



Neutral Citation Number: [2019] EWHC 1322 (QB)

Case No: QB/2018/0215

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/05/2019

Before :

MR JUSTICE NICOL

Between :

Evelyn Horne
(as Executrix of the estate of Edward Horne,
deceased)
- and -
Prescot (No.1) Ltd

Claimant/
Respondent

Defendant/
Appellant

Jamie Carpenter (instructed by **Taylor Rose TTKW**) for the **Appellant/Defendant**
Benjamin Williams QC (instructed by **Fieldfisher LLP**) for the **Respondent/Claimant**

Hearing dates: 7th May 2019

Approved Judgment

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

.....
MR JUSTICE NICOL

Mr Justice Nicol :

1. This is an appeal from Master Nagalingam in the Senior Courts Costs Office. At a hearing on 9th July 2018 the Master conducted a detailed assessment of the Claimant's costs. The Claimant's bill of costs had totalled £104,870.79. As reflected in the final costs certificate (sealed on 10th September 2018) the total costs were assessed at £121,017.16 (including £20,018.39 as the costs of the detailed assessment itself. Thus, the costs of the action itself were assessed at £91,807.06¹). By a letter of 5th March 2018, Fieldfisher, the Claimant's solicitors, had offered to accept £82,000, exclusive of the costs of the assessment and, critically for the purposes of this appeal, 'exclusive of interest'. The offer (which I set out in full below) was described as a 'an offer to settle in accordance with CPR Part 36'. The Defendant, the paying party, asserted that an offer 'exclusive of interest' was not an offer within Part 36. As part of his decision on 9th July 2018 the Master found that an offer in this form was capable of being, and in this case was indeed, a valid Part 36 offer. Since the costs assessed by the Master very substantially exceeded the Claimant's offer, it followed that the Claimant was entitled to the benefits which flowed from achieving a judgment which beat her offer (see Rule 36.17).
2. On this appeal, Mr Carpenter on behalf of the Defendant argues that the Master was wrong. Mr Williams QC on behalf of the Claimant argues that he was correct, but in any event, by virtue of his Respondent's Notice, he submits that the Master's decision can properly be upheld on other grounds. Mr Williams had two further alternative arguments. First, he says that, if the rules did not permit a Part 36 offer to be exclusive of interest, the offer made by Fieldfisher should be treated as inclusive of interest, in which case the Claimant had still succeeded in obtaining a decision which beat her offer and the beneficial consequences for such an offer would still follow. His final alternative was to submit that, if the letter from Fieldfisher was not a Part 36 offer, the Court in its discretion should make a decision that has some (though he accepts, not all) of the same advantages for the Claimant.
3. Permission to appeal was granted by Martin Spencer J. on 18th February 2019. He did so, not as an indication that he considered the appeal was meritorious, but because there had been conflicting decisions on this issue at the lower level and authority at the level of the High Court was desirable. In fact, one of those decisions was in a case called *King v City of London Corporation* (a decision of HHJ Dight at the Central London Civil Justice Centre on 14th December 2018). I understand that the Court of Appeal has granted permission to appeal from his decision and the appeal is due to be heard in November 2019. Neither of the parties to the present appeal suggested that this hearing should be adjourned pending judgment in *King*.
4. At the hearing of the appeal, I had the benefit of the considerable assistance of Master Simon Brown who is both a Costs Judge and a Queen's Bench Master. The decision on the appeal, however, is mine and so any errors in this judgment are my responsibility.

The underlying claim

¹ As I explain below, the costs of preparing and checking the bill of costs itself are treated as part of the costs of the action, rather than as part of the costs of the detailed assessment.

5. The Claimant's husband contracted mesothelioma from which he later died. Her claim on behalf of her husband's estate arose in consequence. The parties agreed a settlement figure of £180,000, but one of the beneficiaries was a protected party and, for the settlement to be effective, it therefore had to be approved by the court. In consequence Part 8 proceedings were issued and the terms were set out in a consent order dated 14th December 2017, sealed on 29th December 2017. One of the terms of the order was that the Claimant's costs should be subject to detailed assessment if not agreed. Agreement was not reached and, as I have said, the detailed assessment was conducted by Master Nagalingam.

The material parts of the (current) Civil Procedure Rules

6. I remind myself that the issue in the present case arose in the context of a detailed assessment. Part 47 of the CPR deals with detailed assessment of costs and the costs of the detailed assessment proceedings is addressed by r.47.20. Rule 47.20(4) says:

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

- (a) “claimant” refers to “receiving party” and “defendant” refers to “paying party”
- (b) “trial” refers to “detailed assessment hearing”
- (c) a detailed assessment hearing is “in progress” from the time when it starts until the bill of costs has been assessed or agreed.
- (d) for rule 36.14(7) substitute, “If such sum is not paid within 14 days of acceptance of the offer, or such other period as has been agreed, the receiving party may apply for a final costs certificate for the unpaid sum.”
- (e) a reference to “judgment being entered” is to the completion of the detailed assessment and references to a “judgment” being advantageous or otherwise are to the outcome of the detailed assessment.’

The parties are agreed that the modifications simply adapt the language of Part 36 to the language of detailed assessment proceedings.

7. Rule 47.20 has been modified from time to time. Its present form dates from 1st April 2013 and the commencement of the Civil Procedure (Amendment) Rules 2013 SI 2013 No. 262. The transitional provisions are immaterial because the detailed assessment proceedings in this case commenced after 1st April 2013.
8. Part 36 has also gone through various changes. Mr Carpenter submits these are significant and I shall return to them, but it is convenient first to set out the material parts of the current rules following their re-enactment by the Civil Procedure (Amendment) Rules 2014 SI 2014 No.3299 with effect from 6th April 2015.

’36.1

- (1) This Part contains a self-contained procedural code about offers to settle made pursuant to the procedure set out in this Part (“Part 36 offers”)

...

Section I Part 36 offers to settle

36.2 ...

(2) Nothing in this Section prevents a party making an offer to settle in whatever way that party chooses, but if the offer is not made in accordance with rule 36.5, it will not have the consequences specified in this Section.

