Neutral Citation Number: [2022] EWHC 3084 (TCC)

Case No: HT-2020-000141

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 02/12/2022

Before :

VERONIQUE BUEHRLEN KC (SITTING AS A DEPUTY HIGH COURT JUDGE)

- -

Between :

COLDUNELL LIMITED	**Claimant**
- and -	
HOTEL MANAGEMENT INTERNATIONAL LIMITED	**Defendant**

- -
- -

Henry Webb (instructed by **IBB Law**) for the **Claimant**
Kester Lees (instructed by **Pinsent Mason**) for the **Defendant**

Hearing dates: 11 November 2022

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Friday 2 December 2022

DEPUTY HIGH COURT JUDGE VERONIQUE BUEHRLEN KC :

Introduction

1. Judgment was handed down in this matter on 27 May 2022. However, regrettably it was not possible for the parties to agree the terms of the order following that judgment because of disagreement as to the consequences of offers made by the Claimant under CPR Part 36. As a result, it was ordered on 10 June 2022 by consent that there be a further hearing to deal with costs and consequential matters ("the 10 June 2022 Order"). The 10 June 2022 Order also provided for the payment by the Defendant to the Claimant of £597,117 as payment of the judgment sum together with £203,764 by way of an interim payment on account of the Claimant's costs.

2. The matters for determination at this hearing concern the validity of the Claimant's Part 36 offers and, subject (in part) to the outcome of that issue, determination of:

   (i) What interest is payable on the judgment sum and for what period;

   (ii) The basis on which costs should be awarded and the amount of the payment on account of those costs;

   (iii) Whether there should be interest on costs and, if so, at what rate and for what period; and

   (iv) Whether there should be an order for the payment of an additional sum under CPR Part 36.17(4)(d).

The various settlement offers

3. Before setting out the terms of the Claimant's 2 July 2019 Offer it is relevant to note that prior to these proceedings, the parties were party to an earlier set of proceedings, known as the Lease Renewal Proceedings. Those proceedings were settled in June 2019 when HHJ Luba Q.C. made an order including an order for the Claimant to pay a proportion of the Defendant's costs of those proceedings. I refer below to that order as "the 2016 Costs Order".

4. The Claimant made two relevant settlement offers in respect of these proceedings said to have been made pursuant to CPR Part 36:

   (i) The first was an offer to settle upon payment by the Defendant of the sum of £495,000 made on 2 July 2019 ("the Claimant's July 2019 Offer"); and

   (ii) The Second was an offer to settle upon payment by the Defendant of the sum of £380,000 made on 13 November 2019 (the Claimant's 13 November 2019 Offer and together "the Claimant's Offers").

5. The Claimant's 2 July 2019 Offer read as follows:

"We refer to the recent mediation in relation to our client's terminal dilapidations claim (including its claim for loss of profits) in respect of the above property ("the Claim") … This Offer is made pursuant to Part 36 of the Civil Procedure Rules, and it is intended to be a claimant's Part 36 offer. Accordingly, if your client accepts this Offer within 21 days ("the relevant period"), your client will be liable for our client's costs, in accordance with CPR 36.13.

Terms of the Offer

Our client is willing to settle the Claim, including any actual or proposed counterclaims, in the matter referred to above on the following terms:

- Your client to pay our client, within 14 days of accepting this Offer, the sum of £495,000 ("the settlement sum"), by electronic transfer into the following account:

  …
- This Offer takes account of any counterclaims that your client may have against ours in this matter including, without prejudice to the generality of the foregoing, your client's claim for costs pursuant to the Order of His Honour Judge Luba QC dated 27 June 2016.
- The settlement sum does not include costs and, as mentioned above, your client will be liable to pay our client's costs on the standard basis, to be assessed if not agreed, up to the date of service of notice of acceptance if this Offer is accepted within the relevant period.
- The settlement sum is inclusive of interest until the relevant period has expired. Thereafter, interest at a rate of 8% p.a. will be added.

Failure to accept this Offer

If your client does not accept this Offer, and our client obtains a judgment which is equal to or more advantageous than this offer, our client intends to rely on CPR 36.17. In other words, our client will be seeking an order in the following terms:

- Your client to pay our client's costs up to the expiry of the relevant period.
- Your client to pay our client's costs on the indemnity basis from the date on which the relevant period expired, with interest on those costs of up to 10% above base rate and interest on the whole or part of any sum awarded at up to 10% above base rate for some or all of the period starting from the same date.
- An additional amount of 10% of the first £500,000 and 5% of any amount above that figure of the damages awarded by the Court up to a maximum of £75,000.

