Neutral Citation Number: [2017] EWHC 3266 (IPEC)

Case No: IP-2016-000050

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
INTELLECTUAL PROPERTY ENTERPRISE COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 13/12/2017

Before :

HIS HONOUR JUDGE HACON

- -

Between :

(1) NICHOLAS MARTIN **(2) BIG HAT STORES LIMITED**	**Claimants**
- and -	
JULIA KOGAN	**Defendant/Part 20 Claimant**
- and -	
(1) FLORENCE FILM LIMITED **(2) PATHÉ PRODUCTIONS LIMITED** **(3) QWERTY FILMS LIMITED**	**Part 20 Defendants**

- -
- -

Tom Weisselberg QC (instructed by **Lee & Thompson LLP**) for the **Claimants**
Simon Malynicz QC and Ashton Chantrielle (instructed by **Keystone Law**) for the **Defendant/Part 20 Claimant**
Jonathan Hill (instructed by **Wiggin LLP**) for the **Part 20 Defendants**

Hearing date: 4 December 2017

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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.

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HIS HONOUR JUDGE HACON

Judge Hacon

Introduction

1. On 22 November 2017 I handed down judgment in this action. I held that the First Claimant was entitled to a declaration that he is the sole author of the Screenplay and that the Claimants have not infringed the copyright in the Screenplay. The Counterclaim and Part 20 Claim were dismissed.

2. On 4 December 2017 I heard submissions on the form of order. The main dispute concerned costs, in particular the effect on costs of a successful Part 36 offer by the Claimants. I reserved judgment to be handed down in written form because there has been wider interest in the effect of a Part 36 offer in this court, particularly since *Public Performance Limited v Hagan* [2016] EWHC 3076 (IPEC); [2017] FSR 24.

3. As at the trial, Tom Weisselberg QC appeared for the Claimants, Simon Malynicz QC and Ashton Chantrielle for the Defendant and Jonathan Hill for the Part 20 Defendants.

The offers

4. The Claimants made two Part 36 offers. The first was contained in a letter from the Claimants' solicitors dated 18 February 2016, in which the Claimants offered £35,000 in full settlement of the claim. In addition, the Claimants offered to pay the costs of the Defendant ("Ms Kogan") on the standard basis, to be assessed if not agreed, up to the date of notice of acceptance if within the relevant period as defined in Part 36. This offer was made before the Claim Form was issued on 6 April 2016.

5. The second was in a letter from the Claimants' solicitors dated 19 September 2017. It was expressly stated to be independent of the earlier offer, although it repeated the offer to pay £35,000 in full settlement of the claim and by this time also the counterclaim, including interest. The difference was that Ms Kogan would be liable to pay the Claimants' costs up to the date of service of the notice of acceptance, to be assessed if not agreed.

6. The Part 20 Defendants made a Part 36 offer on 14 September 2017. They offered to pay £5,000 including interest, minus any sum Ms Kogan had agreed to accept from the Claimants, in full and final settlement of the Part 20 Claim against them.

7. Ms Kogan accepted none of these offers. She responded with a Part 36 offer of her own to the Claimants dated 26 September 2017, but given the outcome of the trial it carries no significance.

The rules

8. Rule 36.17(1)-(7) provide (subparagraph (8) is irrelevant):

> "***Costs consequences following judgment***
>
> ***36.17***

(1) Subject to rule 36.21, this rule applies where upon judgment being entered —

(a) a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer; or

(b) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer.

(Rule 36.21 makes provision for the costs consequences following judgment in certain personal injury claims where the claim no longer proceeds under the RTA or EL/PL Protocol.)

(2) For the purposes of paragraph (1), in relation to any money claim or money element of a claim, "more advantageous" means better in money terms by any amount, however small, and "at least as advantageous" shall be construed accordingly.

(3) Subject to paragraphs (7) and (8), where paragraph (1)(a) applies, the court must, unless it considers it unjust to do so, order that the defendant is entitled to —

(a) costs (including any recoverable pre-action costs) from the date on which the relevant period expired; and

(b) interest on those costs.

