



Neutral Citation Number: [2021] EWHC 1668 (QB)

Case No: QA-2020-000213

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
ORDER OF HHJ SAGGERSON DATED 22 OCTOBER 2020
CLAIM NUMBER E25YJ950

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/06/2021

Before :

THE HONOURABLE MRS JUSTICE COLLINS RICE

Between :

Mr Anup Shah
Mrs Alpa Shah

Claimants/Respondents

- and -

Mr Ketan Shah
Mrs Deepika Shah

Defendants/Appellants

Mr Stephen Goodfellow (instructed by Bishopsgate Law) for the **Appellants**
Mr Yash Bheeroo (instructed by CVS Law) for the **Respondents**

Hearing date: 26th May 2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website.

The date and time for hand-down is deemed to be 12pm 21st June 2021

Mrs Justice Collins Rice:

Introduction

1. This is an appeal against a costs decision.
2. The parties are caught up in an intense and protracted family dispute. Amongst other things, they had been litigating over an apartment in Goa, India. They settled one round of that argument by agreement, the terms of which were incorporated by consent into a County Court Order dated 14th December 2016. That required the Appellants to ‘take all necessary steps’ to transfer their ownership of the apartment to a company nominated by the Respondents by a certain date. The Respondents later brought an action claiming breach of that obligation and seeking damages in the order of £30,000.
3. The claim went to trial in the County Court in October 2020. The Judge found the Appellants in breach of their obligation. He awarded the Respondents nominal damages of £10. He invited written submissions on costs, which the parties made.
4. By a judgment of 22nd October, the Judge ordered the Appellants to pay the Respondents their costs. The Respondents had made a ‘Part 36 offer’ which the Judge considered operative. So he ordered the Appellants to pay costs on the standard basis up until the effective date of the offer, and on the more onerous Part 36 basis thereafter. The Appellants say he went wrong as a matter of law in doing so.

The Legal Framework

(i) Awarding Costs

5. The starting point is that the award of costs is at the discretion of a Judge (CPR 44.2). In exercising that discretion, a Judge must have regard to all the circumstances of the case. Those include the conduct of the parties; whether a party has succeeded on part of its case, even if it has not been wholly successful; and whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim. The decided cases give further guidance, but are also clear that the discretion is broad, and highly fact sensitive.
6. The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but a court may make a different order. Again, the caselaw gives guidance on how to identify the ‘successful’ party, including in cases where nominal damages have been awarded.
7. Part 36 of the Civil Procedure Rules is ‘a self-contained procedural code about offers to settle’. Its policy is to encourage settlement of disputes without recourse to litigation. One of the ways it does that is by setting out the components and procedure for parties to make settlement offers the refusal of which can have adverse costs consequences. Where a claimant has made a Part 36 offer, the defendant does not accept it, and the case goes to trial, then if judgment is given against the defendant which is at least as

advantageous to the claimant as the proposals contained in the claimant's Part 36 offer, the costs penalties set out in CPR 36.17(4) will fall on the defendant. Those consequences are mandatory, unless a court considers it would be 'unjust' to impose them. The caselaw confirms that the test of injustice sets a high bar or 'formidable obstacle' for a defendant (*Smith v Trafford Housing Trust [2012] EWHC (Ch) 3320 at [13]*).

8. In cases involving effective Part 36 offers, the award of costs will be a two-part process. The offer will contain a date at which a failure to accept it will trigger the costs penalties. Costs arising after that date fall to be assessed on the more onerous Part 36.17 basis. Costs arising before that date fall to be assessed on the usual CPR 44 basis.

(ii) Appeals Against Costs Decisions

9. The breadth of the discretion under CPR 44.2, and conversely the specificity and mandatory nature of the Part 36 code – and the extent to which both turn on the factual matrix of any given case and the manner in which it has been conducted – have led the Court of Appeal to sound a distinct note of caution in its guidance as to how appellate courts are to approach costs appeals (*Webb v Liverpool Women's NHS Foundation Trust [2016] EWCA Civ 365*). An appeal court:

must exercise self-restraint in substituting its views for the views of the judge who has the feel of the case he has tried, as well as knowledge of its progress and nuances of detail which are not suitable for an investigation on an appeal concerning costs.

10. More specifically, an appellant will need to show that a judge:

erred in principle, took into account matters which should have been left out of account, left out of account matters which should have been taken into account, or reached a conclusion which is so plainly wrong that it can be described as perverse.

One way of testing that last point is to ask whether a Judge's decision is '*wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale*' (*AEI Rediffusion Music Ltd v Phonographic Performance Ltd [1991] 1 WLR 1507 at 1523*).

Procedural History

(i) The Respondents' Part 36 Offer

11. The trial of the Respondents' claim had originally been listed for November 2019, and the parties had prepared themselves for trial on that basis. That date was however vacated for administrative reasons, and the trial was not reinstated until October 2020.
12. The Respondents meanwhile made a Part 36 offer on 21st April 2020. They offered to settle their claim for the nominal sum of £1. The terms included the payment by the Appellants of the Respondents' costs to date. Substantial costs had already been

incurred. Both parties' costs budgets had been set above £100,000, and the Respondents' costs to date then stood at more than £200,000.

