was made in the particular context of proceedings where notice of discontinuance had been served in respect of a claim. It could not properly be interpreted as meaning that there must be proceedings under way for a Part 36 offer to be made – if so, it would contradict the terms of CPR36.7.
33. Third, CPR36.4(1) states that a Part 36 offer shall have the consequences set out "*only in relation to the costs of the proceedings in respect of which it is made...*" Since there never were

proceedings in the County Court at Aldershot in which LCB was claimant and Huntsworth was defendant, Huntsworth contends that the offer could not encompass the costs of the subsequent proceedings in the London Circuit Commercial Court in which Huntsworth was claimant and LCB was defendant. However, CPR36.4 is expressed to relate to the application of Part 36 to appeals, not its application more generally, and CPR36.4(1) goes on after the passage relied on by Huntsworth to say “...and not in relation to the costs of any appeal from a decision in those proceedings.” If it is to be taken to mean that all Part 36 offers apply only once proceedings are under way, CPR36.7 would be of no effect because an offer could not be made in proceedings which were not yet under way. In my judgment, CPR36.4 has no relevance to the situation such as this where the court is not concerned with an appeal.

34. Fourth, Huntsworth says that it cannot simply be a matter for the offeror to declare whether an offer is in fact a Claimant’s Part 36 offer. As Lloyd LJ said in AF v BG at paragraph 16, “*Whether [a part 36 offer] is properly to be regarded as a claimant’s offer depends on the construction of the offer as a whole, not just on the statement by the offeror...*” The author of *Friston on Costs* points out that the decision of Hildyard J in Procter & Gamble v Svenska Cellulosa Aktiebolget SCA [2012] EWHC 2839 appears to be to different effect, since at paragraph 55 of the judgment Hildyard J stated, “*I do not think it is either required or permissible to go behind the formal status of the parties for the purposes of determining compliance with Part 36 and the prima facie effect of a compliant offer: it seems to me that for those purposes the description in the record is conclusive.*” However, it is not apparent that the decision in AF v BG was considered by Hildyard J. He was not concerned with the particular circumstance here, namely whether a party who is named as a defendant in proceedings can make a claimant’s Part 36 offer but rather the situation where it I contended that a nominal claimant who has made a Part 36 offer is in fact in reality the defendant. In rejecting the argument that someone who was nominally the claimant could not make a Part 36 offer, Hildyard J was not it seems to me departing from the principle stated by Lloyd LJ AF v BG at paragraph 16. If he were doing so, I would view Procter & Gamble v Svenska Cellulosa Aktiebolget SCA as decided *per incuriam* and would not follow it.
35. It is this last point that leads to the proper examination of the issues in the case. In AF v BG, the Court of Appeal considered an offer made by a defendant who, at the time of the offer, had not brought a counterclaim within the proceedings. Nevertheless, the offer asserted that he had a counterclaim which he intended to bring by way of amendment and offered to settle both the existing claim and the intended counterclaim by the defendant accepting payment of a sum of money in full and final settlement of both claims. The offer stated that it was intended to have the consequences of a claimant’s Part 36 offer and that in particular, if accepted, the offeree would be liable for the defendant’s costs up to the date of settlement and that, if the defendant

subsequently obtained a judgment at least as advantageous to him as the offer, he would seek costs on the indemnity basis and interest on damages at 10% above base rate.

36. The Court of Appeal held:

36.1 The offer stated that it was intended to have the consequences of a Part 36 as required by the terms of what was then CPR 36.2(2)(b) (now CPR36.5(1)(b)).

36.2 The offer clearly dealt with the potential consequences of the defendant obtaining a judgment more advantageous than the offer, in terms that were consistent only with it being a claimant's Part 36 offer.

36.3 The offer expressly related both to the claim and the proposed counterclaim;

36.4 The proposed counterclaim was a genuine claim whose nature was clear and which was for a stated amount, "*albeit a relatively modest amount compared to the sum that was at stake on the claim.*"

36.5 The offer stated that acceptance would constitute full and final acceptance both of the whole of the claim and the counterclaim.

37. In my judgment, all of these are features necessary or at least desirable for an offer to be interpreted as a claimant's Part 36 offer. Indeed the first would be a requirement of any effective Part 36 offer. But it is notable that the Court of Appeal was not deterred from a finding that the offer was a claimant's Part 36 offer, even though the offeror was not merely anticipated to be a defendant in due course (Huntsworth's argument as to LCB's position on the facts here) but actually was the defendant in the litigation and had not even made a counterclaim at the time of the offer. This demonstrates that the emphasis is to be laid not on a particular party's title within the litigation but rather on their role in making the offer – in that case a party who said that, when his counterclaim was before the court, he would recover a greater sum than the party named as claimant in the action was claiming.

38. The author of *Friston on Costs* at paragraph 17.38 postulates a list of features that may be relevant to whether an offer is in truth a claimant's Part 36 offer:

- "*The relevant facts of the litigation and, in particular, the perceived status of the offeror given the way in which the competing claims were presented at the time that the offer was made*";
- "*The label attached to the offer (either expressly, or by necessary implication), and whether any clarification was made about its effect (such as 'for the avoidance of doubt...')*";

- “Whether the offer is to pay a net amount of damages or debt or to receive a net amount”;
- “Whether the offer makes reference to paying or receiving costs in the event of it being accepted.”
- “Whether the offer refers to the costs consequences of non-acceptance in terms that have the hallmarks of being a defendant’s offer or a claimant’s offer and, in particular, whether it makes mention of any of the claimant-only benefits of making a Part offer...”
- “Whether the offer, by its terms is incompatible with it being either a claimant’s offer or a defendant’s offer.”

39. This list contains many of the same points made Lloyd LJ in AF v BG as well as the judgment of Coulson J as he then was in Van Oord Ltd v Allseas UK Ltd [2015] EWHC 3385 (TCC). It represents a useful list of factors for the court to have in mind so long as the emphasis in the first bullet point is the perceived status of the offeror in making the offer, not the offeror’s perceived status more generally in the litigation, for example whether the offeror is named as claimant or defendant.

40. Here, most of these factors points towards this being treated as claimant’s Part 36 offer:

40.1 At the time that the offer was made, LCB expressed its case to be that it was entitled to £3,662.34 by ways of excise duty from Huntsworth and that its maximum liability to Huntsworth for the theft was £1,000. These were the two claims that were subsequently made in the litigation. LCB asserting (rightly in the event) that there was a net sum due and owing from Huntsworth to it;

40.2 The offer is said to be a claimant’s Part 36 offer and names LCB as claimant and Huntsworth as defendant;

40.3 The offer was to receive a net sum, namely £2,000;

40.4 The offer refers to a liability on Huntsworth, as the defendant in the notice of offer, to pay the costs of LCB, as claimant, if the offer is accepted within 21 days of service of the notice;

40.5 The offer is incompatible with it being a defendant’s offer since, if it were, the statement that “*if the offer is accepted within 21 days of service of this notice, the defendant will be liable for the claimant’s costs in accordance with rule 36.1*” would not make sense given the definition of LCB as the claimant and Huntsworth as the defendant.

41. The factors against that interpretation are far weaker:

41.1 Huntsworth had itself already made a claimant's Part 36 offer. However, this cannot in my judgment bear much weight, given the problems identified above if parties are simply able to assert their status as claimant for all purposes by being the first to make such an offer.

41.2 The offer does not deal with consequences of non acceptance. A statement such as that made by Huntsworth in its offer of 24 July 2019, to the effect that, if the offer were not accepted and Huntsworth obtained a judgment which was equal to or more advantageous than the offer, Huntsworth would seek to rely on CPR 36.17 to recover costs on the indemnity basis, with enhanced interest and an enhanced award of damages, would certainly have put the nature of LCB's offer beyond dispute. However, I do not see its absence as being fatal to the interpretation of the offer as a claimant's Part 36 offer where, as here, the offer is only consistent with being such an offer. No one looking at this offer could consider it to be intended to be anything other than a claimant's Part 36 offer, given that it involved a net sum being payable to LCB and referred to Huntsworth paying LCB's cost if it were accepted.

42. In its solicitors' letter of 3 September 2019, Huntsworth argues, on similar lines to the points advanced now, that the offer was not a valid Part 36 offer at all. The letter accuses LCB of misdescribing the claim and abusing the process of the court. It also asserts that there is no genuine dispute relating to the claim for excise duty. However, in my judgment the letter is wrong in all of these respects:

42.1 For reasons identified above, it was open to LCB to make a claimant's Part 36 offer;

42.2 The assertion that it was not open to LCB to describe itself as claimant and Huntsworth as defendant is simply wrong and involves misunderstanding of the relevant law, as is apparent from the judgment of the Court of Appeal in AF v BG, given that the party who was constituted as the defendant in ongoing proceedings was entitled to make a claimant's Part 36 offer.

42.3 The correspondence passing between the parties shows that there was a genuine dispute about the liability for Huntsworth to reimburse LCB for excise duty, an issue that was pleaded and determined in the trial.

