Neutral Citation Number: [2021] EWHC 76 (Ch)

Case No: BL-2018-002733

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 19/01/2021

Before :

MR JUSTICE MANN

- -

Between :

Roxanne Pallett	**Claimant**
- and -	
MGN Limited	**Defendant**

- -
- -

David Sherborne, Sara Mansoori and **Julian Santos** (instructed by **Hamlins LLP**) for the **Claimant**
Benjamin Williams QC and **Richard Munden** (instructed by **RPC LLP**) for the **Defendant**

Hearing dates: 14th and 15th December 2020

- -

Approved Judgment

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

....

MR JUSTICE MANN

Mr Justice Mann :

Introduction

1. This judgment deals with the costs of this action, which has now settled (apart from the costs aspect). The claimant has brought a claim against the defendant for infringement of privacy rights by mobile telephone voicemail interception and other unlawful information gathering techniques. Her claim was one of a batch due for trial in January 2021, but on 20th October 2020 she made a Part 36 offer to settle for £99,500 and ancillary relief. The offer specified, as it had to, that if accepted within 21 days the defendant would be liable for her costs of the action. On the 22nd day the defendant accepted the offer to settle at that sum, on the expressed basis that the court would be invited to deal with the extent to which it would have to pay costs. It claims that, since the offer was accepted outside the "relevant period" (here, 21 days) it was entitled to invite the court to consider its liability for the costs of the action and was not bound to pay those costs, which it would have been if it had accepted within the 21 days, pursuant to CPR 36.13(5). If it gets over that hurdle it invites the court to disallow the claimant's costs from 26th March 2019 on the basis (putting it shortly) that the claimant did not engage properly in a settlement process. The claimant disputes the defendant's entitlement to have that ruling. She says that the Part 36 offer was accepted and the defendant was not entitled to introduce the qualification which it did. If it was then there is no justification for departing from the sort of costs order in her favour that would follow from acceptance of the Part 36 offer within the relevant period (21 days).

2. The following questions arise in relation to this matter:

   (a) Is the defendant entitled to accept the part 36 offer in the manner which it did?

   (b) If so, did its conduct amount to an acceptance?

   (c) If so, does that acceptance have the effect in principle contended for by the defendant?

   (d) If so, should the court exercise its discretion on costs in the manner proposed by the defendant?

The offer and acceptance

3. The immediate circumstances of the offer and acceptance were as follows.

4. The offer was made against a background in which the defendant and the claimant had both made offers of settlement. The offers of the defendant (to which I will come) were of varying amounts from time to time and their common theme was that they offered only the costs prior to one or other of two dates relatively early in the action. The offers of the claimant always sought the payment of all her costs.

5. The Part 36 offer which was accepted or purportedly accepted was in the following terms (so far as relevant):

> " 1. Our client will accept the sum of £99,500 by way of damages in full and final settlement of her claim. The Offer relates to the whole of the claim and takes into account any counterclaim [there was no counterclaim];
>
> 2. [undertaking not to commit further wrongs]
>
> 3. Your client will pay our client's costs ... of the claim, such costs to be assessed on the standard basis if not agreed.
>
> This offer is being served by email and the date of service is 20 October 2020. Pursuant to CPR 36.5 (1)(c), our client specifies a period of 21 days within which your client will be liable for our clients costs in accordance with rule 36.1(3) if the offer is accepted …
>
> …
>
> If you do not understand any aspect of this offer or would like us to clarify any aspect of this letter or consider that this offer is in anyway defective or non-compliant with Part 36, please let us know in writing within seven days of service in accordance with Rule 36.8."

The terms of the acceptance letter, or purported acceptance letter, sent by the defendant's solicitors were as follows:

> "We write further to previous correspondence in this claim and to confirm that your client's Part 36 offer of 20 October 2020 …is accepted. MGN will arrange for the payment of £99,500 damages to be transferred to the usual Hamlins account.
>
> We note that your client's Part 36 offer states that if that offer is accepted, your client will also seek a Statement in Open Court in terms to be agreed by the parties. That is agreed by MGN; please send us a draft for consideration. Please note that the acceptance of this offer comes with no admission of liability to your client beyond what is set out in MGN's Defence and the accompanying schedule, and it does not consider the sum in your Part 36 that it has accepted to be a fair reflection of the value of your client's claim. It has been accepted in order to bring this matter to a close now and to avoid further costs being incurred by both sides.
>
> We also write to give notice that MGN intends, pursuant to paragraph 37 of the 9th CMC Order, to apply for a variation to the terms of the template order. This is for reasons set out in our open letter of 30 October 2020. We have copied the Lead Solicitor to this letter and we are aware of the notice requirement provided for in paragraph 37."

The reference to the template order in the last paragraph is a reference to a standard form of costs order adopted by settling parties in this litigation. The claimant relies on it as introducing a relevant degree of equivocation as to whether the offer was accepted or not, or as non-correspondence between offer and acceptance. The defendant says that it was merely setting out the posture that it intended to adopt in an argument that it was entitled to run under the CPR.

Was the defendant entitled to accept the Part 36 offer in the manner in which it did?

6. The defendant maintains it is entitled in the circumstances to accept the offer and invite the court to exercise a discretion over all the costs of the action. Part 36 works as follows.

7. CPR 36.13 provides for what is to happen if the costs offer is accepted within the "relevant period" – ie the period of not less than 21 days within which a defendant will be liable for the claimant's costs in accordance with rule 36.13 or 36.20 if the

offer is accepted – see the definition in rule 36.3 which cross refers to rule 36.5(1)(c). In the present case the relevant period is 21 days. In the event of such acceptance within the period rule 36.13 (1) provides that "the claimant will be entitled to the costs of the proceedings …up to the date on which notice of acceptance was served on the offeror."

