Huck (Mrs Rosalind) v Mr Tony Robson [2002] EWCA Civ 398 (21st March, 2002)

CA on appeal from Carlisle County Court (Deputy Circuit Judge Townend QC) before Schiemann LJ, Tuckey LJ, Jonathan Parker LJ. 21st March 2002.

JUDGMENT : Lord Justice Jonathan Parker :

1. This is an appeal by Mrs Rosalind Huck, the claimant in the action, against an order for costs made on 30 July 2001 by Deputy Circuit Judge Townend QC, sitting at Carlisle County Court. The order for costs followed the hearing of the issue of liability for a road traffic accident. The hearing resulted in a finding by the judge that the defendant in the action, Mr Tony Robson, was 100 per cent liable for the accident. By his order, the judge ordered Mr Robson to pay Mrs Huck's costs of the claim and of Mr Robson's counterclaim, on the standard basis.

2. Permission to appeal was granted by Mantell LJ at an oral hearing, on the ground that the appeal raises a point of some general importance under Part 36 of the Civil Procedure Rules ("the CPR") as to the award of indemnity costs in favour of a claimant who has obtained a judgment which is more advantageous to him than the proposals contained in an earlier offer made by him in accordance with Part 36.

3. It is Mrs Huck's case that, pursuant to rule 36.21 of the CPR, the judge ought to have ordered Mr Robson to pay her costs on an indemnity basis, with interest at an enhanced rate, as from 27 October 2000, i.e. as from the expiry of 21 days after she had made an offer in accordance with Part 36. By that offer, Mrs Huck proposed a compromise of the liability issue on the basis that Mr Robson was 95 per cent liable for the accident – a proposal which Mr Robson rejected. He had previously proposed a 50/50 split on liability, and he maintained that proposal.

4. The background to the appeal is, in summary, as follows.

5. In the action, Mrs Huck claims damages for personal injuries sustained in the accident, which occurred on 16 April 1999 on a narrow lane in Cumbria between two cars travelling in opposite directions. Her case is that she saw Mr Robson's car approaching and pulled over onto her near-side to allow it to pass, and that Mr Robson braked but lost control of his car, which skidded into hers. Her case is that her car was stationary at the moment of impact. Mr Robson's pleaded case, on the other hand, was that the lane was at that point too narrow for two cars to pass, and that the two cars skidded into each other. He specifically denied that Mrs Huck's car was stationary at the time of the collision.

6. By letter dated 18 August 1999 from AXA Direct (Mr Robson's insurers) to Bleasdale & Co (Mrs Huck's solicitors), Axa Direct offered to compromise the liability issue on the basis of a 50/50 split. The material part of the letter, which was an open letter, reads as follows: *"We have considered the locus report prepared by your engineer but we do not feel that this contains any conclusive evidence that supports either party in this accident. The photographs confirm that this was a very narrow road and the road surface was not in a good condition. Our insured advises us that he met your client's vehicle on a particularly bad bend in the road where it was too narrow to pass and both cars skidded before colliding with each other. These comments are supported in the Police report where the Police comment that both vehicles travelled around the bend colliding on their off-side and the vehicles braked but skidded on the mud on the road. There is no evidence that supports the fact that either party attempted to avoid this collision more than the other and we feel that the matter should be settled on a 50/50 liability split."*

7. Mrs Huck's response to this offer is not in evidence, but it is clear from subsequent correspondence that she rejected it.

8. By letter dated 12 September 1999, this time headed 'Without prejudice', Axa Direct maintained the offer.

9. The next letter in our bundle is a letter from Bleasdale & Co to Axa Direct dated 18 September 2000 (that is to say, a year or so later). The letter, which is headed "Part 36 offer", reads as follows: *"We refer to the above matter and are instructed to put forward our Client's proposal in respect of liability only.*
We can confirm that our Client will accept a 95/5% split on liability.
This proposal will remain open for a period of 21 days after which it can only be accepted with leave of the court or with the consent of all other parties."

10. It appears that that letter may not have evoked a response, because on 6 October 2000 Bleasdale & Co wrote again to Axa Direct in identical terms. By letter dated 15 October 2000 Axa Direct responded as follows (so far as material): *"We maintain our offer to settle on a 50/50 liability split and re-affirm this as a Part 36 offer on liability."*

11. Proceedings were commenced on 7 November 2000, and the hearing on liability took place on 26 July 2001.

12. The judge began his judgment by commending Mr Robson for his honesty, observing how refreshing it was to come across a completely honest witness. He continued (at p.2D of the transcript): *"Mr Robson in his evidence accepts that he was at fault but he believed, he said, it was not entirely his fault. He was asked why he criticised the other driver and he said: 'I can't answer that question'. He also said he could not say if the other driver had skidded at the time he was skidding. He also said he did not know if the other car was stationary at the time of impact. He would have been guessing had he done so. He did say, of course, that at the time he saw the other car it was moving towards him. That was the impression I got, of course, from Mrs Huck's evidence. She would not have stopped had the other car not been moving towards her. But the overall cause of this accident, in my judgment, is the fact that Mr Robson was going a bit too fast for this road at this place and he unfortunately met mud on the road, otherwise he might have been able to stop, I do not know. It is very difficult with the geography which has been presented to me. But it seems to me that a combination of those factors, his going somewhat too fast and the mud on the road, caused this impact. Mrs Huck's driving cannot be criticised, it seems to me.*

In those circumstances, there must be judgment for the claimant in 100% terms, I suppose is how one puts it, when the issue is as to liability."

