Neutral Citation Number: [2022] EWHC 411 (QB)

Case No: QA-2021-000089

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**MEDIA & COMMUNICATIONS LIST**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/02/2022

**Before** :

**THE HONOURABLE MRS JUSTICE COLLINS RICE**

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**Between :**

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| **FKJ** | **Claimant/ Respondent** |
| **- and –** | |
| **(1) RVT**<br>**(2) QGN**<br>**(3) CBN** | **Defendants/ Appellants** |

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**Mr Simon Browne QC** (instructed by Bloomsbury Law Solicitors) for the Appellants
**Ms Adrienne Page QC** and **Mr David Hirst** (instructed by Taylor Hampton Solicitors) for the Respondent

Hearing date: 31st January 2022

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# Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 12.30pm 25th February 2022.

**Mrs Justice Collins Rice:**

## Introduction

1. There is considerable litigation history between the parties. It has its origins in events in 2017. The Respondent was a newly-qualified solicitor employed and supervised for most of that year by the Appellants, until summarily dismissed. Employment Tribunal proceedings ensued, during which many matters were aired. The Tribunal found for the Appellants.

2. The Respondent issued a claim in misuse of private information against the Appellants on 6th November 2019. (The parties were anonymised at an early stage of this litigation to preserve the Respondent's claimed privacy pending trial.) The Appellants responded on 14th February 2020 with a defence, and a substantial counterclaim alleging malicious prosecution of the earlier Tribunal proceedings against them. The Respondent served her defence to the counterclaim on 4th June 2020. On 11th November 2020, the Appellants applied for summary judgment on both claim and counterclaim.

3. The Respondent had made an offer to settle both her claim and the Appellants' counterclaim, on 15th October 2020. It was headed 'Part 36 Offer – Without prejudice save as to costs', and was open to acceptance for 21 days. It was not accepted. On 23rd November 2020, the Appellants made a formal application to court for an Order:

> … which confirms/declares that: in accordance with CPR Part 36.16(2), the Defendants may refer to a Part 36 offer made by the Claimant on 15 October 2020 for the interlocutory hearing purposes of: (i) case management in this action; (ii) costs budgeting in this action; and (iii) the Defendants' pending strike-out/summary judgment application … .

4. This application came before Senior Master Fontaine on 15th March 2021. She refused it. This is the Appellants' appeal against her decision.

## Legal context: Civil Procedure Rules Part 36

5. According to CPR 36.1(1), Part 36 '*contains a self-contained procedural code about offers to settle pursuant to the procedure set out in this Part*'. Other forms of offer to settle exist and may be pursued, but unless an offer is made in conformity with the Part 36 'code' it will not produce the precise effects set out there (Rule 36.2).

6. The Part 36 code makes detailed provision about the making, acceptance and consequences of 'Part 36 offers'. It includes provision about interlocutory applications that can be made to court during the process: for example, applications for an order for the offeror to clarify their offer (Rule 36.8(2)); applications for permission to withdraw or change an offer (Rule 36.10(2)(b)); and certain applications where permission is required to accept an offer and for the settlement to become binding (Rule 36.11(3); Rule 36.15(4)).

7. CPR 36.16 is headed 'Restrictions on disclosure of a Part 36 Order'. It is the first of a sequence of provisions under the heading 'Unaccepted Offers'. The first two paragraphs of CPR 36.16 provide:

> (1) A Part 36 offer will be treated as 'without prejudice except as to costs'.
>
> (2) The fact that a Part 36 offer has been made and the terms of such offer must not be communicated to the trial judge until the case has been decided.

8. CPR 36.16(3) goes on to provide for four exceptions to subparagraph (2), namely where (a) a defence of tender before claim has been raised; (b) proceedings have been stayed following acceptance of an offer; (c) the offeror and offeree agree in writing it need not apply; and (d) in certain cases of partial settlement.

9. No express provision is made on the face of Part 36 for making interlocutory applications of the kind made by the Appellants to the Master in this case.

