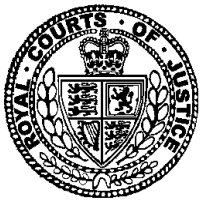

Neutral Citation Number: [2023] EWHC 806 (Ch)

IN THE HIGH COURT OF JUSTICE **Claim No. PT-2021-LDS-000076**
BUSINESS AND PROPERTY COURTS IN LEEDS
PROPERTY, TRUSTS AND PROBATE LIST

Date: 5th April 2023

Before:

Mr Andrew Sutcliffe KC, sitting as a Judge of the High Court

- -

BETWEEN:

JULIE MATE

Claimant

and

(1) SHIRLEY CLAIRE MATE
(2) ANDREW DAVID MATE
(3) ROBERT CHRISTOPHER MATE

Defendants

- -

Mr Timothy Sherwin (instructed by **Charles Russell Speechlys LLP**) for the Claimant
Ms Caroline Shea KC and Mr Michael Ranson (instructed by **Chadwick Lawrence LLP**) for the Second and Third Defendants
The First Defendant did not appear and was not represented

Hearing date: 17 March 2023
(further written submissions on 21 and 23 March 20203)

- -

APPROVED JUDGMENT

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

MR ANDREW SUTCLIFFE KC:

Introduction

1 Further to my judgment in the trial of this matter ("**the Main Judgment**"), handed down on 10 February 2023 (neutral citation number [2023] EWHC 238 (Ch)), I must now deal with the issue of costs.

2 In the Main Judgment I dismissed the Claimant (**Julie**)'s proprietary estoppel claim and allowed her claim in unjust enrichment, assessing the value of the services she provided as being £652,500. This judgment proceeds on the assumption that its readers will be familiar with the detail of the Main Judgment and the definitions and abbreviations used therein will also be applied here.

3 I have to decide the following issues:

3.1 Subject to any consequences that may flow from Julie having made a valid offer under CPR Part 36, what is the appropriate costs award in these proceedings? Julie submits that she was the successful party and should therefore be awarded her costs of the claim. Robert and Andrew submit that it is appropriate to make an issues-based costs award with Julie being paid her costs of the successful unjust enrichment claim by all the defendants (i.e. including Shirley) and Julie paying Robert and Andrew's costs of their successful defence of the proprietary estoppel claim.

3.2 If Julie is entitled to be paid her costs, should Shirley be a paying party along with Robert and Andrew?

3.3 Was the offer of £650,000 made by Julie on 12 August 2022 (**Julie's Offer**) a valid Part 36 offer?

3.4 If so, was Julie's Offer served in time to engage the provisions of CPR 36.17(4)? If Julie's Offer was not served in time, is it appropriate to abridge time retrospectively under CPR 36.17(7)(c) in order to permit Julie to benefit from the provisions of CPR 36.17(4)?

3.5 If the provisions of CPR 36.17(4) are engaged, what is the effect of those provisions and is it unjust to apply some or all of them?

3.6 If there is to be a payment on account of costs, what should it be?

4 Before I turn to look in detail at the respective arguments of the parties, I set out certain procedural steps which have some relevance to the cost issues I have to determine. I also provide a brief summary of the law in relation to costs which I need to bear in mind.

Relevant procedural steps

5 On 16 November 2021, the parties engaged in an unsuccessful mediation. On 1 February 2022, Shirley ceased to instruct solicitors. On 10 May 2022, Robert and Andrew were served with Shirley's witness statement dated 9 May 2022 which indicated that she intended to give evidence for Julie.

6 On 10 June 2022, Robert and Andrew made an offer under CPR 36.15 to settle Julie's claim for the sum of £300,000. Julie did not accept this offer. The offer was silent with regard to the claim against Shirley. CPR 36.15(3)(b) makes clear that because Julie alleged that the defendants' liability to her was joint and several, had she accepted this offer from Robert and Andrew, it would have been open to her to continue her claim against Shirley. Equally, if Julie had accepted this offer (and whether or not she had continued the claim against Shirley), it would have been open to Robert and Andrew to seek a contribution from Shirley in respect of sums paid to Julie in settlement of her claim and costs.

7 On 22 June 2022, Shirley formally admitted Julie's claim by serving an amended defence which struck through her original defence and she issued an application seeking permission to amend her defence on the same day. Permission to amend was granted at the PTR on 26 July 2022.

8 On 24 June 2022 Julie's solicitors sent an offer under CPR Part 36 to Robert and Andrew's solicitors, indicating that she would accept the sum of £1,150,000 in full and final settlement of her claim. This offer was not accepted.

9 Some 7 weeks later, on Friday 12 August 2022, Julie's Offer was sent by email to Robert and Andrew's solicitors at 17:22 in the afternoon. It stated that "*[t]he Claimant will accept the sum of £650,000 in full and final settlement of her claims under Claim No. PT2021-LDS-00076*". It was in standard form N242A and stipulated that if the offer was accepted within 21 days of service of the notice (referred to in CPR Part 36 as 'the relevant period'), the defendant would be liable for the claimant's costs in accordance with rule 36.13.

