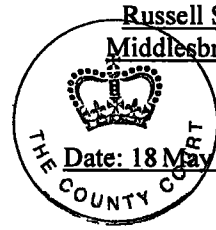
Claim No C51 YJ 790

IN THE COUNTY COURT AT MIDDLESBROUGH

Teesside Combined Court Centre
Russell Street
Middlesbrough



Date: 18 May 2018

Before :

HIS HONOUR JUDGE MARK GARGAN

Between:

Lee Hogg

Claimant/Appellant

-and-

Louise Newton

Defendant/Respondent

Guy Vickers (instructed by True Solicitors LLP) for **the Claimant**

Andrew Hogan (instructed by DAC Beachcroft Claims Limited) for **Defendant**

Approved Judgment

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

JUDGMENT

(1) Introduction

1. I shall refer to the parties as claimant and defendant.

2. This is the claimant's appeal from the order of District Judge Read dated 21 November 2016 in which he: (i) declared that the litigation had settled as the defendant had accepted the claimant's part 36 offer dated 12 February 2013; (ii) stayed the claim; and (iii) ordered the claimant to pay the defendant's costs post-acceptance of that offer.

3. The procedural history of the appeal has not been straightforward. Any appellant's notice was due to be filed at Teesside Combined Court by no later than 12 December 2016. The claimant's solicitors e-filed an appellant's notice at court on 12 December but sent the document to Newcastle upon Tyne County Court, not to Teesside. Newcastle had no jurisdiction to deal with the appeal and duly forwarded the matter to Teesside. The matter came before me in box-work on 27 January 2017. On considering the papers I granted permission to appeal and gave directions for an appeal hearing, not realising that the appeal had been out of time when it reached Teesside.

4. For reasons that are not clear, the court then sent out a notice of hearing stating that "The Permission to Appeal Hearing" would take place on 11 August 2017. When the matter came before the court on 11 August there was no appeal bundle, the transcript of the district judge's judgment had not been obtained and it became apparent that the claimant required an extension of time for filing and serving the appeal notice. In the circumstances, I adjourned the matter and gave further directions in respect of any application the claimant intended to make for an extension of time for filing and serving the appeal notice and for dealing with permission to appeal and any subsequent appeal.

5. On 27 October 2017, the claimant applied for an order granting: (i) a retrospective extension of time to file his Appeal Notice and Grounds of Appeal; and (ii) a similar extension for the service of his Appeal Notice and Grounds of Appeal on the defendant.

6. On 21 December 2017, the parties signed a draft consent order agreeing that the claimant be granted a retrospective extension of time: (i) until 27 October 2017 to file his Appeal Notice and Grounds of Appeal; and (ii) until 16 January 2017 to serve his Appeal Notice and Grounds of Appeal on the defendant. The claimant agreed to pay the defendant's reasonable costs of the application, to be assessed in default of agreement. The parties have now agreed the sum due by way of costs.

7. At the start of the hearing before me on 12th January 2018 I approved the terms of that draft Consent Order.

8. I then informed the parties that I would hear the application for permission to appeal and the substantive appeal together. Having heard counsel for both parties, Mr Vickers for the claimant and Mr Hogan for the defendant (who both appeared before the District Judge), I reserved judgment.

9. Further procedural problems arose after I reserved judgment. I explain these problems in Section 10 of this judgment as they are more easily understood once the full context is apparent.

(2) Background

10. The claim arises out of a road traffic accident which occurred on 13 March 2012. The claimant's case was that he was parked outside the shops on Springbank Road in Hull when the defendant's car collided with the front offside of his stationary vehicle. The claimant sustained a modest whiplash injury and his vehicle was damaged.

11. The claimant instructed Hilary Meredith solicitors ("HM"). On 8 May 2012, HM submitted a claim notification form (CNF) pursuant to the Protocol for Low Value Personal Injury Claims in Road Traffic Accidents. The CNF indicated that: (i) the claimant had sustained a soft tissue whiplash injury "to his neck, lower back and knee"; (ii) his vehicle had suffered damage; (iii) he had required physiotherapy; and (iv) he had hired a car through Accident Exchange Ltd from 16 March 2012 and that the hire would continue until he "gets his own car back". It is not clear whether the defendant failed to respond to the CNF or replied explaining that liability was an issue. In any event the claim "dropped out" of the portal.

12. The next step, and the most significant step for the purposes of this appeal, was for HM to send a letter to the defendant's insurers, Ageas, dated 12 February 2013. The letter identified the respective parties, the defendant's insurance policy number and the date of the accident. It then stated:

> Please find enclosed copy medical report dated 4 December 2012 prepared by Mr Jonathan Page together with our client's schedule of special damages
>
> We make a part 36 offer to you to settle the whole of our client's claim
>
> Our client will accept the sum of £1,600 in full and final settlement of this claim. This offer is net of any counterclaim. This figure is inclusive of interest, but exclusive of our costs. In addition, our client will require you to pay any monies repayable to the DWP as a result of this claim.
>
> You have 21 days from receipt of this letter to respond to this offer. If you do not agree to settlement upon this basis and our client subsequently recovers an equal or greater amount (at trial or otherwise), we will seek the full sanctions available against you under part 36 of the CPR.
>
> Yours faithfully

13. In a reply dated 8 March 2013, Ageas pointed out that liability was denied and stated:

> To narrow the issues we value your clients claim at £1,300 bearing in mind this is a six-week injury. However, as liability is denied we have no offers to make.

14. On 28 July 2013, Ageas made a part 36 offer in respect of liability only, offering to accept a 50-50 apportionment.

15. On 19 March 2014 Ageas made a further part 36 offer of £600 in full and final settlement of the claim. (It is not clear why Ageas offered £600 rather than £650 given that it had valued the claim at £1,300 in previous correspondence and had already offered a 50-50 split on liability).

16. In a letter dated 26 March 2014, HM stated:

> Our client accepts the offer of £650 net of liability (£1,300 gross) which is conditional upon payment within 14 days. We confirm that this acceptance is made in relation to our client's personal injury only and does not include any other issues arising out of the above accident. Settlement is also conditional on your payment of any sums payable to the CRU, payment of costs and consent to detailed assessment failing agreement.

17. On 3 April 2014 Ageas sent a cheque for £650 to HM expressed to be:

> ... in full and final settlement of all claims against our insured. Payment is made without prejudice to the question of liability ...

18. On 1 March 2016 the claimant, then represented by True Solicitors LLP (True), issued proceedings claiming credit hire charges of over £120,000 together with miscellaneous expenses arising out of the damage to his vehicle (to which I shall refer collectively as "the credit hire claim"). Ageas instructed DAC Beachcroft Claims Ltd (DAC Beachcroft) as its solicitors and they filed a defence dated 1 April 2016.

19. By letter dated 15 July 2016 DAC Beachcroft purported to accept the claimant's part 36 offer contained in the letter from HM dated 12 February 2013. DAC Beachcroft's letter stated:

> We are pleased to advise that our clients have accepted your client's part 36 offer dated 12 February 2013 and served on our client on 14 February 2013 in respect of the whole of the claim in the sum of £1,600. We confirm we have today filed a copy of this letter with the court and requested the settlement cheque from our clients. As our client has already made an interim payment towards your client's claim in respect of the personal injury claim of £650, we can confirm that the net sum of the cheque will be £950.
>
> Please let us have details of your profit costs together with a short breakdown detailing number of letters written; telephone calls; time spent other than as above. Please also let us have a schedule of disbursements together with copy fee notes/invoices where appropriate.

20. On 21 July 2016 DAC Beachcroft sent a cheque for £950 "in full and final settlement of your client's claim". The claimant's then solicitors, True, reserved their position and the parties agreed that the cheque could be banked without prejudice to any argument as to settlement.

21. On 4 August 2016 HM wrote to Ageas stating:

> We have been notified by Accident Exchange that you are purporting to accept the offer made by ourselves on 12 February 2013.
>
> We note that we have not received written notice of acceptance in accordance with part 36.11 (1).
>
> For the avoidance of doubt the offer dated 12 February 2013 is withdrawn forthwith.

22. Although HM were purporting to act for the claimant, Mr Vickers points out that HM had been instructed only in relation to the personal injury claim which had determined two years earlier with the credit hire being pursued by True. In the circumstances, Mr Vickers asserts that HM had no authority to send the letter of 4th August 2016.

(3) The position before the District Judge

23. Mr Vickers' skeleton argument before the District Judge was drafted on the basis that the letter of 12 February 2013 was a part 36 offer. Further, Mr Vickers opened his submissions before the District Judge by referring to the letter dated 12th February 2013 as a Part 36 offer, stating:

> No, and in fact I accept that if this Part 36 offer-if the terms of this Part 36 offer relate to the credit hire claim as well as the claim for special damages made in the Part 36 offer and the claim for general damages based on the medical report, then that Part 36 offer probably remained open for acceptance although there is a wrinkle in this case ...

See [80] of the Appeal Bundle.

24. Mr Vickers' principal argument before the District Judge was that, properly construed, the part 36 offer amounted to an offer to settle only the personal injury element of any claim arising out of the accident. Therefore, the offer did not include the credit hire claim and could not be accepted in satisfaction of it.

