Neutral Citation Number: [2023] EWHC 3223 (Ch)

Case No: BL-2020-MAN-000005

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

Date: 15 December 2023

Before :
His Honour Judge Halliwell sitting as a Judge of the High Court

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Between :

Julie Anne Morton
(as executrix of the state of Jennifer Ruth Morton
Deceased)

Claimant

- and -

(1) Simon Nigel Morton
(2) Alison Mary Morton

Defendants

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Giles Maynard-Connor KC and **Alfred Weiss** (instructed by **Aaron and Partners LLP**) for the **Claimant**
Thomas Dumont KC and **Jonathan Edwards** (instructed by **Quinn Barrow solicitors**) for the **Defendants**

Hearing date: **6 October 2023**

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JUDGMENT

HHJ Halliwell

(1) Introduction

1. This is my judgment on costs following the trial of proceedings relating to the dissolution of a family partnership and taking of post dissolution partnership accounts. The partnership was between the late Jennifer Ruth Morton ("**Jennifer**"), her son, Simon Morton ("**Simon**"), and his wife, Alison Morton ("**Alison**"). It related to farms in Cheshire and Staffordshire. The partnership was dissolved during Jennifer's lifetime but Simon and Alison continued to carry on the partnership business from the time of dissolution.

2. Jennifer's daughter, Julie Morton ("**Julie**"), sued as claimant. She did so principally in her capacity as executrix of Jennifer's estate. Simon and Alison defended the action and counterclaimed for relief which has been disposed of with Julie's claim.

3. At this stage of the proceedings, Mr Giles Maynard-Connor KC continues to appear on behalf of Julie together with Mr Alfred Weiss, of counsel. Mr Thomas Dumont KC now appears with Mr Jonathan Edwards, of counsel, who previously appeared before me alone on behalf of Simon and Alison.

4. Issues arise as to the operation *of CPR Part 44.2*, where each party achieves a measure of success. Having made offers to one another under *CPR 36*, there are also issues as to whether they have obtained judgment at least as advantageous to themselves as the proposals in their respective offers and, if so, whether it would be unjust to award additional relief in respect of interest, indemnity costs and payment of the additional amount specified in *CPR 36.17(4)(d).*

(2) Background

5. On 27 January 2022, I gave judgment, *[2022] EWHC 163 (Ch) ("***My First Judgment***"),* on the claim for declaratory relief as to ownership of the partnership assets, Julie's claims for specific performance of a post dissolution option and the taking of accounts. I also gave judgment on the counterclaim for rectification or rescission of the trusts of a transfer ("**the 2008 Land Transfer**") of the main part of one of the farms, mirror claims for equitable relief and the taking of accounts together with an order giving effect to an equity arising from proprietary estoppel.

6. In doing so, I concluded that the material issues as to ownership were generally to be determined with respect to the date on which the assets were introduced to partnership by a deed made on 19 December 2012 ("**the 2012 Deed**"). Most of these issues were resolved in favour of Julie, as Jennifer's executrix. However, I determined that, by proprietary estoppel, Simon was entitled to credit for an enhanced share of the capital of the partnership. On this basis, I set aside an executory agreement following the exercise of the option, awarded Simon and Alison the right to serve a new option notice ("**the Extended Option**") and dismissed Julie's claim for specific performance of the executory agreement. However, I also dismissed the counterclaim of Simon and Alison for an order rectifying or rescinding the trusts of the 2008 Land Transfer. In this judgment, I shall borrow from the nomenclature of My First Judgment. This includes references below to "t**he Second Partnership**", "**the Third Partnership**" and the "**Fourth Partnership**".

7. By order dated 26 April 2022, I made directions for the taking of post dissolution partnership accounts. The post dissolution partnership accounts came before me for hearing in September 2022. I gave judgment on 29 September 2022, [*2022] EWHC 2689 (Ch) ("***My Second Judgment***")* valuing, at £2,053,278, Jennifer's share of the partnership assets. If exercised, this was the amount payable under the option.

8. At this stage, the main issue was whether Julie was entitled, at her election, to interest on Jennifer's share of the partnership assets under *Section 42(1)* of the *Partnership Act 1890* regardless of whether Simon and Alison exercised the option. I determined this issue in Julie's favour. *Section 42(2)* precludes an outgoing partner from her statutory right to an account of profits or interest where the partnership contract furnishes the continuing partners with an option to purchase her interest and the option is duly exercised. However, I concluded that, as Jennifer's personal representative, Julie was entitled to statutory interest regardless of whether the option was exercised since the rights of Simon and Alison under the Extended Option were derived from my judgment and superseded the parties' rights under the 2012 Deed. Statutory interest was calculated at £726,394.44.

9. The hearing in September 2022 had been listed to resolve all issues consequential upon My First Judgment in addition to the taking of post dissolution accounts. This included liability for the costs of the proceedings as a whole.

10. At the end of the hearing, my attention was drawn to a letter dated 19 February 2021 from Julie's solicitors containing an offer, under *CPR Part 36*", to compromise the proceedings for the sum of £2,000,000 plus costs ("**Julie's Part 36 Offer)**. Simon and Alison had been given 21 days for acceptance. The parties were in agreement that the period for acceptance of Julie's Part 36 Offer – denoted in *CPR 36.3(g)* as "the relevant period" - came to an end on 15 March 2021.

11. I awarded Julie 50% of her costs to this date. However, Julie's Part 36 Offer was a valid *Part 36* offer under the Rules. It was not suggested otherwise. On the agreed basis that time for acceptance expired on 15 March 2021, I awarded Julie the whole of her costs from that date, to be assessed on the indemnity basis, plus interest at 2% and, pursuant to *CPR 36.17(4)(d),* an additional sum of £75,000. This was on the grounds that My Second Judgment was at least as advantageous to her as the proposals in Julie's Part 36 Offer and I was not satisfied it would be unjust to make such an order. I also made provision for Simon and Alison to make an interim payment on account of Julie's costs, in the sum of £250,000.

12. My judgment on the *Section 42* issue was subsequently reversed by the Court of Appeal, *[2023] EWCA Civ 700*. In their judgment, on 20 June 2023, they concluded, at [49], that in substance my award required the parties to read the partnership deed in a particular way rather than creating a new option. On this basis, the Extended Option was given by the 2012 Deed. Upon exercise of the Extended Option, *Section 42(2)* would thus exclude Julie's statutory right to interest. The Court of Appeal thus made an order providing that statutory interest would only be payable in the event that the Extended Option was not exercised. They extended the option period further and ordered Julie to pay the costs of the appeal. Since Simon and Alison had made a discrete *Part 36* offer in respect of the appeal itself which Julie had failed to beat, they ordered Julie to pay an additional amount under *CPR 36.17(4)(d)(ii*). She was ordered pay to £60,000 on account of their costs.

13. The Court of Appeal's judgment has potentially brought into play another *Part 36* offer, on behalf of Simon and Alison, in respect of the substantive proceedings ("**Simon and Alison's Part 36 Offer**") and a *Calderbank* offer ("**Julie's *Calderbank* Offer")** on behalf of Julie. Simon and Alison's Part 36 Offer was enclosed in a letter dated 30 August 2022, under which they offered to pay £2,150,000 under the Extended Option on the basis Julie would not be entitled to statutory interest, under *Section 42*, in the event the Extended Option was exercised. She would also be liable for Simon and Alison's costs under *CPR 36.17*. Julie's *Calderbank* Offer was contained in an email message dated 13 June 2021 from Mr Maynard-Connor to Mr Edwards and again incorporated an offer to compromise the proceedings for £2,000,000 plus costs subject, this time, to a scheme for payment in three instalments between 30 October 2021 and 29 October 2023. By return of email on 13 June 2021, Mr Edwards implicitly rejected Julie's *Calderbank* Offer with a counter offer to compromise the whole proceedings for £950,000 inclusive of costs subject, again, to a scheme for deferred payment. These email messages were exchanged by counsel during a weekend when the trial was in progress.