10 By an email sent at 13:19 on Monday 15 August marked "*without prejudice save as to costs*", Robert and Andrew's solicitors asked Julie's solicitors to give them a rough indication of Julie's costs. Julie's solicitors responded by email at 15:35 the same day indicating that her costs were in the region of £370,000 plus VAT.

11 There was no further correspondence in relation to Julie's Offer prior to the commencement of the trial. Julie's Offer was not accepted by Robert or Andrew.

12 On 7 December 2022, after the trial but before judgment was handed down, Robert and Andrew commenced a claim under CPR Part 8 against Shirley. By that claim, Robert and Andrew seek an order that Shirley execute a transfer in favour of Persimmon in order to enable the second tranche of development land to be transferred to Persimmon and the remaining £4.5 million of the purchase price to

be paid. It would appear that Shirley has offered to sign the transfer documents on condition that Robert and Andrew agree to hold the monies received from Persimmon subject to undertakings. I am informed that the parties have recently agreed that this claim should continue as a claim under CPR Part 7.

13 Mr Ranson (who appeared without Ms Shea KC at the consequentials hearing) submitted that since Robert and Andrew had not yet received the second tranche of money due from Persimmon, they should only be required to pay half of the judgment sum of £652,500 by 31 March 2023 with the remaining half of the judgment sum being payable within 21 days of receipt of the second tranche from Persimmon or (if earlier) 31 March 2024. I do not accept that submission. Julie is not a party to Robert and Andrew's dispute with Shirley. The judgment sum can be paid without difficulty from the first tranche of the Persimmon monies. In any event, there is no reason why Robert, Andrew and Shirley should not arrange matters so that the second tranche of Persimmon monies can be paid over and part of it attributed to the judgment sum pending the resolution of their ongoing dispute.

The Law

14 The court's discretion is a wide one and is regulated by CPR Part 44.2, which is well known and I do not need to set out in full in this judgment. It is common ground that the general rule (in CPR 44.2(2)) is that the unsuccessful party will be ordered to pay the costs of the successful party, but that the court may make a different order.

15 As Gloster J emphasised in HLB Kidsons v Lloyds Underwriters [2008] 3 Costs LR 427 , "*[t]he aim always is to 'make an order that reflects the overall justice of the case'...*", a point also emphasised by Briggs J in Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Gida Sanayi Ve Pazarlama AS [2010] 5 Costs LR 657 at [4] by reference to the overriding objective: "*Besides taking due account of the specific provisions of Part 44, the court must in framing an appropriate order for costs bear constantly in mind the need to comply with the overriding objective, that is to deal with cases justly*".

16 The general rule set out in CPR 44.2(2) was described by Lord Woolf MR in AEI Rediffusion Music Ltd v Phonographic Performance Ltd [1999] 1 WLR 1507 (at 1522-1523) as a "*starting point from which the court can readily depart*". However, whilst the court may depart from the general rule, "*it remains appropriate to give 'real weight' to the overall success of the winning party*" (per Gloster J in HLB Kidsons at [10]). In addition, I bear in mind that commercial litigation is complex and that, in almost every case, the winner is likely to have failed on some issues. There is no automatic rule requiring reduction of a successful party's costs if he loses on one or more issues (see HLB Kidsons at [11]).

17 In deciding whether to depart from the general rule, the court must have regard to all the circumstances of the case, including "*(a) the conduct of all the parties; (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and (c) any admissible offer to settle which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply*" (CPR 44.2(4)). Insofar as relevant for the purposes of this judgment, conduct of the parties includes conduct before and during the proceedings, whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue, and the manner in which a party has pursued or defended its case or a particular allegation or issue (CPR 44.2(5)(a)-(c)).

18 The various orders which the court may make are set out in CPR 44.2(6), and I note the terms of CPR 44.2(7) to the effect that before the court considers making an order for costs relating only to a distinct part of the proceedings (i.e. an issue-based order) it will consider whether it is practical to make an order for a proportion of another party's costs or for costs from, or until, a certain date only. As was pointed out by Jackson J in Multiplex Constructions v Cleveland Bridge [2009] EWHC 1696 at [72 (iv)-(v)], the court will hesitate before making an issue-based order "*because of the practical difficulties which this causes*" (amongst other things the additional time and expense that may then be spent on assessment) and because of the steer provided in CPR 44.2(7) . In many cases "*the judge can and should reflect the relative success of the parties on different issues by making a proportionate costs order*".

19 Every case will, inevitably, turn on its own facts and I remind myself that there is only limited assistance to be gained from looking at the findings made in other cases on different facts.

(1) What is the appropriate costs order?