(4) Subject to paragraph (7), where paragraph (1)(b) applies, the court must, unless it considers it unjust to do so, order that the claimant is entitled to —

(a) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;

(b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;

(c) interest on those costs at a rate not exceeding 10% above base rate; and

(d) provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below to an amount which is—

(i) the sum awarded to the claimant by the court; or

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

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

(5) In considering whether it would be unjust to make the orders referred to in paragraphs (3) and (4), the court must 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 was made, including in particular how long before the trial started the offer was made;

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

(d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and

(e) whether the offer was a genuine attempt to settle the proceedings.

(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 rate of interest must not exceed 10% above base rate.

(7) Paragraphs (3) and (4) do not apply to a Part 36 offer –

(a) which has been withdrawn;

(b) which has been changed so that its terms are less advantageous to the offeree where the offeree has beaten the less advantageous offer;

(c) made less than 21 days before trial, unless the court has abridged the relevant period."

The effect of a successful claimant's Part 36 offer on costs in IPEC

PPL v Hagan

9. In *Phonographic Performance Limited v Hagan* [2016] EWHC 3076 (IPEC); [2017] FSR 24 a successful Part 36 offer had been made by the claimant. Two issues arose. The first was whether rule 36.14(3)(b), the equivalent to what is now rule 36.17(4)(b), could override the costs caps generally applicable in IPEC. Like its current equivalent, rule 36.14(3)(b) gave the claimant the right to be awarded indemnity costs from the date on which the relevant period expired unless it was unjust to do so. The second issue was whether an award of an additional amount under rule 36.14(3)(d) (now rule 36.17(4)(d)) fell within or outside the overall costs cap.

10. With regard to the first, I said this:

> "[31] There is a tension between the relief under subparagraphs (b) and (d) of rule 36.14(3) and the caps on costs and damages in IPEC. This was briefly debated and considered in *OOO Abbott v Design & Display Limited* [2014] EWHC 3234 (IPEC). Counsel for the first defendant in that case argued that an award under subparagraph (b) was still subject to the overall £50,000 cap on costs available under the IPEC rules and subparagraph (d) was subject to the overall cap of £500,000 damages. I rejected the argument in relation to subparagraph (d) but accepted it with regard to (b) (at [21]).
>
> [32] Since then, the Court of Appeal has given judgment in *Broadhurst v Tan* [2016] EWCA Civ 94; [2016] 1 W.L.R. 1928. This has a bearing on costs awarded under rule 36.14(3)(b) in the IPEC even though it did not deal with the IPEC costs regime. *Broadhurst* was concerned the fixed costs regime for low value personal injury cases, provided for by Section IIIA of CPR Part 45."

11. Lord Dyson MR, who gave the leading judgment in *Broadhurst*, recorded four arguments in favour of rule 36.14(3)(b) overriding the fixed costs regime under CPR Part 45, Section IIIA. The first turned on the principle of law that general provisions must yield to specific provisions. Lord Dyson held that it provided no clear result. But the next three did. I summarised what Lord Dyson said and whether his acceptance of the second to fourth arguments affected the issue in *Hagan*:

> "[36] Lord Dyson felt that three further grounds supported the primary conclusion in his paragraph 25 that rule 36.14(3)(b) took precedence. The first depended on rule 36.14A(8). As I have said, there is no equivalent to rule 36.14A for IPEC cases, so it does not assist here.
>
> [37] Lord Dyson also referred to with approval a submission that under the wider scheme of Part 36, where fixed costs are intended to prevail, Part 36 says so (at [27], referring back to [13]).
>
> [38] Finally, Lord Dyson ruled at [28] that had he been in doubt, it would have been legitimate to refer to the Explanatory Memorandum as an aid to construction, applying by analogy *Pepper v Hart* [1993] AC 593:
>
> > "[The Memorandum] states in terms that, if a claimant makes a successful Part 36 offer: 'the claimant will not be limited to receiving his fixed costs, but will be entitled to costs assessed on the indemnity basis in accordance with rule 36.14.'"

> [39] Guided by the third and fourth grounds set out by Lord Dyson, both of which, it seems to me, can be applied by analogy to the tension between rule 36.14(3)(b) and rule 45.31, I conclude that the former overrides the latter: the limits on costs in the IPEC, both stage costs and the overall cap, do not apply to an award of costs under rule 36.14(3)(b)."