43. I note the assertion by Huntsworth at paragraph 7 of its submissions that

“Condoning D's approach would impermissibly and incoherently contort the Part 36 regime: (a) it would permit a defendant to avoid paying costs that are properly due to a claimant upon acceptance of a Part 36 offer; (b) worse still, it would permit a defendant to obtain costs benefits which properly belong to a claimant upon acceptance of a Part 36

offer; and (c) it would enable a defendant to effectively select whichever costs consequences it preferred following judgment, irrespective of its status in the litigation.”

All three points are wrong:

- 43.1 If in fact the balance of monies due between the parties led to a net sum being due and owing to LCB prior to the issue of proceedings (the result of my findings in this case), there is nothing remotely wrong in permitting LCB to recover its costs of recovering that net balance.
- 43.2 To suggest that this would permit a defendant to take advantage of a benefit that should only belong to a claimant is to confuse what a party is called (whether by themselves or the opposing party) with who the true claimant in the case is.
- 43.3 The result is not to enable a defendant to select the costs consequences it prefers. LCB chose to make an offer that it said reflected the true situation namely that money was due and owing to it in the event, it was proved right. In being permitted to make a costs offer which properly reflects what ought to be the burden of costs in such a situation cannot be described as permitting it to choose the costs consequences it prefers.

44. I also note the citation by Huntsworth of two other pieces of material:

44.1 A passage from Zukerman on Civil Procedure, Principle of Practice:

“...Where the dispute concerns a number of distinct matters (such as claims and counterclaims), the offer must clearly identify the matters to which it relates. As long as these basic requirements are complied with, the offer will be valid as a CPR 36 offer, even if the offeree considers that it contains insufficient information for them to make an informed commercial decision as to whether to accept it.”

44.2 Note 3 to the guidance to Form 242A:

1. This form may be used to settle the whole or part of any issue that arises in a claim, counter claim, other additional claim, appeal or cross appeal.

...

3. When used to make a Part 36 offer in respect of a counterclaim or other additional claim or a cross-appeal in certain appeal proceedings:

- *the party bringing the counterclaim, additional claim or cross-appeal can make (a) a claimant's offer on such counterclaim, additional claim or cross-appeal; or (b) a defendant's offer on the claim or appeal; and*

- *the party bringing the original claim or appeal can make (a) a claimant's offer on such claim or appeal; or (b) a defendant's offer on the counterclaim or cross-appeal.*

In any case the offeror should make plain whether the offer takes into account any adverse claim. For example, when making an offer on a claim, state whether it takes into account the counterclaim. Equally when making an offer on a counterclaim, state whether it takes into account the claim. (See rules 36.2(3), 20.2 & 20.3 in respect of counterclaims and other additional claims. See rules 36.2(3) and 36.4 in respect of cross-appeals.)

45. The passage from Zuckerman supports the proposition that the key to the making of Part 36 offers is clarity as to what the effect of the offer is. The Notes to Form 242A support the conclusion that, so long as there is sufficient clarity, a defendant bringing a counterclaim can make a claimant's offer on the counterclaim, provided that such offer makes clear whether it takes into account the adverse claim. LCB says that this requirement is met here because it is quite apparent that it was making a Part 36 offer based on its claim for duty, giving credit for Huntsworth's claim for damages arising from the loss of the wine.
46. For these reasons, I am satisfied that:
- 46.1 It was open to LCB to make a claimant's Part offer in circumstances in which it contended that Huntsworth's liability to it exceeded any liability it may have to Huntsworth;
- 46.2 The offer made by LCB on 20 August 2019 was a valid claimant's Part 36 offer within the meaning of CPR Part 36.
47. The "*relevant period*" for acceptance of that offer is said to have expired on 13 September 2019, that is to say 24 days later than the date of the offer. That date has not been disputed and I shall for the remainder of this judgment use the phrase "*relevant period*" to mean the period up until 13 September 2019.
48. It is clear that LCB has obtained a judgment that is more favourable than the offer that it made since, even without considering the issue of interest, the net sum payable to it under the judgment exceeds £2,000. It follows that CPR36.17(1)(b) applies (treating LCB as the claimant and Huntsworth as the defendant for these purposes) and, pursuant to CPR37.17(4), the court must make the various orders there specified unless it considers it unjust to do so.
49. Huntsworth draws attention to the fact that the fact that a party has obtained a judgment more advantageous to it than a Part 36 offer it made is not in and of itself a bar to the court making an issues based costs order. This is apparent from paragraph 38 of the judgment of Stanley Burnton LJ in Webb v Liverpool Women's NHS Foundation Trust [2016] EWCA Civ 365. LCB notes the

wording of CPR 36.1(1) which states “*This Part contains a self-contained procedural code about offers to settle made pursuant to the procedure set out in this Part...*” Relying on this rule, LCB asserts in its submissions that “*issue based costs can therefore only apply prior to the relevant period.*” I do not accept this to be correct. The amendment to CPR 36 introducing this wording had come into force prior to the Court of Appeal giving judgment in Webb v Liverpool. Whilst that court was concerned with the previous wording of the rule, Stanley Burnton LJ referred to this very principle at the beginning of paragraph 38 in which he said that “*Part 36 does not preclude the making of an issue-based or proportionate costs order.*” I can see no basis for concluding that his statement of principle about the power of the court to make such orders does not apply with equal force since as before the 2015 amendment that introduced the current wording of CPR36.1(1).

50. However as Stanley Burnton LJ went on to state in paragraph 38 of his judgment in Webb v Liverpool:

“a successful claimant is to be deprived of all or part of her costs only if the court considers that would be unjust for her to be awarded all or that part of her costs. That decision falls to be made having regard to “all the circumstances of the case”. In exercising its discretion, the Court must take into account that the unsuccessful defendant could have avoided the costs of the trial if it had accepted the claimant’s Part 36 offer, as it could and should have done.”

Thereafter Stanley Burnton LJ cited with approval the judgment of Briggs J as he then was in Smith v Trafford Housing Trust [2012] EWHC 3320 (CH):

“13. ... For present purposes, the principles which I derive from the authorities are as follows:

a) The question is not whether it was reasonable for the claimant to refuse the offer. Rather, the question is whether, having regard to all the circumstances and looking at the matter as it affects both parties, an order that the claimant should pay the costs would be unjust: see Matthews v Metal Improvements Co. Inc [2007] EWCA Civ 215, per Stanley Burnton J (sitting as an additional judge of the Court of Appeal) at paragraph 32.

b) Each case will turn on its own circumstances, but the court should be trying to assess “who in reality is the unsuccessful party and who has been responsible for the fact that costs have been incurred which should not have been”: see Factortame v Secretary of State [2002] EWCA Civ 22, per Walker LJ at paragraph 27.

c) The court is not constrained by the list of potentially relevant factors in Part 36.14(4) to have regard only to the circumstances of the making of the offer or the provision or otherwise of relevant information in relation to it. There is no limit to the types of circumstances which may, in a particular case, make it unjust that the ordinary consequences set out in Part 36.14 should follow: see Lilleyman v Lilleyman (judgment on costs) [2012] EWHC 1056 (Ch) at paragraph 16.

d) Nonetheless, the court does not have an unfettered discretion to depart from the ordinary cost consequences set out in Part 36.14. The burden on a claimant who has failed to beat the defendant’s Part 36 offer to show injustice is a formidable obstacle to the obtaining of a different costs order. If that were not so, then the salutary purpose of Part 36, in promoting compromise and the avoidance of unnecessary expenditure of costs and court time, would be undermined.”

51. The question then is whether it would be “unjust” to make the orders specified by CPR 36.17. In considering the argument that it would be unjust to make such an order in respect of the offeror’s costs, but that rather the court should consider making an issue based costs order, I bear in mind Lord Woolf MR’s comment in AEI Rediffusion Music Ltd v Phonographic Performance Limited [1999] 1 WLR 1507 at pp1522-1523:

“The most significant change of emphasis of the new Rules (sc relating to costs) is to require courts to be more ready to make separate orders which reflect the outcome of different issues. In doing this the new Rules are reflecting a change of practice which has already started. It is now clear that too robust an application of the “follow the event principle” encourages litigants to increase the costs of litigation, since it discourages litigants from being selective as to the points they take. If you recover all your costs as long as you win, you are encouraged to leave no stone unturned in your effort to do so.”

52. In F & C Alternative Investment (Holdings) Ltd v Barthelemy (No. 3) [2013] 1 WLR 548, Davies LJ made the point that, where a party chooses to pursue to trial issues on which it is ultimately unsuccessful at considerable expense, it may well be that the unsuccessful party should expect to have to pay the costs of that issue. That however was in the context of an offer that Davies LJ held was not a Part 36 offer. For that reason, he was not concerned with the point made by Briggs J at paragraph 13(d) of his judgment in Smith v Trafford Housing Trust as to the effect of a Part 36 and the “*formidable obstacle*” to a party who has failed to beat an opponent’s Part 36 offer being able to show such injustice.