14. Following the Court of Appeal's judgment, Simon and Alison gave notice exercising the Extended Option. Pursuant to the Court of Appeal's judgment, the option price of £2,053,278 thus became payable in two instalments on 27 September 2023 and 27 September 2024. After setting off Julie's interim costs liability of £60,000, Simon and Alison have paid the first instalment in the sum of £1,190,000. The balance, following detailed assessment of Simon and Alison's costs and payment of the additional amount due to them, under *CPR36.17(4)(d)*, is payable on 27 September 2024. The net amount payable will also be subject to the overall outcome of the hearing before me.

15. Under the Court of Appeal's order, all issues as to the costs of and incidental to the High Court proceedings were remitted to me for further consideration in the light of their conclusions. I have done so by revisiting *CPR 44* and the statutory scheme of *CPR 36* in the light of the parties' offers and counter offers following a hearing at which the respective cases of each party were argued more fully than before and in uncompromising terms.

(3) ***The Court's discretionary jurisdiction subject to Part 36***

16. *CPR Part 36* provides a self-contained procedural code. Subject to *Part 36*, the Court's discretion as to costs is governed by *CPR 44.2*.

17. By *CPR 44.2(2)(a),* the general rule is for the unsuccessful party to be ordered to pay the costs of the successful party. However, in deciding what order to make about costs, the court will have regard to all the circumstances, including the conduct of the parties, *CPR 44.2(4)(a),* whether a party has *partly* succeeded, *CPR 44.2(4)(b),* and any admissible offer of settlement, *CPR 44.2(4)(c).* For these purposes, a party's "conduct" is deemed to include the issue of whether it was reasonable for that party to raise, pursue or contest a particular allegation or issue, *CPR 44.2(5)(b). Calderbank* offers are taken into consideration, under *CPR 44.2(4)(c),* as part of the overall circumstances. They operate outside *Part 36*.

18. The orders which a court may make under *CPR 44,* include an order providing for one party to pay a proportion of the other party's costs, costs from or until a certain date and costs in relation to a distinct part of the proceedings, *CPR 44.2(6).* However, before making an order providing for a party to pay the costs relating to a distinct part of the proceedings it must consider whether it is practicable to make an order for the payment of a proportion of the other party's costs or costs from a specific date only, *CPR 44.6(7).* This qualification reflects the practical difficulties of assessment.

19. I must first identify the successful party. This has become a live issue. Julie contends that she is the successful party. Simon and Alison now maintain otherwise. Viewed with reference to the overall outcome of the litigation, they contend that they are the successful parties.

20. This is in issue because the parties have achieved mixed success in the proceedings as a whole. In broad terms, there were two phases in the litigation, each of which were sufficiently distinct from one another to merit separate treatment under *CPR 44.2(6)(f).* The first phase ("**the First Phase**") included all pre-trial process and the trial itself. The second phase ("**the Second Phase**") has encompassed all post trial process save the subsequent hearing in relation to consequential matters and directions. Most importantly this included the taking of accounts. In my judgment, Julie was

predominantly the successful party during the First Phase and, owing to their success on the statutory interest issue, Simon and Alison were ultimately more successful than Julie during the Second Phase. However, since the First Phase was the most important phase and the success of Simon and Alison during the Second Phase was more qualified than the success of Julie during the First Phase, Julie was ultimately the successful party within the meaning of *CPR 44.2(2)* in respect of the Claim and Counterclaim, each of which comprehended overlapping issues.

21. I have reached my overall conclusion on the following basis. In broad terms, Julie brought the proceedings, in her capacity as Jennifer's executrix, with a view to establishing Jennifer's historic interest in the partnership assets, obtaining post-dissolution accounts, and ensuring that the partnership property was realised or disposed of. Simon and Alison were continuing to carry on business with the assets of the partnership. Indeed, this remains the case. Although Julie is the sole beneficiary to Jennifer's residuary estate, she was and is under a duty, as Jennifer's executrix, to establish and realise Jennifer's rights and interest in the partnership assets. Through these proceedings, Julie has achieved her ends notwithstanding that Jennifer's estate has not yet been fully realised.

22. Simon and Alison counterclaimed for declaratory relief in relation to the ownership of Reddish Hall Farm, rectification of the trusts of a transfer dated 29 October 2008 ("**the 2008 Land Transfer Trust**") under which Reddish Hall Farm, Lymm was transferred into the names of Jennifer and Simon, an order providing for Reddish Hall Farm and Fairoak Grange to be transferred to Simon and Alison to give effect to their equity under the doctrine of proprietary estoppel and post dissolution accounts and inquiries. There was a substantial overlap between the issues on the claim and counterclaim. However, Simon and Alison advanced a positive case on most issues and generally failed to do so successfully.

23. During the First Phase, the primary issues were as to the ownership of the partnership properties when introduced to the 2012 partnership and thus the amount of credit to which the parties would be entitled in respect of such properties upon the taking of partnership accounts. In order to address these issues, it was necessary to trace the ownership of the assets through four specific periods, namely 24 September 1958-7

August 1985, 7 August 1985-8 February 2001, 8 February 2001-29 October 2008 and 29 October 2008 -19 December 2012.

24. Simon contended that, at the outset, he was given a 30% share in the assets of the Second Partnership, including the land. He contended that his interest in the properties was recognised in the partnership accounts on this basis. He also maintained that he was entitled to an interest in the partnership properties on the basis that the profits of the partnership had been applied towards the repayment of monies advanced by way of mortgage. He contended that, in 2002, he reached agreement with Jennifer to introduce his father's interest in the properties to the Third Partnership and that, in 2007, he submitted – with Jennifer – an application for first registration of the Main Estate on the footing that, together, they were beneficially entitled to the same as tenants in common in equal shares. Consistently with his case on these issues, Simon sought an order rectifying or rescinding the 2008 Land Transfer Trust on the basis that such land was held on trust for Simon and Jennifer as beneficial tenants in common in equal shares. On each of these issues, Simon's case failed. Since she adopted his case, Alison failed on the same issues.

25. Conversely, Simon succeeded on his case based on proprietary estoppel. This constituted an important part of the First Phase of the proceedings and, during the trial, it consumed more time during the examination and cross examination of witnesses than any other single issue. In view of his success on this aspect of the case, I also dismissed Julie's claim for specific performance of the original option. However, contrary to Simon's primary case at trial, he did not establish that he had been given assurances or representations that he would inherit the entirety of the farm assets. Contrary to his evidence, I concluded that Simon was aware, at an early stage, of his parents' scheme of succession with both siblings entitled to an equal undivided share in the farmland subject to a mechanism for him to buy out Julie's interest if and once she decided to sell. This was consistent with his parents' assurances which Jennifer implicitly repudiated when she made her Final Will.

26. Following trial, I made directions for the taking of accounts. The Second Phase commenced immediately following these directions. During this phase, the issue as to Julie's right to a statutory account was indubitably the single most important issue

before me. Ultimately, Simon has succeeded on this issue. However, this issue was based solely on a discrete question of law. During this phase, the parties achieved mixed success on the evidential issues and, following Mr Maynard-Connor's concessions, Simon failed on the questions otherwise left to me for determination at the September hearing, namely the issues in relation to the treatment of Jennifer's capital account and the children's loan account. These were the only issues on which oral evidence was called. Substantially more time was consumed at the September hearing on issues where Julie was ultimately the successful party than on the single issue referred to the Court of Appeal on which Simon and Alison succeeded.

27. Having determined that Julie was the successful party within the meaning of *CPR 44.2(2)(a*), I shall now turn to the overall circumstances and the three specific considerations listed in *CPR 44.2(4).*

28. Taking first into consideration the "conduct" of the parties under *CPR 44.2(4)(a),* I am not persuaded that this, in itself, warrants specific costs provision or adjustment nor, more generally, a departure from the general rule under *CPR 44.2(a).*

29. "Conduct" is denoted so as to include each of the matters listed in *CPR 44.2(5).* In addition to the parties' conduct more generally, I can take into account compliance with the *Practice Direction* for *Pre-Action Conduct*, the extent to which it was reasonable for the parties to advance particular allegations, the manner in which they pursued or defended their respective cases and whether, as claimant or claimants, they exaggerated their claim or counterclaim.

