JUDGMENT : Mr Peter Prescott QC: Chancery Division. 23rd April 2007.

1. This is an appeal from a decision of Master Moncaster of 9 January 2007. It raises an important little point of practice: how do you accept a Part 36 offer to settle a case if it involves a disposition of an interest in land?

2. It arises more often than one might suppose. Take the common case of a dispute between business partners. It is frequently resolved by one of them agreeing to resign in exchange for suitable compensation. But the business has an office and he may have some interest in the lease. The property may be a side-issue, or not an issue at all. But it has to be dealt with.

3. A Part 36 offer is a written offer to settle a case on specified terms. If wrongly refused, there will adverse costs consequences later. All this is part of a detailed scheme laid down by the Civil Procedure Rules. Its purpose is to encourage the settlement of litigation.

4. A Part 36 offer may be accepted by sending a notice of acceptance. The way it is commonly done is this. You write out a short document that says you are accepting the Part 36 offer and that identifies that offer, usually by referring to its date; you sign it; and you send it back to the other side. Good practice requires that the notice should refer to the title of the case and its claim number, and that it should also be filed with the court. It also requires that the Part 36 offer should be signed by the party making the offer or by his legal representative, and the same goes for the notice of acceptance. I shall revert to those requirements of the Practice Direction in paragraphs 20 to 22 of this judgment.

5. However, Mr Geoffrey Zelin, who appears for the claimant in this case, contends that that commonly used method of accepting a Part 36 offer will not work where the settlement would involve the disposition of an interest in land.

6. The reason it will not work, says Mr Zelin, is that the offer and acceptance will not comply with section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. For present purposes the Act requires a single document that incorporates all the express terms of the contract, signed by both sides. Two documents, one signed by the claimant and the other signed by the defendant, only one of them containing the terms, will not do. They will not create a contract.

7. What you ought to do, says Mr Zelin, is to take the very pages you have received, write *"I accept",* sign underneath those words, and send back those pages. For good measure you ought perhaps to have a covering letter stating that an acceptance of the Part 36 offer is enclosed. It might seem very technical, but it is the law.

8. He candidly admitted that not everyone is alive to the difficulty. If that is right there must be quite a few litigants who are under the mistaken impression that they have arrived at a binding settlement.

9. In passing, I am not sure that even Mr Zelin's ingenious solution would work either. The document that contains the Part 36 offer does not contain the words *"I accept"*. Those words are added afterwards by the acceptor. Therefore the document that was signed by the offeror is not the same document as was signed by the acceptor. The latter is an amended version, and means to be. Furthermore it may have omitted one of the essential terms, namely, the effective date of the contract. The acceptance is not effective until is received by the offeror.

10. Mr Paul Marshall, who appears for the defendants, contends that the 1989 Act has no application to the settlement of legal proceedings under the detailed mechanism of Part 36 of the CPR. But his main point is that the acceptance of a Part 36 offer need not create a contract at all. Rather, it creates an obligation *sui generis* that the court can enforce. It can enforce it by requiring the parties to do what is necessary to implement the settlement. If necessary it can enforce that obligation by ordering the parties to enter into a contract that does comply with the formalities of section 2 of the 1989 Act.

11. To which Mr Zelin ripostes that the Civil Procedure Rules do not confer substantive rights. They merely regulate practice and procedure. Therefore a party cannot be ordered to implement a settlement unless it was a binding contract in the first place.

The Background To This Case

12. The background to this case can be stated fairly shortly. The parties are members of a firm of solicitors in Bournemouth. I shall call it *"the Law Firm"*. The Law Firm used to own its own offices but some time ago they were transferred to Walker Properties and leased back. Walker Properties is itself a partnership and its members are some, though not all, of the partners in the Law Firm.

13. The claimant, whom I shall call Mr Orton, is a member of both partnerships. I say "*is"* for the sake of convenience. I do not mean to decide whether the partnerships have been dissolved.

14. Mr Orton's wife was an employee of the Law Firm. In May 2006 it was discovered that she had misappropriated about £75,000 of clients' money, apparently to pay gambling debts. This led to a falling out between Mr Orton and the other members of the Law Firm, who said that Mr Orton could and should have taken steps to prevent the wrongdoing.