13. Mr William Waldron (appearing for Mrs Huck) then addressed the judge on the question of costs. He drew the judge's attention to Bleasdale & Co's letter dated 6 October 2000, and continued (at p.3D of the transcript): *"…. in those circumstances, because the [defendant] has been held liable for more than the offer and the judgment is more advantageous to the claimant [than the offer], your Honour may order costs for the claimant on the indemnity basis from 27 October. I invite your Honour to do that."*

14. In the result, as indicated earlier, the judge declined to accept that invitation, and awarded Mrs Huck her costs on the standard basis.

15. However, before I examine the judge's reasons for so doing, as they appear from the discussion between the judge and Mr Waldron, it is convenient to set out at this point the relevant provisions of the CPR.

16. I start with Part 36, the relevant provisions of which are as follows:

"36.1((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. .....

36.2 (1) An offer made in accordance with the requirements of this Part is called –

(a) if made by way of payment into court, "a Part 36 payment";

(b) otherwise " a Part 36 offer". .....

(2) The party who makes an offer is the "offeror".

(3) The party to whom an offer is made is the "offeree".

(4) A Part 36 offer or a Part 36 payment –

(a) may be made at any time after proceedings have started; and

(b) may be made in appeal proceedings.

(5) ....."

17. Rules 36.3 and 36.4 deal with offers by a defendant to settle a claim which is wholly or partly a money claim. They are not material for present purposes. Nor are rules 36.5 (form and content of a Part 36 offer), 36.6 (notice of a Part 36 payment), 36.7 (offer to settle a claim for provisional damages) 36.8 (time when a Part 36 offer or a Part 36 payment is made and accepted), or 36.9 (clarification of a Part 36 offer or a Part 36 payment notice).

18. Rule 36.10 provides as follows (so far as material):

"36.10 (1) If a person makes an offer to settle before proceedings are begun which complies with the provisions of this rule, the court will take that offer into account when making any order as to costs.

(2) The offer must –

(a) be expressed to be open for at least 21 days after the date it was made;

(b) .....; and

(c) otherwise comply with this Part."

19. I need not, I think, read rules 36.11 to 36.19 inclusive.

20. Rule 36.20 deals with the costs consequences where a claimant fails to better a defendant's Part 36 offer or a Part 36 payment. It provides as follows:

"36.20 (1) This rules 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. Rule 36.21 deals with the costs consequences where the claimant betters his own Part 36 offer. I must read the whole of the rule.

"36.21 (1) This rule applies where at trial –

(a) a defendant is held liable for more; or

(b) the judgment against a defendant is more advantageous to the claimant,

than the proposals contained in a claimant's Part 36 offer.

(2) The court may order interest on the whole or part of any sum of money (excluding interest) awarded to the claimant at a rate not exceeding 10% above base rate for some or all or the period starting with the latest date on which the defendant could have accepted the offer without needing the permission of the court.

(3) The court may also order that the claimant is entitled to –

(a) his costs on the indemnity basis from the latest date when the defendant could have accepted the offer without needing the permission of the court ; and

(b) interest on those costs at a rate not exceeding 10% above base rate.

(4) Where this rule applies, the court will make the orders referred to in paragraphs (2) and (3) unless it considers it unjust to do so.

(Rule 36.12 sets out the latest date when the defendant could have accepted the offer.)

(5) In considering whether it would be unjust to make the orders referred to in (2) and (3) above, the court will take into account all the circumstances of the case including –

(a) the terms of any Part 36 offer;

(b) the stage in the proceedings when any Part 36 offer or Part 36 payment was made;

(c) the information available to the parties at the time when the Part 36 offer or Part 36 payment was made; and

(d) the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer or payment into court to be made or evaluated.

(6) Where the court awards interest under this rule and also awards interest on the same sum and for the same period under any other power, the total interest may not exceed 10% above base rate."

22. I turn next to Part 44 of the CPR, which deals with costs. Rule 44.3 deals with the court's discretion in relation to costs, and the circumstances to be taken into account when exercising that discretion. I refer to this rule because Mr Nicholas Bacon, who appears for Mr Robson, submits, among other things, that the offer in question was not a Part 36 offer since it was made before the commencement of proceedings, and that the effect of rule 36.10 is that it is to be taken into account by the court in exercising its discretion as to costs.

