

ENGLAND AND WALES / JUDGMENT

Matiere SAS v ABM Precast Solutions Ltd

COURT
IN THE HIGH COURT OF JUSTICE

BEFORE
ALEXANDER NISSEN KC
SITTING AS A DEPUTY JUDGE OF THE HIGH
COURT

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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT
Case No: HT-2022-000255
Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL
Date: 31 July 2025

Before: ALEXANDER NISSEN KC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

Between: MATIÈRE SAS
(a company incorporated under the laws of France)
- and -
ABM PRECAST SOLUTIONS LTD
Claimant
Defendant

Jonathan Lewis KC and Caroline Ziebart (instructed by Wallace LLP) for the
Claimant
Marc Lixenberg (instructed by Barton Legal Ltd) for the Defendant
Hearing date: 2 July 2025

JUDGMENT

This judgment was handed down at 10:30am on 31 July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

- ----- Alexander Nissen KC:

Introduction

1. This judgment concerns the consequential matters arising from the liability judgment handed down on 11 June 2025: [2025] EWHC 1434 (TCC). In very short order, in December 2021 Matière SAS (“Matière”), as claimant, instituted proceedings against ABM Precast Solutions Ltd (“ABM”), as defendant, for a balance owing on unpaid invoices in the total sum of £373,295.06. Those sums were said to be due under the Consortium Agreement. In the Defence and Counterclaim, dated February 2022, that claim for payment was the subject of a partial admission that, subject to set off, £157,241.91 was due. The balance of the claim was not admitted. The claim was also met with a counterclaim for damages for breach of express obligations of good faith owed under both the Consortium Agreement and a subsequent agreement known as the Collaboration Agreement. At that time, the counterclaim was quantified in the order of £4.8m. Later, the quantum was increased by amendment to £18.92m, alternatively £16.62m.
2. By the time of the trial, ABM had admitted all but £35,000 of the sum claimed by Matière on the invoices. In the event, I found that Matière was entitled to the full sum claimed and gave judgment in the sum of £373,295.06 and interest. I dismissed the counterclaim in its entirety.
3. On 4 April 2022, that is after service of the Defence and Counterclaim in its original form, Matière issued a Part 36 letter (“the Part 36 Offer”) expressed in the following way: “...our client is aware that the costs of these proceedings will quickly become disproportionate to the value of their claim (disregarding in its entirety, of course, your client’s unmeritorious and entirely speculative counterclaim, which is bound to fail). Our client is therefore amenable to the notion of settling the proceedings if an acceptable compromise can be reached with your client. In the circumstances, we are instructed to make the following offer of settlement pursuant to Part 36 of the Civil Procedure Rules (the “Offer”). The Offer is made by our client as claimant in these proceedings. It is therefore intended to have the consequences set out in Section I of CPR Part
36. In particular, your client will be liable for our client’s costs up to the date of service of notice of acceptance, if the Offer is accepted within 21 days (the “relevant period”). No doubt you will advise your client of the cost consequences of not accepting the Offer, either within the relevant period or at all. Our client is prepared to settle the entire proceedings, including the whole of the claim and your client’s counterclaim, for the sum of £350,000 (the “Settlement Sum”) to be paid to our client in full and in cleared funds within 14 days of acceptance of this Offer. For the avoidance of doubt, the Settlement Sum does not include our client’s costs.

The amount is inclusive of interest until the relevant period has expired. Thereafter, interest at a rate of 8% p.a. will accrue.”

