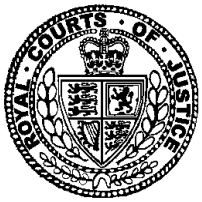

Neutral Citation Number: [2019] EWCA Civ 754

Case No: A1/2018/1951

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT,
TECHNOLOGY AND CONSTRUCTION COURT
His Honour Judge McKenna
HT-2016-000331

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/05/2019

Before :

LORD JUSTICE HAMBLEN
LORD JUSTICE FLAUX
and
LADY JUSTICE ASPLIN

- -

Between:

Calonne Construction Limited	**Appellant**
- and -	
Dawnus Southern Limited	**Respondent**

- -
- -

Mr Alexander Cook (instructed by **Candey**) for the **Appellant**
Mr Robert Stokell (instructed by **DJM Law**) for the **Respondent**

Hearing date: Thursday 11th April 2019

- -

Approved Judgment

Order at bottom of this judgment.

Lady Justice Asplin:

1. This appeal concerns the requirements of a Part 36 offer. In particular, it is concerned with whether such an offer is valid if: it is made by a defendant in respect of both a claim and a proposed counterclaim which has yet to be pleaded; and it contains provision for interest to accrue at a particular rate after the expiry of the "Relevant Period".

2. The Appellant, Calonne Construction Limited ("Calonne") contends that an offer dated 22 February 2017 (the "Offer") which was made on behalf of the Respondent, Dawnus Southern Limited ("Dawnus") was not a valid offer for the purposes of CPR Part 36, His Honour Judge McKenna was wrong to treat it as such and that Dawnus should be ordered to pay at least part, if not all of Calonne's costs of the proceedings below. The appeal is from the Judge's order dated 25 July 2018. The Judge had dealt with the substantive matters in a written judgment the citation of which is [2018] EWHC 1634 (TCC) which had been handed down on 29 June 2018.

Background and substantive decision

3. The proceedings in which the Offer was made were concerned with the disputes which arose in connection with works carried out by Dawnus in relation to the extension and refurbishment of a residential property at 12 Calonne Road, Wimbledon (the "Property"). The Property is owned by Mr Nader Farahati and his wife. Calonne was set up as a special purpose vehicle to manage the works. It then appointed Iesis Limited ("Iesis") as independent contract administrator and Visu Verum Limited ("VV") as project manager.

4. Dawnus was engaged by Calonne to carry out works as part of the refurbishment pursuant to a contract dated 20 January 2014 (the "Contract"). The works were subject to delays and the completion date under the Contract was not met. Applications for extensions of time were rejected by Iesis. Practical completion was certified on 26 January 2016, conditional on certain outstanding works being completed.

5. On 25 February 2016, Dawnus served a Statutory Demand on Calonne based on three invoices issued between November 2015 and January 2016. In any event, it provided its final account on 1 March 2016 and Iesis produced a final account review on 9 March 2016 on behalf of Calonne. A Non-Completion Notice was issued the following day.

6. On the night of 22 June 2016, a storm caused water ingress into the basement of the Property, and on 6 July 2016, Calonne agreed to accept £131,598.70 by way of insurance payment in full and final settlement of the claim for the damage caused by the water. As a condition of payment Mr Farahati, on behalf of Calonne, and a Mr Squirrel, on behalf of VV, signed a declaration to the effect that Calonne and VV had not and would not be recovering any compensation from any other source.

7. Thereafter, by a claim form dated 20 December 2016, Calonne sought: declarations as to the sums due under the Contract, including issues relating to provisional sums,

changes to the works and extensions of time; liquidated damages in the sum of £103,420.00; damages for defective and incomplete works in the sum of £70,911.66; loss and damage in relation to the water ingress in the sum of £256,382.23; and damages in the sum of £120,000, allegedly equivalent to six months' rental income for the period during which it was alleged that the Property could not be inhabited as a result of the water damage.

8. On 3 February 2017 Calonne made an offer to settle the proceedings which was expressed to be a Claimant's Part 36 offer. It stated that Calonne was willing to settle the claim and the "anticipated counterclaim" if Dawnus accepted the offer and paid £100,000 inclusive of interest within 14 days of having done so. On 22 February 2017, within the 21 day period specified in Calonne's offer, Dawnus' solicitors sent a letter to Calonne containing the Offer. In so far as relevant, the Offer provides:

