Neutral Citation Number: [2023] EWHC 385 (CH)

Case No: CH-2021-BRS-000004

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
On appeal from the County Court, Swindon
Order of HHJ Parkes KC dated 28th July 2021

Bristol Civil Justice Centre
2 Redcliff St, Redcliffe, Bristol BS1 6GR
Date: 23/02/2023

Before :

THE HONOURABLE MRS JUSTICE COLLINS RICE

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Between :

MR CALVIN MUNDY	**Claimant & Appellant**
- and –	
TUI UK LIMITED	**Defendant & Respondent**

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- -

Mr Ian Pennock (instructed by **Eatons Solicitors**) for the **Appellant**
Mr James Laughland (instructed by **Kennedys Law**) for the **Respondent**

Hearing date: 7th February 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 23rd February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mrs Justice Collins Rice :

Introduction

1. Mr Mundy went to Mexico on an all-inclusive holiday supplied by TUI. He complained of food poisoning and claimed against TUI, seeking general damages of between £25,000 and £35,000. The case was heard in the County Court in May 2021. The Judge found Mr Mundy had indeed become infected through contaminated food at the hotel, and TUI had therefore breached an implied term of the holiday contract by supplying goods not of a satisfactory quality. But he found the illness caused, while 'very unpleasant', was less severe and long-lasting than Mr Mundy claimed. He awarded Mr Mundy £3,700 in general damages and £105.60 in special damages.

2. The question of costs arose. It emerged there had been some negotiation history with a view to settling the claim in whole or in part, and both parties had made 'Part 36' offers to settle along the way, none of which had been accepted. The Judge received submissions, handed down a costs judgment, and made a split order: the Defendant to pay the Claimant's costs up to 19th December 2019 (the date of expiry of the Defendant's offer) and the Claimant to pay the Defendant's costs thereafter, to be assessed on the standard basis if not agreed. Meanwhile, the Claimant's damages were to be held by the Defendant on account, the Defendant to be entitled to set off its costs against the Claimant's damages and costs.

3. This is Mr Mundy's appeal against that costs order.

Legal framework

4. The appeal turns on the effects properly to be given to the parties' rejected offers. Part 36 of the Civil Procedure Rules '*contains a self-contained procedural code about offers to settle pursuant to the procedure set out in this Part*' (CPR 36.1(1)). The Part 36 code makes detailed provision about the making, acceptance and consequences of Part 36 offers. CPR 36.2(3) confirms that a Part 36 offer may be made in respect of the whole, or part of, or any issue that arises in, a claim.

5. By CPR 36.17 (as relevant):

> **(1)** … this rule applies where upon judgment being entered—
>
> (a) a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer; or
>
> (b) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer.
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> …
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> **(2)** 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.

(3) Subject to paragraphs (7) and (8), where paragraph (1)(a) applies, the court must, unless it considers it unjust to do so, order that the defendant is entitled to—

(a) costs (including any recoverable pre-action costs) from the date on which the relevant period expired; and

(b) interest on those costs.

(4) Subject to paragraph (7), where paragraph (1)(b) applies, the court must, unless it considers it unjust to do so, 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.

> **(5)** In considering whether it would be unjust to make the orders referred to in paragraphs (3) and (4), the court must take into account all the circumstances of the case including—
>
> (a) the terms of any Part 36 offer;
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> (b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;
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> (c) the information available to the parties at the time when the Part 36 offer was made;
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> (d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and
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> (e) whether the offer was a genuine attempt to settle the proceedings.
>
> **(6)** Where the court awards interest under this rule and also awards interest on the same sum and for the same period under any other power, the total rate of interest must not exceed 10% above base rate.
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> **(7)** Paragraphs (3) and (4) do not apply to a Part 36 offer—
>
> (a) which has been withdrawn;
>
> (b) which has been changed so that its terms are less advantageous to the offeree where the offeree has beaten the less advantageous offer;
>
> (c) made less than 21 days before trial, unless the court has abridged the relevant period.
>
> …

The 'Part 36' offers

6. Mr Mundy made two offers, on the same day, 2nd November 2018. Both were designated as Part 36 offers. One was in the following terms:

> Please note that pursuant to Part 36 CPR the claimant is prepared to accept the sum of £20,000 inclusive of interest and special damages, but net of acceptance of any liability offer, in full and final settlement of this claim.

> This offer shall remain open for acceptance for 21 days from receipt by you.

