Neutral Citation Number: [2021] EWHC 3103 (Ch)

Claim No: PT-2020-000828

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
PROPERTY, TRUSTS & PROBATE LIST (ChD)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Friday, 19 November 2021

Before:

ROBIN VOS
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

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Between:

LONDON TROCADERO (2015) LLP — **Claimant**

- and -

(1) PICTUREHOUSE CINEMAS LIMITED
(2) GALLERY CINEMAS LIMITED — **Defendants**
(3) CINEWORLD CINEMAS LIMITED

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NICHOLAS TROMPETER QC (instructed by **Druces LLP**) appeared for the **Claimant**
JONATHAN SEITLER QC (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) appeared for the **Defendants**

Hearing date: 3 November 2021

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APPROVED JUDGMENT

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

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be Friday, 19 November at 10:30am.

DEPUTY JUDGE ROBIN VOS:

Introduction

1. This judgment relates to the costs to be awarded against the third defendant, Cineworld Cinemas Limited following a successful summary judgment application made by the claimant landlord in respect of arears of rent and service charges against all three defendants.

2. By way of a very brief background, the first defendant is the current tenant and the claimant is the current landlord under two leases. The second defendant was the original tenant under the first lease and the third defendant is the guarantor under both leases.

3. The premises in question are used as a cinema. Arrears of rent and service charges had built up as a result of the Covid pandemic which, for a large part of the period in question, had resulted in the cinema being closed. The result of the summary judgment application confirmed that this did not however relieve the tenant from its obligation to continue to pay rent and service charges.

4. The hearing on 3 November was to deal with a number of consequential matters arising as a result of the summary judgment in favour of the landlord, including costs. I awarded indemnity costs against the first and second defendants based on the landlord's entitlement under the terms of the leases to recover its costs of enforcing the tenant's obligations under the lease. This was uncontested. However, in the case of the third defendant, the landlord has opted to rely on a Part 36 offer which was communicated by the landlord's solicitors to the defendants' solicitors on 15 December 2020 and which specified a relevant period of 21 days, expiring on 5 January 2021.

5. The offer specifically stated that it only related to part of the claim, being the rent which had become due on 30 June 2020 and on 30 September 2020 together with contractual interest. The total rent due was £841,965 and the interest up to the date of the offer was £8,402.34. The landlord stated that, in settlement of this part of the claim, it was willing to accept the full amount of the rent without any interest. At the time, this therefore represented approximately 99% of the amount claimed.

6. It is accepted that the summary judgment against the third defendant is at least as advantageous to the landlord as the proposals contained in the Part 36 offer thus, in principle, triggering the consequences set out in CPR rule 36.17. The third defendant however contests this for two reasons:

    6.1 It says that the Part 36 offer is invalid as it was not properly served on the third defendant in accordance with CPR Part 6 as required by CPR rule 36.7(2).

    6.2 In any event, the third defendant says it would be unjust to impose the consequences provided for by CPR rule 36.17 for a number of reasons, including the fact that it was not a genuine offer to settle the proceedings but was simply a litigation tactic designed to put pressure on the defendants.

7. Assuming there is a valid Part 36 offer, I also need to decide what order for costs should be made for the period up to and including the 5 January 2021. The third defendant argues that it has been successful in part of its case and that this should be reflected by making a proportionate costs order which gives the claimant 67% of its costs.

8. If it turns out that the Part 36 offer is invalid, I need to decide what order for costs should be made.

Validity of the Part 36 offer

9. Until 2007, CPR rule 36.8(1) provided that a Part 36 offer is made when it is received by the person to whom the offer is made. From 2007, CPR rule 36.7 has provided that a Part 36 offer is only made when it is served on the offeree. The White Book (at 36.7.2) concludes from this that "it is unlikely that anything less than formal service under Part 6 will suffice".

