CA on appeal from Bournemouth CC (HHJ Hurley) before Kay LJ; Keene LJ. 13th December 2002.

JUDGMENT : LORD JUSTICE KAY:

2. This appeal raises issues relating to the way in which an offer to settle pursuant to Part 36 of the CPR can be made.

3. It is an appeal from the decision of District Judge Hurley sitting in the Bournemouth County Court on 29 May 2002 whereby he ordered that the defendant pay 75% of the costs of a personal injuries claim brought by the claimant in which she was awarded damages of £49,231.44.

4. The claimant had been injured in an accident at work on 7 January 1998 when she tripped over a piece of split carpet in her office. Liability was admitted and thus the issue to be determined was one of quantum. In the accident the claimant suffered a sprained ankle and she claimed that as a result she would be unable to work again. The district judge concluded that she could and should have returned to work by 30 April 2001. He therefore held that her loss of earnings and the loss of gratuitous care consequent upon the accident terminated at that date. This resulted in the award to which I have already referred.

5. There were two issues for the district judge to determine on costs, one relating to attempts made by the defendant to settle the matter and one relating to the conduct of the parties in the litigation. As to the latter, the defendant contended that the claimant had added significantly to the costs of the action by the exaggeration of her claim. The district judge accepted that this should be reflected by reducing the costs payable by the defendant so that the claimant would only receive 75%. That aspect of the matter is not in issue in this appeal. The district judge made no further adjustment to the award of costs to reflect the attempts which had undoubtedly been made to compromise the action and it is this aspect of his judgment that is challenged in this appeal.

6. In order to consider the matter it is first necessary to set out the history of the relevant attempts at compromise. On 11 February 2002 the claimant's solicitors sent by fax a Part 36 offer to the defendant's solicitors, offering to accept £110,000 in settlement of her claim, inclusive of interest but exclusive of an interim payment of £10,000 and of the CRU liability. The offer amounted to a total of approximately £144,000.

7. At 11.14 am on Friday 1 March 2002 the defendant's solicitors sent a fax to the claimant's solicitors in which an offer was made to settle damages at £50,000 inclusive of interest but subject to the deduction of any recoverable benefits (the figure not then being established) and the interim payment of £10,000 which had already been paid. The letter made it clear that the offer was made pursuant to CPR 36.23 and that a payment into court would be made not more than seven days after receipt of the updated figure for recoverable benefits. The hard copy of the faxed letter was posted on the same date and was received by the claimant's solicitors on 4 March 2002.

8. On 6 March 2002 the defendant's solicitors received the certificate of recoverable benefits and two days later the appropriate sum representing £50,000 less the recoverable benefits and the £10,000. A total of £16,379.89 was paid into court and notice of the payment was given to the claimant's solicitors.

9. On 13 March 2002 the defendant's solicitors made an increased offer by telephone to the claimant's solicitors of £75,000 gross and five days later increased this offer still further, again by telephone, to £79,000 gross.

10. None of the offers were accepted and on 25 March 2002 the trial of the action commenced. It lasted for three days and judgment was reserved. Judgment was given on 29 May 2002 in the sum already indicated and the order for costs against which this appeal is brought was made.

11. Part 36 of the CPR contains the relevant provision for the making of offers to settle proceedings and for the costs consequences of such offers. It is convenient to set out at this stage the relevant provisions of this Part and the other rules that have a bearing on the costs issues raised before the district judge. CPR 36.1 provides:

"(1) This Part contains rules about -

(a) offers to settle and payments into court; and

(b) the consequences where an offer to settle or payment into court is made in accordance with this Part.

(2) Nothing in this Part prevents a party making an offer to settle in whatever way he chooses, but if that offer is not made in accordance with this Part, it will only have the consequences specified in this Part if the court so orders."

