Case No: A52YM937

IN THE COUNTY COURT sitting at CARDIFF
On appeal from District Judge Hywel James

Cardiff Civil Justice Centre,
2 Park Street,
Cardiff

Date: 18/08/2015

Before :

HIS HON JUDGE CURRAN QC

- -

Between :

MARGARET WOODHEAD	**Claimant**
- and -	
TESCO STORES Ltd	**Defendant**

- -
- -

Romilly Cummerson (instructed by **Parable Law LLP t/a Plexus Law**)
for the **Defendant (Appellant)**

Mark Diggle (instructed by **Frearsons**)
for the **Claimant (Respondent)**

Hearing dates: 27 July, 4 September 2015

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JUDGMENT
(as approved)

- -

Judge Curran:

Introduction

1. On 3rd February 2012 the Claimant was injured in a tripping accident within the Defendant company's premises. She began proceedings claiming damages for personal injuries and consequential losses. The pleaded claim was for damages in the sum of £107,249.00. Primary liability was admitted on 25th May 2012, although contributory negligence was alleged. The parties attempted to settle the matter, but a dispute subsequently arose over the validity of a Part 36 offer to settle made on behalf of the Claimant. That dispute culminated in an application by the Claimant to the District Judge for a declaration that no valid compromise of the case had been made. The District Judge granted the application. The Defendant now appeals by leave of His Hon Judge Gaskell.

The facts leading to the Claimant's application

2. On the 27th March 2013, just over a year after the accident, the Defendant company made a Part 36 offer to settle the case. The offer was in the sum of £12,500.00 and was made using the appropriate court form N242A. That offer was not accepted by the Claimant but remained open for acceptance, as it was not withdrawn by the Defendant.

3. On 21 March 2014 the Claimant made a Part 36 offer to settle the case in the sum of £110,000.00. That offer was not accepted.

4. On 6 December 2014 the solicitors for the Claimant were instructed to make a further offer in the reduced sum of £90,000.00. Therefore, on 10 December 2014 the Claimant's solicitors wrote a letter to the Claimant's solicitors. This read as follows.

> "In a *final* effort to conclude this matter our client will agree to accept £90,000.00 net of any repayment due to the Compensation Recovery Unit, ["CRU"] in full settlement of the claim in respect of both general and special damages and interest." (Emphasis added.)

They concluded their letter by saying,

> "We enclose Form N242A. Notice to settle – Part 36, by way of service."

5. There is no dispute that the member of the firm of solicitors for the Claimant who was the author of the letter, Mr Toon, had in error typed "£10,000.00 net of CRU" in the Form N242A as the amount of the offer to settle, instead of the sum of £90,000.00 net stated in the covering letter.

6. The Defendant's solicitors do not assert that they were unaware of the obvious error. However, instead of seeking clarification from the solicitors for the Claimant, or, at least, enquiring whether there had possibly been some

mistake, their response in a letter dated 15 December 2014 and sent by fax was as follows.

> "Thank you for your letter of 10 December. Our client accepts the part 36 offer of £10,000 net of CRU. We will forward a cheque shortly."

7. It is to be noted that the solicitors for the Defendant referred to the "letter of 10 December" 2014, which contained the offer to settle for the sum of £90,000, rather than to the form N242A containing the erroneous entry of £10,000.

8. In due time it became clear that the Defendant proposed to hold the Claimant to an alleged compromise of the action in the sum of £10,000, by reason of the provisions of Part 36.

9. On 15 December 2014 Mr Toon sent the solicitors for the Defendant a further email in which he stated that unless the Defendant by 19 December 2014 accepted that a mistake had been made he would make an application to the court. In response he received a cheque for £5000 on the 18th of December 2014, as the balance of the sum of £10,000 after taking into account an interim payment of £5000 previously made. The solicitors for the Defendant invited those acting for the Claimant to indicate what authority existed for the proposition that a mistake in making the offer of £10,000 made it incapable of acceptance by them.

10. On 22 December 2014 Mr Toon replied,

> "…. We made a typographical mistake in the form N242A. We contend that you know full well that we made a mistake… you know this because the accompanying letter referred to an offer of £90,000. That inconsistency alone should have been sufficient to alert you to our mistake.
>
> "However, there was more. While reducing an offer from £110,000 to £10,000 might not alone have been sufficient to put you on enquiry, reducing the offer *to less than your own offer still outstanding of £12,500* should certainly have alerted a competent and reasonable solicitor to our mistake. [Original emphasis.]
>
> "… you now unjustly seek to take advantage of our error. Not surprisingly, the law does not permit such injustice. Please consider Foskett on Compromise (seventh edition), and the provisions relating to mistake and in particular mutual mistake at paragraph 4-21:
>
> > 'One situation to be considered under the general heading of mutual mistake arises where each party interprets and accepts the offer of the other in a completely different sense from that which was intended. In such a situation no contract comes into existence.'
>
> …."