10. On this basis, Mr Seitler submits that the Part 36 offer has not been validly made and is therefore of no effect.

11. Mr Trompeter accepts that the Part 36 offer was not properly served in accordance with Part 6 as it was sent by email and the requirements of paragraph 4 of Practice

Direction 6A were not complied with. However, he argues that CPR rule 3.10 saves the day. This provides as follows:

> "**3.10 General power of the court to rectify matters where there has been an error of procedure**
>
> Where there has been an error of procedure such as a failure to comply with a rule or practice direction –
>
> (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and
>
> (b) the court may make an order to remedy the error."

12. Mr Trompeter submits that the failure to serve the offer in accordance with CPR Part 6 is an error of procedure which does not therefore invalidate the Part 36 offer unless the court so orders. He also invites the court to make an order remedying the error if it is considered necessary in accordance with CPR rule 3.10(b).

13. In support of his submission, Mr Trompeter refers to the decision of Master Yoxall in *Thompson v Reeve* (20 March 2017, unreported). That case related to the service of a notice withdrawing a Part 36 offer. As in this case, the notice of withdrawal was sent by email which did not constitute service in accordance with CPR Part 6. Relying on the decision of Popplewell J in *Integral Petroleum SA v SCU-Finanz AG* [2014] EWHC 702 (Comm) the Master concluded at [20] that CPR rule 3.10 has a wide effect and could be applied in the particular circumstances of that case.

14. Mr Seitler draws a distinction between the withdrawal of a Part 36 offer and the making of a Part 36 offer. He submits that it is vital to identify the date when a Part 36 offer is made as this fixes the start of the "relevant period" which has a number of implications, for example the costs consequences which differ depending on whether a Part 36 offer is accepted before or after the end of the relevant period (see CPR rule 36.13). Given the deliberate change in the CPR in 2007 requiring a Part 36 offer to be served rather than just received, Mr Seitler suggests that it cannot have been intended that a Part 36 offer which is not properly served could nonetheless be valid just because it is received.

15. The issue in *Integral Petroleum* did not relate to the service of a document in relation to a Part 36 offer but instead dealt with the defective service of particulars of claim

which, again, were sent by email without complying with the requirements of Practice Direction 6A. This was relevant as the court was being asked to set aside a judgment in default of a defence. One of the grounds for the application was that the time for filing a defence had not expired as the particulars of claim had not been properly served. The claimant relied on CPR rule 3.10.

16. In concluding that CPR rule 3.10 applied so that the service of the particulars of claim by email could be treated as effective, Popplewell J relied heavily on the decision of the House of Lords in *Philips v Symes* (also known as *Philips v Nussberger*) [2008] 1 WLR 180. That case concerned the service of a claim form and associated documents on defendants in Switzerland. As a result of mistakes made by the Swiss authorities, the English language claim form was not included in the pack served on the second defendant and the third defendant was not served at all. Lord Brown (with whom the other judges agreed) took the view that CPR rule 3.10 applied. He considered it arguable at [31] that an order could be made under paragraph (b) of rule 3.10 that the relevant defendant should be regarded as properly served given that paragraph (a) of rule 3.10 provides that an error of procedure does not invalidate any step taken in the proceedings unless the court so orders (the relevant step being the service of the proceedings).

17. In this context (and relying on the decision of the Court of Appeal in *Golden Ocean Assurance Limited v Martin* [1990] 2 Lloyd's Rep 215), Lord Brown noted at [32] that rule 3.10, like its predecessor, RSC Ord 2, r 1 "was a most beneficial provision, to be given wide effect".

18. Although Lord Brown considered that it may not be necessary, given the effect of CPR rule 3.10, he went on at [35] to dispense with service under CPR rule 6.9 (as it was at the time), holding that the court had power to make an order which had the effect of treating the claim form as having been validly served at the date of the original attempted service.