> "**WITHOUT PREJUDICE SAVE AS TO COSTS**
>
> **OFFER MADE PURSUANT TO CPR PART 36**
>
> As you are aware, we are in the process of preparing our client's defence and counterclaim which will be filed on 3rd March 2017. . .
>
> . . . We are therefore, authorised by our client to make your client, the following offer to settle under Part 36 ("the Offer").
>
> This Offer is intended to have the consequences set out in Part 36 of the Civil Procedure Rules. In particular, your client will be liable for our client's costs up to the date of notice of acceptance which must be in writing ("Notice of Acceptance"), in accordance with CPR 36.11, if the offer is accepted within 21 days ("the Relevant Period").
>
> This offer will remain open for a period of 21 days from the date of receipt of this letter.
>
> Terms of the Offer
>
> Our client is willing to settle the whole of your client's claim contained within the claim number HT2016000331, together with the counterclaim which our client will shortly be issuing within the same proceedings:
>
> 1. You pay to our client the sum of £100,000 ("the Settlement Sum") payable within 14 days of service of the Notice of Acceptance.
>
> 2. 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.
>
> 3. The Settlement Sum is inclusive of interest until the relevant period has expired. Thereafter, interest at a rate of 8% per annum will be added.
>
> . . ."

9. Dawnus then served its Defence and Counterclaim dated 3 March 2017. The counterclaim was for damages in the sum of £407,524.93. Dawnus abandoned its claim in relation to an extension of time under the Contract and for loss and expenses

in that regard in its Defence. Furthermore, most of the claim in relation to the Contract sum, all of the liquidated damages and the claim in relation to changes had been agreed before trial. At trial, therefore, the Judge was only concerned with whether the Contract included certain provisional sums, whether the works were defective and/or incomplete, whether defective works had allowed the water ingress into the basement, and if so, whether Dawnus was liable for it and in what amount and whether there was an agreement that Calonne would settle Dawnus' account within 14 days of practical completion.

10. In summary, the Judge found that Dawnus' claim in relation to provisional sums failed: see judgment at [25] – [29]. As to the alleged agreement about payment, the Judge concluded that in reality, "there never was a concluded agreement entered into in November 2015" in the form alleged by Dawnus. If he was wrong about that, he held that, in any event, Dawnus did not comply with the terms it asserted were agreed and was not entitled to suspend its works: [36].

11. In relation to the claims relating to water ingress in the basement, the Judge noted that Mr Farahati had tried to keep the insurance claim and the settlement of that claim secret, did not provide standard disclosure of the documents concerning the insurance claim and that it was not until the end of 2017 that Calonne finally accepted that the documentation should be disclosed: [52]. He went on to note that the claim had been pursued successfully against the insurers on the basis that the loss and damage were caused by a storm, and not by any negligence on the part of Dawnus, that Calonne had been compensated for the water ingress and damage and that it followed that Calonne could not pursue the claim: [55] - [56]. The Judge went on to make detailed findings in relation to Calonne's claims in relation to defective works ([57] – [67]) and, lastly, he rejected its claim for damages equivalent to six months' rental income: [75].

Hearing in relation to consequential matters

12. At the hearing of the consequential matters, amongst other things, the Judge addressed the two main submissions which it was said rendered the Offer invalid for the purposes of CPR Part 36. First, the Judge rejected the argument that the inclusion in the Offer of a counterclaim which had yet to be pleaded rendered the Offer invalid. He did so on the basis that although the argument was supported by the judgment of Morgan J in *Hertel & Anr v Saunders* [2015] EWHC 2848, he was either bound by the decision of the Court of Appeal in *AF v BG* [2009] EWCA Civ 757 [2010] 2 Costs LR 164, which had not been cited to Morgan J, or it was very persuasive. The Judge is recorded in the transcript of the consequential hearing as having described the *AF v BG* decision in the following terms:

> " . . the judgment of the court is given by Lord Justice Lloyd, where it's absolutely plain that he considers that there is nothing preventing an offer purporting to settle a counterclaim not yet formulated which would take the offer outside Part 36."

13. Second, the Judge rejected the argument that the addition of a provision relating to the rate of interest to be charged after the end of the relevant period rendered the Offer invalid as a Part 36 offer. The wording was contained in paragraph 3 of the Offer and

provided that interest at the rate of 8% would be added. The Judge dealt with this aspect of the matter quite briefly. He concluded that Offer did comply with the provisions of CPR Part 36.5 and accordingly, that the argument must fail.

14. By an order dated 25 July 2018 amongst other things: judgment was entered for Dawnus in the sum of £116,616.89 plus interest of £11,751.78; it was recited that Dawnus had beaten "its Part 36 offer" (the Offer); Calonne was ordered to pay 75% of Dawnus' costs of the proceedings and as to those costs where relevant costs incurred prior to 15 March 2017 were to be assessed on the standard basis if not agreed, and costs incurred on or after that date were to be assessed on the indemnity basis; and interest was awarded at the rate of 7% in respect of costs incurred on or after 15 March 2017. The Judge departed, therefore, from the consequences of CPR 36.17(4) having found that it would be unjust to apply the provisions of that sub-rule.