8. That is, of course, not what happened in this case. In this case the offer was accepted outside the 21 days, on the 22nd day. It appears that that was deliberate. That sort of acceptance is provided for by rule 36.13(4):

> "(4) Where –
>
> …
>
> (b) a Part 36 offer which relates to the whole of the claim is accepted after expiry of the relevant period …
>
> The liability for costs must be determined by the court unless the parties have agreed the costs."

9. The next two paragraphs deal with how the court is to go about that exercise:

> "(5) Where paragraph 4(b) applies but the parties cannot agree the liability for costs, the court must, unless it considers it unjust to do so, order that –
>
> (a) the claimant be awarded costs up to the date on which the relevant period expired, and
>
> (b) the offeree do pay the offeror's costs for the period from the date of the expiry of the relevant period to the date of acceptance.
>
> (6) In considering whether it would be unjust to make the orders specified in paragraph (5), the court must take into account all the circumstances of the case including the matters listed in rule 36.17(5)."

And 36.17(5) provides:

> “In considering whether it would be unjust to make the orders referred to in paragraphs (3) and (4), the court must take into account all the circumstances of the case including—
>
> **(a)** the terms of any Part 36 offer;
>
> **(b)** the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;
>
> **(c)** the information available to the parties at the time when the Part 36 offer was made;
>
> **(d)** the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and
>
> **(e)** whether the offer was a genuine attempt to settle the proceedings.”

10. Thus Mr Ben Williams QC, for the defendant, says that his client’s acceptance triggers those provisions and entitles him to invite the court to consider the matter and make an order which deprives the claimant of her costs from 26th March 2019 (which was the date of the service of the Defence in the action).

11. Mr Sherborne for the claimant does not dispute that the offer can be accepted after the 21 days referred to in it has expired, but says that the provisions of rule 36.13 do not assist the defendant. His starting point is that the Part 36 offer was accepted and the defendant is not entitled to introduce qualifications into that acceptance by seeking to depart from the costs element of the offer. If the offer was accepted, then so was the costs element, which required the defendant to pay the claimant’s costs. That is the position which now exists.

12. Mr Sherborne’s position is essentially a contractual offer and acceptance analysis. It suffers from two flaws. First, authority tells us that such an analysis is not appropriate to the Part 36 regime. Second, it would fail to get him what he wanted even if such an analysis were appropriate. I will take the second point first.

13. Under the contractual analysis Mr Sherborne seeks to take the acceptance part of the letter and say that that brings about an acceptance from which the defendant cannot resile in the second part of the letter by introducing a qualification about costs. That argument fails because it does not treat the letter in the correct fashion. The letter cannot be treated as being divided into two severable parts – an acceptance part, which has an effect as such, and then an attempt to graft a qualification on to a contract which has just come into existence as a result of an offer and acceptance. The letter has to be treated as a whole. Read as such, if one applied a contractual analysis, it would be incapable of being an acceptance because it does not accept one of the terms of the offer (the costs element) and proposes a different term. There would be no match between offer and acceptance. That would mean that there is no contract - the Part 36 offer has not been accepted, Mr Sherborne is not entitled to the damages referred to or his costs, and the action continues. So if Mr Sherborne is entitled to his contractual analysis it does not get him to where he wants to be.

14. In fact his contractual analysis is wrong. It is clear from Part 36 itself and from authority that the Part is its own self-contained regime, whose terms it prescribes. It does not adopt a traditional contractual regime. CPR 36.1 provides:

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

15. In *Gibbon v Manchester City Council* [2010] 1 WLR 2081 Moore-Bick LJ emphasised this feature:

> "4. It can be seen from Part 36 as a whole, as well as from the extracts cited above, that it contains a carefully structured and highly prescriptive set of rules dealing with formal offers to settle proceedings which have specific consequences in relation to costs in those cases where the offer is not accepted and the offeree fails to do better after a trial … In seeking to settle the proceedings, therefore, parties are not bound to make use of the mechanism provided by Part 36, but if they wish to take advantage of the particular consequences for costs and other matters that flow from making a Part 36 offer, in relation to which the court's discretion is much more confined, they must follow its requirements.
>
> 5. Part 36 is drafted as a self-contained code. It prescribes in some detail the manner in which an offer may be made and the consequences that flow from accepting or failing to accept it. In some respects those consequences reflect broadly the approach

> the court might be expected to take in relation to costs; in others they do not; for example, rule 36.14(3) allows the court to award a claimant who has obtained a judgment at least as advantageous as his offer interest on the sum for which he has obtained judgment at an enhanced rate of up to 10% over base rate, costs on the indemnity basis and interest on those costs at an enhanced rate as well.
>
> 6. Basic concepts of offer and acceptance clearly underpin Part 36, but that is inevitable given that it contains a voluntary procedure under which either party may take the initiative to bring about a consensual resolution of the dispute. Such concepts are part of the landscape in which everyone conducts their daily life. It does not follow, however, that Part 36 should be understood as incorporating all the rules of law governing the formation of contracts, some of which are quite technical in nature. Indeed, it is not desirable that it should do so. Certainty is as much to be commended in procedural as in substantive law, especially, perhaps, in a procedural code which must be understood and followed by ordinary citizens who wish to conduct their own litigation. In my view, Part 36 was drafted with these considerations in mind and is to be read and understood according to its terms without importing other rules derived from the general law, save where that was clearly intended."

16. That means that Mr Sherborne's attempt at a contractual analysis fails and one has to follow through the flow of the rules. Mr Williams' analysis is correct. Odd though it may seem, he is entitled to invoke rule 36.13(4) and have the costs determined by the court.