20 There can be no doubt that Julie was the successful party. I do not accept Robert and Andrew's submission that it is appropriate to make an issues-based costs award with Julie being paid her costs of her successful unjust enrichment claim and Julie paying Robert and Andrew's costs of their successful defence of the proprietary estoppel claim. That would not be a just outcome. Pursuing a claim in proprietary estoppel did not amount to unreasonable conduct as Robert and Andrew contend. Moreover, there was a considerable degree of overlap in the evidential enquiry that was required to be undertaken for both aspects of Julie's claim.

21 I have concluded that Julie should be awarded 75% of her costs. I have made a reduction of 25% as representing what I believe to be a fair estimate of the parties' costs attributable to the proprietary estoppel claim. That 25% deduction takes account of the fact that Julie failed to obtain the declaration which was her primary ground of relief, namely, that she and her sisters were entitled to an equal share with Robert and Andrew "*in the net proceeds of sale of the family farmland or any*

part thereof". Whilst there was a considerable degree of overlap in the facts, in making this assessment I have borne in mind that certain of the facts (in particular those before 2004) would not have been part of the factual enquiry relevant to the unjust enrichment claim and I have also taken account of the time taken up with the proprietary estoppel issue in correspondence, pleadings, witness statements, cross-examination and written and oral submissions at trial. I consider that it is in accordance with the overriding objective that Julie's entitlement to costs should be reduced by 25% in order to reflect the fact that she failed to make good one of the two alternative bases on which she put forward her claim.

22 Mr Sherwin submitted that, if Julie's Offer was valid, it was stated to relate to the whole of her claim and, had Robert and Andrew accepted that offer, the entire proceedings would have been brought to an end for less money than Julie has been awarded. He says this is a reason for awarding Julie all her costs and not making a deduction from those costs to reflect the fact that she was unsuccessful in her proprietary estoppel claim. I do not accept this submission. As Mr Ranson submitted, Julie's Offer was made so close to trial that the consequences of accepting that offer for Robert and Andrew would not have fairly reflected the costs they had incurred in defending the proprietary estoppel claim. Had Julie's Offer been made at a much earlier stage in the proceedings, the position might have been different.

23 Nor (again assuming Julie's Offer is valid) do I consider that it would be just to require Robert and Andrew to pay all Julie's costs on an indemnity basis from 6 September 2022 (being the date of expiry of the relevant period provided for in Julie's Offer). I consider that, even though acceptance of Julie's Offer would have avoided the need for a trial, the existence of the unsuccessful proprietary estoppel claim was a sufficiently different and distinct cause of action resulting in the incurring of significant additional costs to make it unjust to require Robert and Andrew to pay all Julie's costs on the indemnity basis from 6 September 2022 onwards. On the contrary, in my judgment, justice requires that Julie should only be awarded 75% of her costs on the indemnity basis from that date.

24 Accordingly, for these reasons and for the further reasons given below when addressing the consequences of Julie's Offer, I conclude that it is appropriate to make a proportionate costs award of 75% in Julie's favour (i) under CPR 44.2(6)(a) (mindful of the guidance in CPR 44.2(7)) on the standard basis prior to 6 September 2022 and (ii) under CPR 36.17(4)(b) on the indemnity basis thereafter, in both cases to reflect the fact that I rejected one of the two ways in which she put her claim.

(2) Ought Shirley to be a paying party?

25 I do not consider that it is appropriate for the costs award in Julie's favour to be made against all three defendants. Until February 2022, when she ceased to be legally represented, Shirley instructed different solicitors from Robert and

Andrew, no doubt in recognition of the potential for conflicting interests between Shirley on the one hand and Robert and Andrew on the other. Julie does not seek to recover any part of her costs from Shirley.

26 Robert and Andrew submit that all three defendants should be the paying parties until the PTR on 26 July 2022 when Shirley was given permission to amend her defence in order to admit Julie's claim. However, this ignores the fact that from at least 10 May 2022 Robert and Andrew were aware that Shirley had ceased to instruct solicitors and was supporting Julie's claim. More importantly, in circumstances where Shirley had no beneficial entitlement to the monies being paid by Persimmon and was in reality defending the claim for the benefit of Robert and Andrew, it would not in my judgment represent a just outcome for Shirley to be made jointly liable for Julie's costs up to a certain date. This is especially the case where she was plainly a reluctant participant in the trial, appearing only to give evidence in the morning of the third day. I have no doubt at all that Shirley would have preferred the case to have settled prior to trial but that was a matter outside her control.

27 As Mr Sherwin pointed out, any of Julie's costs which are not common costs and are solely attributable to dealing with Shirley's defence of the claim (such as the costs of her reply to Shirley's defence) can be identified and excluded on a detailed assessment.

28 I express no view on the question of whether Robert and Andrew are entitled to make a claim against Shirley for a contribution to the judgment sum and/or the costs which they are required to pay. They have not brought any contribution claim against Shirley within these proceedings so that is not a matter I have to determine.