7. The other was in the following terms:

> We are instructed by our client for entirely business and commercial reasons to make a Part 36 Offer to the Defendant in relation to liability. We annexe form N242A containing the Claimant's Part 36 Offer. You will see that the Claimant offers to settle the issue of liability on the basis of 90%/10% in favour of the Claimant.
>
> For the avoidance of doubt should the Defendant not accept the Claimant's offer within the time specified within the annexed form N242A, the Defendant will become liable for the Claimant's costs on an indemnity basis from the 27 November 2018, the Defendant accepts full liability or the issue is determined by the Court.

The annexed form confirmed '*the Claimant offers to settle the liability aspect of this claim on the basis of a 90% / 10% apportionment in favour of the Claimant*'.

8. TUI did not accept either offer. It made a Part 36 offer itself on 28th November 2019, to settle the whole claim for £4,000. Mr Mundy did not accept.

The decision under appeal

9. In his judgment, the County Court Judge observed that, on the face of it, TUI might have been thought to have beaten its own offer (that is to say, within the terms of CPR 36.17(1)(a), the claimant had *failed to obtain a judgment more advantageous* than a defendant's Part 36 offer), since Mr Mundy had been awarded less than £4,000 on his claim.

10. But Mr Mundy had submitted that the case fell within CPR 36.17(1)(b) instead, because *judgment against the defendant was at least as advantageous to him as the proposals contained* in his 90/10 liability offer. He had beaten that offer: the judgment placed 100% liability on TUI. The Judge thought this argument had been developed in various ways.

11. First, he understood the point to be that the offer had been made on the basis Mr Mundy would concede 10% contributory negligence, and that he had beaten that: no contributory negligence had been found. The Judge rejected that argument. TUI had pleaded contributory negligence, but it was a hopeless idea: '*no competent legal adviser could have regarded the contributory negligence plea as having the slightest chance of success*'. So if this was what Mr Mundy's offer meant, it was not a 'genuine offer to settle', it was '*a plainly tactical device, to take advantage of a foolish piece of pleading*'.

12. Second, he understood the point to be that the offer was a proposal for settling breach of duty, but going on to fight causation and quantum. The Judge, however, saw a flaw in that logic, since if breach of duty (or breach of contract) was accepted, but no causation was found, there was no liability anyway. So it made no sense to see it as an

offer to settle 'breach of duty liability'. Causation was the only aspect of liability in real issue in any event.

13. The Judge concluded as follows ([34]):

> It seems to me that the only sensible or realistic way to interpret the claimant's Part 36 offer is that he was offering to accept 90% of the value of the claim. If that is correct, he failed to recover a judgment which was at least as advantageous to him as the proposals contained in his Part 36 offer, and the CPR 36.17(4) consequences cannot follow. If I am wrong in that, and the claimant's offer should be understood as discounting for the contributory negligence plea, then I take the view that in all the circumstances it would be most unjust for the usual consequences to follow, having regard in particular to CPR 36.17(5)(e).

14. TUI, by contrast, had made a clear offer to pay £4,000. The Judge noted that if TUI's offer had been accepted '*it would have disposed of the proceedings at a relatively early stage and the claimant would have done better than he eventually did at trial*', on the basis that '*the court compares the amount of the offer with the amount of the judgment*'. Mr Mundy objected that because he had beaten his own offer, he was entitled to the further 10% on damages pursuant to CPR 36.17(4)(d)(i), which would take the damages over £4,000. But the judge repeated that in his view Mr Mundy had *not* beaten his own offer, and was *not* in any event entitled to the uplift. He concluded ([38]):

> In the circumstances, it seems to me that the true position is that the claimant has failed to obtain a judgment more advantageous to him than the defendant's offer, and that it is CPR 36.17(1)(a) which applies, with the consequences set out at 37.17(3). However, I do not regard this as a case for indemnity costs.

15. He added that on the current state of the law, pending the result of the Supreme Court appeal in the case of *Ho v Adelekun [2020] EWCA Civ 517*, TUI was entitled to set off its costs against costs awarded to Mr Mundy.