25. Somewhat surprisingly, Mr Vickers' skeleton argument also asserted that the part 36 offer did not include the £75.20p damages claimed as consequential upon the personal injury, arguing that there was still a residual claim for the £75.20p. Therefore, on paper, Mr Vickers argued that only the claim for damages for pain, suffering and loss of amenity had been resolved by the compromise in 2014 and that in 2016 the defendant had purportedly accepted an obligation to pay further £950 to settle the remaining special damage claim of just £75.20. However, during his oral submissions before the District Judge, Mr Vickers appeared to accept that the part 36 offer should have been construed as including the miscellaneous expenses consequent upon the injury but **not** any other aspects of the potential claim which were not expressly mentioned in the letter.

26. Mr Vickers relied upon **Joyce v West Bus Coach Services Ltd [2012] 3 Costs L. R. 540**, as authority for the proposition that a part 36 offer lapses when a claim is finally disposed of, whether by settlement or dismissal. Mr Vickers argued that, by analogy, the agreement reached in 2014 was sufficient to cause the claimant's part 36 offer to lapse.

27. Mr Hogan argued that the phrase "*the whole of our client's claim*" must be taken to mean all claims arising out of the road traffic accident. In his skeleton argument, Mr Hogan spent considerable time addressing the extent to which the post-offer documents were admissible as an aid to construction. He contended that the whole of the claim had not been compromised and that a part 36 offer remained capable of acceptance until it was withdrawn and, as the offer dated 12th February 2013 not been withdrawn before, it had been accepted by the defendant's letter dated 15 July 2016. Mr Hogan also noted that the claimant had not sought to put forward any argument based upon unilateral mistake.

28. In §11 of his careful judgment, District Judge Read recorded the parties' agreement that:
    28.1 Pursuant to **Gibbon v Manchester City Council [2010] 1 WLR 2081,** part 36 is a self-contained statutory code and common law rules should only be imported to assist *"where it is essentially obvious and necessary to do so"*;
    28.2 It is legitimate for the court to borrow from the canons of contractual construction to construe a part 36 arrangement *"where it is necessary to ascertain what the terms of the compromise were, and construing the phrase "the whole of our client's claim" in this case requires that"*.

29. The District Judge accepted that he had to take into account the principles of construction identified in:
    29.1 the speech of Lord Hoffmann in the decision of the House of Lords in **ICS Ltd v West Bromwich Building Society**; and
    29.2 the speech of Lord Newman in the decision of the Supreme Court in **Arnold v Britton**.

30. District Judge Read set out the basis of his decision in §15 to §20 of his judgment where he said:

> 15.
> I accept the defendant's argument that the pre-acceptance correspondence is inadmissible here as an aid to construction. In oral argument in fact counsel for the defendant put his case in a slightly different way by means of, if you like, a "route one" alternative. Put simply "the whole of our client's claim" means just that; and how else would it be possible to construe it as meaning anything other than "all claims made within these proceedings, the course of this correspondence", in other words including the credit hire claim.
>
> 16.
> In the reformulation of principle the matrix of fact is key to the court's conclusions. It was said by the defendant that the claim notification form was significant. The Claimant said that was really more just an opening salvo, a first move, an opening gambit in negotiations; the start of the "dance", if you like, towards settlement. However, I must beg to differ. It establishes both that there was a potential claim for credit hire and also that the solicitors Hilary Meredith were well aware of that fact, had deposed as much through their client's statement of truth and it was, therefore, fairly and squarely comprised within the claim.
>
> 17.
> Credit hire claims do-I think it is something I can take judicial notice of-sometimes have a tendency to disappear in the pre-or post-litigation course of proceedings, without trace. Pausing there to muse on this for a moment; no wonder, therefore that the appellate courts have been keen to stress that pre-acceptance, pre-contract

negotiations and correspondence are inadmissible. There may, of course, be good reasons tactically for a party's silence concerning a particular aspect of its claim. In this case have formed the view that if it wished to maintain the credit hire claim it was up to the claimant's representative to have reserved, and expressly reserved, its position on that.

18.
I accept the defendant's case that the other documents within counsel for the claimants, Mr Vickers's, "four corners" of the offer letter documents which simply have not been provided before, by which I mean Mr Page, the medical expert's report, and the £75.20 schedule of incidental expenses. They do not really have any relevance further than that. There is a lack of specificity in the terms in which that offer was made that was capable of reducing what acceptance would bind the accepted to.

19.
I bear in mind that the offer was made by solicitor's firm. One as a litigant, or as an opponent to a litigant, is entitled to assume they are familiar with the terminology and working of part 36, in whatever form it took at a given time, and the mechanism by which claims may be settled pre-or post-issue of litigation.

20.
It follows, therefore, for those reasons, whether one takes the very simple (as I termed it) "route one" route; that it means what it says; or whether one adopts the approach to construction of Lords Hoffman and Newman. The part 36 offer of 2013 did offer to settle the whole of the claim, including the credit hire claim, and when it was accepted by the defendant this year it had the effect of valid acceptance and therefore, compromise the entirety of the claim and there should be a declaration to that effect.

(4) The Grounds of Appeal and the Respondent's Notice

31. Mr Vickers put forward three grounds of appeal in his finalised skeleton argument and asserted that the judge was wrong because:

(a)
The letter dated 12 February 2013 was not a part 36 offer and, thus, had lapsed after a reasonable time and/or when the respondent ("R") made a counter-offer on 9 March 2013. It was not open for acceptance when R purported, by her solicitors, to accept it almost 3½ years later;

(b)
If the letter dated 12 February 2013 was a part 36 offer, the judge was wrong to find it remained open for acceptance after the personal injury claim, which also arose out of the said accident, had been compromised in March/April 2014; and/or

(c)
If the letter dated 12 February 2013 was a part 36 offer, the judge was wrong to find that the words "the whole claim" in the letter dated 12th February 2013 meant both the claim consequent upon damage to property and the personal injury claim. The judge should have found that, on its true construction, the phrase "the whole claim" meant the whole of the claim brought by the claimant in February 2013, i.e. the personal injury claim only.

32. The defendant supported the decision of the District Judge but, by a Respondent's Notice, argued that, whilst a contract is to be construed at the time of agreement, a part 36 offer

should be construed at the point in time at which the offer is made, in the light of the known context of the dispute at that time.

(5) The defendant's argument

33. The point raised in the Respondent's Notice can be dealt with very shortly.

34. Mr Vickers conceded, correctly in my view, that a part 36 offer should be construed at the time it is made.

(6) Dealing with the appeal generally

35. Pursuant to CPR 52.21(1):

> Every appeal will be limited to a review of the decision of the lower court unless:
>
> (a) ....; or
>
> (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a rehearing.

36. Pursuant to CPR 52.21(3) the Appeal Court will allow an appeal where the decision of the lower court was:

> (a) wrong; or
>
> (b) unjust because of a serious procedural or other irregularities in the proceedings of the lower court.

As neither party suggests that there has been any serious procedural or other irregularity, I must decide the decision of the lower court was "wrong".

37. **Ground 1:** As the claimant did not pursue this argument before the District Judge there is no question of reviewing the District Judge's approach to this issue. I must first decide whether the claimant should be allowed to pursue the argument on appeal. If so, I must exercise my own judgment to determine whether the letter was a part 36 offer. If I find that the letter was a part 36 offer then Ground 1 adds nothing to grounds 2 and 3. If the letter was not a part 36 offer it is agreed that the appeal must succeed on the basis that any purely contractual offer was deemed to be withdrawn because of the delay in acceptance and/or because it had lapsed once the defendant rejected it and made a counter-offer.

38. **Ground 2:** the claimant contends that, by operation of law or by implication, the offer was no longer available for acceptance after the compromise in 2014. The factual matrix was agreed. Therefore, in my judgment, this raises a question of law and I must decide whether the District Judge applied the law correctly.

39. **Ground 3:** I must review the approach taken by the District Judge when construing the letter.

40. When conducting such a review I must bear in mind the following guidance from May LJ in **Dupont de Nemours v ST Dupont [2006] 1 WLR 2793** set out in the **White Book §52.21.2:**

> A review here is not to be equated with judicial review. It is closely akin to, although not conceptually identical with, the scope of an appeal to the Court of Appeal under the former RSC. The review will engage the merits of the appeal. It will accord appropriate respect to the decision of the lower court. Appropriate respect will be tempered by the nature of the lower court and its decision making process. There will also be a spectrum of appropriate respect depending on the nature of the decision of the lower court which is challenged. At one end of the spectrum will be decisions of primary fact reached after an evaluation of oral evidence where credibility is in issue and purely discretionary decisions. Further along the spectrum will be multi-factorial decisions often dependent on inferences and an analysis of documentary material.

41. This is not a case where the District Judge heard oral evidence and made findings of primary fact. Nor is it akin to the exercise of a discretion. In my judgment, the District Judge was making a multi-factorial decision based on inferences and the analysis of documentary material, all of which is available to the appeal court. Therefore, whilst I must pay due regard to the decision of the District Judge, the appeal court is in an equally good position to determine the proper construction of the document.

42. I shall deal with the claimant's arguments in reverse order. Further, when dealing with Grounds 2 and 3, I shall assume that the letter of 12th February 2013 was a Pt. 36 offer.

(7) Ground 3: Construing "the whole claim"

43. I have been referred to and read the passages in **ICS Ltd v West Bromwich Building Society** and **Arnold v Britton** identified above. I do not propose to set them out in full in my judgment. However, I consider the following passages from **Arnold v Britton** particularly helpful:

> 17.
> ... the exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case that meaning is most obviously to be gleaned from the language of the provision...;
>
> 18..
> ... When it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it ...