13. The Appellants were given 21 days to accept the offer. That expired on 12th May, which was therefore the point at which the CPR 36.17(4) costs consequences would be triggered. The Appellants did not accept the offer.

(ii) The Award of Nominal Damages

14. The County Court judgment of 14th October, handed down shortly after the end of the trial of liability, found the Appellants in breach of their legal obligations, but observed that whether damages were recoverable was 'another matter'. In fact the Judge had already informed the parties at the close of the proceedings on 13th October of the result on liability and quantum.
15. There were two aspects to the damages claim. The first related to the delay in the transfer of the apartment. The terms of the settlement Order had been that the Appellants were to transfer the apartment not directly to the Respondents but to a company nominated by them. The arrangement between the Respondents and the company about the apartment was complicated and apparently artificial. The Respondents were claiming for a form of notional monthly rental income to be realised from the (untransferred) apartment which was in fact a notional interest rate on a notional sum owed by the company to the Respondents attributed to a notional value of the apartment (which bore a relationship of some sort to the costs of the settled litigation). In his judgment, the Judge described this complicated arrangement as 'contrived' and hence found problems with the way in which the losses had been identified.
16. He also found the losses unproven. There was no valuation evidence as to what the apartment was worth. There was no evidence of prevailing interest rates. He found an 'imbalance between the evidence and the pleading' demonstrating 'some contortions on the Claimants' part to justify an alleged loss'. He noted that if the Respondents had suffered loss it would be the loss of the use of the capital sum agreed as the purchase price of the apartment for the period of the delay. A 'loss of use' claim, he thought, was capable of being expressed as a lost monthly rental income; however in the absence of market valuation and potential rental income evidence the Judge was 'not prepared to speculate' on what the figures might be. His conclusion was that '*Because the Claimants' case on this aspect of their alleged losses faces two ways: towards "rent" and towards "interest", none of this has been gone into. I am simply not satisfied that this aspect of the damages claim has been adequately made out, even on balance.*'
17. The second part of the damages claim related to legal costs. The Judge noted there was no witness evidence about this. Some invoice bundles were relied on, but there was unexplained discrepancy between the totals and the sum claimed, the periods of the invoices did not relate straightforwardly to the conveyancing history of the apartment, and there was no evidence the invoices had been paid or that any outstanding sums were liable to be paid. In these circumstances, the Judge found '*such evidence as there is on the legal costs, at best perfunctory, and unnecessarily so. It is not good enough to establish the claim.*'

18. The Judge had framed his judgment in the general terms that the dispute was part of a broader background in which *'the parties have fallen out and lost their sense of proportion'*. He concluded it in similar terms.

There will be judgment for the Claimants. The judgment will be for the nominal sum of £10.00. I am constrained to conclude that the contrivances and shortcomings of the Claimants' claim as it is put in damages is due to the fact that the recovery of genuine losses is not the objective of this disproportionate litigation. Rather, the motivation (as the factual witness statements suggest) is that this action is merely a further round in the continuing personal battles between these two factions of the same family.

(iii) The Costs Decision

19. The Judge concluded the hearing on 13th October by inviting oral submissions on costs. The Appellants proposed that *'in a case of this kind clearly the winner is the defendant and that the costs should be borne by the claimants'*. The Respondents drew attention to their Part 36 offer. The Appellants began submissions that the normal Part 36 consequences should not follow *'because it's not a genuine offer to settle the value of the claim; it is simply an attempt to game the system in terms of obtaining a costs order...'* when the Judge intervened. He commented on the unusualness of a Part 36 offer based on nominal damages. He said he was aware of *'law on gamesmanship and tactical part 36 offers'*, proposed a short timetable for written costs submissions, and reserved his position.
20. The parties made detailed costs submissions. The costs judgment of 22nd October 2020, which is the subject of the current appeal, records them. It records that the Judge directed himself to the provisions of CPR 44.2 and CPR 36.17, and sets those provisions out.
21. The operative part of the judgment is as follows:

8. In my judgment, the proper place to start must be CPR 36.17 and the sometimes harsh, even brutal, default consequences of 36.17 must be applied in the present case.

9. I am satisfied that this action was contested with disproportionate investment of time, energy and cost on both sides, as I am satisfied that it forms only the latest chapter in a sad story of family dysfunction. However, I am not satisfied that the claim was an abuse or motivated solely out of the vindictiveness of the Claimant towards, or the economic oppression of, the Defendants. The damages, in the way they were claimed, were contrived and the evidence in support of that claim, contorted, but, properly thought out to the point of proof, there may have been some recoverable legal expenses in there somewhere and a rethink about the consequences of a delayed

registration of title could have yielded a more viable claim for loss of use of the property. I infer that by the time the Part 36 offer was made, with so much already invested in the action, the Claimants are more likely than not to have concluded that re-working their financial claim and the supporting evidence was too risky and too expensive to be worth further pursuit. In colloquial terms, they saw the writing on the wall on damages. Something of the sort must have been in their minds given their Part 36 attempt to trade the damages claim for an acceptance of liability and costs. Unpromising though the claim for damages was, as then configured, the Claimants were entitled to consider that, despite its flaws, they might still recover something.