12. Regarding the second issue of an additional amount pursuant to rule 36.14(3)(d) (now 36.17(4)(d)), I referred to my ruling in *Abbott* that the additional amount referred to in the rule was not a species of costs and was therefore to be awarded outside the costs cap.

Whether PPL v Hagan was correctly decided

13. I gave judgment in *Hagan* with the benefit only of a written argument from one side, provided by PPL's solicitors. Mr Malynicz submitted that *Hagan* was wrongly decided and that I should say so.

14. For reasons I will explain, the correctness of *Hagan*, a judgment about a claimant's Part 36 offer, is not directly relevant to my decision. I must deal with it nonetheless because it has a bearing on the balance of advantage between claimants and defendants when it comes to Part 36 offers, which in turn affects how the court should approach cost caps in relation to a defendant's successful Part 36 offer.

15. As appears above, in *Hagan* I applied by analogy the third and fourth arguments presented to the Court of Appeal in *Broadhurst*, both accepted by Lord Dyson. Regarding the third argument, Lord Dyson stated:

> "[13] … Where fixed costs are intended to prevail, Part 36 says so. First, rule 36.10A is introduced to disapply the right to costs assessed on the standard basis which would otherwise arise where a Part 36 offer is accepted by a claimant in a fixed costs case. Secondly, rule 36.14A makes specific provision for fixed, rather than assessed, costs in situations other than those where a claimant makes a successful Part 36 offer. Thus, if a defendant's offer is successful, rule 36.14A provides for the claimant only to recover fixed costs until the effective date of the offer, in place of the usual rule that the claimant will recover standard basis costs until that date. Thereafter, the defendant is also limited to fixed costs: rule 36.14A(7) . Thirdly, regard should be had to rule 36.21, which deals with offers made within the Ministry of Justice portal process. Here again, the rule specifically provides for fixed, rather than assessed, costs to be payable in such cases, even where the claimant has made a successful Part 36 offer: rule 36.21(4)."

16. Mr Malynicz submitted that when Lord Dyson said that where fixed costs are intended to prevail Part 36 says so, his references to rules 36.10A and 14A which follow (both now within rule 36.20) show that he had in mind where Part 36 expressly says so. Former rules 36.10A and 14A dealt with the costs consequences of acceptance of a Part 36 offer where Section IIIA of Part 45 applies. Part 36 does not expressly say anything about Section IV of Part 45, which deals with costs in the IPEC. Therefore, Mr Malynicz argued, I was wrong to rely on this third ground of Lord Dyson's for finding that an award of indemnity costs could override the IPEC costs caps.

17. I am not sure that follows. Lord Dyson's point still holds good: where the fixed costs regime of Part 45 is to be preserved, Part 36 says so. By inference silence in relation to Section IV of Part 45 can be taken to mean that the capped costs of that Section are not preserved when a successful Part 36 offer has been made. The alternative is neutral: the CPR committee did not have Section IV in mind at all when drafting Part 36. Neither interpretation of the rules supports the contention that the costs caps of Section IV override rule 36.17.

18. Lord Dyson's fourth ground concerned the Explanatory Memorandum referred to in paragraph 15 of *Broadhurst*. The Civil Procedure (Amendment No.6) Rules 2013 (2013 No. 1695 (L. 18)) ("the 2013 Amendments") came into force on 31 July 2013. The changes to the CPR made by rules 4 to 7 of the 2013 Amendments were in consequence of an extension of the procedure for commencing a low value claim for personal injury arising from a road traffic accident. Two new rules were introduced, rules 36.10A and 36.14A, respectively headed "Costs consequences of acceptance of a Part 36 offer where Section IIIA of Part 45 applies" and "Costs consequences following judgment where Section IIIA of Part 45 applies". I set out here paragraph 7.1(e) from the Explanatory Memorandum to the 2013 Amendments quoted by Lord Dyson at [15]:

> "New rules 36.10A and 36.14A make provision in respect of the fixed costs a claimant may recover where the claimant either accepts or fails to beat a defendant's offer to settle made under Part 36 of the CPR . Provision is also made with regard to defendants' costs in those circumstances. If a defendant refuses a claimant's offer to settle and the court subsequently awards the claimant damages which are greater than or equal to the sum they were prepared to accept in settlement, the claimant will not be limited to receiving his fixed costs, but will be entitled to costs assessed on the indemnity basis in accordance with rule 36.14 ."

