Neutral Citation Number: [2025] EWHC 819 (KB)

Case No: QB-2021-004325

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/04/2025

Before :
Mr Justice Dexter Dias

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Between :

(1) THOMAS BARRY **(2) CATHERINE BARRY**	**Claimants**
- and –	
DENIS BARRY	**Defendant**

- -
- -

David Sawtell (instructed by **CDS Mayfair**) for the **Claimants**
Roger Laville (instructed by **Direct Access**) for the **Defendant**

Hearing date: 28 February 2025
(*Judgment circulated in draft: 3 March 2025*
Counsel suggestions: 10 March 2025
Further submissions (payment on account): 11 March 2025
Judgment (payment on account) circulated in draft: 17 March 2025

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JUDGMENT

Remote hand-down: this judgment was handed down remotely at 10.30 am on 8 April 2025 by circulation to the parties or their representatives by e-mail

and release to the National Archives.

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THE HON. MR JUSTICE DEXTER DIAS

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Mr Justice Dexter Dias :

1. This is the judgment of the court.

2. To assist the parties and the public to follow the main lines of the court's reasoning, the text is divided into four sections, as set out in the table of contents above. The table is hyperlinked to aid swift navigation.

I. *Introduction*

3. This judgment is exclusively concerned with costs.

4. It follows an extended and acrimoniously contested trial in a contract dispute between two parents and their son. The representation of the parties remains the same, with the claimants Mr and Mrs Barry represented by Mr Sawtell of counsel, and their son the defendant Denis Barry by Mr Laville. Once more, the court is grateful to both counsel.

5. The judgment should be read in conjunction with the trial judgment, where the facts are set out in detail ([2024] EWHC 1661 (KB)). The essence of what happened can be drawn from the concluding paragraphs of the previous judgment, which serve as a shorthand introduction to the case:

> "239. The court noted at the outset of the judgment the distress that has been caused by this litigation amongst a previously close-knit family. The court has viewed with growing dismay the private

grief aired in public at hearings necessarily spread over a period of months. Mrs Barry puts it this way (B126-27):

> "I do not know Denis anymore and haven't seen him or his wife and children over the last three years unless from a distance. I am shattered from the lies he has told … He is someone we don't know any more and a very changed man."

240. The court cannot but hear in Mrs Barry's comments a distant echo of the observations of Danckwerts LJ in *Jones v Padavatton*, where he said (329D):

> "it is distressing that [mother and daughter] could not settle their differences amicably and avoid the bitterness and expense which is involved in this dispute carried as far as this court."

241. I find that Denis Barry's parents loaned him money to help him purchase 295 Salmon Street and both the leasehold interest at 37a Reeves Avenue and the freehold at the site for both flats with the clear intention, agreed on both sides, that he would repay the sums. Mr and Mrs Barry loaned their son substantial sums in excess of £650,000 in good faith, because they trusted that he would repay them, as they trusted, and had every reason to trust, all their children in other loan arrangements that everyone treated historically with the requisite seriousness attending a legally binding situation. The claimants had no reason to doubt that their son Denis would respect their trust and pay them back as soon as he was able. He did not. Instead, he has devised a series of elaborate, unreliable and untrue accounts to seek to evade the debt he owes his parents. His refusal to repay the claimants the money he unquestionably owes them - because this is a very serious amount of money loaned in contracts all parties intended to be legally enforceable - has caused his ageing parents both hardship and, I have no doubt more painfully, profound heartache."

6. Regrettably, evidence filed with the court subsequent to the trial judgment indicates that matters have not improved and in certain respects deteriorated further, with one of the brothers pleading guilty to assaulting the defendant and evidence of other acts of recrimination.

7. The following issues initially arose for determination, narrowed as agreed below:

(1) The Claimants' application to amend their cost budget dated 3 November 2023.

(2) Costs not dealt with previously. **AGREED**.

(3) Consequences of the Claimants beating their Part 36 offers.

(4) (Subject to the above in respect of Part 36 offers) the principle of costs, and the basis of assessment. **AGREED AS INDEMNITY BASIS**.

(5) Application for payment on account of costs.