Mr Mundy's appeal

16. Mr Mundy's grounds of appeal are as follows:

> (1) The learned judge was wrong in law to hold that to grant the Claimant the benefits of CPR 36.17 was 'irrational and wrong', and failed to give any weight or proper consideration to CPR 36.17(2) or give any adequate reasons why he was not compelled to hold that the Claimant had beaten their Part 36 offer.
>
> (2) The learned Judge was wrong in law and fact when he construed the Claimant's Part 36 offer, to settle liability on the basis of 90%/10% in his favour, as an offer to accept 90%

> of the amount claimed by the Claimant, rather than 90% of the amount to be decided by negotiation or the court.
>
> (3) The learned Judge was wrong in law and fact when he failed to apply the consequences of CPR 36.17 in favour of the Claimant, so that the Claimant would in fact have been awarded £4,186.16, making the Defendant's offer of £4,000 irrelevant.
>
> (4) The learned Judge was wrong in law to allow the Defendant to set off its costs against the costs to be paid to the Claimant.

17. Giving permission to appeal by order dated 30th March 2022, Foxton J made the following observations:

> The nub of the proposed appeal is that the Claimant says he has beaten the Claimant's Offer (there being no reduction in the recovery of such loss as he was found to have suffered, albeit he was found to have suffered only a fraction of the loss he claimed), and that, with the benefit of the 10% uplift which comes from beating his own offer under CPR 36.17(d)(i), the Claimant has beaten the Defendant's offer too.
>
> While the decision of the Judge that, in these circumstances, it is the Defendant who gains the benefits of Part 36 and not the Claimant, seems intuitively right and is highly likely to prevail, the terms of Part 36 are not wholly clear in addressing the consequences of issues-based Part 36 offers of this kind, such that the appeal just meets the requisite threshold of arguability. Further the practice of making "90/10" offers to secure costs benefits appears to be widespread and would benefit from an authority at High Court level. On that basis, permission is granted for grounds 1 to 3.
>
> So far as ground 4 is concerned permission is sought on a precautionary basis as the issue has gone to the Supreme Court, and I am satisfied it is appropriate to grant it on that basis.

Analysis

18. The Part 36 *self-contained procedural code about offers to settle pursuant to the procedure set out* is a balanced system of financial incentives to settle claims, issues or parts of claims, without recourse to litigation. Where a settlement offer is accepted, CPR 36.13-14 makes provision for a claim to be stayed on the terms of the agreement and for the costs consequences which are to follow. Where an offer is rejected, however, and the claim goes forward to trial, then there is an exercise to be done at the end of the proceedings in comparing the rejected benefits with the benefits achieved by the trial. If the comparison favours the rejected offer – the offer has not been 'beaten' – adverse costs and other financial consequences are automatically visited on the rejecting party unless a court is prepared to say that would be 'unjust' (a high bar).

19. This appeal puts a spotlight on the operation of the principal provision dealing with rejected offers – CPR 36.17 – and how it plays out in relation to a factual matrix involving both (a) competing financial settlement offers, both of which were rejected and unbeaten and (b) a claimant's rejected '90/10' liability offer.

(a) The rejected financial settlement offers

20. There is no material dispute between the parties about how CPR 36.17 works in what might be called the ordinary case of one or more offers to settle a whole claim for a sum of money. I start therefore with the basics of CPR 36.17, and how it would have operated in this case leaving aside, for the moment, the 90/10 liability offer at the centre of the controversy in this appeal.

21. CPR 36.17 is a provision about financial consequences *following judgment*. It requires a comparison between *judgment* and *offer*, and an evaluation of which is the more *advantageous* to a claimant. Mr Mundy's claim is a 'money claim' – he seeks only financial compensation. Where a money claim is concerned, 'advantageous' has to be construed by reference to what is, or is not, '*better in money terms*' (CPR 36.17(2)).

22. CPR 36.17(1) sets out what appear on the face of it to be binary, mutually exclusive, premises. If a defendant has made an offer, and the claimant *fails* to beat it, then adverse consequences follow for the claimant. If a claimant has made an offer, and *succeeds* in equalling or beating it, then adverse consequences follow for the defendant.

23. The comparison exercise is in principle entirely simple. The first question CPR 36.17(1) asks is whether, upon judgment being entered, a claimant has failed to get more money than a defendant offered. Where a defendant has made a settlement offer, that ought to be capable of a straightforward yes/no answer. And here, the answer would have been a straightforward 'yes' – TUI offered £4,000 and Mr Mundy was awarded less than that.