11. The solicitors for the Defendant declined to agree that any mistake affected the validity of the compromise. Accordingly the solicitors for the Claimant served an application notice seeking a declaration that there had been no valid compromise, supported by a witness statement from Mr Toon, He said that on receipt of what he described as the "Defendant's purported letter of acceptance" he had sent an email making it clear that the "N242A Part 36 notice contained a typographical error". He then referred to two points which he said made that obvious: (1) that the covering letter referred to £90,000, and (2) that the Defendant's first offer of £12,500 had not been withdrawn.

The judgment of the District Judge

12. District Judge James noted at paragraph 3 of his judgment that apart from the witness statement filed on behalf of the Claimant, no other evidence had been filed and in particular, no evidence had been filed on behalf of the Defendant in response to the application.

13. At paragraph 7 of his judgment the judge said as follows:

> "The position of the Defendant in my finding was that it was aware of the discrepancy and the serious discrepancy in the offer, the letter indicating £90,000, the N242A £10,000. This, in my finding, on the balance of probability meant that the Defendant was aware of the mistake in the Claimant's offer. I accept [that] to that point the Defendant had not contributed to the mistake. I find, based on the only evidence available to me, … that the insertion of the £10,000 in the N242A was a mistake and appeared to be a typographical mistake."

14. At paragraph 8 the learned district judge said that "as an aside" he did not find that the Defendant should necessarily have appreciated that a mistake had been made because the sum of £10,000 was smaller than the Defendant's own earlier part 36 offer, but, he said:

> "… what was and is sufficient in my finding to conclude that the Defendant was aware of a mistake was the serious discrepancy between the two figures received together on the 10th or soon after 10th December 2014, a figure of £10,000 and a figure of £90,000. …. The Part 36 offer, to be complete, comprises both of letter and N242A."

15. Paragraph 9 of the judgment is as follows. ,

> "It was open to the Defendant to seek clarification. Indeed, clarification should have been sought as to which of the two figures was the correct figure. Ii is not, in my finding, in accordance with the overriding objective for the Defendant to seek to jump upon what would have been and was apparent that the Defendant as a mistake in the form. Given the serious discrepancy [in] the figures, the Defendant, in my finding, has not ensured that matters are dealt with fairly, nor in accordance with CPR 1.3 which requires the parties to assist the court furthering the overriding objective.

Clarification, in my finding, should have been sought by the Defendant prior to acceptance."

16. Addressing a submission made on behalf of the defendant to him at the hearing to the effect that "everybody knew what was being offered" the judge said that the answer to that proposition was "no." He found that the defendant knew of the mistake upon receipt of both documents, the letter which referred to £90,000 and the notice which referred to £10,000. He said that the defendant had chosen not to present evidence to the contrary to him, nor indeed to respond to an invitation given on behalf of the claimant made in open correspondence, to dispute the finding that it was aware that there had been a mistake at the time. That silence was, he said, "significant." (Looking at the correspondence, the "invitation" from the claimant might also have been described as a challenge to the defendant: if it was, the gauntlet lay where it fell.)

17. Later in his judgment at paragraph 12 the judge referred to the passage in Foskett, *supra*. He said that in the light of that, "I find by way of mistakes that there was a mutual mistake here."

18. He then made reference to the defendant's submission that common law principles as to mistake do not apply to part 36 procedures. He said that he rejected that contention.

> "Firstly, Part 36 is subject to the overriding objective. That objective includes dealing with cases justly.….Secondly there is no authority that Part 36 procedure is not subject to the common law."

The judge said that the defendant had placed reliance on the case of *Gibbon v. Manchester City Council* [2010] EWCA Civ 726; [2010] 1 WLR 2081 and he recited a passage dealing with the self-contained or 'stand-alone' status of Part 36 from paragraph 6 of the judgment of Moore-Bick LJ (set out in full later in this judgment at paragraph 28) which was relied upon. He then said,

> "… that is not, in my view, authority to exclude all provisions of common law from Part 36. The fact that Part 36 is a subject to be dealt with justly is further authority for indicating that common law principles may well apply where there is, as in this case, mutual mistake as to any purported compromise. No part of the CPR stands in exclusion to common law principles. The word 'justly' in the overriding objective seems to suggest that common law may on occasions have applicability." (Paragraph 13.)

19. The judge gave his conclusion in paragraph 14 of his judgment.

> "This is a case of a genuine mistake that appears to have been typographical in terms of the notice. On the face of the documents received following 10th December it was clear to the defendant that there was a mistake. They deliberately chose not to seek clarification, sought to rely upon the mistake; it is a mutual mistake. When they

sought acceptance the defendant knew of the mistake of the claimant. Common law doctrine is applicable and exists in terms of Part 36, and on that basis the claimant is entitled to a declaration in this case that there has been no compromise."

Permission to appeal

20. Permission to appeal was refused by His Hon Judge Seys Llewellyn QC on the papers. He said that the Defendant " … knew that the offer of £10,000 was a mistake …" and thus "… plainly was not entitled to accept the offer as a binding offer. From the outset therefore the process of Part 36 was not engaged." He said that he did not regard the appeal as having a real prospect of success, nor was there any other compelling reason why an appeal shall be permitted.