4. The letter went on to set out the consequences for which Matière would contend if it obtained a judgment which was equal to or more advantageous than the Part 36 Offer.
5. There was no response to the letter. 6. It is common ground that Matière’s offer of April 2022 is a valid Claimant’s Part 36 offer within the meaning of CPR 36.5 and that Matière achieved a more advantageous result than that which it offered to accept. That is because, whatever interest is awarded (see below), the principal sum for which judgment has been given exceeds, on its own, the amount in the offer.
7. Also relevant to the chronology is that, on 17 September 2024, that is shortly before trial, ABM issued its own Part 36 offer in which it expressed itself as willing to accept £5m in full and final settlement of the whole proceedings.
8. Any determination of Matière’s entitlement to interest is itself dependent on the effect of the Part 36 Offer, so it is right to consider that question first. The Part 36 Offer
9. CPR 36.17(1) applies because the judgment against ABM is at least as advantageous to Matière as it offered to accept. Accordingly, rule 36.17 is engaged.
10. CPR 36.17(4) is in the following terms: “(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 Up to £500,000 Prescribed percentage 10% of the amount awarded”
11. CPR 36.17(5) is in the following terms: “(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.”
12. On behalf of Matière, Mr Lewis KC, who appears with Ms Ziebart, submits that Matière is entitled to all the beneficial consequences flowing from Rule 36.17 from the expiry of the relevant period, that being 25 April 2022. On his case, this includes an entitlement to indemnity costs in respect of the counterclaim from the expiry of the relevant period. That contention was the most significant issue between the parties at the hearing given that the trial process was almost exclusively concerned with the counterclaim and Matière’s actual costs exceeded its cost budget by a significant amount (c. £700k).
13. In essence, Matière’s submissions were as follows. Part 36 is a self-contained code. Following CPR 35.17(4), I must order the relief set out in Part 36 unless it would be unjust to do so. The burden is on ABM to demonstrate injustice which is a “formidable obstacle”. In anticipation of the points being argued by ABM, it contended that the Court’s findings of fact against Matière in respect of breach of duty of good faith were not sufficient to make a different order. In addition, not all of ABM’s allegations of breach were upheld and ABM was, itself, open to criticism. The full consequences of CPR 36.17(4) should be applied both to claim and counterclaim. The offer was a genuine attempt to settle the entire proceedings. ABM had sufficient information to accept the Part 36 Offer.
14. On behalf of ABM, Mr Lixenberg’s principal contention was that, on a proper construction of the Part 36 Offer, it was not a genuine attempt to settle the proceedings, which is a factor which the Court should take into account: see CPR 36.17(5)(e). The overwhelming majority of the costs were incurred in relation to the counterclaim which was distinct in character from the claim. Matière’s offer was to settle the whole proceedings including the counterclaim but was not, in that latter respect, a genuine one. As part of that submission, Mr Lixenberg emphasised that the Part 36 Offer described the counterclaim as “unmeritorious and entirely speculative” and “bound to fail”. ABM accepted that a sufficient concession on the value of the claim was made by Matière such that the Part 36 Offer amounted to a genuine offer to settle the claim, and, for that reason, that the 10% uplift on the sum recovered and additional interest should be awarded to Matière.
15. By way of further submission, ABM contended that the information available to ABM at the time when the offer was made was such that it would be unjust to visit the cost consequences of CPR 36.17(4) on ABM.

16. ABM also submitted that, in accordance with the principles set out in CPR 44.2, ABM should only be ordered to pay a proportion of Matière's costs. Reliance is placed on CPR 44.2(4)(a) and (5), given the Court's findings as to the extent and severity of Matière's breaches of duty. It is also said that the Court should take account of ABM's success on substantial parts of its case, namely in respect of the contractual issue of scope of duty and on breaches, where Matière failed. Mr Lixenberg contends that the Court should reduce Matière's costs by 70% to take account of these matters. The Law
17. The approach which should be adopted is helpfully set out in *Webb v Liverpool Women's NHS Foundation Trust* [2016] EWCA Civ 365: "[37] In deciding what costs order to make under 36.14, the Court does not first exercise its discretion under Part 44. Its only discretion is that conferred by Part 36 itself. The alternative construction requires the Court first to exercise its discretion under Part 44, on the basis of all the circumstances of the case, and then to exercise its discretion under Part 36, again having regard to all the circumstances of the case. This makes no sense.
- [38] It follows from the above, and in particular that Part 36 is a self-contained code, that the discretion under 36.14 relates not only to the basis of assessment of costs, but also to the determination of what costs are to be assessed. I agree with the Judge that Part 36 does not preclude the making of an issue-based or proportionate costs order. However, a successful claimant is to be deprived of all or part of her costs only if the court considers that would be unjust for her to be awarded all or that part of her costs. That decision falls to be made having regard to "all the circumstances of the case". In exercising its discretion, the Court must take into account that the unsuccessful defendant could have avoided the costs of the trial if it had accepted the claimant's Part 36 offer, as it could and should have done. The principles were aptly summarised by Briggs J (as he then was) in *Smith v Trafford Housing Trust*
- [2012] EWHC 3320 (Ch): "13. ... For present purposes, the principles which I derive from the authorities are as follows:
- a) The question is not whether it was reasonable for the claimant to refuse the offer. Rather, the question is whether, having regard to all the circumstances and looking at the matter as it affects both parties, an order that the claimant should pay the costs would be unjust: see *Matthews v Metal Improvements Co. Inc* [2007] EWCA Civ 215, per Stanley Burnton J (sitting as an additional judge of the Court of Appeal) at paragraph 32.
- b) Each case will turn on its own circumstances, but the court should be trying to assess "who in reality is the unsuccessful party and who has been responsible for the fact that costs have been incurred which should not have been": see *Factortame v Secretary of State* [2002] EWCA Civ 22, per Walker LJ at paragraph 27.