## Grounds of Appeal

10. The Appellants appeal on four grounds, suggesting the Master misdirected herself on the law and principles applicable to communicating to a court the existence and terms of a Part 36 offer at pre-trial stages of a claim. They come at the point from a number of angles:

> 1. The Master wrongly failed to apply the decision of His Honour Judge Freedman (sitting as a High Court Judge) in *Handyside v Lowery* (unreported, 2 April 2015) at [14]. The decision of the High Court Judge was binding upon the Master and should have been treated as such.
>
> 2. The Master wrongly equated the principles applying to 'without prejudice' privilege with those applying to Part 36 offers.
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> 3. The Master ought to have concluded that parties are permitted to refer to Part 36 offers where questions of proportionality arise. This is the basis for permitting parties to refer to Part 36 offers in the context of interim payments, for example. The Master wrongly concluded that Part 36 offers may not be taken into account at an interim stage because they are or may be admissions against the offeror's interest. In the case of interim payments, it is on this very basis that Part 36 offers are relied upon (because the offeree seeks to demonstrate that the offeror acknowledges that his/her claim has at least a certain value, which is greater than his/her open position).
>
> 4. The Master was wrong to conclude that the 'costs' in 'without prejudice save as to costs' refers exclusively to final costs orders (that is, costs orders made after the relevant issue

has been decided). Alternatively, the Master was wrong to decline to extend the list of common law exceptions to the 'without prejudice save as to costs' rule to costs management.

## Analysis

11. This is an appeal to which Part 52 of the Civil Procedure rules applies. I am to review the Master's decision. The appeal will be allowed if the Master's decision was wrong in its outcome, or unjust because of serious procedural or other irregularity.

*(a) The question of principle*

12. The question of principle raised by these grounds of appeal is about the meaning and effect of Rule 36.16, and its relationship to the case management powers of the court at interlocutory stages before any full and final trial hearing of a claim. Rule 36.16 undoubtedly prevents a judge hearing a final trial from being told about an offer, except in the limited circumstances set out. But does Rule 36.16 mean the fact and terms of a Part 36 offer cannot or should not be communicated to an interlocutory judge either? Or is that something to be decided case by case – whether by reference to the exceptions in Rule 36.16(3), or to 'without prejudice' principles, or otherwise as a matter for the ordinary case management discretion of the court?

13. I put the question of principle that way because, although the Appellants had taken a position before the Master that they had not formally needed to ask for permission to refer to and rely on the Part 36 offer in the first place, they accepted before me that it was at least not a 'routine' occurrence, and they did not assert an *unqualified entitlement* to refer to the offer without the consent of the offeror or the permission of the court. Even if the Appellants are right that, as a matter of law and principle, it *may* be possible for them to rely on a Part 36 offer for the sort of purposes they have in mind, that would clearly be a fact-sensitive question in any given case, the fairness of which it would be the responsibility of Master or Court to consider in all the circumstances and decide on. The Appellants accepted before me that in this respect cases do at least turn on their facts.

14. So the appeal was put on the footing that the Master had misdirected herself in law in a number of respects, and erred in concluding either that she had no legal power to give the permission sought, or that she ought not as a matter of principle to do so.

15. The parties to the appeal concurred in advising me that there is no clear decided authority definitively resolving the question of principle. That was surprising to hear, on what looked on the face of it like a major point of procedure where uncertainty would not be expected to be tolerable for long. I was not, either, offered evidence of established practice in the sort of applications being pursued in this litigation. Instead, I was invited to consider the question from first principles, and taken to a number of authorities for the light they might shed on the issue – both as a matter of interpreting CPR 36.16 and also for help on principle and policy.

16. The Appellants, for example, relied heavily on the limitation in Rule 36.16(2) to the '*trial judge*' to suggest in the first place that the bar on communication of Part 36

offers is intended to have no application at all to a (different) judge performing functions at an interim or interlocutory stage – including case management functions, costs budgeting, and the consideration of applications for summary judgment.

17. They gain some support for that view from the White Book commentary on Rule 36.16, which includes the following:

> *Interim Hearings* – As stated in r.36.16(2), the general rule restricts disclosure to the 'trial judge' and it has long since been understood that it does not prevent disclosure to a judge dealing with interim matters in the course of which it may be both necessary and desirable for the judge to know of offers made (*Williams v Boag* [1941] 1 KB 1, CA). Nowadays, of course, parties and their solicitors should be aware of the need for different approaches to references to offers depending on whether the judge conducting the CMC [case management conference] or other interim hearing is, or could be, the trial judge. This is of particular importance where the designated civil judge is conducting the pre-trial proceedings or in specialist courts where case management is undertaken by judges rather than masters or district judges.