21. The defendant company renewed its application at an oral hearing, and His Hon Judge Gaskell granted permission, whilst making the following observations.

> "This is an appeal which appears to have little, if any, merit. The finding of fact that the part 36 offer of £10,000 was made in error, as must have been obvious to the Defendant's solicitors, is unappealable and is clearly right. The actions of the Defendant's solicitors in taking advantage of a clear mistake may be considered reprehensible. However, I was persuaded that there was enough in the point that Part 36 has a self-contained code to take the prospects of success just over the bar of the merely 'fanciful' and to merit a full hearing. It is of note that the amendment made to Part 36 by 36.10 (in effect from 6 April 2015) shortly after the judgment herein (9 March 2015) is clearly designed to address the problem which arose in this case by providing a remedy when a mistake has been made which, although probably designed for different situation, i.e. the failure to withdraw an offer which has being overtaken by later events, adds possibly some credence to the appellant's case."

The relevant provisions of Part 36

22. Before setting out a summary of the submissions on both sides, it may be helpful to reproduce the relevant parts of the CPR.

> "*Scope of this Part*
> **36.1**
> (1) This Part contains a self-contained procedural code about offers to settle made pursuant to the procedure set out in this Part ("Part 36 offers").
> ….
>
> *Scope of this Section*

36.2
(1) This Section does not apply to an offer to settle to which Section II of this Part applies.
(2) Nothing in this Section prevents a party making an offer to settle in whatever way that party chooses, but if the offer is not made in accordance with rule 36.5, it will not have the consequences specified in this Section.

Form and content of a Part 36 offer
36.5
(1) A Part 36 offer must—
(a) be in writing;
(b) make clear that it is made pursuant to Part 36;
(c) specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with rule 36.13 or 36.20 if the offer is accepted;
(d) state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and if so to which part or issue; and
….

Time when a Part 36 offer is made
36.7
(1) A Part 36 offer may be made at any time, including before the commencement of proceedings.
(2) A Part 36 offer is made when it is served on the offeree.
….

Clarification of a Part 36 offer
36.8
(1) The offeree may, within 7 days of a Part 36 offer being made, request the offeror to clarify the offer.
(2) If the offeror does not give the clarification requested under paragraph (1) within 7 days of receiving the request, the offeree may, unless the trial has started, apply for an order that the offeror do so.
(3) If the court makes an order under paragraph (2), it must specify the date when the Part 36 offer is to be treated as having been made.

Withdrawing or changing the terms of a Part 36 offer generally
36.9
(1) A Part 36 offer can only be withdrawn, or its terms changed, if the offeree has not previously served notice of acceptance.
(2) The offeror withdraws the offer or changes its terms by serving written notice of the withdrawal or change of terms on the offeree.
…."

N.B. The following rule was made and added to the CPR *after* the material events in this case, and after the hearing of the appeal: it came into effect on 6 April 2015.

"Withdrawing or changing the terms of a Part 36 offer before the expiry of the relevant period

36.10

(1) Subject to rule 36.9(1), this rule applies where the offeror serves notice before expiry of the relevant period of withdrawal of the offer or change of its terms to be less advantageous to the offeree.

(2) Where this rule applies—

(a) if the offeree has not served notice of acceptance of the original offer by the expiry of the relevant period, the offeror's notice has effect on the expiry of that period; and

(b) if the offeree serves notice of acceptance of the original offer before the expiry of the relevant period, that acceptance has effect unless the offeror applies to the court for permission to withdraw the offer or to change its terms—

(i) within 7 days of the offeree's notice of acceptance; or

(ii) if earlier, before the first day of trial.

(3) On an application under paragraph (2)(b), the court may give permission for the original offer to be withdrawn or its terms changed if satisfied that there has been a change of circumstances since the making of the original offer and that it is in the interests of justice to give permission."

(As Judge Gaskell observed, the addition of 36.10 to the rules seems to be designed to deal with a different factual situation from that in the instant case – *i.e.* a change in circumstances in terms of later events. It is perhaps conceivable that a situation in which an offeror first becomes aware of the existence of a typographical error in the offer, after making it, which the offeree then unreasonably declines to accept as an error, might arguably amount to a change in circumstances. However, since the new rule does not on any view apply to the present case, that question is of no practical concern.)

Submissions on appeal

23. Miss Cummerson, counsel for the defendant company, Tesco, submitted that the judge was wrong in law in holding that the the offer contained within form N242A was not a valid offer, as it complied in every way with the formal requirements of Part 36.

24. It was submitted that the judge was wrong to hold that the Part 36 offer comprised both the Form N242A and the letter. Some attempt was made in the skeleton argument to argue that the letter and the form should have been regarded as separate offers. That was not a point pursued at any length by counsel at the hearing. Instead Miss Cummerson focused her submissions upon two main points.

25. First, that part 36 is a self-contained code, and as such an offer in Form N242A stands alone, and is not to be construed according to common law concepts governing the formation of contrcats. This was clear, she said, from Part 36.2.2. The appellant company was presented with an offer which

complied with the provisions of the rules, and they accepted it. There was no requirement or need for them to point out any error.