44. In my judgment, in the absence of some special factor, the natural meaning that should be given to the phrase "the whole of our client's claim" in the context of a claim arising from a road traffic accident is that it encompasses all potential claims for damages arising out of the accident.

45. Mr Vickers argued that three factors should lead the court to adopt a different construction:
    45.1 the letter enclosed the medical report and a schedule of special damages limited to those consequent upon the injury, thereby showing that the only "claim" being considered was that arising from the personal injury;
    45.2 the absence of any reference in the letter to the credit hire claim identified in the CNF; and
    45.3 the way in which Ageas used the phrase "the whole claim" in post offer correspondence when settling the personal injury claim.

46. I agree with the approach adopted by District Judge Read in §18 of his judgment. The medical report and the schedule were being used to support the proposed settlement figure. They do not qualify or limit the reference to "the whole of our client's claim". It would have been easy for HM expressly to limit the Part 36 offer to the personal injury element of the claim. However, they did not do so.

47. Further, I agree with District Judge Read that the CNF forms part of the factual matrix and shows that both HM and Ageas knew that there was a potential claim for credit hire. I do not consider that the potential existence of such a claim when the CNF was completed in 2012 should have lead a reasonable reader of the Pt 36 offer in 2013 to understand the clear words "the whole of our client's claim" as meaning "only the personal injury element of our client's claim". As District Judge Read pointed out, claims for credit hire can "disappear" or be abandoned for many different reasons. If HM wanted to exclude the credit hire claim from the offer they could, and should, have done so expressly.

48. Having conceded (rightly) that the Part 36 offer should be construed at the time it was made, I do not see how Mr Vickers can gain any assistance from the 2014 correspondence. As I understand his point, Mr Vickers argued that the Defendant used the phrase, "the whole of the claim" to refer to the personal injury element of the claim in 2014 and therefore: (i) this shows that the phrase was capable of referring to the personal injury element of the claim only; and (ii) therefore, that meaning that should have been attached to the phrase in the Part 36 offer.

49. In my judgment, the post-offer correspondence cannot be used to construe the terms of the Part 36 offer which must be determined at the time it was made. Further, even if it is permissible to refer to it, I do not consider that the 2014 correspondence assists the claimant. The starting point is that the defendant's offer of £600 was made in respect of the "whole of" the claim. In my judgment, all this shows is that the defendant wanted to cap its liability arising out of the accident at £600.

50. In stating that *acceptance is made in relation to our client's personal injury only and does not include any other issue arising out of the above accident"* HM demonstrated that: (i) it was necessary to distinguish between a settlement of the "whole of the claim" and "just" the personal injury element of the claim; and (ii) that it was very easy to do so.

51. Ageas stated the cheque for £650 that was sent *in full and final settlement of all claims against our insured.* At its highest this shows that the defendant believed that it had settled all claims against it-presumably because no claim for credit hire had been pursued since it had been

mentioned in the CNF about 2 years earlier. It does not show that the defendant believed the phrase "the whole of our client's claim" should be construed as excluding the claim for credit hire.

52. Therefore, there is no special factor which requires (or permits) the court to construe the phrase "the whole of the claim" as referring to anything other than all claims arising out of the accident. In my judgment, District Judge Read was correct and this ground of appeal must fail.

(8) Ground 2: Does settlement of part of the claim revoke a part 36 offer

53. Given the finding that the part 36 offer was made in respect of both the personal injury claim and the credit hire claim, the claimant argues that the offer should be deemed to have been withdrawn upon settlement of the personal injury claim.

54. In support of that argument Mr Vickers referred me to: (i) **Joyce v West Bus Coach Services Ltd (above)**; and (ii) **Super Group Plc v Just Enough [2014] EWHC 3260 Comm.**

55. In **Joyce,** the claimant failed to comply with an unless order which provided that the claim would be struck out if he failed to serve a standard disclosure list together with copy documents by 10 September 2010. After the deadline, the defendant wrote to the court inviting it to strike out the claim. On 17 September 2010, before the court had made any further order, the claimant purported to accept the defendant's part 36 offer which had been made over a year earlier.

56. The claimant relied upon:

56.1 CPR 36.9(2) which provides:

> A part 36 offer may be accepted at any time (whether or not the offeree has subsequently made a different offer) unless the offeror serves notice of withdrawal on the offeree;

and

56.2 CPR 36.9(5) which provides:

> Unless the parties agree a part 36 offer may not be accepted after the end of the trial but before judgment is handed down.

57. In **Joyce** the claimant argued that a part 36 offer remains open for acceptance unless: (i) it has been withdrawn in writing; or (ii) there has been a trial and judgment is awaited-in which circumstances the offer can be accepted only with the agreement of the parties; or (iii) judgment has been given.

58. The defendant relied upon part 36.11(1) which deals with the acceptance of a part 36 offer and provides:

> If a part 36 offer is accepted, the claim will be stayed

The defendant argued that this provision was predicated upon the basis that there was an extant claim to be stayed and that in the absence of such a claim the part 36 offer could not be accepted.

59. **Parker J** held that the claim had automatically been struck out on 10 September 2010 and that:

59.1 **§34:**

> ... The reason why the dismissal of the claim or entry of judgment precludes the acceptance of a part 36 offer is that on dismissal or entry of judgment the claim is then, to all intents and purposes, at an end. But that is also the position where a statement of case or claim has been struck out under an "unless" order ...
>
> Therefore, as there was no extant claim the part 36 offer could not be accepted.

59.2 allowing a claimant who had breached an unless order to accept a part 36 offer was likely to militate against, rather than promote, the overriding objective.

60. In **Super Group** the claimant brought a claim for damages and the defendant counterclaimed. In November 2013, the defendant made a part 36 offer to accept £33,000 in full and final settlement of the claim and counterclaim. Proceedings continued for about 18 months during which the defendant became increasingly confident that the claimant's claim was spurious and that it would succeed in its counterclaim. In May 2014, the defendant said it would only agree to the proceedings being brought to an end if it was paid £160,000 in full and final settlement of the whole action. Two days after this offer was made the claimant discontinued its claim. A week later the claimant purported to accept the part 36 offer from November 2013 and argued that the counterclaim was stayed and that its liability was limited to £33,000.

61. Flaux J held that the November 2013 part 36 offer had been withdrawn in writing and could no longer be accepted. However, he went on to state (obiter):

> **25.**
> Given my very firm conclusion about those matters, it is not strictly necessary to deal with the effect of the notice of discontinuance. The rules do not deal with this matter expressly. Ms Bombas submits that, even though the claim had come to an end by virtue of the notice of discontinuance, the counterclaim was still extant and that therefore it was still open to the Claimant to accept the Part 36 offer if it had not been withdrawn as I found it was by the letter of 25 April. It seems to me that the obvious difficulty in that argument is that although the Part 36 offer sought to (if I may use the word colloquially) rubbish the claim and give it no credit whatsoever, the fact is that the Part 36 offer was an offer to settle both the claim and the counterclaim and it seems to me that although the rules do not deal with the matter expressly, they contemplate that Part 36 offers are made in respect of proceedings which are extant and if you make a Part 36 offer in respect of a claim and the counterclaim, then it seems to me it is on the basis that the claim and the counterclaim remain extant. Otherwise in effect, if Ms Bombas were right, her clients would be in a position where they could accept an offer effectively on different terms from the terms on which it was being offered because it was being offered on the basis of a claim and a counterclaim being extant, but the position is that after the notice of discontinuance was served only the counterclaim was extant and in those circumstances it seems to me that it was not open to the Claimant to seek to accept the offer.

> 26.
> As I say, the matter is not really dealt with in the rules, but it does seem to me that the conclusion I have reached on that point, which is of course wholly obiter for present purposes, is consistent with paragraphs 33 and 34 of the judgment of Kenneth Parker J in Joyce v West Bus Coach Services Ltd [2012] EWHC 404 QB, but as I say it is not strictly necessary to decide that point.

62. Mr Vickers, argues that the personal injury claim was no longer extant when the defendant purported to accept the part 36 offer and therefore, by analogy to the reasoning of Flaux J in **Super Group**, it was no longer open to the defendant to accept the part 36 offer.

63. Mr Hogan argues that the claim arising out of the road traffic accident remained "extant" when the offer was accepted as the claimant had issued proceedings for the credit hire claim. In the circumstances, he argues that the offer could only be withdrawn in writing pursuant to CPR 36.11(2).

64. The point was raised, but not fully developed, before the District Judge who does not appear to have dealt with this point in any detail in his judgment. In the circumstances, I consider that I must apply my own judgment to the issue.