53. It is of course true that Huntsworth succeeded on some of the issues in the case. I agree that it was the successful party on issues 2, 3 and 5. (LCB is correct in its responsive costs submissions to say that issue 5 was not identified in the agreed list of issues between the parties; however by its closing submissions at paragraph 77.2, LCB put in issue whether in fact the exclusion of liability clause applied.) Further, it is correct that I was persuaded by Huntsworth’s evidence on issue 10, the value of the wine and that it can be said to have succeeded on that issue. It is questionable that it can be said to have won on issue 9. LCB was found able to invoke the limitation of liability clause in respect of the liability that Huntsworth was able to demonstrate. A separate issue (which I did not have to determine) was whether, if LCB had been found vicariously liable of its employees who were complicit in the theft, the limitation of liability clause would have applied. As is apparent from paragraph 224 of the judgment, I declined to determine this issue on the ground that it as entirely academic given my other findings. At footnote 3 of its submissions, Huntsworth said that LCB only succeeded on Issue 9 parasitic on Issue 4, Huntsworth otherwise succeeding on the issue. It would be more accurate to say that LCB succeed on issue 9 parasitic to issue 4, but that if it had not done so, the issue was otherwise unresolved.

54. Equally however there is some force in LCB’s criticism of Huntsworth for taking several issues on which it was not successful, in particular in the causes of action of fraudulent misrepresentation/misstatement.

55. In any event, the overall picture here is that LCB correctly identified in its first letter prior to making its Part 36 offer that its liability could not exceed £1,000 on the facts of the case (see letter from LCB’s solicitors dated 21 March 2019). Whilst it is true that LCB disputed whether it was liable at all, it could not be unjust to order Huntsworth to pay the costs of the action (or to suffer any of the other adverse consequences of an effective claimant’s Part 36 offer) merely because, in reaching the conclusion that Huntsworth’s position was right on the issues of excise duty and the limitation of liability, the court considered a variety of other issues, some of which were determined favourably to LCB and some of which were not. LCB’s offer exactly reflected my determination of the case. LCB is clearly the successful party in having that offer vindicated. If the opposite question is asked, who was responsible for costs being incurred after that offer was made, the answer is obvious: Huntsworth was responsible because it did not accept an offer that in fact properly reflected the liabilities between the parties.
56. To depart readily from the proposition that the party who makes an effective Part 36 offer should have the benefits of the provisions of Part 36 risks undermining the “*salutary purpose*” of that provision referred to in Smith v Trafford Housing Trust. Huntsworth could and should have accepted LCB’s Part 36 offer. In my judgment, it would not be unjust for Part 36 to have its normal consequences simply on the ground that LCB was not successful on all of the issues at trial.
57. I deal below with other relevant aspects of the discretion as to costs, in particular the failure of LCB to engage in mediation at an early stage in the litigation. None of these factors lead me to the conclusion that it would be unjust to depart from the usual order where a party has done better than a claimant’s Part 36 offer.

B. WHO WAS THE SUCCESSFUL PARTY?

58. Given my findings relating to the Part 36 offer, the issue as to who was the successful party is one that arises solely in respect of costs incurred up to and including 12 September 2019. The claim brought by Huntsworth was stated in the Claim Form to be for in excess of £175,000. The claim comprised the alleged value of the wine stolen (in the region of £125,000) together with unquantified damages for loss of profits arising from the loss of the wine, damages for loss of reputation, damages suffered as a result of the cancelation of a business trip and additional VAT. The valuation, inclusive of the consequential losses, was stated in Huntsworth’s skeleton argument of to 16 March 2021 to be estimated at £206,408.25 and LCB take the value of the claim to be around £200,000. The majority of the claim for unquantified losses was struck out by His Honour Judge Bird on 17 March 2021, and at trial only the claim for the value of the wine stolen and the claim for VAT were extant. Nevertheless, the sum of £1,000 awarded on the claim

was well less than 1% of the value of the claim as originally brought by Huntsworth and less than 0.5% of the high point of Huntsworth's valuation of the claim.

59. LCB is able to contend that it is in substance the successful party because it is Holdsworth who have had to "*write the cheque*" (in the language of some of the authorities). Even in so far as Holdsworth was successful in its claim, it recovered only a small percentage of the sum that it sought. In such cases, as Sir Thomas Bingham MR put it in Roache v News Group Newspapers Ltd [1998] EMLR 161 at pp168-169, "*The judge must look closely at the facts of the particular case before him and ask: who, as a matter of substance and reality, has won? Has the plaintiff won anything of value which he could not have won without fighting the action through to a finish? Has the defendant substantially denied the plaintiff the prize which the plaintiff fought the action to win?*"
60. Moreover, the only Part 36 offer made by Huntsworth was in the sum of £120,500 plus costs. This appears to support the conclusion that Huntsworth was always fighting the action with a view to winning the prize of the value of the stolen wine.
61. The case is similar to Pepe's Piri Ltd v Jinauid [2019] EWHC 2097 and [2019] EWHC 2769 (judgment on costs) in which a claimant who had claimed in excess of £500,000 at trial received £2,523.07. The trial Judge, Mr Mathew Gullick sitting as a Deputy High Court Judge said of this that "*...it is difficult to conceive that a claim for the sum ultimately recovered – which is well below the threshold for the small claims track, in which only very limited costs are recoverable (see CPR 27.14) – would ever have been advanced by a reasonable litigant in the position of the Claimants.*" The same applies with equal if not greater force in circumstances where, ignoring a counterclaim, Huntsworth sought around £125,000 at trial and recovered £1,000, but where, bringing the counterclaim into the equation, the net sum due from Huntsworth to LCB exceeded even that modest sum.
62. In my judgment, it is clear that, for the purposes of CPR Part 44, LCB was the winning party in this trial, given that it defeated a claim for just short of £125,000 and succeeded on its counterclaim.

C. THE CONDUCT OF THE PARTIES

63. On the issue of conduct, LCB makes very criticism of Huntsworth for failing to engage with the issues in the case. It is important in this respect that a litigant is not punished twice over, once for pursuing a weak claim and again for failing to engage with the weaknesses in the claim. However in certain respects it seems to me that there is force in the criticisms that are made of Huntsworth:
- 63.1 Those acting for Huntsworth have been guilty of ill judged criticism. An example, perhaps the worst, is the comment in Mr Pennal's email of 25 June 2019, "*We received your letter*

dated 19 June, and then suffered the dreary misfortune of reading it. As you know, it continued in the style of your previous correspondence – a peculiar cocktail of ‘Macawberism’ and filibuster. It was completely unconstructive, said nothing of substance, and provided no information whatsoever.” Regardless of whether there is any merit underlying the comment that LCB’s approach was unconstructive, this passage in the email amounts to little more than rude disparagement of the author of the email to which it is replies. Parties to litigation cannot expect the opposing party to bear the costs where matters are dealt with in this fashion.

63.2 The claim by Huntsworth in misstatement/misrepresentation was not advanced at the outset, but only by way of amendment to the claim, At paragraph 26 of his trial witness statement, Mr Meyer of Huntsworth stated of an email dated 25 February 2019 (shortly after the theft), *“That email, which I sent very shortly after the break-in and my resulting visit to LCB Linton, reflects unequivocally what my expectations were (and are): I was (and am) truly ‘shocked’ that a supposedly secure bonded warehouse should have no overnight security. It was (and is) truly ‘sobering’ that the ‘reality’ at Linton, as opposed to what I had been led to believe, was that ‘the CCTV was not monitored but merely recorded’.”* It has never been adequately explained why the pleading of misrepresentation was only by way of amendment if, as Mr Meyer states, it was known from almost immediately after the theft.

63.3 The consequential losses claim was never adequately fleshed out, leading to it being struck out by His Honour Judge Bird;

63.4 Huntsworth advanced a weak but prolix case in fraudulent misrepresentation/deceit by way of re-amendment of the Particulars of Claim after the claim had been transferred to the Shorter Trials Scheme. Paragraph 2.2 of PD57AB dealing with the Shorter and Flexible Trials Scheme states, *“The Shorter Trials Scheme will not normally be suitable for (a) cases including an allegation of fraud or dishonesty.”* I agree with LCB that there must be some doubt as to whether this claim would have been transferred to the Shorter Trials Scheme had this claim been made from the outset.

64. Huntsworth is critical of LCB in two particular respects:

64.1 For declining to engage in mediation at an early stage in the litigation;

64.2 In pursuing issues to trial that were unsuccessful.

65. The correspondence shows that Huntsworth was eager to mediate. Examples include its solicitor’s emails of 22 July 2019, 29 July 2019, 15 August 2019, 3 October 2019 and 12 August 2020 and letters of 14 August 2019 and 2 July 2020.

66. The correspondence from LCB tends to support the argument of Huntsworth that LCB put barriers in the way of mediation. Examples can be seen in the following letters from LCB's solicitors:

66.1 7 October 2019:

“ ...

2. Our client's position on mediation is as we have communicated throughout. Our client is willing to mediate, but on condition that there is equality of knowledge.