10. What was really left of the action in monetary terms were the prodigious costs. Regrettably, this will not have been the first nor the last action which turns out, during the course of the litigation, to be more about costs than the substance of the case. The Claimants were entitled to take this into account as they were entitled to consider that, whatever losses could be proved, their case on breach of the Tomlin Order was strong. Vindication in respect of a transaction that had been completed years previously was not the only issue engaged by April 2020. In my judgment the relevant point is that the costs had become unavoidably entangled in the litigation as a whole. Whilst the parties (particularly the First Claimant) may have become fixated on costs, this is hardly surprising; neither is it, unfortunately, unusual.

11. I cannot depart from the default position under CPR 36.17 simply because the rules themselves may appear harsh or produce a harsh result. The whole object of Part 36 is to drive litigating parties towards a reality check such that they are prepared to “give” as well as to “take” and to demand that reassessment is made, on all sides, of entrenched positions. The Claimants had on several previous occasions invited the Defendants to acknowledge their breach of the strongly worded Tomlin Order, but to no effect.

12. By this Part 36 Offer the Claimants were prepared to bend. The Defendants were, at least by then, unbendable; despite having previously made unsuccessful offers to settle of their own. Whilst much of the costs would already have been incurred by April 2020, there were still substantial savings to be made by the Defendants in the event that their defence was unsuccessful and there remained a risk, for them, that a Court would in addition to finding against them on liability, award something in damages to the Claimants.

13. I am not persuaded that this case is a mirror image of those in which a Claimant has offered to accept the full amount of a claim in order to try and take an illegitimate, tactical

advantage over a Defendant simply to recover the uplifts awarded under Part 36.17. I am satisfied that this Part 36 Offer was a genuine attempt to settle the action; to have done with it. As things turned out, it was an Offer that got very close to the final conclusion of the Court.

14. CPR 36.17(1)(b) applies to this situation. The “... *judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant’s Part 36 offer*”.

15. I am not too concerned about the fact that the Part 36 Offer to settle for nominal damages was £1.00 whereas the judgment was for £10.00. The fact of the matter is that the Claimants offered to settle for nominal damages and that is precisely what they were awarded having proved their case on breach of contract. Therefore the Judgment is at least as advantageous as the Offer. There may be room for argument in other cases as to whether the precise amount of an expressly nominal sum has the same importance or impact as small difference in substantial damages. The point is not necessary to decide in the present case.

16. I do not accept the submission that up until the date of the Part 36 Offer the Defendants would be entitled to their costs which in some way, it is submitted, justifies the Defendants’ intransigence on liability. Of course, the CPR 44.2 factors are important and relevant, but they can only be seen, in a case such as this, in the context of Part 36. If there is any tension between the Part 44.2 factors and Part 36, the starting point must be Part 36 due to its clear, underlying purpose. 36.17(5) engages certain factors that must be taken into account in the determination of whether it is unjust to follow through on the default Part 36 consequences, but these are not to the exclusion of factors such as those itemised within Part 44.2.

17. The Court’s usually wide discretion on costs in these circumstances is much more limited. Departure from the costs consequences of Part 36.17 whether in principle or in terms of the additional sums awarded can only be avoided where it is unjust to apply the rules or apply them to their full effect.

18. The authorities are clear. This is a high hurdle. In *Ayton v RSM Bentley Jennison & Ors* [2018] EWHC 2851 (QB); a case in which the court considered whether it would be unjust to order the default Part 36 costs consequences after the claimant beat his Part 36 offer, Lewison LJ noted that “*the cases are unanimous in stating that the test of injustice is a high hurdle...*”. Elsewhere, Biggs J (as he then was) described the burden on a claimant in this regard as a “*formidable obstacle*”.

19. It is sufficient for me to recognise and accept the submissions made on behalf of the Claimants in paragraphs 18 (1)-(11) of Mr Bheeroo's skeleton argument. In the light of my findings, the Claimants are not able to demonstrate that applying the consequences of Part 36.17 would lead to an injustice.

20. In more detail, it is submitted on behalf of the Defendants as follows.

20.1 The Defendants were the successful party. I reject this submission.

20.2 The Defendants attempted to engage the Claimants in settling the claim. This is correct but they were unsuccessful.

20.3 The manner in which the Claimants pursued the litigation is relevant and was demonstrably motivated by malice. I have rejected this submission.

20.4 The Claimants' exaggerated their claim. I have accepted that the damages claim was flawed as presented to the Court.

20.5 The Claim was an abuse and designed for an improper purpose. It was not, in my judgment.

20.6 When considering the Claimants' Part 36 Offer the Court should take into account that:

20.6.1 the offer was not '*at least as advantageous*' as the judgment obtained. It was.

20.6.2 It would be unjust to award the Claimants costs or any of the enhanced awards because

- (a) the terms of the Offer were an abuse.
- (b) The stage of the proceedings when the offer was made being after the costs had been largely incurred.
- (c) The Claimants had withheld crucial information from the Defendants and the court.
- (d) The conduct of the Claimants.
- (e) The offer was not a genuine offer to settle the proceedings.