Ground of Appeal and Respondent's Notice

15. Calonne sought permission to appeal in relation to a claim for damages for delay which the Judge had rejected and in relation to the validity of the Offer and as a consequence of the latter, stated that Dawnus should be ordered to pay some or all of its costs of the claim. Coulson LJ granted Calonne permission to appeal solely in relation to whether the Offer was valid for the purposes of CPR Part 36 but noted that it would be rather more difficult to argue that the consequence of successfully challenging the validity of the Offer would be that Calonne was entitled to all its costs. Accordingly, permission to appeal was granted conditional upon Calonne paying into court the full amount of the costs ordered by the Judge.

16. Dawnus' primary contention is that the Judge was right to decide that the Offer was valid for the purposes of CPR r 36 and that he was entitled to exercise his discretion in relation to costs pursuant to CPR r 36.17(4) as he did. Its secondary case is that when exercising his discretion, the Judge took into account the circumstances of the case and the conduct of the parties, including Calonne's conduct in relation to the insurance claim and that the order he made would have been and is an appropriate exercise of the Court's discretion pursuant to CPR r 44.2 in respect of costs and interest in any event.

Relevant CPR Provisions

17. The current version of CPR Part 36 was introduced by the *Civil Procedure (Amendment No. 8) Rules 2014 (SI 2014/3299*) and came into force on 6 April 2015. It is common ground that it is a self-contained and prescriptive code about settlement offers and their consequences if they are in the prescribed form. This is made clear expressly by CPR r 36.1 itself. The prescriptive code does not prevent a party, nevertheless, from making an offer to settle in whatever form it chooses. This is set out at CPR r 36.2(1) as follows:

> "36.2
>
> . . .
>
> (1) Nothing in this Section prevents a party making an offer to settle in whatever way that party chooses, but if the offer is

> not made in accordance with rule 36.5, it will not have the consequences specified in this Section.
>
> (Rule 44.2 requires the court to consider an offer to settle that does not have the costs consequences set out in this Section in deciding what order to make about costs.)"

18. CPR r 36.2(3) sets out the permissible scope of a Part 36 offer and accordingly, the Part 36 regime in the following terms:

> "(3) A Part 36 offer may be made in respect of the whole, or part of, or any issue that arises in –
>
> (a) a claim, counterclaim or other additional claim; or
>
> (b) an appeal or cross-appeal from a decision made at a trial.
>
> (Rules 20.2 and 20.3 provide that counterclaims and other additional claims are treated as claims and that references to a claimant or a defendant include a party bringing or defending an additional claim.)"

"Counterclaim" is defined in the glossary to the first volume of the Civil Procedure Rules as "[a] claim brought by a defendant in response to the claimant's claim, which is included in the same proceedings as the claimant's claim."

19. CPR r 20.2 provides as follows:

> "(1) This Part applies to –
>
> (a) a counterclaim by a defendant against the claimant or against the claimant and some other person;
>
> (b) an additional claim by a defendant against any person (whether or not already a party) for contribution or indemnity or some other remedy; and
>
> (c) where an additional claim has been made against a person who is not already a party, any additional claim made by that person against any other person (whether or not already a party).
>
> (2) In these Rules –
>
> (a) 'additional claim' means any claim other than the claim by the claimant against the defendant; and
>
> (b) unless the context requires otherwise, references to a claimant or defendant include a party bringing or defending an additional claim."

CPR r 20.3(1) states that "[a]n additional claim shall be treated as if it were a claim for the purposes of the Rules except as provided by this Part" and the remainder of the Rule sets out those exceptions. No reference is made to Part 36.

20. The necessary requirements of a Part 36 offer, upon which this appeal is centred, are set out in CPR r 36.5(1) as follows:

> "(1) A Part 36 offer must –
>
> (a) be in writing;
>
> (b) make clear that it is made pursuant to Part 36;
>
> (c) specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with rule 36.13 or 36.20 if the offer is accepted;
>
> (d) state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and if so to which part or issue; and
>
> (e) state whether it takes into account any counterclaim."

The real dispute arises as to whether the requirements of (d) were met in this case, when read in the light of the authorities to which I shall refer, whilst also taking account of CPR r 36.7. That rule provides that a Part 36 offer:

> "(1) . . . may be made at any time, including before the commencement of proceedings."

21. A distinction is made in the Rules, between a "claimant's offer" and a "defendant's offer." In simple terms, a claimant's offer sets out what the claimant is willing to accept in order to settle. A party making a claimant's offer is described at note 5 of the Form N242A upon which Part 36 offers are usually made as:

> ". . . offering to accept something to settle their own claim, counterclaim, additional claim, appeal, cross-appeal or costs assessment proceedings on terms that their opponent pays their costs."