II. *Issue 1 – costs budget*

8. The claimants seek vary their costs budget dated 22 July 2022 and approved at the CCMC on 14 July 2022. The application to vary is dated 3 November 2023, that is, made after the start of the trial that began on 4 October 2023. The items of the budget for which variation is sought are (all net of VAT):

(1) Disclosure: £22,650
(2) Witness evidence: £4,800
(3) Trial preparations: £29,662.50
(4) Trial length: following the defendant's late amended defence
(5) Defendant's application to vary his defence

9. The application is supported by the third statement of the claimants' solicitor Alice Lane.

10. The defendant does not object to (4) due to the "additional trial days". Therefore, the defendant "accepts" that the trial phase budget "should be increased by £11,000". Neither is there any objection taken to (5). It would be difficult to mount a credible objection given the late application by the defendant to add a new and fundamental plank to his defence and the necessary additional work that entailed. Objection is taken to the other heads.

11. Applications to vary are made under CPR, r3.15A. This rule states:

> "(1) A party ("the revising party") must revise its budgeted costs upwards or downwards if significant developments in the litigation warrant such revisions.
>
> (2) Any budgets revised in accordance with paragraph (1) must be submitted promptly by the revising party to the other parties for agreement, and subsequently to the court, in accordance with paragraphs (3) to (5).
>
> (3) The revising party must—
>
> (a) serve particulars of the variation proposed on every other party, using the form prescribed by Practice Direction 3D;

> (b) confine the particulars to the additional costs occasioned by the significant development; and
> (c) certify, in the form prescribed by Practice Direction 3D, that the additional costs are not included in any previous budgeted costs or variation.
>
> (4) The revising party must submit the particulars of variation promptly to the court, together with the last approved or agreed budget, and with an explanation of the points of difference if they have not been agreed.
>
> (5) The court may approve, vary or disallow the proposed variations, having regard to any significant developments which have occurred since the date when the previous budget was approved or agreed, or may list a further costs management hearing.
>
> (6) Where the court makes an order for variation, it may vary the budget for costs related to that variation which have been incurred prior to the order for variation but after the costs management order."

12. It was common ground between the parties that the revising party (the claimants) need to establish (1) significant development(s); (2) prompt application. A parallel application is made by the claimants under PD 3D – Costs Management. It is made under para 13, which provides as follows:

> "G. Oppressive behaviour
> **13.** Any party may apply to the court if it considers that another party is behaving oppressively in seeking to cause the applicant to spend money disproportionately on costs and the court will grant such relief as may be appropriate."

13. I preface my examination of the individual heads with some general comments. The importance of costs budgets in the modern post-Jackson dispensation was made clear by Moore-Bick LJ in *Silvia Henry v News Group Newspapers Ltd* [2013] EWCA Civ 19. He said at para 28:

> "[Pursuant to the new Rules] although the court will still have the power to depart from the approved or agreed budget if it is satisfied that there is good reason to do so, and may for that purpose take into consideration all the circumstances of the case, I should expect it to place particular emphasis on the function of the budget as imposing a limit on recoverable costs. The primary function of the budget is to ensure that the costs incurred are not only reasonable but proportionate to what is at stake in the proceedings. If, as is the intention of the rule, budgets are approved by the court and revised at regular intervals, the receiving party is unlikely to persuade the court that costs

> incurred in excess of the budget are reasonable and proportionate to what is at stake."

14. Coulson J (as he then was) said in *Elvanite Full Circle Ltd v AMEC Earth* [2013] EWHC 1643 (TCC) at paras 41-42:

> "41. … If the defendant were permitted to revise its budget now, after the trial, the claimant would be faced with a personal liability that might be as much as a quarter of a million pounds. That again seems to me to be unjust and contrary to the costs management rules.
>
> 42. If I am wrong to conclude that an application to amend the costs management order should not be entertained after judgment, then I consider that, at the very least, the defendant would need to demonstrate good reason why the application was made so late. In my judgment, the defendant has not done that here. Indeed, there is no explanation in the witness statement of Mr Loveday, the defendant's solicitor, as to why the application was not made in early February, or at the outset of the trial, which I consider to be a significant omission. Although Ms Day submitted that the preparation of the trial took precedence over the making of such an application, not only was there no evidence to that effect but, on these facts, I find that that was not a good reason for not making the application."