23. The relevant provisions of rule 44 are as follows:

"44.3 (1) The court has discretion as to –

(a) whether costs are payable by one party to another;

(b) the amount of those costs; and

(c) when they are to be paid.

(2) If the court decides to make an order about costs –

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order. .....

(4) 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). .....
(5) The conduct of the parties includes –
(a) conduct before as well as during, the proceedings, and in particular the extent to which the parties followed any relevant pre-action protocol;
(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
(c) the manner in which a party has pursued or defended his case or a particular allegation or issue;
(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim. ....."

44.4 *(1) Where the court is to assess the amounts of costs (whether by summary or detailed assessment) it will assess those costs –*
(a) on the standard basis; or
(b) on the indemnity basis,
but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.
(1) Where the amount of costs is to be assessed on the standard basis, the court will –
(a) only allow costs which are proportionate to the matter in issue; and
(b) resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party.
(3) Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.
(4) Where –
(a) the court makes an order about costs without indicating the basis on which the costs are to be assessed; or
(b) the court makes an order for costs to be assessed on a basis other than the standard basis or the indemnity basis, the costs will be assessed on the standard basis.

44.5 *(1) The court is to have regard to all the circumstances in deciding whether costs were –*
(a) if it is assessing costs on the standard basis –
(i) proportionately and reasonably incurred; or
(ii) were proportionate and reasonable in amount, or
(b) if it is assessing costs on the indemnity basis –
(i) unreasonably incurred; or
(ii) unreasonable in amount.
(2) .....
(3) The court must also have regard to –
(a) the conduct of all the parties, including in particular –
(i) conduct before, as well as during, the proceedings; and
(ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;
(b) the amount or value of any money or property involved;
(c) the importance of the matter to all the parties;
(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;
(e) the skill, effort, specialised knowledge and responsibility involved;
(f) the time spent on the case; and
(g) the place where and the circumstances in which work or any part of it was done.

24. I can now return to the discussion about costs which followed delivery of the judge's judgment, and to Mr Waldron's invitation to the judge to award Mrs Huck her costs on an indemnity basis as from 27 October 2000. The judge's immediate response, referring to Mrs Huck's offer to split liability 95/5 in her favour, was that the offer "*was not an offer of anything*", and that it was "*derisory*" and "*meaningless*". "*It is nothing*", he said.

25. When Mr Waldron said that he had heard of offers by a claimant to accept a compromise on liability of the basis of 99.9% liability by the defendant and .1% by the claimant, the judge commented that an 80:20 split might be realistic, and that he had even known of cases being resolved on the basis of a 90:10 split, but that he had never heard of a case being resolved at 95:5, and that he would regard such a result as "nonsensical". Mr Waldron then submitted that by virtue of rule 36.21, to which he referred the judge, the court was bound to award indemnity costs unless it would be unjust to do so. The judge

responded that he considered that it would be unjust so to order. The judge then inquired as to the approximate value of the claim. Mr Waldron suggested (without committing himself) that it might be worth between £17,500 and £40,000. The judge then said this (at p.7B of the transcript): *"In my judgment 95% on the kind of value that we are talking about here was no kind of offer and it seems to me inevitable that the defendant would reject it. In those circumstances, in my judgment it would be unjust to award indemnity costs even though I have found that the claimant succeeds in the proportion of 100%."*

26. Mr Waldron then said: *"For my own purposes and understanding, is it your Honour's judgment, as I understand it to be, ... that the injustice is that the offer was derisory and meaningless?"*

27. To which the judge replied: *"It was derisory, yes."*

28. The judge accordingly went on to award Mrs Huck her costs on the standard basis.

29. By her grounds of appeal, Mrs Huck contends firstly that the judge failed to appreciate that the application of rule 36.21 depends solely upon whether the judgment against Mr Robson on the issue of liability was more advantageous to her than her offer of a 95:5 split, as in the event it was. Secondly, she contends that the judge failed to give sufficient weight to para (4) of the rule, which provides that the court will order costs on an indemnity basis "unless it considers it unjust to do so", and that Mr Robson's view of the offer was not a relevant consideration. Thirdly, she contends that in concluding that it would be unjust to order costs on an indemnity basis, the judge failed to have regard to the various matters set out in para (5) of the rule. Fourthly, she contends that the judge's decision to award costs on the standard basis was wrong, and that his reasoning was flawed and led him to make a decision so perverse as to indicate that he must have fallen into error.

30. Although Mr Waldron did not expressly invite the judge to award interest on the indemnity costs, pursuant to paragraph (3)(b) of rule 36.21, section 5 of Mrs Huck's Appellant's Notice includes a claim for such interest.