A "defendant's offer" is expressly defined in CPR r 36.6(1) as "an offer to pay a sum of money in settlement of a claim [which] must be an offer to pay a single sum of money" (CPR r 36.6(1)). They are further described at CPR r 36.6(2) in terms which are not directly relevant here. Whether an offer is a defendant's or a claimant's offer can be more complicated to determine where there is both a claim and a counterclaim and will be a question of construction: *Van Oord UK Ltd & Anr v Allseas UK Ltd* [2015] EWHC 3385 (TCC) [2016] 1 Costs L.O.1.

22. Subject to certain caveats which are not relevant here, Part 36 Offers can be accepted at any time unless they have already been withdrawn (CPR r 36.11(2)). If a Part 36 Offer is not accepted and is "beaten" in the sense that the party making the offer does better in the litigation than it would have done if the terms of the offer had been accepted by the other side, different costs consequences flow, depending on whether the offer was a "claimant's offer" or a "defendant's offer". A successful claimant is entitled to the raft of enhancements set out at CPR r 36.17(4). On the other hand, a

defendant who has beaten its Part 36 offer has a more limited entitlement set out in CPR r 36.17(3).

23. Lastly, it is necessary to explain the concept of the "relevant period". Although the concept is a key component to the operation of the Part 36 regime, it is only necessary to mention it briefly. Its relevance on this appeal is limited to the fact that under paragraph 3 of the Offer, interest was to be added at 8% per annum after the relevant period had expired. The term is defined at CPR r 36.3(g) as:

> "(i) in the case of an offer made not less than 21 days before a trial, the period specified under rule 36.5(1)(c) or such longer period as the parties agree;
>
> (ii) otherwise, the period up to the end of such trial."

(1) The effect on a Part 36 offer of the inclusion of an anticipated counterclaim

24. Was the Offer invalidated as a Part 36 offer by the inclusion of the counterclaim which had yet to be pleaded? In essence, Mr Cook on behalf of Calonne submits that as a result of the decision of the Court of Appeal in *Hertel & Anr v Saunders* [2018] EWCA Civ 1831, [2018] 1 WLR 5832 (which was handed down after the Judge made his order) the inclusion of a counterclaim which had yet to be pleaded was fatal to the validity of the Offer as a Part 36 offer. Mr Stokell, on the other hand, on behalf of Dawnus, submits that the counterclaim is treated as a separate claim for the purposes of the Rules as a result of CPR r 20.2 and 20.3, CPR r 36.7 provides that a Part 36 offer can be made at any time, including before the commencement of proceedings and, accordingly, the Offer was not invalidated despite the fact that the counterclaim had yet to be pleaded. He relies in this regard on *AF v BG*, upon which the Judge also relied but which was not cited in *Hertel* at first instance or in the Court of Appeal.

25. In *AF v BG* the Court of Appeal was concerned with an application which arose from a dispute about whether the proceedings pending in the Court of Appeal had been the subject of a binding compromise or not. The outcome of the application was that there had been no binding compromise and accordingly, the proceedings were to go ahead. In the meantime, secrecy was necessary because a Part 36 offer had been made. As issues of wider significance as to the interpretation of Part 36 had been raised, a heavily edited version of the judgment which had been handed down in private was made available.

26. Lloyd LJ, with whom Rimer LJ agreed, decided that the offer in that case was a valid Part 36 offer and that the proceedings to which it related were the entire proceedings, being both the original claim and a proposed counterclaim, and that upon acceptance it would have had the effect that not only would the entire proceedings be stayed, but that the applicant would become liable to pay the respondent's costs, not only of the proposed counterclaim, but of defending the applicant's original claim (see [22]).

27. The offer which had been made stated, where relevant, as follows:

> "Accordingly, our client has a counterclaim against you in the Claim for the debt [giving the amount] plus interest. Such counterclaim has not yet been pleaded in the Claim but our client intends to amend his pleadings to incorporate this counterclaim in the future, if required.
>
> For the reasons set out previously in correspondence with you and in our client's submissions to the Court, we do not consider that the claims you are pursuing against our client have any reasonable prospect of success.
>
> However, our client realises that significant cost and inconvenience will be caused to all parties concerned if this matter is taken any further. Our client is, therefore, willing to accept payment of [a specified sum, smaller than that identified above as the subject of the intended counterclaim] ("the Sum") in full and final settlement of the whole of our client's claim and the whole of your claim against our client. For the avoidance of doubt, this offer includes all of the claims you have advanced against our client in the Claim.
>
> This letter is intended to have the consequences of a claimant's offer to settle in accordance with Part 36 of the Civil Procedure Rules. . . .
>
> . . .
>
> As required by CPR 36.3(3)(a), the Sum is inclusive of interest up until the expiry of the Relevant Period. Thereafter interest, calculated at 1% above Bank of England base rate from time to time, will accrue on the Sum. . ."