17. I say that it may seem odd because of the way in which it is said to operate in this case. The claimant has made an offer which she has pitched as being acceptable provided that her costs are paid. In making an offer an offeror is likely to make it on the basis that the monetary offer proposed is acceptable provided that the costs are also paid. That is what the offer says, and that is the effect of an offer accepted within the 21 days. The offeror (if a claimant) might well expect that if the offer is not accepted it is open to the offeror to continue with the action and see if he/she can better the offer and still get costs. The one thing that an offeror would not expect is that the offeree can wait until the relevant period (usually 21 days in practice) has passed, accept the offer (and thus bind the offeror) and then seek to avoid the costs by asking the court to determine them. The offeror will usually not think that that is an appealing option to have forced on him or her; otherwise it would have been offered in the first place. Yet that seems to be the effect of CPR 36.13(4), and Mr Sherborne did not contend otherwise. That this is the effect of the rule is demonstrated by the

decision of Warby J in *Optical Express Ltd v Associated Newspapers* [2017] 6 Costs LR 803, and the decision of the Court of Appeal in *Dutton v Minards* [2015] 6 Costs LR 1047 which accepted that position without demur. I must therefore apply that rule, though the nature of the oddity, and the potential oddity of its application, is something that I consider should be borne in mind when exercising my discretion. Indeed, it might be thought to be the factor underpinning the presumption in CPR 36.13(5).

18. I therefore consider that the defendant was entitled to do what it did, that is to say to accept the Part 36 offer and say what it said about the costs. In making the latter point it was merely pointing out what it would be saying to the court conducting the exercise of deciding the costs which it was entitled to call upon the court to decide.

19. That deals with the first three questions which arise on this application.

The exercise of the discretion – preliminary

20. Mr Williams' case involves looking at the pattern of offers made in this case (open, without prejudice save as to costs – WPSAC – and Part 36) and inviting me to conclude and find that the claimant was culpable of a serious failure to engage with the settlement process. If she had engaged at prior stages, and particularly in the pre-issue period and for a few months after issue, the matter would likely have settled, and even if there is any doubt about that then the failure to engage was serious, not to be encouraged, and in fact should be discouraged by my making the costs order that he seeks, depriving the claimant of her costs since March 2019.

21. There is a piece of background which needs to be understood before setting out the correspondence. There is a step in this litigation known as early disclosure, provided for in an earlier order which applies to all proceedings of this genre. Under it, after service of the proceedings, the claimants get some limited disclosure to enable them (potentially) to form a better view of the strength of their cases, with the possibility of producing an earlier settlement being one of the objectives of this step. Disclosure generally in all these cases is very important because practically all relevant documents revealing what, if any, wrongful acts the defendant committed, and their contribution to the publication of articles, are in the hands of the defendant. Under the early disclosure process the claimant provides his/her relevant telephone numbers so that the defendant's phone records can be checked for calls to them, and they provide the names of up to four associates whose numbers are also searched and the results provided. In addition, the claimants are given search results relating to them from private investigator records in relation to 4 private investigators, and the results of the same searches in relation to the associates. In some cases the defendant took to

providing early disclosure to claimants even before the claims were issued, which is obviously very sensible.

22. However, for an extended period, which spanned the initiation of this claim, the defendant took to refusing to give associate data on the footing that in some unspecified case they would risk revealing a confidential source. I ruled that they were not entitled to do that and the Court of Appeal ([2019] EWCA Civ 350) confirmed that ruling. I assume that full early disclosure then resumed. The significance of this is that these proceedings were notified and started during this period of non-disclosure, so the claimant did not get the early disclosure that she was entitled to.

23. The Court of Appeal judgment contains a succinct summary of the importance of the early disclosure regime:

> "7. Thus, each claimant was able to nominate four associates (family, friends or others) all of whose call data would be disclosed. This early disclosure was designed in part to enable claimants to enter settlement negotiations with MGN. The judge was told that this regime had been successful in causing cases to settle. It prevented claimants having to "settle blind". It also saved the expenditure of much time and money and court resources. Given the scale of the litigation, this was obviously an enormous benefit."

The facts relevant to this application

24. The pattern of events relied on by the defendant arises out of the correspondence that took place between the parties from 2018 to the date of the acceptance of the Part 36 offer.

25. The correspondence starts with a letter of claim from the claimant's solicitor (Hamlins) to MGN dated 24 September 2018. It provided the claimant's mobile telephone numbers across the period in question. While acknowledging that the defendant was not providing associate data at the time (the appeal to the Court of Appeal on the point was pending) the letter asked for call data and private investigator invoices relating to the claimant and articles in which she was named. The letter indicated that further articles might be added to the claim, and indicated that the claim was for substantial compensation (not specified) and other non-pecuniary relief which

is not relevant to this application. It invited a “satisfactory response” within 14 days, failing which the claimant would commence proceedings without further notice.

26. The response from MGN (26th September 2018) pointed out that early disclosure of associates could be given provided that their consent was forthcoming (which was its stance at the time, which stance it was held it was not entitled to adopt) and it raised a query about the telephone numbers provided. It ended by saying:

> “There are two other matters. Your letter makes no mention of MPS [Metropolitan Police Service] disclosure or ADR. We presume, firstly, that there is no MPS disclosure… and… although you have not mentioned ADR in your letter you are willing to engage in ADR with us so that we can amicably, and hopefully quickly, resolve your client’s claim. Again please confirm.”

27. Hamlins responded on 19 October 2018, taking the point that they considered that the consent of each associate was not required (again in line with the approach of claimants across this period). They further said:

> “Our client has not received MPS disclosure. With regard to your query in relation to ADR, our client will clearly need to see the material requested in our Letter of Claim before she is in a position to consider consenting to ADR. Subject to this, our client is of course willing in principle to engage in ADR and to consider any realistic settlement proposals you may have.”

28. Nothing seems to have happened before 17 December 2018 when Hamlins told MGN that their client had the benefit of ATE insurance and informed MGN of the stages at which the premium would become payable (but not the amount of the premium). The incurring of ATE premiums when the claim started is one of the costs issues which one can see stood in the way of settlement of this case in its early stages.