19. Mr Malynicz submitted that the Explanatory Memorandum did not purport to be laying down any general statement about the effectiveness of Part 36 offers in fixed costs cases and therefore had no bearing on the effect of a successful Part 36 offer in an IPEC case. That is true, but it does not address the point I made in *Hagan*: the third and fourth grounds identified by Lord Dyson for concluding that an award of indemnity costs under rule 36.14(3(b) overrode the fixed costs limitations of Part 45 Section IIIA, can be applied by analogy to a Part 45 Section IV case, see *Hagan* at [39]. In other words, there is something to be said for a consistent policy across Sections IIIA and IV of Part 45 and beyond.

20. An example of aiming for such consistency was demonstrated in *Lowin v W Portsmouth & Co Ltd* [2016] EWHC 2301 (QB); [2017] C.P. Rep 1. Elizabeth Laing J (with Master Leonard sitting as a costs assessor) applied *Broadhurst* in a context outside Section IIIA of Part 45, namely to rule 47.15(5) which caps the maximum amount awarded for a provisional assessment of costs. The tension between that rule and rule 36.17(4) was resolved in favour of the latter. The position in *Lowin* was closer to *Broadhurst* than was *Hagan* in that Part 47 makes specific provision for the relationship between Part 47 and Part 36. However, Elizabeth Laing J said:

> "[32] It seems to us that because [the draftsman of Part 47.20 has not provided that the provisions of Part 36 would apply to the costs of the detailed

> assessment with modifications that included 47.15(5)] it must follow that the provisions of Pt 36 apply to this case and that they are not displaced by a provision of r.47.15(5). To that extent it seems to us that the scheme of the reasoning in *Broadhurst* helps us to reach a conclusion on the correct relationship between Pt 36 and Pt 47 on the facts of this case."

21. Leaving aside *Broadhurst*, Mr Malynicz gave reasons why *Hagan* should be reversed so that Part 36 would have no effect on the capped costs regime in IPEC:

    (1) The goal of predictable levels of costs and recovery, which are intended to facilitate access to justice, are otherwise undermined.

    (2) *Hagan* allows a well-funded claimant with a weak case to put unfair pressure on a defendant by making a Part 36 offer. It forces the defendant to accept the offer rather than risk losing the benefit of the cap.

    (3) Reversing *Hagan* would still allow a Part 36 offer to have effect in the IPEC, subject to the costs cap.

    (4) Whereas the effect of rule 36.17(4) in the general list of the High Court might increase the percentage of costs awarded by a relatively modest percentage, following *Hagan* the percentage increase in the IPEC could be much higher, even three or four fold higher.

22. I can see that the first, second and fourth points have some force in theory, but they ignore the obligation on the court to exercise its discretion to avoid injustice and they need not arise, depending on how rule 36.17(4)(b) in particular is implemented. As to which, see below.

23. The third point is correct, with the important qualification that reversing *Hagan* would mean that where the overall costs that may be awarded to a claimant reach £50,000, which is not uncommon, the defendant becomes immune to the effect of a claimant's Part 36 offer under rule 36.17(4)(b). The important rationale underlying Part 36 would be undermined, albeit not wholly defeated. I referred to the rationale in *OOO Abbott v Design & Display Ltd* [2014] EWHC 3234 (IPEC):

> "[22] … the principle to be maintained in relation to CPR 36.14(3) [now r.36.17(4)] is that it should be applied in a way such as to generate a vigorous incentive to make and accept claimants' Part 36 offers."

24. The risk is that claimants become cynical about making a Part 36 offer if experience begins to teach that such offers can have limited effect.

25. I decline to reverse my judgment in *Hagan*. It is neither inconsistent with any part of the CPR to which my attention has been drawn nor contrary to the authorities. Moreover, I take the view that reversing it may result in depriving rule 36.17(4)(b) of its intended effect in many cases.