3. We have repeatedly asked you for a full explanation of the position on insurance. You have persistently refused to provide it. This information is important and your clients are clearly extremely keen to conceal it.

4. We also need a full account of the arrangements in respect of the goods in which third parties have an interest. Initially you and your client said nothing about that. You then stated that some of the goods were owed by third parties. Your Particulars of Claim no longer refer to ownership but instead to unspecified contractual/common law duties and refused our request for details. It appears from your correspondence that these third party interests account for about 2/3 of the quantity of the goods. It is therefore important to the equality of knowledge that your clients provide a full and frank explanation of the third party interests, the contractual, common law or proprietary rights of those third parties and what communications have passed between your clients and them.

5. Your initial disclosure should have referred to all these matters (since they clearly include adverse documents) but all such reference was conspicuously absent. We have already asked you to give disclosure in relation to these matters and you have refused on the basis of a wholly inadequate pretext.

6. Accordingly we repeat (again) our demand for this information, disclosure and copies of documents/communications. Please provide them. When we are satisfied that you have given full and frank information and disclosure we can then discuss arrangements for a mediation.”

66.2 25 June 2020:

“Mediation in this case has been previously canvassed. We have throughout made it clear that our client is prepared to mediate provided that you first give full disclosure of the information and documents relating to the lack of insurance over the goods (and as it now appears, a claim against your client's insurance broker) so that we can participate on an equally informed basis. You have so far consistently refused to provide this. The small amount of information which has been grudgingly released since the proceedings were issued is not a substitute for proper disclosure.”

66.3 2 July 2020:

“Once you provide full disclosure of the insurance documentation we will mediate. The sooner you do this the sooner a mediation can happen.”

66.4 10 August 2020:

“We have made it clear throughout that ADR needs to be on the basis of a full and proper disclosure of information and documentation about the absence of insurance taking place first. You have known from the start that it is a key issue in the case.”

66.5 11 December 2020:

“As to mediation, we have made our position clear on many occasions. We want to see all the documents relating to the insurance position, including those relating to the claims

made by your client against the insurer and the broker. Please provide all these so that a mediation can be held on an informed basis. Despite our repeated requests you have never explained why your client has so far refused to provide them. The disclosure you have given is woeful and clearly incomplete notwithstanding the statement of truth from your client.”

67. Eventually, by solicitors’ letter dated 10 February 2021, LCB agreed to mediation. The mediation took place on 23 April 2021 but was unsuccessful. LCB points out that this was 4 weeks after service of the re-Amended Particulars of Claim.
68. LCB seeks to justify its refusal to agree to mediation earlier on the basis that it was entitled to engage in mediation on an equal footing and that, absent disclosure of information relating to Huntworth’s insurance position, it was reasonable not to engage in mediation. LCB draws attention to the fact that paragraph 12 in the list of issues was “*If ... it was a term of the contract that the Claimant must obtain insurance, then why was insurance not obtained and what was the consequence of not obtaining it?*” This appears to reflect paragraph 67.3B of the Re-Amended Defence and Counterclaim, where it is pleaded, “*Since the service of the Defence the Claimant has disclosed (despite requests for such information by the Defendant prior to issue of these proceedings) that it has a claim against its insurance broker (“the Broker”, believed to be Holgate) in respect of the absence of insurance over the Stolen Goods but is choosing not to pursue it at present. The Broker is “a person for whom the Defendant is not responsible” within the meaning of UKWA Condition 3.8 and consequently the Defendant is not liable for any loss suffered by the Claimant to the extent that it was caused or contributed to by the Broker. The Defendant’s case is that the Claimant’s loss was caused or contributed to by the absence of insurance which was (according to the Claimant) the fault of the Broker; or it was caused or contributed to by the Claimant as pleaded at 67.3 above, or was caused or contributed to by both the Claimant and the Broker.*” However, this point is plainly unarguable. The loss of the wine was not caused by it not being insured; it was caused by it being stolen. It is correct that the insurance position was at least potentially relevant to arguments about limitation/exclusion of liability including the reasonableness of such clauses. However I fail to see that disclosure of the insurance documentation was necessary for LCB to have the necessary information to engage in mediation. In those circumstances, it was not reasonable for LCB to decline to engage in mediation at an earlier point.
69. It is undoubtedly the case that a party who declines to engage in mediation is at significant risk of being penalised by the ultimate costs order (see for example Hurst v Leeming [2002] EWHC 1051). It will not necessarily be protected from that consequence merely because it has made a valid Part 36 offer (see PGF II SA v UMFS Co 1 Ltd [2014] 1 WLR 1386). Further, the nature of this dispute clearly made it suitable for mediation.

70. However any criticism of LCB is substantially undermined by the fact that Huntsworth amended its claim in a significant manner only shortly before the mediation to plead misstatement/misrepresentation. At trial, these causes of action formed a significant part of Huntsworth's case. If LCB had engaged in mediation at an earlier time, this would have predated the introduction of this claim. An earlier mediation would almost certainly have been frustrated by the failure of Huntsworth to bring all of its case into the litigation by adequately pleading it. It is of course the case, as Huntsworth point out at paragraph 22 of their responsive submissions, that late service of the Amended Particulars of Claim was not given as a reason for failing to mediate. But it is hardly likely that a party who does not know that its opponent will in the future apply to amend its statement of case would anticipate that possibility as a reason for not engaging in mediation.
71. Whilst LCB can be criticised for not consenting to mediation, it would be perverse to reward Huntsworth for this where it did not bring forward into the litigation the issues that it sought to rely on in that mediation until very shortly before the mediation. In those circumstances, I do not consider that it would be unjust for LCB to recover its costs in the indemnity basis or otherwise to have the benefit of the provisions of CPR36.17.
72. On the second issue of pursuing issues that were unsuccessful, Huntsworth again uses this as an argument for an issues based costs order. I have concluded above that the effect of LCB's Part 36 offer is that it would not be unjust for it to have the benefit of the Part 36 regime and accordingly I do not accept that its conduct in pursuing those issues should detract from LCB's right to recover costs in full after the expiry of the relevant period. However, issues 2 and 3 in particular took up a considerable amount of court time at trial and thereby led to greater cost being incurred than should have been. To the extent that I am concerned with the costs of the litigation without the intervention of LCB's Part 36 offer, that is to say until the expiry of the relevant period for the acceptance of the offer, I would in principle look to making an order disallowing LCB's costs in so far as they relate to the issues 2 and 3 and setting off the costs incurred by Huntsworth on these issues in so far as the court is able to assess those costs up until the expiry of the relevant period for acceptance of the Part 36 offer. The quantification of such costs is not straightforward but that is not in principle a reason not to make this assessment.
73. However a further point is in play. It is LCB's case that Huntsworth failed properly to engage with the Pre Action Protocol by clearing stating their case prior to issue. Indeed, it was only following service of the draft Particulars of Claim under cover of a letter 12 July 2019 that LCB contends that the claim against it came close to being properly particularised and even then the draft was revised on issue; there was yet further amendment and then re-amendment after issue.
74. I have commented already on the tone of Mr Pennal's email of 25 June 2019, but some of the other correspondence from Huntsworth's solicitors is hardly more constructive. An example of

this is the query raised by LCB about the criminal activity which Huntsworth alleged was relevant to LCB's liability. In the long letter of 13 June 2019, Huntsworth's solicitors speak amongst other things of "*a theft engineered or facilitated or perpetrated by LCB itself.*" LCB understandably sought further details of what they rightly deduced was an allegation of dishonest involvement of theft. As LCB's solicitors put it in their letter of 19 June 2019, "*please would you confirm that we have correctly understood that your allegation is that LCB was dishonestly involved in the theft of your client's goods and that such dishonesty is the reason why the contrail limitation of liability is not applicable*", adding "*as to dishonesty, please let us know whose alleged dishonesty it is which you say makes LCB itself guilty of dishonesty.*" This is a perfectly reasonable request, given the allegations in the letter from Huntsworth's solicitors of 13 June 2019.

75. In response, Huntsworth's solicitors say of the first request, "*Such confirmation was not required – see above. Your client's position resolves around reasonable care and unforeseen activity – albeit mere assertion with no engagement on the facts*" and of the second "*ditto. Beyond this - your client has sought to exploit its outrageous failure to engage in relation to the facts in the synthetic context of 'specificity'. Further, notwithstanding that non-engagement, our correspondence was, on any proper view, adequately specific...*" In so far as it is possible to understand this communication (and I am not clear precisely the point being made), it is wrong in law if it seeks to assert that an allegation of dishonesty does not have to be fully particularised – see for example per Lord Millett in Three Rivers DC v Bank of England [2001] UKHL 16 at paras 184 to 186. The failure by Huntsworth's solicitors to engage with the basis for alleging dishonesty is not consistent with proper pre-trial engagement in defining issues. It is notable in contrast that, when Counsel drafted Particulars of Claim, he properly engaged with the pleading obligation so it could hardly be said that Huntsworth's solicitors were unable to do so.