15. I note that the CPR does not define the term 'significant development'. The White Book 2024 states at para 3.15A.1:

> "It appears to include any event, circumstance or step which is of such a size and nature as to go beyond the events, circumstances and steps which were taken into account, expressly or impliedly, in the budget previously approved or agreed. A development is taken into account impliedly if it is something that was, or should reasonably have been, anticipated by the applicant for revision at the time of a previously approved or agreed budget."

16. I will take the test to be one of reasonable anticipation.

(1) Disclosure

17. Disclosure took place in October 2022. It is hard to conceive how the claimant can be said to have acted "promptly" as required under the rule when making an application over a year later. I accept the defendant's submission on this point and reject the application to vary this budget item on this basis.

18. I now consider the question of oppression or, as characterised in the rule, oppressive behaviour. Counsel agreed that there did not appear to be any relevant guidance in the authorities about the definition of the term. Mr Sawtell submitted, perhaps accurately, that it is likely to entail a "fairly high

threshold". However, in my judgment the key question here is the way in which the rule (if that is what it is) has been framed in para 13 of the PD. I judge that the critical words are "in seeking to cause". Seeking connotes on a natural and ordinary reading intentional causation (on such an interpretive approach, see *R (The Good Law Project) v Electoral Commission* [2017] EWHC 2414 per Leggatt LJ (as he then was) at para 33). I recognise that causation may be in two distinct senses: a "but for" (sine qua non) causation or a more deliberately targeted intentionality. I judge that the latter is the correct reading. This is because one must interpret the phrase in the context of its neighbouring term "behaving oppressively". One must be careful not to construe a PD like a statute, but where there are two competing interpretations, it is helpful to use recognised interpretative tools including "the particular context" (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349 per Lord Nicholls at para 396).

19. This is an important conclusion for this application. This was a bitterly contested family dispute, as my trial judgment makes clear. The defendant was unquestionably intent on testing his parents' case to the extent permissible. The approach at trial was to leave no stone unturned and take, if not every point, then almost all of them. It is in this light and context that one must view the correspondence exchanges, the disclosure requests and the litigation strategies. Although my judgment fell very heavily against Denis Barry and made serious criticisms of his evidence, I never once sensed that he was trying to run up costs needlessly or deliberately to oppress or coerce his parents. What he wanted was not to pay back the money. I agree that the timing of the letter to the claimants on Christmas Eve was regrettable. The contents of the correspondence on both sides was firm, strident and at times became heated. However, I cannot find oppressive behaviour on the interpretation of the test as I hold it to be. I find no causative intent.

(2) Witness statements

20. The first-round witness statements were exchanged on 27 March 2023. The second round took place on 7 July 2023. While the delay in applying for variation was less pronounced than for disclosure, nevertheless there is no adequate reason provided by Ms Lane to justify the delay in applying for variation until November 2023. The management of costs is integral to the effective working of the modern costs regime. Here there is an unjustified lack of promptness. There is no good or sufficient reason for the budget variation not to have been made promptly and certainly far more proximate to the significant developments and before trial. I accept the defendant's submission and refuse the variation due to lack of promptness.

21. Mr Sawtell anticipated the fragile nature of aspects of his variation application and set considerable store on oppressive behaviour. For similar reasons to the disclosure head, I reject the existence of oppressive conduct. I would add that the defendant was concerned about being told that his parents were unwell when footage existed, contrary to such claims, of his parents walking in the street. There was a flurry of activity about all of this. It was a

matter reasonably explored, but also speaks to the extent of the breakdown of trust in the relationship between the parties. It is a long way from oppressive behaviour with the necessary causation intent.

(3) Trial preparation

22. There is no doubt that the claimants received the defendant's proposals for the trial bundles very close to the deadline. As the Form T notes, the defendant made "extensive criticisms and requests for further searches". This is entirely plausible given the nature of the correspondence. It is also credible and reasonable for a significant body of work to have been necessitated by the further disclosure, including "extensive documentation". The defendant sought the addition of a substantial array of documents. The index alone was extended to 39 pages.