If you consider this offer to be in any way defective or non-compliant with Part 36, please let us know by return.

…"

6. There were three other settlement offers made in these proceedings:

   (i) An earlier offer made by the Claimant to settle upon payment by the Defendant of the sum of £675,000 also said to have been made pursuant to CPR Part 36; and

   (ii) Two *Calderbank* offers made by the Defendant:

      a. The first made on 24 May 2019 in the sum of £275,000; and

      b. The second made on 3 December 2019 in the sum of £325,000 (together "the Defendant's Offers").

7. The Defendant's Offers were inclusive of costs and stated to be made on the basis that the sum of £25,000 was to be deducted from the Settlement Sum offered "by way of set-off in respect of" the Claimant's liability for costs under the 2016 Costs Order. The Defendant's offers were withdrawn by email dated 27 January 2020.

The Parties' Submissions

8. It is the Claimant's case that its 2 July 2019 Offer was a valid Part 36 offer. Judgment against the Defendant having been at least as advantageous to the Claimant as that offer, the Claimant is entitled to the benefit of the provisions of CPR Part 36.17(4) and therefore to:

    (i) Interest on any sum of money awarded at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired, being 23 July 2019;

    (ii) Costs on an indemnity basis from the same date;

    (iii) Interest on costs not exceeding 10% above base rate; and

    (iv) An additional amount calculated in accordance with CPR Part 36.17(4)(d).

9. Mr Lees submitted on behalf of the Defendant that:

    (i) The Claimant's Offers were outside the scope of Part 36 because they did not comply with CPR Part 36.2(3). The reason they did not comply with CPR Part 36.2(3) was because they were stated to take into account the Claimant's liability for costs pursuant to the 2016 Costs Order.

    (ii) The Claimant's Offers did not comply with the requirements of CPR Part 36.5(d) because:

        (a) They incorporated a matter (the Claimant's costs liability pursuant to the 2016 Costs Order) that was neither part of the claim nor an issue arising in the claim or a counterclaim; and

        (b) They did not sufficiently clearly define the claim they were settling.

    (iii) The Claimant's Offers were not properly served and without valid service there was no valid Part 36 offer.

    (iv) Even if there was a valid Part 36 offer, it would be unjust to give the Claimant the benefit of the provisions of CPR Part 36.17 on the grounds that:

        a. The Claimant unreasonably refused a second mediation of the terminal dilapidations claim when a second mediation stood a reasonable and realistic prospect of success;

b. The Claimant's claim was overstated and some 40% of the value of the claim abandoned shortly before trial; and

c. There was late disclosure by the Claimant of a report dating back to 2015 concerning the condition of the carpets at the Property.

The validity of the Claimant's 2 July 2019 Offer as a CPR Part 36 offer

10. I need only consider the validity of the Claimant's 2 July 2019 Offer under Part 36 because if that offer is a valid Part 36 offer it is the earliest of the two relevant offers in time and therefore that relied upon by the Claimant to trigger the consequences set out at CPR Part 36.7.

11. Mr Lees first relies on CPR Part 36.2(3) by which:

"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 …"

12. Mr Lees submitted that in so far as the Claimant's 2 July 2019 Offer included a reference to the 2016 Costs Order, the offer was not made in respect of any issue arising in the claim or any counterclaim taking the offer outside the confines of the CPR Part 36 provisions. He relied on the fact that no counterclaim had been intimated by the Defendant at the time the Claimant's 2 July 2019 Offer was made and submitted that the Defendant's entitlement to the lease renewal costs was not a matter capable of coming before the Court in these proceedings. This being because liability for payment of the costs had already been dealt with by the terms of the 2016 Costs Order and the quantification of those costs was a matter for detailed assessment.

13. It is correct that at the time the Claimant's 2 July 2019 Offer was made no counterclaim had been brought by the Defendant. That reflected the fact that the Claimant's 2 July 2019 Offer pre-dated the issue of proceedings. However, CPR Part 36.7 expressly provides that a Part 36 offer may be made at any time, including before the commencement of proceedings and therefore prior to any counterclaim being brought. Given that provision, it is not surprising that the Court of Appeal has made clear that an offer will not be invalidated because it refers to a proposed counterclaim that has yet to be pleaded at the time the offer is made: *Calonne Construction Ltd v Dawnus Southern Ltd* [2019] 1 WLR 4793.

