



Neutral Citation Number: [2026] EWCA Civ 13

Case No: CA-2025-002007

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SHEFFIELD COUNTY COURT
HIS HONOUR JUDGE BADDELEY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/01/2026

Before:

LORD JUSTICE BEAN
LORD JUSTICE PHILLIPS

and

LORD JUSTICE STUART-SMITH

Between :

JAYDEN JAMES SMITHSTONE
(A child by his Litigation Friend, Kirsty Louise Norris)

Appellant
Claimant

- and -

TRANMOOR PRIMARY SCHOOL

Respondent
Defendant

Kevin Latham and Fraser Barnstaple (instructed by Switalskis) for the Appellant
Craig Ralph and Elliot Kay (instructed by DWF Solicitors) for the Respondent

Hearing date: 25 November 2025

Judgment Approved by the court

Lord Justice Bean:

1. This is an appeal about the costs recoverable on settlement of a fast track personal injury claim.

Factual and procedural background

2. The Claimant, then aged 10, was a pupil at the Defendant school who suffered a minor injury when his fingers became trapped in a door on 25 September 2018. A claim was issued in the county court alleging negligence and breach of the Occupiers Liability Act 1957.
3. The claim was entered into the Low Value Fixed Costs regime by the submission of a Claims Notification Form into the Protocol portal on 31 October 2018.
4. On 13 December 2018, before any medical report had been served, the Claimant made a Part 36 offer to settle liability on a 90/10 basis. On 19 December 2018 the Defendant rejected that offer.
5. Proceedings were issued. The Defendant denied liability and raised issues of contributory negligence in its Defence. The matter was allocated to the Fast Track and was listed for trial.
6. The Claimant made a without prejudice offer of settlement dated 18 March 2020. The offer was in the sum of £3,500, and was stated to be open for 21 days, expiring on 8 April 2020.
7. On 27 April 2020 the Defendant's solicitors wrote to indicate that they were awaiting instructions on the Claimant's offer. It was never accepted.
8. The claim was listed for a Fast Track Trial before Deputy District Judge Ruwena Khan on 26 November 2020. The Defendant's witness failed to attend court and the parties negotiated.
9. Settlement of the claim was agreed at £2,650. The agreement went before the court for the purpose of approval pursuant to CPR r 21.10.
10. DDJ Khan approved the sum of £2,650 on the basis that it was all to go to the Claimant. She was then addressed on whether the Claimant's solicitors should recover fixed costs (as the Defendant contended) or whether the case should be treated as falling outside the fixed costs regime by virtue of CPR 36.17 (as they contended).

Civil Procedure Rule 36.17

11. At the time of the hearing before the deputy district judge CPR 36.17, so far as relevant, read as follows (there were minor amendments introduced in September 2023, but not to any of the provisions which I am about to cite):

Costs consequences following judgment

- (1) 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.....

(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.

(8) Paragraph (3) does not apply to a soft tissue injury claim to which rule 36.21 applies.

(Rule 44.2 requires the court to consider an offer to settle that does not have the costs consequences set out in this Section in deciding what order to make about costs.)

12. The judge decided that the fixed costs regime applied. She said:

“Dealing with the preliminary issue relating to costs, the Claimant’s position is that ordinarily this would be a fixed costs case but matters have arisen which mean that there are exceptional circumstances which warrant this matter falling out of the fixed costs regime.

One of the key issues is the lack of negotiation or attempts at negotiation by the Defendant or lack of engagement in correspondence until very recent times ...

Offers have been made by the Claimant, neither of which bites for today’s purposes in terms of Part 36 offers, but taking all those matters into the round the Claimant submits that this is a case which warrants the case falling out of the fixed costs regime.

Mr Kay, on behalf of the Defendant, said there is nothing exceptional about this case. None of the offers, albeit made, have come close to fruition today in terms of the settlement and the matter is a very standard case which would be dealt with on the fixed costs regime.

I have to say I am more persuaded by Mr Kay’s submissions on that point. There are perhaps matters where the Defendants ought to have engaged further with the Claimants but, ultimately, they were effectively at loggerheads in terms of liability and quantum and both matters were properly taken through to court. I do not think it was unreasonable for the Defendants to import their defence all the way to today for purposes of assessment and it is not unusual for matters of this nature to settle at the door of the court.