24. Since Mr Mundy also made a money settlement offer, the second question CPR 36.17(1) asks – whether he equalled or beat it – technically arises. But, on the face of it, this is a technical question only. It would be irrational for a claimant's own money offer to be *the same as or lower than* a rejected defendant's offer. So if the answer to the first question is 'yes', then the answer to the second question can be expected to be 'no'. That indeed would have been the position here. Having failed to beat TUI's £4,000 offer, of course Mr Mundy had failed to equal or beat his own much higher £20,000 offer. CPR 36.17(1) generally works on the basis that in all cases where an offer to settle has been rejected *either* (a) *or* (b) – and their respective different consequences – will apply.

25. These are the simple and familiar mechanics of CPR 36.17, and that was the County Court Judge's starting point. But then he had to grapple with how Mr Mundy's rejected 90/10 liability offer fitted in.

(b) The rejected 90/10 liability offer

26. Counsel before me agreed with Foxton J that the practice of making 90/10 liability offers, to secure costs advantages, has indeed become widespread. They were also

unaware of any existing authority on precisely how these offers fit in to CPR 36.17 if they are rejected.

27. As Mr Pennock, on behalf of Mr Mundy, explained the general mechanics, the idea of these offers is that a claimant who is confident of success on liability will make a 90/10 liability offer to induce a defendant to concede liability and agree for the case to proceed to trial (or negotiation) on quantum alone. It is intended to incentivise a defendant to agree to the saving of the time and expense of a liability trial. If accepted, it means that quantum, if not agreed, can be dealt with at a comparatively simple disposal hearing. It proceeds on the basis that a defendant who agrees to this offer will have the reward of retaining 10% of the damages ultimately awarded or negotiated. But Mr Pennock says as well as this carrot, there is a stick: a defendant who rejects this offer, and then goes on to lose on liability, will face the adverse consequences of CPR 36.17.

28. Leaving aside any submissions that may have been made below about the possible relevance of contributory negligence pleadings, or about subdivision of liability issues, that is the characterisation of the 90/10 offer as put to me by Mr Pennock as being relevant to this appeal. (His second ground of appeal suggests the County Court judge had not properly understood this nature of a 90/10 offer in the first place. I am not persuaded that, just reading the judgment, the Judge did in fact make the mistake suggested – thinking the percentages applied to the amount *claimed* rather than the amount in the event awarded or agreed. But it may be that little turns on the point.)

29. Mr Pennock explained just how confident they had been of a clear win on liability in this case. Mr Mundy had been established to have ingested cyclospora, a parasite endemic in Mexico but rare in the UK. He had never left the hotel. The incubation period fitted. He was characteristically symptomatic. Breach of contract and causation spoke for themselves, and the only question was how far the *extent* of his subsequent debility was attributable to the cyclospora infection and how far, if established at all, to other things.

30. And, says Mr Pennock, they were proved right. Mr Mundy did win on liability – 100%. So, he says, that establishes that TUI's rejection of the 90/10 offer, which put the parties to the unnecessary trouble and expense of a liability trial, ought to attract the adverse consequences for it provided for in CPR 36.17 (ground 1 of the appeal).

31. The mechanics of that proposition rely on fitting the rejected 90/10 offer into the wording of CPR 36.17(1)(b). Mr Pennock says that ought not to pose any difficulty: judgment against the defendant, on 100% liability, was at least as advantageous to the claimant as the proposals contained in his 90%/10% offer. But it does pose difficulties.

32. In the first place, it seems to cut across the binary structure of CPR 36.17(1) by contemplating a situation in which the answer to *both* limbs could be 'yes': a claimant can have failed to beat a defendant's money offer, but still have beaten or equalled his own liability offer. That raises the problematic prospect of subsections (3) and (4) *both* applying, in circumstances where it is far from obvious that is within the contemplation of the rule at all.

33. Mr Pennock has two answers to this difficulty. First, he says that before you try and answer the question in CPR 36.17(1)(a), you first have to answer the question in CPR 36.17(1)(b) about any offer the claimant had made. If the answer to *that* question is

'yes' – which it is, on the liability offer – then you have to follow the logic of CPR 36.17(4) *before* you can make the comparison invited in CPR 37.17(1)(a). And here, that produces a result that applies an uplift to Mr Mundy's damages award and means he got more than £4,000. So he did *not* fail to beat TUI's money offer, and that produces the classical 'no, yes' to the two questions in CPR 36.17(1).