(Rule 44.2 requires the court to consider an offer to settle that does not have the costs consequences set out in this Section in deciding what order to make about costs)

(3) A Part 36 offer may be made in respect of the whole, or part of, or any issue that arises in –

(a) a claim, counterclaim or other additional claim; or

(b) an appeal or cross appeal from a decision made at a trial.

36.5

(1) A Part 36 offer must-

(a) be in writing;

(b) make clear that it is made pursuant to Part 36;

(c) specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with rule 36.13 or 36.20 if the offer is accepted.

(d) state whether it relates to the whole of the claim or to part of it or to an issue that arises on it and if so to which part or issue; and

(e) state whether it takes into account any counterclaim

(2) Paragraph (1)(c) does not apply if the offer is made less than 21 days before the start of a trial.

(3) In appropriate cases, a Part 36 offer must contain such further information as is required by rule 36.18 (personal injury claims for future pecuniary loss), rule 36.19 (offer to settle a claim for provisional damages) and rule 36.22 (deduction of benefits).

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

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

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

36.6 Part 36 offers - defendant's offer

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

...

....

36.13 Costs consequences of acceptance of a Part 36 offer

- (1) Subject to paragraphs (2) and (4) and to rule 36.20, where a part 36 offer is accepted within the relevant period the claimant will be entitled to the costs of the proceedings (including their recoverable pre-action costs) up to the date on which notice of acceptance was served on the offeror.

...

- (2) Where –

- (a) a defendant's Part 36 offer relates to part only of the claim; and
(b) at the time of serving notice of acceptance within the relevant period the claimant abandons the balance of the claim

The claimant will only be entitled to the costs of such part of the claim unless the court orders otherwise.

- (3) Except where the recoverable costs are fixed by these Rules, costs under paragraphs (1) and (2) are to be assessed on the standard basis if the amount of costs is not agreed.

- (4) Where –

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

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

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

the liability for costs will be determined by the court unless the parties have agreed the costs

....

36.14 Other effects of acceptance of a Part 36 offer

- (1) If a Part 36 offer is accepted the claim will be stayed.
 - (2) In the case of acceptance of a Part 36 offer which relates to the whole claim, the stay will be upon the terms of the offer.
 - (3) If a Part 36 offer which relates to part only of the claim is accepted, the claim will be stayed as to that part upon the terms of the offer.
 - (5) Any stay arising under this Rule will not affect the power of the court –
 - (a) to enforce the terms of a Part 36 offer; or
 - (b) to deal with any question of costs (including interest on costs) relating to the proceedings
- ...

36.17 Cost consequences following judgment

- (1) Subject to r.36.21, this rule applies where upon judgment being entered
 - (a) a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer; or
 - (b) a 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.
- (3) Subject to paragraphs (7) and (8) where paragraph (1)(a) applies, the court must, unless it considers it unjust to do so, order that the defendant is entitled to –
 - (a) costs (including any recoverable pre-action costs) from the date on which the relevant period expired, and
 - (b) interest on those costs.
- (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...’

9. There is a Practice Direction to Part 36, but nothing turns on this.
10. The Practice Direction to Part 47, however, is relied upon by Mr Williams. At paragraph 19 it says this,

‘Costs of detailed assessment proceedings – rule 47.20: offers to settle under Part 36 or otherwise Where an offer to settle is made under Part 36 or otherwise, it should specify whether or not it is intended to be inclusive of the cost of the preparation of the bill, interest and VAT. Unless the offer states otherwise it will be treated as inclusive of these.’

The terms of the Claimant’s offer

11. Fieldfisher’s letter of 5th March 2018 said this,

‘Without Prejudice save as to costs – Part 36 offer

The Claimant hereby makes an offer to settle in accordance with CPR Part 36. This offer is intended to have the consequences of Section 1 of Part 36.

If the Defendant accepts this offer within 21 days of the date it is received the Defendant will be liable for the Claimant’s costs in accordance with Rule 36.13. After 21 days the Defendant may only accept this offer if we agree the liability as to costs. If this cannot be agreed the Court will make an Order.

This offer relates to the whole of the Claimant’s claim for the costs of the action excluding interest and excluding the costs of assessment.

There is no counter claim to the Claimant’s claim.

The offer is that the Claimant shall accept the sum of £82,000 in full and final settlement of her claim for costs exclusive of interest and exclusive of the costs of assessment.

This offer is acceptable only by your serving written notice of acceptance.’

The Master’s decision

12. The Master said this,

‘That in part Miss Culley [the Defendant’s representative], is your interpretation of rule 36.5(4). I do not agree with your interpretation. The practice direction assists me in interpreting how a rule was drafted. I do not think it right to conclude that an offer that is exclusive of interest is automatically non-compliant with Part 36. My reading of rule 36.5(4) effectively clarifies that what the practice direction is saying that if interest is not expressly excluded then it is deemed to be included. That gives clarity and is extremely important in Part 36 so

that the parties know exactly the value of the offer they have received. I think Mr Benson [representative of the Claimant] is right to refer me to the practice direction for the purpose of the record [the Master then quoted CPR 47PD paragraph19 and continued] The offer states otherwise. That does not lock the receiving party, or the party that made that offer out of the Part 36 consequences and therefore the Part 36 consequences will apply. The test there, of course, is provided it is not unjust that they apply. You can of course make that argument Miss Culley, but on the face of it I do not see that there are any just reasons to lock the receiving party out of the Part 36 consequences. The whole point of Part 36 is to encourage settlement and incentivise the parties in that regard.’

13. There does not appear to have been a formal order, as such, embodying the Master’s decision, or stating that, because this was a valid Part 36 offer and the Claimant had beaten it, the consequences in r.36.17(4) must follow. However, both parties treated these consequences as implicit in the Master’s decision.