21. The points drawn from the Defendants' submissions of 20.6.2 above are further developed by Mr Coulter in his written

submissions. In the light of the findings I have made I am unable to accept those submissions.

22. I am satisfied that the Part 36 consequences in respect of indemnity costs from 13 May, together with interest at 2.5% above base rate, are not unjust in all the circumstances. A payment on account of costs is warranted, there being no reason to depart from current usual practice and I have assessed this in a sum modestly lower than that sought by the Claimants, namely, £75,000.00.

22. The costs order provided:

The Defendants shall pay the Claimants:

- (1) their costs of these proceedings on the standard basis until 12 May 2020 to be subject to detailed assessment if not agreed;
- (2) their costs of these proceedings on the indemnity basis from 13 May 2020 until 19 October 2020 to be subject to detailed assessment if not agreed; and
- (3) interest on the whole of the sum awarded by the Court from 13 May 2020 until 15 October 2020 at the rate of 2.5% per annum above Bank of England base rate from time to time.

Grounds of Appeal

23. The Appellants have permission to appeal on the following grounds:

1. The learned judge was wrong to find that the Appellants should pay the costs of the action.
 - a. The learned judge failed adequately or at all to address the costs issues or misdirected himself, in that:
 - i. He failed to address the question of as to who was the winner.
 - ii. He failed to address the point that a party who is awarded nominal damages is axiomatically the loser.
 - b. The learned judge was wrong to find that the Respondents' claim was not an abuse.

- c. The learned judge failed to apply his finding of fact that the claim was “*contrived*” and that the Respondent’s evidence was “*contorted*”.
 - d. The learned judge failed to find that the Respondents’ Part 36 Offer (in the sum of £1) was an abuse or alternatively was not a proper Part 36 Offer.
 - e. If contrary to the Appellants’ primary argument the learned Judge was entitled to find that the Respondents could rely on their Part 36 Offer the learned judge failed to find that in bringing a claim for damages which had failed the Respondents should pay the Appellants costs up to the date of the expiry of the Part 36 Offer (by which date the vast majority of the budgeted costs would have been incurred).
 - f. The learned judge failed to give any or any adequate weight to his findings that the Respondents had brought the claim not for the purported claim for damages but in order to continue a family dispute.
 - g. The learned judge failed to find that awarding costs to the Respondents would be ‘unjust’.
2. The learned judge failed to address adequately or at all the arguments raised by the Appellants on costs in his judgment. In particular:
- a. Who was the winner, and what were the consequences of the answer to that question.
 - b. Whether the Respondents’ claim and/or the Respondents’ Part 36 Offer were an abuse.
 - c. Whether the Appellants should have had their costs up to the date of the expiry of the Part 36 Offer.
 - d. Whether it would be unjust to make a costs order in the Respondents’ favour.
3. The learned judge’s decision if allowed to stand would tend to bring the system for awarding costs into disrepute and would permit wealthy Claimants to abuse the system.
4. The learned judge took into account matters which he ought not to have done.
- a. The learned judge relied on correspondence from the Respondents to the Appellants suggesting that the

Appellants should concede that they were in breach of the Tomlin Order.

- b. In doing so the learned judge failed to bear in mind that the offers were tied to a requirement that the Appellants similarly agree to be liable for damages and the costs of the proceedings and therefore the learned judge took out of context words in the offers on which he relied.
5. The learned judge failed to take into account matters which he ought to have done.
- a. The learned judge failed to take into account the attempts made by the Appellants to negotiate.
 - b. The failure by the Respondents to engage with those attempts to negotiate.
 - c. The aggressive manner in which the First Respondent in particular conducted the dispute including the litigation.
 - d. The value of the contrived claim as against the costs incurred.
 - e. The learned judge's finding as to the purpose of the litigation and the motivation of the Respondents which was not the recovery of genuine losses but rather a personal family battle.
 - f. The conduct of the Respondents and in particular that the whole claim had been contrived by the Respondents in order to pursue a family dispute.

Analysis

24. Much time, energy and money has been spent on pursuing this dispute through litigation. Now it arrives at the High Court. Able advocates on each side have scrutinised a County Court costs decision through the lens of a set of grounds of appeal which question every aspect of the Judge's efforts. They have provided fine forensic analysis, guidance from authoritative case law, and submissions advancing in full all the points which can be made in each party's favour. The parties may be reassured of the thoroughness of their work.
25. Costs appeals are, however, limited in scope. I begin with the scope issue, identifying the specific points properly arising for consideration on appeal, before applying the relevant legal tests to those points.