23. This was a prompt variation application by the claimants. The variation is in respect of what is a qualifying significant development, being one not reasonably anticipated. I reject the defendant's submission that the claimant "always knew they would be looking at 20 years of transactions". As the trial approached, the scope of the defence widened significantly, including the application to amend the defence on the very eve of the trial, and pursued over the first two days, to add what would become the main plank of the defence, or near the top of the list: the lack of intention to create legal relations. Indeed, I dealt with this matter first in my trial judgment as it became Issue 1, the parties having addressed the question first in closing submissions, and rightly so, such was its significance and far-reaching, potentially terminatory, implications. In oral argument, the defendant accepts that the developments "could amount to a significant development". I judge that unquestionably they do. The next question is to what extent the budget should be varied upwards.

24. Having reflected carefully on this after the hearing, and gone back through all the documentation, and while I am satisfied that there was intense last-minute work to ensure the case was trial-ready, I am unpersuaded that the scope variation is reasonably justified to the extent sought. I accept the defendant's submission that there was the overuse of "partner time" for some of the more routine aspects of the work entailed. I cannot think that 60 hours of partner time was the right balance and more of the work could have been delegated to more junior members under supervision. That said, I cannot accede to the defendant's submission that the court should reject "all the time claimed". That is clearly unrealistic. I approve, therefore, an upward variation by £18,000 under this head. I do not need to consider oppressive behaviour, the application having substantially succeeded, but if I did, would not find the causative nexus.

(4) Trial length/(5) application to vary defence

25. I address heads (4) and (5) together, as the parties did in their Form T annotations. In his skeleton argument, the defendant accepts a variation by £11,000 for the "trial phase". It appears that again this includes both heads (4) and (5). On the Form T, the claimants seek a variation of £37,500.

26. First, there can be no doubt that there was a significant increase in trial length due to the altered nature of the defence, where late amendment was granted exceptionally to the defendant as a matter of fairness and in the interests of justice. This undoubtedly entailed significant extra work. Thus, there is a significant development justifying a budget variation. In the defendant's response to the Form T, there is criticism of the second claimant Mrs Barry's evidence as being "evasive" and "cantankerous". While the submission was not pursued orally, it tellingly demonstrates how unbalanced and unrealistically partial the submission is. The £15,000 increase of budget for counsel's fees sought by the claimants seems entirely reasonable. Once more, however, a very high proportion of the solicitor costs were incurred by the "partner with conduct". While I appreciate the nature of the case required close involvement by the partner, a significant portion of the 50 hours work could have been undertaken by a more junior fee earner. The claimants seek a variation of £37,500 "in addition to the budgeted costs of £34,840". This is a substantial increase. While the developments were significant, a sense of balance and proportion must be maintained.

27. Therefore, the court is prepared to vary the budget upwards by £27,500 under this head. The claimants have substantially succeeded, but if I had to consider oppressive behaviour, once more, I would not find the requisite causative intent.

III. *Issue 3 – Part 36*

28. The gateway question is whether the claimants have beaten their Part 36 offer. Part 36 is entitled "Offers to settle" and forms a self-contained code directed at providing structure and clarity to assist parties settle their disputes without the need for further legal proceedings, thus saving time, costs and valuable court resources.

29. Part 36 provides both the conditions for a valid offer under its head and certain consequences. The conditions are set out at CPR 36.5, which provides as relevant:

> "Making offers
> 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 36.23 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
> (e) state whether it takes into account any counterclaim.

> (2) Paragraph (1)(c) does not apply if the offer is made less than 21 days before the start of a trial.
> (3) In appropriate cases, a Part 36 offer must contain such further information as is required by rule 36.18 (personal injury claims for future pecuniary loss), rule 36.19 (offer to settle a claim for provisional damages), and rule 36.20 (deduction of benefits).
> (4) A Part 36 offer which offers to pay or offers to accept a sum of money will be treated as inclusive of all interest until—
> (a) the date on which the period specified under rule 36.5(1)(c) expires; or
> (b) if rule 36.5(2) applies, a date 21 days after the date the offer was made.
> (5) A Part 36 offer to accept a sum of money may make provision for accrual of interest on such sum after the date specified in paragraph (4). If such an offer does not make any such provision, it shall be treated as inclusive of all interest up to the date of acceptance if it is later accepted."