15. A slight complication is that there is a deed of 1 May 1988 by which the then members of the Law Firm entered into a partnership on that date. Since that date some of the names on that deed have retired or resigned in the ordinary way and it is not clear or, at any rate, not before me now, whether the deed continues to govern the partnership constituted by the current Law Firm. That deed makes provision for what is to happen in the event of

any partner ceasing to be such. In particular Clause 13(4)(c) provides for the sale of the outgoing partner of his share in any freehold or leasehold property of the partnership at a valuation.

16. On 30 August 2006 Mr Orton gave notice purporting to dissolve both partnerships. On the next day he started the present proceedings. He sued all those who are or might be the members of both partnerships. Amongst other relief he claimed declarations that both partnerships had been dissolved; an order for the sale of the freehold property; for the appointment of a receiver; for all necessary accounts and enquiries; and that both partnerships should be wound up. For reasons I need not describe no defence was served, nor a counterclaim.

17. On 19 October 2006 Mr Orton's solicitors made a Part 36 offer to settle the proceedings he had started. The covering letter said: *"Please find attached hereto our client's formal offer of settlement under Part 36 of the Civil Procedure Rules. It relates to the whole of our client's claim and is inclusive of interest. This offer will remain open for acceptance for 21 days and after that time the offer may only be accepted if the parties agree liability for costs or the Court gives permission".*

18. I can paraphrase the relevant terms of the Mr Orton's offer as follows. Mr Orton would withdraw his notices of dissolution. He would retire from the Law Firm and from Walker Properties on a date to be specified by the defendants. He would withdraw the present proceedings. The partnerships would pay Mr Orton his entitlement in respect of the Law Firm and Walker Properties in accordance with the Deed of 1 May 1988: in other words he would dispose of his interests in the office premises at a valuation. As compensation for the loss of his partnerships he would be *"indemnified from and against all monies misappropriated by his wife and any consequential losses and expenses"* and he would be paid the additional sum of £97,500.

19. About a week later, on 27 October, the defendants' solicitors, Putsmans (as they were then called), sent the following email:

From: Lipscombe Terry
Sent: 27 October 2006 17:21
To: 'Agnew, Donald'
Subject: Harold G Walker & Co Solicitors (the "Firm") and Kim Orton

[There follows the address of the defendants' solicitors and their name as it would appear on their letter-head, i.e. "Putsmans Solicitors" in stylised form together with their logo.]

Dear Sirs,

Our clients hereby accept the Part 36 Offer dated 19 October 2006. The date of retirement for the purposes of Paragraph 1 of the Offer will be 31 October 2006 on which date your client will cease to be a partner in the Firm and the property partnership.

Yours faithfully,

Putsmans

Standard wording at the end of the email stated that "Putsmans is the business name of Putsmans LLP which is a limited liability partnership" and its registration number was given.

20. The Practice Direction that supplements CPR36 requires that a notice of acceptance should be signed by the party who is accepting the offer, or by his legal representative. It also requires the notice should set out the claim number and the title of the proceedings. See PD36 7.7.

21. Mr Zelin doubted whether simply typing "Putsmans" on the email amounted to a signature that complied with the Practice Direction, citing ***Nilesh Mehta v. J Pereira Fernandes S.A***. [2006] EWHC 813 (Ch), but wisely he did not waste much time on the point. In that case the signature was alleged to be constituted by the words *"From: Nelmehta@aol.com"* appearing in the email header. It was a mere statement of the sender's email address and it would have been generated automatically after the message was transmitted. It was not put there by the sender with the intention of authenticating the document. In contrast, in our case the word "Putsmans" was deliberately typed in (what is more, after the customary salutation "Yours faithfully"). I have no doubt that its purpose would be recognised throughout the profession. Anyone would think: *"Putsmans are signing off on this document"*. It was intended to signify that document was being sent out with the authority of the defendants' legal representative.

22. Mr Zelin was on stronger ground when he said that the notice of acceptance failed to set out the claim number and the title of the proceedings. That was a breach of the Practice Direction. However, nobody was misled or prejudiced and in my judgment it was a mere error of procedure. CPR 3.10 says that it is not a nullity for that reason and it empowers the court to correct it. I am prepared to exercise that power.

23. Some little time after the notice of acceptance had been sent there arose a dispute about the meaning of Mr Orton's offer. According to Mr Orton, it meant, not only that he would be indemnified personally in respect of the monies misappropriated by his wife, but also that the defendants would not seek to recover those monies from the wife herself. That is not what his offer actually said, his wife was not a party to the proceedings, and the defendants did not accept that interpretation.