(i) Scope

26. I have set out the Judge's decision at length because that is where a costs appeal must start. It is not a rehearing of argument, a reconsideration of the parties' full costs submissions to the Judge, or a re-evaluation of facts. It examines the decision already made for defect of approach, principle or law. Otherwise, the decision is final. Grounds of appeal objecting that a Judge was 'wrong', gave the wrong weight to a factor, or did not give enough reason for rejecting a submission will not succeed unless they go beyond inviting an appellate court to disagree with a Judge. The question is not whether I, or any other Judge, would make the same decision. The question is whether the Judge made a decision he was not properly entitled to make at all.
27. The scope of costs appeals is limited because costs decisions are so fact-sensitive. The original Judge has the benefit of having tried the full case, seen and heard all the evidence, and observed how the parties have conducted themselves. It is impossible to replicate that on appeal, and wrong to try. The substantive litigation is over, and the facts have been conclusively found. An appellate court must show proper respect for the process of trial; it will not revisit fact-finding, or the evaluation of fact, unless it appears that a Judge has gone 'wholly wrong' and done something they were not entitled to do.
28. Whether this costs decision is so 'plainly wrong' as to be *perverse*, forcing a conclusion that the Judge failed to make any fair balance of factors, is not a matter of adding up points of potential disagreement. It is about the quality of any objections that may be made to a decision, not the quantity. Perversity is a fundamental defect. It is not to be confused either with imperfections of expression, or with strong disagreement on the merits. It is a pointer to a decision which is unsustainable or inexplicable: one which a Judge doing a proper job on the materials before them was not entitled to make.
29. The costs Order in this case is not obviously perverse on its face. In principle, where judgment has been given for a claimant after a trial, an order for the defendant to pay standard costs up to the effective date of a Part 36 offer and indemnity costs thereafter, looks conventional; it is the default. The question then is whether the Judge went wrong in law or principle in performing his functions along the way, such that that outcome is nevertheless unsustainable.
30. The functions of the Judge were: to identify the successful party; to exercise his CPR 44 discretion in awarding costs in so far as that discretion was not displaced by the CPR 36 code; to decide whether there was indeed an effective Part 36 order in this case; and, if so, to consider whether it was 'unjust' for the CPR 36.17 consequences to follow. These are routine decision-making functions following trial. They are all fact-sensitive and evaluative.
31. The Judge in this case made operative decisions on each of these points. He found the Respondents to be the successful party. He found they had made an effective Part 36 offer. He awarded them their costs on the standard basis up to the effective date. He did not consider it 'unjust' for the Part 36 consequences to follow thereafter. All of this is either explicit in his judgment or at least implicit in the Order he made. The Appellants say he erred in law or principle, misdirected himself or failed to take the proper factors into account, or did not explain himself adequately, in each decision he made. I consider them in turn.

(ii) Identifying the Successful Party

32. The first issue is whether, having made an award of nominal damages, the Judge went wrong in principle in finding the Respondents, not the Appellants, the successful parties. What the Judge had to do was this:

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 a prize which the plaintiff fought the action to win? (*Roache v News Group Newspapers Ltd* [1998] EMLR 161 at 168-9).

33. The Appellants pointed to cases where an award of nominal damages, or a large discrepancy between sums claimed and achieved, resulted in a claimant not being the ‘successful’ party even though they had proved a point on liability. They drew the Judge’s attention (and mine) to *Pepe’s Piri Piri v Junaid (Costs)* [2019] EWHC 2769 (QB) as a good example. A judgment for nominal damages can indeed amount to a ‘defeat’ (*Marathon Asset Management v Seddon* [2017] 2 Costs LR 255). We also looked at *Clack v Wrigleys Solicitors LLP* [2013] All ER (D) 83 (Apr) and *Jones v MoD* [2020] EWHC 1987 (QB). However, reverting to the test set out in *Roache* (cited with approval in *Pepe’s Piri Piri*), what the Judge had to do first and foremost was to look closely at the facts of the particular case before him.
34. The facts as found here were these. The Respondents had won on liability, on the main issue. The Judge awarded nominal damages, but not because the Appellants were not ‘really’ liable, their breach was ‘technical’ only, the Respondents had missed the target they were aiming at, or the claim was worth nothing. He did so because he found the Respondents had not done a good enough job of disentangling the complicated set-up between themselves and their nominated company to show, and evidence, the extent of their recoverable loss. He was prepared, on the facts, to accept in principle that there was a recoverable loss, but concluded he had not been given enough to work with to quantify it, and was not prepared to speculate. He found this case had not in any event been fought on a commercial basis on either side; he found on the facts that the decision on fault was *the* important issue between the parties and that quantum, although not negligible, was second-order. It was an unusual case.
35. On these findings the Judge made, this case is factually distinct from the cases where a defeat on quantum meant an overall lack of success. Each case turns on its own facts, and the evaluation of those facts determines ‘success’. Nominal damages may or may not be consistent with ‘success’; there is no automatic (or ‘axiomatic’) rule. The analogous cases are just that – analogies, so far as they go. The issue on this appeal is not whether the Judge *could* have found the Respondents to be the unsuccessful parties but whether he *had* to, or had made a mistake of principle which infected his decision either way. I do not see that his decision was either necessarily constrained as to result, or defective. On the facts as he found them, on the reasons he gave for awarding nominal damages, taking the circumstances as a whole, I am satisfied that the Judge had a tenable basis for concluding that: as a matter of ‘substance and reality’ the Respondents had won; they had won something of value (determination of legal fault) which they could not have won without fighting the action through to a finish; and the

Appellants had not substantially denied the Respondents the prize which the Respondents fought the action to win. That the Respondents did not get substantial damages was due to their own litigation mis-steps and not to the intrinsic substance or merits of their case. That did not *necessarily* prevent them being ‘successful’ overall.

