Claim No. QB-2021-000496

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

[2022] EWHC 67 (QB)

Before :

MASTER THORNETT

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Between :

LORRAINE HEATHER O'GRADY (widow and executrix of the Estate of

MARTIN JAMES O'BRIEN

Claimant

-and-

B15 GROUP LIMITED (formerly BRIGHTHOUSE GROUP LIMITED)

Defendant

Date: 17 January 2022

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Mr Richard Wilkinson (instructed by Slater and Gordon) for the Claimant
Mr David Brounger (instructed by Kennedys Law LLP) for the Defendant

Hearing date: 9 December 2021

JUDGMENT

1. On 15 February 2018, the Claimant's husband, Mr Martin O'Brien, was killed when a lorry, driven by an employee of the Defendant, attempted to execute a U-turn on a dual carriageway in contravention of "no U-turn" signs. The Defendant's driver was convicted on a guilty plea of causing death by careless driving. The Defendant was notified of the civil claim by Letter of Claim dated 25 March 2018 sent on behalf of the "Estate and dependants of Mr Martin O'Brien (deceased)."

2. The following relevant events then occurred:

2.1 20 April 2020: the Defendant's solicitors put forward a Part 36 offer whereby they offered to apportion liability on the basis of a 60/40 split in favour of the Claimant. At that stage the Defendant had not made any formal admission in relation to primary liability. The Claimant did not accept this offer, but neither was it withdrawn;

2.2 10 February 2021: the Defendant formally conceded primary liability but made clear that contributory negligence remained live;

2.3 11 February 2021: Claim Form issued by the Claimant in respect of claims under the "Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Act 1976";

2.4 23 February 2021: the Claimant's solicitor put forward a Part 36 on the issue of liability. The offer (literally) read :-

"The Claimant offers to resolve the issue of liability of on 80/20 basis. For the avoidance of doubt if the Defendant accepts this offer it will only be required to pay 20& of the Claimant's damages."

2.5 24 February 2021: Having received the Claimant's offer by e-mail at 15.51 on 23 February, the Defendant's solicitor accepted it by e-mail at 10.02 on 24 February;

2.6 24 February 2021: The Claimant's replied by e-mail at 10.12 to make clear that the offer that he intended to make on behalf of the Claimant was 80/20 in the Claimant's favour;

2.7 8 June 2021: the Claim Form was served along with a Schedule of Loss claiming damages of £397,516.73, mostly in relation to claims for loss of dependency by the Claimant's wife, his stepsons and his granddaughter, Lottie. Lottie was born on 22 November 2017 and so is now aged four.

3. The Claimant issued an Application on 2 March 2021 for permission to withdraw her offer or to change its terms under CPR 36.10(2)(b). Witness statements were exchanged and, in consequence, the Claimant felt obliged to issue a subsequent Application dated 22 October 2021 for permission to call the Defendant's solicitor and cross-examine him on the contents of his witness statement. In particular, whether the Defendant's solicitor knew or suspected that the Claimant's offer had been made in error by her solicitors.

4. I listed a preliminary hearing for 3 November 2021 specifically to decide whether the Defendant's solicitor should be called to be cross-examined in these circumstances. Very shortly before the hearing, but very helpfully in terms of narrowing the issues, the Defendant conceded that the mistake relied upon by the Claimant's solicitor in formulating the offer was of a kind that would render any agreement void if the court were to accept that the common law doctrine of mistake is relevant when considering Part 36 offers. The hearing on 3 November briefly proceeded instead to explore the procedural issues as remained for consideration. Also helpfully and pragmatically, counsel agreed that any tensions between them on the correct interpretation and application of r.36.10(2)(b) on these facts could be resolved by agreeing to treat the Application as seeking a declaration that no binding agreement had been reached on the

issue of liability in the claim and this did not necessitate formal amendment of the Claimant's first (and so now as only relevant) Application.

5. The recital to the Consent Order following that hearing recorded the agreement that "the Claimant's solicitor, in making the offer to apportion liability at 80/20 in favour of the Defendant, rather than 80/20 in favour of the Claimant as had been intended, made a mistake of a kind which in law would render the agreement void if the court finds that common law principles (specifically in relation to the doctrine of mistake) apply to P36 offers".