24. A little later still Mr Orton raised the point that there was no settlement agreement anyway because the Part 36 offer and notice of acceptance did not comply with section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. It did not comply because those were two documents, not one as the 1989 Act required. The Master said it

was "a very technical objection" but he held that it was, nevertheless, correct. He therefore gave judgment for Mr Orton on this preliminary point.

25. I write 'preliminary point' because there was an alternative point that was taken before the Master. Mr Orton said that in all the circumstances it should anyway have been obvious to the defendants that he had intended his Part 36 offer to include a release in favour of his wife personally. So much so, that the written contract should be rectified to correct the mistake, or should be rescinded. That point was not decided by the Master. It is common ground that, if it arises, it needs to go back to him. Thus if Mr Orton is right on that point there is a forum in which he can get justice. The point is not before me now.

26. What I have to decide is whether the Part 36 settlement, if otherwise good, is defeated by section 2 of the 1989 Act for failure to comply with the formalities prescribed by that section.

Section 2 of the 1989 Act

27. Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 says:

(1) A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.

(2) The terms may be incorporated in a document either by being set out in it or by reference to some other document.

(3) The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract.

(4) Where a contract for the sale or other disposition of an interest in land satisfies the conditions of this section by reason only of the rectification of one or more documents in pursuance of an order of a court, the contract shall come into being, or be deemed to have come into being, at such time as may be specified in the order.

(5) ...

(6) In this section—

"disposition" has the same meaning as in the Law of Property Act 1925;

"interest in land" means any estate, interest or charge in or over land.[1]

(7) …

(8) Section 40 of the Law of Property Act 1925 (which is superseded by this section) shall cease to have effect.

28. The Part 36 offer, says Mr Zelin, was one document, signed on behalf of Mr Orton; the acceptance notice was another document, signed on behalf of the defendants; there was not a 'single document' that contained all the terms and was signed by both sides. Therefore the formalities of section 2 were not complied with and there is no contract at all.

Disposition of an Interest in Land

29. The first point is whether, assuming there was a Part 36 settlement, and supposing it to be a contract, it was for the disposition of an interest in land. In my judgment the Master was right on this point and I am not able to improve upon his explanation. In essence, it would be a necessary part of the settlement agreement that Mr Orton would have to dispose of his interest in the office property. This is now accepted, rightly in my view, by Mr Marshall, who appears for the defendants.

The Purposes of Section 2

30. Section 2 of the 1989 Act does not define what it means by a 'document'. In ***Firstpost Homes Ltd v. Johnson*** [1995] 4 All ER 355, 363 Balcombe LJ said *"Like the proverbial elephant, a document may be difficult to define but it is easy to recognise"*.

31. Section 2 does not require the contract to be signed by both parties at the same time and place. It does not require the contract to be signed by two witnesses in the presence of each other, like a will. It does not require it to be witnessed at all. It does not require that the terms of the contract be set out in a continuous scroll. Nowadays contracts will often run to a number of pages. The Act does not require that each page of the document be signed or initialled by the parties.

32. When we think of a written contract we may vaguely imagine a bundle of pages held together by a staple at the top left-hand corner. The Act does not prescribe even that formality – not in terms, anyway. The staple may fall out or it may be removed but I do not see that that would stop it being a contract. We have all seen contracts that are so voluminous that it would not be possible to staple the pages together: they may fill a large lever-arch file, with dividers. Nothing in section 2 says, in terms, that that would not be a 'document'.

33. Whatever its form, the document may be lost or it may be destroyed in a fire. That would not cause the contract – the legal obligation – to cease to exist. Nor would it stop one of the parties from trying to prove its terms, if he could. For example he might prove it by oral evidence supplemented by a copy of the final draft.

34. In any case subsection (4) informs us that it is possible to rectify one or more documents pursuant to an order of the court so as to make them comply with section 2 where they did not before. That would require oral evidence. There does not have to be an antecedent oral agreement which, but for want of writing, would otherwise be binding. See page 20 of the Law Commission report, *Formalities for Contracts for Sale etc of Land*, Law Com. No. 164, 1987, where the authorities are conveniently summarised.

[1] As amended by the Trusts of Land and Appointment of Trustees Act 1996, sch 4.