36. I am not concerned with the merits of this decision, only with its propriety. I cannot find that it discloses error of principle or law. It was a decision which it was open to the Judge to take, for the reasons he gave, consistently with the law and authorities, on the facts as he found them.

(iii) The Award of Costs

37. The second issue of principle arising on this appeal is whether, having found the Respondents the successful party, the Judge went wrong in principle in deciding to award them (all of) their costs. This is a question about the proper exercise of his discretion under CPR 44.2. The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, and that is what the Judge did. But he could have made a different order. He had to have regard to all the circumstances of the case, including the conduct of the parties; whether a party has succeeded on part of its case, even if not wholly successful; and whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.
38. The Appellants’ challenges on this ground are multiple, and I group them under two headings. The first proposes the Judge’s failure to address his mind to CPR 44 at all; the second (necessarily in the alternative) takes issue with the way he did so.
39. A failure to consider CPR 44 at all would be an error of principle. The Appellants say the Judge preoccupied himself with the Part 36 issue (and the conundrum of an offer to settle on terms of nominal damages) to an extent which led him either to forget to address himself to the pre-offer period at all, or erroneously to regard the answer to the Part 36 issue as determinative of the costs question altogether. It is said he just worked backwards from his Part 36 conclusion (with its limited discretionary component) to a CPR 44 conclusion (ignoring its much wider discretionary component).
40. The Appellants draw particular support for their concerns on this score from what is certainly the costs judgment’s preoccupation with the Part 36 question, from the indication at paragraph 8 of the judgment that the Judge thought ‘*the proper place to start must be CPR 36.17*’ and from the way the Judge expressed his thinking at paragraph 16.
41. What the Appellants had said about this in their original costs submissions was first, that they were the successful parties and entitled to their costs in accordance with the general rule, but second (and even if they were not the successful party) the claim was abusive and exaggerated and should result in a ‘different order’, namely an award of costs in their favour in any event.
42. The Judge clearly considered and rejected the submission that the claim was abusive at paragraph 9 of the costs judgment. The Appellants say that was inconsistent with what he had already found in the liability judgment, namely that ‘*the contrivances and shortcomings of the Claimants’ claim as it is put in damages is due to the fact that the recovery of genuine losses is not the objective of this disproportionate litigation.*’

Rather the motivation (as the factual witness statements suggest) is that this action is merely a further round in the continuing personal battles between these two factions of the same family.'

43. I am not persuaded of inconsistency. The Judge was able at the same time to find that the claim had real substance and was not vexatious, but that the Respondents' preoccupation with fault, and the personal context of the litigation, had distracted them from the task of making out their case on quantum properly. The two are not mutually exclusive.
44. What the Appellants say now, however, is that, having rejected these submissions, the Judge ought to have turned his mind to his CPR 44 discretion and all the facts of the case, but instead simply defaulted to an award of costs in favour of the Respondents by faulty deduction from his CPR 36 analysis.
45. I have reflected carefully on this point. The Judge's articulation of his CPR 44 decision is economical, and some of his explanation quite condensed, particularly at paragraph 16 of his costs judgment. But these have to be read fairly, as a whole, and in context – including the context of his liability judgment. I am not, on balance, persuaded that the Judge fell into the error the Appellants attribute to him: overlooking the CPR 44 component of his decision altogether, or making unjustifiable extrapolations from his Part 36 analysis. My reading of his decision is that he was simply but consciously adopting the CPR 44 default that costs follow the event and had concluded that was the obvious course.
46. The submissions that had been made to him were on an all or nothing basis – either the Respondents should have their costs in full or the Appellants should (and on an indemnity basis). The Judge chose the former – not, in my view, because he thought his Part 36 decision drove him there, but because for the reasons he had previously given he considered the Respondents fairly the successful party on liability and rejected on merit the Appellants' submissions to make a different order.
47. On the basis that the Judge did give his mind to his CPR 44 function, the question is whether he did so defectively, failing to direct himself to the correct factors or otherwise going wrong in principle. He was required to have regard to all the circumstances of the case, including the merits, the evidence, the conduct of the parties and any degree of success by the 'unsuccessful' party. He was required to take a rounded, fact-sensitive and evaluative decision.
48. The Judge had tried the case, heard the evidence, found the facts, given a reasoned judgment on liability and quantum, and received detailed costs submissions. He plainly had a close appreciation of the ins and outs of the case and a rich mix of fact and argument before him. His decision was discretionary, multi-factorial and holistic. Such decisions are not easily reducible to point by point commentary by the decision-maker, and it is not expected of them. Nor are such decisions readily susceptible to point by point objection on appeal.
49. The CPR 44 discretion is broad. The submissions made to the Judge were polarised. He had a spectrum of possible choices between those poles, but it is not wrong in principle to start with the general fairness of the outcome produced by the general rule, and that is where he also ended up. I am clear that the Appellants strongly disagree

with that conclusion and feel that it did not give them enough credit and the Respondents enough discredit. But the Judge had found credit and discredit on both sides. Where objection to a costs decision is about criticising the relative weight given to one factor or another, or to one party's arguments and perspectives rather than the other's, or to the way in which the decision-maker combined the factors – then that is the sphere of disagreement on the merits rather than error of principle unless the decision is '*wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale*'.