30. As it happens, no point has been taken about non-compliance with the *Practice Direction* for *Pre-Action Conduct*. None of the parties was wholly successful on each aspect of their case. They each gave evidence personally. I did not accept the entirety of the evidence of any of the parties. On most issues, Julie was more convincing, in her testimony, than Simon and Alison. However, in the present case, this can properly be reflected in my determination under *CPR 44.2(4)(b)*. On some factual issues, I had serious concerns about Simon's testimony, see My First Judgment at [65] and [66]. On some issues, Simon's case was thin and soon unravelled when tested at trial, for example his case in relation to the understanding on which Jennifer entered into the

transfer dated 29 October 2008. Simon himself elected to call Mr Young as a witness. When he did so, it became clear that there was no room to suggest Jennifer was mistaken about the shares in which Simon and herself would thus be beneficially interested in Reddish Hall Farm. I have reflected carefully on whether, under *CPR 44.2(5)(b)* and *(c),* these considerations should be reflected in my award of costs. However, Simon's case was generally presented in a way that was measured and carefully tailored to the relevant issues. Ultimately, he partially succeeded on each evidential aspect of his case based on proprietary estoppel. On balance, I have reached the conclusion that, if their conduct is assessed with reference to the case they advanced and the manner in which they did so, this does not warrant costs provision transcending or derogating from *CPR 44.2(4)(b).*

31. *CPR 44.2(4)(b)* provides that I should have regard to parts of the parties' case on which they have not been wholly successful. Having done so, I am persuaded the success of Simon and Alison on some of the issues – in particular the proprietary estoppel and statutory interest issues – merits an adjustment under CPR *44.2(4)(b).* In view of the nature of the issues and substantial overlap between the Claim and Counterclaim, this can be achieved by taking an overall view of the parties' success. Whilst Simon and Alison raised issues in their Counterclaim which did not initially form part of the Claim, for example their rectification and proprietary estoppel claims, it became necessary, once they did so, for these issues to be resolved when determining Julie's claims for declaratory relief in relation to the ownership of partnership assets and the footing on which the post dissolution accounts were to be taken. Owing, in part, to the substantial overlap between the issues in both claims, I am satisfied, on the hypothesis the Claim and Counterclaim can sensibly be treated separately, that the Defendants broadly achieved the same degree of success on the Claim and Counterclaim. It might be said that Simon and Alison specifically succeeded on the issues in their Counterclaim related to proprietary estoppel but their case, as such, was also deployed in answer to the Claim. In any event, their Counterclaim for rectification failed in its entirety as did their Counterclaim in relation to the ownership of assets introduced to partnership, itself deployed in answer to the Claim.

32. I shall initially deal with the costs of the First Phase, which includes the whole period up to and including 26 April 2022. During this Phase, Simon and Alison partially succeeded on discrete issues which have had a significant bearing on the ultimate outcome of the case. It is possible for me to carry out only a general and imprecise assessment of the time and resources that were expended by the parties, or can be taken to have been expended by them, on these issues at least in the period ending on 15 March 2021. Although informed by my overall impressions as trial judge, it includes my assessment of the time and resources likely to have been expended by the parties at the preliminary stages of the dispute, on all procedural steps in the period ending on 15 March 2021. In all likelihood, this is not materially different from the consumption of time and resources thereafter. On this basis, I would estimate that the parties are likely to have expended in the region of 75% of their time and resources on issues in respect of which Julie ultimately succeeded and 25% on issues in respect of which Simon and Alison have succeeded during this Phase. I am inclined to net them off. Subject to the *Part 36* issues, I shall thus make an order providing for Simon and Alison to pay 50% of Julie's costs during the First Phase.

33. However, the Second Phase raises different issues. Following my directions on 26 April 2022, the parties jointly instructed an expert to prepare a partnership balance sheet as at 8 May 2015 separately recording the capital in the current account for each partner. There were also directions for the parties to provide a schedule setting out their balance sheet adjustments. The parties co-operated with one another in this exercise and, by the time of the hearing, only limited issues remained. These were ultimately disposed of in My Second Judgment. Having heard the evidence, I determined the remaining evidential issues in favour of Julie. The issue in relation to the payment of statutory interest was indubitably the main issue between the parties and, had it not been for this issue, it is more than conceivable the whole case would have compromised at this stage. Since my determination on this issue has been reversed in favour of Simon and Alison, this must be reflected in my costs order. However, Julie succeeded, at the September hearing, on the remaining evidential issues. Moreover, Simon and Alison have already been awarded their costs of the appeal. Subject to the parties' Part 36 offers, I take the view, based on the parties'

respective measure of success on the issues at this stage that the fairest and most just outcome is for there to be no order as to costs after the hearing in relation to consequential matters and directions on 26 April 2022.

34. I shall now turn to the third consideration specifically listed in *CPR 44.2(4),* namely admissible offers of settlement under *CPR 44.2(4)(c).*

35. Julie's *Calderbank* offer provided for Simon and Alison to pay £2,000,000 subject to a deferred payment plan with £750,000 payable by 30 October 2021, £625,000 by 30 October 2022 and £625,000 by 29 October 2023. In the event of default, the unpaid balance was payable immediately. They were also to pay the whole of Julie's costs within 28 days of assessment or agreement. This was an astute offer. Had it been accepted, the costs of the Second Phase could have been avoided in their entirety. The offer to settle for £2,000,000 remains less than the option price of £2,053,278 once Simon and Alison exercised the option following the judgment of the Court of Appeal. However, the difference is marginal and the time scale for payment became significantly longer once the Court of Appeal extended the dates for payment. In a sense, Julie brought this upon herself since the Court of Appeal could reasonably have been expected to extend the dates for payment, as they did, in the event Simon and Alison's appeal succeeded.

36. Moreover, Julie's *Calderbank* offer made no concession in relation to costs. Subject to assessment, Julie's *Part 36* Offer provided for the entirety of her costs to be payable within 28 days of assessment or agreement. In *Coward v Phaestos [2014] EWCA Civ 1256*, David Richards J observed, at [98], that *CPR 44.2(4)* contains no provision analogous to *CPR 36.17(2)* (then *CPR 36.14(1A*)) for a judgment to be deemed more or less "advantageous" than an offer according to their nominal amounts. He also observed that "clearly a payment into court or an admissible offer to settle is unlikely in normal circumstances to be of much if any relevance if the offeree has achieved significantly more at trial". In view of Simon and Alison's success on some of the issues, it was unrealistic for Julie to assume that she would *prima facie* be entitled to the entirety of her costs. Moreover, at a time of rising interest rates, Simon and Alison have succeeded in extending the dates for payment well beyond the dates specified in Julie's *Calderbank* offer so as to give themselves more time to borrow the funds

required to pay the option price. In my judgment, it follows that Julie has not achieved a significantly better result than Julie's C*alderbank* offer. Julie's C*alderbank* offer does not, in itself, warrant an adjustment under *CPR 44.2(4)(a).* However, the offer is now admissible to show the negotiating stance of the parties at the time and I can reasonably take it into consideration later, when determining whether it would be unjust for me to make an order under *CPR 36.17(4).*

37. For the sake of completeness, Simon and Alison's own *Calderbank* offer, itself by email dated 13 June 2021, plainly cannot be utilised in their favour. This was an offer to compromise the proceedings for a payment of only £950,000 in three stages over two years. It was inclusive of costs. Obviously, they have not achieved a better outcome following trial and the taking of accounts. Indeed, it is self-evident from the exchanges of the parties' email messages on 13 June 2021 that Julie's negotiating stance, at least at this stage, was far more realistic than the stance taken on behalf of Simon and Alison.

38. By letter dated 29 July 2022, Julie made a second *Calderbank* offer, through her solicitors, in which she offered to compromise the proceedings for the sum of £2,850,000, payable in three instalments on 31 December 2022, 31 December 2023 and 21 December 2024. This amount was expressed to be inclusive of costs and tax. However, by this stage her negotiating stance had hardened. Following the Court of Appeal's judgment, it is at best of limited assistance to Julie. Indeed, in the light of the Court of Appeal's judgment, Simon and Alison's negotiating stance was as realistic as Julie's at this stage. At least on the headline figures, Simon and Alison's Part 36 Offer to compromise for £2,150,000 plus costs was at least as realistic as Julie's offer to compromise for £2,850,000 inclusive of costs although Julie might reasonably have considered she was more likely than Simon and Alison to be awarded her costs. Her Part 36 Offer had not been withdrawn. If the cost consequences of *Part 36* do not apply to Simon and Alison's *Part 36* Offer on the grounds this would be unjust, they are admissible as evidence of Simon and Alison's evolving negotiating stance under *CPR 44.2(4)(c)* to reinforce my conclusion that, subject to the operation and effect of Julie's *Part 36* Offer, there should be no order as to costs following the hearing on 26 April 2022.