Interest: on substantive claims and on awards of costs

14. If a claimant alleges that, in addition to the debt or damages or other sums which is claimed, interest is also due then CPR r.16.4 provides that the particulars of claim must state that is the case (r.16.4(1)(b)), and the basis on which interest is said to be due (r.16.4(2)(a)) and if the claim is for a specified sum of money, the rate of interest claimed, the date from which it is claimed, the date to which it is claimed (not later than the date of the claim form) and the daily rate thereafter (r.16.4(2)(b)).
15. Commonly interest is claimed in the High Court pursuant to Senior Courts Act 1981 s.35A, in the county court pursuant to County Courts Act 1984 s.69 or sometimes as a result of contractual terms.
16. The entitlement to interest on judgment debts has a different basis which, for High Court judgments, derives from Judgments Act 1838 s.17. With the modifications made by Judgment Debts (Rate of Interest) Order 1993 SI 1993 No. 564 article 2 and the Civil Procedure (Modification of Enactments) Order 1998 SI 1998 No 2940 article 3, this now reads as follows,
 - ‘(1) Every judgment debt shall carry interest at the rate of 8% per annum.
 - (2) Rules of court may provide for the court to disallow all or part of any interest otherwise payable under subsection (1).’
17. A final costs certificate may be enforced as if it were a judgment for the payment of an amount of money – see 47PD 16.12.
18. CPR r.40.8 now provides,
 - ‘(1) Where interest is payable on a judgment pursuant to s.17 of the Judgments Act 1838 or s.74 of the County Courts Act 1984, the interest shall begin to run from the date that judgment is given unless-
 - (a) A rule in another Part or a practice direction makes different provision; or

(b) the court orders otherwise.

(2) The court may order that interest shall begin to run from a date before the date that judgment was given.’

19. There is specific provision for interest on the costs of detailed assessment proceedings. This is in CPR r.47.20(6) which says,

‘Unless the court otherwise orders, interests on the costs of detailed assessment proceedings will run from the date of default, interim or final costs certificate as the case may be.’

20. It may also be material to note that the rule regarding the Court’s discretion as to costs (CPR r.44.2) includes at 44.2(6) the following provision,

‘The orders which the court may make under this rule include an order that a party must pay –

...

(g) interest on costs from or until a certain date including a date before judgment.’

21. It will be seen that, while the court is given a discretion to alter the period over which Judgments Act interest will accumulate, it does not have a power to alter the rate of interest, a point on which the present parties were agreed, and which has the support of the editors of the 2019 edition of the White Book (see paragraph 44.2.29).

22. Detailed assessment proceedings are commenced by the receiving party serving a notice of commencement of proceedings and a copy of the bill of costs (CPR r.47.6). The time for commencing such proceedings is prescribed by r.47.7. If the receiving party delays, the paying party can apply for an order requiring the receiving party to start them within such time as the court directs - see r.47.8(1). Further, if the receiving party delays in starting detailed assessment proceedings,

‘the court may disallow all or part of the interest otherwise payable to the receiving party under s.17 of the Judgments Act 1838 or s.74 of the County Courts Act 1984 but will not impose any other sanction except in accordance with r.44.11 (powers in relation to misconduct)’ – r. 47.8(3).

23. The Practice Direction to Part 47 confirms that permission to commence detailed assessment proceedings is not required – see 47PD paragraph 6.2. However, a party who wishes to apply for an order under r.47.8(1) must issue an application in writing in the appropriate office and must serve the application not less than 7 days before the hearing of the application – see 47PD paragraph 7. In the present case detailed assessment proceedings began on 7th February 2018. The parties have confirmed to me that no such application under r.47.8(1) was made in the present case. The Court can (and sometimes does) disallow interest under r.47.8(3) in the absence of an application under r.47.8(1), but no such issue arose in this case, nor, since the receiving party had started detailed assessment proceedings well within the time prescribed by r.47.7, could it have done.

24. If the paying party disputes any item in the receiving party's bill of costs, it must serve points of dispute – see r.47.9. In this case points of dispute were served on 27th February 2018. Where points of dispute are served, the receiving party must file a request for a detailed assessment hearing within 3 months of the expiry of the period for commencing detailed assessment proceedings – see r.47.14(1). If the receiving party fails to do so, the paying party may apply for an order that the receiving party do so within a specified time. Again, the Court is given power to disallow all or part of the period of interest in consequence of the receiving party's delay in requesting a detailed assessment hearing – r.47.14(4). The Practice Direction to Part 47 provides that an application in the detailed assessment proceedings must comply with CPR Part 23 – see 47PD.13.7. In this case the Claimant, as the receiving party, requested a detailed assessment hearing on 19th March 2018. No point was, or could have been, taken as to delay in taking this step. On the contrary, it was taken expeditiously. Again, an application for the disallowance of interest is not essential. An order could be made anyway, but again that is academic on the facts of the present case.
25. In the present case the final costs certificate is dated 5th September 2018 (sealed on 10th September 2018) and regarding interest it says,

‘The date from which any entitlement to interest under this certificate is to run is-

 1. As to the amount of the bill as assessed excluding the costs of assessment, the date of the order [i.e. the date of the order entitling the claimant to her costs which was the order sealed on 29th December 2017]
 2. And as to £20,018.39 being the costs of assessment, the date of this certificate.’
26. As to paragraph 1 of this part of the certificate, the Master was following the principle in *Hunt v R.M. Douglas (Roofing) Ltd.* [1990] 1 AC 398 that the entitlement to costs and interest on those costs under the Judgments Act 1838 ran from the date of the judgment awarding the party those costs (sometimes called ‘the incipitur date’) and not from the quantification of the costs by the assessment (sometimes called ‘the allocatur date’). As to paragraph 2 of this part of the certificate, the Master apparently saw no reason to depart from the presumptive position in r.47.20(6).
27. It is, perhaps, worth noting that the final costs certificate does not quantify the interest under either paragraph 1 or paragraph 2.
28. At 8% the Judgments Act rate of interest is very substantially higher than the commercial rate of interest (in 2015 described by Leggatt J. as 2% above the base rate of 0.5% - i.e. 2.5% - see *Involnert Management Inc v Aprilgrange Ltd and others* [2015] EWHC 2834 (Comm) at [9]). The problem is particularly acute in the case of costs which have yet to be subject to detailed assessment. In accordance with *Hunt*'s case, unless some other order is made, this very attractive rate of interest (from the point of view of the receiving party) will run from the date of judgment, even though at that stage, the paying party will not know how much is due. This has led some judges (including Leggatt J. in *Involnert*) to order that interest on costs at the Judgments Act rate will be postponed for a particular period and, instead, during that period interest will accrue at a rate nearer to the commercial rate.