14. However, regardless of whether the sum due from the Claimant to the Defendant pursuant to the 2016 Costs Order fell properly to be described as a counterclaim, it is in my judgment clear that it was a matter that was outstanding between the parties at the time the offers were made, and a liability which both the parties understood needed to be set off against any liability established by the Claimant against the Defendant in these proceedings. The Claimant's liability under the 2016 Costs Order was raised by the Claimant in its first settlement offer dated 13 May 2019. Like the Claimant's subsequent

offers the Claimant's 13 May 2019 offer took into account the Claimant's liability for costs pursuant to the 2016 Costs Order. That liability was then expressly referred to in the Defendant's 24 May 2019 *Cladderbank* offer. Pursuant to that offer, the Defendant offered to pay the Claimant the sum of £275,000 in respect of its dilapidations claim but expressly went on to state that:

> "The sum of £25,000 is to be deducted from the Settlement Sum by way of set-off in respect of your client's extant liability pursuant to the Order of HHJ Luba QC dated 27.6.17 …"

15. It is therefore perfectly clear that both parties were cognisant of the Defendant's claim to be entitled to set off the Claimant's liability for costs pursuant to the 2016 Costs Order against the Claimant's claim in the terminal dilapidations dispute at the time the parties various offers were exchanged. The Claimant's liability under the 2016 Costs Order provided the Defendant with a defence of set off against the Claimant's dilapidations claim. Indeed, that is precisely how it was addressed by the Defendant when it came to plead its defence, paragraph 14 of which averred:

> **"Set off**
>
> 14. Further or alternatively, as set out in sub-paragraph 6.2 above, the Claimant is liable to the Defendant for the remainder of the costs order and the Defendant is entitled to set-off such sum against any liability for breach of the covenants in the Lease (which is denied). The assessment of those costs will be complete by the trial of this claim and, therefore, the quantum of such set-off will be known by trial."

16. Whilst, it is correct that the issues of liability and quantification of the costs the subject of the 2016 Costs Order were not matters to be ruled upon by the Court in these proceedings, the Defendant's right to set off the costs liability arising under the 2016 Costs Order against the Claimant's claim in these proceedings was. Thus, had the Defendant proceeded to have that liability quantified, as was apparently the intention at the time the Defence was served, the claim to a set off would have been addressed as part of the judgment in these proceedings.

17. It follows that the Claimant's costs liability under the 2016 Costs Order was an issue that arose in the claim for the purposes of CPR Part 36.2(3) and I accept Mr Webb's submission to that effect.

18. Moreover, if I was wrong so to conclude then, as was submitted by Mr Webb, there is nothing which expressly precludes the inclusion of terms in a Part 36 offer as long as the offer meets the requirements set out in CPR Part 36.5(2). CPR Part 36.2(2) expressly preserves the ability to make an offer to settle in whatever way a party chooses, albeit that if rule 36.5 is not complied with, the offer will not have the costs consequences provided for at rule 36.17: *Calonne Construction Limited v Dawnus Southern Limited* [2019] EWCA Civ 754 at [44] per Asplin LJ. It was therefore open to the Claimant to

include a term in the offer addressing its liability under the 2016 Costs Order as long as the offer complied with the requirements of CPR Part 36.5.

19. Mr Lees also submitted in support of the Defendant's case under CPR Part 36.2(3) that, as a result of the inclusion of the Claimant's liability under the 2016 Costs Order in the terms of the Claimant's 2 July 2019 Offer, the Court was not in position to determine whether the Claimant had obtained a judgment at least as advantageous as the Claimant's offer. I do not consider that to be the correct position. The Defendant valued the Claimant's liability under the 2016 Costs Order at £25,000 at the time the Defendant's Offers were made. Further, the liability was always ascertainable and as was submitted by Mr Webb, the Defendant knows very well the maximum sum it could hope to recover pursuant to the 2016 Costs Order. If that sum was such as to put in any doubt whether the judgment was at least as advantageous as the Claimant's Offers then the sum in question would have been disclosed by the Defendant which it has not.