65. In my judgment, the Part 36 offer remained open at the time it was accepted by the Defendant. I reach this conclusion because:
    - 65.1 It had not been withdrawn in writing as required by CPR part 36.9(2);
    - 65.2 In **Super Group** the court was dealing with an offer to compromise both claim and counterclaim. When the claimant in **Super Group** purported to accept the offer the entirety of the claim had been withdrawn and was no longer extant. In this case, the credit hire claim formed part of a single overall claim arising out of the accident which had not been wholly resolved and was still "extant";
    - 65.3 Further, I regard the conclusion that the offer remained open as more consistent with the overriding objective;
    - 65.4 In order to illustrate my point I develop the hypothetical example I raised during argument as follows, say:
        - .1 a claimant in a building dispute raised 10 separate heads of damage and claimed a total of £10 million, made up of £1 million for the first 9 issues and £9 million for the final head claim;
        - .2 the defendant considered itself vulnerable in respect of the first 9 heads of claim but regarded the remaining claim as wholly excessive;
        - .3 the defendant made a part 36 offer to pay £1 million in respect of the whole claim;
        - .4 12 months later, after considerable costs had been incurred, the defendant agreed to pay the claimant £750,000 in respect of issues 1 to 9 with issue 10 remaining live;
    - 65.5 On the claimant's argument, such an agreement would automatically deprive the Defendant of the benefit of its part 36 offer and expose it to costs if the claimant recovered any damages in respect of the outstanding head of claim. On the defendant's argument, the original offer remains in place unless the defendant decides to withdraw it. On this basis, the defendant would continue to offer £1 million in respect of the entire claim (provided it wished to do so-and, if it did not, it

could expressly withdraw the offer). In practice, this would mean that the defendant had the protection of a continuing part 36 offer of £250,000 in respect of the outstanding issue. In my judgment, the latter outcome serves to promote settlement, the saving of expense and promotes a just outcome.

66. Therefore, I reject the claimant's argument under Ground 2.

(9) Should the claimant be granted permission to argue Ground 1

67. The defendant puts forward three separate lines of argument in support of its contention that the claimant should not be allowed to raise Ground 1 on appeal:
    67.1 the circumstances in which a party may raise a new argument on appeal generally, and, in particular, the guidance given in **Crane t/a In Digital Satellite Services v Sky In-Home Ltd [2008] EWCA Civ 978**;
    67.2 the doctrine of approbation and reprobation; and
    67.3 estoppel by convention.

68. I set out the way in which Mr Hogan developed each argument in turn.

69. Mr Hogan referred me to the following passages in the judgment of Arden LJ in **Crane**:
    69.1 At §12 of her judgment Arden LJ set out a passage from the judgment of the Privy Council in Paramount Export Ltd (in Liquidation) And New Zealand Meat Board [2004] UK PC 45:

> [46]
> ... Mr Cooke referred their Lordships to a recent observation of Lord Bingham of Cornhill in *Grobbelaar v News Group Newspapers Ltd* [2002] UKHL 40, [2002] 1 WLR 3024, 3034, para 21:
>
> "Only rarely and with extreme caution will the House permit counsel to withdraw from a concession which has formed the basis of argument and judgment in the Court of Appeal."
>
> [47]
> That is a sound policy and in deciding to allow the concession to be withdrawn, their Lordships hope they have displayed the same caution as the House did in Grobbelaar's case. If there were any possibility that the outcome could have been affected if the point had been taken earlier, that would of course have been an entirely different matter. But their Lordships consider that in this case the plaintiffs can be adequately compensated by a suitable order for costs."

    69.2 At §18 where Arden LJ set out a passage from the judgment of May LJ in **Jones v MBNA**:

> 52.
> Civil trials are conducted on the basis that the court decides the factual and legal issues which the parties bring before the court. Normally each party should bring before the court the whole relevant case that he wishes to advance. He may choose to confine his claim or defence to some only of the theoretical ways in which the case might be put. If he does so, the court will decide the issues which are raised and normally will not decide issues which are not raised. Normally a party cannot raise in subsequent proceedings claims or issues which could and should have been raised in the first proceedings. Equally, a party cannot, in my judgment, normally seek to appeal a trial judge's decision on the basis that a claim, which could have been brought before

the trial judge, but was not, would have succeeded if it had been so brought. The justice of this as a general principle is, in my view, obvious. It is not merely a matter of efficiency, expediency and cost, but of substantial justice. Parties to litigation are entitled to know where they stand. The parties are entitled, and the court requires, to know what the issues are. Upon this depends a variety of decisions, including, by the parties, what evidence to call, how much effort and money it is appropriate to invest in the case, and generally how to conduct the case; and, by the court, what case management and administrative decisions and directions to make and give, and the substantive decisions in the case itself. Litigation should be resolved once and for all, and it is not, generally speaking, just if a party who successfully contested a case advanced on one basis should be expected to face on appeal, not a challenge to the original decision, but a new case advanced on a different basis. There may be exceptional cases in which the court would not apply the general principle which I have expressed. But in my view this is not such a case."

69.3 §21 and §22:

21.
There is further useful guidance in this passage for the purposes of the present case. Peter Gibson LJ adopted the approach that, before allowing a new case to be raised on appeal, he had to be satisfied that, if the new case had been raised at trial, the other party would not have altered the way it conducted the case. Likewise, in this case, in my judgment the court has to be satisfied that SHS will not be at risk of prejudice if the new point is allowed because it might have adduced other evidence at trial, or otherwise conduct the case differently. It should consider for itself, as best it can, what factual issues are likely to be raised by the new case. Moreover, in circumstances such as the present, where there has been no disclosure relative to the new way in which the appellant seeks to put his case and virtually no opportunity to consider the matter, I do not consider that the court can reasonably expect the party against whom the amendment is sought to be made to be specific about the evidence he would have adduced had the point been raised earlier. If there is any area of doubt, the benefit of it must be given to the party against whom the amendment is sought. It is the party who should have raised the point at trial who should bear any risk of prejudice.

22.
The circumstances in which a party may seek to raise a new point on appeal are no doubt many and various, and the court will no doubt have to consider each case individually. However, the principle that permission to raise a new point should not be given lightly is likely to apply in every case, save where there is a point of law which does not involve any further evidence and which involves little variation in the case which the party has already had to meet (see *Pittalis v Grant* [1989] QB 605). (If the point succeeds, the losing party may be protected by a special order as to costs.) ...

70. Mr Hogan invites me to draw the following conclusions from the passages to which he referred me:
    70.1 I should treat the claimant's application to rely on this ground as though it were an application to withdraw a concession;
    70.2 permission to withdraw a concession should be granted *only rarely and with extreme caution*;
    70.3 I should not allow Ground 1 to be argued if there was any possibility that the outcome could have been affected if the point had been taken earlier;
    70.4 The general principle that a party cannot seek to appeal a judge's decision on the basis of an argument that was not pursued below is not merely a matter of "*efficiency,*

expediency and costs". It is founded upon a principle of "*substantial justice*" for the reasons set out by May LJ above;

70.5 This is not a change which involves *little variation* in the claimant's case but represents a 180° change in position which involves considerations not as to the interpretation and effect of the letter as a part 36 offer but as to its status as a part 36 offer in the first place;

70.6 The defendant might have taken a different course if the claimant's position had always been that the letter did not constitute a part 36 offer.

71. In support of his argument based upon the doctrine of approbation and reprobation Mr Hogan cited the decision of Mann J in **Eight Representative Claimants v MGN Ltd [2016] EWHC 855.** In that case, the defendant was arguing that the recovery of uplifts and ATE premiums in CFA cases was unlawful. However, at first instance the defendant had argued that, because they were being represented under a CFA and had the opportunity to recover the uplift, they should not be entitled to claim the additional 10% in damages available where parties were not so represented. The court agreed with that and limited the award of damages accordingly. Faced with the defendant's argument that the claimants could not recover the uplift the court observed:

> 33.
> In the circumstances Mr Millar's propositions in this application are flat contrary to the basis on which the point was dealt with at the trial of the eight decided cases, and contrary to the basis on which his client succeeded on the 10% damages point. To allow him to take and succeed on the point now, in relation to those cases, would be to allow him to approbate and reprobate in a manner which is contrary to principle. I was not treated to a lot of submissions as to precisely which form of estoppel would prevent Mr Millar taking his point, though it is plainly not issue estoppel in its strict sense. Mr Tomlinson relied on *Express Newspapers plc v News (UK) Ltd* [1990] 1 WLR 1320. That case involved a newspaper adopting opposing positions in two different pieces of litigation. Sir Nicolas Browne-Wilkinson VC said (at page 1329):
>
> "There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not entitled to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitude towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance.
>
> To apply that general doctrine to the present case is, I accept, a novel extension. But, in my judgment, the principal is one of general application and if, as I think, justice requires, there is no reason why it should not be applied in the present case."
>
> 34.
> I agree that those words can be made to apply in the present case. The way in which it works is obvious. Having relied on the availability of the recovery of CFA additional liabilities in this class of litigation, the defendant now seeks to rely on the absence of that recovery in the present application. That is a classic approbation and reprobation. It is an inconsistency which should not be allowed. An alternative way of looking at it would be to view it as an abuse of process, which in my view it is. But whichever label one chooses to give it, the present stance is one which MGN should not be allowed to adopt.

72. Mr Hogan argues that, having relied upon the letter as a part 36 offer until the personal injury damages were agreed and having accepted that the letter was a part 36 offer at all material times thereafter, including asserting that it was a part 36 offer at the hearing before District Judge Read, the claimant could not now contend that the letter failed to comply with the technical requirements necessary to constitute a part 36 offer. Mr Hogan argued that, in doing so, the claimant was seeking both to approbate and reprobate which he should not be permitted.