29. In the present case, no such order was made. Accordingly, the default position in the Judgments Act itself governed the situation.

The Appellant's submissions

30. Mr Carpenter assembled his arguments under four headings:
- i) As a general matter (setting aside whether there is any special regime for detailed assessment proceedings) Part 36 precludes the claimant making an offer which is exclusive of interest.
 - ii) It is no different in the particular circumstances of detailed assessment proceedings. In that context as well, an offer exclusive of interest cannot be a valid Part 36 offer.
 - iii) The argument in the Respondent's Notice that the offer made by Fieldfisher should be interpreted as *inclusive* of interest should be rejected.
 - iv) The further alternative in the Respondent's Notice that, in the Court's discretion, the Claimant should be awarded indemnity costs and enhanced interest should also be rejected. Mr Carpenter observes that the Respondent accepts that the court would have no jurisdiction to award the additional amount akin to rule 36.17(4)(d).

Can a valid Part 36 offer which excludes interest be made by a claimant in general litigation?

31. Mr Carpenter stressed that Part 36 established a highly prescriptive regime and must be strictly complied with if a litigant wished to have the substantial benefits which could follow a successful Part 36 offer – see *Gibbon v Manchester City Council* [2010] EWCA Civ 726, [2010] 1 WLR 2081 CA at [4]. As Moore-Bick LJ there said, this approach was justified because a party who did not wish to be curtailed by the requirements of Part 36 was always free to make any other offer to settle the litigation. That is expressly acknowledged in r.36.2(2) and, by r.44.2(4)(c), when exercising any discretion as to costs the Court is required to take into account any admissible offer to settle which is not a Part 36 offer.
32. In addition, Mr Carpenter argued, to come within Part 36, the offer must not only conform to the formal requirements, but must also not conflict with the operation of the Part 36 regime. In support of this submission, he took me through the different versions of Part 36. They could be divided into three periods: (i) from 1999-2007; (ii) from 2007 – 2015; and (iii) from 2015 to the present.
- i) *1999-2007* Mr Carpenter argued that as originally adopted Part 36 had these notable features, referring to the 1999 version of the Rules:
 - a) The Court had a discretion to disregard non-compliance with the requirements of Part 36 – see then rule 36.1(2).
 - b) A defendant could only offer to settle a money claim by paying that sum of money into court – see then rule 36.3(1).

- c) An offer could be made to settle part only of a claim or any issue that arose in the claim – see then rule 36.5(2) and (3).
- d) By then r.36.22 a claimant's offer to accept a particular sum of money would be treated as inclusive of interest 'unless [the offer] indicates to the contrary'. If the contrary was expressed and so the offer was exclusive of interest, then r.36.22(2) required the offeror to say whether interest was offered, and, if so, the amount offered, the rate or rates offered and the period or periods for which it was offered – then r.36.22(2).
- e) By then rule 36.5(6) a Part 36 offer had only to be available for a minimum of 21 days (by contrast Part 36 offers now are without limitation of time, though different consequences follow if the offeree wishes to accept the offer more than 21 days later).

Thus, because of then r.36.22, Mr Carpenter argued, the type of offer made in the present case would not have been a valid Part 36 offer under the 1999 rules because the Claimant had not said whether she would require interest on the amount of costs she offered to accept, nor, if she was expecting interest to be paid at what rate or for what period she was expecting it.

- ii) *2007 version* Mr Carpenter stressed that so far as this version of the rules was concerned:
 - a) They removed the discretion to treat a non-compliant offer as a valid Part 36 offer – see then r.36.1(2).
 - b) As before the offer had to give the offeree at least 21 days to accept it with the beneficial consequences – then r.36.2(2) (c) and (d), but, as long as the offer had not been withdrawn, it could be accepted at any time, subject to some qualifications.
 - c) As previously, the offer could relate to part of the claim or an issue which arose in the claim – see then r.36.2(2)(d).
 - d) The 2007 Rules abolished the requirement that a defendant's offer in relation to a money claim had to be accompanied by a payment into court. Instead, subject to immaterial exceptions, 'a Part 36 offer by a defendant to pay a sum of money in settlement of a claim must be an offer to pay a single sum of money.' – see then r.36.4(1).
 - e) He submitted by reference to then r.36.11 that if the offer related to the whole of the claim and was accepted, there would be no power to deal with any question of interest because the action would be stayed and the qualifications to the stay did not include the determination of interest.
 - f) What is now r.36.5(4) appeared as then r.36.3(3) in identical language.

33. Turning to the present version of the Rules, Mr Carpenter submitted:

- i) As with the 2007 version, the Court had no discretion to treat an offer, which did not comply with Part 36, as though it did.
- ii) If the Part 36 offer relates to only part of the claim, the liability for costs must be determined by the Court unless the parties agree – see r.36.13(4)(c). There would, in other words, in those circumstances be no automatic entitlement to costs if such an offer was accepted.
- iii) As noted, under the original rules, a Part 36 offer expressed to be exclusive of interest had nonetheless to spell out whether interest was offered and, if so, its rate and the period. Thus, an offer of the kind in the present case would not, under those rules, have been a valid Part 36 offer. No good reason as to why the current version of the Rules should lead to a different outcome has been advanced.
- iv) The effect of the Master’s decision is that r.36.5(4) is re-written as if it said ‘*Unless the offer indicates otherwise* a Part 36 offer which offers to accept a sum of money will be treated as inclusive of all interest until...’. Yet words to the same effect had been included in the 1999 version of the rules and have now been deleted.
- v) There is an obligation on a Defendant who wishes to make a Part 36 offer which includes payment of a sum of money to express the offer as a single sum. There is no good reason why the ability of a *claimant* to offer to accept a sum of money should not be similarly constrained. In both cases there is a value in requiring certainty and precision: the offeree would then know precisely what is on the table.
- vi) Mr Carpenter recognised that r.36.5(4) was couched in different language to 36.5(1). It said that an offer to accept a sum of money ‘will be treated as inclusive of all interest.’ This was different from the way in which r.36.5(1) was expressed (‘A Party 36 offer must’). However, he submitted, this was a distinction without a difference. Rule 36.2(2) says,

‘Nothing in this Section prevents a party making an offer to settle in whatever way that party chooses, *but if the offer is not made in accordance with rule 36.5*, it will not have the consequences specified in this Section [emphasis added].’