35. All those considerations cause me to believe that it was not the purpose of section 2 of the 1989 Act to create rigorous machinery designed to prevent the fraudulent or accidental substitution of pages. Nor can it have been intended in all possible circumstances to dispense with the need for oral evidence, or other extraneous evidence. What, then, was its purpose? For it is Mr Marshall's case that if a CPR Part 36 settlement is outwith the mischief that section 2 aimed to suppress the latter ought, to that extent, to receive a narrow construction. Compare ***Nweze v. Nwoko*** [2004] EWCA Civ 379 where it was held that a contract to put a house on the open market was not within section 2, even though its language was capable of covering that case.

36. It is a very old rule that, in order to construe an Act of Parliament you may need to identify the mischief it was intended to address. The Court of Appeal in *Nweze* looked at the Law Commission report and so shall I. That report led to the enactment of section 2, although not quite in the form suggested by the Commission.

37. The old law was contained in section 40 of the Law of Property Act 1925. In those days you could have an oral contract to transfer land, but a court of law would not enforce it unless and until there was 'some memorandum or note thereof', in writing, 'signed by the party to be charged' or by somebody authorised by him. Because the oral contract was not invalid, merely unenforceable, it meant that a vendor could keep a cash deposit paid to him by a purchaser under such a contract.

38. Section 40 of the 1925 Act, and its predecessor the Statute of Frauds, led to various dodges and mistakes. An example of a mistake would be a party who wrote a letter that described the oral contract and sought to dispute its meaning. Experienced solicitors would write "subject to contract" but lay persons might not be sophisticated enough to take that precaution. Then the letter would amount to a 'memorandum or note' of the contract signed by the party to be charged and so it would be enforceable against him – precisely the opposite effect to what he had intended. Worse, it could be enforced *against* him but it could not be enforced *by* him: his opponent had signed nothing.[2]

39. An example of a dodge, of which Mr Zelin reminded me in argument, was that if you had a mere oral agreement you sued on it anyway and hoped that your opponent's counsel would fall into a trap. You hoped that he would sign a defence that admitted there was an agreement but pleaded it was oral, hence not enforceable because of section 40 of the 1925 Act. Since counsel was the duly authorised agent of 'the party to be charged' you would then discontinue your action and start a fresh one, relying on the defence as a 'memorandum in writing'.

40. A court of equity could enforce an oral agreement if there was part performance e.g. entering into occupation of the premises and paying the rent. It thought that section 40 should not be used as an instrument of fraud. However the Law Commission said (§1.8) that "*As a result of judicial attempts to prevent the statute being used as an instrument of fraud, it is virtually impossible to discover with acceptable certainty, prior to proceedings, whether a contract will be found to be enforceable under the statutory requirements*". It referred to House of Lords decision in ***Steadman v. Steadman*** [1976] AC 536 according to which a mere payment of a sum of money might amount to an act of part performance, as might the act of a purchaser instructing solicitors to prepare and submit a draft conveyance or transfer.

41. The old law also sometimes allowed you to connect two separate documents together with the assistance of some oral evidence. This led to a certain amount of litigation and it created uncertainty. An extreme attempt, which failed in the end, was ***Timmins v. Moreland Street Property Co Ltd*** [1958] Ch 110, C.A., which is referred to in the Law Commission report. In that case it was sought to connect the signature on a purchaser's deposit cheque with an unsigned memorandum that stated the terms of the contract.

42. Having considered the Law Commission report with some care, I believe I can summarise the defects that were perceived to exist in the old law. There was an oral agreement that was alive and well; but, except under the doctrine of part performance, which lacked acceptable certainty, it could not be sued upon unless the other party had sufficiently acknowledged it in writing. Whether he had sufficiently acknowledged it might be quite fortuitous, or inadvertent, and difficult to determine without recourse to troublesome litigation. Furthermore the acknowledgment might well be unilateral, so that there was an unjust lack of mutuality. Because solicitors were *"comparatively rarely consulted"* at the early stages of the negotiations there was a danger that citizens could fall into technical traps or be exposed to trouble and litigation. Indeed the Law Commission stated that *"No reform should increase the likelihood of contracts for the sale (or other disposition) of land becoming binding before the parties have been able to obtain legal advice"*.