30. The claimants' offers can be summarised as follows:

(1) On 17 September 2021, the claimants made a written offer under Part 36 to settle the Salmon Street loan of £350,000 by accepting a reduced sum of £305,550. The defendant was given until 14 October 2021 to accept.
(2) Also on 17 September 2021, the claimants made a written offer under Part 36 to settle the Reeves Avenue loan of £304,555.90 by accepting a reduced sum of £262,589.31. The specified period for acceptance was the same.

31. It is accepted by the defendant that they are valid Part 36 offers and that in consequence, the CPR 36.17 entitlements as a starting-point take effect subject to any disapplication or adjustment. These consequences are provided for under the rule as follows:

> "36.17 Costs consequences following judgment
>
> (1) Subject to rule 36.24, this rule applies where upon judgment being entered—
>
> …
>
> (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.

…

(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 awarded	10% of the amount
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."

32. The parties agreed that the claimants have "beaten" their Part 36 offers. Therefore, the provisions under CPR 36.17 apply.

A. Approach to entitlements under CPR 36.17

33. First, and having reviewed the authorities, I set down my analysis of the proper approach to the entitlements arising under CPR 36.17:

> (1) The CPR 36.17(4) cost entitlements apply if the claimant obtains a judgment at least as advantageous as the proposals in the Part 36 offer;
> (2) The court must order the four CPR 36.17(4) entitlements unless it is unjust to do so;
> (3) The burden shifts to the defendant to establish that it is unjust to order any of the four entitlements;
> (4) Entitlement (d) "additional amount" is an "all or nothing" entitlement (*JLE (by her mother and litigation friend ELH) v Warrington & Halton Hospitals NHS Trust Foundation* [2019] EWHC 1582 (QB) per Stewart J at para 78);
> (5) Therefore, the court must order the tiered "prescribed amount" unless the defendant establishes that it unjust;
> (6) In determining whether it is unjust, the court should have regard to the fact that the additional amount is not compensatory (*OOO Abbott (A company incorporated in the Russian Federation) v Design Display Ltd* [2014[EWHC 3234 (IPEC)); is a key ingredient of the Part 36 code to provide additional incentive to accept reasonable offers and avoid or end unnecessary litigation *(Thai Airways International Public Co Ltd v KI Holdings Co Ltd (formerly known as Koito Industries Ltd)* [2015] EWHC 1476 (Comm)); and is intended to penalise the unreasonable refusal to accept an adequate offer (*Cashman v Mid Essex*

Hospital Services NHS Trust [2015] EWHC 1312 (QB) per Slade J at para 7 (cf. Lord Justice Jackson final report, Review of Civil Litigation Costs (2009) at para 3.9: noting that previously, "the claimant was insufficiently rewarded and the defendant insufficiently penalised when the claimant has made an adequate offer").

(7) In assessing the sum to which the prescribed percentage applies, the court should consider the gross award it would have made but for the Part 36 provisions, including basic interest, which would otherwise constitute "the sum awarded to the claimant by the court" (CPR 36.17(4)(d)(i)), but not any additional interest ordered under Part 36 (*Mohammed v The Home Office* [2018] EWHC 3051 (QB) per Edward Pepperall QC (as he then was), sitting as a Deputy High Court Judge);

(8) In considering whether ordering the additional amount is unjust, the court must have regard to "all the circumstances" (CPR 36.17(5));

(9) The court should also have regard to the five matters set out at subparagraph (5): the terms of the offer; the stage of proceedings when offered; the information available to the parties; the conduct of the parties in giving or refusing of information relevant to the offer; whether the offer was genuinely intended to settle proceedings (one might add, as opposed to a mere tactical device).

B. Additional amount

34. I now apply these principles to the instant case. The following observations are pertinent:

(1) The Part 36 offers were made in writing validly under the Part 36 code and were explicitly stated to be.

(2) They were made (a) pre-issue (b) two years before the trial and (c) shortly after attempts by the claimants to mediate had failed.