28. Lloyd LJ, with whom Rimer LJ agreed, rejected the argument that the offer was not in accordance with CPR r 36.2(2)(b) (now, in substance, CPR r 36.5(1)(b)) because of the specific reference to a "claimant's offer to settle". CPR 36.2(2)(b) had required a Part 36 offer to "state on its face that it is intended to have the consequences of Part 36." Lloyd LJ decided that the offer did state on its face that it was intended to have those consequences. See [16]. He went on as follows:

> ". . . Here, what is more, there was an existing claim but only a proposed or contemplated counterclaim. It seems to me that it was entirely appropriate and legitimate for the offer letter to spell out the fact that it was not just an offer in accordance with Part 36, but that it was an offer made by the Respondent by way of a claimant's offer. Whether it is properly to be regarded as a claimant's offer depends on the construction of the offer as a whole, not just on the statement by the offeror, but to make this statement does not mean, as the Applicant submitted, that it is not a Part 36 offer at all."

29. At [17], Lloyd LJ turned to the question of whether if the offer was within Part 36, its consequences in relation to costs related only to the proposed counterclaim. He rejected this contention as well. He went on:

> ". . . The situation is unusual because the counterclaim had not been pleaded, and therefore did not yet exist as a claim in the proceedings. However, the counterclaim was a genuine claim, whose nature was clear, and which was for a stated amount, albeit a relatively modest amount compared to the sum that was said to be at stake on the claim. As rule 36.3(2) [r36.7] says, a Part 36 offer may be made before the commencement of proceedings. So the fact that the counterclaim had not been formulated or pleaded does not of itself matter. The Applicant pointed out that the Respondent would require permission to amend his proceedings to include the counterclaim, because of rule 20.4(2)(b). The offer letter recognised that this would be necessary, and I do not need to decide whether such permission would have been, or would be, granted.
>
> 18. A Part 36 offer made in respect of the whole of a claim, as this was, must state that it does so relate, and it must also state whether the offer takes into account any counterclaim. This offer did so state; it made it clear that the offer was put forward on a net basis, and that acceptance of it would constitute full and final satisfaction both of the proposed counterclaim and of all claims asserted by the Applicant against the Respondent. It would therefore settle both the liability on the proposed counterclaim and the liability on the claim. In those circumstances, it seems to me that rule 36.3(4), with its reference to "the proceedings in respect of which [the Part 36 offer] is made", applied in the present case to both the claim and the counterclaim. Accordingly, it seems to me to follow that, where rule 36.10(1) speaks of "the costs of the proceedings", it means in the present case the costs both of the counterclaim and of the claim.
>
> 19. The Applicant argues that rule 36.10(6) is inconsistent with that. I have set this rule out already. He argues that this rule only applies to a claimant, properly so-called, who makes an offer which takes into account the defendant's counterclaim and that it does not apply if it is the defendant, albeit claimant on the counterclaim, who makes an offer on a net basis taking into account the claimant's original claim. He says this is so because the claimant's original claim cannot properly be fitted within the words "takes into account the counterclaim".
>
> 20. It seems to me that that would be a curious reading of the rule. It is quite common to find, on the one hand, a monetary claim for a given amount and on the other hand a counterclaim, which is raised both by way of set-off and defence and by way of counterclaim, for a different, and often larger, monetary amount. A typical example is a claim by a professional for fees, met by a defence and counterclaim for damages for negligence. There may or may not be an issue as to liability for the fees (possibly only as regards quantum), but there will usually be a real issue on the negligence claim. On the Applicant's

argument, the original claimant could make a Part 36 offer which would have the consequences attaching to a claimant's offer as regards both the costs of the claim and the counterclaim, but the defendant could not do so. Accordingly, the result as between the parties, as regards the opportunity for using Part 36 as a claimant, would depend on what might be a matter of chance as to who started the proceedings. The Applicant submitted that the policy behind that was that the claimant could not choose whether he was sued by the defendant by way of counterclaim or by way of separate action whereas the defendant could choose how he wished to proceed. If the defendant to the first proceedings wished to be able to make an offer as claimant he should bring separate proceedings rather than counterclaim. That would seem to me to be odd and unsatisfactory because, naturally enough, the defendant would wish to, and indeed possibly need to, defend and counterclaim in the first action in order to set up his cross-claim as a defence to the claimant's claim. To read the rules in such a way that separate proceedings, rather than a counterclaim in the same proceedings, were desirable does not seem to me to be either sensible or consistent with the overriding objective.