43. I therefore believe that Mr Marshall is right to say that the mischiefs that section 2 of the 1989 Act must have been intended to redress can have no relevance whatever to the settlement of existing court proceedings under the machinery now provided by CPR Part 36. There is no question of lack of mutuality, nor of the uncertainties said to arise out of the doctrine of part performance. If a Part 36 offer is made and accepted according to the rules there can be no doubt that the acceptance should be read together with the offer and the problems illustrated by ***Timmins v. Moreland Street Property Co Ltd*** do not arise. Furthermore the parties know that they are entering into a solemn and binding legal transaction. They have the opportunity to seek legal advice: a Part 36 offer, if not withdrawn, remains open for 21 days (unless the trial is imminent, in which case the permission of the

[2] In one case (***Law v. Jones*** [1974] Ch 112, C.A.) it was held that even a letter expressed to be "subject to contract" might be evidence of an antecedent oral agreement, although the opposite was afterwards decided in ***Tiverton Estates Ltd v. Wearwell Ltd*** [1975] Ch 146, C.A. It was this that led the Law Society to ask the Law Commission to examine the subject

court is required). Indeed in the ordinary way the parties will be advised by lawyers throughout, much more so than when most vendors and purchasers are in the initial stages of negotiating a land contract.

May the CPR Create Substantive Rights?

44. Even so, Mr Marshall disclaims the proposition that CPR Part 36 can override section 2 of the 1989 Act. Rather, his case is that Part 36 can create substantive obligations independently of the law of contract. I believe that is the crucial point in the case.

45. Mr Zelin submits that the Civil Procedure Rules do not create substantive rights: they merely regulate practice and procedure. He says that whether a transaction has complied with section 2 of the 1998 Act so as to create a binding contract for the disposition of an interest in land is a matter of substantive law. If the transaction has not created such a contract nothing in the CPR can empower the court to order the parties to enter into one.

46. Mr Zelin's address to the court was as impressive as anything that I have seen for a long time. Even so, I consider that his proposition is a bit too wide, or depends on its own ambiguity. I appreciate there is a difference between substantive and procedural law, but for reasons I shall attempt to explain I do not accept that they exist in mutual isolation nor that there is a bright dividing line.

47. First, one must bear in mind the inherent jurisdiction of the court, which has been famously described as *"the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner"*: Sir Jack Jacob QC, *"The Inherent Jurisdiction of the Court"* [1970] Current Legal Problems 23, an article that has been judicially cited very often. While it is commonly said, and no doubt is true, that this is practice and procedure, yet the line that separates it from substantive law is not so clear-cut as one might suppose. He who doubts it should consider two illustrations. No right can be as "substantive" as the right to go about freely, and few can be so "*substantive"* as the right to keep one's money. Yet you might be deprived of your liberty if you were to commit a contempt of court, and you will be deprived of your money if you are ordered to pay costs. In ***Jennison v. Baker*** [1972] 2 Q.B. 52, 61 Salmon L.J. pointed out that: *"The inherent power of the judges of the High Court to commit for contempt of court has existed from time immemorial… The power exists to ensure justice shall be done. And solely to this end, it prohibits acts and words tending to obstruct the administration of justice. The public at large no less than the individual litigant have an interest and a very real interest in justice being effectively administered".*

Likewise the power to award costs, although now highly regulated by the CPR, is nevertheless part of the court's inherent jurisdiction: it was literally inherited from the old courts that existed before the Judicature Acts, and hence it too has existed from time immemorial.

48. In the second place, we need to recall what Parliament had in mind when it enacted the Civil Procedure Act 1997, under which the CPR have been made. The Civil Procedure Rules are allowed or disallowed by the Lord Chancellor: Civil Procedure Act 1997, s.3. And by section 4:

(1) The Lord Chancellor may by order amend, repeal or revoke any enactment to the extent he considers necessary or desirable in consequence of
(a) section 1 or 2, or
(b) Civil Procedure Rules.
(2) The Lord Chancellor may by order amend, repeal or revoke any enactment passed or made before the commencement of this section to the extent he considers necessary or desirable in order to facilitate the making of Civil Procedure Rules.

'Any enactment' would, of course, include section 2 of the Law of Property (Miscellaneous Provisions) Act 1989.

CPR Part 36

49. Section 2 refers to 'a contract for the sale or other disposition of an interest in land'. I therefore turn to examine whether those words apply to a settlement that is said to arise under CPR Part 26 which, if implemented, would require the sale or other disposition of an interest in land.