Mr Carpenter argues that the offer must be ‘in accordance with’ all the subparagraphs of r.36.5, not just 36.5(1) and this offer was not in accordance with r.36.5(4).

- vii) In any event, Mr Carpenter submitted, an offer will not be a valid Part 36 offer if its terms are inconsistent with the Part 36 scheme. In *Mitchell v James* [2002] EWCA Civ 997, [2004] 1 WLR 158 CA the offer had proposed that each party bear its own costs. That was not compatible with the Part 36 scheme (as it then existed, or now) and the offer was not a valid Part 36 offer, even though it had not contravened any of the then mandatory requirements for a valid Part 36 offer, see too, *James v James* [2018] EWHC 242 (Ch).

34. Mr Carpenter argued that the offer was not a valid Part 36 offer to settle part of the claim (i.e. the principal sum exclusive of interest) for the following reasons:
- i) Part 36 was to be construed as a whole. If, on its true construction interest had to be included in a valid Part 36 offer, r.36.2(3) could not permit the claim to be divided up in this way.
 - ii) The historical development of Part 36 is against the idea that interest could be treated as a distinct part of the claim.
 - iii) If interest could be treated as a severable issue, there would be unexpected consequences if the offer was accepted. The offeree would not automatically be entitled to his or her costs – see r.36.14(4)(c).
 - iv) If the offer was intended to apply only to part of the claim, it did not comply with r.36.5(1)(d) which requires the offer to ‘state whether it relates to the whole of the claim or part of it or to an issue which arises in it and, if so, to which part or issue.’ This offer was expressed to relate to ‘the whole of the Claimant’s claim for the costs of the action excluding interest and excluding the costs of the assessment.’ The phrase ‘the whole of the claim for costs’ was intended to echo the same phrase in r.36(1)(d). No part or issue as such was identified.
35. The Master had relied on the Practice Direction to Part 47, but the Respondent accepted that a Practice Direction was only a weak aid to the interpretation of a Rule. It would be curious for a Practice Direction to a different part of the Rules to have a significant bearing on the meaning of Part 36.

Can an offer to settle detailed assessment proceedings be valid if it is exclusive of interest?

36. Mr Carpenter accepted that the source of the power or duty to pay interest on the costs of a detailed assessment was the Judgments Act 1838, but, he submitted, that was immaterial. In substantive claims, interest could be claimed by a variety of means. There was nothing obviously particular or special about a claim to interest under the Judgments Act which merited distinctive treatment. It was the case that interest in a substantive claim had to be pleaded. Interest under the Judgments Act did not.
37. In his skeleton argument, Mr Williams had said, ‘It is now established that Part 36 offers may only relate to pleaded claims.’ He had relied on *Hertel v Saunders* [2018] EWCA Civ 1831, [2018] 1 WLR 5852 in which Coulson LJ had said,

‘[31] In my view, this question only has to be posed for the answer to become immediately apparent. In civil proceedings, claims/parts/issues can only properly be defined by reference to the pleadings. Indeed that is the principal purpose of pleadings. It would introduce unnecessary and unwelcome uncertainty if claims/parts/issues were given a wide definition that did not seek to anchor them to the pleadings which the parties have exchanged.

[32] To take an extreme example, Mr Smith [counsel for the claimant/appellants] suggested in his oral submission that, if the claimant’s solicitor introduced a

possible new claim in a letter to his opponent, then that would be caught by the words of the rule, even if it had not been the subject of any formal amendment, and even if it had not been the subject of a response by the defendant. I consider that such an interpretation would lead to uncertainty and confusion; it may even encourage the abuse of the Part 36 regime.

[33] Accordingly, like Morgan J. [the first instance judge], I would construe the words “claim”, “part of a claim” and “issue” as referring to *pleaded* claims, parts of claims or issues, and not other claims or issues which may have been intimated in some way but never pleaded. Once proceedings have started, the certainty required for Part 36 to operate properly can only be achieved by this interpretation. A new claim which has been intimated, but which is not part of the pleadings, is not therefore caught by r.36.2(2)(d) (current rule 36.5(1)(d)).’

38. *Hertel* was considered by the Court of Appeal in the recent judgment of *Calonne Construction Ltd v Dawnus Southern Ltd*. [2019] EWCA Civ 754 (a judgment given on 3rd May 2019 only 4 days before the hearing of the present appeal). Asplin LJ succinctly summarised the issue in *Calonne* at [1] when she said,

‘The appeal concerns the requirements of a Part 36 offer. In particular, it is concerned with whether an offer is valid if it is made by a defendant in respect of both a claim and a proposed counterclaim which has yet to be pleaded, and it contains provision for interest to accrue at a particular rate after the expiry of the “Relevant period.”’

39. It was in the context of the objection that the offer included reference to the unpleaded counterclaim that the appellant in *Calonne* relied on *Hertel*. As to this, Asplin LJ said at [41],

‘It seems to me that *Hertel* was primarily concerned with the effects of [then] CPR rule 36.10(2), a provision which is no longer within the CPR and, in fact, has been reversed. Furthermore, it was concerned with a defendant’s offer in relation to part of a claim intended to be contained in a proposed amendment to the claim in proceedings which had already been commenced. It was in that context that Coulson LJ decided that “claim” or “part of a claim” and “issue” in what is now Rule 36.5(1)(d) meant pleaded claims. See [27], [31], [33] and [35]. No consideration was given to the effect of CPRr.36.7 in relation to a counterclaim which is to be treated as a separate claim by virtue of rrs. 20.3 and 20.3 and has yet to be commenced. In fact, r.36.7 was only addressed in the context of a submission that “claim”, “part of a claim” or “issue” should not be defined too narrowly because a Part 36 offer can be made at any time, including before commencement of proceedings and, accordingly, should not be construed by reference to pleadings after commencement either. See [26]. Not surprisingly, perhaps, that submission was rejected. As Coulson LJ stated at [27] “the position pre-commencement is inevitably different to that which exists after commencement of proceedings”’.