31. By a Respondent's Notice, Mr Robson raises the contention that the offer in question was not a Part 36 offer; that it is merely a matter which the court will take into account in exercising its discretion as to costs, and that accordingly the judge was not obliged by paragraphs (3) and (4) of rule 36.21 to award costs on an indemnity basis.

32. Mr Bill Braithwaite QC (who leads Mr Waldron on this appeal) submits that the offer is a Part 36 offer, or at least is to be treated as if it were. He submits that the true effect of rule 36.10 is that it is to be taken into account by the court *under Part 36*, and that rule 36.21 accordingly applies to it.

33. Turning to the application of rule 36.21 itself, Mr Braithwaite submits that the only precondition for the application of rule 36.21 to the offer in question is that Mrs Huck should have bettered that offer (which indisputably occurred, since Mr Robson was held to be 100% liable). Accordingly, indemnity costs should be awarded as from 27 October 2000, with interest from that date, *unless it would be unjust so to order* (see paragraphs (3) and (4) of the rule). That, he submits, is the only issue.

34. On that issue, Mr Braithwaite criticises the judge for not having referred expressly to each of the four factors listed in rule 36.21(5) – the only one of such factors to which he referred expressly being the terms of the offer. Mr Braithwaite submits that the fact that the judge failed to do so indicates that he did not have the relevant factors sufficiently in mind.

35. In any event, submits Mr Braithwaite, there was no basis for the conclusion that it would be unjust to make the costs order sought.

36. He reminds us, by reference to the decisions of this court in ***Petrotrade Inc v. Texaco Ltd*** [2001] 4 All ER 853 and ***McPhilemy v. Times Newspapers Ltd (No 2)*** [2001] 4 All ER 861, that an order for indemnity costs under rule 36.21 does not imply any disapproval of the defendant's conduct, still less does it carry any element of stigma; nor is it intended to be punitive. He submits that a claimant who betters his own Part 36 offer, by however small a margin, is *prima facie* entitled to indemnity costs under the rule, and that there are no grounds in the instant case for depriving Mrs Huck of that *prima facie* entitlement.

37. Mr Braithwaite submits that the judge was in error in approaching the question whether it would be unjust to award Mrs Huck indemnity costs by asking himself whether there was a possibility of the court making a finding of contributory fault by her of less than 10 per cent. Mr Braithwaite accepts that such a finding would not have been appropriate in the circumstances of the instant case, but he submits that Mrs Huck's offer is to be regarded not as an assessment of the likelihood of a particular outcome if the issue of liability went to trial but rather as an assessment by her of the risk she would be running if it did so. She was, he asserts, confident of her case that her car was stationary at the moment of impact, and in the event that confidence was resoundingly justified. The fact that her offer reflected that degree of confidence ought not, he submits, to serve to deprive her of the indemnity costs to which she would otherwise be entitled under the rule.

38. As to the judge's inquiry about the estimated value of the claim, Mr Braithwaite submits that the value of the claim is not a material factor. A five per cent discount on even a small claim cannot be described as nominal.

39. Turning to the four factors listed in paragraph (5) of the rule, Mr Braithwaite submits (as to (a), the terms of the offer) that the offer gave Mr Robson the opportunity to resolve the issue of liability with the benefit of a 5% discount; (as to (b), "the stage in the proceedings when [the offer] .... was made") that the offer was made in advance of the commencement of proceedings and would, if accepted, have avoided the need for any trial on liability; (as to (c), the information available to the parties at the time when the offer was made) that the information available to the parties in October 2000 was identical to that which was available at trial; and (as to (d), the conduct of the parties) that Mrs Huck's conduct cannot be criticised, whereas Mr Robson's defence that Mrs Huck was 50 per cent to blame for the accident (a defence which he had maintained throughout) effectively collapsed at trial on the admissions to which the judge referred at the start of his judgment.

40. Mr Braithwaite further submits that the judge was in error in attaching what appeared to be significant weight upon his own evaluation of the reasonableness of Mr Robson in rejecting the offer, whereas the only relevant question was whether Mrs Huck had bettered her own offer; that the judge effectively penalised Mrs Huck for assessing her prospects of success in the action as extremely good; that the implication of the judge's reasoning was that a claimant with a strong claim would always have to concede at least a 10% reduction before he could take advantage of the provisions of rule 36.21; and that the judge failed to take account of the fact that had Mr Robson conceded before the hearing that he did not know whether or not Mrs Huck's car was stationary when the accident occurred a trial of the liability issue might have been avoided altogether.

41. In support of the Respondent's Notice, Mr Bacon (for Mr Robson) submits that the offer contained in the letter dated 6 October 2000 was not a Part 36 offer at all, since it was made before proceedings were commenced. In support of this submission he relies on paragraph (4)(a) of rule 36.2, which provides that a Part 36 offer "may be made at any time after proceedings have started". Mr Bacon submits that the offer in question was an "offer to settle before proceedings are begun", of a kind which the court will "take into account" under rule 36.10. Mr Bacon submits that "take into account", in that context, means that the court will take it into account in exercising its discretion as to costs, but that rule 36.21 does not apply to it.