19. In deciding whether to make an order dispensing with service, Lord Brown commented at [37] that the power should be exercised sparingly and only in the most exceptional circumstances. It does however seem clear that this comment was made in the context of the service of a claim form and the particular issue in that case which

was whether the effect of making the order would alter the priority of the seisin of proceedings under an international convention (see [36]).

20. This is perhaps now reflected in the difference between CPR rule 6.16 under which a court may only dispense of the service of a claim form in exceptional circumstances and CPR rule 6.28 which gives the court a more general power to dispense with service of any other document.

21. Having considered Lord Brown's comments in *Philips v Symes* (and acknowledging that the comments relating to CPR rule 3.10 were obiter), Popplewell J in *Integral Petroleum* concluded at [38] that:

> "… given that the purpose of service of documents subsequent to proceedings having been validly commenced is essentially limited to bringing their contents to the attention of the other party as a procedural step, there is in my view every reason to give CPR 3.10 very wide application so as to be capable of application where that purpose has been fulfilled."

22. In principle, I would agree with this conclusion. I would however add that, as Mr Seitler points out, another purpose of service of documents is to be clear about the date on which service has taken place. This is particularly important in the context of a Part 36 offer although, it has to be said, it was also the key point in *Integral Petroleum* as it fixed the date from which time started running in order for a defence to be filed and therefore directly impacted the question as to whether a judgment obtained in default of the filing of a defence should be set aside.

23. As I have said, Mr Seitler puts forward the additional point that there was a conscious change to CPR rule 36 to require service of a Part 36 offer rather than just receipt of the offer. This does not however to my mind preclude the application of CPR rule 3.10. What it does is to give the court a discretion as to whether some defect in procedure should invalidate the offer (given the power of the court under CPR rule 3.10(a) to make an order that any step suffering from a procedural irregularity should be invalid) as opposed to the previous situation where a Part 36 offer would automatically be validly made if it could be shown that it had been received by the recipient of the offer.

24. In this case, the error of procedure could be said to be the failure to comply with paragraph 4 of Practice Direction 6A by failing to verify that the defendants' solicitors were willing to accept service by email. Alternatively, there was a failure to comply with CPR rule 6.20 which specifies other methods of service.

25. The effect of CPR rule 3.10(a) is that the failure to comply with the rule/practice direction does not invalidate the making of the Part 36 offer unless the court so orders and that in accordance with sub-paragraph (b), the court may make an order remedying the error.

26. In these circumstances, there is in my view no need for the court to make an order under CPR rule 6.28 dispensing with service, for the reasons suggested by Lord Brown in *Philips v Symes*. However, to the extent that it is necessary, it is clear from *Philips v Symes* that the court has power to make such an order in a way which validates the purported service of the relevant document. This might be done either under CPR rule 3.10(b) or CPR rule 6.28. There seems to me to be no reason to suppose that the factors the court should take into account in deciding whether or not to exercise its discretion either under CPR rule 3.10 or CPR rule 6.28 are any different.

27. Although neither party made any real submissions on the point, in my view this is a case where the court is considering whether to impose a sanction (under CPR rule 3.10(a)) rather than whether to grant relief from a sanction already imposed. The court is therefore exercising a judicial discretion taking into account all the circumstances of the case in accordance with the overriding objective of dealing with cases justly and at a proportionate cost.

28. I accept that a failure to comply with the rules of service in CPR Part 6 should not be taken lightly. This is particularly so given the requirement to enforce compliance with rules and practice directions in accordance with the overriding objective. No reason has been put forward by the claimant as to why the rules were not followed. On the other hand, it is clear that the defendants' solicitors received the Part 36 offer on 15 December 2020. Mr Seitler does not contend otherwise. No complaint was made about the method of service of the Part 36 offer until shortly before the hearing on 3 November. No suggestion has been made that there is any prejudice to the third

defendant in the Part 36 offer having been sent by email rather than having been served in some other way, for example by post. In these circumstances, it would in my view be (as Popplewell J put it in *Integral Petroleum* at [37]) "a triumph of form over substance" if the court were to make an order invalidating the Part 36 offer. Although it may be unnecessary to do so, for the avoidance of any doubt, I will make an order either under CPR rule 3.10(b) or CPR rule 6.28 that the Part 36 offer is to be treated as having been validly made on 15 December 2020.