12. CPR 36.2 distinguishes between a Part 36 payment (an offer made by way of payment into court) and a Part 36 offer (an offer made otherwise). CPR 36.3 provides that an offer by a defendant to settle a money claim will not have the consequences set out in Part 36 unless it is a Part 36 payment.

13. CPR 36.5 (which is headed 'Form and content of a Part 36 offer') provides

"(1) A Part 36 offer must be in writing .... .

. . . .

(6) A Part 36 offer made not less than 21 days before the start of the trial must -

(a) be expressed to remain open for acceptance for 21 days from the date it is made; and

(b) provide after 21 days the offeree may only accept it if --

(i) the parties agree the liability for costs; or

(ii) the court gives permission."

14. CPR 36.6 deals with "Notice of a Part 36 Payment". It requires the filing of a Part 36 payment notice with the court. Paragraphs (3) and (4) provide:

"(3) The court will serve the Part 36 payment notice on the offeree unless the offeror informs the court, when the money is paid into court, that the offeror will serve the notice.

(4) Where the offeror serves the Part 36 payment notice he must file a certificate of service."

15. CPR 36.8 is headed "***Time when a Part 36 offer or a Part 36 payment is made and accepted***". It reads:

"(1) A part 36 offer is made when received by the offeree.

(2) A Part 36 payment is made when written notice of the payment into court is served on the offeree.

(3) An improvement to a Part 36 offer will be effective when its details are received by the offeree.

(4) An increase in a Part 36 payment will be effective when notice of the increase is served on the offeree.

(5) A Part 36 offer or Part 36 payment is accepted when notice of its acceptance is received by the offeror."

16. CPR 36.9 provides for clarification of a Part 36 offer or a Part 36 payment notice. If the offeree does not ***"give the clarification requested",*** an application can be made to the court.

17. CPR 36.10 provides for the making of a Part 36 offer before commencement of proceedings. An offer in respect of a money claim must be the subject of a Part 36 payment within 14 days of the claim form being served. An offer under this rule is made when it is received by the offeree.

18. CPR 36.11 provides for the acceptance of a defendant's Part 36 offer or Part 36 payment. The court's permission to accept is not required for an acceptance within 21 days of the offer unless the offer of payment is made less than 21 days before the commencement of the trial.

19. CPR 36.13 provides that when a Part 36 offer or a Part 36 payment is accepted without needing the permission of the court, the claimant is entitled to his costs of the proceedings up to the date of serving notice of acceptance.

20. CPR 36.20 provides:

"(1) This rule applies where at trial a claimant -

(a) fails to better a Part 36 payment; or

(b) fails to obtain a judgment which is more advantageous than a defendant's Part 36 offer.

(2) Unless it considers it unjust to do so, the court will order the claimant to pay any costs incurred by the defendant after the latest date on which the payment or offer could have been accepted without needing the permission of the court."

21. CPR 36.23 makes provision for the situation which arose in this case where the recoverable benefits cannot be established at the time when the defendant wishes to make an offer. Notwithstanding it is a money claim, a Part 36 offer may be made where application has been made for a certificate of the

recoverable benefits provided payment into court is thereafter made within seven days of receipt of the certificate.

22. The Practice Direction supplementing CPR Part 36 provides at 11.1: *"Where a party on whom a Part 36 offer, a Part 36 payment notice or a notice of acceptance is to be served is legally represented, the Part 36 offer, Part 36 payment notice and notice of acceptance must be served on the legal representative."*

23. Since the arguments in this case turn upon the need for service of a Part 36 offer, it is necessary also to record the relevant parts of Part 6 and the Practice Direction that supplements it dealing with these issues. CPR 6.2 lists the methods by which service may be effected. It includes first-class post, the use of a document exchange and service by fax. The Practice Direction at 3.1(1) provides: *"Subject to the provisions of paragraph 3.2 below, where a document is to served by facsimile (fax);*

(1) the party who is to be served or his legal representative must previously have indicated in writing to the party serving -

(a) that he is willing to accept service by fax, and

(b) the fax number to which it should be sent,

(2) if the party on whom the document is to be served is acting by a legal representative, the fax must be sent to the legal representative's business address, and.