73. In support of his third argument, estoppel by convention, Mr Hogan relied upon **Stevensdrake Ltd v Hunt (Liquidator of Sun Bow Ltd) [2017] EWCA Civ 1173.** In **Stevensdrake** a firm of solicitors, SL, was seeking to recover its fees from SH who argued that he should only be liable for such fees to the extent that he recovered any monies from the litigation in which SL was acting. Mr Hogan relied, in particular, upon the passages at paragraphs 60 and 96 to 97 in the judgment:

> **60.**
> As summarised in *Chitty on Contracts* (32nd edition) at 4-108:
>
> "Estoppel by convention may arise where both parties to a transaction "act on assumed state of facts or law, the assumption being either shared by both or made by one and acquiesced in by the other." The parties are then precluded from denying the truth of that assumption, if it would be unjust or unconscionable (typically because the party claiming the benefit has been "materially influenced" by the common assumption) to allow them (or one of them) to go back on it."
> ...
>
> **96.**
> In any event, the injustice or unconscionability requirement of estoppel by convention focuses on the reliance placed on the convention by the party asserting the estoppel. As stated in *Chitty,* this will typically be because that party has been "materially influenced" by it. On the judge's findings, this is a case not merely of material influence but of seriously detrimental reliance. SH would otherwise have withdrawn his instructions from SL and found solicitors prepared to do the work on a recoveries only basis. In my judgment, no grounds have been shown which would justify this court to go behind the Judge's finding that it would be unjust to allow SL to depart from the shared common understanding.
>
> 97.
> For all these reasons, I would dismiss the appeal on ground 2.

74. Mr Hogan argued that both parties in this case had acted in the belief that the letter constituted a valid part 36 offer which constituted the "convention" for the purposes of his argument. Mr Hogan argued that the defendant had been materially influenced by the convention because it had been induced to accept the offer and to incur considerable costs in seeking a declaration that the claim was stayed and/or resisting the claimant's application for directions taking the claim to trial.

75. I now deal with Mr Vickers response to each of these arguments.

76. Mr Vickers argues that I should distinguish between a "material concession" and a "simple assumption". He contends that there was no formal concession that the letter was a part 36 offer. The question was never raised, as the claimant proceeded on the assumption that the

letter met the requirements of part 36. The point was not recognised rather than being expressly conceded.

77. Apart from costs, Mr Vickers argues that the defendant's position is no more prejudiced by the part 36 point being taken on appeal than if it had been taken before the District Judge. The form and content of the letter has never been in issue. Therefore, the appeal court does not require further evidence and is in an equally good position to determine whether the letter satisfies the requirements of part 36.2(2). Any potential prejudice to the defendant as a result of incurring additional costs can be met by ordering the claimant pay the costs below.

78. Mr Vickers does not accept that the claimant has approbated and reprobated. He argues that I should ignore the letter from HM in 2016 on the basis that they were not instructed to act for the claimant at that point and must have been seeking to protect their own position. Following the hearing Mr Vickers has referred me to the decision of HH Judge Behrens sitting as a judge of the High Court in **Thewlis v Groupama [2012] EWHC 3 (TCC).** The issue before HH Judge Behrens was whether the offer letter constituted a part 36 offer. Mr Vickers argues that the decision is significant in that, as here, the defendant was arguing that the claimant's letter was technically compliant with part 36 whilst the claimant was arguing that it was a contractual offer and had been withdrawn. The judge accepted the claimant's argument without suggesting that, having put the letter forward as a part 36 offer, it could not challenge its status.

79. Finally, dealing with the estoppel argument, Mr Vickers contends that there is nothing inequitable in allowing the claimant to raise the part 36 argument. An order for costs can properly compensate the defendant for any expenses incurred in relation to the earlier hearing. If anything is inequitable, argues Mr Vickers, it is allowing the defendant to accept the offer of £1,600 and thereby depriving the claimant of the opportunity to litigate its credit hire claim for £120,000.

80. I must now decide between the competing arguments.

81. I do not consider that this is a case in which the claimant has sought to approbate and reprobate. If this doctrine came in to play whenever a purported part 36 offer was made then there would be no circumstances in which a party making such an offer could successfully contend that it failed to comply with the technical requirements of the CPR. In my judgment for the doctrine of approbation/reprobation to apply to a purported part 36 offer the offeror must have either (i) argued that the relevant offer was part 36 compliant when the question was in issue or (ii) have derived some benefit from the part 36 status of the offer over and above the influence which an unaccepted part 36 offer might have on negotiations. I am fortified in this view by the absence of any such argument being raised by the defendant in **Thewlis.** Therefore, I consider that this case can be distinguished from the **MGN case** relied upon by Mr Hogan where the Defendant had not merely accepted that the claimants would be entitled to an uplift on their fees under the CFA but relied upon that to prevent the claimants recovering an additional 10% by way of damages. Having relied on the recovery of the uplift to its advantage the defendant could not then challenge the right to recover that uplift. In this case, the claimant has not argued that the letter was part 36 offer compliant

when the matter was in issue and has not derived any collateral advantage from its purported status.

82. Equally I do not consider that the doctrine of estoppel by convention has any role to play in this case. I accept that, when the offer was made, both parties believed it to be a part 36 offer. However, at the time it was accepted the claimant's representatives did not realise that it was still open for acceptance and the parties were not both acting under a common understanding at that point. Further, at the time of acceptance, the defendant must have known that the claimant did not want to settle its credit hire claim pleaded at £120,000+ for an additional £950. If the offer was part 36 compliant the defendant was entitled to take advantage of the position. However, I do not consider that there was any common understanding between the parties so as to give rise to any equity which makes it unconscionable for the claimant now to deny that the offer was part 36 compliant.

83. Therefore, I am left with the defendant's first and primary objection which relies upon the decision in **Crane**.

84. I accept Mr Vickers' argument that the court is not dealing with an application to withdraw a concession in this case. If the status of the letter had been in issue after the defendant purported to accept the offer and the claimant had expressly conceded that it was part 36 compliant, I would not have been prepared to exercise my discretion in favour of allowing that concession to be withdrawn. However, the claimant and its advisers did not address their minds to the status of the letter which they simply assumed to be a part 36 offer. Therefore, the claimant seeks to raise a new argument not one which it expressly conceded below.

85. Further, I am satisfied that the point which Mr Vickers seeks permission to argue is an argument of pure law. No further evidence is required as the letter was before the District Judge. If I allow Mr Vickers to argue his point the court must determine whether, as a matter of law, the terms of that letter are part 36 compliant.

86. Although the point was not raised below the claimant has given the defendant ample opportunity to consider the argument in advance of this hearing, as demonstrated by the impressive submissions that Mr Hogan has made in response.

87. Mr Hogan suggested that the defendant might have acted differently if the point had been taken earlier. I respectfully disagree. If the claimant had been aware of the argument about the status of the letter before the defendant purported to accept it, the offer would have been withdrawn. The time to judge whether the argument about the status of the letter would have made any difference is after purported acceptance. If the claimant had taken the point at that stage the defendant would have faced a binary choice, either (i) accept that the letter was not part 36 compliant and contest the credit hire claim on its merits; or (ii) contest the issue and seek a stay as it has done. In my judgment, the defendant would not have taken the former course. Further, if it is seriously argued that the defendant would have accepted that offer was not part 36 compliant, it would not be just to prevent the claimant taking the point at this stage, providing that the defendant is adequately compensated in costs. If the

defendant had taken the latter option it would have been in the same position as it will find itself if permission to argue Ground 1 is given, save that it will have incurred additional costs.

88. In my judgment, the defendant can be adequately protected in costs for any failure to take the point before the District Judge.

89. Therefore, although I give due regard to the need for certainty in litigation and the substantive justice in requiring a party to bring his full case before the court, I consider that I should exercise my discretion in favour of allowing the claimant to pursue Ground 1 as (i) it is a pure point of law; (ii) the defendant has had adequate opportunity to deal with the point; (iii) the defendant had not acted to his detriment on the faith of the earlier failure to raise it and (iv) the defendant can be adequately protected in costs.

(10) Events after the hearing

90. During the hearing I asked the parties if they were aware of any decided cases in which the party who had sent a letter intended and expressed to be a part 36 offer had succeeded in persuading the court that it was not a part 36 offer. Neither Counsel was able to identify such a case at the hearing.

91. However, under cover of an email dated 14 January 2018, Mr Vickers (counsel for the appellant) sent the court a copy of the judgment of HH Judge Behrens sitting as a judge of the High Court in **Thewlis v Groupama Insurance Company Limited [2012] EWHC 3 (TCC)**.

92. In the email to which the authority was attached, Mr Vickers pointed out that, in **Thewlis**, the claimant successfully argued that its own letter did not comply with part 36. Mr Vickers made no other submissions in relation to this authority.

93. Mr Hogan, did not make any comments on behalf of the Respondent at that stage.

94. I prepared a draft judgment in which I determined the approbation/reprobation argument in the appellant's favour, mentioning **Thewlis** as part of my reasoning as set out in §§77-80 above. I did not refer to **Thewlis** when deciding whether the claimant's letter amounted to a part 36 offer. I emailed my draft judgment to counsel on 26th February inviting them to point out any errors in the judgment.

95. On 27th February Mr Vickers emailed asking me to reconsider my draft judgment on the basis that **Thewlis** represented a binding authority in his favour on the question of whether the letter constituted a valid part 36 offer. Mr Hogan sent an email in response in which he argued that the decision in **Thewlis** should be distinguished.