29. For completeness, I should mention the decision of HHJ McKenna in *Sutton Jigsaw Transport Limited v Croydon Borough Council* [2013] EWHC 874 (QB) which was referred to by Master Yoxall in *Thompson v Reeve*. Like Master Yoxall, I do not consider this case to be of any real assistance given that CPR rule 3.10 was not relied on and is not referred to in the judgment. I do also note that the situation there was very different with the defective notice being a notice to accept a Part 36 offer which was made two minutes before valid service of a notice withdrawing the Part 36 offer. In the circumstances of this sort of competition between the parties, it is easy to see why the judge concluded that they should be on a level playing field.

30. I must now turn to consider the effect of the Part 36 offer in accordance with CPR rule 36.17.

The consequences of beating the Part 36 offer

31. The consequences of beating a Part 36 offer as set out in CPR rule 36.17(4). In summary, the claimant is entitled to:

31.1 interest at up to 10% above rase rate on the amount of money awarded (excluding interest) from the expiry of the "relevant period" (in this case from the 6 January 2021);

31.2 indemnity costs from the end of the relevant period;

31.3 interest on those costs at a rate not exceeding 10% above base rate; and

31.4 an additional amount capped at £75,000 being 10% of the first £500,000 awarded and (subject to the cap) 5% of any amount above that.

32. The court must make these orders in favour of the claimant unless the court considers it unjust to do so. CPR Rule 36.17(5) requires the court, in considering whether it would be unjust to make any of the orders, to take into account all of the circumstances of the case including:

    32.1 the terms of the Part 36 offer;

    32.2 the stage in the proceedings when the offer was made;

    32.3 the information available to the parties at the time the offer was made;

    32.4 the conduct of the parties in respect of the provision of information enabling the offer to be evaluated; and

    32.5 whether the offer was a genuine attempt to settle the proceedings.

Genuine offer to settle

33. Although Mr Seitler puts forward a number of reasons why it would be unjust to make the normal orders, he relies on the submission that the offer was not a genuine offer to settle and as a separate reason why none of the orders should be made. This submission is based on the fact that the only concession which was made was foregoing the minimal amount of interest which had accrued on the unpaid rent and the fact that the offer was made the day before the third lockdown (which came into effect on 16 December 2020) and that it was made against a background where many landlords were agreeing concessions such as the waiver or deferral of rent.

34. Mr Trompeter, on the other hand, relies on similarities with the decision in *Rawbank SA v Travelex Banknotes Limited* [2020] EWHC 1619 (Ch), a decision of Zacaroli J, in submitting that the Part 36 offer was a genuine offer to settle. In that case, the claimant's claim was for £48,311,860. The claimant made a Part 36 offer to settle for a sum of £48,290,000. Together with interest up to the date of the Part 36 offer, the total claim was £48,448,059. The discount being offered was therefore about £158,000 which represented 0.3% of the total amount claimed. Unlike in this case however, the concession included not just the interest but also a very small discount on the principal amount claimed.

35. Zacaroli J noted the observation of Henderson J in *AB v CD* [2011] EWHC 602 (Ch) at [22] that there must be some genuine element of concession, but nonetheless accepted that, on the basis that there was no issue as to quantum (either the sum was due or it was not) and that the defendant clearly had no defence to the claim, even a very small discount offered constituted a genuine offer of settlement. Zacaroli J also concluded at [31] that the possibility that the defendant was unable to pay did not prevent the offer from being a genuine offer to settle as the claimant was entitled not to accept the defendant's assertion that it could not pay and could not be said to be acting otherwise than genuinely as long as it believed that there was a possibility that the defendant could pay.