(3) Was Julie's Offer a valid Part 36 offer?

29 Robert and Andrew submit that Julie's Offer was not a valid Part 36 offer because it was not addressed to or served on Shirley. They rely on the fact that, at the time Julie's Offer was made, Julie had not taken any steps to seek judgment against Shirley based on her admission of the claim nor had she discontinued her claim against Shirley. Indeed, Shirley remained a defendant to the claim at trial and at least in respect of the proprietary estoppel claim Julie sought relief against all the defendants.

30 CPR Part 36 is a self-contained code which, by r.36.5(1)(d), permits for settlement of the 'whole of a claim' or 'part of it' or 'an issue that arises in it'. Julie's Offer was clearly expressed to be made "*in full and final settlement*" of all her claims in the proceedings. Mr Ranson submits that in circumstances where Julie's Offer was to settle the whole of a claim which included a claim for declaratory relief, it is self-evident that the offer must be made to all the defendants and a failure to do so means that the requirements of CPR Part 36 have not been met.

31 In support of this proposition, Mr Ranson refers to CPR 36.15 which deals with the circumstances where a Part 36 offer is made by one or more, but not all, defendants and relies on r.36.15(2) which provides that, where defendants are sued jointly, a claimant can only accept a Part 36 offer made by fewer than all the defendants without the permission of the court if the claimant discontinues the claim against those defendants who have not made the offer and those defendants give written consent to the acceptance of the offer. Mr Ranson accepts that there is no equivalent provision relating to circumstances in which the claimant makes a Part 36 offer to fewer than all the defendants to a claim, as Julie has done in this case, but nevertheless submits that Part 36 does not anticipate a claimant's offer being a valid offer in such circumstances.

32 Mr Ranson further submits that accepting Julie's Offer would have required Robert and Andrew to speak for Shirley in respect of declaratory relief which was plainly something they could not do and that accepting the offer would either have required them to be responsible for Julie's costs under r.36.13(1), including the costs of Julie pursuing Shirley, or somehow to have achieved the position whereby Robert, Andrew and Shirley were together responsible for costs under r.36.13(1) in circumstances where Shirley had done nothing to signal her acceptance of those costs. Mr Ranson therefore submitted that what Julie should have done was to serve her offer on all the defendants and given them all the chance to accept its terms and be bound by the costs consequences of doing so or, alternatively, in keeping with CPR 36.15, if Julie had wished to settle against Robert and Andrew, she should have discontinued her claim for declaratory relief against Shirley.

33 Mr Sherwin submits that there is no requirement in CPR 36.5 requiring a claimant's Part 36 offer to be served on or copied to all the defendants. He says that there is nothing in the self-contained code that constitutes Part 36 which requires a claimant to do this. Indeed, the fact that r.36.5(1)(c) refers to "the defendant" in the singular suggests that even in multi-party cases an offer may be made to a single defendant. He says the absence of an equivalent provision to CPR 36.15 was deliberate. The very fact that Part 36 is a self-contained code means that it is not possible to imply that provisions similar to CPR 36.15 apply to a claimant's Part 36 offer made to some but not all of the defendants. Moreover, since any liability of the defendants for the judgment sum or costs is joint and several, the fact that Julie's Offer was not made to Shirley cannot affect Robert and Andrew's liability. He further submits there is nothing to stop Robert and Andrew seeking to claim a contribution from Shirley in respect of sums they have paid to Julie. Finally, Mr Sherwin also relies on Robert and Andrew's failure to raise this point at the time Julie's Offer was made, when it was clear that Julie's Offer was being made to them and not to Shirley (who by that time had formally admitted Julie's claim).

34 I prefer Mr Sherwin's submissions on this point. I consider that the fact that Julie's Offer was not addressed to or served upon Shirley does not render it an invalid offer so far as Robert and Andrew are concerned. There is nothing in CPR Part 36

which requires a claimant to serve a Part 36 offer on all the defendants. There was nothing to prevent Robert and Andrew from accepting Julie's Offer in full and final settlement of her claim and thereafter seeking a contribution from Shirley (if they considered themselves so entitled) in respect of the judgment sum and/or costs. The fact that they did not raise any query regarding Shirley's position at the time Julie's Offer was made suggests they were well aware that they could have brought Julie's claim to an end by agreeing to pay the sum of £650,000 as indicated in that offer, and that they could then have taken their own steps to recover a contribution from Shirley, if they saw fit to do so.

(4) Was the Part 36 Offer served in time?

35 Having concluded that Julie's Offer was a valid Part 36 offer, I must now consider whether it was served in time in order to engage the provisions of CPR 36.17(4). CPR 36.5(1)(c) stipulates that a Part 36 offer must specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with r.36.13 if the offer is not accepted. CPR 36.17(7)(c) provides that the provisions of r.36.17(4) do not apply where a Part 36 offer is "'*made less than 21 days before trial, unless the court has abridged the relevant period*".