6. The Claimant's case, carefully developed and with reference to numerous authorities, essentially is that there is no reason, either by reference to Part 36 itself or case law, why a mistake in the formulation of a Part 36 Offer as known to be a mistake by the recipient, should not prevent that offer from constituting an effective and binding Part 36 offer. Mr Wilkinson on behalf of the Claimant emphasises the significance of the Defendant's concession in this regard: the Application no longer draws upon any interpretative requirements as to the meaning of the offer and its effect upon the recipient reader but instead proceeds on a point of legal principle.

   Pausing there, however, I am asked by the Claimant to note that the Defendant's concession was hardly surprising. The Claimant says it was surely always obvious that the 23 February 2021 communication was not that intended. Read literally, the assertion in the "clarification clause" of the offer that the Defendant would only be required to pay "20&" of the Claimant's damages made no sense and plainly invited clarification. Further, any mention of an 80:20 ratio in an offer from a claimant would ordinarily indicate an expectation for an 80% apportionment in their favour, yet this phrase, insofar as it meant anything, oddly suggested the opposite. The implausibility of the Claimant truly intending to compromise her claim for only 20% of its value becomes even more striking given the Defendant had made an offer many months previously of 60:40 in her favour as well as subsequently admitting primary liability.

   These observations, whilst no longer relevant to a former factual question whether the offer had been made in mistake, remain pertinent to the particular circumstances by which the Claimant seeks the relief she does. Mr Wilkinson emphasised that the circumstances whereby an offer of settlement are known by the receiving party to be mistaken must be rare and extreme. Whilst submitting that these particular circumstances justify her Application, the Claimant by no means seeks to suggest that *any* mistake by a party putting forward a Part 36 should result in an agreement being rendered void. Mr Wilkinson contrasted this case for one where, say, a claimant had offered to accept 80:20 in their favour rather than 90:10 and so where the margin of error would not, or not obviously, have been apparent to the recipient. He adds that the proposition of an obvious and understood mistake being relevant could as much work to the relief of a defendant who, for example, offers a large sum expressed in sterling rather than, say, dollars.

The Claimant accepts the fundamental principle that Part 36 is intended to be a self-contained code but submits it would be a very peculiar procedural code that can wilfully shut its eyes to a mistake of this kind. Whilst there is every justification for the rules to impose limits on the circumstances in which an offeror can change their mind about the making of an intended offer within the initial "relevant period", there ought to be no such justification when the offer was made, and known to have been made, in error.

7. Mr Brounger on behalf of the Defendant sought first to qualify the portrayed status of the mistake in issue. Whilst the Defendant now accepts that a mistake had been made by the Claimant's solicitors of the kind defined, Mr Brounger submitted it was not helpful to seek to further categorise or define that mistake as if one might already be applying common law principles. Mr Brounger took issue, for example, with Mr Wilkinson's emphasis upon the mistake being tagged as "obvious".

   By way of similar qualification, and not unconnected to his submission above, Mr Brounger briefly reminded me of the facts as give rise to the Defendant's allegation of contributory negligence against the Deceased. The joint expert accident reconstruction report in the criminal proceedings had concluded that the Deceased was travelling significantly faster than the speed limit, having passed a camera some 100 metres from impact at 46 – 48 mph and then accelerated up to 56mph before the collision. They also concluded that had the Deceased been travelling at the speed limit he would have been able to avoid the collision.

   The Defendant's position therefore is that Part 36 is both the starting and end point, being a self-contained code. There is no basis anywhere in Part 36, or otherwise generally in the CPR by way of cross-reference, for example by reference to the Overriding Objective, for importing into Part 36 the feature of an offer having been made by mistake. The application of a strict approach being applied once an offer has been made facilitates certainty and consistency in the operation of a Rule that is deliberately intended to codify and simplify the resolution of disputes. Seen in this way, cases initially focusing upon the interpretation of offers, even if Part 36 offers, have no true bearing on the workings of Part 36 itself and whether it is capable of incorporating the doctrine of mistake.

   The Rules Committee, the Defendant submits, could easily have provided an express provision that where there an offer had been accepted under a mutual mistake it could be withdrawn or varied even after acceptance. The absence of such safeguard serves to emphasise the importance of preparation and satisfaction in the initial drafting of an offer before submission. In response to the Claimant's reliance upon general principles of "dealing with cases justly" to resolve the dispute, the Defendant submits that any reasonable citizen reading Part 36 would realise that once an offer is made and accepted then the consequences contained in the code will follow. If they have made a mistake in the formulation of their offer, then it is only "just" that that should be their "look-out". Any perceived harshness of consequence in this approach is by far eclipsed by the need for certainty and consistency of the procedure.