29. On 17th December MGN supplied call data for the claimant’s provided numbers and returned to the question of settlement. It said:

> “We do not understand why your client needs to see the material requested in your letter of claim before she is in a position to consider consenting to ADR. She should be

> agreeing to consent to ADR without any preconditions and that is our position; we wish to resolve your client's claim amicably, without proceedings, and through ADR."

30. I will observe at this stage that MGN's stance slightly missed the point of early disclosure. The whole point of early disclosure was to start to level up the playing field of the asymmetry of information. I do not see why it is unreasonable for the claimant to decline to engage in a settlement process until she had information which the established processes entitled her to have (albeit technically not until after the issue of proceedings), and with good reason.

31. On the same day (17th December 2018) MGN made its first offer, which was a WPSAC offer. It offered £60,000 plus reasonable legal costs, together with certain non-pecuniary relief. From now on I shall omit any reference to non-pecuniary relief (save where relevant) because it is not material to the issues on this application; there was never going to be any difficulty about those elements of a settlement and the real question was how much money was on offer. The offer was said to be open for 21 days (to 7 January 2019), though it would be treated as rejected if proceedings were started. The letter ended:

> "If the terms of settlement offered in this letter are only acceptable to your client if other remedies are provided then please let us know if that is the case and what those other remedies are." A PS indicated that the letter was dictated before receipt of the letter notifying MGN of the ATE insurance having been taken out.

32. Four days later, on 21 December 2018, Hamlins served the claimant's proceedings which had been issued on 20 December, thereby indicating a rejection of the offer made. She also gave notice of funding under a CFA. The letter re-provided the claimant's telephone numbers for searching purposes and required early disclosure in relation to her and 4 specified associates. It went on to indicate that the claimant would seek additional remedies, namely proper disclosure, an explanation of the nature and extent of the illegal interception of her voicemail messages, and other relief. It did not make a counter-offer.

33. On the same day (21st December) Hamlins responded to the MGN letter of 17 December. It sought to point out that MGN's proposals for ADR involved its seeking to avoid giving disclosure whilst simultaneously expecting the claimant to enter into settlement discussions. The letter complained that that approach would place the parties on an unequal footing. Mr Williams described this as a blustering letter in the face of a willingness to negotiate. I do not accept that categorisation. It was not

"blustering" and I find that the refusal to enter into negotiations without receiving at least the early disclosure, which would have been provided had MGN not previously changed its stance on it, was not unreasonable.

34. In a witness statement prepared for the purposes of this application, Mr Galbraith of Hamlins explained that the offer was a significant undervalue of the claim, and he pointed out that the sum ultimately accepted by the defendant was £39,500 more. That is true and significant.

35. On 10 January 2019 MGN's solicitors (RPC) followed up the initial offer complaining about a "complete" failure to negotiate and saying that if the initial offer had been unsatisfactory to the claimant, why did she not raise the points by negotiation during the 18 days in which the offer remained live? They pointed out that what it described as a lack of response and engagement was the sort of conduct which I had criticised in earlier decisions in this litigation (the cases of Mr Henson and Mr Jordan). The letter went on to make a further WPSAC offer of £85,000 and costs up to the day before the claim was issued, which excluded any costs of preparing and issuing proceedings. The offer was open until 24 January. The letter went on:

> "If this offer is acceptable subject to the provision of further remedies or modification of the costs remedy offered above, please set this out so that MGN can consider and understand your client's position. Similarly, if this offer is rejected because certain remedies offered above are agreed but others are not, please tell us what the agreed remedies are."

36. That letter was not responded to. In his witness statement Mr Galbraith explained that the acceptance of this offer would have deprived his client of the costs of preparing and issuing proceedings, and the costs of the ATE insurance premium which were incurred at the same time, and this justified its rejection. It would probably have been better if Hamlins had pointed that out in correspondence, even though it would have been obvious to the defendant. Mr Galbraith also pointed out that, again, the final sum bettered the offered sum, this time by £14,500, and at this time she still had not had the benefit of full early disclosure.

37. On 31 January 2019 Particulars of Claim were served.

38. On 1 March 2019 (a Thursday) MGN's solicitors wrote a letter complaining about the claimant's refusal to engage with attempts at settlement and the commencement of the

proceedings in the face of the offer that had been made. By now (on 7 March) the Court of Appeal had rejected the attempt by MGN to limit associate early disclosure, and the letter points out that the stay on the early disclosure regime had been lifted. The letter now enclosed call data and invoices relating to all the early disclosure for associates. Then it turned to the question of "settlement". It said

> "MGN accepts that it has a liability to your client for voicemail interception on a small number of isolated occasions in 2006. MGN also accepts that a small number of its journalists unlawfully instructed private investigators to undertake investigations about your client on five occasions in 2006. MGN apologises for these limited instances of unlawful activity relating to your client and – as has been made clear to your firm since 26 September 2018 – wishes to resolve your client's claim."

39. It then went on to make an offer of payment of damages set out in an accompanying WPSAC letter and referred to the interaction between that offer and the forthcoming service of a Defence:

> "In view of the impending Defence deadline, this letter is open for acceptance until 10am on Monday, 25 March 2019. Should your client require more time to consider this offer, please let us know. MGN is willing to extend time for consideration of the offer if a corresponding extension for service of the Defence can be agreed.
>
> If this offer is acceptable subject to the provision of further remedies, please set this out so that MGN can consider and understand your client's position. Similarly, if this offer is rejected because certain remedies offered above are agreed but others are not, please tell us what the agreed remedies are."