26. The second point concerned the judge's interpretation of Part 36 by application of the overriding objective, which was impermissible, counsel submitted, as the judge had used it to import the common law principle of mistake when considering the validity of the offer.

The "stand alone" status of Part 36

27. On the first point, reliance was placed by counsel upon the case of *Gibbon v Manchester City Council*. The claimant in that case brought a personal injury claim against the council after she tripped and injured herself in a playground. The council admitted liability and the claimant made a Part 36 offer of £2500 which was rejected, but which was not thereafter withdrawn. The council made various low Part 36 offers culminating in a final Part 36 offer, also of £2500. The claimant rejected it, but the council then accepted the Claimant's earlier Part 36 offer of £2500 instead, on the basis that, under the rules, until withdrawn it remained open. The judge at first instance held that because the Claimant's offer was not formally withdrawn under CPR 36.3(7), the offer had been open for acceptance by the Council. The Court of Appeal upheld that decision and confirmed that CPR Part 36 does not acknowledge implied withdrawals or rejections of offers. To remove the possibility of acceptance, an offer must be formally withdrawn.

28. The Defendant company relies in particular, upon the observations of Moore-Bick LJ, with whom the other members of the court agreed, at paragraphs 1, and 4 – 6, as follows.

> "1. …. The central question raised on this appeal is whether Part 36 embodies a self-contained code or is subject to the general law of offer and acceptance insofar as it fails expressly to provide otherwise.
>
> ….
>
> " 4. It can be seen from Part 36 as a whole, … that it contains a carefully structured and highly prescriptive set of rules dealing with formal offers to settle proceedings which have specific consequences in relation to costs in those cases where the offer is not accepted and the offeree fails to do better after a trial. In cases where there has been no Part 36 offer or a Part 36 offer has been bettered the judge has a broad discretion in dealing with costs within the framework provided by Part 44. Rule 44.3(4) provides that when exercising its discretion as to costs the court will have regard to the general rule that the unsuccessful party should pay the costs of the successful party, but will also have regard to the conduct of the parties and any payment into court or admissible offer to settle made by one or other party which falls outside the terms of Part 36. In seeking to settle the proceedings, therefore, parties are not bound to make use of the mechanism provided by Part 36, but if they wish to take advantage of the particular

consequences for costs and other matters that flow from making a Part 36 offer, in relation to which the court's discretion is much more confined, they must follow its requirements.

"5. Part 36 is drafted as a self-contained code. It prescribes in some detail the manner in which an offer may be made and the consequences that flow from accepting or failing to accept it. In some respects those consequences reflect broadly the approach the court might be expected to take in relation to costs; in others they do not; for example, rule 36.14(3) allows the court to award a claimant who has obtained a judgment at least as advantageous as his offer interest on the sum for which he has obtained judgment at an enhanced rate of up to 10% over base rate, costs on the indemnity basis and interest on those costs at an enhanced rate as well.

"6. Basic concepts of offer and acceptance clearly underpin Part 36, but that is inevitable given that it contains a voluntary procedure under which either party may take the initiative to bring about a consensual resolution of the dispute. Such concepts are part of the landscape in which everyone conducts their daily life. It does not follow, however, that Part 36 should be understood as incorporating all the rules of law governing the formation of contracts, some of which are quite technical in nature. Indeed, it is not desirable that it should do so. Certainty is as much to be commended in procedural as in substantive law, especially, perhaps, in a procedural code which must be understood and followed by ordinary citizens who wish to conduct their own litigation. In my view, Part 36 was drafted with these considerations in mind and is to be read and understood according to its terms without importing other rules derived from the general law, save where that was clearly intended."

29. Those general observations, as I understand it, are relied upon as being authority for the proposition advanced in paragraph 19 on the skeleton argument filed by the appellant (and adopted by Miss Cummerson, although not composed by her) that,

> " … the common law does not apply to part 36 offers."

Therefore, it is contended, the learned district judge was in error in so far as he applied any common-law concepts of the law of contract in resolving the issues before him.

30. For the Claimant, Mr Diggle submitted that the words "[b]asic concepts of offer and acceptance clearly underpin Part 36" plainly indicated that the submissions of the Defendant on the first point were too narrow to be correct. As an illustration of such basic concepts, generally, he drew my attention to the case of *OT Africa Line Ltd ["OTAL"] v Vickers plc* ("*the Kukawa"*) [1996] 1 Lloyd's Rep 700, and to certain observations of Mance J, as he then

was, on mistakes made in the context of compromise. In that case the defendants' solicitors sent a fax to offering to settle the claim in the sum of £150,000. The defendants' solicitors had in fact been instructed to make an offer of (US)$155,000 and had in error dictated the letter offering the sum of £150,000 in sterling. In an application for a declaration that the agreement was not binding, the defendants contended that the plaintiffs' solicitor as a competent and reasonable solicitor ought to have realised that a mistake had been made and that therefore no agreement was in fact made; alternatively, if there was an agreement, the defendants were entitled to rescind it on the grounds of unilateral mistake contained in their offer. Applying an objective test, the judge dismissed the application. He held that (1) the test as to awareness of a mistake was not what the actual intentions of each party were, but what each party was entitled to conclude from the attitude of the other; (2) on the facts, there was nothing to indicate that the plaintiffs or their solicitors ought reasonably to have known that a mistake had been made. He added the following observation.