42. It follows, submits Mr Bacon, that Mrs Huck's grounds of appeal are misconceived in so far as they are premised on the existence of a Part 36 offer. Rather, the judge was exercising a general discretion, and there are no grounds on which his exercise of that discretion can be challenged in an appellate court.

43. If and in so far as (contrary to his primary submission) the offer in question was a Part 36 offer, or falls to be treated as such, Mr Bacon submits that it is apparent from the transcript of the discussion concerning costs which followed delivery of his judgment that the judge appreciated that the condition for the application of rule 36.21 was that Mrs Huck should have bettered her own offer, and that in the event that condition had been fulfilled, and that the judge then went on (correctly, on this basis) to consider whether in the circumstances of the instant case it would be unjust to award indemnity costs.

44. Mr Bacon warns us against concluding from the judge's references to admissions made by Mr Bacon in the course of his oral evidence that Mr Bacon had run the action up to trial on the issue of liability by persisting in a defence which he knew to be false. Mr Bacon submits that it is clear from the judge's references to Mr Bacon's honesty as a witness that the judge did not take that view; on the contrary, the judge was plainly satisfied that Mr Bacon honestly believed that he was not solely to blame for the accident.

45. Mr Bacon submits that in the circumstances of the instant case a finding of contributory fault on the part of Mrs Huck of less than 10 per cent was not a realistic possibility, and that in consequence the judge was fully entitled to regard Mrs Huck's offer as being one which Mr Robson would inevitably reject.

46. Mr Bacon submits that, in order to qualify as a Part 36 offer, the offer must represent a genuine and realistic attempt to dispose of the dispute by agreement, and that the court is entitled to conclude that an offer by a claimant which the defendant will inevitably refuse does not meet that requirement.

47. In support of this submission, Mr Bacon relies on the fact that one of the matters to which the court will have regard in considering whether it would be unjust to award indemnity costs under rule 36.21 is the terms of the offer itself (see paragraph (5)(a) of the rule). This was, he submits, the crucial factor in the instant case, as the judge made abundantly clear. He submits that the fact that the judge did not make specific reference to each of the matters listed in paragraph (5) of the rule does not in any way vitiate his decision. In concluding that it would be unjust to award indemnity costs, the judge no doubt had all those factors in mind.

48. Accordingly, submits Mr Bacon, even if (contrary to his primary submission) the offer was one to which rule 36.21 applied, the judge's decision that it would by unjust to award indemnity costs is not a decision with which this Court should interfere.

49. Before turning to the issues, I should record that I accept Mr Bacon's submission that this court should not proceed on the basis that (in effect) Mr Robson maintained a defence on liability which he knew to be false, only to capitulate at the hearing. I agree with Mr Bacon that had the judge taken that view, far from commending Mr Robson for his honesty he would have expressed himself very differently and might well have come to a different conclusion on the crucial question whether it would be unjust to award Mrs Huck indemnity costs. We have not seen the transcript of Mr Robson's evidence and are accordingly in no position to form our own view, but the judge's comments are entirely consistent with Mr Robson having frankly admitted, under pressure of cross-examination, that he could not say for sure that Mrs Huck's car was still moving at the moment of impact, although he believed that to be the case. In the circumstances, this court should not in my judgment draw any inferences adverse to Mr Robson from the admissions which the judge records him as having made in the course of his evidence beyond the plain fact that those admissions were fatal to his case that both parties were equally to blame.

50. I turn, then, to the issue raised by the Respondent's Notice; that is to say, the issue whether the offer is one to which rule 36.21 applies.

51. The issue turns on the true meaning and effect of rule 36.10, and in particular of the words "the court will take that offer into account" in paragraph (1) of the rule. In my judgment the purpose and effect of r.36.10 is to enable a party to make an offer which complies with Part 36, and which has all the consequences of a Part 36 offer, before proceedings are commenced. As Lord Woolf CJ said in ***Ford v. GKR Construction Ltd*** [2000] 1 WLR 1397 at 1403D: *"Under the CPR it is possible for the parties to make offers to settle before litigation commences."*

52. Later (at p.1403E) he said: *"If the process of making Part 36 offers before the commencement of litigation is to work in the way which the CPR intend, the parties must be provided with the information which they require in order to assess whether to make an offer or whether to accept that offer. Where offers are not accepted, the CPR make provision as to what are to be the cost consequences of not accepting an offer which, when judged in the light of the litigation, should have been accepted."*

53. Read in context, the words *"the court will take that offer into account"* in rule 36.10 mean, in my judgment, that where an offer has been made before the commencement of litigation which complies with the requirements of the rule (which in turn requires that the offer comply with the remainder of Part 36) the court will take that offer into account *as a Part 36 offer*, and accordingly that where the offer has been made prior to the commencement of proceedings by the prospective claimant rules 36.20 or 36.21 (as the case may be) will apply to it. I reject Mr Bacon's submission that rule 36.21 means no more than that the court will take such an offer into account when exercising its discretion as to costs. In the first place, such a provision would be otiose since rule 44.3 provides that in exercising its discretion as to costs the court will have regard to (among other things) the conduct of the parties before the commencement of the proceedings (see ibid. paras (4)(a) and (5)(a)), and, more importantly in the present context*: "any .... 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)"* (see ibid. para (4)(c)).