21. In any event it seems to me that the Applicant's reading of rule 36.10(6) is incorrect. It fails to take into account the provisions of Part 20 dealing with counterclaims. The express purpose of Part 20 is to enable counterclaims and other additional claims to be managed in the most convenient and effective manner. By rule 20.2 it applies both to counterclaims against the claimant, or against the claimant and others, and also to additional claims by a defendant against someone who may or may not already be a party to the proceedings, and of course to yet further additional claims by parties brought in as defendants to additional claims themselves. By rule 20.2(2), for the purposes of the rules, "additional claim" means any claim other than the claim by the claimant against the defendant and "unless the context requires otherwise references to a claimant or defendant include a party bringing or defending an additional claim". By rule 20.3(1) "an additional claim shall be treated as if it were a claim for the purposes of these rules, except as provided by this Part." Nothing in Part 20 excepts Part 36 from the provisions of that rule. Thus the Respondent's proposed counterclaim is to be treated as if it were a claim and the Respondent, as the party bringing the counterclaim, is to be treated as within references to a claimant; correspondingly, in relation to his position defending the proposed counterclaim, the Applicant is treated as within references to a defendant. Accordingly, going back to rule 36.10(6), that rule covers the Respondent's costs as the party bringing the additional claim and the rule has the effect that his costs include any costs incurred in dealing with the counterclaim of the Applicant who is for this purpose treated as within the reference to the defendant. The Applicant's argument is that that contention cannot succeed because he has not brought a counterclaim. He has brought an original claim but not a counterclaim. I agree that the word does not fit perfectly but it seems to me that, making the adjustments that need to be made in order to apply Part 20

> to Part 36, where one is talking about a situation where the "defendant" is himself the original claimant as well as the defendant to a counterclaim, the reference to the defendant's counterclaim in rule 36.10(6) is to be taken as being to the original claim, i.e. the cross-claim to the new counterclaim by the original defendant, the Respondent. Only in that way does it seem to me that the rule can apply in an even-handed way, as it plainly should, and so as not to have arbitrary results according to which party brought proceedings first."

30. Although these passages, so far as they are concerned with the unpleaded counterclaim, are obiter, and there was no direct argument as to whether the reference to an unpleaded counterclaim invalidates what might otherwise be a Part 36 offer, it seems to me that Lloyd LJ's conclusions are relevant to the very issue with which this part of this appeal is concerned. He reached his conclusions on the basis that it did not matter that the counterclaim had not been "formulated or pleaded" (see [17]) and relied on a combination of rule 36.3(2) (now CPR r 36.7) and CPR r 20.2 and 20.3.

31. As Lloyd LJ pointed out at [21], the express purpose of Part 20 is to enable counterclaims and other additional claims to be managed in the most convenient and effective manner. As a result of CPR rs 20.2 and 20.3, a counterclaim is treated as a claim for the purposes of the CPR except as expressly provided in that Part of the Rules. Nothing in Part 20 excepts Part 36 from the provisions of that rule. Furthermore, the sentence in parenthesis at the end of r 36.2(3) makes clear that rs 20.2 and 20.3 apply for the purposes of Part 36, and r 36.2(3)(a) provides that a Part 36 offer may be made in respect of the whole or part of or any issue that arises in a claim, counterclaim or additional claim.

32. Accordingly, it seems to me that a defendant's proposed counterclaim must be treated as if it were a claim for the purposes of Part 36. In those circumstances, and in the light of the fact that a party is entitled to make a Part 36 offer at any time, including before commencement of proceedings (r 36.7), it seems to me that it cannot be correct that a Part 36 offer cannot be made in relation to a counterclaim before that claim has been pleaded. To conclude otherwise would derogate from both CPR r 20.3 and from CPR r 36.7. That must be the case even if proceedings in relation to another claim, the original claim, are already on foot. If it were otherwise, those rules to which express reference is made at the end of r 36.2 and r 36.7 would be undermined. It follows that I reject Mr Cook's argument that in such circumstances, the party who wishes to counterclaim remains entitled to make a Part 36 offer "at any time" pursuant to r 36.7 and it is only the content of that offer which is constrained. Such an approach would have the effect of negating r 36.7 as far as any proposed claim by way of counterclaim was concerned.

33. It seems to me, therefore, that the Judge was right to conclude that the Offer was not invalidated by reason of a reference to the proposed counterclaim which was not pleaded until some ten days later and that CPR r 36.5(2)(d) and, for that matter, (e), must be construed in a way which enables such an offer to be made despite the fact that the counterclaim, which is a separate claim for the purposes of the Rules, has yet to be commenced.