I also bear in mind that the settlement sum is much lower than was ever proposed on behalf of the Claimant. In all those circumstances I allow the fixed costs as ordinarily would be sought.”

13. On 21 December 2020 the county court sealed a document in Form N24, “General Form of Judgment or Order”, dated 26 November 2020, which provided, so far as relevant, that:

“.....upon the parties having agreed damages (subject to approval) at £2,650 but asking the Court to determine the issue of costs....

IT IS ORDERED THAT:

1. The Claimant may accept the sum of £2,650.00 in satisfaction of the claim.

2. The Defendant shall pay the Claimant's fixed costs of the action summarily assessed in the sum of £7,114,50.

3. The Defendant shall pay both damages and costs to the Claimant's solicitors by 4 pm on 18 December 2020."

14. More than three years later the Claimant was granted permission to appeal against the costs decision by His Honour Judge Baddeley. The same judge heard the appeal on 19 August 2024. Mr Kay, for the Defendant, relied on the judgment of Collins-Rice J in *Mundy v TUI UK Ltd* [2023] EWHC 385 (Ch); [2023] Costs L.R. 153.

Mundy v TUI UK Ltd [2023] EWHC 385 (Ch)

15. *Mundy* was a holiday sickness claim. The claimant, Mr Mundy, made two offers to settle on the same day: one to accept £20,000 in full and final settlement of the whole claim, the other to settle liability only on a 90:10 per cent basis in favour of the claimant. The defendant later made a counter-offer, expiring on 19 December 2019, to pay £4,000 in full and final settlement. At trial the judge found the defendant in breach of contract but awarded general damages of £3,700 plus special damages of £105.30. The judge ordered the defendant to pay costs up to 19 December 2019, but the claimant to pay the defendant's costs thereafter. Save for a conceded point about set-off, Collins-Rice J dismissed the claimant's appeal.
16. The Appellant in *Mundy* argued that winning 100% on liability was more advantageous than the 90:10 liability offer rejected by the Respondent. The Respondent should thus be subject to adverse consequences under CPR 36.17.
17. At [32] Collins-Rice J observed that a 90:10 liability offer would cut across the binary structure of CPR 36.17(1). It would lead to a scenario where a claimant could fail to beat a defendant's money offer but have still beaten their own liability offer. This would engage both CPR 36.17(3) and CPR 36.17(4) which are otherwise mutually exclusive. Both parties would thus recover costs for the same periods, but only the Claimant would receive the enhancements in CPR 36.17(4).
18. The Appellant argued that the correct construction of CPR 36.17 was to:
- i) First answer the question at CPR 36.17(1)(b) (i.e. is the judgment against the defendant at least as advantageous to the claimant as the proposals in the claimant's Part 36 offer).
 - ii) Second, if the answer is yes, then the Appellant argued that the cost consequences at CPR 36.17(4) would need to be applied (in *Mundy* the Appellant argued he was entitled to a 10% uplift on his damages award pursuant to 36.17(4)(d)(i), which would then 'beat' the Respondents' Part 36 offer).
 - iii) Third, only then could the question at CPR 36.17(1)(a) (i.e. has the claimant failed to obtain a judgment more advantageous than the defendant's Part 36 offer) be considered.
19. Collins-Rice J held that there was a fundamental incompatibility of 90:10 offers with CPR 36.17. At [41] she described the use of 90:10 offers as a "unilaterally imposed

insurance policy to reverse the losses otherwise provided for by CPR 36.17” and an attempt to use CPR 36.17 “against itself”. At [42] she said:

“I am unpersuaded this rejected 90:10 liability offer can be fitted into the terms of CPR 36.17(1)(b) consistently with the wording, integrity and practicality of the CPR 36.17 mechanism. Trying to do so strains the language of the provision, undermines its careful balance, and introduces a degree of complexity and uncertainty which I am not persuaded is within its contemplation. It is a provision that relies on its clarity, simplicity and predictability for the incentivising effects which put it at the heart of the Part 36 code.”

20. Collins-Rice J held that a 90:10 liability offer is not an offer to settle the claim on quantifiable financial terms. The purpose of CPR 36.17 was to facilitate "straightforward comparison between what a defendant offered and what a claimant got 'in money terms'" which was not possible here. The Appellant’s argument would allow a claimant, who had failed to beat a monetary Part 36 offer, to recoup a substantial sum under CPR 36.17(4) despite ‘losing’ on quantum.