20. That said, there is also no question of the amount of the Claimant's costs liability under the 2016 Costs Order impacting the question of whether the Claimant has achieved a judgment at least as advantageous as the Claimant's 2 July 2019 Offer. That is because the Defendant's costs budget in the Lease Renewal Proceedings totalled some £195,000. This included the costs of both Trial Preparation and Trial which did not take place resulting in a deduction from the total costs budget of some £50,000. Of the remaining £145,000 pursuant to the 2016 Costs Order the Claimant was only liable for 50% of the costs that is some £72,500, £50,000 of which it had already paid on account. This no doubt explains why the Defendant valued the Claimant's costs liability at £25,000 for the purposes of the Defendant's offers. On the other hand, the Claimant's 2 July 2019 Offer proposed a settlement sum of £495,000 which is some £100,000 less than the judgment sum of £597,117 that the Claimant has obtained in these proceedings.

21. Mr Lees' second submission was that the 2 July 2019 Offer was not sufficiently clearly defined to meet the requirements of CPR 36.5(d). By CPR 36.5(d) a Part 36 offer must:

> "(d) state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and if so to which part or issue".

22. Firstly, Mr Lees submitted that the Claimant's 2 July 2019 Offer did not contain a statement to confirm whether it was the whole or part of the claim which the Claimant was offering to settle. I do not consider that to be correct. The Claimant's 2 July 2019 Offer expressly stated that it was "to settle the Claim, including any actual or proposed counterclaims, in the matter referred to above". The Claim was defined at the outset of the offer as the Claimant's "*terminal dilapidations claim (including its claim for loss of profits) in respect of the above Property*". It is perfectly clear that the offer was made in respect of the whole of the Claimant's terminal dilapidations claim.

23. Secondly, Mr Lees criticised the Claimant's 2 July 2019 Offer for failing to specify whether the 2016 Costs Order entitlement was to be waived or simply set-off meaning,

according to Mr Lees, that the offer was insufficiently clear as to scope and that accordingly the Defendant could not know how to evaluate it. I disagree. I do not see what specifying whether the liability under the 2016 Costs Order was being set off or waived would have added to the terms of the Claimant's 2 July 2019 Offer. The terms of the offer were perfectly clear. The Claimant was offering to settle the Claim (including its liability to the Defendant in respect of the 2016 Costs Order) for the sum of £495,000. There is nothing to suggest that the Defendant had any difficulty in evaluating the terms of the offer. Indeed, as is evidenced by Pinsent Masons' letter dated 24 May 2019, that is exactly what they did in respect of the Claimant's earlier 13 May 2019 offer (that was made on the same terms as the Claimant's 2 July 2019 Offer) when stating that the offer constituted a discount of nearly £400,000 of the headline value of the claim. If the Defendant had been in any doubt as to the scope of the Claimant's 2 July 2019 Offer at the time I would expect it to have sought clarification. It did not.

24. Thirdly, Mr Lees submitted that the Claimant's 2 July 2019 Offer only referred to the "terminal dilapidations claim (including its claim for loss of profits)" which he said was an inadequate identification of the claim. Taking into account the context in which the Claimant's 2 July 2019 Offer was made, the fact that it followed upon a history of exchanges concerning the Claimant's schedule of dilapidations dated 9 November 2017 as well as a much more recent mediation between the Parties, I regard the definition of the Claim as referring to the Claimant's "terminal dilapidations claim (including its claim for loss of profits" in respect of the Mitre Hotel as sufficient to identify the claim in respect of which the offer was being made.

Invalid Service

25. CPR Part 36.7(2) provides that a Part 36 Offer is made "when it is served". The learned authors of the White Book note at paragraph 36.7.2 that "it is unlikely that anything less than formal service under Part 6 will suffice". The Claimant's 19 July 2019 Offer was served by email. However, the Defendant's solicitors had not consented to documents being served by email under CPR PD6A, para. 4.2. Mr Lees therefore submitted that service was not valid and that without valid service there was no valid Part 36 Offer.

26. Mr Webb accepted that the Claimant's 2 July 2019 Offer had not been validly served. However, he submitted that the effect of CPR Part 3.10(a) was that the failure to comply with the rule as to service did not of itself invalidate the making of a Part 36 offer unless the Court so ordered relying on the decision of Robin Vos in *London Trocadero (2015) LLP v Picturehouse Cinemas Ltd* [2021] 4 WLR 143 at [25]. Further, he submitted that the Court has power to make an order validating the service under either CPR Part 3.10 or 6.28 and that the Court should do so having regard to all the circumstances of the case including the fact that:

    (i) The Claimant's 2 July 2019 Offer was emailed to Mr Richard Bartle, the solicitor at Pinsent Masons with the conduct of the Defendant's case throughout these

proceedings, including pre-action, and the person who corresponded with the Claimant's solicitor by email throughout;

(ii) Mr Bartle received the Claimant's Offers and the Claimant's 2 July 2019 Offer was expressly rejected by him on behalf of the Defendant during a conversation he had with Mr Mowbray (the Claimant's solicitor) on 11 July 2019, as is recorded in the Claimant's 13 November 2019 Offer.