39. Subject to the parties' *Part 36* Offers, I shall thus make an order providing for Julie to be entitled to 50% of her costs of the proceedings as a whole during the First Phase and the hearing on 26 April 2022 when I dealt with matters consequential upon My First Judgment and gave directions for the taking of accounts. This comprehends the Claim and Counterclaim and applies until after 26 April 2022. However, after 26 April 2022, there shall be no order as to costs.

(4) Julie's Part 36 Offer

40. By her *Part 36 Offer*, Julie offered to compromise the entire proceedings for a payment of £2,000,000 "in respect of the Estate's profits, capital and assets (and interest thereon)…" of the Fourth Partnership. This was on the basis that, upon payment, Julie would execute all documents reasonably necessary to transfer her interest – as executrix – in the relevant assets. However, it was also on the understanding that Simon and Alison would be liable to pay the whole of Julie's costs to the date of notice of acceptance.

41. *CPR 36.13(1)* provides that, where a *Part 36* offer, is accepted within the relevant period – in the present case within 21 days of delivery of Julie's Part 36 Offer – the claimant will be entitled to her costs of the proceedings until served with notice of acceptance.

42. If, as in the present case, the defendants decline to accept the claimant's Part 36 Offer, the statutory consequences are set out in *CPR 36.17* for cases in which "judgment against the defendant[s] is at least as advantageous to the claimant as the proposals contained in the claimant's part 36 offer". In *CPR 36.17(1),* this is expressed to apply "…*upon judgment being entered*…"

43. *CPR 36.17(2)* provides that "for the purposes of paragraph (1), in relation to any money claim or money element of a claim, 'more advantageous' means *better in money terms* by any amount, however small, and 'at least as advantageous' shall be construed accordingly".

44. If this test is satisfied, the court *must* make the orders specified in *CPR 36.17(4)* and *(4)* unless it considers it *unjust* to do so. This includes interest on the amount awarded, costs on the indemnity basis, interest on costs, and an additional amount not

exceeding £75,000 calculated by applying a prescribed percentage to the amount awarded.

45. In the present case, the first question that arises is whether "judgment against the defendant is at least as advantageous to the claimant" as Julie's Part 36 Offer. In order to answer the question, it is first necessary to identify the relevant judgment. Mr Maynard-Connor submitted that it was My Second Judgment. Mr Dumont submitted that it was the Court of Appeal's judgment.

46. On this question, the Rules are obscure. It is implicit in *CPR 36.5(1)(d*) that a *Part 36* offer can relate to the whole of the claim or part of it or to an issue that arises in it. The references in *CPR 36.17(1)* to "judgment" are thus to the judgment finally disposing of the claim or the relevant part of the claim or issue and the statutory consequences in *CPR 36.17(1)* apply "upon judgment being entered". "Judgment" is wide enough to encompass the judgment itself together with the order made pursuant to the judgment to carry it into effect. It is plainly envisaged this will generally be the judgment at first instance. Moreover, *CPR 36.4(1)* expressly provides that "except where a Part 36 offer is made in appeal proceedings, it shall have [the relevant statutory consequences] only in relation to the costs of the proceedings in which it is made, and not in relation to the costs of any appeal from a decision in those proceedings".

47. Where the judgment at first instance is successfully appealed, it is necessary to consider how it has been dealt with by the appellate court. No doubt in cases where, having allowed the appeal, the appellate court gives judgment fully determining the claim or relevant part of the claim or issue, this will then become the judgment to which the statutory consequences of *CPR 36.17(1)* apply. Conversely, where the appellate court allows the appeal and remits the claim, in its entirety, to the lower court, the lower court will give the operative judgment. In the present case, however, the Court of Appeal made an order varying the order pursuant to My Second Judgment by deleting a provision for Simon and Alison to pay statutory interest and providing that, in the event they exercise the Extended Option, the sum payable, following the taking of accounts, shall be £2,053,278.96 only. Simon and Alison's Extended Option became exercisable by notice on or before 4pm on 27 September 2023 with the

scheduled payments of £1,250,000 and £803,278 to be made on or before 27 September 2023 and 2024. On this basis, the operative judgment for the purposes of *CPR 36.17(1)* is My Second Judgment together with the order pursuant to it, subject to the variations effected by the Court of Appeal ("**the Varied Judgment**"). The Varied Judgment includes each of the provisions incorporated in my relevant order by the Court of Appeal and, to this extent, it includes the order made by the Court of Appeal itself consequential upon its judgment. However, it does not include the order made by the Court of Appeal in relation to the costs of the appeal. This is separate from the Varied Judgment and is thus not to be taken into consideration when assessing whether Julie has obtained a judgment against Simon and Alison which is at least as advantageous to her as the proposals in her Part 36 Offer.

48. If there were to become an issue as to when the Varied Judgment was "entered" for the purposes of *CPR 36.17(1),* I take the view that it was entered when the Court of Appeal made the order giving effect to their judgment, namely on 27 June 2023.

49. On behalf of Simon and Alison, Mr Dumont submitted that the operative judgment is not "at least as advantageous to" Julie as the proposals in Julie's Part 36 Offer. The sum payable in her Part 36 Offer was £2,000,000 but Simon and Alison were given only 21 days for acceptance and there was no provision in Julie's Part 36 Offer for payment to be postponed or deferred. Moreover, as part of their order, the Court of Appeal required Julie to pay Simon and Alison's costs of the appeal with an interim payment of £60,000 on account. Subject to this, their own liability to Julie was £2,053,278. Once their right to an interim payment is set off, they are liable to pay Julie no more than £1,993,278.

50. These submissions were presented with ingenuity and skill. Had it not been for the context and historical origins of the amendments to *CPR 36* following *Carver v BAA plc [2009] 1 WLR 113* and the *Review of Civil Litigation Costs: Final Report (December 2009) ("the Jackson Report"),* there would be force in the argument that "better in money terms" requires an evaluation of the projected advantage where the *Part 36* proposal and the court judgment provide for payment according to different time scales. However, the material amendments to *CPR 36*, in particular the new definitions of "more advantageous" and "at least as advantageous", now contained in

*CPR 36.17(2) (*initially *CPR 36.14(1A)),* were introduced so as to implement the recommendations of the *Jackson Report*. After referring, at *Chapter 42 Para 2.2*, to Ward LJ's observation in *Carver (supra)* that "more advantageous" was an open textured phrase apt to provide for a wide-ranging review of all the facts and circumstances to decide whether the judgment "was worth the fight", it was recommended, at Para 2.9, that *Carver* should be reversed to clarify that "in any purely monetary case 'more advantageous' means better in financial terms by any amount, however small". This recommendation was made in the light of respondents' comments about the uncertainty *Carver* had generated and its tendency to depress the level of settlements, for further exegesis see *JLE (a child) v Warrington and Halton Hospitals NHS Foundation Trust [2019] 1 WLR 6498* at *[42]-[43*], Stewart J.

51. It is not obvious that "better in *money* terms", in *CPR 36.17(2),* is informed by the distinction between "nominal" or "money" value and "real" value nor, indeed, that it has been borrowed from the lexicon of economists. However, *CPR 37.17(1)* is now a bright line rule under which a comparison is drawn between the nominal amounts when the offer is made with no room for additional analysis. For an example of the consequences, see *CCC v Sheffield Teaching Hospitals NHS Foundation Trust [2023] EWHC 1905 (KB).* Consistently with this, it is un-necessary to assess whether an offer in an amount nominally lower than the amount ultimately adjudged payable is, in *real* terms, of higher value by the time judgment is given and *vice versa*.