The decision of HHJ Baddeley on the first appeal

21. Judge Baddeley understandably concluded that he was bound by *Mundy*. After citing paragraph 42 of Collins-Rice J’s judgment, he said at [30]:

“In my judgment, I am bound by the decision in the *Mundy* case. The defendant never conceded liability. A global settlement was put to the deputy district judge, albeit without any discussion of discounts from full liability damages. Had the claimant wished to protect his position, he could have made a realistic global Part 36 offer but, in my judgment, DDJ Khan was right to find that the Part 36 offer on liability did not bite.””

Grounds of appeal

22. The Appellant pursues the following ground, arguing that each of the judges below erred in:

“Failing to award the Claimant all, or any, of the consequences provided for under Part 36.17 (4), when, the Claimant contends, the order made by the judge was a judgment which was at least as advantageous to the Claimant as a Part 36 offer which the Claimant had made and there was no finding such consequences would be unjust.”

Appellant’s submissions

23. Mr Latham and Mr Barnstaple submitted that::

(1): DDJ Khan made errors of law in not allowing the Claimant the consequences set out in Part 36.17(4) when there was a “judgment” which was “at least as advantageous”

as the terms of a Part 36 offer made by the Claimant, and no suggestion or finding that such consequences would be unjust.

(2) Judge Baddeley also appeared not to have upheld the reasons of the deputy district judge, but rather accepted an argument of the Defendant that he was bound by *Mundy* to hold that an offer on liability was not effective for the purposes of Part 36, or at least Part 36.17 (4). The Appellant contended, and maintains, that *Mundy* was decided *per incuriam* and should be overruled.

(3) The Appellant also submits that the actions of the Defendant in running the case to a full trial on liability without making any offer on liability constitute circumstances justifying the use of the escape clause in CPR 36.17 where it would be “unjust” to confine the claimant to fixed costs.

Respondent’s submissions

24. Mr Ralph and Mr Kay ask this court to uphold the decisions below on the following grounds:
- i) First, the agreed global settlement was put to the Deputy District Judge by both parties for the purpose of obtaining an order approving a settlement under CPR r21.10. There was no “judgment” for the Claimant and CPR 36.17 cannot be engaged.
 - ii) Should this court find that judgment had been entered for the Appellant (contrary to the Respondent’s primary position), the agreed global settlement was not “*at least as advantageous to the Claimant*” as the proposals contained in the Appellant’s/Claimant’s Part 36 liability offer, for the following reasons:
 - a) This being a money claim, “more advantageous” means better in money terms (CPR 36.17(2));
 - b) The Appellant’s/Claimant’s Part 36 offer did not make a monetary offer and is therefore incapable of comparison with a sum of money;
 - c) The Appellant’s/Claimant’s Part 36 offer invited a concession of liability. No such concession was ever made by the Respondent/Defendant nor was liability found by the Court. No agreement was reached on liability. Settlement was a money sum;
 - d) The agreed global settlement sum of money in satisfaction of the claim was less than 90% of the pleaded sum endorsed on the claim form (or 90% of the Appellant’s/Claimant’s monetary offer of £3,500 in any event).
25. The Respondent argues that the Appellant’s solicitors have taken a tactical approach and not put forward a genuine offer. Mr Kay and Mr Ralph rely on *AB v CD* [2011] EWHC 602 (Ch) where at [22] Henderson J held that a Part 36 offer to settle must:

“contain some genuine element of concession on the part of the claimant, to which a significant value can be attached in the

context of the litigation... which it is in the [offeror's] power to give up at the time when the offer is made."

26. The Respondent also argues in the alternative that it would be "unjust" under CPR 36.17(5) to permit the consequences of r 36.17(4) to accrue in the context of a low value money claim, where liability was not subject to separate determination; and the 90:10 offer on liability was not a genuine attempt to settle proceedings.

Discussion

27. The main issues in dispute are accordingly:
- i) Was there a "judgment"?
 - ii) If so, can a 90:10 offer engage the provisions of CPR 36.17(4)?
 - iii) If so, on the facts of this case, was the outcome "at least as advantageous to the Claimant as the proposals contained in the Claimant's Part 36 offer"?
 - iv) If not, is it unjust to confine the Claimant's solicitors to recovering fixed costs? (Alternatively, if the Claimant has succeeded thus far, is it nevertheless unjust to require the defendant to pay additional sums?)