(3) a fax number ....

(b) set out on the writing paper of the legal representative of the party who is to be served ....

shall be taken as sufficient written indication for the purposes of paragraph 3.1(1)."

24. It is finally necessary to refer to the general provisions as to the award of costs contained in CPR Part 44. CPR part 44.3(1) gives the court a discretion in relation to the award of costs. CPR 44.3(2) provides that the general rule is that the unsuccessful party will be ordered to pay the successful party's costs. This is qualified by CPR 44.3(4) which provides: *"In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including -*

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and

(c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36).

(Part 36 contains further provisions about how the court's discretion is to be exercised where a payment into court or an offer to settle is made under that Part.)"

25. The issue which arose before the district judge was whether the offer made by the defendant's solicitors by fax on Friday 1 March 2001 was a valid Part 36 offer, which, since it was accepted that it was received by the claimant's solicitors on that day, would have meant that the offer was made more than 21 days before the commencement of the trial. Thus under CPR 36.20 the defendant would have been entitled to its costs from 23 March 2002 unless the court concluded that such an order would be unjust.

26. On behalf of the defendant it was argued that the receipt of the fax by the claimant's solicitors meant that the offer was, in accordance with CPR 36.8(1), made at that moment. There was no requirement for the making of the offer to be effected in any particular way other than it must be in writing and thus it was a valid Part 36 offer. It was further submitted that even if it was not a valid Part 36 offer, the court was bound by CPR part 44.3(4) to take into account the offers made to settle and the payment into court.

27. On behalf of the claimant it was contended that the offer made by fax was not a valid Part 36 offer. To be effective a Part 36 offer had to be served on the claimant's solicitors in accordance with the provisions of Part 6 of the CPR. Service by fax on the legal representatives of the claimant would only be effective if they had indicated a willingness to receive service in that way and although their letterhead gave a fax number it made clear that they were not willing to accept service in this way, thus rebutting the presumption which would otherwise arise by virtue of the Practice Direction supplementing Part 6 at 3.1(1). Thus it was submitted that the Part 36 offer was made only when the written offer was received via the Document Exchange on 4 March 2002. This was less than 21 days before trial and hence would not give rise to the consequences provided for by CPR 36.20. The district

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judge's conclusions were: *"My view on it is simply this. A Part 36 offer is a document which is given pursuant to Part 36, namely to a rule. The information that has to be contained in it is proscribed by Part 36 to some extent. To that extent, therefore, a Part 36 offer document is different from ordinary correspondence that will pass between solicitors, or parties, conducting litigation. It is my view, therefore, that it being a document that has to be given pursuant to a rule to be effective that receipt of it means effectively when that document is served and I do not consider that there is a distinction in essence or in fact between the words 'received' and 'served' as employed in Part 36.8 .... I am of the view that a document needs to be served to be properly received, especially one that is governed by the rules, as this one is, and because it does carry with it such important ramifications.*

It is my finding, therefore, in this case that there has been no valid payment in, so to speak, of £50,000 that would affect my order with regard to the costs of this matter as the payment in that was made was not made more than 21 clear days before the start of the trial."

28. When the district judge considered the exercise of his discretion in making his costs order, he said that one of the factors that had to be taken into account was the conduct of the parties but he made no reference in this regard to the relevance of any offer or payment in.

29. Mr Norris QC, who appears on behalf of the defendant although he did not represent him in the court below, submits that the district judge was wrong in his conclusion that it is necessary that an offer should be served in accordance with the provisions of Part 6 before it becomes effective as a Part 36 offer. In the alternative, he submits that if he is wrong on this first point, the district judge had a discretion under the rules to take the history of the offers into account and that he failed to exercise that discretion. He submits that this could have been done in two ways. The first was that he should have considered whether this was an appropriate case to make an order under CPR 36.1(2) that the offer should have the consequences specified in Part 36. Alternatively the district judge was obliged by CPR 34.3(4)(c) to have regard to any payment into court or admissible offer to settle and that he failed so to do.