40. The accompanying WPSAC letter, dated 21st March offered £90,000 in damages and payment of 90% of the claimant's reasonable costs, to be assessed if not agreed, but excluding any costs of issuing proceedings. It went on:

> "The costs of issuing proceedings are excluded as your client should have engaged with MGN's two letters of 17 December 2018 rather than responding by issuing a claim form on 20 December 2018.…

> Whilst MGN recognises that your client has a valid claim, the damages offered represents a vast over-payment to her. MGN makes this offer on a pragmatic and commercial basis, recognising the costs incurred when settling your clients Defence, and not because your client's claim is worth this sum."

41. Yet again the costs of and since the issue of proceedings are not included in the offer. This turns out to be a significant factor in the argument.

42. The offer just described was made on a Thursday (assuming it was made on the date of the letter specifying the amount) and remained open until the following Monday. The evidence of the claimant, filed in connection with this application, explains that it was sent to only one fee earner which is said to have limited the time in which instructions could be taken. The disclosure which had been provided was not voluminous, but Mr Galbraith has explained that it needed to be assessed, and the short deadline for acceptance was unreasonable in those circumstances. I agree, though it made a little sense in the context of the imminent date for service of the Defence.

43. It seems that on the Tuesday there was a telephone call between the solicitors which is recorded in an email from RPC to Hamlins timed at 17:59 on Tuesday 26 March. It reads:

> "Thanks for your time on the phone earlier.
>
> You initially requested that MGN reopen its offer made on 21 March until Thursday (28 March) and agree a corresponding deadline for service of its Defence to this Friday (29 March).
>
> As I explained, MGN is not minded to reopen its offer of 21 March. That offer was made to avoid having to incur the costs of preparing its Defence. A significant proportion of these costs have now been incurred (predominantly by counsel). MGN is, however, willing to listen to the terms on which your client is willing to settle at this stage. You confirmed that you would take instructions from your client on that basis.

> I have not heard from you since and, as discussed, MGN's Defence is due tomorrow. As you are taking instructions from your client as to the terms on which she is willing to settle, could we please agree a corresponding extension of time for service of our client's Defence until after we have heard from you in order to avoid incurring further – potentially wasted – costs?
>
> You suggested that you should be able to obtain instructions from your client by close of business on Thursday (28 March). If this remains possible, I would suggest extending the Defence deadline to Friday (29 March) although, if you are able to obtain instructions from your client sooner, a shorter deadline may be feasible."

44. That email was chased the next day (27th March) at 10:58. In its email RPC pointed out that MGN's Defence was due on that day but they had halted work on it for the moment so as to avoid incurring potentially unnecessary costs. It said that if RPC did not hear from Hamlins with confirmation of the extension by noon then they would work on the basis that the Defence was to be filed that day. The letter went on to protest that MGN had consistently demonstrated its willingness to engage in ADR by making offers of settlement without any engagement from the other side. The email ended by saying that MGN's cost of finalising its Defence would be reflected in any further settlement discussions.

45. Hamlins responded at 11:22. Their correspondent (Mr Galbraith) said that he had just popped out of the meeting, was not ignoring RPC but had not been able to obtain his client's instructions. He was not hopeful that he would be able to do so as he believed his client was still out of the country but if the position changed he would revert to RPC.

46. 21 minutes later, at 11:43, RPC replied expressing surprise that there had been no agreement as to an extension of time for the service of the Defence. In the absence of confirmation by midday they would finalise the Defence and file it that day.

47. Hamlins were able to respond at greater length at 15:17 on the same day (27 March). The correspondent (Mr Galbraith) explained that the call of the previous day was expressly on the footing that he would need to take instructions. The email conveyed that his client did not wish to put forward proposals prior to receipt of the Defence "which has been prepared in any event". The email went on:

> "For the avoidance of doubt, my client is not refusing to engage in settlement discussions (a baseless but often repeated allegation). We will consider whether our client has sufficient information to put forward informed proposals shortly."

48. The letter of 27 March 2019 which accompanied service of the Defence complained again about a failure to engage in negotiation. It firmly asserted that MGN's position was that many, if not all, of the articles relied on should never have been claimed on. It was said that the vast majority of the information complained of was not private and/or not the information of the claimant and/or was trivial. Notwithstanding that, MGN accepted that it had a liability for the misuse of private information in relation to the instruction of private investigators on five occasions (which were all occasions appearing from early disclosure – the letter did not point that out). Having complained further about a lack of engagement and pointed out that that sort of conduct was criticised by me in two previous judgments in the Mirror Group phone hacking litigation, the letter went on to make a further offer. It offered the payment of a sum in damages set out in a separate letter, other relief and (once again) payment of reasonable legal costs to be assessed if not agreed up to the day before the issue of proceedings (i.e. taking the same position on costs as had been taken in previous offers). The offer was open for acceptance until 6pm on 10th April 2019. The letter ended:

> "If this offer is acceptable subject to the provision of further remedies or modification of the costs remedy offered above, please set this out so that MGN can consider and understand your client's position. Similarly, if this offer is rejected because certain remedies offered above are agreed but others are not, please tell us what the agreed remedies are."

49. The separate letter containing the sum of damages offered was a WPSAC letter and offered a sum of £60,000. The letter expressed the belief that that figure was in excess of what the claim was worth (let alone the earlier higher figures offered).

50. There was no further relevant communication for almost 18 months. In his witness statement Mr Galbraith explained that his client had decided to await disclosure in the action so that she could appreciate the scope of the wrongdoing and value her claim accordingly. He also drew attention to the fact that the defendant's offer had been reduced. Full disclosure was not given until after a dispute was resolved as to its scope (in the claimant's favour) in January 2020, and even after that some further relevant disclosure was made.