Was there a judgment?

28. In the present case, the papers include a completed county court form N24, headed "General Form of Judgment or Order", which sets out the order which DDJ Khan made on 26 November 2020. The wording of the form reflects the fact that the terms "judgment" and "order" are often used interchangeably. CPR 40 likewise uses the phrase "judgments and orders" without drawing a distinction, and without either term being defined in the interpretation section of the Rules. There is an extensive but inconclusive discussion on this topic in the notes to CPR 40.1. The editors suggest that "it could be argued that under the CPR a "judgment" is a final decision of a court in a claim, and an "order" is any other decision". If that is indeed correct it does not help the Defendant in this case since DDJ Khan's decision was a final decision on the claim.
29. In *Vanden Recycling Limited v Kras Recycling BV* [2017] EWCA Civ 354 Hamblen LJ considered whether a consent order made as between the claimant company and the second defendant was to be treated as a "judgment" for the purposes of the rule that satisfaction of a judgment against one tortfeasor defendant is a bar to a claim against another tortfeasor alleged to be liable for the same damage. He said:

"46. In the White Book commentary to CPR 40.1 there is a discussion as to the meaning of a "judgment" or "order" under the RSC and the CPR. It is pointed out that although the CPR refers to the two terms, sometimes in conjunction and sometimes not, "no basis for distinguishing between them can be derived from the rules themselves".

.....

49. If one has regard to what the Consent Order does rather than what it says it requires Bolton to pay a specified sum in respect of Vanden's claims. As far as those claims are concerned it is a final order. If there was judgment for Vanden on its damages claims following a trial a court order for payment in similar terms would be likely to be made. Although the Consent Order does not use the wording of adjudication or judgment, the order it makes is to the same effect as one which would be made following a judgment.

50. Since in substance and in effect the order for payment made by the Consent Order is the same as would be made following a judgment I consider that the judge was correct to conclude that it is to be treated as a judgment for the purpose of the rule that satisfaction of a judgment bars claims against tortfeasors liable for the same damage.”

30. I have set out above the terms of the order made by DDJ Khan on 26 November 2020 recorded on the court’s “General Form of Judgment or Order”. I have no doubt that it is both a judgment and an order and any attempt to distinguish between the two terms in describing it is misconceived. One might have a rather abstract discussion about whether the words in paragraph 1, “the Claimant may accept the sum of £2,650.00 in satisfaction of the claim”, had they stood alone, could properly be described as a judgment or an order. Paragraph 3, stating that “the Defendant shall pay both damages and costs to the Claimant’s solicitors by 4pm on 18 December 2020” is both a judgment and an order. So is paragraph 2 ordering the Defendant to pay the Claimant’s fixed costs summarily assessed at £7114.50. Each of these paragraphs, and the document as a whole, can be described as either a judgment or an order.

Can a 90:10 settlement offer be effective for the purposes of CPR 36.17?

31. The next issue, the key dispute which has brought the present appeal to this court, is whether, in principle, an offer by a claimant to settle liability on the basis of the defendant being liable for 90% of the full value of the claim (but not specifying any money sum) can be effective for the purposes of CPR 36.17.
32. In *Huck v Robson* [2002] EWCA Civ 398; [2003] 1 WLR 1340 this court had to consider, in a road traffic collision case, whether a claimant’s offer to accept a 95:5 split on liability was effective so as to entitle the claimant to indemnity costs when the defendant was eventually held 100% liable. This court held by a majority (Schiemann and Tuckey LJ, Jonathan Parker LJ dissenting) that the offer was indeed effective. The fact that no trial judge would have apportioned liability in the percentages 95:5 was irrelevant. Tuckey LJ said:

“70. ... I do not think that the court is required to measure the offer against the likely outcome in a case such as this. In this type of litigation a claimant with a strong case will often be prepared to accept a discount from the full value of the claim to reflect the uncertainties of litigation. Such offers are not usually based on the likely apportionment of liability but merely reflect the reality that most claimants prefer certainty to the ordeal of a trial and

uncertainty about its outcome. If such a discount is offered and rejected there is nothing unjust in allowing the claimant to receive the incentives to which he or she is entitled under the Rules. On the contrary, I would say that this is a just result.