30. In support of these contentions, Mr Norris firstly submits that Part 36 at no point imposes an obligation on a party to serve a Part 36 offer on the other party. The language employed throughout is that a party may "make" an offer and the only requirement imposed is that the offer must be made in writing. CPR 36.8(1) provides that an offer is "made when received by the offeree".

31. The court's attention is directed specifically to the distinction between 36.8(1) and 36.8(2). A Part 36 offer is made when received by the offeree and a Part 36 payment is made when written notice of the payment into court is "***served on the offeree***". Exactly the same distinction is drawn in 36.8(3) and 36.8(4) when an improved or increased offer is made.

32. Mr Norris argues that such an interpretation of the rules makes good sense. It is very much in the scheme of the CPR to try to encourage parties to reach a settlement if they can and therefore not to introduce artificial handicaps to such a settlement. There is no need for any formality at that stage. What is necessary is that the offeree should know about the offer and then after he knows of it have the three-week period to make the decision as to whether to accept or not. Thus what is important from his point of view is that he should have received the offer so that he can start considering it. From the offeror's point of view, what is necessary is that there should be a simple and speedy process so that he can make an offer and limit as soon as possible his liability for costs. There may be circumstances, particularly where the three-week deadline before trial is approaching, when it is necessary to make an offer as a matter of urgency and it serves no purpose to prevent him from doing so because the offeree or his solicitor may be some distance away and may decline to receive the offer by fax.

33. As to his alternative ground, Mr Norris submits that there were powerful reasons why, even if technically the making of the offer by fax meant that it did not satisfy the conditions of Part 36, the court should have ordered that it had the same consequences as if it had complied with Part 36. He lists five reasons:

1) There were good reasons why the offer could not have been made until the time when it was made. On 23 February 2002 the psychiatrists advising each party had produced a joint response to various questions that had been raised. This was followed four days later by a joint conference of the rheumatologists producing answers to various questions asked of them. Two days later the offer was made by fax.

2) It was necessary for the offer to be made urgently otherwise it would not have been effective and the sensible way of making it urgently was by fax.

3) Although the claimant's solicitors had indicated by the heading of their notepaper that they were not prepared to receive service by fax, they had chosen that method to communicate their offer of 11 February 2002, some three weeks before.

4) When the offer was sent by fax there was no objection taken by the claimant's solicitors. Indeed, the point was never taken at all until a skeleton argument was produced in relation to costs on 23 May 2002 shortly before the costs hearing.

5) The way in which the offer was communicated had no bearing upon the claimant. It is clear that however and whenever made this offer would have been refused, as indeed were the two subsequent increased offers.

34. Finally, Mr Norris argues that this history was bound to be reflected in the exercise of the court's discretion under CPR 44.3 if in no other way. The district judge apparently ignored it once he had concluded that the offer did not come within Part 36.

35. Mr Brilliant, on behalf of the claimant, submits, as he did in the court below, that CPR 36.8 makes provision for the time when a Part 36 offer is made but does not purport to make provision for how such an offer is to be made. Part 6, he submits, makes general provisions dealing with the way in which documents are delivered and it applies to a written offer pursuant to Part 36 as much as it does to any other document of which service is required. The effect of CPR 36.8 is to remove what otherwise would be deemed to be the date on which service was effected under Part 6 and make clear that it does not become effective, however served, until there is an actual receipt.

36. Mr Brilliant submits that the distinction between a Part 36 offer and a Part 36 payment in CPR 36.8 is simply to reflect the time at which each will become effective, the one on receipt, the other according to the rules relating to service.