36. Drawing an analogy with *Rawbank*, Mr Trompeter submits that this is also a case with a binary outcome – either the rent is due or it is not. There is no dispute as to the amount. Although the concession offered was small (only approximately £8,000), in percentage terms, it is greater than the discount offered in *Rawbank*. In addition, the claimant was entitled to take the view that the defendants had no realistic defence which, he says, is vindicated by the fact that the court has granted summary judgment. As in *Rawbank*, the claimant has therefore offered to give up something which it had a near certainty of obtaining.

37. I accept Mr Trompeter's submissions in relation to this point. It is quite clear (and remains the case) that the claimant considered that the defendants were able to pay the rent but had simply chosen not to do so in order to preserve liquidity. It is equally clear that the claimant considered that the defendants did not have a realistic defence to the claim, as was demonstrated by the fact that they issued their summary judgment application shortly after the expiry of the relevant period in relation to the Part 36 offer. This is reflected in the very small concession made by the claimant. Nonetheless, there was a concession.

38. The fact that the offer was made on the eve of the third lockdown and against a backdrop of other landlords and tenants agreeing concessions does not, in my view, mean that the offer was not a genuine offer to settle, particularly in circumstances where the claimant had previously been told that the defendants intended to "vigorously defend the proceedings" as well as to pursue a number of counterclaims.

39. It also cannot, in my judgment, be said that, objectively, no defendant would accept the offer bearing in mind the surrounding circumstances. It may well be the case that a tenant might accept that it had no realistic prospect of defending the claim and that, therefore, if it was able to pay, it should do so despite the fact that other tenants were being offered concessions. On the basis that the claimant genuinely believed that the defendants could pay (but were choosing not to do so), the offer remains a genuine offer to settle.

40. I therefore reject the submission that the Part 36 offer was not a genuine offer to settle and it is not therefore, for this reason, unjust to make the order to which the claimant seeks. I do however need to go on to consider whether there is any other reason why it might be unjust to make all or any of those orders.

Injustice

41. Mr Seitler puts forward a number of points in support of his submission that it would be unjust to make the relevant orders. In summary, these are as follows:

41.1 The claimant is in any event entitled to indemnity costs under the terms of the leases.

41.2 The claimant should have followed the Government's Code of Practice encouraging landlords to offer concession where tenants are unable to pay their rent as a result of Covid restrictions affecting their business.

41.3 The Covid pandemic was not the defendants' fault.

41.4 In the light of the proposed binding arbitration scheme which has subsequently been announced by the Government and which may allow the defendants to obtain concessions in relation to the rent, it would be unjust for the third defendant to suffer the full consequences of the failure to accept the Part 36 offer.

42. Mr Trompeter referred in response to the observation (mentioned in The White Book at paragraph 36.17.5) of Sir David Eady in *Downing v Peterborough and Stamford Hospitals NHS Foundation Trust* [2014] EWHC 4216 (QB) at [61] that a judge should not make an exception to the normal rule "merely because he or she thinks the

regime itself harsh or unjust. There must be something about the particular circumstances of the case which takes it out of the norm."

43. Given the wholly exceptional circumstances created by the Covid pandemic which is itself recognised by the introduction of the binding arbitration scheme relating to rent arrears, it would in my view be unjust to apply the full rigour of CPR Rule 36.17 in this case.

44. I appreciate that, in reaching the conclusion I have, I am taking into account events which have occurred after the date when the Part 36 offer was made. However, although the specific factors listed in CPR Rule 36.17(5) all relate in one way or another to the Part 36 offer itself, it is clear that the court should take into account all of the circumstances of the case. There is no restriction on taking into account matters which occur after the offer has been made.