8. The Defendant seeks to use the Low Value Personal Injury Portal as an example of a "fixed" scheme where there is no room for subjective consideration of steps taken within the process. I was referred to a County Court decision of HHJ Parker in *Fitton v Ageas* [2018] WL07252944, where the court had to consider whether a binding agreement had been reached according to a sequence of pro-forma exchanges in the Portal. The judge reviewed various notes both in the introduction to the Protocol and in the White Book as to its strictly prescriptive intended effect, described in the White Book as constituting a "special and limited court procedure". The judge noted the description by Jackson LJ in *Phillips v Willis* [2016] EWCA Civ. 401 that this "modified procedure is designed to minimise the expenditure of further costs and in the process deliver fairly rough justice. This is because of the sums in issue are usually small and it is not appropriate to hold a full-blown trial."

   Having regard to such expressed aims as to proportionality and cost-effectiveness, HHJ Parker was satisfied that the normal rules of contract were excluded from the Protocol [Paras 36-39] and so could not be used to assist.

   A similar conclusion was reached in 2019 by HHJ Davey QC in the County Court claim in *Harris v Browne* D00BD701. HHJ Davey QC reviewed similar commentaries, as well as the decision itself, in *Fitton v Ageas* and likewise concluded the effect of the Protocol was to exclude both common law principles or "external data" as established mistake. He was, however, satisfied that there was a case for the application of the Overriding Objective where, as in *Harris*, the defendant had purported to accept an offer knowing that it was not an intended offer, being substantially lower than what must have been intended.

9. On the issue of proportionality and cost effectiveness justifying the approach to be taken to the application of a rule, protocol or system to resolve disputes, I consider by analogy the system of Fixed Costs. In *Ho v Adelekun* [2019] Costs LR 1963, the Court of appeal cited the description of Moore-Bick LJ in *Solomon v Cromwell Group plc* [2011] EWCA Civ. 1584 at para 20 that the "whole purpose" of introducing the fixed costs rules in Section II of CPR 45 was "to impose a somewhat rough and ready system in a limited class of cases because the commercial interests behind the parties who bear the burden of large numbers of such cases considered that, taken overall, it was fair and saved both time and money."

10. Both judgments in *Fitton* and *Harris* explored the proposition that there can exist a self-standing system for the conclusion of a dispute by drawing upon remarks of the Court of Appeal in *Gibbon v Manchester City Council* [2010] 1 WLR 2081 how Part 36 was intended to be a "self-contained code". I do not read either of these judgments, however, as going as far as to accept that common law principles are also excluded from Part 36. The point instead was that the intention for the RTA Protocol to be a self-contained code, like Part 36, is a significant starting point in asking whether common law contractual rules should be treated as excluded for the purposes of the RTA Protocol.

11. I am clear that the operation, application and effect of Part 36 are all very different to those of the RTA Protocol or the Fixed Costs regime. Such distinction more than sufficiently persuades me that analogy with the RTA Protocol in the resolution of the issue in this case is not helpful. I agree with Mr Wilkinson that a system intended for the conclusion of low value disputes, and the reasoning accordingly expressed in *Fitton* and *Harris*, is not apt for application to Part 36, a procedure as much intended for the resolution of multi-million pound claims as those, for example, only just above the RTA Portal financial limit. Whereas the Court of Appeal itself has accepted that concepts of "rough justice" and a "rough and ready system" are applicable to systems where the value of claims is low, and within "a limited class" at that, it seems to me a very different and more nuanced approach has to be applied to Part 36 given its far wider application.

12. The principle of the effect of knowledge of mistake upon a contractual offer, is well established at common law. As described in *Chitty on Contracts*, 34th Ed, (Vol 1) at 5-022:

    "A mistake as to the terms of the contract, if known to the other party, may affect the contract. In this case, the normal rule of objective interpretation is displaced in favour of admitting evidence of subjective intention. In Hartog v Colin and Shields 1 [1939] 3 All E.R. 566 the defendants offered for sale to the plaintiffs some Argentine hare skins, but by mistake offered them at so much per pound instead of so much per piece. The previous negotiations between the parties had proceeded on the basis that the price was to be assessed at so much per piece, as was usual in the trade. But the plaintiffs purported to accept the offer and sued for damages for non-delivery. The court held that the plaintiffs must have known that the offer did not express the true intention of the defendants and that the apparent contract was therefore void".