50. An appellate court in considering that question will not itself undertake a comparative balancing exercise. It cannot. Trial Judges are far better placed to assess the overall balance of a case than appeal courts, and they will not readily interfere with a CPR 44 decision. I am satisfied that this Judge's decision was within the range of decisions he was entitled to take. He had all the necessary materials before him to come to his own conclusions about what was fair, on the accounts he had been given and what he himself had perceived. He might have done something different, including awarding the Respondents only a proportion of their costs, if he had been convinced of the fairness of doing so, but I am not persuaded that his decision to award full costs was 'wholly wrong' or discloses error of law, principle or approach, warranting (much less 'forcing') interference on appeal. The bar for interference is set high, and rightly so.

(iv) The Part 36 Offer

51. The Judge's hesitation to make a costs decision without written submissions and time to think about them, was prompted by the circumstance of a claimant Part 36 offer to settle on terms of nominal damages, but subject to the payment of substantial incurred costs. He was aware that gave rise to a possible prior question of whether this qualified as an enforceable Part 36 offer at all. Whether an offer is a 'genuine attempt to settle the proceedings' is identified in CPR 36 as a factor to be considered in whether it would be 'unjust' to enforce it, but some of the authorities approach it as an initial question of whether an offer properly qualifies for Part 36 consequences in the first place.
52. The Appellants submitted that it did not. They said it was a sham: an acknowledgment that the claim was worth nothing, and an impermissible attempt to use settlement procedure to oppress another party with an excessive costs bill. It was late: both sides had run up the majority of their trial costs, and the Appellants said the Respondents were seeking a last-minute exit from a weak case and trying to make them pay over the odds for it.
53. The Judge was particularly focused on this point. On appeal, we looked at some of the caselaw giving guidance on the difference between enforceable and unenforceable Part 36 offers. They acknowledge that all Part 36 offers are 'tactical' (*Wharton v Bancroft* [2012] EWHC 91 (Ch) at [22]) and that there are important public policy reasons for working on the basis that they are enforceable, chief among which is certainty:

A party faced with a Part 36 offer ought to be entitled to evaluate it by reference to a rational assessment of his own case (including the risk of incurring unrecoverable costs if he presses on). He should not have to make a significant allowance for the court's view of factors that are inherently difficult to value... (*Gibbon v*

Manchester City Council [2010] EWCA Civ 726 at [40], cited with approval in *AB v CD [2011] EWHC Ch 602*).

54. Where courts have refused to recognise Part 36 offers as enforceable they have therefore not done so lightly. The test was expressed in *AB v CD* as being whether there is a genuine offer with some genuine element of concession and a genuine attempt to avoid litigation, rather than a '*lightly disguised request for total capitulation*' or for submission to the entirety of the relief sought, simply to attach the Part 36 consequences to a successful claim. The offer must include give as well as take (*MVN v RB Greenwich [2015] EWHC 2663 (Admin)*). It must not be 'derisory' (*Wharton v Bancroft*).
55. Here, the Judge found the Respondents had made a genuine attempt to settle the litigation and have done with it. They had been entitled to consider they had a strong case on liability and a valuable claim for damages. They were willing to give up something of value. And, while the incurred costs were already high, there were 'still substantial savings to be made' for both parties in avoiding the trial, and for the Appellants in avoiding the risk of a damages award. In these circumstances, the Judge was satisfied that the purposes of Part 36 were properly served: there was a genuine basis offered for avoiding litigation and if the Appellants chose to proceed they did so at their own risk.
56. The Judge reasoned that this was not the sort of case disapproved of by the authorities where a claimant offers to accept *the full amount* of a claim, simply so as to manoeuvre a defendant into a place where the CPR 36.17 uplifts technically apply. He found the Respondents' offer a genuine compromise in which they were prepared to settle for *less than* their claimed entitlement and thus confer a valuable benefit on the Appellants. How much the Respondents cared about their money claim, the state of this aspect of their litigation, and how much they would have to spend to get it into better shape were tactical issues for them, but did not necessarily undermine the validity of the offer.
57. The disproportion in this case between the *commercial* value of a win on liability, the offer to settle for nominal damages, and the scale of the costs both incurred and prospective was not lost on the Judge. But it is not necessarily determinative of whether the offer is enforceable. A concession may be genuine even at the price of a large costs bill; giving up any and all claim to a financial remedy may be a significant concession; and '*as a matter of principle, the implications of costs should never overwhelm the issue at the centre of litigation*' (see *MR v Metropolitan Police Commissioner [2019] Costs LR 1441* at [16]-[18]) – in this case, the issue of fault.
58. I am satisfied, for the reasons he gave, that the Judge's decision that the Part 36 offer was genuine is consistent with the authorities and one he was entitled to take on the facts as he found them. The Appellants clearly found the offer unattractive. It required them to concede the very point on liability which they refused to concede and it required them to pay a hefty costs bill. So the questions they had to go on to ask themselves were exactly how much they were prepared to stake on the liability issue (how important it was to them), how likely they were to win or lose, how much *more* in the way of costs they were risking if unsuccessful, and whether to make a counter-offer. Those are the components of the usual sorts of calculations parties have to make about

whether to settle or not. Part 36 offers demand hard choices about the least worse alternative. The Part 36 code is specifically designed to make parties face up to these sorts of difficult decisions.