27. Lastly, Mr Webb submitted that the Defendant had suffered no prejudice as a result of receipt of the Claimant's Offers by email and that it would be a "*triumph of form over substance*" if the Court were to make an order invalidating the Claimant's Offers as Part 36 Offers.

28. I agree with Mr Webb's submissions. CPR Part 3.10 provides as follows:

> "**3.10 General power of the court to rectify matters where there has been an error of procedure**
> Where there has been an error of procedure such as a failure to comply with a rule or practice direction –
> (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and
> (b) the court may make an order to remedy the error."

29. In *London Trocadero,* Robin Vos (sitting as a Deputy High Court judge) having reviewed various authorities held that "the effect of CPR rule 30.10 is that a failure to comply with the rule/practice direction does not invalidate the making of the Part 36 offer unless the court so orders and that in accordance with sub-paragraph (b), the court may make an order remedying the error". Mr Lees submitted that Robin Vos was wrong not to treat the service requirement under CPR 36 as a condition going to the validity of a Part 36 offer. However, I think that Mr Webb made a valid point when submitting that there was a difference between the mandatory requirements of CPR Part 36.5 together with CPR Part 36.2.2 and the provisions of CPR Part 36.7.2 which is primarily concerned with the time when a Part 36 offer is made and not with its validity. With that in mind, I see no reason not to follow Robin Vos' conclusion.

30. There is therefore no need for the court to make an order. However, if there was then I would make an order under CPR rule 3.10(b) or indeed CPR rule 6.28 dispensing with service and stating that the Claimant's 2 July 2019 Offer was validly made on that date. The key purpose of service of a Part 36 Offer is that the date from which time starts to run for acceptance of the offer, and the assessment of its consequences, should be fixed as well as the obvious need for the offer to have been brought to the offeree's attention. On the facts of the present case, there is no question that the Claimant's 2 July 2019 Offer was communicated to the Defendant since it was sent to the individual solicitor with the conduct of the Defendant's case and responded to by the Defendant. Nor is there any question as to when the offer was sent and received and thus that the date from which time started running for the purposes of ascertaining the consequences of the offer was 2

July 2019. To that falls to be added that there is no question of the Defendant being prejudiced by the fact that the Claimant's 2 July 2019 Offer was sent by email rather than by post. So I entirely agree with Mr Webb that to invalidate the Claimant's 2 July 2019 Offer on the basis of defective service would be a "*triumph of form over substance*".

The consequences of the Claimant's 2 July 2019 Offer being a valid Part 36 Offer

31. There is no question that the Claimant obtained a judgment that was significantly more advantageous to it than the sum it was willing to settle for in July 2019. The consequences of the Claimant having obtained judgment more advantageous that the Claimant's 2 July 2019 Offer are set out at CPR rule 36.17(4). In summary, the Claimant is entitled to:

    (i) Interest at up to 10% above rase rate on the amount of money awarded (excluding interest) from the expiry of the "relevant period" (in this case from 23 July 2019);

    (ii) Indemnity costs from the end of the relevant period;

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

    (iv) An additional amount capped at £75,000 being 10% of the first £500,000 awarded and (subject to the cap) 5% of any amount above that.

32. CPR rule 36.17(4) provides that the Court must make these orders in favour of the Claimant "unless it considers it unjust to do so". In considering whether it would be unjust to make any of the orders the Court is required to take all the circumstances of the case into account including (i) the terms of the offer, (ii) the stage in the proceedings when the offer was made, (iii) the information available to the parties at the time the offer was made, (iv) the conduct of the parties with regard to the provision of information in order to evaluate the offer and (v) whether the offer was a genuine attempt to settle the proceedings (see CPR rule 36.17.5).

33. There can be no doubt that the Claimant's 2 July 2019 Offer was a genuine attempt on the part of the Claimant to settle before proceedings were issued, with a view to saving the considerable costs that would otherwise be incurred in litigation, and Mr Lees rightly did not submit otherwise.