54. In the second place, the specific requirements of rule 36.10 (2) (viz. that the offer be expressed to be open for at least 21 days, that (if made by a prospective defendant) it includes an offer to pay the prospective claimant's costs up to the expiry of the 21 days, and that it otherwise complies with Part 36) limit the category of pre-litigation offers which the court will "take into account" to those which are equivalent to Part 36 offers made after the commencement of proceedings.

55. In any event, I can see no logical reason why costs consequences which follow from an offer which fulfils the requirements of Part 36 and which is made after the commencement of proceedings should not equally follow from an offer which also fulfils those requirements but which is made before proceedings are commenced. Indeed, I can see very good reasons why the consequences should be the same. The philosophy underlying Part 36 is the need to provide encouragement to litigants or prospective litigants to resolve their disputes by agreement. So far as claimants are concerned, paragraphs (2) and (3) of rule 36.21 reflect that philosophy by providing incentives in the form of awards of interest and indemnity costs. In the context of the instant action, the relevant incentive that is provided by paragraph (3) (indemnity costs). Absent some such incentive under the CPR, there would be no reason for a claimant to make a Part 36 offer. As Simon Brown LJ said ***Victor Kermit Kiam II v. MGN Ltd*** [2002] EWCA Civ 66 (at paragraph 8): *"If the claimant thought that, even if he were to make and then beat an offer, he was going to get no more than his costs on the standard basis, why would he make it? It would afford him no advantage at all. He would be better simply to claim at large and recover his costs whatever measure of success he gained. His position is, in short, quite different from that of a defendant who plainly has every incentive to make a settlement offer, generally by way of payment into court, irrespective of the basis on which any costs order will be made."*

56. The need for an incentive to encourage a claimant to make an offer of settlement before proceedings are commenced is at least as great as the need to make one where proceedings are already on foot. Indeed, one would have thought that the need for an incentive to make offers of settlement which might avoid proceedings altogether would be regarded as, if anything, greater than the need for an incentive to compromise proceedings which are already on foot.

57. Accordingly the judge was right, in my judgment, to proceed on the basis that the offer made in the instant case was one to which r.36.21 applied.

58. I turn, then, to the question whether the judge's decision that it would be unjust to award Mrs Huck her costs on an indemnity basis is one with which this court should interfere.

59. I turn first to Mr Braithwaite's criticism of the manner in which the judge expressed his decision on costs, in that in reaching that decision the judge did not expressly refer to the matters listed in paragraph (5) of the rule as being factors which the court will take into account in considering that question; the only factor to which he made express reference being the terms of the offer itself.

60. In my judgment it is not obligatory for a judge, when giving his decision on the question whether it would be unjust to award indemnity costs under rule 36.21, to make express reference to each of the four factors listed in paragraph (5) of the rule: nor did Mr Braithwaite go so far as to suggest that it was. At the same time, it may well be a counsel of prudence for a judge to do so, if only to forestall the

argument that because he did not expressly refer to a particular factor, he cannot have had that factor in mind.

61. I turn, therefore, to Mr Braithwaite's challenge to the substance of the judge's decision on costs.

62. True it is that once a claimant has bettered his own offer, even though he may have done so by the narrowest of margins, then rule 36.21 will apply. But, as Mr Braithwaite rightly accepts, it does not follow that indemnity costs will necessarily be ordered. In every case where the rule applies, the question for the court is whether it would be unjust to make such an order. In this sense, a claimant who has bettered his Part 36 offer has a *prima facie* entitlement to indemnity costs.

63. At the same time, it is in my judgment implicit in rule 36.21 that, consistently with the philosophy underlying Part 36 (to which I have already referred), in order to qualify for the incentives provided by paragraphs (2) and (3) of the rule a claimant's Part 36 offer must represent at the very least a genuine and realistic attempt by the claimant to resolve the dispute by agreement. Such an offer is to be contrasted with one which creates no real opportunity for settlement but is merely a tactical step designed to secure the benefit of the incentives. That is not to say that the offer must be one which it would be unreasonable for the defendant to refuse; that would be too strict a test, and would introduce considerations of punishment and moral condemnation which (on the authority of ***Petrotrade*** and ***McPhilemy***) are irrelevant in the context of paragraph (3) of rule 36.21. Indeed, the terms of the offer may reflect a degree of optimism and confidence on the part of the claimant/offeror. Provided only that the offer represents a genuine and realistic offer to resolve the dispute by agreement, it is for the claimant to decide at what level to pitch his offer. In some cases, an offer which allows only a small discount from 100 per cent success on the claim may be a genuine and realistic offer; in other cases, it may not. It is for the judge in every case to consider whether, in the circumstances of that particular case, and taking into account the factors listed in paragraph (5) of rule 36.21, it would be unjust to make the order sought.