34. That is a suggestion of some ingenuity. But first, it seems to assume what it sets out to prove, namely that 'failure' on a money offer to settle can be rescued by 'success' on a 90/10 liability offer. And secondly, of course, it is not a solution capable of working in cases where, on the facts, the uplift does not take the total award above a defendant's offer, even if it happened to do so in this case.

35. Mr Pennock's other suggestion is that subsections (3) and (4) can be reconciled in a single case by taking a chronological, sequential approach to the making of the offers, such that priority can be given to an earlier offer. I did not find it straightforward to follow how that would work in practice. But in any event, it takes me to a further set of problems with fitting rejected 90/10 liability offers into the scheme of CPR 36.17, which are more fundamental.

36. A 90/10 liability offer is not straightforward to recognise as an offer to settle a whole claim on quantified or quantifiable financial terms, in a case where there is no genuine question of issues-based liability. Mr Pennock relies on CPR 36.2(3) to bring it within Part 36 at all. He says it is an offer of settlement of 'part of' or 'an issue arising in' a claim – liability. But liability as such is not obviously a distinct or severable 'part' or 'issue' capable of being given a monetary value, as contemplated by CPR 36.17(1) and (2), distinct from the value of the claim. A 90/10 liability offer does not appear, in a case like this, to be an attempt to estimate or predict any split-liability orders a court may make in a given case. Unless split liability is a genuine prospect on the facts of a case (for example a road traffic case where contributory negligence is a live issue), a 90/10 liability offer looks, if accepted, like a complete concession of liability in return for a financial reward – a share of quantum. Otherwise, and if not accepted, it looks something like a claimant's stake on a 100% winning outcome on liability at trial. Despite its proportional form, it is something of a binary proposition in substance.

37. Returning to the basics, therefore, I see no encouragement at all in CPR 36.17, or anywhere else in the Part 36 scheme, for the idea of approaching rejected offers, where a defendant has made a money offer to settle the whole claim, by doing anything other than starting with the question at CPR 36.17(1)(a) and making a straightforward comparison between what a defendant offered and what a claimant got 'in money terms'. What a claimant got is to be considered in terms of *obtaining a judgment*. The judgment entered, obtained and recorded in this case was for a sum less than £4,000.

38. On a plain reading, CPR 36.17(1) (a) and (b) are directed to a *like for like* comparison. Both limbs are directed to the quantified (money) terms on which either party offered to *settle the proceedings*. It is a provision entirely simple in structure. That plain reading of CPR 36.17(1), as being directed in a case like this to quantified money offers to settle, is supported not just by its own internal logic, read together with CPR 36.17(2), but also by the logic of the rest of CPR 36.17. CPR 36.17(5) sets out the mandatory considerations to be taken into account for a court considering whether it would be 'unjust' for the normal Part 36 consequences to follow. They include '*(e) whether the offer was a genuine attempt to settle the proceedings*'. That means that in every case

where the issue of 'unjust' is raised, the court must consider whether 'the offer' – that is, the operative offer referred to in CPR 36.17(1) – was a genuine offer to *settle the proceedings*. A single offer is referred to – *either* the unbeaten defendant's offer *or* the beaten or equalled claimant's offer. The single relevant offer must have been an offer *to settle*; the question for consideration by the court is then whether *that* offer, to settle, was *genuine* in its (unsuccessful) attempt.

39. I was not encouraged by the parties to seek assistance from the decided authorities in interpreting CPR 36.17(1) – on the basis that the basics of how it operates are not in dispute and there is no authority on rejected 90/10 offers. I mention only in passing, therefore, that the 'plain reading' – that the rule is concerned in a case like this with comparing rejected *quantified money settlement offers* to the *judgment entered* – is apparently the basis on which the White Book commentators proceed. For example, at 36.17.1 they say that: '*This rule deals with the costs and other monetary consequences following judgment of effective Part 36 offers. It is at the heart of Pt 36 since it contains the careful balance of incentives that are intended to encourage parties to make and accept sensible settlement offers*. And at 36.17.4 they review the leading authorities on claimants' offers where 'settlement offers' are consistently referred to. In context, these are not easy to make sense of unless they mean offers to settle *the claim*, or a *quantifiable* part of or issue in a claim, for an identifiable sum of money which can be compared to the sum awarded.