52. Julie's claim plainly encompassed a money claim or money element of a claim within the meaning of *CPR 36.17(2).* It included a claim for an account and payment of all sums due to Jennifer's estate on the taking of such an account. By her *Part 36* Offer, Julie offered to settle the money claim for £2,000,000. Subject to Mr Dumont's set off argument, she is entitled, under My Second Judgment, to £2,053,278.96 in her capacity as Jennifer's personal representative following the taking of post dissolution accounts. This is higher than the amount offered in Julie's *Part 36* Offer. It follows that My Second Judgment is deemed at least as advantageous to her as the proposals in Julie's Part 36 Offer. It is true that, pursuant to My Second Judgment, Simon and Alison became entitled to an option providing for them to purchase Jennifer's interest over an extended period, initially in two instalments payable on 30 December 2022

and 29 December 2023, subsequently extended further by the Court of Appeal to 27 September 2023 and 27 September 2024. Since these instalments will be paid free of interest, they would almost certainly yield less for Julie in *real* terms than a payment of £2,000,000 in March 2021. However, this is immaterial for the purpose of determining whether the Second Judgment is deemed to be at least as advantageous to Julie as the proposals in her Part 36 Offer.

53. Mr Dumont's second argument was that, in assessing whether the judgment is at least as advantageous to Julie as her *Part 36* proposals, I should take into consideration Julie's obligation, under the Court of Appeal's order, to make an interim payment of £60,000 on account of costs. Once £60,000 is deducted from Simon and Alison's liability to Julie of £2,053,278, she is entitled to no more than £1,993,278. In support of this argument, he submitted that the costs of the appeal are to be treated separately from the costs of the substantive proceedings in the light of *CPR 36.4(1).* This provides that a *Part 36* offer does not have the statutory consequences set out elsewhere in *Part 36* save where made in appeal proceedings. Julie's *Part 36* Offer was not made in appeal proceedings. Mr Dumont submitted that, if the appeal costs are not subject to Julie's Part 36 Offer, they should be taken into consideration when determining whether the judgment is more advantageous to Julie than her *Part 36* Offer. In view of the fact that she has been placed in a position where she must pay £60,000 to Simon and Alison outside the scope of the *Part 36* regime, she is not in a more advantageous position than she would have been had the proposals in her Part 36 Offer been accepted.

54. However, there can be no room for this if, as I have concluded (see Para 47 above), the Varied Judgment, as defined, is the operative judgment for the purposes of *CPR 36.17(1)*. The cost consequences of CPR *36.17* apply if the operative judgment is at least as advantageous to the claimant as the proposals in her Part 36 Offer. If, as I have concluded, the operative judgment does not include the Court of Appeal's order as to costs, such costs are not to be deducted from the amount due to Julie on the taking of accounts or otherwise taken into consideration in determining whether the judgment is at least as advantageous to her as the proposals in her Part 36 Offer.

55. It follows that My Second Judgment is at least as advantageous to Julie as the proposals in her *Part 36* Offer within the narrow sense provided by the R*ules*. I must thus consider whether it would be *unjust* for me to make an order that Julie is entitled to one or more of the payments set out in *CPR 36.17(4).*

56. This is to be assessed, at the time of the hearing, with respect to "all the circumstances of the case" including, without limitation, each aspect specifically listed in *CPR 36.17(5).* This includes (a) the terms of any *Part 36* offer (b) the stage of any proceedings when the offer is made (c) the information available to the parties when the offer is made (d) the conduct of the parties in giving or refusing to give information to enable the offer to be evaluated and (e) whether the offer was a genuine attempt to settle the proceedings". The listed considerations are not exhaustive. However, it is not without significance that they are to be assessed with respect to the time when the *Part 36* Offer is initially made and evaluated. Indeed, *CPR 36.17(5)(c)* is expressly limited to the information available to the parties at the time when the *Part 36* offer was made. It can thus be surmised that the court's assessment will be based primarily on the circumstances when the Part 36 Offer is initially made and evaluated. However, it generally remains open to the offeree to serve notice of acceptance until the offer is withdrawn. In the present case, Julie's Part 36 Offer was never withdrawn and it thus remained open to Simon and Alison to serve notice of acceptance long after the express period for acceptance had expired. Had they done so, it is likely they would have been required to pay Julie's subsequent costs but this is not a good reason, in itself, to exclude the subsequent period from consideration. There is no express limitation in *CPR 36.17(5)* on the period to be taken into consideration when determining whether it would be unjust for the court to make an order under *CPR 36.17(4).* Whilst *CPR 36.17(5)(c)* is limited to the information available to the parties at the time when the Part 36 offer is first made, *CPR36.17(5)(d)* comprehends *subsequent* conduct in relation to the provision of information and there can be no good reason to exclude from consideration information that subsequently becomes available to the parties nor, more generally, evidence as to the subsequent evolution of their relationship.

57. I am thus satisfied I can take into consideration all admissible evidence as to the evolving negotiations between the parties and their legal representatives and the information exchanged between them during the whole of the subsequent period in determining whether it would be unjust to make an order against Simon and Alison under *CPR 36.17(4*).

58. In addressing this question, I have borne in mind the following guidance of Briggs LJ In *Adrian Smith v Trafford Housing Trust [2012] EWHC 3320*, at [13], in relation to the cost consequences of a claimant's failure to obtain a judgment more advantageous than a defendant's *Part 36* offer. These are equally applicable, *mutatis mutandis*, to the costs consequences of a case such as this where a claimant obtains judgment against a defendant which is at least as advantageous to the clamant as the proposals in her *Part 36* offer.

"(a) The question is not whether it was reasonable for the claimant to refuse the offer. Rather, the question is whether, having regard to all the circumstances and looking at the matter as it affects both parties, an order that the claimant should pay the costs would be unjust: see *Matthews v Metal Improvements Co. Inc [2007] EWCA Civ 215*, per Stanley Burnton J (sitting as an additional judge of the Court of Appeal) at paragraph 32.

(b) Each case will turn on its own circumstances, but the court should be trying to assess "who in reality is the unsuccessful party and who has been responsible for the fact that costs have been incurred which should not have been.": see *Factortame v Secretary of State [2002] EWCA Civ 22*, per Walker LJ at paragraph 27.

(c) The court is not constrained by the list of potentially relevant factors in Part [36.17(5)] to have regard only to the circumstances of the making of the offer or the provision or otherwise of relevant information in relation to it. There is no limit to the types of circumstances which may, in a particular case, make it unjust that the ordinary consequences set out in Part [36.17] should follow: see *Lilleyman v Lilleyman* (judgment on costs) [*2012] EWHC 1056 (Ch)* at paragraph 16.

(d) Nonetheless, the court does not have an unfettered discretion to depart from the ordinary cost consequences set out in [*CPR 36.17].* 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."

59. To persuade me it would be unjust to make orders against them under *CPR 36.17(4),* Simon and Alison must thus overcome "a formidable obstacle". In considering whether they have done so, I must consider who, in reality, is the unsuccessful party and who has been responsible for the unnecessary consumption of costs.

60. In his submissions for Simon and Alison, Mr Dumont said that it would be unjust to apply the costs consequences of *CPR 36.17(4)* in the present case on the basis that, following Julie's Part 36 Offer, they had no prospect of paying the sum of £2,000,000 within 14 days of acceptance and Julie must be taken to have known that this would be so. Julie's Part 36 Offer was thus wholly unrealistic. Moreover, by contesting Julie's case in these proceedings, they have achieved an outcome under which they are required to pay no more than £2,053,278 upon exercise of the option, payable in two instalments on 27 September 2023 and 27 September 2024. Futhermore, after setting off Julie's interim costs liability of £60,000, their overall liability to Julie is no more than £1,993,278.

61. In response, Mr Maynard-Connor submitted that it was always open to Simon and Alison to seek clarification of Julie's Part 36 Offer to see whether she was willing to accept payment by instalment and, any doubt about this was clarified, when she made her *Calderbank* offer. He also submitted that it is not open to me to consider the margin by which Julie had beaten her own Part 36 Offer in the light of Stewart J's judgment in *JLE (a child) v Warrington and Halton NHS Foundation Trust [2019] EWHC 1582(QB).* He submitted that this judgment had been approved by the Court of Appeal in *Telefonica UK Limited v the Office of Communications [2020] EWCA Civ 1374* and is thus binding on this Court. In view of the fact that this issue only emerged late in the argument, I gave the parties permission to file supplementary written submissions

following the hearing. They took the opportunity to do so and, for the avoidance of doubt, I have taken their supplementary written submissions into consideration.