The Capped Costs List Pilot Scheme

26. Since *Hagan* it has become apparent that *Broadhurst* has met with a mixed response (as has *Hagan*). Views on *Broadhurst* emerged in the *Review of Civil Litigation*

Costs: Supplemental Report, Fixed Recoverable Costs by Lord Justice Jackson, 31 July 2017 ("the Jackson Supplemental Report"). In chapter 5 at paragraph 2.6, Jackson LJ referred to *Broadhurst* and said that there was a sharp division in views on its effect. Nine of his assessors believed that changes should be made to the CPR to ameliorate its effect by having a percentage uplift in costs in the event of a successful Part 36 offer rather than uncapped indemnity costs, whereas five preferred to keep the effect of *Broadhurst* as it is. Jackson LJ noted:

> "I have set out the competing arguments, because this is the only issue on which my assessors are sharply divided. After considering the powerful arguments on both sides, on balance … I favour replacing indemnity costs with a percentage uplift of 30% or perhaps 40%. BUT this is a clear issue of policy, which will need to be addressed in the consultation exercise following this report."

27. One of the recommendations of the Jackson Supplemental Report was an increase in the use of capped costs in civil litigation. A capped costs pilot scheme was proposed. Part of the proposal addressed the effect of a successful Part 36 offer. Appendix 15 sets out the rules to be applied to litigation conducted under the pilot. Paragraphs 3.1 to 3.11 set out the general proposed scheme for awarding costs. Paragraphs 3.12 to 3.14 apply Part 36 to the pilot, but modify the effect of a Part 36 offer. Paragraph 3.15 says this:

> "3.15 Where an order for costs is made pursuant to rule 36.17(4), unless it considers it unjust to do so, the court will order that the Claimant is entitled to –
>
> (1) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;
>
> (2) costs assessed in accordance with paragraphs 3.1 to 3.11 to the date on which the relevant period expired;
>
> (3) costs assessed on the indemnity basis in accordance with paragraphs 3.1 to 3.11 from the date on which the relevant period expired save that –
>
> (a) the maximum amount allowed under paragraph 3.5 for any stage of the claim on which work was done after expiry of the relevant period shall be increased by 25%; and
>
> (b) the total costs a court may order under paragraph 3.6 are not more than £100,000; and
>
> (4) an additional amount which is 10% of the amount of –
>
> (a) the sum awarded to the Claimant by the court; or
>
> (b) where there is no monetary award, the sum awarded to the Claimant in respect of costs."

28. Coincidentally, the capped costs pilot scheme started in the London Circuit Commercial Court on 4 December 2017, the day of the present hearing on costs.

How rule 36.17(4)(b) should be implemented in IPEC

29. The implementation of rule 36.17(4)(b) is always subject to the court's discretion and the need to avoid injustice. It seems to me that it will seldom be appropriate to apply the rule without restriction as was done in *Hagan*.

30. *Hagan* was an unusual case in a number of ways, two of which are relevant here. First, the impact of rule 36.14(3)(b) (now 36.17(4)(b)) was limited. Much of PPL's costs had been incurred in the general Chancery list so the IPEC caps did not apply. Its IPEC costs were very modest compared to those of the Claimants in the present litigation. Secondly, Mr Hagan's conduct was not exemplary. He pretended to be someone else in order to avoid liability and then he fabricated an email by which, he claimed, he had accepted the claimant's Part 36 offer. Costs were thereby significantly increased.

31. The present case provides a contrasting and, I think, more typical example. There was no blameworthy conduct of the sort that happened in *Hagan*. Also, the scale of costs incurred by the Claimants in the present case means that an unqualified abandonment of the costs cap would have a much more dramatic effect on Ms Kogan than it did on Mr Hagan. In the normal course, it would be unjust to remove the costs caps altogether when rule 36.17(4)(b) is applied. I think this is true in the present case.

32. What, then, is the best approach? In my view the treatment of Part 36 and costs caps recommended in the Jackson Supplemental Report now provides a helpful guide. The just course, in the absence of serious misconduct by the defendant, will generally be to apply rule 36.17(4)(b) in a manner which accords with paragraph 3.15 of Annex 15 of the Jackson Supplemental Report. There will be a difference in that the overall cap should be lifted to £62,500 on the final determination of a claim in relation to liability, rather than £100,000 as contemplated in the pilot. Such a difference is appropriate because the standard cap under the pilot scheme, i.e. where Part 36 does not apply, is £80,000 (see paragraph 3.6 of Annex 15). The percentage effect is the same: a 25% uplift on the overall cap.