13. The principle was recognised specifically in the context of settlement negotiations by Mance J (as he then was) in *O.T. Africa Line Ltd v Vickers Plc* [1996] 1 Lloyds Rep 700 at 703:-

    "I further proceed on the basis that Vickers would not be bound [by the agreement] if they could show that OTAL, or those acting for OTAL, either knew or ought reasonably to have known that there had been a mistake by Vickers or those acting for Vickers. …… The question is what is capable of displacing that apparent agreement. The answer on the authorities is a mistake by one party of which the other knew or ought reasonably to have known. I accept that this is capable of including circumstances in which a person refrains from or simply fails to make enquiries for which the situation reasonably calls and which would have led to the discovery of the mistake. But there would have, at least, to be some real reason to suppose the existence of a mistake before it could be incumbent on one party or solicitor in the course of negotiations to question whether another party or solicitor meant what he or she said."

14. On the question whether this common law principle, either directly or at least by analogy, should apply to the facts of this case in the context of a Part 36 Offer neither

counsel has been able to find a case directly on the point. Mr Wilkinson adds that given this situation is unlikely to be unique, even if unusual, the absence of authority more than probably reflects that all other offerees must have taken a pragmatic view in response.

15. Counsel seemed agreed that the authority of *Gibbon* nonetheless provides at least the closest guidance on the point, although only to the extent of *obiter* comment at Para 6 in the judgment.

16. In *Gibbon*, the Court of Appeal rejected submissions by the claimant that the defendant was prevented from accepting her earlier Part 36 offer owing to the defendant initially having rejected it and her own rejection of the defendant's subsequent offer, all which gave rise to the common law rules of rejection and implied withdrawal. The reasoning of the Court of Appeal was that could such common law contractual principles could not be reconciled with the express language of the rules within Part 36 governing the circumstances in which an offer could be accepted at any time, unless withdrawn, and relating to the requirements for withdrawal of an offer only by serving written notice. In the face of express provision how a Part 36 offer may be made, how it may be varied and how it may be withdrawn, there was no scope for common law concepts of lapse or rejection

    As stated in the opening of the leading judgment from Moore-Bick LJ, the central question on the appeal was whether Pt 36 embodies a self-contained code or is subject to the general law of offer and acceptance "in so far as it fails expressly to provide otherwise". The significance of this latter phrase becomes clear from Para 6 of the judgment:

    "Basic concepts of offer and acceptance clearly underpin Part 36, but that is inevitable given that it contains a voluntary procedure under which either party may take the initiative to bring about a consensual resolution of the dispute. Such concepts are part of the landscape in which everyone conducts their daily life. It does not follow, however, that Part 36 should be understood as incorporating all the rules of law governing the formation of contracts, some of which are quite technical in nature. Indeed, it is not desirable that it should do so. Certainty is as much to be commended in procedural as in substantive law, especially, perhaps, in a procedural code which must be understood and followed by ordinary citizens who wish to conduct their own litigation. In my view, Part 36 was drafted with these considerations in mind and is to be read and understood according to its terms without importing other rules derived from the general law, save where that was clearly intended".

17. I see no conflict between the observation at the end of this para that Part 36 is a code that can and should be applied without reference to common law rules "save where that was clearly intended" and acceptance earlier within the paragraph that general contractual principles nonetheless still "underpin" Part 36. The point is that Part 36 does not incorporate "all the rules governing the formation of contracts" but is nonetheless

compatible with them in the absence either of express exclusion, express inclusion or direct contradiction.

This observation returns one to the real difference between the parties in this case. The Claimant submits that the common law principle of unilateral mistake is both consistent and compatible with the question whether her Part 36 offer should be treated as valid, whereas the Defendant points to the absence of clear intention within the drafting of Part 36 that it should.

18. I am satisfied that the Defendant's invitation to disregard anything not directly expressed within Part 36 to have effect is inconsistent with other decisions on Part 36. The following cases may well have concerned the application of the principles of contractual interpretation to offers. However, the broader point they share is an acceptance that contractual principles still underpin Part 36 and from which a particular methodology (in these particular cases, interpretation) can be drawn providing that is still consistent and compatible with the drafting of Part 36.