62. The present proceedings do not easily sit within the statutory framework of *CPR 36.17*. They did not include a straightforward debt or damages claim. There was a claim for declaratory relief, specific performance and an order for the taking of post dissolution accounts. There was a counterclaim for declaratory and equitable relief and a remedy based on proprietary estoppel. Julie's *Part 36* Offer was astutely designed to short circuit the more complex issues by offering to settle the entirety of the proceedings for a single payment of £2,000,000 in return for the assets of the partnership. Simon and Alison were given the minimum period of 21 days for acceptance. If and once they accepted the offer, they had 14 days to make payment under *CPR 36.14(6).*

63. Having regard to the overall circumstances, including the terms of Julie's Part 36 Offer, the information available to the parties and whether it could reasonably be regarded as a genuine attempt to settle the proceedings, it would be unjust for me to make an order under *CPR 36.17* in respect of the period from 15 March 2021, when the period for acceptance of Julie's Part 36 Offer expired until 13 June 2021, when counsel delivered Julie's *Calderbank* Offer. Simon and Alison had no realistic prospect of raising £2,000,000 within 14 days as Julie's Part 36 Offer provided. She must have known that this was so. To raise the funds, Simon and Alison would have to borrow or re-sell. In view of the nature and scale of such a transaction and the amount of borrowing required, it is likely they would need to mortgage or re-sell the property at Reddish Hall Farm. To do so would require them to show they had a good and marketable title to the Farm which would, in turn, require Julie's co-operation. Following My First Judgment, it is clear that the legal title to extensive parts of the land at this farm was vested in Julie as Jennifer's executrix, including four parcels of unregistered title in respect of which no vesting instrument has been registered.

64. It can thus be surmised that Julie's *Part 36* Offer was made for tactical purposes with a view to securing the advantages of *Part 36* and improving her prospects of obtaining an order against Simon and Alison with the sweeping consequences of *CPR 36.17(4*) knowing that it was almost inconceivable that Simon and Alison would be able to accept the offer and comply with the terms for performance within the initial period

expressly provided. Whilst Mr Maynard-Connor submitted it was open to Simon and Alison to seek clarification of Julie's Offer to see whether she would be willing to accept a scheme for deferred payment, Julie's *Part 36* Offer was unambiguous. It did not require clarification. At this stage, Simon and Alison had no reason to believe that Julie would be willing to submit to a scheme for payment by instalment.

65. However, this changed completely on 13 June 2021 when the trial was in progress following the intervention of counsel. Julie's *Calderbank* Offer on 13 June 2021 offered to compromise the proceedings for the sum of £2,000,000 subject to a deferred payment plan. This provided Simon and Alison with a realistic time scale for payment in three instalments, £750,000 on 30 October 2021, £625,000 on 30 October 2022 and £625,000 on 29 October 2023.

66. Later that day, 13 June 2021, Mr Edwards emailed a response in which he declined to accept the offer indicating that his clients were committed to continuing with the trial unless they could achieve terms enabling them to retain the farm. On this basis, he offered to raise their payment to £950,000, payable over three years. No doubt, this reflected his clients' financial position but, again, it did not realistically reflect his clients' litigation risk.

67. The critical point is that, from the time of Julie's *Calderbank* Offer, it is clear Julie was willing to compromise by entering into a scheme for payment by instalment. At least as important, Simon and Alison would also have been made aware of Julie's willingness to compromise on this basis but failed to engage with any sense of realism.

68. In my judgment, Julie's *Calderbank* Offer was transformative. For the reasons given (see paras 35 and 36 above), Julie has not clearly beaten her *Calderbank* Offer. However, from the time when they declined Julie's C*alderbank* Offer until 30 August 2022, the date of Simon and Alison's *Part 36* Offer, Simon and Alison were primarily responsible for the un-necessary consumption of costs. This was the test identified by Walker J in *Factortame (supra)* and reaffirmed by Briggs LJ in *Adrian Smith v Trafford Housing Trust (supra),* see Para 58 above.

69. The issue of whether Simon and Alison can rely on the narrow margin by which the Varied Judgment is as advantageous to Julie as her Part 36 Offer is not determinative

in the present case. In *JLE (a child) v Warrington (supra),* Stewart J stated, at [44], that "it is not open to judges to take into account in the exercise of the discretion the amount by which a *Part 36* offer been beaten. To do so risks reintroducing C*arver* and the adverse consequences which it brought in its wake, and which the Rule Committee reversed on the recommendation of Jackson LJ". Mr Maynard-Connor submitted that this principle was endorsed, without qualification, by the Court of Appeal in *Telefonica (supra)* in which, having referred to the above passage from Stewart J's judgment, Phillips LJ (with whom Arnold and Peter Jackson LLJ agreed) stated, at [44], that "it is difficult to see the relevance of the level of the offers given that the key factor is that the defendant could have avoided the need for the proceedings (or most of the proceedings) by accepting one of the offers and been in as good a position as it was after trial….the level of the offers could not, in itself, form the basis of an assessment of the 'proportionality' of enhanced interest, let alone a finding that any enhanced interest would be unjust". Contrary to Mr Maynard-Connor's submissions, I am not persuaded that Phillips LJ's judgment in *Telefonica (supra)* amounts to an unqualified endorsement of the principle that the courts are required to exclude the margin from consideration altogether. However, as Mr Dumont recognises, it does amount to a clear statement that this cannot, in itself, justify withholding relief under *CPR 36.17(4)*. In the present case, a strong case could be made out that, without a scheme for deferred payment, the proposals in Julie's Part 36 Offer were more advantageous to her in *real* terms than the Varied Judgment. However, this ceased to be significant as a consideration once Julie demonstrated her willingness to enter into a scheme for deferred payment. It follows that this consideration does not add, in any substantial sense, to the conclusion which I have already reached by applying the more general guidance of Walker LJ in *Factortame* (supra) and Briggs LJ in *Adrian Smith v Trafford Housing Trust (supra).*

70. I am thus persuaded that it would not be unjust to order that Julie is entitled to relief under *CPR 36.17* with respect to the period from 13 June 2021 until 30 August 2022 when, through their solicitors, Simon and Alison finally sought to engage with Julie's solicitors on a realistic basis. However, it remains necessary for me to determine the

extent to which I can do so by applying the miscellany of provisions in *CPR 36.17(4)(a)-(d).*

71. To the extent it is material, *CPR 36.17(4)* provides for the court "…unless it considers it unjust to do so, [to] order that the claimant is entitled to:

> (a) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;
>
> (b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;
>
> (c) interest on those costs at a rate not exceeding 10% above base rate; and
>
> (d) provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below to an amount which is—
>
> (i) the sum awarded to the claimant by the court; or
>
> (ii) where there is no monetary award, the sum awarded to the claimant by the court in respect of costs—

Amount awarded by the court	Prescribed percentage
Up to £500,000	10% of the amount awarded
Above £500,000	10% of the first £500,000 and (subject to the limit of £75,000) 5% of any amount above that figure."

72. On their face, the statutory orders in sub-paragraphs *(b)* and *(d)* are crude and absolute whereas sub-paragraph (a) and, to a lesser extent, sub-paragraph (c) provide for a more nuanced order based on the exercise of a judicial discretion. However, in *Thinc Group Ltd v Kingdom [2013] EWCA Civ 1306*, Macur LJ (with whom Ryder and

Ardern LJJ agreed) stated, at [22], that "the phrase 'unless it considers it unjust to do so' in *CPR 36.14(2)* and *(3)* bear the obvious interpretation of 'unless and to the extent of'". These are the provisions now contained in *CPR 36.17(3)* and *(4).* In *JLE v Warrington (supra*), Stewart J observed, at [76], that, by the time, the Court of Appeal gave their judgments, the provision for payment of an additional amount, now contained in *CPR 36.17(4)(d),* had been incorporated in the *Rules*.