40. Asplin LJ also rejected the argument that the offer was invalid as a Part 36 offer because it included terms as to interest after the end of the relevant period – see [43]-[47].

41. Accordingly, Mr Carpenter submitted that the claim for interest could be 'part of the claim' even though it had not been pleaded as such in the detailed assessment proceedings.
42. He further submits that, if the Respondent is correct and interest is not part of a claim for the purposes of detailed assessment proceedings, a Part 36 offer in relation to such proceedings could not be inclusive of interest. Yet 47PD paragraph 19 on which the Respondent relies not only envisages that a Part 36 offer in relation to such proceedings may include interest, but that it will be assumed to do so unless the contrary is indicated.
43. In addition, he argues, if Judgments Act interest is not part of the claim, an offer such as the present one would be an offer in relation to the whole of the claim. The consequence of that would be that, if the offer was accepted, the whole of the proceedings would be stayed and the court would then have no power to deal with interest.

If an offer to settle which is expressed to be 'exclusive of interest' is incompatible with a Part 36 offer, is such an offer nonetheless to be treated as being inclusive of interest?

44. Mr Williams' argument in this respect is simple. His primary contention is that r.36.5(4) does not preclude a Part 36 offer being made exclusive of interest. His first fall-back submission is to say if he is wrong about that, then he relies on the rule itself. On this hypothesis, Fieldfisher's offer of 5th March 'is to be treated as inclusive of all interest' and accordingly is valid.
45. Mr Carpenter submits that this argument should not succeed. Where there is genuine ambiguity in the offer then ordinary principles of construction will be adopted. These will include (so far as possible) interpreting the offer in accordance with the offeror's intention, as objectively expressed (see for instance *C v D* [2011] EWCA Civ 646, [2012] 1 WLR 1962 CA). But what the Court cannot do is change the offer in a way that exceeds those ordinary principles of construction. Thus, for instance, *C v D* was distinguished in *Shaw v Merthyr Tydfil County Borough* [2014] EWCA Civ 1678 at [20]. Mr Carpenter argues that, if his interpretation of Part 36 is correct, the offer made in this case is simply not within Part 36 and r.36.5(4) cannot save it. In any case it would be unfair to the defendant to conclude that an offer which was ostensibly exclusive of interest should be interpreted as one inclusive of interest.

If the Appellant otherwise succeeds should the Court exercise its discretion to award the Claimant indemnity costs and/or enhanced interest?

46. Mr Carpenter argues that it would not be a proper exercise of the court's general discretion as to costs to award the Claimant either indemnity costs or enhanced interest. There is no principle that a court in exercising its general discretion can have regard to the fact that an offer to settle was made which was nearly, but not quite, a valid Part 36 offer. On the contrary, that would be a wrong approach.
47. Mr Carpenter refers me to *F & C Alternative Investment (Holdings) Ltd v Barthelemy (No.3)* [2012] EWCA Civ 843, [2013] 1 WLR 548. In that case there was multiple litigation between the parties which the defendants offered to settle. Since the

structure of Part 36 was not directly applicable, the offer was expressly *not* a Part 36 offer. It was not accepted, but after the judge gave judgment in favour of the defendants, they argued (and the Judge accepted) that recourse could be had to part 36 by analogy when exercising the general discretion as to costs. Accordingly, the Judge ordered the claimant to pay costs of the defendants on an indemnity basis. The Court of Appeal reversed the Judge and the order for indemnity costs was set aside. At [56] Davis LJ said,

‘Once that position is appreciated [he was referring to the inapplicability of the costs regime in Part 36 and the court being asked to exercise its general discretion as to costs], however, I have the greatest difficulty in seeing how the costs regime of Part 36, whether indirectly or by analogy, can properly be invoked. [then] Rule 36.14 [now r.36.17] represents a departure from otherwise established costs practice. It imposes a deliberately swingeing costs sanction by [then] rule 36.14(3) [now 36.17(3)] on a claimant who fails to beat a defendant’s Part 36 offer. That is for policy reasons, designed to encourage a sensible approach of claimants to offers and to promote settlement (that defendants do not get corresponding benefits under Part 36 may be for reasons in part explained by Simon Brown LJ in paragraph 6 of his judgment in *Kiam v MGN Ltd (No.2)* [2002] 1 WLR 2810). But there is no reason or justification in my view, for indirectly extending Part 36 beyond its expressed ambit. Indeed, to do so would tend to undermine the requirements of Part 36 and the repeated insistence of the courts that intended Part 36 offers should be carefully drafted so as to comply with the requirements of Part 36. As Mr Browne [counsel for the claimant/appellant] observed, Part 36 is highly prescriptive with regard to both its procedures and sanctions.’

48. Davis LJ added at [63],

‘nor can there be any quarrel with the judge having regard to the without prejudice save as to costs offers as part of the relevant material in deciding overall whether to order indemnity costs. But, in my respectful view, it goes altogether too far to take into account as a factor that, had those offers been made under Part 36, then indemnity costs would have been payable as a matter of course. That is a course neither mandated nor permitted either under Part 36 or under rule 44.3... Perhaps there can be *de minimis* errors or obvious slips which mislead no one: but the general rule, in my opinion, is that for an offer to be a Part 36 offer it must strictly comply with the requirements.’

49. For essentially similar reasons, he also held that the judge’s award of a higher than usual rate of interest on the principal sum was likewise wrong in principle – see [80]-[88].

Decision

50. Mr Carpenter’s oral and written submissions were most impressive (as were those of Mr Williams). However, I have come to the clear conclusion that, at least in the context of detailed assessment proceedings, the Master came to the right conclusion.