45. In my view, a further relevant factor to take into account is the defective service of the Part 36 offer. Although I have concluded that it is not in accordance with the overriding objective to invoke CPR Rule 3.10 (a) and make an order that the Part 36 offer has not been validly made, this is in my view a reason why it would be unjust to award the claimant the maximum available under CPR Rule 36.17.

46. However, I do also bear in mind that the Part 36 regime is intended to encourage settlement of disputes and to reduce costs. The normal order is not intended to be purely compensatory but is a part of the mechanism through which that encouragement is achieved (*OMV Petrom SA v Glencore International AG* [2017] EWCA Civ 195). It is therefore in my view right that some of the consequences provided for by CPR Rule 36.17 should apply in this case given the third defendants' failure to accept the Part 36 offer.

47. In deciding what order to make, there are two preliminary points which I need to deal with and which arose during the course of submissions. The first is whether, although the Part 36 offer only related to a part of the claim, the consequences set out in CPR Rule 36.17 should apply (as a starting point) to the entire sum awarded to the claimant as a result of the summary judgment application and to the entirety of the costs or whether those consequences should only apply to that part of the claim (and the costs of that part of the claim) to which the Part 36 offer related.

48. The second point is whether "the additional amount" of up to £75,000 provided for by CPR Rule 36.17(4)(d) is "all or nothing" or whether, if the court considers that it would be unjust to award the full amount, it can award some lesser amount.

49. Taking the second issue first, I have in any event concluded that it would be unjust to order the third defendant to pay an additional amount in accordance with CPR Rule 36.17(4)(d). As I have already indicated, the reasons for this are the defective service of the Part 36 offer and the introduction of the proposed binding arbitration scheme. Although there is no certainty as to the terms of that scheme[1], it is clear that a tenant whose business has been affected by Covid and who has rent arrears might expect to obtain some sort of concession. In the light of this, whether or not the defendants in this case are able to take advantage of the arbitration scheme it would, in my judgment, be unjust to require the third defendant to pay an additional amount on top of the rent arrears, notwithstanding its decision not to accept the Part 36 offer. I do not therefore need to decide whether I could have ordered the third defendant to pay an additional amount which is smaller than the amount given by the calculation required to be made in accordance with CPR Rule 36.17.

50. Although I did not hear detailed submissions on the point, had I needed to decide this point, my provisional view is that the court does have power to order the defendant to pay a lesser amount rather than the court only having a choice between awarding the full amount or nothing at all. Where questions of justice arise, it would be surprising if it were not open to the court to take a view as to the extent of any injustice and to make an order accordingly. This conclusion is supported by the decision of the Court of Appeal in *Thinc Group Limited v Kingdom* [2013] EWCA Civ 1306 where, in the context of an award of indemnity costs in accordance with Rule 36.17(4)(b) Macur LJ rejected an all or nothing approach, stating at [22] that:

> "the phrase 'unless it considers it unjust to do so' in CPR 36.14(2) and (3) bear the obvious interpretation of 'unless and to the extent of'."

51. Mr Seitler drew attention to the decision of His Honour Judge Waksman QC in *Bataillion v Shone* [2015] EWHC 3177 (QB) who clearly assumed (although without any analysis) that he had power to award a smaller additional amount, ordering the

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[1] I note that since the hearing draft legislation has been laid before Parliament. However, my decision on this point does not depend on whether or not the defendants are able to take advantage of the scheme.

defendant to pay $50,000 rather than the maximum of £75,000 which would otherwise be due.

52. That case was considered by Stewart J in *JLE (a child) v Warrington and Halton Hospitals NHS Trust* [2019] EWHC 1582 (QB) who reached a different conclusion having looked in detail at the history of the rule and other authorities including *White v Wincott Galliford Limited*, (SCCO Reference CCD1705254-28 May 2019) and *Cashman v Mid-Essex Hospital Services NHS Trust* [2-15] EWHC 1312 (QB).