36 The parties are agreed that if the trial started on 5 September 2022, Julie's offer was made less than 21 days before trial and therefore the provisions of r.36.17(4) do not apply unless I agree to abridge time. Equally, if the trial started on 6 September 2022, Julie's offer was made 21 days before trial and the provisions of r.36.17(4) must be applied unless I consider it unjust to do so.

37 In October 2021, the court sent a document to the parties entitled "*Notice of Trial Date*" which read as follows: "*The trial of the above claim will take place at 10:30am on the 6th, 7th, 8th, 9th, 12th, 13th, 14th September 2022 with a time estimate 7 days. Judicial Reading has been allocated on the 5th September 2022 and the parties are not required to attend on this day*".

38 Mr Ranson submits that the trial was listed to start with judicial pre-reading on Monday 5 September 2022. He relies on paragraph 11.11 of the Chancery Guide which states that the trial timetable "*should allow a realistic time for pre-reading by the judge*". He says that judicial pre-reading is plainly part of the 'trial' because, in order for there to be material for the judge to read such as agreed bundles and skeleton arguments, all the work by way of preparation for trial must be complete before the judicial reading begins. He also relies on the fact that judges sometimes make contact with trial counsel during reading days for clarification of matters relevant to the trial.

39 Attractively as Mr Ranson put his arguments on this point, I cannot agree with him. The court notice referred to above plainly states that the trial of the claim is to take place on 6 September 2022 and the ensuing six days. It refers to judicial reading having been allocated for 5 September 2022 and the parties not being required to attend on that day. I do not consider that the extract from the Chancery

Guide to which I was referred by Mr Ranson supports his submission that the trial is deemed to start on the day allocated to judicial reading. In my view the trial started on the day all parties were required by the notice to attend court. The fact that, in advance of the trial, trial bundles and skeleton arguments were prepared and lodged and that provision was made for a day's judicial reading does not override the clear terms of the notice given to the parties.

40 I therefore conclude that Julie's Offer was served in time. This has two consequences. First, I do not need to consider Julie's alternative request that I abridge time in order to enable her to take advantage of the provisions of CPR 36.17(4). Second, I must apply the provisions of CPR 36.17(4) unless I consider it unjust to do so.

41 In case this matter goes further, I should indicate that, had I considered Julie's Offer was not served in time, I would not have been prepared to accede to her request that I abridge time under CPR 36.17(7)(c) since I see no good reason for doing so. I accept that in practice Julie gave Robert and Andrew more than 21 days in which to consider her offer because it was attached to an email sent to Robert and Andrew's solicitors at 17:22 on Friday 12 August 2022. However, as is common ground, by reason of CPR 6.26, Julie's Offer was not deemed served until Monday 15 August 2022. Robert and Andrew are entitled to rely on the deemed service provisions of the CPR. I see no good reason to abridge time. Julie has not explained why she waited until after close of business on the Friday before making her offer. Robert and Andrew certainly did nothing to encourage her to delay making that offer.

(5) The effect of the provisions of CPR 36.17(4) and whether it is unjust to apply all or at least some of them?

42 Having concluded that the provisions of CPR 36.17(4) are engaged, I need to consider the effect of those provisions in this case and Robert and Andrew's further submission that it is unjust to apply all or at least some of them.

43 CPR 36.17(4) provides as follows:

> (4) Subject to paragraph (7), where paragraph (1)(b) applies, the court must, unless it considers it unjust to do so, order that the claimant is entitled to—
> (a) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;
> (b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;
> (c) interest on those costs at a rate not exceeding 10% above base rate; and
> (d) provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below to an amount which is—
> (i) the sum awarded to the claimant by the court; or

(ii) where there is no monetary award, the sum awarded to the claimant by the court in respect of costs—

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

44 Under r.36.17(5) "*In considering whether it would be unjust to make the orders referred to in [paragraph (4)], the court must take into account all the circumstances of the case*". This specifically includes (i) the terms of any Part 36 offer (r.36.17(5)(a)); (ii) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made (r.36.17(5)(b)); and (iii) the information available to the parties at the time when the Part 36 offer was made (r.36.17(5)(c)).

45 Mr Ranson submits that (i) Julie's Offer was made very shortly before trial and there was no good reason for it being left so late; (ii) the terms of Julie's Offer were at best ambiguous given that it was addressed to Robert and Andrew alone but sought to compromise a claim for declaratory relief which Julie pursued against Shirley throughout the trial; (iii) this was a bitter family dispute where Julie would have known that Robert and Andrew would struggle to liaise with Shirley in the run-up to trial to understand her position, as a litigant in person, in respect of something as complicated as a Part 36 offer and in circumstances where Shirley's position had recently sharply diverged from theirs and communication had effectively ceased; and (iv) by accepting Julie's Offer, they would have been opening themselves up to liability for legal costs incurred by Julie in making her claim against Shirley and at the time the offer was made Robert and Andrew had no meaningful information about Julie's costs.