34. I am fortified in my conclusion by the wider consequences if Mr Cook's argument is right. It cannot be correct that the defendant must go to the expense of pleading the

counterclaim and if necessary, obtaining permission in relation to it, or alternatively, issuing separate proceedings in order to be able to make a Part 36 offer in relation to it or which takes the counterclaim into account. Such a consequence would be contrary to the policy behind both Part 20 and Part 36 itself.

35. I also note that in different circumstances in the *Van Oord case*, when determining whether an offer was a claimant's offer attracting the consequences in CPR 36.17(4) or a defendant's offer with the consequences set out in CPR 36.17(3), Coulson J, as he then was, did not question and the parties agreed that an offer made by a defendant which took into account a counterclaim which had yet to be formulated, was a Part 36 Offer.

36. In this case, as Mr Stokell points out, there was no uncertainty about the nature and extent of the counterclaim because Iesis had produced a final review report which contained the figures upon which the counterclaim would be based and Calonne had included it in their own offer of 3 February 2017. Even if that were not the case, any uncertainty about the nature of a proposed counterclaim could be addressed by a request for clarification pursuant to CPR r 36.8 and ultimately, if necessary, could be addressed under the "unless unjust to do so" provision in CPR r 36.17(4).

37. I have come to this conclusion despite the decision of the Court of Appeal in *Hertel*. In that case Coulson LJ, with whom Lewison and David Richards LJJ agreed, upheld the decision of Morgan J that once proceedings had commenced "claim or part of [a claim] or issue" for the purposes of CPR r 36.2(2)(d) (which is now CPR r 36.5(1)(d)) should be interpreted to mean claims which had been pleaded and did not include an amendment to the claim which was in draft but which had not been made. No reference was made whether at first instance or in the Court of Appeal to the decision in *AF v BG*.

38. The issue arose in circumstances where an offer had been made by the defendants in respect of a new claim by the claimants which was intended to be introduced by way of a proposed amendment to the particulars of claim which was in draft, but which had not yet been the subject of a court order granting permission. All the pleaded claims were abandoned when the offer was accepted by the claimants. Deputy Master Lloyd held that the offer was in accordance with Part 36 and ordered that, as a consequence of what was Rule 36.10(2) (now Rule 36.13(2)), the defendants should pay the claimants' costs of the abandoned claims down to the date of acceptance of the offer.

39. At the hearing of the appeal before Morgan J, the appellants/defendants took the point for the first time, that their own defendant's offer was not a valid Part 36 offer because the claim which was the subject of the proposed amendment was not "a claim or part of the claim or an issue which arose in the claim". It was said that because the amendment had not been pleaded it did not satisfy CPR r 36.2(2) (now r 36.5(2)). If that were correct, the defendants said that CPR r 36.10.(2) (now r36.13(2)) did not apply and on an exercise of discretion under CPR r 44, it was the defendants who should be regarded as the successful party in relation to the abandoned claims and who were, therefore, entitled to their costs of the proceedings. Morgan J allowed the appeal, holding that the offer did not conform with CPR r36.2(2)(d) and ordered that the claimants pay the defendants' costs of the abandoned claims.

40. CPR Rule 36.10(2) has not been preserved and on the contrary, as Coulson LJ pointed out at [8] of his judgment, the current rule 36.13(2) expressly states that, where a Part 36 offer relates to part only of the claim "the claimant will only be entitled to the costs of such part of the claim unless the court orders otherwise".

41. It seems to me that *Hertel* was primarily concerned with the effects of CPR Rule 36.10(2), a provision which is no longer within the CPR and, in fact, has been reversed. Furthermore, it was concerned with a defendant's offer in relation to part of a claim intended to be contained in a proposed amendment to the claim in proceedings which had already been commenced. It was in that context that Coulson LJ decided that "claim" or "part of a claim" and "issue" in what is now Rule 36.5(1)(d) meant pleaded claims. See [27], [31], [33] and [35]. No consideration was given to the effect of CPR r36.7 in relation to a counterclaim which is to be treated as a separate claim by virtue of rrs 20.3 and 20.3 and has yet to be commenced. In fact, rule 36.7 was only addressed in the context of a submission that "claim", "part of a claim" or "issue" should not be defined too narrowly because a Part 36 offer can be made at any time, including before commencement of proceedings and, accordingly, should not be construed by reference to the pleadings after commencement either. See [26]. Not surprisingly, perhaps, that submission was rejected. As Coulson LJ stated at [27] "the position pre-commencement is inevitably different to that which exists after commencement of proceedings".

42. It seems to me, therefore, that the decision in *Hertel* is not directly relevant to the circumstances under consideration in this appeal and did not address them.