> "There may of course be cases where the surrounding circumstances enable a party to say words cannot be taken at what might otherwise be their face value, and that they bear, objectively, some other meaning. In the light of the dicta in the *Centrovincial* [1983] Com LR 158 … I further proceed on the basis that Vickers would not be bound if they could show that OTAL, or those acting for OTAL, either knew or ought reasonably to have known that there had been a mistake by Vickers or those acting for Vickers. I put the onus that way around, as it appears so in the authorities, but it would not make any difference in this case if it were the other way round. The authorities contain no support for any more widely expressed principle qualifying the binding nature of apparent agreement…. Here there is objectively agreement on a particular sum. The question is what is capable of displacing the apparent agreement. The answer on the authorities is a mistake by one party of which the other knew or ought reasonably to have known. I accept that this is capable of including circumstances in which a person refrains from or simply fails to make enquiries for which the situation reasonably calls and which would have led to discovery of the mistake. But there would have, at least, to be some real reason to suppose the existence of a mistake before it could be incumbent on one party or solicitor in the course of negotiations to question whether another party or solicitor meant what he or she said."

31. Whilst placing reliance on these *dicta* case as being highly persuasive when applied to the facts of the present case, I understood Mr Diggle to also submit that the logical implication of the actual decision in *the Kukawa* was that where an offeree was well aware of an unconscious error made by the offeror, any apparent agreement to settle was not merely displaced but was a nullity. Indeed, counsel submitted that since the decision in *The Great Peace* [2003]

QB 679 it is probable that the modern view might be that the exceptional cases to which Mance J referred would be decided upon the basis that there had been no formation of contract at all. Whether the principle is regarded as one of law or of simple logic, it is reasoning which would apply equally to cases under the law of compromise in general and to cases within the narrower ambit of Part 36.

32. In any event, moving from the general position on compromise to the particular matter of compromise under Part 36, counsel for the Claimant drew my attention to the case of *Rosario v Nadell Patisserie Ltd.* [2010] EWHC 1886 (QB), Tugendhat J. In that case, in a dispute over an offer to settle under the provisions of Part 36, the judge held that the terms of the Defendant's response, together with the sending of cheques, were all words and conduct that would convey to a reasonable person having all the background knowledge available to the Claimant, that the Defendant considered the matter to have been finally disposed of.

33. At paragraph 34 of his judgment in *Rosario* Tugendhat J said:

> "The parties agree that the issues are to be determined by applying an objective test to arrive at the meaning of the correspondence. While the provisions of Part 36 are not part of the law of contract, they are made against the background of that law. The need to apply an objective test is one of the rules which apply in both contexts. Under the objective test, a party may be bound if his words or conduct are such as to induce a reasonable person to believe that he intends to be bound, even though he in fact has no such intention. The Editors of Chitty on Contracts 30th edn Volume 1 para 2-003 give the example of [the facts of the *The Kukawa*] .... Mr Armstrong cited *Investors Compensation Scheme v West Bromwich BS* [1998] 1 WLR 896 at 912–913."

34. Mr Diggle also submitted that the there was no provision in the rules which required the district judge to shut his eyes to the letter and look only at the form enclosed within it. He had decided that the offer and the acceptance of the offer were tainted by mistake. The error was made in the form, not the letter, he found. To put it another way, perhaps, the letter was the clearest possible evidence to any objective observer of the fact that an error had been made in the form. On the evidence, the judge was entitled to conclude that the Defendant must have been aware of the error.

The overriding objective

35. The second main point taken by the Defendant concerns the judge's application of the overriding objective. The Civil Procedure Rules, described in the final Woolf report as "a compass to guide courts and litigants and legal advisers as to their general course" are expressly governed by Part 1 (see CPR 1.2 set out below.) So far as is material for present purposes Part 1 reads as follows.

"1. (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.

(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –

(a) ensuring that the parties are on an equal footing;
(b) saving expense;
(c) dealing with the case in ways which are proportionate –
(i) to the amount of money involved;
(ii) to the importance of the case;
(iii) to the complexity of the issues; and
(iv) to the financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly;
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and
(f) enforcing compliance with rules, practice directions and orders.

Application by the court of the overriding objective
1.2 The court *must* [*emphasis added*] seek to give effect to the overriding objective when it –
(a) exercises any power given to it by the Rules; or
(b) interprets any rule … [subject to certain provisions relating to terrorism and national security.]

Duty of the parties
1.3 The parties are *required* to help the court to further the overriding objective [*emphasis added*]."