18. *Williams v Boag* was an extremely brief decision of the Court of Appeal in which general dicta are to be found to the effect that restriction on disclosure in court of a settlement offer '*does not prevent a Judge on an interlocutory application being informed of the fact of payment in, where it is desirable that he should know it*'; or again '*it would really lead to injustice very often if it were thought that the Judge in Chambers could not be told that money had been paid into court*'. It was of course a case decided long years before the self-contained Part 36 code came into being, under the old Order 22 'payment into court' system.

19. Rule 7 of Order 22 did have provision barring communication of a payment-in '*to the Court at trial or hearing of the action or counterclaim or of any question or issue as to the debt or damages until all question of liability and of the amount of the debt or damages have been decided*'. But it also had separate provision at Rule 14 in relation to 'written offers *without prejudice save as to costs*', the fact of which '*shall not be communicated to the Court until the question of costs falls to be decided*'. No limitation to a *trial* judge or court appears in that formulation.

20. The Appellants also draw attention to *Foskett on Compromise* where the learned author is of the view that:

> Since the rule refers specifically to the trial judge … there is within the rules no prohibition, in appropriate circumstances, against drawing the attention of a judge, master or district judge exercising pre-trial case management functions to the existence (and indeed the terms) of a Part 36 offer. (paragraph 14-07)

21. Then again, the interpretation clause of Part 36, at Rule 36.3(c), says that 'trial' in Part 36 is to be taken to mean '*any trial in a case whether it is a trial of all issues or a trial of liability, quantum or some other issue in the case*'. Query the application of that to a 'trial' of a summary judgment application – and hence the meaning of 'trial judge'.

22. Rule 36.16(1) states that a Part 36 offer is itself to be treated as 'without prejudice except as to costs'. The Respondent relies heavily on that as an express indication that the *general* or common law prohibition on the disclosure in *any* court context of a without-prejudice offer to settle (subject to exceptions) is the starting point for Rule 36.16. She also underlines that the Rule 36 code, with its detailed procedural provisions, is a world away from the old Order 22 payment-in. She points out, in addition, that the factual matrix of ***Williams v Boag*** is specific. Mackinnon LJ had put it this way:

> I do not agree that, if a man has paid money into Court with an admission of liability, and subsequently has found that he has made a mistake and gets leave to amend his defence, it is then impossible for him to come to the Court in some way or other and say: 'Having regard to the new defence that I have been allowed to put up denying liability, I ought to have liberty to withdraw that notice of admission of liability and safeguard my right ultimately to have that money repaid to me'.

23. The '*admission of liability*' in ***Williams v Boag*** contrasts with the 'without prejudice' (ie without admission of liability) of the Rule 36 code. Moreover, the Respondent says, the specific issue in that case is now dealt with by CPR 36.10 where *express* provision is made for applications to withdraw or amend offers (at any rate while they are live). That in itself, she says, shows ***Williams v Boag*** can no longer be cited, if it ever could, as authority for some *general* liberty to seek to disclose and rely on Part 36 offers at interlocutory stages.

24. The Appellants relied before the Master, and in their grounds of appeal, on the – brief, and apparently unreported – judgment in ***Handyside v Lowery*** (QB Claim no.3NE90017 - 2nd April 2015 – HHJ Freedman sitting in the High Court). We looked at that case. It was not a case about a Part 36 offer, but about another kind of offer to settle. The Judge noted that the offer stated on its face that '*for the avoidance of doubt this offer is made without prejudice save as to costs and should not be referred to at any hearing of an application for an interim payment*'. He gave effect to those express words. There is a passage in his judgment where he notes that, not being a compliant Part 36 offer, the full benefits of a Part 36 offer would not accrue, but '*it is entirely reasonable that [the offeror] should be entitled to another type of benefit which, in this instance, is the advantage of the offer not being made known to the court except when the question of costs comes to be considered*'.