(3) At the point of offer, there was broad informational parity between the parties. The nature of the claim was clear and simple: we loaned you the money and need it repaid. The disputed sums were readily identifiable (and no dispute about the amounts occurred at trial). The contest was the basis of the transfers (were they to the defendant or a company Bardon Limited; were they part of his inheritance) and, late in the day, whether there was ever an intention to create legal relations. There was nothing of significance that ultimately determined the issues in the case not known to either party. The mass of evidence adduced assisted the court to determine the truth of what happened and largely went to credibility – vital here – but each side of the litigation divide knew perfectly well what had happened. The court concluded that the defendant subsequently devised a series of misleading and false accounts to evade his obligations to his parents. He was at no informational disadvantage.

(4) The claimants' offer was a significant reduction from the sums claimed (substantial "discount", as Mr Sawtell put it). A reasonable period of 14 days was given to accept. It was on any view a genuine attempt on the part of the claimants to settle the proceedings, following on their immediately preceding offer of mediation. These were not derisorily discounted offers (cf. *Jockey Club Racecourse Ltd v Willmott Dixon Construction Ltd* [2016] EWHC 167 (TCC) per Coulson J: 95 per cent offer on liability was genuine attempt to settle and not derisory). The claimants offers were not tactical, nor made to gain a tactical advantage in the litigation. The claimants wished to avoid the dispute being aired in public at trial, something that became inevitable given the defendant's stance, and something that caused the whole Barry family immense distress and continues to do so.

35. No other circumstances were put before the court by the defendant to meet its persuasive burden. The submission made by Mr Laville is that the claimants have "got their justice" by succeeding in the claim and should not be doubly or over-rewarded through an additional amount. Such payments are not, it is submitted, "penalties". I cannot accept this submission. It is clear to me that these additional amounts were deliberately added to the new costs regime to strongly incentivise offerees to accept adequate (reasonable) offers and if necessary to penalise. Should the offeree refuse, and the offer is at least as advantageous (claimants) or more advantageous (defendants), there are consequences (entitlements) mandated by the rules. The factors identified in the rule, while not exhaustive, point clearly to how the court should approach the consideration of unjustness. One returns to the purpose and policy of the rule: it is to resolve cases without unnecessary litigation or further proceedings where an adequate offer has been made in good time and reasonably and with the right motivation, which is to genuinely settle the proceedings rather than instrumentally glean a tactical advantage. I have no hesitation in concluding that the claimants' offers bear all these positive attributes. Mr and Mrs Barry did not want to litigate this matter against their son. They tried to mediate. They made reasonable offers to settle. Denis Barry was not interested. His case failed in virtually every particular at trial. His submission on this matter comes nowhere close to persuading me that it would be unjust not to order the mandated additional amount entitlement. Mr Sawtell submits that in fact it would be "just" to make the order. That is not the test. He does not have to establish that. The default of the scheme is clear. The rule mandates the additional amount unless displaced by the weight of circumstances that establish the award is unjust. It is not unjust. This is a paradigm case where the additional amount should be awarded.

36. I therefore conclude, consistent with the rule, that the additional amount "must" be awarded. It is capped in this case at £75,000. That is the additional amount awarded.

C. Interest rate

37. On the interest rate to be awarded on the CPR 36.17 entitlements, the claimants rely on the case of *Mate v Mate* [2023] Costs LR 1425, a decision of Mr Andrew Sutcliffe KC, sitting as a judge of the High Court. I have found, as did the judge, that the decision of Chamberlain J in *BXB* v *Watch Tower and Bible Tract Society of Pennsylvania* [2020] EWHC 656 (Admin) to be of great usefulness. Chamberlain J said at paras 14-15:

> "14 … Rule 36.17(4) provides (subject to r 36.17(7), which is inapplicable here) that the court must, unless it considers it unjust to do so, order that the claimant is entitled to interest on damages and on costs 'at a rate not exceeding 10% above base rate'. This enhanced interest rate fulfils two functions: first the private function of compensating the claimant for the cost of money but also for the inconvenience, anxiety and distress involved in litigating (*Petrotrade v Texaco Ltd* [2002] 1 WLR 947 (Note), [63]–[64] (Lord Woolf MR)); second, the public function of encouraging settlement so as to make better use of the court's resources in the interests of other litigants (*OMV SA v Glencore International AG* [2017] 1 WLR 3465, [39] (Sir Geoffrey Vos C)).
>
> 15. However, the wording of r 36.17(4) makes plain that an enhanced rate of 10% above base rate will not always be appropriate. Nor do I accept the submission made on behalf of the claimant that the wording of r 36.17(4) ('a rate not exceeding 10% above base rate') implies that it will be the default position, nor that it implies any different approach to the exercise of discretion than would be implied by 'up to 10%'. The applicable rate is a matter for the discretion of the court, taking into account all the circumstances of the case and the effect of the other consequences that flow from Part 36 of the CPR: *Petrom v Glencore International*, [41]."

38. It is critical to have regard to the global effect of the court's costs orders. In my judgment, questions of overall proportionality remain relevant in the assessing the level of enhanced interest rate, despite the operation of the entitlements. There is not a discretion in respect of additional amount once the court rejects unjustness, but discretion lives in the assessment of a proportionate enhanced rate of interest. Here I have in mind that these are private individuals and not institutions. While I have been critical of Denis Barry's evidence, I must remain fair. I have read *Mate v Mate* with interest, but acknowledge that each case is exquisitely fact-sensitive.

39. A rate of zero per cent would be materially equivalent to a finding of unjustness, which I have rejected. I have little hesitation in concluding that the top rate of 10 per cent is inappropriate looking at proportionality overall. I must have at the forefront of my mind that this interest award is an

augmentation above base rate, so proceeds from that established platform. The relevant factors seem to me to fall into two broad groups. First, the conduct of the claimants: these were reasonable Part 36 offers, genuinely made with a view to avoiding proceedings with significant reductions. Second, the conduct of the defendant: as explained in the trial judgment, his case was weak and implausible and contrary to most of the contemporaneous evidence and the clear history of this family; further, he knew perfectly well that continuing with this case was likely to cause grave upset and distress to his parents. That is precisely what happened. Therefore, the assessment I make of the interest level is nearer to that advocated by the claimants "at or close to the cap" (claimants). The significantly lower rate submitted by the defendant would fail to reflect the policy imperative enshrined in the rule of, as Chamberlain J puts it, "encouraging settlement".

40. The interest rate should be 8 per cent above base rate. This enhancement applies both to the principal sum and costs.

41. My conclusion is as follows under CPR 36.17:

(1) Interest on the principal sum is ordered at 8 per cent above base rate;
(2) Costs should be awarded on the indemnity basis from 15 October 2021;
(3) Interest on those costs is ordered at 8 per cent above base rate;
(4) There is an additional amount ordered under CPR 36.17(4)(d) made up of the following components:
    i. 10 per cent of £500,000 = £50,000.
    ii. 5% of the balance of £627,555,90 = £31,377.80.
    iii. Capped total under the rule: £75,000.

IV. *Issue 5 – payment on account*

42. The claimants seek a payment on account of costs under CPR 44.2(8). The principle of such a payment is not disputed by the defendant, but the amount is disputed.

43. The claimants seek a payment on account of costs of 60 per cent of incurred costs and 90 per cent of estimated costs from the last budgeted costs (as of 28 February 2025). The defendant does not dispute the principle of payment on account of costs. However, he argues for different amounts. There should be 50 per cent of incurred costs; 90 per cent of costs budgeted in July 2022; and 50 per cent of the revised upward variation granted in February 2025.

44. The court received further written submissions from counsel and is, as ever, grateful to them both. I take the two issues separately and in turn (5A: incurred costs; 5B: budgeted costs).

Issue 5A: incurred costs

45. The claimants submit that as a result of the Part 36 outcome, they should be awarded 60 per cent of incurred costs. The claimant relies on *Thomas Pink Ltd v Victoria's Secret UK Ltd* [2014] EWHC 3258 (Ch), [2015] 3 Costs LR 463 ("*Thomas Pink*"), where the court granted just over 50 per cent of incurred costs.