50. On 6 April 2007 (that is to say, after I reserved judgment in this case) a new version of Part 36 came into effect. I shall give judgment on the old version but I do not believe the new version, had it been in force, would have made any difference to the result. I shall deal with that in a postscript to this judgment.

51. The law encourages litigants to settle their differences. This is anyway consonant with the Overriding Objective set out in Part 1 of the Civil Procedure Rules 1998, which includes saving expense, dealing with cases expeditiously and fairly, and saving court time. The Rules were made pursuant to powers conferred by the Civil Procedure Act 1997. Section 1(1) says *"There are to be rules of court (to be called "Civil Procedure Rules") governing the practice and procedure of … the High Court"*. Section 1(3) says that "The power to make Civil Procedure Rules is to be exercised with a view to securing that the civil justice system is to be accessible, fair and efficient".

52. Part 36 of the CPR lays down a scheme that is intended to promote that objective. It is not the only way of settling a case but, when adhered to, it may produce some costs advantages. I have already described the essence of Part 36 insofar as is relevant for present purposes. However the parties differ as to what is the legal effect of a notice of acceptance. In that connection both of them refer to certain provisions of Part 36.

53. One thing seems quite clear. The distinguished judges and lawyers who comprised the Civil Procedure Rule Committee must have been well aware of section 2 of the 1989 Act. Yet the alleged need for one document, not two, in order to compromise claims pursuant to Part 36 in certain cases touching land cannot have occurred to

them. If it had, they surely would have drafted Part 36 accordingly, or at least the Practice Direction. They would not have left it as a trap for the unwary. They would have prescribed Mr Zelin's method (if that is effective): sign the papers and return them.

54. A Part 36 offer is made when it is served on the offeree and is accepted when notice of its acceptance is served on the offeror.

55. The old version of Part 36 continues:-

The effect of acceptance of a Part 36 offer or a Part 36 payment

36.15*(1) If a Part 36 offer … relates to the whole claim and is accepted, the claim will be stayed.*

I interject to say that, as the Glossary confirms, a stay may be lifted. Continuing with the text:-

> *(2) In the case of acceptance of a Part 36 offer which relates to the whole claim -*
> *(a) the stay will be upon the terms of the offer; and*
> *(b) either party may apply to enforce those terms without the need for a new claim.*
> *(3) …*
> *(4) …*
> *(5) Any stay arising under this rule will not affect the power of the court -*
> *(a) to enforce the terms of a Part 36 offer;*
> *(b) to deal with any question of costs (including interest on costs) relating to the proceedings;*
> *(c) to order payment out of court of any sum paid into court.*
>
> *(6) Where -*
> *(a) a Part 36 offer has been accepted; and*
> *(b) a party alleges that -*
> *(i) the other party has not honoured the terms of the offer; and*
> *(ii) he is therefore entitled to a remedy for breach of contract,*
> *the party may claim the remedy by applying to the court without the need to start a new claim unless the court orders otherwise.*

I have stressed certain words or phrases that are relevant to the parties' arguments.

56. Mr Marshall's chief argument is that the acceptance of a Part 36 offer does not create a contract at all. It creates a binding settlement under the court's rules which the court can enforce. He draws particular attention to the language I have stressed in sub-rules (2) and (5). It is the *terms of the offer* that the court can enforce: they do not speak of enforcing a contract.

57. It is true, admits Mr Marshall, that sub-rule (6)(b)(ii) refers to one who is *'entitled to a remedy for breach of contract'*. But that is a special case, says Mr Marshall, because it was put in to deal with a problem that was highlighted in ***Hollingsworth v. Humphrey***, Court of Appeal, 10 December 1987. For that he cites the well known commentary of Mr David Foskett QC, who, as Mr Marshall was not slow to point out, was a member of the Civil Procedure Rule Committee. *Hollingsworth* was a case decided under the old law, i.e. before the Civil Procedure Rules were made. It was about a Tomlin order, meaning an order made by the court that stayed the proceedings on the terms of a compromise *"except for the purpose of carrying the said terms into effect"*. The defendant had failed to honour the contract and the judge awarded damages against him. His appeal was allowed. Fox LJ said *"It was not open to the judge to make an award of damages … It seems to me that under the terms of the Tomlin order the only jurisdiction that he had in this action to make an order for the purpose of carrying into effect the terms of the compromise. An award of damages is not carrying the terms into effect. It is granting a remedy for breach of contract. In my view any claim by Mrs Hollingsworth for breach of contract must be pursued in a separate action"*.