25. The Appellants say this is binding authority that a Part 36 offer by contrast *can* 'be made known to the court'. I disagree. These remarks are not in my view addressed to the effects of Part 36 offers at all, and if they were, they would be entirely *obiter*. There is no indication that the 'question of principle' arising in the present case was even raised before the Judge in ***Handyside***. I can see little assistance to be gained from this case.

26. There are some other possible straws in the wind. The Court of Appeal in *Gibbon v Manchester City Council [2010] 1 WLR 2081* emphasises the self-contained nature of the Part 36 code and cautions against '*importing other rules derived from the general law, save where that was clearly intended*' (in that case rules derived from contract law). The Appellants say that is an indication not to 'import' wider 'without prejudice' rules wholesale into Part 36; the Respondent says 'without prejudice' is there (including in quotation marks) on the face of Rule 36.16 and clearly intended.

27. And in *Johnson v Gore Wood [2004] EWCA Civ 14* the Court of Appeal said this:

> The court cannot adopt a strained construction of the CPR in reliance on the overriding objective: see per Peter Gibson LJ in *Vinos v Marks & Spencer* [2001] 3 All ER 784, 791. The terms of CPR 36.19 admit of only one construction, namely the payment in can only be used on arguments as to costs.

The reference to CPR 36.19 is to an earlier version of the Part 36 Rules which provided that (1) a Part 36 offer will be treated as 'without prejudice except as to costs' and (2) the fact that a Part 36 payment has been made shall not be communicated to the trial judge until all questions of liability and the amount of money to be awarded have been decided'; the equivalent modern provision to the second of these is CPR 25.9: *The fact that a defendant has made an interim payment, whether voluntarily or by court order, shall not be disclosed to the trial judge until all questions of liability and the amount of money to be awarded have been decided unless the defendant agrees.* This is not, however, a case about a Part 36 payment.

28. So such authorities as were cited to me provide limited assistance, analogous at best. Unless there are clearer authorities I was not shown, I am inclined to agree that the question of principle remains outstanding, however surprisingly. In an appropriate case, it may be necessary to resolve that question definitively one way or the other. I do not, however, consider the present appeal to be that case, for the reasons which follow.

*(b) Senior Master Fontaine's decision on the facts*

29. The application before the Master was necessarily made on the basis that (a) she had the legal power to approve the Appellants' reliance on the Part 36 offer against the Respondent's wishes and (b) to do so would be relevant to the matters to be determined and in the interests of justice.

30. The Master decided, having read and heard submissions and reviewed the authorities cited to her (including many of those cited to me), that she had no clear legal basis for granting the Appellants' application. The Master's judgment deals with *Handyside* and the other authorities somewhat summarily. She found 'some inconsistency' there. She made some remarks about the scope of Rule 16(1) and its exceptions. She did not give herself a clear legal direction on the nature and extent of her discretion in this matter. The Appellants' grounds of appeal focus exclusively on this analysis and seek, by way of this appeal, declaratory clarity on the point.

31. The Master also decided, however, that to grant the Appellants' application would in any event serve no practical purpose, and would be unfair, on the facts of the case.

That may or may not be a complete explanation for her perhaps declining to take a fully analysed and detailed position on the question of principle. But the Master's decision has to be looked at as a whole and in substance for the purposes of this appeal, not least to consider whether the outcome can be described as 'wrong' or 'unjust'. The grounds of appeal do not address the decision as a whole.

32. The Master's decision to refuse the application on the facts was, in essence, because the purpose for which the Appellants wished to deploy the Part 36 offer was to compare and contrast three figures: (i) the 'settlement sum' mentioned in the Part 36 offer as being '*in full and final settlement of the monetary element*' of the Respondent's claim, (ii) the sum mentioned in the Respondent's claim form as representing the value of her claim (in damages), and (iii) the sums appearing in the Respondent's costs budget, both incurred and estimated. The reasons the Appellants wanted to refer to these three figures was to help show on their summary judgment application that '*the costs of the exercise will have been out of all proportion to what has been achieved. The game will not merely not have been worth the candle, it will not have been worth the wick*' (*Jameel v Dow Jones [2005] QB 946*), and to help show the disproportionality between their own costs and the Respondent's. The Appellants said they were concerned the court might be misled if it did not have regard to the first sum in relation to the other two.