96. Having considered the parties' submissions I directed that:

    1. The appeal shall be re-listed for a further hearing with a time estimate of 1 hour.
    2. The further hearing shall take place by telephone.

3. Counsel for both parties shall file Skeleton Arguments by no later than 4pm on 16th March 2018 which shall deal with the following questions:
   3.1 Whether the court is entitled to reconsider its decision between sending out the draft judgment and judgment being handed down;
   3.2 The impact (if any) that the decision of Thewlis v Groupama should have upon determining whether the Claimant's letter was a Part 36 offer.

97. The telephone hearing took place on 18th April 2018. I then reserved judgment so that I could send out a composite document dealing with all matters.

(11) Should I reconsider my judgment

98. It is agreed that the court has the power to recall and reconsider a judgment at any time before it is entered and perfected. The issue between the parties is whether that power should be exercised in this case.

99. At **§40.2.1.1 The White Book** states:

> In the case of *In re L (Children) (Preliminary Finding: Power to Reverse) [2013] UKSC 8; [2013] 1 W.L.R. 634 SC*, the Supreme Court held that a judge's power to recall and reconsider his or her judgment is not restricted to "exceptional circumstances". Whether a judge should exercise the discretion to recall a judgment will depend upon all the circumstances of the case. Relevant considerations include: (a) a plain mistake by the court; (b) the failure of the parties to draw the judge's attention to a plainly relevant fact or point of law; (c) the discovery of new facts after judgment was given; (d) whether any party has acted upon the judgment to his detriment (especially where this would be expected), but a carefully considered change of mind can be sufficient. In this case the question whether the judge had power to recall a judgment and whether it was rightly exercised arose, not in the context of ordinary civil proceedings, but in the context of child protection proceedings, where the judgment recalled related to a preliminary "fact-finding" hearing held before a "welfare" hearing. Although made in the context of that particular (and well-established) two-stage procedure, the court's judgment was not confined to it.

100. Mr Hogan made the following points in support of his argument that the court should not reconsider its judgment:
   100.1 The issue, namely whether the letter amounts to a part 36 offer was fully argued at the original hearing;
   100.2 A fully reasoned draft judgment has been sent to the parties;
   100.3 The claimant is not seeking to rely on a new authority decided after the hearing;
   100.4 This is the claimant's "third bite of the cherry", having not argued that that **Thewlis** was a binding authority on this issue either at the hearing or when raising the decision after the hearing;
   100.5 **Thewlis** was considered in my draft judgment;
   100.6 There were no exceptional circumstances;
   100.7 There should be finality in litigation.

101. There is considerable force in the points made by Mr Hogan. The first four observations are entirely accurate. I do not wholly accept the fifth point he raises. Although **Thewlis** was mentioned in the draft judgment, I had only considered it briefly in relation to approbation/reprobation because that was the only issue in respect of which it was raised. I also agree with Mr Hogan that, as a general principle, there should be finality in litigation.

102. However, I do not accept that the claimant must show *exceptional circumstances* before I should reconsider the judgment: see **In re L (above)**.

103. The claimant contends that **Thewlis** cannot properly be distinguished from the present case and that I am bound by it as a decision of the High Court on the same issue. Therefore, if I reach a different conclusion to that reached in **Thewlis** (as I have in my draft judgment) the claimant will inevitably succeed on appeal.

104. I accept that, as a decision of the High Court, **Thewlis** is binding on me unless it can be distinguished. I did not consider whether **Thewlis** could properly be distinguished in my draft judgment and can only determine that issue if I accept the claimant's invitation to reconsider the matter.

105. If Mr Vickers argument is correct then:
   105.1 if I do not reconsider the judgment, I would be failing to follow a binding authority a course which would inevitably give rise to a (successful) appeal;
   105.2 if I do reconsider the judgment and make such a finding I will be saving the costs of an unnecessary appeal.

106. On the other hand, if Mr Vickers' argument is wrong, there is no prejudice to the defendant from me reconsidering my judgment and the claimant will have the benefit of a reasoned rejection of what he believes to be his strongest argument.

107. In these circumstances I do not consider that it would be consistent with the overriding objective of dealing with cases justly and at proportionate cost to refuse to reconsider my judgment.

108. The following section of my judgment represents my view having reconsidered the matter in the light of the parties' further submissions.

(12) The part 36 argument

109. The relevant provision is Part 36.2(2) which provides

> (2) a Part 36 offer must:
>
> a) be in writing,
> b) state on its face that it is intended to have the consequences of section 1 of Part 36,
> c) specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with rule 36.10 if the offer is accepted,
> d) state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and if so to which part or issue, and
> e) state whether it takes into account any counter claim."

110. Both parties referred me to the decisions of the Court of Appeal in **C v D [2011] EWCA 1962** and **Shaw v Merthyr Tydfil County Borough [2014] EWCA 167**. In addition the claimant has referred me to the decision in **Thewlis**. I shall deal with the authorities in the order in which they were decided.

111. In **C v D** the defendant purported to accept the claimant's part 36 offer after the relevant period had expired. The claimant contended that that the offer was not a part 36 offer and therefore was not open for acceptance. The claimant succeeded at first instance. However, the Court of Appeal found that the offer did satisfy the requirements of Pt. 36.2. The key phrases in the text were: (i) *The offer will be open for 21 days from the date of this letter;* and (ii) the offer was *intended to have the consequences set out in* CPR Pt 36. It was common ground that the concept of the relevant period and the consequences set out in CPR Pt 36.14 were part of the structure of Part 36.

112. In his judgment, Rix LJ cited and approved the decision of the Court of Appeal in **Onay v Brown [2010] 1 Costs LR 29** where the offer stated that it was made pursuant to Part 36 and then stated *the relevant acceptance period is 21 days.* Rix LJ noted:

> 24.
> No one suggested that the stipulation of an "acceptance period" prevented the offer from being a Part 36 offer. Again, the precise point before us was not the point before the court. But in a concurring judgment Carnwath LJ said, at paras 32–33, which resonates in the context of our case:
>
> > *32.*
> > *I also agree. The moral of this story is that someone who writes a letter headed 'Part 36 offer', and which is stated as 'intended to have the consequence of that rule', should make sure that he knows what those consequences are. I agree with Goldring LJ that those consequences in a case such as this are clearly set out in rules 36.2(2) and 36.10(1). If the party writing the letter does not want those consequences to apply, he should put his offer in some other way, as is expressly permitted by rule 36.2.*
> >
> > *33.*
> > *... it seems to me important, in the interests of certainty, that, when the Part 36 jurisdiction is expressly invoked, the court should generally take that at face value, and as far as possible give effect to the consequences as envisaged by the rules."*

113. The Court of Appeal held that a time-limited offer could not be a Part 36 offer and that:

> 44.
> Therefore, the claimant's offer must be construed in the context of a Part 36 scheme which does not permit an offer within the scheme to be time-limited.

114. The claimant in **C v D** argued that the phrase *open for 21 days* meant that the offer could not be accepted thereafter and therefore was time limited. The defendant argued that this was merely a reference to the relevant period after which it might be withdrawn. Rix LJ held that the letter should be construed to give effect to the clear intention that it should be a Part 36 offer. As part of his reasoning he stated:

> 55.
> Another principle or maxim of construction which is applicable in the present circumstances is that words should be understood in such a way that the matter is effective rather than ineffective (verba ita sunt intelligenda ut res magis valeat quam pereat). If the words "open for 21 days" are given the meaning for which the claimant

contends, then the offer, intended to take effect as a Part 36 offer, fails as such. If, however, the words are given the meaning for which the defendant contends, then the intention of making a Part 36 offer is fulfilled. There are numerous instances of the application of this maxim.

115. Further, Rix LJ went on to state in §68:

> 68.
> ...Ultimately, it is important for the security of the Part 36 scheme, in countless cases, that it should be clearly understood that if a claimant wishes to make a time limited offer, in the sense that the offer is to lapse of its own accord at the end of a stipulated period, then such an offer cannot be made as a Part 36 offer; that an offer presented as a Part 36 offer and otherwise complying with its form will not readily be interpreted in a way which would prevent it from being a Part 36 offer; and that if an offeror wishes to bring his Part 36 offer to an end, so that it cannot be accepted, then he must serve a formal notice of withdrawal. It seems to me that, although the precise point raised in this appeal is new, all the jurisprudence on Part 36 cited above contributes to these conclusions.

116. Rimer LJ noted that it was important to focus judicial attention on the point that often the true sense of the words that people use can only be assessed by paying careful regard to the particular context in which they have used them: see §74. He then went on as follows:

> 74
> ...
> This is because, as he shortly afterwards explained in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co. Ltd [1997] AC 749* and *Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896* (and quoting from the Investors Compensation Scheme case, at p 913):
>
> > *"The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax ..."*
>
> 75
> In the present case, therefore, it is not of utility to consider the meaning of the offer paragraph in isolation from the context in which the offer was made. Whatever else may be in dispute, there is no dispute that the offer was intended to comply with Part 36 . It was expressly stated to be an "Offer to settle under CPR Part 36 " that was "intended to have the consequences set out in Part 36 ..." Of course, that does not mean that it did in fact comply with Part 36 and therefore must, come what may, somehow be shoehorned into the confines of its four corners: a stated bid to attain a particular goal does not also mean that the goal has been attained. The answer to the critical question still turns on how the reasonable man would read the offer. The relevance, however, of the claimant's expressed intention to make its offer a Part 36 offer is that, if there are any ambiguities in it raising a question as to whether the offer does or does not comply with the requirements of Part 36 , the reasonable man will interpret it in a way that is so compliant. That is because, objectively assessed, that is what the offeror can be taken to have intended. That is also in line with the principle of construction to which Rix LJ referred in para 55.