53. I accept that, as pointed out by Stewart J, an element of discretion is built into the interest provisions in CPR rule 36.17 (4)(a) and (c) by providing that the interest is to be at a rate "not exceeding" 10% above base rate and that this might indicate that there is therefore not intended to be any discretion in relation to the additional amount which simply imposes a fixed method of calculation subject to a cap of £75,000. However, the same could be said of the indemnity costs provision in CPR rule 36.17(4)(b) which was the subject of the decision in *Thinc* and yet the Court of Appeal still concluded that there was an element of discretion in relation to this aspect.

54. Clearly there is a divergence of views in relation to this point at first instance and it can only be hoped that, at some point, the Court of Appeal will have the opportunity to resolve this uncertainty.

55. Turning to the first point, which is whether the Part 36 consequences apply in relation to the whole of the claim or only that part in respect of which the Part 36 offer was made, neither party referred to any authorities on this point. Mr Trompeter submits that, based on the wording of CPR rule 36.17, the consequences must apply to the whole of the sum awarded and the whole of any costs. Mr Trompeter did refer in passing to the decision of the Court of Appeal in *Webb v Liverpool Women's NHS Foundation Trust* [2016] EWCA Civ 365. However, he accepted that this was a case where the Part 36 offer related to the whole of the claim and so does not provide any assistance in relation to the effect of a Part 36 offer which relates only to part of a claim.

56. It is clear from CPR Rule 36.5(1)(d) that a Part 36 offer may be made in relation to a part of a claim.

57. In *OMV*, the Chancellor explained at [33-39] that the purpose of the awards in what is now CPR rule 36.17 is to encourage the making of reasonable settlement offers and the acceptance of such offers (quoting paragraph 1.1 of chapter 41 of Jackson LJ's final report in respect of the proposed CPR reforms).

58. In relation to the award of interest on any sum awarded, the Chancellor went on to observe at [38] that:

> "The level of interest awarded must be proportionate to the circumstances of the case".

59. Although the Chancellor was talking about the rate of interest, this perhaps sheds some light on the correct interpretation of CPR rule 36.17(4). It would in my view be wholly disproportionate if a defendant who chooses not to accept a Part 36 offer in relation to a relatively small part of a claim is then saddled with all of the Part 36 consequences in respect of the entirety of the claim and the costs of the claim should the claimant ultimately be successful.

60. For example, if a claimant brings a claim for a total of £1 million but makes an offer in respect of a part of the claim worth £100,000, can it be right that, if the defendant does not accept that offer and the claimant is successful in relation to the whole of their claim, the defendant is liable to pay an additional amount of £75,000 (based on the £1 million total claim) rather than a figure of £10,000 (based on the £100,000 to which the Part 36 offer related)? This would, in my view, be wholly disproportionate. The result of this is that, in my judgment, the references in CPR rule 36.17(4) to sums awarded and to costs must be interpreted as references to sums awarded or costs (as the case may be) in relation to the part of the claim in respect of which the Part 36 offer was made.

61. Mr Trompeter submits that the same effect could be achieved simply by reducing the awards in exercise of the court's discretion if making the award on the basis of the entire claim would be unjust. However, this submission does not sit well with his suggestion that the court in any event has no discretion to reduce the additional amount under CPR rule 36.17(4)(d).

62. My conclusion therefore is that any award should be based on the sum awarded and the costs incurred in relation to the part of the claim to which the Part 36 offer relates.

63. Turning then to what orders should be made, I have already concluded that there should be no award of any additional amount under CPR rule 36.17(4)(d) for the reasons I have given. For the same reasons, I consider that it would be unjust to award the claimant an enhanced rate of interest on the rental arrears which were the subject of the Part 36 offer. I do, however, accept that, as the claimant has obtained judgment which is at least as advantageous as the Part 36 offer, it should have interest from the end of the relevant period at the judgment rate.