(2) The effect on a Part 36 offer of the inclusion of a provision for interest after the end of the Relevant Period

43. Did the inclusion of a term as to interest after the end of the Relevant Period render the Offer invalid for the purposes of CPR r 36? In my judgment, it did not. First, there is nothing in Part 36 and in CPR 36.5 in particular, which precludes the inclusion of terms as to interest in a Part 36 offer which are intended to apply after the Relevant Period has expired. The only express provision in relation to interest is CPR Rule 36.5(4) which provides that offers to pay or accept a sum of money will be treated as inclusive of interest essentially until the Relevant Period expires. It seems to me that that takes the matter no further.

44. Secondly, there is nothing which expressly precludes the inclusion of terms in addition to the requirements in CPR 36.5(2) and CPR 36.2(2) expressly preserves the ability to make an offer to settle in whatever way the party chooses, albeit that it provides that if r 36.5 is not complied with the offer will not have the costs consequences set out in that section.

45. Thirdly, as Mr Stokell points out, if a party could not provide for interest to run after the end of the Relevant Period, it would not be compensated with interest for any delay between the end of that period and a subsequent acceptance of the offer.

46. Fourthly, it seems to me that there is nothing in Mr Cook's submission that if this is correct, an offeror could state, for example, that the settlement sum was subject to 25% or even 200% interest after the expiry of the Relevant Period, something which he says would inhibit settlement and be contrary to the policy of CPR Part 36. Mr

Stokell suggests in his skeleton argument that there are two alternative answers to this. First, the assessment of whether an offeror has obtained a judgment, at least as advantageous as the proposal in its offer is made at the date of the judgment. An offeror who had provided for the application of such interest rates after the expiry of the Relevant Period might find that the judgment was not more advantageous than the offer and accordingly, the costs consequences of Part 36 would not apply. Secondly, and in the alternative, as interest after the end of the Relevant Period is ignored for the purposes of the CPR 36.17 assessment (see *Purrunsing v A'Court* [2016] EWHC 1528 (Ch), [2016] CILL 2861 (ChD) per HHJ Pelling QC at [15] – [16]), it should also be ignored for the purposes of determining whether the Part 36 offer is valid. Although Mr Cook's objection is undermined in either case, it seems to me that the latter reflects the correct approach.

47. Fifthly, if the offeree found the particular clause unpalatable, it would be possible for it to make its own Part 36 offer in the same terms but without the offending provision. It seems to me therefore, that there is no reason whether of policy or otherwise which renders an offer invalid for the purposes of Part 36 if it includes provisions as to interest after the expiration of the Relevant Period. After all, as Flaux LJ pointed out in the course of argument, there is nothing wrong with a party making a Part 36 offer expressed as a specified sum which includes interest during the Relevant Period calculated on the basis of a particularly high rate. He just has to take the consequences when it comes to be determined whether the offer has been "beaten".

48. For all the reasons set out above, I would dismiss the appeal. Accordingly, it is unnecessary to decide the points which arise on the Respondent's Notice or to determine whether this court should exercise the discretion under CPR part 44 in relation to Calonne's costs below or decide to remit the matter to the Judge for reconsideration.

Lord Justice Flaux:

49. I agree.

Lord Justice Hamblen:

50. I also agree.

ORDER

UPON the Appeal

AND UPON hearing Counsel for both parties

AND WHEREAS the Appellant paid the sum of £100,000 into Court pursuant to the Order

dated 20 September 2018; and the Appellant paid into Court, by consent and pursuant to an Order dated 21 November 2018, the sums of £10,000 and £15,000 as security for costs of the Appeal

AND WHEREAS the Respondent made an offer dated 7 January 2019 in respect of the Appeal

IT IS ORDERED that

1. The Appeal is dismissed.
2. The Appellant shall pay the Respondent's costs of the Appeal on the standard basis to be the subject of a detailed assessment if not agreed.
3. Having regard to CPR 37.3 the Court gives permission for the sum of £125,000 which the Appellant paid into Court to be paid out, with interest thereon, to the Respondent forthwith, as follows:
   (1) £100,000 plus the interest thereon in part-payment of the Judgment Sum; and
   (2) £25,000 plus the interest thereon in part-payment of the Respondent's costs of the Appeal.
4. Mr Nader Farahati is hereby joined to these proceedings pursuant to CPR Part 46.2 for the purpose of an application by the Respondent that he be made jointly and severally liable for the Respondent's costs of the Appeal. The hearing and determination of such application is referred to the Trial Judge, and is to be heard together with the Respondent's application dated 3 July 2018 that Mr Nader Farahati be made jointly and severally liable for the Respondent's costs of the proceedings.

Dated 2 May 2019