40. Mr Mundy's 90/10 liability offer was not an offer to *settle the claim*, or a *quantifiable* part of or issue in the claim. It is difficult to fit into the Part 36 scheme altogether. If accepted, in what sense will that produce the result that 'the claim will be stayed' (CPR 36.14(1))? If rejected, in what sense does that produce a quantifiable proposition capable of being compared with what a claimant got 'in money terms' from a judgment – that is, from the judgment itself and not from a private algorithm pre-attached to the judgment? A simple case like this in which liability is not fought on a distinct issues basis but in its entirety cannot produce anything other than a 100% result on liability either way; the *value* of a win on liability 'in money terms' is difficult if not impossible to separate from the quantum of damages awarded, and that will always and axiomatically be more advantageous to a claimant than 90% of it. There is a problematic degree of artificiality in all of this.

41. Mr Mundy had made a money settlement offer at the same time as his 90/10 liability offer. He had also made a proposal about how the two offers fitted together – the offer to settle for £20,000 was to be '*net of acceptance of any liability offer*'. That was a proposal about the effects of acceptance. Whether to accept a 90/10 liability offer will be a matter for a defendant's commercial judgment (the proportions on offer, however, may be unlikely to be attractive outside an issues-based claim; it is an offer likely to be attractive only to a defendant clinging on to an outside chance of winning). But the effects of rejection of the liability offer do not speak for themselves. And the effect proposed by Mr Mundy in this appeal goes far beyond incentivising the avoidance of a liability trial. It makes a 90/10 liability offer into a means for a claimant, who fails to beat a money offer to settle his claim, to recoup a substantial premium for 'winning' the case nevertheless. It is an attempt at a unilaterally imposed insurance policy to reverse the losses otherwise provided for by CPR 36.17. It is, in other words, an attempt to use CPR 36.17 against itself, contrary to both its letter and its spirit.

42. I am unpersuaded this rejected 90/10 liability offer can be fitted in to the terms of CPR 36.17(1)(b) consistently with the wording, integrity and practicality of the CPR 36.17 mechanism. Trying to do so strains the language of the provision, undermines its careful balance, and introduces a degree of complexity and uncertainty which I am not persuaded is within its contemplation. It is a provision that relies on its clarity, simplicity and predictability for the incentivising effects which puts it at the heart of the Part 36 code.

43. How, then, does this 90/10 liability offer fit into the scheme of CPR 36.17, if not in the manner suggested by Mr Pennock? The simplest answer to that lies in CPR 36.17(5). In a case like this – an otherwise straightforward CPR Part 36.17(1)(a) case in which a claimant has failed to beat a defendant's offer – a court considering whether it would be unjust to visit the subsection (3) consequences on the claimant must take into account all the circumstances of the case. I can see that in an appropriate case – and whether or not a 90/10 liability offer counts as 'any Part 36 offer' for the purposes of CPR 36.17(5)(a) – a court may be invited to consider any injustice arising by virtue of the defendant having rejected that offer.

44. The 'unjust' bar of course remains a high one: a 'formidable obstacle' as Mr Pennock acknowledged. The default provisions of CPR 36.17 cannot be expected to be diluted by considerations relating to rejected 90/10 liability offers to the extent that it loses the very clarity, simplicity and predictability on which its incentivising effects depend. It may be that 90/10 liability offers, where no issue of split liability genuinely arises, largely need to rely on any inherent attractiveness and incentivisation they may have in the context of a particular case to achieve an outcome – agreement to avoiding a liability trial – if that is in the commercial best interests of both parties. It may be that they cannot rely on the incentivisation furnished by the 'Part 36' consequences of rejection. It may be, in other words, that in a simple case like the present they are all carrot and no stick. If so, that is a result which seems to me entirely consistent with the letter and spirit of the Part 36 code, and its focus on backing sensible money offers to settle claims or quantifiable parts of claims.

(c) Was the County Court Judge 'wrong'?

45. I recognise, in the strong instincts expressed by the County Court Judge in this case, substantial consistency with the analysis I have set out above. He started in the right place – by considering the question posed by CPR 36.17(1)(a). The obvious answer to it was 'yes' – Mr Mundy had failed to obtain a judgment more advantageous than TUI's Part 36 offer.

46. He considered and rejected the ingenious suggestion that a different answer could be reached by recalculating what Mr Mundy had got - via fitting the rejection of the 90/10 offer within CPR 36.17(1)(b) and adding in the CPR 36.17(4) uplift before answering the CPR 36.17(1)(a) question. For the reasons I have given, he was right to do so.