37. Mr Brilliant suggests that were it otherwise, there would not be anything to stop an offer being made in bizarre circumstances. He gives as an extreme example the flying of a plane over a solicitor's office towing a banner upon which the offer was written. He submits that once such an offer had been made in this way, if the defendant's submissions were right, provided it was read by the solicitor it would be received by him and the Part 36 consequences would follow.

38. Mr Brilliant also places reliance on the Practice Direction supplementing Part 36 at paragraph 11.1 and the requirement, common to a Part 36 offer, a Part 36 payment and acceptance of an offer, that where a party is represented the offer or notice must be served on the legal representative. This was not a point made to the district judge but, submits Mr Brilliant, it is powerful support for the fact that the district judge's decision was right.

39. Mr Norris, dealing with this aspect of Mr Brilliant's submissions, suggests that "served" is used in this paragraph as a collective expression for the way in which each of the documents had to be brought to the attention of the other party. To list each and use separate and distinct language for each would have made the provision unnecessarily long and complex when all that was needed was to convey the requirement that each document should go to the solicitor and not simply to the lay client.

40. Assuming that he is right in his primary contention, Mr Brilliant submits this was not a case for the exercise of the court's discretion in a way other than that reached by the district judge. He observed that it is not surprising that the district judge did not refer to CPR 36.1(2) because he was never invited by the defendant to make an order under that provision. That part of the rule, he submits, is to deal with technical breaches in the terms of the Part 36 offer (see for example **Mitchell v James** [2002]

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EWCA Civ 997) but was not intended to be used when no offer in accordance with Part 36 has been made under the rules until within the 21-day period before trial.

41. Mr Brilliant submits that in exercising his discretion under CPR 44.3 the district judge adopted a broad-brush approach which reflected the justice of the case. He argues that there were good reasons why no allowance should have been made for these offers. The defendant delayed any attempt to make a realistic offer until the very last minute. He only acted then when criticised by the district judge at a case management conference on 20 February 2002 and even then had delayed further in making an offer. The evidence obtained shortly before the making of the offer was not of a significance which could have explained the delay. He submits that the fact that the offer made by the claimant was sent by fax to the defendant's solicitors is not relevant because those solicitors did not indicate that they were not prepared to accept service in this way and accordingly it was perfectly proper to serve the offer in that way. This service did not alter the rules about service on a solicitor who was not prepared to receive service by fax.

42. Mr Brilliant, however, has not suggested that the approach of the claimant or her solicitors would in any way have been affected if the letter containing the offer had, for example, been hand-delivered on 1 March 2002 rather than sent by fax.

43. For my part I have no difficulty in concluding what should be the outcome of this appeal, although I have found the point on the method of effecting a valid Part 36 offer far from straightforward. If the submission made by Mr Brilliant as to the need for service of a Part 36 offer is right, I have no doubt at all that the justice of the case required the district judge to exercise his power under CPR 36.1(2) and to order that the offer communicated to the claimant's solicitors on 12 March 2002 should have the consequences provided by Part 36. Whether he was specifically invited to do so or not, is not in my judgment of critical importance. The district judge is taken to be aware of his powers in relation to these matters and if that was the just way of dealing with the matter, that is the course that he should have taken. If for any reason he had decided that it was inappropriate to make such an order, he should then have gone on to consider these matters in the exercise of his discretion under CPR 44 and that should have led to precisely the same outcome.