46 Mr Ranson further submits that r.36.17(5)(c) tests the position as at the time Julie's Offer was made so the fact that Robert and Andrew did not seek clarification or further information about the offer under r.36.8 is irrelevant because that would, by necessity, have had to be done after the offer was made. Furthermore, he says that r.36.17(5)(d) is concerned only with the conduct of the parties "*with regard to the giving of or refusal to give information*" about the offer – it does not allow the court to assess what efforts an offeree made to obtain information. The burden is not on the offeree to clarify any offer.

47 Robert and Andrew's position is therefore that none of the consequences of r.36.17(4) should be visited upon them on the basis that it would be unjust for the court to do so. Alternatively, they submit that it is not an 'all or nothing' decision and it is open to the court to make some but not all of the orders available under r.36.17(4). Mr Ranson relied on JLE v Warrington & Halton Hospitals NHS Foundation Trust [2019] EWHC 1582 (QB); [2019] 1 W.L.R. 6498 where the court held (at [23] and [32]) that while it was open to a judge to conclude that it

would be unjust to order some, but not all, of the orders in sub-paragraphs (a) to (d) of CPR 36.17(4), it would be unusual for the circumstances to yield a different result for some only of the orders.

48 In McPhilemy v The Times Newspapers Ltd (No.2) [2001] EWCA Civ 933; [2002] 1 W.L.R. 934, Simon Brown LJ observed at [28]: "*[These provisions are] not designed to punish unreasonable conduct but as an incentive to encourage claimants to make, and defendants to accept, appropriate offers of settlement. That incentive cannot work unless the non-acceptance of what ultimately proves to have been a sufficient offer ordinarily advantages the claimant in the respects set out in the rule.*"

49 I propose to consider each of the provisions of CPR 36.17(4) in turn by reference to the circumstances which apply in this case.

CPR 36.17(4)(a): enhanced interest

50 Rule 36.17(4)(a) requires the court to award interest on the whole or part "*of any sum of money awarded*" at an enhanced rate not exceeding 10% above base rate for some or all of the period starting with the date on which "*the relevant period*" expired. It is common ground that the relevant period expired on 6 September 2022.

51 Mr Sherwin originally sought to contend that the date from which statutory interest should start to run on the sum awarded to Julie was 25 January 2018 which he identified as being the date when Mr Hartley's work came to an end (see paragraph 273 of the Main Judgment). Mr Ranson submitted that, whilst the usual position is that interest should run from the date when the cause of action arises, the approach is different when dealing with a restitutionary claim. He referred to the decision of Claymore Services Limited v Nautilus Properties Limited [2007] EWHC 805 (TCC) where Jackson J stated at [39], in the context of a restitutionary quantum meruit claim: "*Interest should only run from the date when the sum due is ascertainable*". He then referred me to an email sent on 27 July 2021 from an agent at Savills to Robert and Andrew which indicated that on that date Persimmon had confirmed that "*they will agree a net purchase price of £9,000,000 split over two equal payments over a 12 month period*". The date of 27 July 2021 was confirmed in a subsequent letter from Persimmon to Mr Oates dated 6 August 2021 as being the date on which the price of £9,000,000 had been agreed. Accordingly Mr Ranson submitted it was not until 27 July 2021 that the sum due to Julie was capable of being ascertained and interest should only start to run from that date. In view of the fact that Claymore was handed up after Mr Sherwin had made his oral submissions, I gave him an opportunity to consider that case and he helpfully confirmed by email after the hearing that Julie accepted the date from which interest should run was 27 July 2021, as proposed by Robert and Andrew.

52 The draft order submitted by Julie seeks interest on the sum of £652,500 at the rates of (i) 2% over the Bank of England base rate from time to time (**base**) from 27 July 2021 to 5 September 2022 pursuant to s.35A of the Senior Courts Act 1981; (ii) 10% over base from 6 September 2022 to 10 February 2023 pursuant to CPR 36.17(4)(a); and (iii) 8% over base from 11 February 2023 pursuant to CPR 40.8. Subject to any further submissions Robert and Andrew may make following receipt of this draft judgment, it seems to me that it is appropriate to award interest at the rates sought in (i) and (iii) for the periods set out. In relation to (ii), Robert and Andrew say it would be unjust to award interest at an enhanced rate of up to 10% over base over this period of some five months for the reasons given by Mr Ranson as set out above.