51. On 14 October 2020 Hamlins wrote a WPSAC letter expressing a willingness to pursue the matter to trial (then scheduled for the end of January 2021) if necessary. That view was said to be fortified by a particular piece of disclosure which was said to evidence a greater degree of intrusion into privacy than had hitherto been apparent. Notwithstanding that, and in the light of further costs to be incurred, the claimant was prepared to take a "pragmatic view in an attempt to reach an early resolution" and she put forward an offer that she was willing to accept, namely £95,000 plus costs.

52. RPC responded two days later on 16 October 2020 (a Friday). They made a counter offer of £95,000 plus costs to the date of the Defence (25th of March 2019). The offer remained open until 6pm on the following Monday. An explanation was given as to why the costs offer was limited as it was. It said:

> "The reason that the costs are only offered to the date above should be apparent to your firm and your client. Had you properly engaged with MGN in settlement discussions, as a properly funded litigant no doubt would have, extensive costs could have been avoided and the action could have resolved in March 2019. Her lack of engagement also runs entirely in accordance with the behaviour clearly criticised by the Managing Judge in the *Jordan* judgement… It appears clear to us that you are only now asking for £95,000 to give the impression that the £90,000 offered by MGN in March 2019 was not acceptable. Plainly on receipt of that offer from MGN your client could and should have engaged in settlement discussions and the case could have been resolved. No other Claimant in Wave 3 has waited this long before engaging in settlement discussions."

53. The deadline was extended by roughly 24 hours by agreement. On 20 October 2020 the claimant made the Part 36 offer identified above which was ultimately accepted. Before accepting it the defendant made another WPSAC offer by letter dated 27 October 2020. The offer was of damages of £99,500 with costs payable only up to 25 March 2019 again. The letter again sought to justify the costs qualification by reference to what MGN said was a culpable failure to engage in negotiations which, had they been carried out properly in or by March 2019, would have resulted in a settlement.

54. On 30 October 2020 RPC in effect repeated its previous offer of £99,500 plus costs to 25th March 2019 (again employing the technique of a separate WPSAC letter containing the damages figure). It proposed that the incidence of costs after 25 March 2019 should be decided by me as the Managing Judge. That offer was, in effect, rejected on 4 November 2020 after a certain amount of ancillary correspondence.

55. After yet further correspondence, which I do not need to set out, the then still outstanding Part 36 offer was accepted in a letter of 12 November 2020.

The authorities relied on

56. MGN submits that that story justifies, if it doesn't require, that the normal order for costs which would result from acceptance of a Part 36 offer should be departed from so as to disallow the claimant's costs from the date of the Defence and give her her costs only for the period up until then. Mr Williams accepts that he needs to make a strong case because of the presumption arising out of CPR 36.13(5). He accepted that on the authorities he faced a "formidable obstacle" in seeking to demonstrate that the normal consequences of the acceptance of an offer should not apply – *Smith v Trafford Housing Trust* [2012] EWHC 3320 (Ch) at para 13(d):

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

57. Having accepted that burden, Mr Williams submitted that he has discharged it. He relied on what he says is a failure to engage in negotiations both before and after the commencement of proceedings, and authorities which, he says, renders that culpable to an extent which justifies departure from the normal rule. He stressed remarks made by Sir Geoffrey Vos C in *OMV Petrom SA v Glencore International* [2017] 1 WLR 3465, which it seems to me can be best summed up in the words of the Chancellor in paragraph 39:

> "39. The culture of litigation has changed even since the Woolf reforms. Parties are no longer entitled to litigate forever simply because they can afford to do so. The rights of other court users must be taken into account. The parties are obliged to make reasonable efforts to settle, and to respond properly to Part 36 offers made by the other side. The regime of sanctions and rewards has been introduced to incentivise parties to behave reasonably, and if they do not, the court's powers can be expected to be used to their disadvantage. The parties are

> obliged to conduct litigation collaboratively and to engage constructively in a settlement process."

58. I was also reminded of my decisions in this litigation in *Henson v MGN Ltd* (unreported, 7th March 2017) and *Jordan v MGN Ltd* [2017] 4 Costs LR 687. In the first of those decisions I considered the sort of principles encapsulated in the Chancellor's statement (though without the benefit of the actual statement which had not been pronounced by then) and modified what would have been considered the normal order for costs to a limited extent. It was a decision on the facts. It was not a Part 36 case. *Jordan* was a case in which I actually applied the principles from *OMV* and the basic Part 36 costs provisions and rejected a somewhat bold submission that those provisions should be disapplied. Again, it was a decision on its own particular (and somewhat peculiar) facts.

59. Mr Williams also pressed what Jackson LJ said in *Thakkar v Patel* [2017] EWCA Civ 117, [2017] 2 Costs LR 233 at para [31]:

> "The message which this court sent out in *PGF II v OMFS Ltd* was that to remain silent in the face of an offer to mediate is, absent exceptional circumstances, unreasonable conduct meriting a costs sanction, even in cases where mediation is unlikely to succeed. The message which the court sends out in this case is that in a case where bilateral negotiations fail but mediation is obviously appropriate, it behoves both parties to get on with it. If one party frustrates the process by delaying and dragging its feet for no good reason, that will merit a costs sanction."

60. The *Optical* case was another Part 36 case, and in it Warby J adjusted the normal costs provisions and held that the heavy burden (which fell on the defendant) had been fulfilled – it is the only reported case which the parties have been able to find where that happened. The main factor that Warby J took into account in making an order that the normal claimant's entitlement to costs should be limited to a date earlier than the offer was his finding that the claimant was slow in particularising the amount of its claim, and if it had done so earlier the offer would have been made, and would have been accepted, earlier than it was (see para 48). Again, that was a case on its own facts, but in the respect just described it has a resonance with one factor in the present case (at least according to the defendant).

61. With the material arising from those facts in mind, I therefore approach the decision in the present case. Mr Williams' case is that his client was making offers and was met with silence, and the failure to engage went back to the pre-issue stage. It

behoved the claimant to engage properly before issue, and she did not, without any good reason.