44. In my judgment the justice of the case clearly called for such an approach and under CPR 1.2 the court was bound to give effect to the overriding objective of enabling the court to deal with cases justly in exercising the powers given to it by the rules. CPR 36.1(2) specifically makes clear that a party can make an offer to settle in whatever way he chooses. There is thus no bar to the making of an offer in the way that this offer was made. If it was not made in accordance with Part 36 the defendant was exposed to the risk that the court might not conclude that it was just that it should have the consequences specified in Part 36. However, in order to exercise that discretion the court must inevitably look at the way in which the offer was made and ask whether the making of the offer in that way in any way affected the interests or rights of the offeree. In this case it quite plainly did not make the slightest difference to the claimant and nor could it have done so. If it had not been received it would not have been effective in any event. Once it was received, as it was here, the claimant was in precisely the position she would have been if the offer had been hand-delivered to the solicitor's office. As already indicated, there is no suggestion made that it led to any difference of approach to the offer. No objection was taken at the time and the reliance upon this matter is little more than an attempt at a late stage to avoid the consequences of the claimant's unwillingness to accept what was determined to be a fair and sensible offer.

45. Thus even if the claimant is right that the offer was not made in a manner that satisfied the rules, I should have no difficulty in concluding that the normal Part 36 consequences should follow.

46. The other question thus becomes academic in this case and may be academic in most similar cases because of the power contained in CPR 36.1(2). But nonetheless it may be of importance in some other cases and should be addressed.

47. It is perhaps surprising that the rules do not provide an immediate answer to the question. It seems to me that it would be helpful if they specifically spelt out what a party must do in order to make a Part

36 offer. For my part I am impressed by the arguments advanced by reference to the distinction in language between 36.8(1) and 36.8(3) on the one hand and 36.8(2) and 36.8(4) on the other hand. I can see no reason why the different language is employed in these provisions unless it was to suggest that a Part 36 offer was effected once received by the offeree without any need to comply with the form of provisions as to service contained in Part 6.

48. It is perhaps of importance to observe that the whole question of offer and acceptance finds its basis in contract law without the need for the involvement of the court. In contract law an offer would be effected once it is drawn to the attention of the offeree and would provide the offeree with the opportunity of deciding whether to accept it or not. In contrast to this situation, a payment into court of necessity involves the court in the process and the more formal requirement of service can be understood in this context.

49. Thus from an examination of the rules alone, I would conclude that it was not necessary for there to be formal service of an offer for it to be an effective offer under Part 36.

50. The difficulty arises, however, when the Practice Direction is considered. Paragraph 11.1 does, as Mr Brilliant submits, suggest the contrary with its reference not only to service of a Part 36 payment notice and of a notice of acceptance, but also of a Part 36 offer. Not without some hesitation, I have concluded that this cannot have been intended to impose a requirement for service which was not expressly suggested by the rules themselves and that Mr Norris must be right that it was used not in the formal sense but collectively to deal with the various different situations without the need to over-complicate a fairly simple proposition that each of these steps must be effected through the solicitor.

51. In practice I can see no unfairness arising from this approach. The court has in any event power under CPR 36.20(2) to vary the normal rules to protect a claimant if they operate unjustly. Mr Brilliant's extreme example of the plane towing an offer is not a realistic one. It would in any event be arguable that seeing a plane towing a message was not the same as "***receiving the offer***" and in any event the court's discretion would come into play.

52. It would perhaps be desirable for this matter to be put beyond question by the Rules Committee so that it was immediately obvious to the parties what they should do. However, as the rules stand at present, I would conclude that the rules for formal service do not apply to the making of a Part 36 offer. It is sufficient that the offer is communicated in writing to the other party and that the other party receives the offer.

53. The effect of my conclusion is that I would allow the appeal and substitute for the district judge's order as to costs, an order in the terms sought by the defendant.

53. **LORD JUSTICE KEENE**: I agree.

ORDER: Appeal allowed. An order in the terms sought by the respondent to be substituted for the order below. The appellant to have its costs under the provisions of the Community Legal Services (Costs) Regulations 2000. (Order does not form part of the approved judgment)

MR W NORRIS QC and MISS E CONNOR (instructed by Berrymans Lace Mawer) appeared on behalf of the Appellant
MR S BRILLIANT and MR A WILLE (instructed by Letcher & Son, Ringwood BH24 1BS) appeared on behalf of the Respondent