33. In summary, the usual result in this court where rule 36.17(4)(b) applies is likely to be that the cap on each stage of costs is raised by 25%. The total amount of costs awarded becomes subject to a raised overall cap of £62,500. This of course remains subject to the discretion of the court as required by rule 36.17(4).

The implementation of rule 36.17(4)(d)

34. Mr Malynicz did not challenge the ruling in *Abbott* that the IPEC cost caps do not apply to the additional amount to which a claimant will usually be entitled pursuant to rule 36.17(4)(d).

35. The capped costs pilot scheme likewise does not make the additional payment subject to any cost cap, see Jackson Supplemental Report, appendix 15, paragraph 3.15(4).

The effect of a successful defendant's Part 36 offer on costs in the IPEC

36. No question of indemnity costs or an additional amount arises under Part 36 where a defendant makes a successful Part 36 offer because there is no need. Rule 36.17(3) provides that the defendant gets his costs from the date of expiry of the relevant period, plus interest.

37. A question does arise as to whether the stage costs caps and the overall costs cap apply. The argument in favour is to put defendants on an equal footing with claimants when it comes to Part 36 offers, assuming that *Hagan* is correct; for the reasons I have given I have declined to reverse *Hagan*.

38. However, as I have discussed, in the normal course Part 36 will be applied in a limited way to a claimant's successful Part 36 offer, particularly rule 36.17(4)(b). Removing the caps where there is a defendant's successful Part 36 offer would tilt the balance of advantage unfairly in favour of defendants.

39. The Supplemental Jackson Report suggested no change to the usual effect of a defendant's successful Part 36 offer for the capped costs pilot scheme, see appendix 15, paragraph 3.14. I will do likewise. The IPEC stage and overall costs caps remain in place.

Whether Part 20 costs are subject to separate caps

40. There was a dispute as to whether separate caps apply to the costs of a Part 20 claim or whether they fall within the caps of the main proceedings. If the latter, there was the further question of how awards should be apportioned where the totals of the two sets of costs exceed the caps.

The arguments

41. Mr Weisselberg began with rule 45.31 which sets out the basic rule on the overall costs cap in the IPEC:

> *"(1) Subject to rule 45.32, the court will not order a party to pay total costs of more than –*
>
> *(a) £50,000 on the final determination of a claim in relation to liability; and*
>
> *(b) £25,000 on an inquiry as to damages or account of profits.*"

42. He submitted that two words were of significance here: 'party' and 'claim'. Vis-à-vis the Part 20 Defendants, Ms Kogan was a claimant. She had brought what constituted a 'claim' against the Part 20 Defendants by filing what, after all, is called a 'Claim Form (Additional claims – CPR Part 20)', issued on 10 June 2016. If the action started by the Claimants had settled, the Part 20 claim, which had a life of its own, would have continued independently.

43. Mr Weisselberg acknowledged that a claim and counterclaim are to be treated as a single claim for the purpose of rule 45.31, with a single costs cap, see *Liversidge v Owen Mumford Limited* [2012] EWPCC Civ 40; [2013] F.S.R. 38 at [13]-[15] and

Global Flood Defence Systems Ltd v Johann Van Den Noort Beheer BV [2016] EWHC 189 (IPEC); [2016] 1 Costs L.R. 137 at [7]-[15]. He argued that there were good reasons for treating a Part 20 claim differently. A counterclaim does not limit a claimant's entitlement to recover up to £50,000 if he wins. A Part 20 claim, not within the claimant's control, would have that effect if there is a single costs cap. The defendant, on the other hand, has a free choice whether to start a Part 20 claim or not.

44. Mr Hill adopted what Mr Weisselberg had said and I think, by implication, submitted that a party joined as a Part 20 defendant should not have the prospect of receiving less than £50,000 in costs if he were to successfully defend the claim. Mr Hill added that whereas Table A in CPR 45PD Section IV makes it plain that a claim and counterclaim are subject to a single overall cap, the same is not true of a Part 20 claim.