76. Given the failure by Huntsworth properly to engage in pre action correspondence, it would in my judgment be wrong to make an issues based costs order in its favour relating to the parts of the case on which it was successful. Rather, LCB, as the ultimate overall successful party, should recover its costs on the standard basis up until the expiry of the relevant period and therefore on the indemnity basis as a result of its Part 36 offer.

D. ADMISSIBLE OFFERS TO SETTLE

77. If I had not considered LCB's offer of 20 August 2019 to have been a valid Part 36 offer, a question would have arisen as to whether it was "*an admissible offer to settle*" of a kind that the court ought to have regard to under CPR44. 4(c). There may have been a compelling argument to this effect, on the ground that it was unreasonable for Huntsworth to pursue the litigation once LCB had made an offer that correctly gave effect to the parties' relative entitlement. However, given my finding on the effect of Part 36, the point is academic and need not be considered further.

E. THE APPROPRIATE COSTS ORDER IN RESPECT OF THE COSTS OF THE CLAIM

78. It follows from the reasoning above:

78.1 LCB is the true successful party in this litigation and ought to recover its costs prior to the expiry of the relevant period;

78.2 LCB made a valid claimant's Part 36 offer and obtained judgment at trial that was more favourable than that offer;

78.3 From the expiry of the relevant period within the meaning of Part 36, LCB should have the benefit of CPR36.17, such that, unless it is unjust so to order, LCB should recover:

- 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) the additional amount, calculated in accordance with CPR37.17(4)(d).

78.4 No deduction is appropriate from such costs to reflect the fact that LCB was not successful on all issues at trial;

78.5 It is not unjust for LCB to recover its costs on the indemnity basis from the expiry of the relevant period.

F. QUANTIFICATION OF THE COSTS ORDER

F1 INTRODUCTION

79. I turn to the quantification of the costs, excluding certain interlocutory costs orders set below. For this purpose, I have regard to the Defendant's costs schedule, which has been prepared in the format of a costs budget pursuant to PD3E, using Precedent H. In so far as I am concerned with the costs of the issues on which Huntsworth was successful, I have regard to its document headed "Claimant's Summary of Incurred Costs" and its written submissions.

80. This case involved a number of causes of actions and some involved argument about the duties of bailors. But the most substantial issues were factual ones as to the state of the premises, the circumstances of the theft and the value of the wine. I have dealt above with the value of the claim.

81. In assessing LCB's costs, I bear in mind the relevant guideline hourly rates pursuant to the current version Summary Guide on the Assessment of Costs. These, so far as relevant to this case are:

Grade	Fee Earner	London 1	London 2	London 3	National 1	National 2
A	Solicitors and legal executives with over 8 years' experience	£512	£373	£282	£261	£255
B	Solicitors and legal executives with over 4 years' experience	£348	£289	£232	£218	£218
C	Solicitors and legal executives with over 4 years' experience	£270	£244	£185	£178	£177
D	Trainee solicitors, paralegals and other	£186	£139	£129	£126	£126

82. LCB’s solicitors, who are based in Chester therefore fall geographically within “National 2”, charge grade A fee earner time variously in the range £210-£350. If one divides the Grade A fees claimed by the total number of hours, the average hourly rate claimed for Grade A fee earner work is just short of £304 per hour. This compares with Huntsworth, whose London based lawyers’ have charged grade A work in the range £250 - £495 per hour, with an average hourly rate of just over £328. The hourly rates are therefore similar, though Huntsworth’s solicitors are based in central London, in the “London 1” band.
83. LCB’s solicitors claim specialism in litigation relating to warehousing. I have no reason to doubt that that they have such specialism. This litigation is well outside the norm for guideline hourly rates. An average Grade A rate of around £300 per hour is not excessive for litigation of this nature. I calculate costs on the basis that this is a reasonable hourly rate for Grade A work. In using a Grade A rate, I bear in mind that some of the work charged for could have been done at a lower rate by a lower grade fee earner but that, in using a Grade A fee earner, it can be expected that the work will be done more efficiently and therefore in less time.
84. In dealing with the quantification of costs, Huntsworth point to the comments made by HHJ Pelling QC during the course of the Security for Costs application as to the level of LCB’s costs. I note what he had to say though reach my own judgment on the reasonable (and where appropriate proportionate) costs. In particular, it should be noted that HHJ Pelling QC was (rightly) concerned with costs that were both reasonable and proportionate whereas I, for the most part, am assessing costs on the indemnity basis, and therefore am concerned only with reasonableness and even then with a different test as to the resolution of any doubt which is more favourable to the receiving party. Further, at the time of the hearing before Jude Pelling QC, Huntsworth had not amended its case to plead misrepresentation/misstatement, causes of action which undoubtedly further complicated the trial.

85. I set out in appendix to this judgment a table setting out the figures from my assessment for costs below. The appendix sets out the figures claimed by LCB, the corresponding claim for Huntsworth and the amount which I allow as reasonable and proportionate up the expiry of the relevant period and thereafter as reasonable. It will be noted that the total figure I allow is over £136,000, considerably less than either party claim by way of costs, but still around two thirds of the highest valuation put on their claim by Huntsworth. The figure that I allow as reasonable is some way below the figures claimed either by LCB (£215,185) or Huntsworth (£179,988.22). (The figures for Huntsworth differ from the summary in the document headed “Claimant’s Summary of Incurred Costs” because they do not include the other costs orders in Huntsworth’s favour, in respect of which no claim is made by LCB.)
86. It will also be noted that my assessment of LCB’s costs on the indemnity is considerably lower than what it would appear Huntsworth would value the costs on the standard basis. Footnote 1 to Huntsworth’s draft order appears to assume that the reasonable and proportionate figure for LCB’s costs is 50% of just over £175,000, a reduction of £40,000 on the sums claimed by LCB. The apparent concession that LCB’s reasonable and proportionate costs are as high as this is presumably informed by the assertion that Huntsworth’s reasonable and proportionate costs are at a similar level. In any event, this does not represent a proper basis on which to assess costs.
87. Had the assessment of these costs been subject to the test of proportionality, I would unquestionably have considered the figure to be disproportionate. For example, had the claim been brought under the now-defunct Capped Costs Pilot Scheme, the parties’ costs would have been limited (absent an effective Part 36 offer) to a total of £80,000. Whilst I would not have considered that to be a cap on the proportionate costs for these proceedings, it would have been of some assistance it deciding what was proportionate absent an effective Part 36 offer.

F2 PRE-ACTION COSTS

88. In dealing with the phases, I start by dealing with costs up to and including 13 September 2019. This is the period until expiry of the relevant period for the purpose of LCB’s Part 36 offer. LCB is entitled to its costs assessed on the standard basis.
89. LCB seek almost 40 hours of fee earner time. This in my judgement is both unreasonable and disproportionate to the amounts in issue. Doing the best I can on the limited material, I would estimate that a reasonable and proportionate figure for the totality of the work done on LCB’s side was 20 hours at £300 per hour plus counsel’s fees for advising of £1,800, a total of £7,800.
90. Beyond this first period, LCB’s costs are to be assessed on the indemnity basis with no deduction for Huntsworth’s costs.

F3 ISSUES/STATEMENTS OF CASE

91. The Issues/Statements of Case phase does not include the costs of and occasioned by amending the Particulars of Claim and the Defence (these are dealt with by the order of HHJ Pelling QC dated 16 July 2020 and are dealt with in either F12 or G1 below). Accordingly they are limited to dealing with the Particulars of Claim, the consequential Defence and Counterclaim, dealing with the Reply and Defence to Counterclaim and making Part 18 Requests.
92. I consider a reasonable amount of fee earner time in this respect to be 20 hours, which at £300 per hour totals £6,000. In addition, I allow counsel's fees of £5,000 and the court fee of £205, a total of £11,205.

F4 CASE MANAGEMENT CONFERENCE

93. In dealing with issue G2 below, it will be noted that Huntsworth argue that the costs of the case management conference should be borne equally by the parties. In my judgment, that is wrong for reasons set out below. They are costs in the case and should be dealt with in the same way as other such costs, LCB recovering its costs on the indemnity basis.
94. The claimed figures of 46 hours of Grade A fee earner time are remarkably high and well above what I would consider capable of being reasonable. I allow a total of 20 hours, which at £300 per hour is £6,000. Counsel's fee of £4,625 is reasonable. Hence in total I allow £10,625.

F5 DISCLOSURE

95. LCB claim 68.3 hours of fee earner time for disclosure. This is not a very document heavy case and again this figure appears unreasonably high. Huntsworth in contrast claim 37 hours (plus £1,100 for counsel).
96. I would expect a Grade A fee earner dealing with a case such as this to be efficient in identifying what documents are relevant and what are not. A reasonable amount of Grade A fee earner's time is 30 hours, which at £300 per hour comes to £9,000. I see no reason to disallow the minimal time for assistance from a trainee of £132 and therefore allow in total £9,132.