59. The next question was whether the judgment the Respondents had obtained was ‘at least as advantageous’ to them as their offer. The Judge concluded it was: they had obtained judgment on liability and a nominal award of damages slightly higher than the sum they had asked for. He was entitled to that conclusion.
60. The last question the Judge had to address was whether, in *all* the circumstances, it would be ‘unjust’ for the CPR 36.17 consequences to ensue. He correctly observed that the authorities had indicated this was a ‘high hurdle’, in order to preserve the risk structure of CPR 36 and the powerful motivation to avoid litigation which it is its policy to provide. CPR 36.17 directs a Judge’s attention, in considering the test of ‘unjust’, to all the circumstances including the terms of the offer; the stage in the proceedings (in particular how long before the trial started) the offer was made; the information available to the parties at the time; the conduct of the parties with regard to the giving of or refusal of information for the purposes of enabling the offer to be made or evaluated; as well as whether the offer was a genuine attempt to settle the proceedings.
61. The Judge accepted the Respondents’ submissions that it would not be unjust for CPR 36 to take its normal course. He found the claim had substance and was not abusive; the Respondents had a good case on liability; they had an arguable case on damages (although defectively presented); and the objections made to the Respondents’ conduct – in a hard-fought case where *both* parties were so heavily invested in winning on fault that the Respondents were prepared to settle without satisfaction of their money claim and the Appellants were ‘unbendable’ to the point of proceeding to litigation at Part 36 risk – did not, in all the circumstances, amount to ‘injustice’ sufficient to set aside the Part 36 consequences.
62. It has to be acknowledged (and the Judge did so expressly) that the consequences of Part 36 in cases such as this are punishing, but it is a separate question whether they are unjust. The *justice* of Part 36 is that decisions about litigation should be economically utilitarian: it actively discourages litigation on ‘points of principle’ by making litigation not fought on a commercial basis a high stakes activity. Whether the Appellants over-estimated their prospects of success, or whether, as the Judge thought, they valued the chance of inflicting litigation defeat on the Respondents so highly they were prepared to take that chance whatever the cost, their choice to litigate was one which Part 36 is designed to discourage. However intuitively unappealing the offer, the Judge found it reasonable to expect the Appellants to consider it very seriously indeed. On that basis, the Part 36 result was not an unjust windfall for the Respondents, but the product of the Appellants’ preference for a win/lose outcome and the hope of victory, over a settlement which the Judge found *not* to be a ‘request for total capitulation’ in objective reality. He found the reason it was refused was not its inherent and objective lack of merit but the Appellants’ ‘intransigence’ on the issue of fault. The justice of the outcome therefore has to be seen next to what would have been the injustice to the Respondents of forcing them to litigate for a result they would have settled for, but avoiding the adverse consequences of doing so which the Rules provide.
63. The authorities are clear that the test of an injustice is a high hurdle. No court will easily set aside the Part 36 consequences of litigating, when a judgment confirms an

outcome a claimant could have achieved by other means if a defendant had engaged on commercial terms. The Judge directed himself correctly to the test and applied it to the facts of the case as he found them. No error of principle appears in this.

Conclusions

64. I am in no doubt that the Appellants disagree with the costs judgment in this case in the strongest terms. The intensity of their disagreement is a measure of their acute disappointment, the personal context the Judge found to be driving this litigation, and the bill they have to pay. It is not, however, a measure of the injustice or impropriety of the Judge's decision-making. I have examined that decision-making with the critical respect which is required of an appellate court. I do not find a proper basis for interfering with it. The decisions he made he was entitled to make. The test is not whether, like the Appellants, I also disagree with the Judge; nor whether all of his decisions were 'right' in the sense that they were the only ones he could have taken; nor whether any of them was 'wrong' in the sense that he could have taken different or better ones. The test is whether in any respect he took a decision which it was not properly open to him to take at all, because he got the law wrong, went wrong in principle or reached a wholly unsustainable conclusion. I am not satisfied, for the reasons I have given, that that test is passed.
65. Litigation consumes public resource. It is both discouraged and constrained by rules of court, on the basis that it should be a last resort, avoided where possible. That is particularly relevant to contract disputes within families: litigation is costly, adversarial and delivers binary outcomes on limited issues, so is likely to solidify rather than dissolve the grievance and controversy of long-standing personal quarrels. The rules of litigation justice, and the discretions judges can and must exercise in the interests of fairness to *both* sides, and in the public interest, will in those circumstances produce results that a disappointed party may find very hard to come to terms with.

Decision

66. The appeal is dismissed.