58. Thus ***Hollingsworth v. Humphrey*** illustrates the distinction between ordering a party to implement the terms of a compromise and awarding damages for breach of contract. I can see that it is possible that the Civil Procedure Rule Committee may have had that distinction in mind, which might well explain the rather different use of language in sub-rule (6) when contrasted with sub-rules (2) and (5). But that does not tell us whether, in order that the terms of a compromise may be enforced, it is necessary that it should be a binding obligation arising out of the general law of contract – offer and acceptance.

59. Counsel drew my attention to a large number of authorities. I hope it will not be discourteous if I refrain from analysing them here, for I believe they give me little assistance in what I have to decide. It is true that the language of some of those cases may tend to suggest that a Part 36 payment (i.e. paying money into court) is not a contractual offer whereas a Part 36 offer is. But I am satisfied that in none of them did the courts have in mind anything like the point in this case.

60. In my judgment the solution to this case is not to be sought by creating two mutually exclusive pigeonholes marked "Contract" and "Part 36 Settlement". It seems to me that the acceptance of a Part 36 offer may well create a contract and probably does so in the vast majority of cases.[3] When it does create a contract which requires further implementation (e.g. a contract to assign the copyright in a song) it may be possible to obtain specific performance. Or if the contract is broken a party may choose to start a new claim on that contract. But what I

[3] A possible exception is an executed copyright assignment, expressed to be conditional upon the claimant raising the money and paying it over within 21 days. Because the claimant is not obliged to raise the money anyway, or to do anything, his notice of acceptance would not seem to create a contract.

have to decide is whether a Part 36 acceptance that, for some reason, creates no contract can nevertheless be enforced by application to the court.

61. In my judgment, if parties who are before the court choose to employ machinery prescribed by the court's rules in order to settle their dispute, they must be taken to submit to the consequences. Namely, that if the offer is accepted the court may enforce it. A party who makes a valid Part 36 offer, or one who accepts it, must be taken to be binding himself to submit to those consequences.

62. As to those consequences, I interpret Part 36 in the light of the Overriding Objective (CPR 1): the object is to deal with cases justly which includes saving expense, proportionality, expedition, fairness and saving court time. I therefore hold that it need not be a contract that is being enforced and that the regime of Part 36, while it may well give rise to a contract under the general law touching offer and acceptance, does not depend upon contract law, except in the special case mentioned in rule 15.6. Infringement of human rights there is none. Nobody is forcing a party to make or accept a Part 36 offer. The obligation that arises is not primarily contractual. It is *sui generis*. It is part of the court's inherent jurisdiction, now regulated and clarified in CPR Part 36, "to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner". The administration of justice includes addressing the settlement of disputes.

63. It follows that, subject to the separate point about mistake, rectification or rescission, which is to be decided elsewhere, the claimant and the defendants arrived at an enforceable settlement. The court has power to order the parties to sign a single document incorporating the terms of the settlement.

Postcript

64. The new version of CPR Part 36 contains the following rule: it may be compared and contrasted with old CPR 36.15 as set forth in paragraph 55 above.

The effect of acceptance of a Part 36 offer

36.11(*1) If a Part 36 offer is accepted, the claim will be stayed.*

(2) In the case of acceptance of a Part 36 offer which relates to the whole claim the stay (GL) will be upon the terms of the offer.

(3) …

(4) …

(5) Any stay arising under this rule will not affect the power of the court—

(a) to enforce the terms of a Part 36 offer;

(b) to deal with any question of costs (including interest on costs) relating to the proceedings.

(6) …

(7) …

(8) Where—

(a) a Part 36 offer … is accepted; and

(b) a party alleges that the other party has not honoured the terms of the offer,

that party may apply to enforce the terms of the offer without the need for a new claim.

65. For present purposes, the main difference is that the reference to a remedy for breach of contract is omitted. The new rule always refers to enforcing the terms of the 'offer' – not a contract. The defendants' case, had it been decided under the new rule, would have been somewhat easier to argue. Be that as it may, I allow the appeal.

Mr Paul Marshall (instructed by Shakespeare Putsmans LLP, Birmingham) for the Defendants/Appellants
Mr Geoffrey Zelin (instructed by Blake Lapthorn Linnell, Portsmouth) for the Claimant/Respondent