Rimer LJ went on to hold that in the circumstances the appropriate construction of the phrase *open for 21 days* in the letter was as a reference to the *relevant period* identified within the Rule.

117. I then turn to the decision in **Thewlis.** The starting point is the offer letter. This provided:

> We write further to the above and in one last attempt to settle this matter, we are instructed to put forward the following offer, this offer is made pursuant to Part 36 of the CPR and remains open for acceptance for a period of 21 days, from your receipt of this offer letter, thereafter it can only be accepted if we agree the liability for costs or the Court gives permission:—
>
> 1. Your client to pay our client damages in the sum of £20,000 within 21 days of the date of the letter.
> 2. Your client to pay our reasonable costs and our clients experts costs (Peter Wade Consultancy) such costs to be subject to detailed assessment if not agreed.
>
> The above mentioned offer relates to the whole of our client's claim against your client and takes into account any counterclaim they may have and is inclusive of interest.
>
> Please take your client's instructions on the above and revert to us in due course.
>
> Yours faithfully
>
> Lawsons

118. The claimant argued that the letter failed to comply with the requirements of part 36 because: (i) it failed to say on its face that it was intended to have the consequences of Part 36; and (ii) it was inconsistent with part 36 because it stated that, after 21 days, it could only be accepted if the parties agreed liability for costs or the court gave permission.

119. HH Judge Behrens held that the letter failed to comply with part 36 on both grounds.

120. Mr Vickers contends that §§26-28 of HH Judge Behrens' judgment establish that the question of compliance is not a matter of "construction" but of "form". Therefore, even though it was apparent that the claimant intended to make a part 36 offer it had not done so because it had failed to comply with the mandatory provisions of part 36 and had failed to state in the letter that it was intended to have the consequences of part 36. Further, Mr Vickers argued that a party wishing to make a part 36 offer must use precisely the terms identified in the rule and that any failure to do so prevented the offer letter being a part 36 offer.

121. I set out the material paragraphs from HH Judge Behrens' judgment below:

> 26
> Mr Smith seeks to avoid this argument in a number of ways. He says that when the letter is read as a whole it refers to Part 36 in two places – one in bold type. It was plainly intended to be a Part 36 offer. The court should follow the guidance given by Stanley Burnton LJ and resolve any ambiguity, so far as possible as complying with Part 36. In those circumstances one should ignore the last few words of the first paragraph of the offer. It is plain that the author of the letter had in mind the old provisions of Part 36 . In those circumstances a reasonable solicitor receiving the letter was entitled to interpret the letter as if it was made under the new regime.

> Whilst he accepted that that there was no express statement that the letter was intended to have the consequences of Part 36 when the letter is read as a whole it is plain that was the effect. He referred me to the heading, the other reference to Part 36, the requirement to pay the reasonable costs and the statements that the sum claimed was inclusive of interest and that it relates to the whole of the claim. All of these are features of Part 36 and thus show that the letter was intended to have the consequences set out in Part 36 .
>
> 27
> Whilst I see the force of Mr Smith's submissions I cannot accept them. In my view rule 36.2 means what it says. As Mr Buck pointed out it uses the word "must". Furthermore, both Underhill J and Akenhead J have treated failures to comply with rule 36.2 as fatal and I see no reason not to follow their approach. Mr Smith attempted to distinguish both of these decisions. He pointed out that the failure in Huntley related to a different provision. To my mind that is a distinction without a difference. To my mind what is important is that Underhill J regarded the defect as technical yet he still held that the offer was not a Part 36 offer. It was for that reason he had to exercise his discretion under CPR 44.3.4(c) .
>
> 28
> Mr Smith submitted that Carillon could not stand with the decision in C v D which is not referred to in the judgment. With respect I cannot agree. C v D is concerned with the interpretation of the offer. Carillon is concerned with whether the failure to comply with rule 36.2 means that the offer is not a Part 36 offer. To my mind there is considerable force in the observations in paragraph 15 of Akenhead J's judgment. It is also by no means clear that the Claimant did intend the letter to have the consequences of the new Part 36 . The final sentence of the first paragraph is inconsistent with Part 36 . Furthermore whilst the letter refers to some of the consequences of Part 36 it does not refer to them all. It is not without significance that in paragraph 68 of his judgment in C v D Moore-Bick LJ was careful to point out that an offer presented as a Part 36 offer must "otherwise comply with its form" . In my view the letter of 24th September 2008 does not comply with rule 36.2 and is not therefore an offer within Part 36 .

122. Mr Vickers argued that the decision in **Shaw v Merthyr Tydfil** provided further support for his argument. In **Shaw** the offer:
    122.1 was headed "Part 36 Offer" but did not refer to part 36 in the text;
    122.2 stated that it remained:

> Open for acceptance for a period of 21 day from your receipt of this offer letter, thereafter it can only be accepted if we agree the liability for the costs or the court gives permission.

123. The Court of Appeal held that such an offer was contrary to the express language of Part 36.2(2)(b) and (c) in that:
    123.1 It failed to state that it was intended to have the consequences of Section I of part 36; and
    123.2 the terms of the letter were inconsistent with the provisions of part 36 which allows offers to be accepted at any time-albeit that the court will make provision for costs if they are not been agreed by the parties.

In the circumstances, no rule of construction could render the letter a part 36 offer.

124. I set out the relevant passages from the judgments of the respective judges in the Court of Appeal:

124.1 Maurice Kay LJ:

> 16
> The letter in the present case, whilst headed " Pt 36 Offer", did not so state. Moreover, it is inherent in the Pt 36 regime that, once made, an offer can only be withdrawn even after the time specified pursuant to r.36.2(2)(c) if the withdrawal complies with r.36.3(5) to (7) . Here the letter stated that the offer:
>
> > "remains open for acceptance for a period of 21 days from your receipt of this offer letter, thereafter it can only be accepted if we agree the liability for the costs or the court gives permission."
>
> That reflected language of r.36.5(6)before it was amended with effect from 6 April 2007. It is inconsistent with the language and approach of the amended Pt 36 , which was in force at the relevant time in this case.
>
> 17
> In these circumstances, as a matter of form, the offer did not satisfy the mandatory requirements of Pt 36 . Accordingly it was not a Pt 36 offer, even though the letter described it as one. This case is indistinguishable from Thewlis which the judge followed with manifest reluctance.
>
> 18
> In my view, that reluctance was misplaced. The judgment of HH Judge Behrens (sitting as a Deputy High Court) in Thewlis contains the correct analysis. Rule 36.2(2)(b) was not complied with and, as Judge Behrens said of the same wording in the offer letter in Thewlis , the sentence in the letter limiting the circumstances in which the offer might be accepted after 21 days "is inconsistent with Pt 36 " (at [28]).
>
> ....
>
> [20]
> In these circumstances the case of *C v D* is plainly distinguishable. Here the offer was not a Pt 36 offer because it failed to comply with the mandatory and highly prescriptive requirements of the current "self-contained code". In these circumstances, it is not necessary to engage in the construction, exercise invited by Mr Rivers. No process of construction, however liberal, can bring about satisfaction of procedural requirements which were not fulfilled.

124.2 Elias LJ:

> **[23]**
> Having adopted that analysis, he then submits that the court should deem the mandatory requirement in 36.2(2)(b) as though it had been complied with notwithstanding that this involves treating the time limited offer as though it were open-ended and treating the conditions under which the offer could be accepted after 21 days as though they did not exist.
>
> **[24]**
> In my judgment, that is an impossible submission. There is no justification for treating an offer whose terms are wholly inconsistent with a Pt 36 offer as though it were consistent with that provision and it is fanciful, in my judgment, to say that a mandatory requirement is satisfied when no reference is made to it at all. I see no basis at all for assuming that a reasonable solicitor would have understood the offer as being intended to comply with Pt 36 when its detailed terms are at odds with that provision.

124.3 Pitchford LJ:

> [27]
> In the present case we are not concerned with a Pt 36 offer presented as such and "otherwise complying with its form" (see the judgment of Rix LJ at para 68). We are concerned with an offer that purports to be made under Pt 36, but whose terms are completely inconsistent with Pt 36 and that fails otherwise to comply with its form.