64. Turning to the question of costs, I am satisfied that it is right for the claimant to receive its costs in relation to the matters dealt with by the summary judgment application from 6 January 2021 on the indemnity basis. Although, given my conclusions above, this relates only to the costs of the part of the claim to which the Part 36 offer relates, as Mr Trompeter submits, there is no real basis for supposing that any significant additional costs have been incurred in relation to the claims which are the subject of the summary judgment simply by adding to the claim the subsequent periods for which rent was not paid.

65. In addition, it is not in my view practical (and indeed Mr Seitler did not invite me to do so) to isolate any other costs relating to the summary judgment application such as those that might relate to service charges as opposed to rent (which did not feature in the Part 36 offer). This is because the key issues in relation to the summary judgment application were the same whether they related to rent or service charges.

66. The final award under CPR rule 36.17(4) relates to interest on those costs. For the reasons set out above, any award of interest should apply to the whole of the costs since the relevant date given that, in substance, they all relate to the arrears of rent. However, bearing in mind the defective service of the Part 36 offer, it would be unjust to award the maximum interest of 10% above base rate. In my view, a just award amounts to interest calculated at a rate of 5% above base rate.

Costs before 5 January 2021

67. I now need to consider the award of costs relating to the period prior to the expiry of the relevant period on 5 January 2021. The parties agree that the normal principles in CPR Part 44 apply.

68. The starting point is that the claimant should have its costs as it is the successful party. However, Mr Seitler submits that the defendants have been successful in relation to two aspects. The first is their claim for set off (in respect of which the first defendant and the third defendant were both successful). The second aspect relates to the arguments in relation to failure of basis. Although my conclusion was that there was no failure of basis, I accepted that, had there been a failure of basis, it would have been a total failure of basis in relation to the periods during which the premises were not permitted to open.

69. As far as the second point is concerned, this was not, in my view, a success in any meaningful sense given the conclusion that there was no failure of basis in the first place and, as Mr Trompeter points out, the further conclusion that, in any event, the concept of failure of basis does not, as the law presently stands, provide any defence to a contractual claim. It is not therefore in my view appropriate to make any reduction in this respect.

70. I do however accept that the third defendant has had some success in relation to its arguments in respect of set off resulting from the first defendant's counterclaims. However, this aspect was a relatively small part of the summary judgment application and of the hearing. It is nonetheless appropriate to recognise this limited success in the award of costs which I will make.

71. Mr Seitler seeks a further reduction based on the claimant's conduct. He referred in particular to two examples. The first is the fact that the claimant issued a letter before action on 5 October 2020 which made no concessions and contained no deadline. Despite a response on 15 October 2020, proceedings were issued only a week later on 22 October 2020. In addition, Mr Seitler points out that the second and third defendants were only formally told about the proposed proceedings on 19 October 2020. Mr Seitler describes this as not playing by the rules.

72. The second point highlighted by Mr Seitler is the fact that the claimant's calculations originally included compound interest as opposed to simple interest. When this was put to the claimant, the initial response was that they were not claiming compound interest. When it was pointed out that this was clearly the effect of the calculations, the claim for compound interest was simply removed.

73. In my view, these examples fall well short of conduct justifying any reduction in the award of costs. The defendants' response to the issue of proceedings in their letter of 30 October 2020 was that they intended to "vigorously defend the proceedings" and so, as Mr Trompeter submits, a less aggressive approach to the pre-action correspondence on the part of the claimant would have made no difference at all. As far as the compound interest incident is concerned, it is clear to me that this was simply a mistake on the part of the claimant which was swiftly corrected once the true position was appreciated by them.

74. Taking all of this into account, it is in my view right to make a proportionate award in favour of the claimant amounting to 90% of its costs. This takes account of the third defendant's success on the set-off point. Bearing in mind the terms of the leases, these costs should be assessed on the indemnity basis.

75. I would be grateful if Counsel could incorporate the consequences of this judgment into the draft order which they are currently discussing and which is due to be provided to me by Friday 19 November 2021.