64. As Chadwick LJ said in *McPhilemy* (at para 7): *"There is no doubt that the question whether or not it was unjust to make orders under paragraph (2) and (3) of CPR 36.21 was a question for the judge to determine in the exercise of his discretion. .... If the judge took into account the matters which he ought to have taken into account, and left out of account matters which ought not to have [been] taken into account, it would be wrong in principle to for this Court to interfere with his decision. It could only do so if satisfied that the decision was so perverse that the judge must have fallen into error. This Court must respect the judge's exercise of the discretion which has been entrusted to him. This Court must resist the temptation to substitute its own view for that of the judge unless satisfied that his discretion has been exercised on a basis which is wrong in law; or that the conclusion which he has reached is so plainly wrong that his exercise of the discretion entrusted to him must be regarded as flawed."*

65. In the instant case, it is plain from the comments which he made during Mr Waldron's submissions on costs that the judge considered that the offered discount of 5 per cent was, in truth, illusory and that that was the basis for his conclusion (at p.7B of the transcript) that it was inevitable that the offer would be rejected. As I read the transcript, that conclusion founded his decision that it would be unjust to treat the offer as entitling Mrs Huck to indemnity costs under paragraph (3) of the rule. In particular, I do not understand the judge to have reached that decision on the basis that in a personal injury case the court will never apportion liability more precisely than in multiples of 10 per cent: had he taken that view, he would plainly have been wrong. Rather, his comments about findings of 5 per cent contributory fault were, as I read them, made in the particular context of the instant case, where he regarded it as plain that there was no real possibility of any outcome on liability other than either 100 per cent or 50 per cent.

66. Given Mr Robson's pleaded defence that both parties were equally to blame, and given the earlier offer by Mr Robson's insurers of a 50/50 split on liability, the judge was, in my judgment, entitled to regard the offer as being one which Mr Robson would inevitably reject and on that basis to conclude, in the exercise of his discretion, that it would in the circumstances be unjust to order indemnity costs.

67. I would accordingly dismiss this appeal.

Lord Justice Tuckey:

68. Like Schiemann L.J. I agree with the first 62 paragraphs of Jonathan Parker L.J.'s judgment and that the crucial question which the judge had to answer was whether it was unjust to award the Claimant indemnity costs despite the fact that she had "beaten" her part 36 offer.

69. I think it is clear that the judge deprived the Claimant of indemnity costs simply because liability would never have been apportioned 95:5. Jonathan Parker L.J. says that this was within the judge's discretion because such an offer did not create any real opportunity for settlement in a case where there was no real possibility of any outcome other than 50:50 or an outright win for the Claimant (paragraphs 63 and 65). Schiemann L.J. says that the fact that no judge would apportion liability 95:5 is irrelevant. A defendant can choose not to accept such an offer but if the Claimant beats it there is nothing unjust in awarding indemnity costs.

70. I think Schiemann L.J. is right about this. I do not think that the court is required to measure the offer against the likely outcome in a case such as this. In this type of litigation a Claimant with a strong case will often be prepared to accept a discount from the full value of the claim to reflect the uncertainties of litigation. Such offers are not usually based on the likely apportionment of liability but merely reflect the reality that most claimants prefer certainty to the ordeal of a trial and uncertainty about its outcome. If such a discount is offered and rejected there is nothing unjust in allowing the claimant to receive the incentives to which he or she is entitled under the Rules. On the contrary, I would say that this is a just result.

71. I would however add that if it was self-evident that the offer made was merely a tactical step designed to secure the benefit of the incentives provided by the Rule (e.g. an offer to settle for 99.9% of the full value of the claim) I would agree with Jonathan Parker L.J. that the judge would have a discretion to refuse indemnity costs. But that cannot be said of the offer made in this case, which I think did provide the Defendant with a real opportunity for settlement even though it did not represent any possible apportionment of liability. I would therefore allow this appeal.

Lord Justice Schiemann:

72. There are policy reasons which lead some jurisdictions in general to deny a successful claimant all costs, and other jurisdictions including our own in general to deny successful claimants some of their costs – the difference between the standard and the indemnity bases of taxation in particular.

73. The general policy stance traditionally adopted in this country is that a claimant who obtains all he asks for should be awarded his costs on a basis which does not amount to full recovery. There is a case for having a general policy stance that such a claimant should be awarded his costs on the indemnity basis. However, that has not been the traditional stance adopted in this country. Nor is it the stance adopted by the CPR.