Court's duty to manage cases
1.4 (1)The court must further the overriding objective by actively managing cases.
(2) Active case management includes – …

(f) helping the parties to settle the whole or part of the case; …."

36. In the course of the judgment the judge made mention of the overriding objective under Part 1 of the CPR, and said that Part 36 did not " … in any way fall outside the overriding objective." He also said that there was no authority that Part 36 procedure "… is not subject to the common law." Whilst he did not make express reference to it, he may have had in mind the observation of Lord Phillips PSC in *Nina NML Capital Limited v Republic of Argentina* [2011] UKSC, at paragraph [74] where he said that,

"… procedural rules should be the servant not the master of the rule of law …"

37. The Defendant company complains that the judge "decided that the overriding objective allowed him to import the rules of common law, and specifically the doctrine of mistake, into his consideration of the Part 36 offer and as to whether a valid compromise had been reached between the parties." In stating that "[n]o part of the CPR stands in exclusion to common law principles …." It is submitted that the judge was "plainly wrong." The case of *C v D* [2011] EWCA Civ 646 is relied upon as authority.

38. In that case the respondent brought a claim against the appellant for breach of a contract for the sale of development land. During the proceedings the respondent had made an offer to settle the claim by its solicitors' letter to the appellant's solicitors dated 10 December 2009. The letter was headed "Offer to Settle under CPR Part 36" proposing a "Settlement Agreement" giving the appellant two settlement options. The second of the two options was that the respondent would drop the action and settle the claim at £2,000,000.The letter stated that

> "the offer will be open for 21 days from the date of this letter (the "Relevant Period"). Your clients can thus walk away from the dispute by the year end having achieved an attractive settlement. Both offers are intended to have the costs consequences set out in Part 36 of the Civil Procedure Rules and are to settle all matters raised in these proceedings."

Under a section headed "Failure to Accept this Offer" the respondent stated that it would rely on the letter to invoke the costs consequences of CPR 36.14. The appellant purported many months later to accept the offer by a letter dated 5 November 2010. The respondent said that the offer had lapsed and was not capable of acceptance, and it issued an application for a declaration to that effect. Warren J held that a Part 36 offer cannot be time-limited as it could only lapse upon service of a written notice of withdrawal; the phrase "open for 21 days" in the letter meant that the offer was a "time limited offer" and lapsed after that period without the need for express withdrawal, with the result that, although expressed as such on its face, the offer was not a Part 36 offer. Without formally deciding the point, the judge said that if the offer had been a Part 36 offer, it had never been validly withdrawn by the respondent.

39. Three issues were before the Court of Appeal:
    (1) whether a Part 36 offer could be made in terms which limit the acceptance of the offer to a stipulated period, with the result that the offer lapses at the end of that period?
    (2) What the true construction was of an offer stated to be "open for 21 days" in the context of what the parties accepted was intended to be a Part 36 offer?
    (3) If withdrawal of a Part 36 offer is necessary, was the respondent 's offer validly withdrawn?

40. The Court of Appeal allowed the appeal, holding that the appellant had validly

accepted the respondent's Part 36 offer which had never been withdrawn. The fact that the appellant's acceptance just before trial may have been opportunistic was not a reason to find that the offer had not been validly accepted.

41. The Defendant company in the present case relies upon certain dicta of Rix LJ at paragraphs 67-68 of his judgment. He said,

> " …. The defendant's acceptance of the alternative offer, to pay £2 million, on 5 November 2010, only three and half weeks before trial, was effective, for the claimant had made a Part 36 offer which it had never withdrawn.
>
> "It is said that such an acceptance was opportunistic, for disclosure and the exchange of witness statements had led the claimant to think that its case had improved. However, whether that view is correct or not would have been revealed, if at all, at trial and has not been debated in these interlocutory proceedings. It is said that the offer had become less advantageous to the claimant, because it has continued to suffer additional holding costs of the property in the form of security and insurance costs. That may be, but such variables will always arise, as Moore-Bick LJ explained in *Gibbon* at [16]. It is suggested that the defendant's case with regard to the offer lacks merits, but a similar suggestion failed to deflect the result in *Gibbon*. Ultimately, it is important for the security of the Part 36 scheme, in countless cases, that it should be clearly understood that if a claimant wishes to make a time limited offer, in the sense that the offer is to lapse of its own accord at the end of a stipulated period, then such an offer cannot be made as a Part 36 offer; that an offer presented as a Part 36 offer and otherwise complying with its form will not readily be interpreted in a way which would prevent it from being a Part 36 offer; and that if an offeror wishes to bring his Part 36 offer to an end, so that it cannot be accepted, then he must serve a formal notice of withdrawal. It seems to me that, although the precise point raised in this appeal is new, all the jurisprudence on Part 36 cited above contributes to these conclusions."

42. Miss Cummerson submitted that both *Gibbon* and *C v D* were authority for the proposition that the court may deal "justly" with a case where a mistake is made by one party, to the knowledge of the other party, who then takes advantage of that mistake. The need to uphold Part 36 (counsel said) trumped vague considerations of justice. Part 36 contained a provision that a party "may" seek clarification, but it did not provide any requirement to do so.