19. Around the time *Gibbon* was being heard, the judgment in *Rosario v Nadell Patisserie Ltd* [2010] EWHC 1886 (QB) was handed down. In that case, Tugendhat J had had to consider whether an offer was a Part 36 offer or alternatively an offer not made under Part 36. The consequences applicable depended upon which of the two it was. Tugendhat J acceded to the agreement of the parties to apply an objective test in this task:

"34. The parties agree that the issues are to be determined by applying an objective test to arrive at the meaning of the correspondence. While the provisions of Part 36 are not part of the law of contract, they are made against the background of that law. The need to apply an objective test is one of the rules which apply in both contexts. Under the objective test, a party may be bound if his words or conduct are such as to induce a reasonable person to believe that he intends to be bound, even though he in fact has no such intention. The Editors of Chitty on Contracts 30th edn Volume 1 para 2-003 give the example of a solicitor who had been instructed by his client to settle a claim for US $155,000 but by mistake offered to settle it for the higher sum of £150,000…"

20. Plainly from this para, and in particular the acknowledgment of an objective contractual test being "one of the rules which apply in both contexts", Tugendhat J was satisfied that the background of the law of contract could be applied to the correspondence irrespective whether or not the resulting conclusion was than an offer under Part 36 had been made. It is explicitly clear that the approach was not to ask whether a "non-Part 36 "contractual" offer" had been made and so, if the answer was negative, by deduction to conclude it must therefore have been a Part 36 offer. To the contrary, the same method was justified, whatever the potentially differing ends.

On this analysis, I see no difference in a methodology that analyses the effect of common law mistake on a Part 36 offer when the recipient does accept that the offeror

did not intend to be bound owing to mistake. It is simply the application of a different contractual rule and effect but still equally compatible to the context of Part 36.

21. In *Ho v Adelkun*, there was no issue that a Part 36 offer had been made but court had to consider whether it intended to pay "conventional" costs and so displace the fixed costs regime that would otherwise apply. In first assessing whether the defendant had offered to pay costs on a "conventional" rather than fixed basis ["Issue 1"], the Court of Appeal was satisfied that the Part 36 offer should be subject to an objective test as to meaning:

"26. Issue 1 turns on the correct interpretation of the offer letter of 19 April 2017. That involves assessment of the "objective meaning of the language" (to quote Lord Hodge in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173 , at para 10) or, in the words of Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912, "ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract".

Newey LJ listed various reasons why the court was entitled to take into account in its interpretation of the offer the inherent improbability that a reasonable recipient of the letter would have believed the offeror intended to offer something that would ordinarily be unexpected and irregular:

"32. Fifthly, it is inherently improbable, as a reasonable recipient of the April 19 letter should have appreciated, that the appellant intended to offer conventional rather than fixed costs. The fixed costs regime could be expected to be considerably more favourable to the appellant than conventional costs and, on the face of it, the appellant would be vulnerable to the latter as regards costs to date only if a court were persuaded that there were "exceptional circumstances" warranting an award of extra costs under CPR 45.29J or that there should be a direction disapplying the fixed costs regime retrospectively under CPR 46.13 following re-allocation to the multi-track pursuant to CPR 26.10 . None of this was obviously inevitable and it is improbable that the appellant would have been willing to concede the higher costs in her offer".

22. The ascertainment and relevance of improbability when interpreting the meaning of a Part 36 offer seems to me to be extremely close, if not contiguous, to the same consideration as an approach to contractual mistake. I remind myself that before the Defendant's concession discussed at Para 5 above, the Defendant (presumably) would have sought to make submissions as to the plausibility of the Claimant's offer objectively seeming to have been intended as far as the Defendant's solicitor was concerned. Thus, if it had suited, to have applied a common law methodology if it had stood a prospect of success. The Defendant's subsequent concession does not, in my view, negate or displace the obvious commonality of approach derived from the cases of *Rosario* and *Ho*: that if a Part 36 offer is objectively implausible or unsustainable on a particular basis from a recipient's viewpoint, that stands capable of recognition by the court irrespective whether the ensuing consequence is that Part 36 costs apply

(*Rosario*), the Fixed Costs regime applies (*Ho*) or, as the Claimant submits in this case, the offer is deemed ineffective owing to the doctrine of mistake.