74. There is no express provision in Part 44 as to the relevant factors which a court is to bear in mind in exercising its discretion as to whether to award costs on the standard or the indemnity basis. Nevertheless, when construed in the light of the overriding objective – see in particular Part 1.1 (2)(c) – and the default position prescribed by Part 44.4, the general presumption must be that costs will be awarded on the standard basis.

75. I have nothing to add to what Parker L.J. has said in the first 62 paragraphs of his judgement.

76. In particular I agree that a claimant who has bettered his Part 36 offer has a *prima facie* entitlement to indemnity costs. The general presumption that a successful claimant only receives costs on the standard basis is displaced by Part 36.21(4).

77. The crucial question to be addressed by the judge in the present case was that posed in Part 36.21(4) : will it be <u>unjust</u> to award the claimant his costs on an indemnity basis? It is important to bear in mind that this is the way the question is phrased. The question is not : will it be unjust <u>not</u> to award the claimant his costs on an indemnity basis?

78. The Judge addressed this question in the passages quoted by Parker L.J. in his paragraphs 24 – 27. The Judge identifies the following consideration as the circumstance which drove him to the view that to

award the claimant costs on the indemnity basis would be unjust, namely, the fact that it was inevitable that the defendant would reject the offer made by the claimant. I do not accept that this is a relevant, still less a conclusive, factor in deciding whether the award of costs to the claimant on the indemnity basis would be unjust.

79. It is not clear whether the judge arrived at his view in the light of (1) his impression of the defendant formed at the trial or (2) what he understood to be the claimant's understanding at the time he made the offer of the likely reaction of the defendant or (3) what a reasonable defendant to a road traffic accident would do when faced with an offer by the claimant to settle the question of liability on the basis of a proportion 95:5 or (4) what a reasonable defendant would have done if the had been the driver of the defendant's car at the time of the crash and had been subsequently faced with this Part 36 offer or (5) a view that it was inevitable that if the case were fought the judge would not apportion liability 95:5.

80. As to (1), this seems to me irrelevant to the question whether it is just to deprive a claimant of the indemnity costs to which he is *prima facie* entitled. The answer to that question should not depend on the forensic fortitude of a particular defendant. As to (2), we were not told of any relevant evidence on this point. But in any event I consider it irrelevant. Again, the answer to the question whether it is just to deprive a claimant of his indemnity costs should not depend on the claimant's understanding of the defendant's forensic fortitude. As to (3), again this seems to me irrelevant. Part 36.21(5) tells the judge to take into account all the circumstances of the case. There is no suggestion that other traffic accidents are relevant. As to (4), I do not categorise the defendant's reaction in the present case as unreasonable. Nor would he have been behaving unreasonably if he had accepted the claimant's Part 36 offer. I however see nothing unjust in awarding a claimant his indemnity costs in circumstances where the defendant chooses not to accept an offer to settle for less than that to which the claimant is entitled. If it was consideration (5) which motivated the judge then in my judgement he fell into error. I accept that it was all but inevitable that no judge would apportion liability 95:5 but this seems to me an irrelevant consideration.

81. Nevertheless, I accept, like my Lords, that circumstances can exist where, notwithstanding that a claimant has recovered in full after making a Part 36 offer for marginally less, he will not be awarded costs on the indemnity basis. I do not consider that Part 36 was intended to produce a situation in which a claimant was automatically entitled to costs on the indemnity basis provided only that he made an offer pursuant to Part 36.10 in an amount marginally less than the claim.

82. The judge had a discretion. Unlike Parker L.J. but like Tuckey L.J. I consider that in the present case the Judge approached the exercise of his discretion on a wrong basis. The judge was unduly influenced by the probable fact that no judge, if the case came to trial, would decide that liability should be split 95:5. I regard this conclusion, although correct, as irrelevant. We are therefore entitled to exercise this discretion afresh.

83. Like Tuckey L.J., I do not consider it just in the circumstances of the present case to deprive the claimant of costs on the indemnity basis. Justice in the individual case is what Part 36.21(5) bids us to take into account; not justice in general as between claimants and defendants or views as to social policy in general.

84. I would therefore allow the appeal and order that the claimant's costs be assessed on the indemnity basis.

85. That being the conclusion of the majority, this appeal will be allowed and the decision of the judge will be set aside.

Order: Appeal Allowed; Claimant's costs to be assessed in the court below on an Indemnity basis plus interest; Defendants do pay Claimant's costs of and occasioned by the Appeal to be subject to detailed assessment if not agreed. (Order does not form part of the approved judgment)

Mr William Braithwaite QC and Mr William Waldron (instructed by Bleasdale & Co.) for the Appellant
Mr Nicholas Bacon (instructed by Keoghs) for the Respondent