53 In BXB v Watch Tower and Bible Tract Society of Pennsylvania [2020] EWHC 656 (QB); [2020] Costs L.R. 341, Chamberlain J said as follows at [14]-[15]:

> 14. The second matter in dispute relates to the enhanced interest rate applicable to damages and costs from 30 July 2019 pursuant to CPR r. 36.17(4), which (by r. 36.17(1)(b)) applies where 'judgment against the defendant is at least as advantageous to the claimant as the proposals contained in the claimant's Part 36 offer'. Rule 36.17(4) provides (subject to r.36.17(7), which is inapplicable here) that the court must, unless it considers it unjust to do so, order that the claimant is entitled to interest on damages and on costs 'at a rate not exceeding 10% above base rate'. This enhanced interest rate fulfils two functions: first the private function of compensating the claimant for the cost of money but also for the inconvenience, anxiety and distress involved in litigating (Petrograde v Texaco Ltd [2002] 1 WLR 947 (Note), [63]-[64] (Lord Woolf MR)); second, the public function of encouraging settlement so as to make better use of the court's resources in the interests of other litigants (OMV Petrom SA v Glencore International AG [2017] 1 WLR 3465, [39] (Sir Geoffrey Vos C)).
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> 15. However, the wording of r. 36.17(4) makes plain that an enhanced rate of 10% above base rate will not always be appropriate. Nor do I accept the submission made on behalf of the Claimant that the wording of r. 36.17(4) ('a rate not exceeding 10% above base rate') implies that it will be the default position, nor that it implies any different approach to the exercise of discretion than would be implied by 'up to 10%'. The applicable rate is a matter for the discretion of the court, taking into account all the circumstances of the case and the effect of the other consequences that flow from Part 36 of the CPR: Petrom v Glencore International, [41].

54 I have this guidance in mind, as well as the guidance of the Court of Appeal in the Petrom case, in considering what enhanced rate of interest should be applied over the period from 6 September 2022 to 10 February 2023. I consider that the appropriate enhanced rate of interest over this period is 8% over base, in other words the same as the Judgment Act rate which applies from 11 February 2023. This is because it is right to recognise the fact that Julie made an effective Part 36 offer which, had it been accepted by Robert and Andrew, would have avoided the need for a trial and the consequent anxiety and distress which that trial entailed. It also reflects the fact that I found aspects of Robert and Andrew's evidence to be unsatisfactory, in particular their evidence that they believed Julie was providing her services gratuitously, without any anticipation of reward.

55 I am not persuaded that any of the matters relied on by Robert and Andrew render it unjust to make an award of enhanced interest of 8% over base in Julie's favour between 6 September 2022 and 10 February 2023.

55.1 It is true that Julie's Offer (deemed made on 15 August 2022) was made at the last possible moment before the trial was due to start on 6 September 2022. However, in circumstances where Robert and Andrew had made a Part 36 offer of £300,000 on 10 June 2022 and Julie had made a Part 36 offer of £1,150,000 on 24 June 2022, this final offer represented a sensible final attempt to compromise the dispute without the need for a trial. It remains an important consideration that, had Julie's Offer been accepted, the trial would have been avoided.

55.2 I do not consider that Julie's Offer was in any sense ambiguous. It was quite clear from its terms that Julie was proposing to accept the sum of £650,000 in full and final settlement of her claim. Had Robert and Andrew accepted that offer, there would have been no trial. They would have had to consider whether to make a claim against Shirley for a contribution to the judgment sum and/or the costs which they would have been required to pay as a result of accepting Julie's Offer.

55.3 The fact that there was a bitter family dispute which might have made it difficult for Robert and Andrew to liaise with Shirley in the run-up to trial in order to understand her position as a litigant in person is an irrelevant consideration, particularly in circumstances where (on Robert and Andrew's case) the entirety of the £9 million due from Persimmon is to be paid to them. There was nothing to stop them accepting Julie's Offer and subsequently seeking (if they saw fit to do so) a contribution from Shirley in respect of the sums paid to Julie as a consequence of accepting her offer.

55.4 I do not agree that by accepting Julie's Offer Robert and Andrew would have been opening themselves up to liability for legal costs incurred by Julie in making her claim against Shirley. Julie would not be entitled to recover from Robert and Andrew any of her costs which are solely referable to the claim against Shirley. That is a matter which could have been resolved after acceptance of the offer either by agreement or upon a detailed assessment of costs. Any of Julie's costs for which Robert and Andrew sought to contend they were jointly and severally liable with Shirley could have been made the subject of a contribution claim against Shirley.

55.5 I note that on the same day Julie's offer is deemed to have been made, 15 August 2022, her solicitors informed Robert and Andrew's solicitors that her costs were at that time in the region of £370,000 plus VAT. This was

in my judgment sufficient information to enable Robert and Andrew to make the decision as to whether or not to accept Julie's Offer.

CPR 36.17(4)(b): costs on the indemnity basis

56 Rule 36.17(4)(b) states that the court must, unless it is unjust to do so, order that the claimant is entitled "*to costs (including any recoverable pre-action costs) on the indemnity basis*" from the date on which the relevant period for acceptance of the offer expired.