125. Mr Vickers contends that the letter fails to comply with CPR Pt. 36.2(2) because:
- 125.1 Although it was expressed to be a Part 36 offer, it did not include the phrase *it is intended to have the consequences of section 1 of Part 36* as required by sub-rule (b). Therefore, as set out in §120 above Mr Vickers argued that the "form" of the letter did not satisfy the mandatory requirements;
- 125.2 The letter mentioned that the defendant had "*21 days to respond to this offer*". It did not make it clear that the offer could be accepted after that date. Therefore, it was a time limited offer and could not be a part 36 offer;
- 125.3 The letter did not specify that the defendant would be liable for the claimant's costs in accordance with Pt 36.10 if the offer was accepted during the 21-day period as required by Pt 36.2(2)(c);
- 125.4 Rather than stating that the defendant was entitled to accept the offer it stated that the defendant had to "*agree to settlement on this basis*";
- 125.5 It asserted that the claimant would seek "*the full sanctions available against you under Part 36*" if the claimant recovered an amount equal to or greater than the offer *at trial or otherwise.* The latter phrase was inappropriate as Pt 36.14 applied only after *judgment.*

126. Mr Hogan set his case by reference to each sub-paragraph of Pt 36.2(2):
- 126.1 He contended that the letter clearly satisfied the requirements at (a), (d) and (e) in that the offer was in writing, stated that it related to the whole of the claim and that it was made net of any counterclaim;
- 126.2 The only argument was whether the letter satisfied sub-rules (b) and (c);

127. As to sub-rule (b), Mr Hogan argued that:
- 127.1 It was not necessary for an offer to recite the words set out in the rule as a "magic formula". Although "form" was important an offer would not be rendered ineffective by every minor departure from the wording set out in the rule;
- 127.2 compliance with procedural rules should be judged first by considering the statutory intention behind a particular rule or provision and then applying a test of "substantial compliance" to see if the statutory intention had been met: see **R v Secretary of State for Home Dept ex parte Jeyneanthan [2000] 1 WLR 354**;
- 127.3 a similar approach had been adopted in a private law context when considering the test to be applied when considering whether a party had complied with the statutory regulations on CFAs in **Hollins v Russell [2003] 1 WLR 2487** at §107;
- 127.4 in **Thewlis,** the only mention of part 36 in the text of the offer was the statement *the offer is made pursuant to Part 36 of the CPR* and in **Shaw** there was no mention of part 36 in the text of the offer at all. Therefore, there was nothing in either of those offers

which could be described as an attempt to comply with the requirement of sub-rule (b);

127.5 Mr Hogan argued that offer in the current claim should be distinguished from those offers because the claimant had stated:

> If you do not agree to settlement on this basis and our client subsequently recovers an equal or greater amount (at trial or otherwise) we will seek the full sanctions available against you under part 36 of the CPR

127.6 Mr Hogan argued that this passage (the relevant passage) amounted to an attempt to comply with the requirement of sub-rule (b) and that, construed in the context of the letter as a whole, it was sufficient to comply (or substantially comply) with the obligation that the letter must state that it is intended to have the consequences of part 36.

128. Similarly, in relation to sub-rule (c) Mr Hogan argued that:

128.1 the requirement in sub-rule (c) was not to recite a particular form of words but "to specify a period of not less than 21 days";

128.2 the claimant had made it clear that the defendant had a 21-day period in which to accept the offer which was sufficient to satisfy the rule .

129. I draw the following principles from the decisions cited:

129.1 A Part 36 offer must comply with the mandatory and highly prescriptive requirements of the *self-contained code;*

129.2 An offer which is inconsistent with the provisions of that code cannot be a Part 36 offer;

129.3 It is not sufficient for the offeror to point to the offer letter as a whole and argue that the offeree knew or ought to have known it was intended to be a part 36 offer. The offeror must comply with each of the requirements identified in part 36.2(2) and must be able to point to a passage in the offer which it contends satisfies each formal requirement. This necessarily follows from the decisions in **Thewlis** and **Shaw** where each offeree was aware that the offeror intended to make a Part 36 offer but the offer was found to be defective because the text failed to satisfy part 36.2(2)(b);

129.4 However, in my judgment, "form" is essential but not absolute. The requirements identified in each sub-rule are not "magic formulae" which must be slavishly followed word for word in order to be effective. In my judgment, this must follow from the decision in **C v D**. If the position were otherwise there would be no need for the court to apply the rules of construction-it would simply check whether the exact form of words had been used. Further, I accept Mr Hogan's argument that the court must look at the underlying purpose of the rule and see whether there has been substantial compliance;

129.5 I consider that this interpretation is consistent with the decisions in **Thewlis** and **Shaw** because in those cases no attempt had been made to comply with the formal requirements of sub-rule (b). In particular, in **Shaw** there was no mention of part 36 in the text at all and in **Thewlis** the only mention was limited to the phrase *"the offer is made pursuant to Part 36 of the CPR";*

129.6 In **Shaw** Elias LJ stated:

> It is fanciful, in my judgment, to say that a mandatory requirement is satisfied when no reference is made to it at all ...

I accept and agree with that statement. However, in my judgment, where some attempt has been made to comply with a mandatory requirement the court must determine whether that attempt is sufficient;

129.7 Therefore, I must decide whether the offer in this case:

.1 Is consistent with part 36;

.2 Contains a statement or passage "on its face" potentially capable of satisfying the relevant requirements; and,

.3 Construe any such passage to determine whether that effectively discharges the requirements of the sub-rule bearing in mind that where there are ambiguities the court should look to a construction which renders the offer effective in accordance with **C v D**.

130. I consider first whether the relevant passage identified by Mr Hogan is sufficient to satisfy sub-rule (b). As a matter of "form" I consider that the passage can properly be distinguished from the text in **Shaw** and **Thewlis**. The distinction with **Shaw** is obvious as in that case there was no passage in the text capable of satisfying the requirement. Further, in **Thewlis** the text did no more than assert that the offer was made under part 36 it did not go on to make any comment about being intended to have the consequences of part 36. In my judgment in **Thewlis** the text of the letter did no more than the heading to the letter in **Shaw**. The relevant passage relied on by Mr Hogan goes considerably further and asserts that the claimant *will seek the full sanctions available under part 36.* In my judgment this is a statement "on its face" which is in a "form" potentially capable of discharging the duty on the offeror **if** the relevant passage can properly be construed as giving the information required by sub-rule (b).

131. I then turn to consider whether the relevant passage can be construed as discharging the claimant's obligation to state that it is intended to have the consequences of section I of Part 36. I do not consider that the failure expressly to mention *section I* of part 36 prevents the offer being effective. When the offer was made there were only two sections to part 36, sections I and II. No-one reading the letter would have understood the offeror to be contending that only section II applied-that would be inconsistent with the statement that the claimant was seeking *the full sanctions* available under part 36. I then go on to consider whether the relevant passage amounts to a statement that the offer was intended to have the consequences of part 36. In my judgment the statement that the claimant would seek the *full sanctions* available under part 36 in a letter expressed to be a part 36 offer is sufficient to communicate clearly to the defendant that the offer was intended to have the consequences of Part 36. Further, a reasonable man (and particularly a reasonable insurer to whom it was addressed) would have read the relevant passage as stating that the offer was intended to have the consequences of section 1 of part 36. In the circumstances as a matter of substantial form and construction I consider that the letter complies with sub-rule (b).

132. Mr Vickers argued that the sanctions under part 36 are available only *on judgment* and that hence the phrase *at trial or otherwise* was inaccurate and meant that the letter was inconsistent with the rule. I do not agree. It may be that the parties would disagree about

the nature of the sanctions that are available under the rule (at trial or otherwise) and/or whether the sanctions identified in the rule are available only *on judgment*. However, in my judgment, stating that a party intends to pursue such remedies as are available to it under the rule cannot render the letter inconsistent with the rule.

133. This leaves Mr Vickers' argument that the letter failed to comply with the requirements of sub-rule (c). The letter expressly states that the defendant had 21 days in which *to respond* to the letter. In my judgment that must be construed as giving the defendant 21 days in which to accept the offer. However, it is then necessary to consider whether the form of words used (i) failed to make it clear that the defendant would be liable for costs in accordance with Pt 36.10 if accepted and/or (ii) made the offer time limited.

134. Mr Hogan argues that the use of the word *specify* refers only to the period of 21 days and the offeror does not have to set out the remaining terms of sub-rule (c) in full. In my judgment that is correct. The application of CPR Pt 36.10 flows from the offer being made under Part 36. I see no reason why the rule should be construed as requiring the offeror to set that provision out again. In my judgment, it is sufficient that the offer identifies the 21-day period.

135. It is then necessary to consider whether the phrase *you have 21 days to respond* carries the implication that the offer will be withdrawn if it is not accepted within 21 days and thereby makes the offer time limited and inconsistent with part 36. In accordance with **C v D** the statement must be construed in the context of the letter as a whole and the claimant's expressed intention to make a Part 36 offer. In my judgment, when construed in the context of a letter which was clearly intended to be a Part 36 offer, the phrase *you have 21 days to respond* falls (just) on the same side of the line as the phrase *this offer will be open for 21 days* used in **C v D**. Therefore, I consider that the letter satisfies the provisions of sub-rule (c).

136. In the circumstances, I find that the letter was part 36 compliant and remained open for acceptance. Therefore, the claimant's appeal on Ground 1 fails.

(13) Conclusion

137. In the circumstances Grounds 1, 2 and 3 of the appeal are dismissed on their merits.

138. As the hearing for permission to appeal from the District Judge and the hearing of the substantive appeal were listed together I should make my views clear as to whether I granted permission to appeal from the District Judge as that may be important for the future conduct of the case. Having listened to the arguments at the hearing on 18th January I considered it necessary to reserve judgment because the issues were complex. In my judgment, it was implicit that I considered it appropriate to grant permission to appeal from the District Judge and that is why I have dealt with the merits of the respective arguments in full. For the sake of completeness, I confirm this expressly and it should be reflected in the Order. [However, this should not be taken as any indication that I would have considered it appropriate to grant permission to appeal from my decision].

15th May 2018