The current dispute and its resolution

62. The case of the defendant in broader outline than I have hitherto described is that there was a culpable failure to engage in settlement negotiations from the moment the claim was made in 2018. The claimant ought to have engaged, as the defendant's correspondence invited, and if she had done so then the matter might have settled. That remained as true after the issue of proceedings as before. The claimant never put forward an offer until October 2020, and that was not good enough. There was a chance of settlement before then had the claimant engaged with a settlement process. So far as the claimant justified her stance by a need to have disclosure, that was no real justification. A large number of cases in this litigation have settled before disclosure, including the *Henson* case. She did not necessarily need disclosure. This was a bad case, and bad enough to allow the defendant to discharge the burden imposed by Part 36 and to limit the claimant's costs to the period prior to the Defence.

63. On analysis the claimant's case has two strands. First, that the offers by the defendant were always inadequate in terms of amount, as the final acceptance of £99,500 demonstrates. The first offer was way below that, and even as offers started to approach what turned out to be the final figure, they did not (after the first offer) include costs, and there was no justification for not including costs. The real value of each later offer was therefore somewhat less than the headline figure of the amount of damages offered, and that must be borne in mind at all times. The second strand is the justifiable desire of the claimant to have disclosure before pitching an offer or deciding whether to accept one from the defendant. At the start of the process she did not have the equivalent of early disclosure, and she did not even have that at the point of time (after the issue of proceedings) which entitled her to it. It was the decision of the defendant to challenge the existing early disclosure regime which deprived her of that information and that decision turned out to be unjustified. The information was information which was to be provided precisely so that the claimant could consider the strength of her case, and it is not a legitimate complaint that she did not negotiate in the absence of that information. Once it was provided, the claimant was justified in reviewing matters and in deciding that she needed more disclosure in order to evaluate her claim. That was a reasonable stance, and it turns out to have been justified when one sees what emerged on disclosure, both in relation to her claimant-specific disclosure and subsequent generic disclosure which revealed documents relating to her which had not previously been revealed. The offer that she ultimately made was a bona fide one (and not one designed to be a bit more than the preceding ones) and since it included costs it was worth a lot more than any of the prior offers, which did not include all the costs.

64. There are two possible ways in which the defendant might succeed in this sort of debate. They both turn on the question of whether the claimant failed to engage in settlement discussions to an extent which should attract the court's censure sufficiently to lead to the sort of costs consequences which the defendant urges on me. The first is whether the failure to engage at an early stage can be seen to have cost an early settlement which would probably have been reached. That was the position in *Optical*. The court was able to see, from the facts as they appeared at the time, that the settlement which was ultimately reached could and probably would have been reached earlier if the claimant had provided its information earlier. The second is whether the failure to engage was, in more general terms, a culpably lost opportunity to arrive at a possible settlement which the claimant should have at least tried to reach even if one cannot be at all certain that any given settlement would have been arrived at.

65. What is not really in issue in this case is whether the claimant acted unreasonably in rejecting any particular offer. I mention that because some of Mr Sherborne's submissions seemed to be directed at that particular point, and some of what Mr Williams said, when he compared some of the later offers with each other, seemed to lean in that direction as well. In the end Mr Williams did not put his case in that way. He leant more on a more general failure to engage, and suggested that there was a gap which might have been bridged with some negotiation, and the claimant ought at least to have tried.

66. It is therefore not necessary to consider the reasonableness of each offer in that context. However, the terms of the offers that were made are not entirely irrelevant, because they at least set the atmosphere for a negotiation. If they can be seen to have been pretty generous, and very close to the final compromise, then the averment of a culpably lost opportunity can be made more strongly. If they did not have that character then the "lost opportunity" point is weaker. A failure to respond to a ludicrously low offer with a counter-offer may not be as culpable as a failure to respond to an offer which can be seen to be generous.

67. It is therefore appropriate to consider briefly the terms of the offers that were made, and to see how they fitted into the developing scenario. It seems to me to be clear that they cannot be used as a background which gave serious prospects of a compromise even when one sees the end result. The first offer was much lower than the final agreed sum, and a straight comparison with that end sum does not demonstrate that the parties were close. It was also made against a background where important early disclosure was not tendered, and its acceptance would have had to be one which was blind as to potentially important information which was being wrongly withheld. It was not an offer which obviously called for acceptance or perhaps some minor tweaking, because acceptance would have gambled on disclosure revealing very little which would inform the debate. Nor was it the sort of offer of which it can obviously be said that it set the scene for a sensible negotiation, again because of the absence of disclosure. The next offer (£85,000, with qualified costs – 10th January 2019) was rather closer to the final sum in terms of damages, but it excluded the costs of preparing the proceedings for issue, the costs of issue and the first ATE insurance

premium. I do not know what those costs were, but it is likely that they would have meant that the effect of the increase in the damages would have been largely (or at least significantly) cancelled out by the deduction of the costs. The offer in those terms would have made sense if one could say that the earlier offer ought to have been accepted, or if a successful negotiation would have been likely prior to the issue of proceedings, but that premise is, as I have just found, wrong.

68. The next offer (21st March 2019 - £90,000 plus 90% of the costs, but not the costs of issuing proceedings) was potentially even less generous in net terms. It also provided a very short time for acceptance. The fourth offer (27th March 2019 - £60,000 plus costs again only up to but not including the issuing of proceedings) was going backwards. The next suite of offers came 18 months later, and is less significant in this context, but by now the costs were limited by reference to a different date – the date of the Defence. This introduced an inconsistency with the costs hypothesis of the earlier offers. The hypothesis of the earlier offers was that the proceedings should never have been issued. The unstated hypothesis of the later offers was that the proceedings were justified to the point of the Defence. That further undermines the earlier hypothesis.