34. All the same, Mr Lees submitted that it would be unjust to impose the consequences provided for by CPR rule 36.6.17 on the Defendant on a number of grounds. Firstly, he submitted that the defect in service was justification for departure from the CPR rule 36.17 consequences citing paragraph 45 of Robin Vos judgment in the *London Trocadero* case referred to above as support for that submission. Robin Vos having taken the view in *London Trocadero* that the defective service was a relevant factor. For my part I do not consider defective service in the circumstances of the present case to be a relevant factor. The Claimant's offer was clearly brought to the attention of the Defendant and nothing turned on the fact that the offer was emailed rather than posted. I am also mindful of the fact that there is reason to believe that the Defendant was aware at the time that the

Claimant's 2 July 2019 Offer had not been properly served and was keeping that fact "up its sleeve" (so to speak). I have come to that conclusion because in response to the Claimant's offers, the Defendant repeatedly stated that it made no admissions as to what "purports to be a letter written pursuant to Part 36 of the Civil Procedural Rules". If the Defendant believed the Claimant's offers were defective it ought, in the spirit of co-operation which would enable Parties to settle their disputes and taking into account that the purpose of Part 36 is to promote settlement, to have raised that with the Claimant at the time rather than merely not admitting the validity of the offer as a Part 36 Offer.

35. Mr Lees further submitted that the following conduct on the part of the Claimant renders it unjust to award the Claimant the CPR rule 36.17 consequences. Firstly, it is said that the Claimant acted unreasonably in refusing to participate in a second mediation on the terminal dilapidations claim when a second mediation stood a reasonable and realistic prospect of success. I do not think that the fact that the Claimant declined a second mediation in November 2019 was unreasonable. By November 2019, the parties had already participated in a mediation a matter of months earlier in relation to the dilapidations claim which had failed. The Defendant's solicitors appear to have raised the prospect of a further mediation, albeit without instructions, in a telephone conversation on 11 July 2019. The Claimant's 13 November 2019 Offer referred to the without instructions proposal, expressed the Claimant's view that a further mediation would not be worthwhile and referred to two unsuccessful mediations in relation to the dilapidations at the Mitre, the first presumably in connection with the Lease Renewal Proceedings. Whether the Defendant was in fact willing to mediate a second (if not third) time is not in fact clear since the possibility was raised by the Defendant's solicitors without instructions. Further, it is clear from the three offers made by the Claimant that it was doing everything it could to settle its claim at substantially less than the dilapidations schedule indicated it was worth at the time. By its 13 November 2019 Offer, the Claimant stated its willingness to settle its claim for £380,000. However, the Defendant's offers were substantially less than those made by the Claimant. It is difficult to see what more could have been achieved through mediation that could not be achieved through the Claimant's offers other than the Claimant being required by the Defendant to reduce its offers even further.

36. Secondly, the Defendant relies on the fact that the claim was "massively overstated" at the time the offers were made (circa £1.4 million at the date of the offers; £1.1 million at the time of issue of the Proceedings). I do not consider the overstatement of the claim as particularly relevant on the facts of this case. The Defendant well knew or ought to have known the true condition of the Mitre hotel. Further, various items of the dilapidations schedule were not pursued because, for instance, the bathrooms required replacement in any event. The Defendant had the opportunity to fully evaluate and accept the Claimant's offer to take £495,000 in settlement of the claim regardless of whether the Claimant was arguing for more at the time. Indeed, the Defendant then had the opportunity to settle the claim for £380,000, a considerable further deduction but refused that offer also.

37. Thirdly, the Defendant points to the fact that the Claimant abandoned some £400,000 of its pleaded claim shortly before trial and that had these concessions been made by the Claimant earlier, as they ought to have been, costs would not have been wasted by the Defendant in preparing to meet the abandoned claims. I think there is force in that submission and that that is a factor that the Court should take into account. However, it is a factor that in my judgment goes to the extent to which the consequences spelt out in CPR rule 36.17.4 should be visited upon the Defendant. It is not a consideration that alone would render it unjust to give the Claimant the benefit of the reliefs set out in CPR rule 36.17.4.

38. Fourthly, the Defendant relies on the late disclosure of a report prepared by Mr Inwood in August 2015 for Michaels & Taylor (a firm of hotel managers and advisers) instructed by the Claimant in relation to the general condition of the carpet. Mr Inwood was the expert who then produced an expert report in relation to the carpets on behalf of the Defendant in these proceedings without informing the Defendant that he had previously inspected the condition of the carpets and produced a report for the Claimant (albeit in the context of the Lease Renewal Proceedings). The first report was prepared for the purposes of litigation and was privileged. There was therefore no obligation on the Claimant to disclose the report in these proceedings. However, the Defendant's case is that the Claimant waived privilege and disclosed the report "tactically" in January 2022 at the time the trial bundle was being produced. Yet, nothing turned on the earlier report and I do not consider that the disclosure of the report (that ought in fact to have been referred to by Mr Inwood in the report he produced for the Defendant) in January 2022 rather than in September 2021 (which is what the Defendant complains about), should render applying the reliefs set out in CPR rule 36.17.4 unjust.