45. Mr Malynicz relied on what HH Judge Birss QC said in *Liversidge* at [13]-[15]. He also said that the Part 20 Defendants should have asked for a stay of their argument on estoppel at the CMC. It has proved to have been unnecessary and the costs of it have been wasted.

Discussion

46. Neither Judge Birss in *Liversidge* nor I in *Global Flood* had the present issue in mind. But as appears from those judgments, however one construes a 'claim' in rule 45.31 and thus the scope of the overall costs cap, it is invariably possible to identify disadvantages that might be visited on one party or another.

47. I agree with Mr Weisselberg that if there is a single cap a claimant could find himself out of pocket when he wins an action solely because the defendant chose to join Part 20 defendants who eat into the costs cap. The Part 20 defendants could be similarly disadvantaged. Equally, though, an impecunious defendant may have no rational choice but to make a Part 20 claim. It might be asked why such a defendant should become vulnerable to a doubling of the stage caps and the overall cap. Also, while it is correct to say that a Part 20 claim has a potential life of its own, so does a counterclaim.

48. I do not accept that the Part 20 Defendants in this action should have sought to stay their argument on acquiescence and estoppel at the CMC. As it has turned out there was no need to run the point, but this court discourages any real possibility of multiple trials on liability where one will do.

49. Taking all the foregoing into account, I have come to the view that a Part 20 claim gives rise to a separate overall costs cap and within it separate stage caps. I say that for two reasons. First, it is difficult to characterise a Part 20 claim, with its own claim form, as anything other than a separate claim. To give 'claim' a different interpretation in rule 45.31 would require severe stretching of its usual meaning. Secondly, while it would be possible to fit Part 20 pleadings into a consolidated Table A, they would not neatly accord with the stages of the substantive claim identified in the Table. I doubt that the framers of that Table thought about Part 20 claims when it was drafted. Alternatively, it was just assumed that Part 20 claims would have separate and equivalent stage caps.

50. A Part 20 claim will have a separate overall cap and separate stage caps which will accord with their equivalents in Table A (subject to the effect of a successful Part 36 offer by the Part 20 claimant).

51. I will say one thing further. I think that there is an obligation, stronger even than the usual one in this court, for a defendant to a Part 20 claim to take all reasonable steps to ensure that costs are minimised. There will often be an overlap with issues arising in the main claim and ample opportunity to avoid unnecessary duplication in costs. One question likely to arise is whether it is necessary to have separate counsel or even a separate legal team. If there is little or no likelihood of a conflict arising between the claimant and the Part 20 defendant, it may well be appropriate for counsel appearing for the claimant, and possibly the claimant's legal team as a whole, to represent the Part 20 defendant once pleadings are concluded if not sooner. I accept that the risk of an unexpected conflict can never be entirely ruled out, but the consequences of that exceptional outcome are likely to be worth the savings made in the general run.

The effect of the offers in these proceedings

Claimants' February 2016 offer

52. The Claimants' offer of 18 February 2016 was made before the start of these proceedings in response to a claim threatened by Ms Kogan. As was common ground, it has the status of a defendant's Part 36 Offer. Pursuant to rule 36.17(3), unless it would be unjust to do so, I must order that the Claimants are entitled to all their costs, including pre-action costs, plus interest. It would not be unjust and I will make that order. The stage and overall caps are not raised.

Claimants' September 2017 offer

53. Mr Malynicz said that the Claimants' offer made by a letter dated 19 September 2017 had been effective less than 21 days before the trial. Mr Weisselberg did not dispute this. Pursuant to rule 36.17(7)(c), rule 36.17(4) does not apply.

54. Mr Malynicz also argued that the only purpose of this offer was to put pressure on Ms Kogan and for that reason it should be discounted. I need not take this further. The offer has no practical effect.

Part 20 Defendants' offer

55. The Part 20 Defendants' offer of 14 September 2017 means that they are entitled to their costs plus interest from 5 October 2017, unless I consider it unjust to make such an order. I do. This would include all the costs of the trial. I asked Mr Hill what potential conflict there could have been between his clients and the Claimants. He pointed to nothing which could reasonably have been seen by the Part 20 Defendants as a material potential conflict. Unsurprisingly, there was none as it turned out. The Part 20 Defendants were entitled to have their interests protected but that could have been done at trial just as effectively by the Claimants' counsel. I was not told that the Claimants' legal team would have objected.