43. Mr Diggle made reference to the principles established by the House of Lords in *ICS v. West Bromwich Building Society* [1998] 1 WLR 896 (HL) that in construing contractual documents the aim was to find the meaning which the

document would convey to a reasonable person having all the background knowledge reasonably available to the parties: and that (1) such knowledge included anything which would have affected the way a reasonable man would have understood it, but (2) excluded declarations of subjective intent; (3) that the meaning which a document would convey to a reasonable man was what the parties using its words against the relevant background would reasonably have been supposed to mean and included the possibility of ambiguity and even misuse of words or syntax; (4) that the court was not obliged to ascribe to the parties an intention which plainly they could not have had, and (5) in choosing between competing unnatural meanings the court was entitled to decide that the parties must have made mistakes of meaning or syntax.

44. Counsel pointed out that in *C v D,* in the context of offers made under Part 36, Rix LJ had made express reference to the *ICS* case at paragraph 45 in the following terms:

> "…there is a necessary inconsistency between an offer being both time limited and a Part 36 offer. An offer may be one or the other, it cannot be both. That is the objective context in which the offer in this case was made by the claimant's solicitors to the defendant's solicitors. Both the writer and the reader of [an] offer must be taken, objectively, to know the legal context. Of course, mistakes occur and must be allowed for. However, the question is how a reasonable solicitor would have understood the offer in that context, including the known context of the dispute as it stood at that time: *ICS v. West Bromwich Building Society* [1998] 1 WLR 896 (HL).*"*
> .....

Conclusions

(1) Offer and acceptance and Part 36

45. It does not seem to me that in the case of *Gibbon* the Court of Appeal were saying that fundamental principles, in terms both of good sense and good law, were to be abandoned in favour of a blind application of the procedural scheme set out in Part 36. Nor, in my judgment, is the case to be regarded as establishing a principle that any offer made in Form N242A – however objectively nonsensical – must *ipso facto* amount to a valid offer capable of binding acceptance by a party who is well aware that it is nonsensical, whether by reason of obvious error or otherwise.

46. Even if the common law principles which have developed on mistake in respect of offer and acceptance are regarded as technical rules, it might be suggested that the solution to a problem such as that in the instant case does not necessarily require the application of those principles or rules. Indeed, the problem is neither solved on the basis that it was a common or mutual mistake (for it was not), nor on the basis that it was a mistake on behalf of the Claimant known to the Defendant (which it was) but on the basis that, looked at objectively, the offer figure erroneously set out in the N242A was not in any

real sense an offer which was being made at all by the solicitors for the Claimant. This is not to employ impermissible reasoning from the subjective intentions of the parties, as any disinterested well-informed observer in possession of all the facts would immediately have pointed out that it was a pure typographical error. No such error occurred on the facts of *Gibbon.*

47. In my view the submission that *Gibbon* shows that common law principles regarding the formation of contracts do not apply to Part 36 offers may amount to an over-simplification of the proper approach. There are qualifications in the words used at paragraph 6 of the judgment in *Gibbon*, as italicised below:

> "*Basic concepts of offer and acceptance clearly underpin Part 36*, but that is inevitable given that it contains a voluntary procedure under which either party may take the initiative to bring about a consensual resolution of the dispute. *Such concepts are part of the landscape in which everyone conducts their daily life*. It does not follow, however, that Part 36 should be understood as incorporating *all the rules of law governing the formation of contracts,* some of which are quite technical in nature. …. … Part 36 is to be read and understood according to its terms without importing other rules derived from the general law, *save where that was clearly intended*."

48. An example of one of the "technical" rules of law governing the formation of contracts – the "postal" rule – was given in argument by Mr Diggle, for the claimant. I understood him to refer to the rule in *Adams v Lindsell* (1818) 1 B & Ald 681. I agree with counsel that that rule indeed represents a principle developed by the common law which might be regarded as an example of one of the technical rules governing the formation of contracts to which Moore-Bick LJ referred. It is not a concept which could possibly be described as part of the landscape in which everyone conducts their daily life. Typographical errors, however, are a very different matter.

49. A case of unilateral mistake which provides some contrast to the factual situation in the instant case, is provided by the case of *Centrovincial Estates PLC v Merchant Investors Assurance Company Ltd* [1983] Com LR 58. Centrovincial's solicitors had written a letter to Merchant Investors in respect of a rent review, to the effect that their clients were advised,

> '… that the appropriate rental value at the review date of 25th December 1982 is £65,000.00 per annum, and you are accordingly invited to agree this figure.'