69. The relevant conclusion from this, so far as one can draw one, is that there was not a promising stage for a negotiation in the early phases of the dispute. It is not possible to conclude that an earlier negotiation would have been likely to have led to a settlement. The claimant would not have been encouraged by the defendant's approach. I am not saying that that approach was wrong; I am merely saying it was not encouraging. The offers do not set a promising scene for further negotiation. Furthermore, if it is relevant, I do not think it can be said that it is likely that there would have been a settlement at this stage if the claimant had indulged in negotiation. The defendant was apparently making less than generous offers and which would not have compensated for the chance of improving the claimant's case via disclosure, and was playing hardball over the costs. I think it unlikely that the parties would have reached an agreement.

70. I now turn to the more significant questions about the culpability of the claimant's absence of engagement per se. In dealing with the picture of negotiations I have already indicated that this case is not like *Optical* – one cannot say that the final settlement sum would have been agreed earlier if only the claimant had done something earlier. The position is too complex for that. So if Mr Williams is to succeed he must establish that, in the circumstances, what he describes as a failure to engage fell so far short of the standards which the courts now expect of litigants (in terms of a willingness to negotiate) that he can be seen to have discharged the heavy burden on him of showing that it would be unjust to apply the normal Part 36 consequences.

71. I do not consider that Mr Williams has discharged that burden. In my view the claimant had reasons, which cannot be dismissed as unreasonable, for not engaging in horse-trading over figures from the outset. In my view the claimant's attitude of declining to negotiate until she was better informed was an entirely reasonable one, bearing in mind the one-sided nature of the possession of information in all these cases and, in this one, the failure of the defendant to comply with the early disclosure regime. In a real sense the defendant brought the claimant's attitude on itself by persisting in its failure to comply with the early disclosure regime, both informal (pre-issue) and formal (post-issue). The statement in the letter of 17th December 2018 which seems to suggest the claimant is being unreasonable in seeking further information is very wide of the mark. It might even be branded as being unreasonable itself. The claimant in this period was not simply refusing to engage; she was indicating that she could not sensibly engage until better informed. That is entirely reasonable, in my view.

72. By March 21st 2019 the early disclosure had been given, but by now on the evidence (which I accept) the claimant had decided that she wished to get full disclosure in order to value her claim. It is not possible to say that that view is unreasonable; it is a sensible view to adopt. The position might have been otherwise if the defendant was making more attractive overtures, but on 27th March the defendant actually reduced its level of offer. It was also making costs offers which assumed that the claimant had been unreasonable in not settling before issue, which was again not promising. While its offer letters did invite a response, both in relation to the amount and in relation to the costs, the hectoring tone and level of the offers made did not actually encourage a belief that a negotiation would achieve a figure which the claimant might have thought attractive enough to forego disclosure (or further disclosure). In the face of all that a decision that there was no point in putting forward figures without getting some disclosure becomes even more understandable.

73. Mr Williams stressed that getting disclosure was not really necessary, and a lot of cases had managed to settle without getting that far. I shall accept the statement about settlement as being accurate. Nonetheless, it does not make this claimant's decision, in these circumstances, to press on without engaging in a negotiation somewhat blind, unreasonable in all the circumstances. Nor can it be seen that the disclosure process turned out to be pointless. Mr Galbraith has exhibited a schedule which identifies the useful and significant disclosure which was obtained by Ms Pallett, some of it as a result of claimant-specific disclosure and some of it later as part of the generic case. It demonstrated the potential for making a case that the level of infringement of privacy was rather greater than the 5 or so instances conceded by the defendant. If the disclosure is accurately described (and it has not been suggested it is not) then it is possible to say that it did indeed have the potential to bolster her case. It was not a pointless exercise as far as she was concerned. I do not propose to lengthen this already lengthy judgment by setting out that disclosure in detail. The disclosure enabled the claimant to put forward her figure of £95,000 on 14th October 2020, which the defendant accepted as a sum in its email of 16th October (despite its protestations that £60,000 was an excessive sum in its offer of 27th March 2019). In

other words, the disclosure (expensive though it no doubt was) enabled the claimant to raise the negotiating stakes by over 50% of the previous offer.

74. In that context it is relevant to reflect on the basis of the offers that the defendant made after early disclosure. At that stage it made offers on the basis of an admission that there were 5 instances of invasion of the claimant's privacy. Those 5 instances were instances which were apparent from the early disclosure. The claimant might well reason that if that was the case, then further disclosure (which she had not got by then) might well reveal further instances (that is said to be true in a large number of cases in this litigation) so waiting for that event, rather than accepting a settlement said to be founded in a limited number of wrongs and gambling that there are not a lot more, becomes more justifiable.

75. In all those circumstances while it can be said that the claimant was not engaging in a negotiation prior to October 2020, it cannot be said that in the circumstances she should have been, and certainly not that the absence of a negotiating stance was culpable (in the manner identified in the authorities) to an extent which makes it unjust to allow the normal consequences of the late acceptance of a Part 36 offer.

76. I therefore find that those normal consequences should follow and that the claimant should have all the costs of the proceedings on the basis of the normal template order.

A word of caution

77. This case has turned on its own facts, and to a large extent on the justification of the claimant in pressing on for disclosure before valuing her claim. It involves a determination in which the burden is on the defendant under Part 36. Because it turns on its own facts, it should not be taken as a green light for all claimants to decline to enter into negotiations before disclosure is complete. Such a posture would not be correct in every case. Each case must turn on its own facts. There may be other cases in which a non-engagement will be unreasonable. That will depend on the facts of those cases. Other cases may not involve the burdens of Part 36. The defendant will no doubt be concerned that every case will now go to disclosure. That would be regrettable, and should not be the case, and in any event the defendant can always seek to protect itself by making early offers which are more generous and less combative than they were in this case. Claimants should not seek to apply this case too generally.