F6 WITNESS STATEMENTS

97. LCB claim 37.5 hours of Grade A fee earner time plus £650 by way of counsel's fee to deal with witness statements. In all, LCB called 8 witnesses. An average of just over 4.5 hours per witness does not appear excessive, even at Grade A rates. In this phase, a considerable amount to the fee earner time, though Grade A, is at a figure of £225 per hour, well below the average established above. To allow 37.5 hours at £300 per hour would lead to a higher figure than that claimed by LCB and would offend the indemnity principle. Accordingly I allow the fee earners' time as claimed together with £650 for counsel's input.

F7 PRE TRIAL REVIEW

98. For the Pre Trial Review, LCB claim 11.5 hours of fee earner time and £2,000 for counsel. I note that the fee earners' time is less than that claimed by Huntsworth (12.5 hours) albeit that counsel's fee is considerable higher on LCB's side. The PTR itself was vacated by order of Judge Pelling QC dated 10 June 2021 (the day before the hearing). The minimal counsel's fee on Huntsworth's side probably reflects this event, but this does not necessarily mean that LCB were similarly able to avoid or reduce counsel's fee where there was a late resolution of the issues for PTR. Given the burden on paying party to establish that claimed cost is unreasonable, and given the absence of information from which to judge this issue, I conclude that Huntsworth has not shown that it was unreasonable for LCB to incur this fee. I therefore allow the figure claimed of £2,000, which is not on the face of it unreasonable for a Pre Trial Review.
99. As with the fee earners time for the witness statements phase dealt with above, the use of a Grade A fee earner for whom £225 per hour is charged reduces the total claim for fee earner's time to below the £300 per hour rate that I allow as an average for Grade A fee earners' time. Therefore I allow that figure as claimed.

F8. TRIAL PREPARATION

100. The trial preparation costs claimed by LCB are:
- 100.1 Fee earners' time - £23,773.50
 - 100.2 Counsel's fee - £20,000
101. As to fee earner's time, LCB's figure is based on 92.7 hours. In comparison, Huntsworth claim 32.5 hours. Whilst I consider 32.5 hours to be on the low side for a trial of this nature, 92.7 hours is some way above that which is reasonable. I allow 50 hours of Grade A fee earner time at £300 per hour, a total of £15,000.
102. In looking at counsel's fees, I compare the sum claimed by LCB with the figure from Huntsworth's schedule., this is set out in slightly different form, counsel's brief fee being included in the trial phase. If instead one transfers it to the trial preparation phase, as LCB have done in accordance with PD3E, the total claim for counsel's fees in the lead up to trial, including the brief fee, on Huntsworth's part is £20,845.
103. The trial was listed for 3 days. A brief fee of £25,000, including a pre trial conference, would be beyond that which is reasonable. I accept the brief fee of £20,000 claimed on Huntsworth's part to be in the range of that which is reasonable and would allow that.

F9. TRIAL

104. In terms of the trial itself, LCB claim 71.9 hours of fee earner time. In contrast, Huntsworth claim 40.75 hours. Whilst I consider it reasonable to allow 10 hours per day for grade A fee earner time during trial, together with some supervision time of say 4 hours per day, that is to say 42 hours across 3 days, I consider the claim by LCB to be beyond that which is reasonable. On the basis of 42 hours at £300 per hour, I allow £12,600 for fee earner time.
105. As regards counsel's fees, the figure of £14,975 might imply refreshers of £7,500 (though the precise figure is somewhat hard to understand). In contrast, Huntsworth claim refreshers of £1,800 per day. In my judgment, Huntsworth's figures are very low, whereas LCB's, if purely referable to refreshers, are very high. I consider refreshers of £4,000 to be reasonable, a total of £8,000 for two days.

F10. ADR/SETTLEMENT DISCUSSIONS

106. In the ADR/settlement phase, LCB claim 18.1 hours, a total of £5,957 at their rates, with a disbursement of £540. For their part, Huntsworth claim 16.5 hours of fee earner's time and disbursements of £450, stating that to be the mediator's fee. In neither respect do I consider LCB's costs to be unreasonable, though I limit the hourly rate for fee earner's time to £300, giving a total under that heading of £5,430.

F11. POST TRIAL COSTS

107. Under the heading "Post Trial Costs", LCB seek to claim costs for preparing the costs schedule, the costs submissions and its reply to Huntsworth's costs submissions. The amount claimed is £12,707 for fee earner's time and £6,500 for counsel.
108. The schedule, costs submissions and submissions in reply are in the name of LCB's solicitors not counsel. The original costs submissions from LCB exceeded the length permitted by the order of 22 October 2021 but this was put right by the filing of further submissions that comply with the limit of 8 pages. (LCB pointed out at the time that there was an error in the order of 22 October 2021. It is correct that there was an error but it was not material to this point, the meaning of the order being both clear and reflecting a consent order lodged by the parties.) Clearly LCB is not entitled to costs occasioned by the need to redraft the submissions so as to make them compliant with the order. Whilst there may have been some input from counsel, I would not consider a total of £19,207, as claimed by LCB, to justify a test of reasonableness regardless of who drafted or had input into them. This is a summary of assessment of costs not a detailed assessment. The submissions therefore need to be targeted to the main issues. Costs of this level are way beyond what is reasonable. It may however be that the costs in this phase are intended to include the closing submissions

109. Huntsworth claim costs relating to the costs issue in paragraph 19 of their submissions, though they are not referred to in their costs summary. This figure does not include costs for drafting closing submissions on liability and quantum, these being referred to by Huntsworth in the trial phase. LCB take the point that Huntsworth's costs referred to in the written submissions cannot be recovered if they are not in the schedule. This point is of course academic because Huntsworth is not recovering these costs pursuant to my order (and is probably rather ambitious in any event), but as a valuation of what work involved I would consider that the figure that Huntsworth claims, a total of £8,200, to be closer to what is reasonable (whether the work relating to costs submissions was done by solicitors, counsel or a combination of the two) though still on the high side. In my judgment, the costs submission and the submissions in reply each justify 8 hours of work at £300 per hour, a total of £2,400 for each. In addition, I would allow a figure for dealing with consequential matters including dealing with the draft judgement and consequential orders. I allow 3 hours at £900 for this.
110. LCB is entitled to payment for closing submissions. The closing submissions of both parties were helpful and I note that Huntsworth claims £6,000 in this respect. I consider that to be high and a reasonable figure for counsel's closing submission for each side to be £5,000. LCB are entitled to some solicitor time for input into these submissions. I allow 5 hours at £300 per hour, a total of £1,500.
111. Accordingly I allow costs for the period after trial, including both closing submission and costs submission as follows:
- 111.1 Fee earners' time: £7,200
- 111.2 Counsel's fees: £5,000

F12. COSTS OF AND OCCASIONED BY AMENDMENT AND RE-AMENDMENT OF THE PARTICULARS OF CLAIM

112. The schedule from LCB states this in respect of Contingency B: "*Assumptions: Relates to time spend dealing with the amendments and re-amendments to the Particulars of Claim (though excludes any time dealing with the applications for the same which has been dealt with separately) and amending and re-amending the Defence for which there are already costs orders for the Claimant's to pay the costs of and incidental to the Amendments and Re-Amendments.*" This appears to reflect the following costs orders:
- 112.1 The order of Judge Pelling QC made by consent and in the absence of the parties on 16 July 2020 by which he ordered amongst other things:
- "2. *Permission shall be granted to the parties as follows:*

(a) The Claimant may amend the Particulars of Claim in the form signed by the Claimant and appended to this Order, with service dispensed with.

(b) The Defendant may file and serve an Amended Defence by 4pm on 7 August 2020.

(c) The Claimant may file and serve an Amended Reply by 4pm on 21 August 2020.

(d) Each of the Amended Particulars of Claim, the Amended Defence and the Amended Reply may exceed the limit of 20 pages.

3. The reasonable costs of and occasioned by amending the Particulars of Claim shall be paid by the Claimant.

4. The reasonable costs of and occasioned by amending the Defence which are not occasioned by responding to the amendments to the Particulars of Claim shall be paid by the Defendant.”

112.2 The order of Judge Bird dated 17 March 2021 by which he ordered amongst other things:

“1. The Claimant has permission to re-amend the Amended Particulars of Claim in the form signed by the Claimant and appended to this Order, with service dispensed with.

2. The Defendant may file and serve a re-amended Amended Defence by 4pm on 14 April 2021, strictly limited to responding to the matters re-amended by the Claimant in the re-amended Amended Particulars of Claim (and for the avoidance of doubt, this includes responding to the matters re-amended by the Claimant which concern the burglar alarm and fire alarm at the Warehouse).

3. The Claimant may file and serve a re-amended Amended Reply by 4pm on 28 April 2021, strictly limited to replying to the matters re-amended by the Defendant in the re-amended Amended Defence.

...