The figure of "£65,000" was in fact an error: it should have read "£126,000." But Merchant Investors were not aware of the mistake. Merchant Investors' chartered surveyor replied to Centrovincial's solicitors stating that he was authorised by Merchant Investors to agree the figure of £65,000.00 per

annum as being the appropriate rental value at the review date of 25th December 1982. Centrovincial contended that no contract was formed because of the mistake, but Merchant Investors contended that a contract had been validly formed. Slade LJ said that there was no proof that the defendants either knew or ought reasonably to have known of the plaintiffs' error at the time when they purported to accept the plaintiffs' offer. He then asked rhetorically,

> " … why should the plaintiffs now be allowed to resile from that offer? It is a well-established principle of the English law of contract that an offer falls to be interpreted not subjectively by reference to what has actually passed through the mind of the offeror, but objectively, by reference to the interpretation which a reasonable man in the shoes of the offeree would place on the offer. It is an equally well-established principle that ordinarily an offer, when unequivocally accepted according to its precise terms, will give rise to a legally binding agreement as soon as acceptance is communicated to the offeror in the manner contemplated by the offer, and cannot thereafter be revoked without the consent of the other party. Accepting, as they do, that they have not yet proved that the defendants knew, or ought reasonably to have known, of their error at the relevant time, how can the plaintiffs assert that the defendants have no realistic hope of establishing an agreement of the relevant nature...?"

50. In my view the words of Rix LJ in paragraph 68 of his judgment in *C v D* quoted above are of assistance in the resolution of the instant case:

> "*... an offer presented as a Part 36 offer and otherwise complying with its form will not readily be interpreted in a way which would prevent it from being a Part 36 offer ...*" [emphasis added]

If taken in its literal mis-typed form this offer was in a sense 'presented' as a Part 36 offer but it was in terms which were clearly erroneous, and which the offeree's solicitors must immediately have known were erroneous. In my view it is clear that there was in reality no Part 36 offer to settle this case for £10,000 at all, and the fact that a form containing an obvious typographical error might have appeared to someone who knew nothing of the background to be such an offer is irrelevant, as objectively there was no doubt whatever: see *C v D*; *OT Africa Line v Vickers; Rosario;* and *Centrovincial.* No attempt at 'interpretation' is necessary: the evidence is all one way.

(2) The Overriding Objective

51. On the issue of the overriding objective, I do not accept Miss Cummerson's submission that *Gibbon* and *C v D* are authority for the proposition that the court may deal 'justly' with a case where a mistake is made by one party, to the knowledge of the other party, who then takes advantage of that mistake.

52. Nor do I accept that a literal application of the provisions of Part 36 should be permitted to 'trump' considerations of justice and to create injustice, in this case by artificially frustrating the claimant's attempt to settle and by rewarding conduct by the defendant's solicitors which in my view Judge Gaskell rightly said may be considered reprehensible. Such conduct flies in the face of the overriding objective and reverses the roles of procedural rules and the rule of law which Lord Phillips identified in his judgment in *Nina NML Capital.*

53. One distinction between both *Gibbon* and *C v D* and the present case is that there was no suggestion in either of those cases of conscious and unjust advantage being taken of a complete mistake such as a typographical error, or of any other conduct which could be described as reprehensible. Another distinction is that in each case the relevant offers had been made consciously and intentionally, and not by means of an error of which the offeror was unaware.

54. Part 1.2 (b) provides that it is a mandatory requirement that the court must seek to give effect to the overriding objective when interpreting any procedural rule. Moreover, Part 36.8 plainly contemplates the possibility that there may be ambiguity or lack of clarity in an offer purportedly made under Part 36. It contains a provision that a party may seek clarification. Whilst I accept that it does not provide any requirement to do so, it at least offers an ethical compass (to adapt the words of the final Woolf report) to a perplexed solicitor to guide him on to the correct course, if he is really in any doubt as to the right direction in which to steer.

55. For the court to hold the Claimant to such an erroneous 'offer' as that made in this case, simply because Part 36 is a self-contained code, would not in my view be to dispose of the case 'justly.' Instead it would amount to an obvious injustice. Part 36 is unquestionably a self-contained procedural unit, but it rests upon the same foundations as the other parts of the Civil Procedure Rules. The keystone of those foundations is the overriding objective. In my view the judge was right to base his judgment upon it.

Overall conclusion

56. For the reasons given above in respect of the two main points of substance raised at the hearing, this appeal is dismissed.

Other matters

57. For the sake of completeness, there were some other complaints made in the original grounds of appeal and the skeleton argument, for example as to a point made "for the record" by the judge that there had been no deletion of the word "Defendant" in the Form N242A served by the Claimant, so that the form read "[t]ake notice that the Defendant/Claimant offers to settle the claim …." That was a matter raised before the transcript was available. It is clear from the transcript that it had no significant influence on his decision. Nor

does the use of terminology such as “mutual mistake” strike at the root of the judgment.

58. Mr Diggle drew attention to the case of *English* [2002] EWCA Civ 605, and to the observations of Lord Phillips MR (as he then was) giving the judgment of the court at paragraph 19 in respect (for present purposes) of the sufficiency of the reasons given by the district judge for the purpose of reviewing the same on appeal. Those reasons had to be sufficient to identify and record those matters which were critical to his decision. In my view the learned district judge did so. His findings of fact are clear and unimpeachable, and his identification of the fundamental flaw in the erroneous offer was perfectly sufficient to satisfy the test in *English.*