57 In Webb v Liverpool Women's NHS Foundation Trust [2016] EWCA Civ 365; [2016] 1 W.L.R. 3899, the Court of Appeal held at [36]-[38] that: (1) r.36.17(4)(b) relates not only to the basis of assessment of costs but also to the determination of what costs are to be assessed; (2) under that provision successful claimants are entitled to all of their costs on the indemnity basis, unless it would be unjust to so order; and (3) the court should not first consider the costs that would have been awarded the claimant under CPR Part 44.

58 In the draft order submitted by Julie, she seeks an order for all the costs of the claim to be assessed on the standard basis until 5 September 2022 and on the indemnity basis thereafter pursuant to CPR 36.17(4)(b).

59 I have already decided (by exercising my discretion under CPR Part 44) that Julie should be paid 75% of her costs on the standard basis until 5 September 2022.

60 Applying the reasoning in Webb, I now need to consider the question of costs incurred after 5 September 2022 in the context of CPR Part 36 which is a self-contained code. The Court of Appeal has made the following matters clear. First, that the discretion under rule 36.17 relates not only to the basis of assessment of costs but also to the determination of what costs are to be assessed. Second, that Part 36 does not preclude the making of a proportionate costs order. Third, that a successful claimant will only be deprived of part of her costs if the court decides that it would be unjust for her to be awarded that part of her costs. Fourth, that decision falls to be made having regard to all the circumstances of the case. In exercising its discretion, the court must take into account that the unsuccessful defendant could have avoided the costs of the trial if he had accepted the claimant's Part 36 offer as he could and should have done.

61 Having taken those matters into account, I have concluded that the appropriate order is for Julie to receive 75% of her costs on the indemnity basis after 5 September 2022. In view of the fact that Robert and Andrew's acceptance of Julie's offer would have resulted in there being no trial, it is appropriate that they should be required to pay Julie's costs of the indemnity basis from 6 September 2022 onwards. My reasons for deciding that it is appropriate to make a proportionate costs order, and therefore to award Julie only 75% of her costs, have already been given in paragraphs 21 to 23 above.

CPR 36.17(4)(c): interest on costs

62 Julie seeks an order for interest to be paid at the rate of 10% above base on her recoverable costs incurred after 5 September 2022. For the reasons I have already given in relation to interest on the judgment sum under CPR 36.17(4)(a) for the same period, I consider that the appropriate rate of interest on these costs is 8% above base.

CPR 36.17(4)(d): the additional amount

63 Subject to Robert and Andrew's submission that it would be unjust to require them to pay any additional amount as a consequence of failing to accept Julie's offer, the parties have agreed the calculation of the additional amount under CPR 36.17(4)(d) as being the sum of £57,625.

64 For substantially the same reasons that I have already given when deciding that it would not be unjust to award Julie enhanced interest and indemnity costs, I do not consider that it would be unjust to require Robert and Andrew to pay the additional amount. I therefore order Robert and Andrew to pay to Julie the additional sum of £57,625.

(6) Interim payment

65 Julie seeks a payment on account of costs pursuant to CPR 44.2(8), calculated by reference to 50% of her costs incurred in the period from the start of proceedings until 5 September 2022 and 65% of her costs thereafter. I indicated in my draft judgment that I considered this to be a reasonable approach and the calculation of the appropriate figure has been agreed as £268,993.83 to be paid by Robert and Andrew on account of Julie's costs by 4pm on 19 April 2023.

Costs of the consequential hearing

66 Following the distribution of this judgment in draft, the parties have filed written submissions regarding the costs of and occasioned by the consequentials hearing on 17 March 2023 (the **March hearing**).

67 Robert and Andrew submit that the appropriate order as regards the costs of preparing for and attending the March hearing is that there should be no order as to costs. Julie submits that she should have 75% of her costs of the March hearing on the indemnity basis.

68 I prefer Julie's submissions on this point. I consider that, in relation to each of the issues considered in this judgment, Julie was substantially the successful party. The 25% reduction which I made in Julie's costs was closer to what Julie was seeking (namely, that she should have all her costs or a reduced amount of 5% as suggested by Mr Sherwin in oral submissions) than what Robert and Andrew were

seeking (namely, that there should be costs each way with Robert and Andrew recovering the costs of their defence of the proprietary estoppel claim (paragraph 10 of their skeleton argument), alternatively that Julie's costs should be reduced by 53% (paragraph 12(b) of their skeleton)). The Part 36 issues which I have considered arising out of Julie's Offer were essentially decided in Julie's favour. This was not a hearing where the honours were even as Robert and Andrew contend.

69 I consider that an order enabling Julie to recover 75% of her costs of the March hearing is the fairest outcome because any consequential argument about the costs of the proprietary estoppel issue and other minor issues on which Julie was unsuccessful at the March hearing are taken into account in reducing Julie's recovery by 25%.

70 Given that (i) the March hearing took place after the expiry of the relevant period in Julie's Offer and (ii) I have decided that Julie is entitled to her costs since the end of the relevant period on the indemnity basis, it is appropriate that Julie should recover 75% of her costs of the March hearing assessed on the indemnity basis.