33. The Master decided the settlement sum was not relevant to any of the purposes proposed. It was not relevant in general because, since a Part 36 offer should be '*a genuine attempt to settle the proceedings*' (CPR 36.17(5)(e)), it must necessarily involve a claimant offeror giving up a part of the claim of some value, in return for, among other things, avoiding ongoing exposure to the risk of litigation costs. A court considering proportionality on a *Jameel* application, or considering costs budgeting, is focused on the ratio of costs to the value of the whole claim, and is not assisted by knowing the undervalue at which a claimant might, for any number of reasons, be willing to settle.

34. It was also not relevant on the particular facts of the case because (a) the proposed comparison between the settlement sum and the other two figures left out of account the settlement of the substantial counterclaim – significantly larger than the claim itself – reflected in the settlement sum, so it was a meaningless comparison in any event; (b) the Master was able on the particulars of the claim to be satisfied that, if liability were established, the value of the claim in damages was likely to be at least that of the sum in the Respondent's claim form; and (c) the settlement sum expressly referred to the *monetary element* of the claim only, and the Part 36 offer was subject to terms and conditions which the Respondent had also brought her claim in order to secure.

35. These terms sought undertakings as to the publication, dissemination, use and retention of the 'private information' the Respondent alleged was subject to unlawful misuse, and undertakings as to future non-communication between the parties. The 'value' of the non-monetary aspects of a claim and/or the relief sought is also within the focus of a court considering *Jameel* or costs budgeting proportionality. An offer of compromise of the monetary element at significant undervalue, rather than being a signifier of the true worthlessness of the whole claim, might rather be understood, in a misuse of private information case, as underlining the correspondingly high value attached by a claimant to the non-monetary elements. The Master put it this way:

> …it is well known to judges that in media claims such as misuse of private information claims, the damages are often the least of the concerns, or only a part of the concerns, of the claimant. Vindication is usually an important consideration, and so can be the obtaining of an injunction so that the mischief caused will not continue.

36. She considered this to be such a case. So in any event knowing about the settlement sum – or even the whole of the Part 36 offer – was of no assistance to a court considering the future if any, and management, of a claim which, if liability were established, would on the facts alleged amount to a '*very serious breach of [the Respondent's] private information*'.

37. These are all conclusions which appear to me to be understandable, rational, and well within the range of decisions properly open to the Master *on any basis*, on the facts, for the reasons she gave. On the assumption most favourable to the Appellants – that she had legal power to grant their application in the exercise of ordinary case management discretion – she would not have done so anyway. She clearly gave her mind to the substance and merits of the application, and reached conclusions supported by evidence and reasoning. An interlocutory court will not need to know, or be misled by not knowing, the existence and terms of this offer, simply because they are not material to the questions that will be before it. So any doubt about the fairness of doing so would be resolved in favour of the offeror.

38. One of the reasons there may be no definitive authority dealing with the question of principle is that – for just these kinds of reasons – it may be rare that the existence and terms of a Part 36 offer are *relevant* to proportionality decisions of this sort at the interlocutory stages of a case. Where no admissions or payments have been made, or liability or quantum in any way resolved or conceded, case management decisions – and indeed many other interlocutory matters - have to be dealt with on the basis of a forward look to what will be before, and what may have to be decided by, the final trial judge. Other than in the limited cases provided for in Rule 36.16(3), the fact or terms of a Part 36 offer will never be before that judge. So an interlocutory judge will rarely need to proceed on any other basis.

39. In any event, I cannot find that the operative decision the Master reached in this case on the facts – that the fact and terms of the Respondent's Part 36 offer were irrelevant to, and should not fairly be before, the judge considering the Appellants' application for summary judgment, nor in relation to case management and costs budgeting for trial should that application be unsuccessful – was wrong, and not properly open to her.

40. Her analysis of the question of principle, and such views as she expressed on it, were to a degree incomplete and contestable. But I am satisfied that she gave her mind fully to the substance and fairness of the Appellant's application on its merits nevertheless; that even if she had directed herself expressly on any of the bases for which the Appellants contend on this appeal it would have made no material difference to her conclusions; and that her final decision was not in all the circumstances either wrong or unjust. As the Appellants acknowledged, cases do in the end turn on their facts.

## Decision

41. The Appellants' appeal is dismissed.