56. Rule 36.17(3) says nothing about costs before the expiry of the relevant period. However the Part 20 Defendants have won. Using the Claimants' counsel and possibly the Claimants' legal team earlier than the trial would have led to further savings, but I think it is broadly just that I disallow the cost of the trial and judgment and allow everything else.

57. The Part 20 Defendants' offer, being a defendant's offer, did not have the effect of raising the stage or overall caps.

Quantum

58. Costs are awarded to the Claimants as follows:

Stage	Claimed Costs	Cap	Sum Awarded
Particulars of Claim	£19,626.90	£7,000	£7,000
Defence and Counterclaim	£21,072.06	£7,000	£7,000
Reply and Def to C/Claim	£8,813.00	£7,000	£7,000
CMC	£23,276.77	£3,000	£3,000
Application	£2,585.00	£3,000	£2,000
Disclosure	£16,572.20	£6,000	£6,000
Witness Statements	£44,189.95	£6,000	£6,000
Trial and Judgment	£66,700	£16,000	£16,000
Sub-total	£202,045.88	£50,000	£50,000
Court fees	£790		£790
TOTAL	£202,835.88		£50,790

59. Costs are awarded to the Part 20 Defendants as follows:

Stage	Claimed Costs	Cap	Sum Awarded
Particulars of Claim	£420.00	£7,000	£320
Defence and Counterclaim	£4,770.50	£7,000	£3,500
Reply and Def to C/Claim	£18,433.00	£7,000	£7,000

CMC	£8,237.50	£3,000	£3,000
Disclosure	£6,061.00	£6,000	£4,500
Witness Statements	£10,110.00	£6,000	£6,000
Application	£2,047.50	£3,000	£1,500
Trial and Judgment	£34,819.25	£16,000	£0
TOTAL	£84,898.75	£50,000	£25,820

Interest

60. I invite the parties to calculate the interest due.

Time to pay

61. Just before the hearing on the form of order Ms Kogan filed a third witness statement. She said that she would be unable to pay costs in one go. Her only assets were sums held in three bank accounts and one third ownership of her parents' apartment in Florida, which could not be sold while her parents remained alive. She offered to pay £1,000 per month.

62. Ms Kogan said that she receives a net salary of £2,295.95 working for her husband's company and must pay monthly rent of £1,646.66. She has funded the proceedings so far from £175,000 compensation received from a road traffic accident suffered in October 2011. She has also borrowed £75,000 from her husband's pension scheme which she will have to pay back.

63. Mr Weisselberg took me through some of Ms Kogan's bank statements. By 10 October 2017 she had paid her solicitors about £90,000, with about £30,000 still owing. The compensation she received for the road traffic accident appears to have been spent, as does the loan from her husband. In her witness statement she said that she now has just over £4,500 in her bank accounts.

64. It was submitted on behalf of Ms Kogan that since she could not pay any likely award of costs immediately, she should pay the £1,000 per month she had offered, all she could afford.

65. The difficulty I have is that on the figures given by Ms Kogan, her current expenditure on rent leaves her with £649 per month to pay for food, utilities and all the other expenses she must have. There is no prospect at all of her paying £1,000 per month to the Claimants and Part 20 Defendants unless she has not been candid about her sources of income. Mr Weisselberg pointed out that nothing was said about her husband's willingness to give her further funds, for instance. Mr Malynicz submitted that I should just accept what Ms Kogan said.

66. Ms Kogan's witness statement did her no favours. I am left with no reliable guide to what Ms Kogan can afford. It could be less or more than £1,000 each month, I don't know.

67. Consequently, I will make the usual order: the costs due to the Claimants and the Part 20 Defendants must be paid within 14 days. I hope that Ms Kogan will be able to reach an accommodation with the Claimants and Part 20 Defendants.

Conclusion

68. Ms Kogan must pay the Claimants £50,790 in costs, plus interest. She must pay the Part 20 Defendants £25,820 plus interest.