6. The Claimant do pay the Defendant’s costs of and occasioned by paragraphs 2-5 above (to be assessed if not agreed).

7. The Claimant do pay the Defendant’s costs of the hearing of the Amendment Application, summarily assessed in the sum of the Defendant’s Statement of Costs save to the extent that such costs concern the costs of the case management conference held on 30 October 2020. [Pursuant to this Order, the Claimant do pay the Defendant’s costs of the hearing of the Amendment Application in the sum of £[X] (sic) by 4.30pm on 31 March 2021.”

113. Thus LCB is entitled in this phase to:

113.1 The costs of and occasioned by the amended to the Particulars of Claim, including any consequential amendments to the Defence and Counterclaim; and

113.2 The costs of and occasioned by the re-amendments to the Particulars of Claim; but not

113.3 The costs of the hearing of the application to re-amend the Particulars of Claim which, it is said have been separately dealt with. As I note above, the order of Judge Bird does not in fact include a figure for the costs of the hearing of the amendment application. I assume for the purpose of this judgment that, notwithstanding this, he in fact dealt with that issue in his order. If he did not, the parties should seek to agree that figure and, if they cannot do so, propose a mechanism for me to resolve the issue.

114. LCB claims 33.3 hours of fee earners' time and counsel's fees of £1,865 for dealing with these matters. As regards fee earners' time, the amounts claimed are unreasonably high. I would consider a reasonable amount to be 20 hours at £300 per hour. Counsel's fees appear reasonable and I allow them as claimed.

G. INTERLOCUTORY COSTS ORDERS

G1. ORDER OF 16 JULY 2020 - COSTS OF AND OCCASIONED BY AMENDMENTS TO THE DEFENCE WHICH ARE NOT OCCASIONED BY RESPONDING TO AMENDMENTS TO THE PARTICULARS OF CLAIM

115. The Order of 16 July 2020 made by Judge Pelling QC required that LCB pay the reasonable costs of and occasioned by amending the defence which are not occasioned by responding to amendments to the Particulars of Claim. These costs are recoverable pursuant to the order of Judge Pelling QC in spite of the general order for costs in the litigation.
116. The costs schedule of Huntsworth does not include figures in this respect. However, its costs submissions refer to a claim for £325 in time costs and £450 in counsel's costs. These figures are both reasonable and proportionate.

G2. ORDER OF 30 OCTOBER 2020 - APPLICATION TO TRANSFER TO THE SHORTER TRIALS SCHEME AND CASE MANAGEMENT

117. The Order of 30 October 2020 required that LCB pay the Huntsworth's costs of and occasioned by the application to transfer the claim to the Shorter Trials Scheme. In its written submissions, LCB contends that Huntsworth should be limited to recovering the only the court fee for issue of the application for transfer to the Shorter Trials Scheme. Its reasoning is that, whilst at the time the case was transferred to the Shorter Trials Scheme, there was no pleading in dishonesty/deceit. Had such a case been pleaded prior to the application for transfer, it is unlikely that transfer would have taken place, given the terms of paragraph 2.2(a) of PD57AB that states that "*the Shorter Trials Scheme will not normally be suitable for (a) cases including an allegation of fraud or dishonesty*"
118. Whilst I accept LCB's argument that transfer to the Shorter Trials Scheme may well not have occurred had Huntsworth already pleaded dishonesty, that is not a ground to disregard the order of Mr Philip Marshall QC. Doubtless the fact that the case was already proceeding in the Shorter Trials Scheme was a factor considered when permission was given to amend the claim to plead dishonesty, since the corollary of paragraph 2.2(a) of PD57AB is that it will not normally be appropriate to grant permission to plead dishonesty in a case which proceeds in that scheme.
119. However Mr Marshall QC's order has not been appealed and to disregard it by simply allowing the issue fee would be tantamount to reversing its effect. It is true that the conduct of Huntsworth

might be relevant to the quantification of costs under that order, but I struggle to see that just because subsequent events might lead to a conclusion that the order arguably ought not to have been made, the order should in effect be set aside.

120. In truth, the effect of this case proceeding in the Shorter Trials Scheme has gone some way to limit the costs incurred on both sides, even if for reasons set out above it has not contained those costs with the bounds of what is proportionate. That is of benefit to the litigation generally (including LCB) and the mere fact that, with the benefit of hindsight the order might not have been made does not undermine that value. Accordingly, I give effect to the order of Mr Marshall QC by assessing Huntsworth's costs on the standard basis.
121. Huntsworth seeks £16,428.27 for the costs of this application. That is an absurdly high amount. Whilst counsel's fee of £1,225 is perfectly proportionate and reasonable (indeed is modest), the cost attendances and work done is ridiculous, in particular where the very purpose of the application was to keep the trial, including its costs, within manageable bounds.
122. In my judgment, a proportionate figure for the fee earners' costs of such an application could not exceed £6,000. I allow this figure together with counsel's fees and the application fee. I do not see that a transcript is justified, therefore I allow in total £7,480.
123. Mr Marshall QC ordered that the costs of case management be costs in the case. Huntsworth contends that, since both parties have achieved a judgment on their claim, the reasonable and proportionate costs pursuant to this order should be borne equally. That is incorrect. These costs fall within the costs of the case which have otherwise been ordered in favour of LCB. There is no principled basis for making a separate order in respect of particular case management costs and I decline to do so.

G3. ORDER OF 23 MARCH 2021 - APPLICATION FOR SPECIFIC DISCLOSURE

124. The order of 23 March 2021 reserved to the Trial Judge the costs of Huntsworth's application for specific disclosure made by application notice dated 8 January 2021.
125. Huntsworth seeks its costs of the application. In essence, its case is that the application for specific disclosure was made because there was an obvious lacuna in LCB's disclosure about the circumstances of the theft and that, prior to the application, LCB had not filed a statement for an appropriately responsible person verifying the search that had occurred.
126. LCB responds that the application made by Huntsworth was for specific disclosure not an order verifying the disclosure already given. In the event, HHJ Pelling QC simply made an order that LCB verify the searches already made. Accordingly Huntsworth did not obtain what it sought on the application and in any event at trial nothing turned on the disclosure issue,

127. In my judgment, Huntsworth was clearly entitled to know what search had been carried out on this issue, which was important to its case, even if issues as to disclosure were not significant at the trial itself. If it had simply sought such a statement, it ought to have recovered its costs of doing so had LCB not consented to the making of an order. However, it sought a broader order. LCB might have been able to resolve the issue by proffering a statement of the kind later made by Mr Allington in order to verify the searches, but it cannot be said to be clear that this would have satisfied what Huntsworth were seeking, at least until LCB had sight of Huntsworth's skeleton argument (which is dated 2 days before the hearing), by when it could be seen that Huntsworth probably would have been satisfied simply with a statement of the kind that Mr Allington later made. In those circumstances, this was an application that was not justified in the form originally sought but which could and should have been satisfied by LCB agreeing to Mr Allington or someone similar providing a statement of the kind that he subsequently did. Neither party is in the right on this issue and in my judgment, it is not appropriate to make any order for costs relating to this application.

H. OTHER MATTERS ARISING FROM CPR 36.17

128. The remaining matters relating to the Part 36 offer are:
- 128.1 Whether the court should order Huntsworth to pay interest on the whole or any part of the sum of money 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;
 - 128.2 Whether Huntsworth should be ordered to pay interest on costs at a rate not exceeding 10% above base rate;
 - 128.3 Whether Huntsworth should pay an additional amount calculated in accordance with the table to CPR36.17(4).
129. In each case, the award specified must be made unless the court considers it unjust to make the award. In my judgment none of the factors that have been drawn to my attention on costs issues would make it unjust to give effect to the other effects of CPR36.17, any more than they might make it unjust to order costs on the indemnity basis. Hence, LCB should recover interest on its costs and the principal award in accordance with CPR36.17 and should recover the enhanced amount on the principal award.
130. The question of the period over which interest on some or all of the money awarded is subject to interest at the enhanced rate, the amount or the sum of money subject to that interest and the rate are not determined by the terms of CPR 36.17.