73. In *Thinc*, the Court of Appeal concluded that the first instance judge had jurisdiction to make an order, under *CPR Part 36*, providing for the successful offeror to be entitled to 20% only of its costs on the indemnity basis notwithstanding that the Rules provided only for the payment of its costs without reference to proportions or amounts. On the basis that *CPR 36.14(2)* and (*3)* were to be construed in accordance with her guidance, Macur LJ observed, at [22], that "there is no merit in [counsel's] argument that the judge should have regarded the terms of *CPR 36.14(2)* and (3) to mean that he must consider that his discretion was fettered by a bi-polar evaluation of 'unjust' to mean that the successful party receives their costs on an indemnity basis or not and thereby fell into error by apportioning costs in percentage terms and on an indemnity basis for the relevant period". Ryder and Ardern LJJ simply agreed with Macur LJ and did not add anything. The Court of Appeal's conclusion is logically based on the principle that the court has jurisdiction to make adjustments to an award under *CPR 36.17(4)* if and to the extent this is necessary to avoid injustice. Consistently with this conclusion, the Court of Appeal in *Thinc* have authoritatively established that the courts have a discretion to award a proportion of a party's costs in the exercise of their statutory jurisdiction under *CPR 36.17(4)(b*). However, this jurisdiction plainly cannot be without limit and no doubt applies only to the extent it is not in contradiction to the express provisions of the Rules.

74. In *JLE (supra)*, Stewart J stated, at [74], that the Court of Appeal's interpretation in *Thinc* "taken at face value does cause a real problem. If it was right for each and every one of sub-paragraphs (a)-(d), there would be no need for the express inherent discretions in (a) and (c)". Quite apart from this anomaly, the Court of Appeal's interpretation potentially introduces an unheralded distinction between the principles to be applied when the courts exercise their express discretion in *CPR*

36.17(a) and *(c)* and the implied discretion to award a proportion only of a party's costs in order to avoid injustice. To exercise their express discretion at least in relation to the rate of enhanced interest on costs under *CPR 36.14(3)(c),* the courts have a wide discretion exercisable with a view to achieving a fairer result for the claimant than would otherwise be the case, see *OMV Petrom SA v Glencore* Sir Geoffrey Vos Ch. (with whom Kitchin and Floyd LLJ agreed) at *[43]* and *[47].* By contrast, the implied discretion would implicitly be exercisable only with a view to eliminating the injustice identified by the Court in the proviso to *CPR 36.17(4).* If this seems tantamount to dancing on a pinhead, each test is different in principle and must be applied as such.

75. However, the issue before the Court of Appeal in *Thinc* was, of course, the first instance judge's jurisdiction to award a proportion of the claimant offeror's costs under *CPR 36.17(4)(b). CPR 36.17(4)(b)* expressly provides only for an award in respect of the claimant offeror's "costs"; it does not provide, in terms, that the claimant offeror must be awarded the whole of its costs. It is thus possible to see why the Court of Appeal considered it was open to the first instance judge to award the offeror a proportion of its costs only. Counsel's argument, in *Thinc*, that the judge did not have jurisdiction to award a proportion only of the claimant's costs must have been based on the proposition that this was implicit, as indeed it was. However, this argument was met by the Court of Appeal's implied proviso.

76. The Court of Appeal in *Thinc* was not asked to deal with an issue as to the date from which the relevant costs were determinable. As it happens, although the first instance judge determined that costs should be assessed with respect to three separate periods, his award under *Part 36* comprehended the whole period from expiry of the claimant's *Part 36* Offer. Although he directed the defendant to pay only a proportion of such costs, he did not impose limits on the relevant period in his Part 36 award.

77. Had the Court of Appeal been asked to deal with an issue as to the period in respect of which the costs were determinable, it is not obvious they would have adjudged that they were determinable in respect of a period commencing otherwise than "from the date on which the relevant period expired" or, indeed, that the court had jurisdiction to make an award of costs in respect of an alternative period. To do so would have been to fly in the face of the express formula in *CPR 36.17(4)(b).* This provides, in

simple terms, for the claimant to be entitled to her costs from the date specified. In contrast to *CPR 36.17(4)(a),* it does not provide for this to apply "for some or all of the period starting" with that date.

78. In my judgment, the court does not have jurisdiction to provide for the payment of costs in respect of some period other than as specified in *CPR 36.17(4)(b).* However, if there is a measure of ambiguity about the parameters of the implied discretion identified in *Thinc*, in particular whether it is confined to proportions or extends to periods, this should not be resolved to the overall disadvantage of Simon and Alison. I have reached this conclusion for the following reasons.

79. Firstly, whilst *CPR 36.17(4)(b)* is in crude terms, this is consistent with the overall objective of encouraging settlement and reducing the risk of uncertainty inherent in more nuanced provisions. If causative of injustice, the court has a simple dispensing power. Secondly, any interpretation to the contrary is inconsistent with the statutory scheme and the natural and ordinary meaning of the words used once *CPR 36.17* is construed as a whole. If the court has an implied jurisdiction to make adjustments to the period or periods for which the offeree is liable in costs under *CPR 36.17(4)(b)*, this suggests that the qualifications in respect of the interest period in *CPR 17.4(a)* are un-necessary if, in a broad sense, the purpose of the qualification was to achieve justice. It would thus introduce or reinforce the anomaly to which I have already referred in Para 74 above. It would also generate un-necessary uncertainty as to the interpretation of *CPR 36.17* as a whole.

80. Nevertheless, it remains open to the court to conclude that it is unjust to make some, but not all, of the orders listed in *CPR 36.17(4),* see for example, *Telefonica UK Ltd v the Office of Telecommunications [2020] EWCA Civ 1374 at [21].* In *JLE (supra),* Stewart J stated, at [23(iv)] that "…it would perhaps be an unusual case where the circumstances of the case, including those particularised in paragraph (5), yield a different result for only some of the orders envisaged in paragraph (4)". However, the nature of the statutory regime and the anomalies to which the court's discretionary jurisdiction potentially gives rise for each type of order certainly leaves such a possibility open.

81. Having concluded that it would be unjust to award relief to Julie under *CPR 36.17* in respect of the period from 15 March to 13 June 2021 and the period after 30 August 2022 but not otherwise, I am satisfied Julie is entitled to simple interest on the whole of amount awarded, namely £2,053,278 from 14 June 2021 to 30 August 2022. Under *CPR 36.17(4)(a),* I shall award interest on the full amount during this period only at 1% over the Bank of England base rate. I shall also award Julie an additional amount of £75,000 under the provision of *CPR 36.17(4)(d).* This is the statutory ceiling on the amount that can be awarded once the prescribed percentages of 10% and 5% are applied to the amount awarded, namely £2,053,278. However, I shall not make orders requiring Simon and Alison to pay Julie's costs from 15 March 2021 or interest on such costs under *CPR 36.17(4)(b)* and (c). This is on the basis that it would be unjust to make such orders in the crude terms statutorily demanded in the overall circumstances of the case for the whole period from 15 March 2021 given that, for the reasons I have already given, it would be unjust to require them to pay Julie's costs on the statutory basis from 15 March-13 June 2021 or after 30 August 2022 and I am not satisfied I have jurisdiction to make an order under these provisions with respect to a modified period. As it happens, Julie will be entitled to 50% of her costs during the whole of this period, to be assessed on the standard basis, under my *CPR 44.2* award.

(5) Simon and Alison's Part 36 Offer

82. Simon and Alison's *Part 36* Offer was delivered with a letter dated 30 August 2022 from their solicitors, Quinn Barrow, stating that it was intended to be a claimant's Part 36 offer and that, if Julie accepted the offer within 21 days, she would be liable for Simon and Alison's costs under CPR *36.13*. The *Part 36* offer was entered on Form N242A and offered to "settle the entirety of the claims/counterclaims" on the basis that the total amount payable in exercise of the Extended Option was £2,150,000 with £1,250,000 and the balance of £900,000 respectively to be paid three months and fifteen months after acceptance. It was provided, for the avoidance of doubt, that in the event the Extended Option was duly exercised, Simon and Alison would not be liable for any interest or share of profits under *Section 42* of the *Partnership Act 1890.*

83. Contrary to Mr Maynard-Connor's submissions, I am satisfied that Simon and Alison's Part 36 Offer is valid as a *Part 36* Offer. Having filed a counterclaim, it was open to

Simon and Alison to make a claimants' offer, see *CPR 36.2(3)(a), CPR 20.2* and *20.3*. Their solicitors achieved this by stating, in their letter, that it was intended to take effect as such and ticking a box on the Form to confirm that this was so, *AF v BG [2009] EWCA Civ 757.* Simon and Alison's Part 36 Offer also complies with the statutory requirements of *CPR 36.5.*

84. Mr Maynard-Connor submitted that Simon and Alison were precluded from relying on their *Part 36* Offer on the basis that, once Julie had beaten her own Part 36 Offer and was thus entitled to relief under *CPR 36.17(4),* it was not open to Simon and Alison to "trump", as he put it, Julie's earlier offer.