51. I accept that this is an issue of the construction of the rules. Accordingly, the issue before me is not merely whether the Master was *entitled* to reach the conclusion he did, but whether he was correct.
52. Although both Mr Carpenter and Mr Williams began with the position in relation to litigation generally, it seems to me necessary and desirable to start with the context in which this particular offer was made, namely detailed assessment proceedings.
53. The part that interest plays in such proceedings is, in my view, qualitatively different from the part that interest plays in substantive litigation. As I have already observed, it is the original judgment which obliges the paying party to pay costs. Interest on those costs will ordinarily be payable from the date of that judgment until payment of those costs. In order to be entitled to such interest, the receiving party does not have to claim, plead or prove anything more in the detailed assessment proceedings. That is quite different from the entitlement to interest in substantive proceedings. Mr Carpenter is right that, in substantive proceedings, the source of the entitlement to interest can vary and sometimes the power to award interest derives from statute (such as Senior Courts Act 1981 s.35A), but these differences are significant and mean that it is not mere assertion on the part of Mr Williams that puts interest under the Judgments Act in a different category.
54. In detailed assessment proceedings what the Costs Judge has to determine is whether the receiving party has made good her entitlement to each of the items in her bill of costs, at least in so far as those items are challenged by the points of dispute. As I understand it, the bill of costs will not include interest: that is for the good reason that interest will follow once the assessment has been completed.
55. Again as I have shown, there is no power in the Costs Judge to alter the *rate* of interest payable under the Judgments Act, either on the assessed costs or on the costs of the detailed assessment itself.
56. Rule 47.8(3) and Rule 47.14(3) give the Costs Judge the power to curtail the period for which interest can be charged on the costs, but in each case that is only where the receiving party has been dilatory and the present case is not one where the claimant unduly delayed either in commencing the detailed assessment proceedings or in requesting a detailed assessment hearing.
57. So far as this case was concerned, there were no issues regarding interest which the Master had to decide. Rule 47.20 does not expressly adapt Part 36 to the nearest equivalents of pleadings in detailed assessment proceedings, but it is sensible to regard them as the bill of costs (the nearest equivalent to particulars of claim) on the one hand and the points of dispute (the nearest equivalent to a defence) on the other. As Coulson LJ said in *Hertel* it is sensible and efficient to look to the pleadings to identify the issues in the litigation. *Calonne* did not dissent from the proposition that this was a legitimate approach, once proceedings had begun.
58. Consequently, it seems to me that the offer which Fieldfisher made on 5th March 2018 was indeed for the whole of the claim in the Detailed Assessment proceedings.

59. What purpose is then served by the words ‘excluding interest’ in the offer or are they in truth no more than mere surplusage? There is a purpose derived from 47PD.19. For convenience, I repeat its terms which are,

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

60. Thus, an offer (whether or not made pursuant to Part 36) which was silent as to interest would be taken to be inclusive of interest. ‘Interest’ in the context of these detailed assessment proceedings can only be a reference to Judgments Act interest. It is difficult to contemplate what other power in these proceedings to award interest could be relevant.

61. What was described to me as the leading textbook, *Friston on Costs*, says at paragraph 43.264,

‘PD47.para 19 implies that is it [sic, presumably ‘it is’] permissible to make an offer that is stated to be exclusive of interest. When Part 47 offers were the predominant type of offer [presumably referring to the rules prior to 2013], this caused no difficulties. *Indeed, such offers were the norm, because offers that were exclusive of interest were far more convenient, both for practitioners and for judges (especially in cases in which payments on account had been made).* Now that Part 36 offers have taken their place, however, the situation is not so clear. [he then quotes r.36.5(4) and continues] Thus on the face of it, a Part 36 offer will be regarded as being inclusive of interest calculated to the last day of the “relevant period”, that period usually being 21 days after it was made. [my emphasis]’

62. Friston then sets out the possible alternative ways in which an offer to accept ‘£x exclusive of interest’ could be interpreted. He noted that Judge Robert Owen QC in Nottingham County Court in *Potter v Sally Montague* (7th October 2016) concluded that such an offer was not a valid Part 36 offer. Friston adds at paragraph 43.267,

‘In the editor’s opinion – which could well be wrong – the first interpretation [viz that the offer relates only to that part of the claim which did not comprise interest] is to be preferred. This is because interest on costs is different from interest on damages in that interest on costs does not form part of the claim itself: interest on damages is pleaded as an integral part of the claim and will merge with the judgment, whereas interest on costs is judgment debt interest payable *on* the claim and will not merge with any judgment. Moreover PD47 paragraph 19 states that Part 36 offers regarding costs can be net of interest, *which was not only the norm prior to 1st April 2013, but also by far the most sensible and least confusing way of making offers in detailed assessment proceedings.* This being so, it would be surprising if CPR r.36.5(4) were to take precedence over CPR r.36.5(1)(d), in such a way as to prevent a party from making an effective Part 36 offer that is exclusive of interest. That said, it should not be forgotten that whilst it is permissible to use practice directions as an aid to interpretation of the CPR, they are, at best, only a weak aid.’ [my emphasis]

63. There are dangers in ‘going off script’ when making an offer which the offeror wants to attract the advantages of Part 36. Part 36 is prescriptive as *Shaw v Merthyr Tydfil* illustrated. But the problem in that case was with the solicitors’ use of an out-of-date precedent whereby the offer included terms which were inconsistent with the then current mandatory requirements and did not include the language which was required – see [16]-[17]. So, too, the offer in *James v James* [2018] EWHC 242 (Ch) included a term as to consequences of acceptance which differed ‘(albeit not by very much)’ from what the rules provided. Consequently, this, too, was not a valid Part 36 offer – see [12].
64. But while Part 36 is prescriptive, no case cited by Mr Carpenter suggested that the inclusion of additional words which did not conflict with the mandatory requirements or the operation of the scheme (to the extent that that is different) would mean that an offer was not a valid Part 36 offer.
65. I recognise that flexibility must be allowed for anticipated issues. Thus, a paying party who did expect to raise an issue about delay and to ask for an order under r.47.8 or 47.14 could conceivably wish to make an offer that did (or did not) take account of the adjustment on interest. Likewise, if an issue about interest was in contemplation, a receiving party may wish to make an offer which did (or did not) include interest. I stress that is not this case because interest simply was not going to feature in what the Master had to decide.
66. In my judgment, the right analysis is as follows:
- i) The bill of costs would not have included interest. The bill of costs and the notice to commence the Detailed Assessment proceedings had been served well within time. No application had been, or could reasonably have been, made under r.47.8 to disallow part of the period on which Judgment Act interest would run. Interest was simply no part of what the Master would have to decide. Interest did not feature in the claim which was the detailed assessment proceedings.
 - ii) Accordingly, the offer of 5th March 2018 was rightly described as relating to the ‘whole of the claim’, that is the whole of the claim in the detailed assessment proceedings. There was no severable part of that claim which concerned interest.
 - iii) Interest would be payable on the costs and the costs of the detailed assessment proceedings, but that would be added automatically by virtue of the Judgments Act: it did not need to be claimed.
 - iv) Because of 47PD.19 it was prudent for the solicitors to specify that the offer was exclusive of interest, otherwise the effect of the Practice Direction would be that the offer would be treated as being inclusive of interest (at least until the conclusion of the relevant period).
 - v) But this qualification did not alter the fact that interest was no part of the claim and so the offer to settle was of the whole of the ‘claim’.