131. In OMV Petrom SA v Glencore International AG [2017] EWCA Civ 195, Sir Geoffrey Vos, then Chancellor of the High Court, said of the power to award enhanced interest under what is now CPR36.17:

*“the use of the word 'penal' to describe the award of enhanced interest under CPR Part 36.14(3)(a) is probably unhelpful. The court undoubtedly has a discretion to include a non-compensatory element to the award as I have already explained, but the level of interest awarded must be proportionate to the circumstances of the case. I accept that those circumstances may include, for example, (a) the length of time that elapsed between the deadline for accepting the offer and judgment, (b) whether the defendant took entirely bad points or whether it had behaved reasonably in continuing the litigation, despite the offer, to pursue its defence, and (c) what general level of disruption can be seen, without a detailed inquiry, to have been caused to the claimant as a result of the refusal to negotiate or to accept the Part 36 offer. But there will be many factors that may be relevant. All cases will be different. Just as the court is required to have regard to "all the circumstances of the case" in deciding whether it would be unjust to make all or any of the four possible orders in the first place, it must have regard to all the circumstances of the case in deciding what rate of interest to award under Part 36.14(3)(a) . As Lord Woolf said in the Petrotrade case, and Chadwick LJ repeated in the McPhilemy case, this power is one intended to achieve a fairer result for the claimant. That does not, however, imply that the rate of interest can only be compensatory. In some cases, a proportionate rate will have to be greater than purely compensatory to provide the appropriate incentive to defendants to engage in reasonable settlement discussions and mediation aimed at achieving a compromise, to settle litigation at a reasonable level and at a reasonable time, and to mark the court's disapproval of any unreasonable or improper conduct, as Briggs LJ put the matter, *pour encourager les autres* .”*

132. This is not a case in which the conduct of Huntsworth leads to the particular need to emphasise the importance of Part 36 as an incentive to negotiate. Huntsworth was agreeable to mediation even though that process was unsuccessful and they subsequently took issues to trial on which they were unsuccessful. Further, whilst I have been critical of some of the attitude demonstrated by Huntsworth in correspondence, it should be noted that I have already been taken this into account in declining to make an issues based costs order prior to the expiry of the relevant period.
133. I conclude that this is not an appropriate case to award a rate of interest, either on the judgement sum or on costs, which is more than compensatory in nature. It is of course well established that the rate of 10% above base rate is not a starting point but merely a maximum (per Chamberlain J in BXB v Watch Tower & Bible Tract Society of Pennsylvania [2020] Costs LR 341). In McPhilemy v Times Newspapers Limited (No. 2) [2001] EWCA Civ 933, Chadwick LJ awarded 4% over base, a figure which the White Book describes in paragraph 36.17.4.3 as subsequently becoming “*the conventional rate*”. In Crema v Cenkos Securities plc (Costs) [2011] 4 Costs LR552, Aikens LJ awarded 5% over base on the ground that this was probably the rate at which the receiving party would have borrowed money at the relevant time.
134. In its submissions, Huntsworth contends that any enhanced rate of interest should be in the range 4% to 5%. LCB contends for a figure of 10.01% (10% over base rate at the time that the calculation was made). Given the current cost of money, I agree that a total figure of 4.5% (4.25%

over current base rate but 4.4% over the base rate for most of the period of interest) is an appropriate figure both for interest on the sum awarded and for interest on costs.

135. Huntsworth contends that that interest is incorrectly calculated on damages in LCB's draft order. I agree, but the reasoning of Huntsworth is itself incorrect. The interest on damages should not be calculated on the sum awarded plus interest, but rather on the sum awarded alone, as is made clear in CPR36.17(4)(a). An additional point is as to how interest that has already been taken into account should be dealt with. CPR36.17 does not allow the court to make two awards of interest. However, my judgment of 22 October 2021 already allows for interest on LCB's claim in the sum of £243.07. Of that award of interest, the interest for the period 13 September 2019 to 22 October 2021 overlaps with the period of enhanced interest allowed below. That is approximately 83% of the total period, or £201.75 of the interest awarded by the order of 22 October 2021. Accordingly this sum should be deducted from the enhanced interest allowed under CPR36.17

136. As to the calculation of the enhanced figure of interest, LCB should recover:

136.1 Interest on the award of £2,662.34 (being the net sum pursuant to the judgment exclusive of interest) at the rate of 4.5% from 13 September 2019 to the date of the judgment of 22 October 2021, that is £252.12 less the interest of £201.75 already awarded for this period in respect of LCB's claim, a net sum of £50.37, and thereafter at the judgment rate. (It should be noted that the interest awarded at the rate of 4.5% is not very much greater than the interest already awarded in respect of LCB's claim. That is because the interest pursuant to CPR Part 36 is calculated not on the gross amount of LCB's claim, but on the net amount of its recovery.)

136.2 Interest on the costs subject to the award on an indemnity basis (in other words all costs save those incurred pre-issue) at 4.5% per annum from the time that those costs which are subject to the enhanced rate of interest were incurred until the date of this judgment (22 October 2021) and thereafter at the judgment rate under Section 17 of the Judgments Act 1838 (as ordered in McPhilemy – see paragraph 25). It is almost impossible for anyone to calculate the time at which the relevant costs were incurred, given that they have been subject to summary assessment in a manner that does not enable the parties to identify the relevant dates. In order to reach a fair but proportionate answer to this, I have noted that, of the costs subject to the indemnity costs order, in the phases from issue to the start of trial preparation but including ADR and settlement and amendments to the Particulars of Claim, just under, £55,000 of costs are allowed; in the stages of trial preparation and trial, just over £60,000 in costs are allowed; and £12,200 for the post trial period. This suggests that nearly one half of the costs were incurred by 19 June 2021 (3 months before trial, by when some of the trial preparation costs would have been incurred but the majority not),

with one half of the costs thereafter. It is reasonable then to calculate interest assuming all costs to have been incurred at this point, any under compensation because the costs were incurred earlier being matched by some overcompensation for a cost that was incurred later. This rough and ready approach would give an award of £3,216.93.

137. As for the award of an enhanced amount pursuant to CPR36.17(4)(d), the correct calculation is 10% of the principal sum (£2,837.53) that is £283.75.

CONCLUSION

138. For the reasons set out above, the following sums are recoverable by LCB in addition to those sums awarded by the judgement of:

138.1 £7,800 by way of costs on the standard basis for the period up until the expiry of the relevant period;

138.2 £128,202.50 by way of costs on the indemnity period for the period from the end of the relevant period;

138.3 £50.37 by way of interest on the sum awarded in the judgment of 22 October 2021 from the period from the expiry of the relevant period to the date of that judgment:

138.4 £3,216.93 by way of interest on the costs referred to at paragraph 138.2 above to the date of this judgment;

138.5 £283.75 by way of additional amount under CPR36.17(4)(d).

139. These figures total £139,553.55.

140. Huntsworth is entitled to:

140.1 £775 in respect of the costs of and occasioned by amendments to the Defence pursuant to the order of 16 July 2020;

140.2 £7,480 in respect of the costs of the application to transfer to the Shorter Trials Scheme pursuant to the order of 30 October 2020.

141. These figures total £8,255.

142. The Defendant is entitled to payment of the balance of £131,298.55. I have made an order of today's date giving effect to this judgment.

APPENDIX

Phase	Claimed by LCB				Huntsworth Claim				Reasonable amount			
	Fee Earner Time	Counsel's Fees	Other Disbursements	Total	Fee Earner Time	Counsel's Fees	Other Disbursements	Total	Fee Earner Time	Counsel's Fees	Other Disbursements	Total
Pre action costs	£13,336.00	£1,800.00	£0.00	£15,136.00	£35,100.00	£0.00	£0.00	£35,100.00	£6,000.00	£1,800.00	£0.00	£7,800.00
Issues/Statements of Case	£19,332.50	£8,435.00	£205.00	£27,972.50	£10,600.00	£16,752.50	£8,750.00	£36,102.50	£6,000.00	£5,000.00	£205.00	£11,205.00
Case Management Conference	£12,556.50	£4,625.00	£0.00	£17,181.50	£6,000.00	£8,722.50	£0.00	£14,722.50	£6,000.00	£4,625.00	£0.00	£10,625.00
Disclosure	£16,111.50	£0.00	£0.00	£16,111.50	£10,000.00	£1,100.00	£0.00	£11,100.00	£9,132.00	£0.00	£0.00	£9,132.00
Witness statements	£9,639.00	£650.00	£0.00	£10,289.00	£10,000.00	£1,055.00	£0.00	£11,055.00	£9,639.00	£650.00	£0.00	£10,289.00
Pre Trial Review	£3,316.50	£2,000.00	£0.00	£5,316.50	£3,500.00	£500.00	£1,090.00	£5,090.00	£3,316.50	£2,000.00	£0.00	£5,316.50
Trial Preparation	£23,773.50	£25,000.00	£0.00	£48,773.50	£10,000.00	£845.00	£823.22	£11,668.22	£15,000.00	£20,000.00	£0.00	£35,000.00
Trial	£20,655.50	£14,975.00	£0.00	£35,630.50	£11,500.00	£29,600.00	£0.00	£41,100.00	£12,600.00	£8,000.00	£0.00	£20,600.00
ADR/Settlement discussions	£5,957.00	£0.00	£540.00	£6,497.00	£5,400.00	£450.00	£0.00	£5,850.00	£5,430.00	£540.00	£0.00	£5,970.00
Post trial costs (including dealing with costs)	£12,707.00	£6,500.00	£0.00	£19,207.00	£4,200.00	£4,000.00	£0.00	£8,200.00	£7,200.00	£5,000.00	£0.00	£12,200.00
Costs relating to the amendment and re-amendment to the Particulars of Claim	£11,205.00	£1,865.00	£0.00	£13,070.00	£0.00	£0.00	£0.00	£0.00	£6,000.00	£1,865.00	£0.00	£7,865.00
TOTAL	£148,590.00	£65,850.00	£745.00	£215,185.00	£106,300.00	£63,025.00	£10,663.22	£179,988.22	£86,317.50	£49,480.00	£205.00	£136,002.50