23. The Court of Appeal in *Flynn v Scougall* [2004] EWCA Civ 873 had to consider a Part 36 offer under the previous regime of monies being paid into court. The claimant had sought to accept a payment into court knowingly at a time when the defendant was applying for permission to reduce the payment owing to less favourable medical evidence having arisen. The claimant's acceptance was within 21 days of the offer and before the hearing of the defendant's application for permission to reduce it. On this basis, the claimant maintained that, according to the provisions of Part 36, he was entirely entitled to do so irrespective of his knowledge of the cross-application.

    The court acknowledged that the Rules in Part 36 did "not spell out" what should happen when conflicting wishes arose within the 21 days of an offer having been made but was satisfied that the construction and interpretation of Part 36 was accordingly subject to the overriding objective:

    "10. The first issue in this appeal turns on the proper construction of CPR Part 36. Part 36 must be looked at in the light of the overriding objective in Part 1 . The rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly: rule 1.1(1). The court must seek to give effect to the overriding objective when it exercises any power given to it by the rules or when it interprets any rule: rule 1.2 . The parties are required to help the court to further the overriding objective: rule 1.3."

24. The Court of Appeal's acknowledgment of the application of the Overriding Objective to the construction of Part 36 in *Flynn* provides yet further illustration that Part 36 is not quite as hermetically sealed a process as the Defendant submits, at least not for the purposes of the facts on the Claimant's Application.

    Conclusion

25. I am satisfied that the doctrine of common law mistake can apply to a Part 36 offer in circumstances where a clear and obvious mistake has been made and this is appreciated by the Part 36 offeree at the point of acceptance. Authority is entirely in support with the application of the doctrine. Nothing about Part 36 being a self-contained code excludes it. On the particular facts of this case, it is entirely compatible with a procedural code that is intended to have clear and binding effect but not at the expense of obvious injustice and the Overriding Objective still has application.

    On the facts of this case, I agree with the Claimant's submission that the Overriding Objective is entirely consistent with the merits of her Application and it should be granted. Conversely, the Overriding Objective provides little support for the Defendant's position once mistake is accepted as in issue. Indeed, it is difficult to think how the Overriding Objective would support the Defendant's position at all. Plainly, "saving expense" [r.1.1(2)(b)] does not have as its primary aim the substantial reduction

of a party's liability for damages owing to the mistake of another "of a kind which in law would render the agreement void".

Ancillary matters

26. A collateral issue between the parties is whether the purported compromise bound only the Claimant in her own right rather than also in her representative capacity. The Defendant maintains that the agreement should have been interpreted as only concerning Lorraine O'Grady, such that the other claims can continue.

    On the basis of my decision that no binding agreement arose, it seems unnecessary to resolve this contention. No settlement arose in respect of any claim(s). However, the Claimant's submissions about the interpretation of the original Letter of Claim (that the claim was being pursued on behalf of the Estate and dependant**s**) and the requirement of the Fatal Accidents Act 1976 that only one action shall lie for and in respect of the same subject matter of complaint would have had considerable force had it been necessary to decide.

27. Similarly, it is no longer necessary to resolve the conundrum explored at the November hearing that, if the Claimant had been bound by her offer and as included the claim of her granddaughter Lottie then, if she were not to see the claim simply held perpetually in suspense, to conclude matters she would have been obliged to seek the approval of the court pursuant to CPR 21.10 despite not actually intended such a compromise. Mr Wilkinson's position in this event was that the court could revisit the appropriateness of the compromise as part of its jurisdiction under Part 21, such jurisdiction being paramount to any intended compromise arising under Part 36 : see *Drinkall v Whitwood* [2004] 1 WLR.

    I agree with that and, for what it is worth, comment that it seems unlikely a court on approval would be persuaded to uphold an agreement that, first, would only have been brought before the court reluctantly by a Litigation Friend who felt bound by an offer made by mistake and, secondly, an agreement that on its face bore no relation to the merits of the case on liability. Such principles would have preceded by some margin arithmetical comparisons of what financial difference it might have made to Lottie's claim that, it has to be said, is not the largest dependency claim within the action.

28. I invite the parties to seek to agree costs on the Application. I anticipate the Defendant will argue that the Claimant was always obliged to make this Application, given the way the offer arose. Conversely, I follow the arguments already featured in Mr Wilkinson's skeleton argument that the position adopted by the Defendant in the initial stages and the course the Application accordingly had to take could have been different.

    If a hearing on costs is required, I ask that dates and time estimates are e-mailed to my clerk.