47. He also addressed himself, in the alternative, to the potential relevance of the rejected 90/10 offer to the 'unjust' question in CPR 36.17(5) – along with all the other circumstances of the case. He was persuaded the high bar would have been cleared for interfering with the CPR 36.17(4) consequences had that been his conclusion. As I read the judgment, that was because to do otherwise would have been unfairly to visit an uncertain, unpredicted and indeed unpredictable consequence on a defendant which had

made a realistic settlement offer in good faith, and which had also reasonably rejected the 90/10 liability proposition.

48. The rejection was reasonable because the issue in principal contention at the trial had been *how far* Mr Mundy's debilities were attributable to the cyclospora infection. That was a quantum question but one in which causation issues were very much live. The 90/10 offer on 'liability' was at large and unparticularised. The difficulties of applying a 90/10 liability offer to issues of causation are illustrated in the decision of the Court of Appeal in *Seabrook v Adam [2021] EWCA Civ 382*, a case referred to in Mr Pennock's skeleton argument; hence the observation there that, in relation to a claimant's offer '*if the issue to be settled is 'liability', it would be sensible to make clear whether the defendant is being invited only to admit a breach of duty, or, if the admission is intended to go further, what damage the defendant is being invited to accept was caused by the breach of duty*'. The offer in this case did not do that. Where *extent* to which debility and damage were *caused* by the defendant's fault is the core of the dispute, as it was here, it is hard to see that the County Court Judge was 'wrong' to see injustice in the conventional operation of CPR 36.17(4) in the present case had he been persuaded it applied here.

49. My conclusion in these circumstances is that the County Court Judge's decision on the issues raised by the rejected 90/10 liability offer was not 'wrong'. I can see that he found the submissions advanced on Mr Mundy's behalf to be strongly counter-intuitive, if not to a degree baffling, but I am unpersuaded that he went wrong in his core analysis. If some of his explanatory reflections reflected rather than resolved that degree of bafflement, I am unpersuaded that his reasoning, taken as a whole, lacked explanatory power, and I have in any event expanded upon it in this judgment. In these circumstances, I would dismiss the appeal on grounds 1-3.

(d) Setting off the Defendant's costs

50. Mr Laughland, for TUI, accepted before me at the appeal hearing that the question raised by the fourth ground of appeal has now been settled by the Supreme Court in *Ho v Adelekun [2021] UKSC 43* in favour of Mr Mundy. He was right to do so. It follows that the appeal falls to be allowed on ground 4, and paragraph 6 of the Order under appeal amended accordingly.

Decision

51. The appeal is dismissed on grounds 1-3, and allowed on ground 4.

CH-2021-BRS-000004

IN THE HIGH COURT OF JUSTICE **Appeal Ref: CH-2021-BRS-000004**
BRISTOL DISTRICT REGISTRY **Claim No: E66YJ641**
ON APPEAL FROM THE COUNTY COURT, SWINDON
ORDER OF HHJ RICHARD PARKES KC, 28.07.21

B E T W E E N:

CALVIN MUNDY

Claimant / Appellant

And

TUI UK LIMITED

Defendant / Respondent

ORDER

BEFORE the Honourable Mrs Justice Collins Rice DBE on 7th February 2023

UPON HEARING remotely by MS Teams Counsel for the Appellant and in person Counsel for the Respondent

IT IS ORDERED:

1. The Appellant's appeal is dismissed, save in relation to Ground 4 which is allowed by way of concession.

2. The Order of His Honour Judge Parkes KC made on 28th July 2021 shall be varied as follows:
   (a) Paragraph 5 shall be deleted, and

   (b) Paragraph 6 shall be amended to read now:

   > *"(6) The Defendant shall be entitled to set off its costs against the Claimant's damages and any interest. ~~or costs awarded to the Claimant~~."*

3. The Appellant shall pay the Respondent's costs of the appeal summarily assessed at £8,757.90; but enforcement of those costs and of the costs allowed to the Respondent at paragraph 3 of the order of 28th July 2021 shall be limited by the value of the damages and interest awarded to the Appellant (£4,071.31).

4. There shall be no order as to costs on the Appellant's application dated 31st January 2023.

5. The Respondent shall by no later than 4pm on 10.03.23 make an interim payment of £10,000 on account of the costs payable to the Appellant in accordance with paragraph 2 of the Order of 28.07.21.

23rd February 2023