39. Accordingly, I consider that the consequences provided by CPR rule 36.17.4 do fall to be applied in this case and that their application would not be unjust to the Defendant who ought to have accepted the Claimant's 2 July 2019 Offer, and failing that most certainly the Claimant's much lower 13 November 2019 Offer. Further, I have kept in mind the fact that it is well settled that the purpose of the Part 36 regime is to encourage settlement and reduce costs and that an order applying the consequences set out in CPR rule 36.17 is not intended to be purely compensatory: *OMV Petrom SA v Glencore International AG* [2017] EWCA Civ 195. Addressing each of the consequences set out in CPR rule 36.17.4 in turn:

What interest should be payable on the judgment sum?

40. It was common ground between the Parties that CPR rule 36.17(4)(a) includes an element of discretion since it provides for interest at a rate "not exceeding" 10%. Mr Webb sought an award of 10% interest. Mr Lees proposed 2-4%. Guidance as to determining the applicable rate has helpfully been provided in *OMV Petrom SA* in which Sir Geoffrey Vos C said this:

> "In my judgment, the use of the word "penal" to describe the award of enhanced interest under CPR r 36.14(3)(a) is probably unhelpful. The court undoubtedly has a discretion to include a non-compensatory element to the award as I have already explained, but the level of interest awarded must be proportionate to the circumstances of the case. I accept that those circumstances may include, for example, (a) the length of time that elapsed between the deadline for accepting the offer and judgment, (b) whether the defendant took entirely bad points or whether it had behaved reasonably in continuing the litigation, despite the offer, to pursue its defence, and (c) what general level of disruption can be seen, without a detailed inquiry, to have been caused to the claimant as a result of the refusal to negotiate or to accept the Part 36 offer."

41. One factor which I think is relevant to take into account in the present case is that the Defendant's expert quantity surveyor's evidence was so partisan and so poor that I was unable to rely on any of it. As a result the Defendant made several bad points at trial. Further, Mr Preston was involved in assessing the Claimant's claim from the outset and his misguided approach likely significantly contributed to the costs that were incurred by the Parties and the Defendant's failure properly to assess the merits of its defence. I am also not convinced that the Defendant engaged constructively in the settlement process since it, for instance, refused to accept the validity of the Claimant's Part 36 Offers at the time they were made without explanation and withdrew its own offers of settlement in January 2020. On the other hand, as noted above the Defendant will have incurred some costs in defending aspects of the Claimant's case that were abandoned shortly before trial. Further, this was not a case of fraud or one in which the defence was dishonest. Applying an interest rate of 10% is clearly the maximum and not the starting point. It is also relevant to keep in mind that interest rates were low during the relevant period.

42. Balancing these various factors, I have come to the conclusion that an enhanced rate of interest is appropriate and that rate should be 5% per annum to be paid by the Defendant on the judgment sum. Mr Lees sought to persuade me that interest should only run from the date of the letter of claim that is from 6 December 2017 and not from the date of lease expiry. I consider that interest ought to run from the date the Mitre was delivered up to the Claimant that is from [28] September 2016, because that is the date when the hotel ought to have been delivered up in a lease compliant condition.

The basis on which costs should be awarded and the amount of the payment on account

43. I am satisfied that it is appropriate for the Defendant to pay costs on an indemnity basis as a consequence of not having accepted the Claimant's 2 July 2019 Offer in accordance with CPR rule 36.17.4. This is the default position and I see nothing unfair in its being applied in the circumstances of the present case.

44. It follows that the payment on account ought to reflect the basis on which the costs are to be assessed. As matters currently stand, the Defendant has paid £203,764 as an interim payment on account of costs on the basis that this represents 80% of the Claimant's

approved costs budget of £254,705. I agree with the Claimant's submission that in light of the award of costs on the indemnity basis, the payment on account of costs ought to be increased to 90% of the Claimant's approved costs budget, that is therefore to the sum of £229,235. A net further £25,471 is therefore payable by the Defendant to the Claimant.