85. In my judgment, this submission is wrong in principle. There is nothing in the Rules to prevent parties making a series of Part 36 Offers. If and once the parties make successive claimants' offers and each obtain a judgment at least as advantageous as their offers, it is for the court to assess who bears primary responsibility for the failure to compromise and attendant consumption of un-necessary costs in accordance with the principle identified by Walker LJ in *Factortame (supra*), see Para 58 above. It is open to the Court to make successive orders against each party under *CPR 36.17(4).* However, if causative of injustice, it is of course expressly provided that the Court may withhold such relief.

86. Following the exercise of the Extended Option, Simon and Alison are entitled to judgment at least as advantageous as the proposals in their *Part 36* Offer since they are liable to pay only £2,053,278, almost £100,000 less than the amount offered, £2,150,000. Although not part of the statutory test in CPR 36.17(2), the dates for payment have also been extended following their successful appeal.

87. The issue is thus whether it would be unjust for me to make an order against Julie under *CPR 36.17(4*). Although this presents her with a formidable obstacle – as Briggs LJ put it in *Adrian Smith v Trafford Housing Trust (supra)* – the answer to this question is, in my judgment, yes.

88. By virtue of *CPR 36.17(5),* I must take into account the overall circumstances, including the aspects specifically listed in *CPR 36.17(5)(a)-(e).* The aspects in *CPR 36.17(5)(c)* and *(d)* are not suggestive of injustice since, by the time Simon and Alison made their

offer, Julie had all the information necessary to evaluate their offer. However, the aspects listed in *CPR 36.17(5)(a), (b)* and (*e)* present a compelling case to the contrary.

89. Firstly, Simon and Alison's Part 36 Offer was made at a very late stage of the proceedings, several months after judgment following trial and on the eve of the taking of accounts. The single joint expert had provided her report and the parties' witness statements had been exchanged for the hearing in September. Most of the parties' costs of the proceedings at first instance had already been incurred. Simon and Alison's Part 36 Offer was not itself apt to deal with the costs of any appeal.

90. Secondly, Simon and Alison's Part 36 Offer related to the whole of the proceedings, not merely the taking of accounts. Simon and Alison could have limited the Part 36 Offer to the taking of accounts, see *CPR 36.5(1)(d*), but chose not to do so. This is significant since, although the parties had achieved mixed success at trial, Julie was predominantly the successful party and, by accepting Simon and Alison's Part 36 Offer, Julie would have assumed liability under *CPR 36.13* for their costs of the proceedings. Quinn Barrow warned Julie that this would be the statutory consequence in their letter dated 30 August 2022.

91. Thirdly, since Quinn Barrow were plainly aware that this would be the statutory consequence for Julie as to costs in the event she accepted Simon and Alison's Part 36 Offer, Simon and Alison can be taken to have been aware of this themselves. Mindful of this, they can also be taken to have been aware that it was unlikely that Julie would accept their Part 36 Offer. The Part 36 Offer thus has the hallmarks of a tactical offer designed simply to take advantage of the cost advantages of Part 36 rather than to achieve settlement.

92. Julie is not free of responsibility for the impasse that was reached at this stage. It is apparent from her later *Calderbank* offer that she was, by then, willing to accept no less than £2,850,000 inclusive of her costs to compromise the proceedings and appears not to have responded to Quinn Barrow's offer by exploring the opportunity to reach settlement on more generous terms.

93. However, for the reasons given, see Paras 89-91 above, it would in my judgment be unjust for me to make an order requiring Julie to make any payment to Simon and Alison under *CPR 36.17(4).* I shall decline to do so.

(6) Standard of assessment

94. To the extent Julie is entitled to an award of costs, such costs should be subject to detailed assessment and assessed on the standard basis. I have not made an award of costs on the indemnity basis under C*PR 36.17(4)(b).* If it were to be suggested that the conduct of the parties or overall circumstances takes the case "out of the norm", as envisaged in *Excelsior Commercial and Industrial Holdings ltd [2002] EWCA Civ 879*, this has not been successfully demonstrated.

(7) Interim payment

95. It is provided by *CPR 44.2(8)* that, where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs unless there is good reason not to do so. In the present case, no good reason has been provided for me to withhold such relief.

96. Simon and Alison must pay Julie 50% of her costs, subject to detailed assessment on the standard basis, until after 26 April 2022 (See Para 39 above).

97. By an order dated 21 August 2020, DJ Carter made a costs management order recording that, by then, Julie had already incurred expenditure on time costs in the sum of £139,865 and disbursements of £25,854.68. He approved further expenditure of £72,150 in respect of time costs and £87,500 on disbursements. On this basis, the aggregated expenditure was £325,369.68.

98. Julie has been given permission to apply to the District Judge to vary her costs budget in the sums set out in a Precedent T. This includes amendments to the budget at almost every stage of the litigation and amounts, in aggregate, to some £176,008.50. However, this application is by no means a formality. With reference to *CPR 3.15A*, Julie's solicitors will be required to satisfy the District Judge that, in each respect, the amendments to her budget are attributable to a significant development in the litigation. They will be required to show they have acted promptly in submitting particulars of each revision and it is warranted by the development. They will then

need to persuade the District Judge it is appropriate to approve the revised budget in the amounts sought. Whilst I have been presented with the bald figures, I have not been provided with information from which I can infer such an application has a realistic prospect of success. I shall thus exclude it from further consideration.

99. The aggregate expenditure already incurred on time costs and disbursements at the time of the hearing before DJ Carter on 21 August 2020 was £165,719.68, of which £93,169.69 was incurred on pre-action costs and £43,750 on the statements of case with £15,900 on the first CMC. Owing to its nature, duration and complexity, the dispute is likely to have generated significant pre-action expense. However, these amounts are significantly higher than might reasonably have been expected. I shall make allowance for £80,000 in respect of expenditure incurred prior to the costs and case management hearing before DJ Carter. Provision was made in Julie's budget for future expenditure in the sum or £165,719.68. However, this would have included expenditure incurred after 26 April 2022, including the provision for expert evidence in the sum of £19,000. It is unclear what, if any, estimated expenditure pertained to the taking of accounts. However, it can reasonably be inferred that this is comprised, for the most part, in Julie's Precedent T and has not yet been approved by the Court. On the available evidence, I shall assume that at least £135,000 of Julie's approved costs was incurred up to and including 26 April 2022. If I allow 90%, this amounts to £121,500 and yields an aggregate sum of £201,500 for expenditure incurred and estimated up to and including 26 April 2022.

100. In view of the fact that Simon and Alison are liable, under my order, for 50% of Julie's costs only, they must make an interim payment on account of Julie's costs in the sum of £100,000, rounded down from £100,750. Ordinarily, they would be required to make payment of this amount within 14 days. However, I shall entertain written submissions from counsel on the issue.

(8) ***Disposal***

101. Julie is entitled to 50% of her costs of these proceedings (including her costs of and incidental to the Claim and Counterclaim) for the whole period prior to 27 April

2022 such costs to be assessed, if not agreed, on the standard basis. Simon and Alison must make an interim payment on account of such costs in the sum of £100,000.

102. Julie is also entitled, under *CPR 36.17(4)(a),* to simple interest on £2,053,278 from 14 June 2021 until 30 August 2022 (inclusive) at 1% over the Bank of England base rate applicable from time to time during this period and, pursuant to *CPR 36.17(4)(d),* payment of an additional sum of £75,000. I shall entertain written submissions in relation to the time scale for payment.

103. There will otherwise be no order as to costs.