- vi) The qualification that the offer also excluded the costs of the detailed assessment was pure surplusage. It did not affect the validity of the offer as a Part 36 offer. If the offer was accepted, those costs would be payable by the Defendant by virtue of r.36.13(3).
 - vii) I note that the Practice Direction also says that (unless the contrary is indicated) the offer will be taken to include the cost of preparing the bill. That may strike those unfamiliar with the minutiae of detailed assessment proceedings as curious: it may rather be thought that the cost of preparing the bill was but one aspect of the costs of the detailed assessment proceedings themselves. However, it seems that the bill will also include the costs of preparing (and checking) the bill itself - see 47PD paragraph 5.19 which says,
 - ‘the bill of costs must not contain any claims in respect of costs or court fees which relate solely the detailed assessment proceedings *other than costs claimed for preparing and checking the bill*’ [my emphasis]
 - viii) The Appellant does not suggest that the offer otherwise failed to satisfy the requirements of Part 36.
 - ix) The validity of the offer as a Part 36 offer was not affected by the inclusion of the words ‘exclusive of interest’.
67. However, if I am wrong about this and interest ought to be regarded as a part of the claim, or an issue in the claim my conclusion would still be that the Master was still right to regard Fieldfisher’s offer as a valid Part 36 offer since it was, on this assumption an offer to settle part of the claim, namely the principal sum in the detailed assessment proceedings, but not interest. None of Mr Carpenter’s arguments persuaded me to the contrary.
- i) The language of r.36.5(1) is in marked contrast to that of r.36.5(4). Rule 36.5(1) is mandatory: in order to be a Part 36 offer it ‘*must*’ contain the four listed requirements. Rule 36.5(4) by contrast is framed as ‘A Part 36 offer which offers to pay or offers to accept a sum of money *will be treated* as inclusive of interest’
 - ii) That contrast is mirrored elsewhere in Part 36. Thus r.36.5(3) says,
 - ‘In appropriate cases a Part 36 offer *must* contain such further information as is required by r.36.18 (personal injury claims for future pecuniary loss), rule 36.19 (offer to settle a claim for provisional damages) and rule 36.22 (deduction of benefits.’ [my emphasis]Each of those rules makes clear which of their requirements are mandatory by also using the term ‘*must*’.
 - iii) I did not find persuasive Mr Carpenter’s argument that an offer which excluded interest could not be a valid Part 36 offer because it would not then be made ‘in accordance with rule 36.5’ as r.36.2(2) requires. I read that as simply a drafting device for cross-referring to rule 36.5. It leaves to rule 36.5 to determine which requirement is mandatory.

- iv) I did not find the historical development of Part 36 to be particularly helpful in interpreting the current version. There clearly have been some very significant changes, but their substantial nature only serves to emphasise the importance of focussing on their present form. I, of course, recognise that there has not, since 2007, been a dispensing power to treat a non-compatible offer as a Part 36 offer. The requirements are strict, but that proposition does not help much in deciding whether an offer may be made in relation to a principal sum (exclusive of interest).
 - v) A *defendant's* Part 36 offer must be expressed as a single sum, but there are other differences in Part 36 between offers by defendants and offers by claimants. Besides, the offer by Fieldfisher was expressed as a single sum. If, as I am currently considering, that was a sum for only part of the claim, it did express what sum the claimant would accept for that part.
 - vi) I see nothing in the claimant's offer which was incompatible with the scheme of Part 36, as had been the case with some of the authorities cited by Mr Carpenter.
 - vii) If this offer was to be treated as relating to part of the claim, I recognise that, on acceptance, the claimant would not have automatically been entitled to her costs, but would have to either obtain the defendant's agreement to this or seek an order from the court. But that is sensible, if (as I am currently assuming) interest is a severable part of the claim.
 - viii) On this same assumption, I do not accept that the court would lack jurisdiction to determine interest. Where an offer in relation to part of the claim is accepted, the claim is stayed as to that part. The claim is not stayed as to the part of the claim to which the offer did not relate.
 - ix) Rule 36.5(1)(d) says that the offer must state whether it relates to the whole or to part of the claim. As I have explained, my view is that it did relate to the whole of the claim. Nonetheless, I am examining here the position if the true interpretation of the offer was that it did relate to only part of the claim. *Ex hypothesi* r.36.5(1)(d) is satisfied. Put another way, if it did not relate to the whole of the claim, that was only because it was qualified so as to exclude interest.
68. Given my conclusions, Mr Williams has no need to have recourse to his fall-back arguments. It is sufficient for me to say that, in regard to them, I see considerable force in Mr Carpenter's responses. First, to treat the offer made by Fieldfisher as *inclusive* of interest would stand the process of contract interpretation on its head. That is simply not what the offer said, nor what its objective intention was. It also seems to me that the remarks of Davis LJ in *F & C Alternative Investment* are a formidable obstacle to the argument that I should exercise my general discretion as to costs so as to allow the Claimant indemnity costs and/or enhanced interest.

Conclusion

69. Nonetheless, for the reasons that I have given, this appeal is dismissed.