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

33. In *Broadhurst v Tan* [2016] EWCA Civ 94; [2016] 1 WLR 1928 Lord Dyson MR observed at [31] that “there are bound to be some difficulties of assessment where costs are partly fixed and partly assessed”, and that where a claimant makes a successful Part 36 offer and recovers indemnity costs from the date that the offer became effective, this leads to “a generous outcome for the claimant.” He continued:

“I do not regard this outcome as surprising or so unfair to the Defendant that it requires the court to equate fixed costs with costs assessed on the indemnity basis. As Mr Williams [counsel for the Claimant] says, a generous outcome in such circumstances is consistent with Rule 36.14(3) [now Rule 36.17] as a whole and its policy of providing claimants with generous incentives to make offers and defendants with countervailing incentives to accept them.”

34. It is unfortunate that neither of these authorities, in particular *Huck v Robson*, appears to have been cited to Collins-Rice J in *Mundy v Tui*: indeed, save on the separate question of set-off which is not relevant to the present case, no authorities are referred to at all. Moreover, as Hill J observed in *Chapman v Mid and South Essex NHS Foundation Trust (re costs)* [2023] EWCA 1871 (KB); [2023] Costs LR 1145, the factual context of *Mundy* is important. As noted above, the claimant had made two separate Part 36 offers, one based on a 90:10 liability split and one to accept £20,000 in settlement of the claim; the Defendant had made a Part 36 offer of £4,000 in full and final settlement; and the Claimant was ultimately awarded damages of £3,805.60. In those circumstances it is perhaps unsurprising that the judge was unwilling to find that the Claimant, who had been seeking damages of more than five times the amount which he recovered, was entitled to a favourable order for costs pursuant to CPR 36.17. But insofar as Collins-Rice J may have suggested (*obiter*) that a 90:10 liability offer is ineffective as a matter of principle to engage CPR 36.17, I disagree. Whether litigation is complex and of high value, or straightforward and of relatively modest value, the courts should, and the Civil Procedure Rules do, encourage settlement of specific issues where the case as a whole cannot be settled. In a case where liability is to be tried before quantum the benefits of a liability-only offer in saving costs and court time are obvious. But even in a fast track case where all contested issues will be resolved by a district judge or deputy district judge in the course of a single hearing, liability-only or

quantum-only offers are still to be encouraged. The policy considerations identified in *Huck v Robson* and *Broadhurst v Tan* remain to this day. The 90:10 offer was in my view to be treated as a genuine offer to compromise, just as the 95:5 offer was treated in *Huck v Robson*.

35. Accordingly, while Judge Baddeley understandably regarded *Mundy v Tui* as binding on him, I would overrule it on the issue of principle. That is not, however, enough to get the Claimant home, since the next issue is whether on the facts of this case the outcome was at least as advantageous to the Claimant as the proposals contained in his offer.

Was the outcome “at least as advantageous” to the Claimant as the proposals contained in the Claimant’s Part 36 offer?

36. The difficulty for the Claimant’s solicitors on the facts is that liability was never determined. If the Defendant had admitted liability or DDJ Khan had tried the case and found the Defendant 100% liable, there would be a case for awarding the Claimant, pursuant to CPR 36.17, costs relating to the issue of liability from the date of the Claimant’s 90:10 offer. But that is not what happened. It cannot be said that the outcome of the case was a finding, even on liability, more advantageous to the Claimant than a 90:10 apportionment of liability. I therefore consider that CPR 36.17(4) does not apply on the facts of this case and that DDJ Khan was right to decide that the Claimant’s solicitors were limited to recovering fixed costs.

If not, is it unjust to confine the Claimant’s solicitors to recovering fixed costs?

37. I do not accept the fallback submission for the Claimant that this is an unjust result, nor that the Defendant’s refusal to admit liability or to engage in settlement negotiations before reaching the door of the court is in itself a reason for departing from the fixed costs regime. As Stanley Burnton LJ said in *Webb v Liverpool Women’s NHS Foundation Trust* [2016] EWCA Civ 365, the burden of showing that the usual consequences of Part 36 will be “unjust” presents a “formidable obstacle”. I should add that if the Claimant *had* made an offer which brought CPR 36.17 into play, it would equally not have been unjust to the Defendant to be required to pay the extra costs set out in that Rule.

Conclusion

38. I would dismiss this appeal.

Lord Justice Phillips:

39. I agree.

Lord Justice Stuart-Smith:

40. I also agree.