Interest on costs

45. I consider that the same rate of interest i.e.5% per annum should apply to the Claimant's costs as to the judgment for the same reasons as justify the application of the enhanced interest rate under CPR rule 36.17.4(a). Interest on costs to run from 24 July 2019 being the date on which the relevant period expired.

The payment of an additional sum

46. CPR Part 36.17(4)(d) envisages the payment of an additional sum "which shall not exceed £75,000, calculated by applying the prescribed percentage" to the sum awarded. The prescribed percentage in the case of an award above £500,000 such as in the present case being 10% of the first £500,000 plus 5% of any amount above that figure up to a maximum of £75,000. The Claimant calculates the maximum additional sum as totalling £54,856 on the basis of the judgment sum of £597,117. The Claimant has not included any interest awarded on the judgment sum in applying the percentages against the "sum awarded to the claimant by the court". It could in my judgment have included an element of interest in the sum awarded, albeit not the full amount of interest i.e. not the CPR Part 36.17.4(a) additional interest element. I would not construe PPR Part 36.17(4)(d) as envisaging that the additional sum should be calculated by reference to the additional interest element.

47. The position as to whether the Court has a discretion to award a lesser amount than the maximum sum envisaged by the calculation under CPR 36.17.4(d) is not clear from the authorities. Stewart J in *JLE (a child) v Warrington and Halton Hospitals NHS Trust* [2015] EWHC 1312 (QB) concluded that there was no discretion to award a smaller additional sum. However, Waksman J in *Bataillion v Shone* [2015] EWHC 3177 (QB) assumed that there was. In his judgment in the *London Trocadero* case, Robin Vos clearly favoured the latter approach albeit that his remarks on the subject were obiter. I do not have to decide the matter in the present case because Mr Webb conceded that the amount of the additional sum was discretionary. He was, I think, right to do so on the basis of the Court of Appeal's approach in *Thinc Group Limited v Kingdom* [2013] EWCA Civ 1306. The case was concerned with the correct application of CPR rule 36.17.4(b) and the award of indemnity costs and not CPR rule 36.17(4)(d). However, Makur LJ said:

> "the phrase 'unless it considers it unjust to do so' in CPR 36.14(2) and (3) bear the obvious interpretation of 'unless and to the extent of'."

48. In the context of CPR rule 36.17.4(d) this would mean that the Court may award an additional sum unless and to the extent it considers it unjust to do so.

49. As already noted, this is not a fraud case nor is it a case in which the defence was dishonestly maintained. Accordingly, I do not consider it to be a case which would justify an award of the maximum additional sum contemplated by CPR rule 36.17.4(d). However, I do consider that an award of an additional sum is appropriate since the Defendant ought plainly to have accepted the Claimant's 2 July 2019 Offer, let alone the Claimant's subsequent 13 November 2019 Offer. Several of the factors I have referred to at paragraph [41] above in the context of determining the applicable rate of interest are in my judgment also relevant to determining the appropriate amount of the additional sum that should be awarded in this case. I think it is relevant to take into account the fact that evidence of Mr Preston, to which I have already referred, failed to comply with the obligations of an independent expert appearing in this Court and that almost everything was denied by the Defendant. I am also mindful that the Claimant's 2 July 2019 Offer was heavily beaten in the sense that judgment was obtained in the sum of £597,117 against an offer of £495,000 and an even lower offer of £380,000 made by the Claimant on 13 November 2019. These are offers that were made prior to proceedings being commenced that, had either of them been accepted by the Defendant as they ought to have been, would have saved the Parties considerable time and money. I also accept Mr Webb's submission that greater co-operation ought to have been forthcoming from the Defendant at the time the offers were made by the Claimant if settlement was to be achieved.

50. Taking into account all the above factors, together with the purpose for which CPR rule 36.17.4(d) exists, I have come to the conclusion that an award of 60% of the maximum amount is appropriate in the instant case.

51. I therefore award the Claimant an additional sum of £32,914.

The costs of the consequential issues hearing

52. Whilst the Claimant has not been entirely successful in the relief it sought, it has been successful overall both in establishing the validity of its CPR Part 36 Offer and in obtaining an award in line with the provisions of CPR rule 36.17.4. The costs of the consequential issues hearing ought therefore to follow the event, which means a further award of the costs of the consequential issues hearing in favour of Claimant. These costs if not agreed can be assessed together with any further issues arising following this judgment on paper.

53. Finally, I would ask that the Claimant draw up a minute of order reflecting the above and dealing with the required calculations of interest.