46. The defendant submits that the court should follow the principles set out in two authorities, *Cleveland Bridge UK Ltd v Sarens (UK) Ltd* [2018] 2 Costs LR 333 ("Cleveland Bridge") at paras 8-22, 31 and *Sharp and Others v Blank and Others* [2020] Costs LR 835 at paras 18-20 ("*Sharp*"). The payment on account should be 50 per cent of incurred costs.

Discussion: Issue 5A

47. The starting-point is that assessing the correct proportion of payment on account is always a matter of risk management. Further, incurred costs are not budgeted and thus not subject to court scrutiny let alone approval in the way budgeted costs are. That introduces an element of uncertainty. In *Thomas Pink*, the court that the correct proportion of incurred costs to be paid on account was 50 per cent. However, in *Thomas Pink* costs were awarded on the standard basis. There is greater confidence in the instant case as costs will be paid on the indemnity basis. CPR 44.3(3) provides:

> "the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party"

48. This materially affects the risk of overpayment on account as "any" doubt about reasonableness will be resolved in favour of the claimant. That said, the 60 per cent sought by the claimants is too high. The appropriate proportion is 55 per cent of incurred costs. This is the reasonable sum on account of costs that the court can have the requisite confidence will not exceed an estimate of the likely level of recovery, always being alert to and allowing for an appropriate margin of estimation error.

Issue 5B: budgeted costs

49. The claimants' primary position is that there should be no distinction between the different budgeted costs. However, very much as a secondary position, submits that if the court were minded to differ in approach, the 50 per cent figure proposed by the defendant is "far too low". The varied budget figure should be no lower than 85 per cent.

50. The defendant's case is that the costs subject to budget variation should effectively be "treated for the purposes of the payment on account as though they were incurred costs and not budgeted costs." The defendant submits that "the additional costs permitted as a result of the variation to the Claimants' budget should not be treated as budgeted costs to which CPR 3.18 applies. They should be treated in the same way as incurred costs".

Discussion: Issue 5B

51. The key point of embarkation is the principle that budgeted costs provide a reliable starting-point for payments on account because the management process has held them to be reasonable and proportionate (*MacInnes v Gross* [2017] EWHC 127 (QB) ("*MacInnes v Gross*") at paras 25-27, as approved by the Court of Appeal in *Harrison v University Hospitals Coventry & Warwickshire NHS Trust* [2017] 1 WLR 4456 at para 40). However, as recognised in *Sharp* at para 19, there always remains the possibility of a good CPR 3.18 reason being identified to depart from the budget.

52. Here the defendant acknowledges that the budget variations were "reduced somewhat by the court in the draft judgment". It must follow that they have been subjected to a measure of judicial scrutiny. In light of this reality, the defendant's submission loses much of its force. The defendant advances a false equivalence between the costs in varied budget and incurred costs. As a result, the submission that the "percentage of 50% would be appropriate" – a classically incurred costs percentage - is based on an analysis that does not survive the fact that these budget variations were subject of detailed rival submissions in writing and orally, were partly refused by the court and partly granted. In *Thomas Pink*, the court ordered payment on account of 90 per cent of all the budgeted costs, including those subject to budget variation. Once more, the fact that costs will be awarded on the indemnity basis is of significance.

53. Doing the best the court can, the amount that should be paid on account as a result of the budgeted costs should be as follows (1) costs budgeted to July 2022: 90 per cent; (2) costs subject to variation granted by the court in February 2025: 80 per cent.

54. The payment of less than the full budgeted costs reflects the possibility that there may be "good reason" in accordance with CPR 3.18 to depart from the budgeted amount (see *Cleveland Bridge*, para 9, citing Coulson J in *MacInnes v Gross*). A budget is not a guarantee. Nor is a varied budget. For the varied budget, I make a further reduction from 90 per cent in recognition of the fact that these budgeted amounts did not receive the same degree of scrutiny that would occur at a CCMC. Thus the costs subject to the variation do not have the same level of "approval", to borrow a term from Coulson J, and thus the "degree of confidence" (*Cleveland Bridge*, para 16) is correspondingly reduced.

Issue 5: conclusions

55. Therefore, the court orders the following payments on account:

5A: Incurred costs: 55 per cent;

5B: Budgeted costs:

i. As per July 2022 budget: 90 per cent;
ii. Variations granted February 2025: 80 per cent.