- c) The court is not constrained by the list of potentially relevant factors in Part 36.14(4) to have regard only to the circumstances of the making of the offer or the provision or otherwise of relevant information in relation to it. There is no limit to the types of circumstances which may, in a particular case, make it unjust that the ordinary consequences set out in Part 36.14 should follow: see *Lilleyman v Lilleyman* (judgment on costs) [2012] EWHC 1056 (Ch) at paragraph 16.
 - d) Nonetheless, the court does not have an unfettered discretion to depart from the ordinary cost consequences set out in Part 36.14. The burden on a claimant who has failed to beat the defendant's Part 36 offer to show injustice is a formidable obstacle to the obtaining of a different costs order. If that were not so, then the salutary purpose of Part 36, in promoting compromise and the avoidance of unnecessary expenditure of costs and court time, would be undermined."
18. Paragraph 13(d) was the source of Mr Lewis's submission that ABM faced a "formidable obstacle" to the obtaining of a different costs order to that set out in Part 36.17(4). Discussion
19. I turn first to the submission that the Part 36 Offer was not a genuine offer to settle the proceedings, as regards the counterclaim.
20. Mr Lixenberg's first point is that, on its proper construction, the offer was not an attempt to settle the counterclaim at all. Read in context, I do not accept that the passage from the Part 36 Offer relied on by Mr Lixenberg ("disregarding in its entirety, of course, your client's unmeritorious and entirely speculative counterclaim") demonstrates that the offer was not an attempt to settle the counterclaim at all. That statement was there to make a different point and was part of an explanation as to why the offer was being made, namely disproportionality. By contrast, the operative part of the offer, which defined its ambit, was clearly to: "settle the entire proceedings, including the whole of the claim and your client's counterclaim".
21. So, in my judgement, there can be no doubt that the offer was an attempt to settle the claim and counterclaim.
22. The next question is whether the Part 36 Offer was a genuine attempt to settle the proceedings of which the counterclaim formed part. As the notes to the White Book explain (at 36.17.6), paragraph 5(e) was introduced to deal with the problem of claimants making very high settlement offers (often as much as 95% of the value of the claim) not in a genuine attempt to settle the claim but to place the defendant at risk of indemnity costs pursuant to r.36.17(4). It continues: "In *AB v CD* [2011] EWHC 602 (Ch), the claimant sought an order under what is now r.36.17(4) on the basis that it had succeeded in full and thereby obtained a judgment "at least as advantageous" as a Part 36 offer seeking 100% recovery. Henderson J refused to order Part 36 consequences, observing that the concept of settlement involved "an element of give and take" and that a settlement offer must involve some genuine element of concession. He castigated the "offer" in that case as a demand for "total capitulation".

23. The notes to the White Book indicate that judges are likely to take a broad-brush view when assessing whether the offer was a genuine attempt to settle the proceedings. It states there is nothing wrong with very high offers in extremely strong cases but, where that arises, claimants would do well to explain why such a small discount is being offered. Cases cited in the White Book include *Jockey Club Racecourse Ltd v Willmott Dixon Construction Ltd* [2016] EWHC 167 (TCC) in which a 95% offer was effective in an 'open and shut' case and *Mundy v TUI UK* [2023] EWHC 385 in which effect was not given to a 90% offer where there was no possibility of finding contributory negligence.
24. I have found helpful the analysis in *Yieldpoint Stable Value Fund LP v Kimura Commodity Trade Finance Fund Ltd* [2023] EWHC 1512 (Comm), also referred to in the White Book. In that case Mr Stephen Houseman KC, sitting as a Judge of the High Court, said this: "14. CPR 36.17(5)(e) itself was inserted by rule amendment taking effect in April 2015, as explained in White Book 2023 at 36.17.6. This provision is not confined to so-called '100% offers' made by claimants seeking to avail themselves of CPR 36.17(4) when they obtain a monetary judgment " at least as advantageous " as their own prior offer: CPR 36.17(1)(b). Nor is it necessary to show that an offer is being used as a " tactical step " in this context; cf. *Huck v. Robson* [2002] EWCA 398; [2003] 1 WLR 1340. As has been observed, all Part 36 offers are made for tactical purposes - such procedural behaviour is both encouraged and supported in the interests of promoting settlement of disputes. That said, an offer which is a cynical attempt to manipulate the Part 36 regime and apply pressure on an adversary is unlikely to be effective for such purposes.
15. The burden of proof or persuasion under CPR 36.17(5)(e) rests upon the offeree. Proof of injustice under CPR 36.17(4) is a " formidable obstacle " to an offeree who finds themselves on the wrong side of a judgment: see *Webb v Liverpool Women's NHS Foundation Trust* [2016] EWCA Civ 365; [2016] 1 WLR 3899.
16. The cases decided under CPR 36.17.(5)(e) invariably concern what may be described as a 'very high claimant offer', i.e. an offer involving a very small or negligible discount against the gross value of the claim and/or waiver of accrued interest: see *Telefónica UK Ltd v The Office of Communications* [2020] EWCA Civ 1374; [2020] Costs LR 1461 per Phillips LJ at [49]. I was referred to authorities in which judges have concluded that a very high claimant offer was a genuine attempt to settle the proceedings in the specific circumstances of a case.
17. There is a danger in glossing the words of the rule itself, not least the risk of circularity by reference to whether or not the consequential enhancements in CPR 36.17(4)(a)-(d) will or will not become available in the event that such offer is not accepted and the claimant equals or betters it at trial. Stepping back, however, it is clear that the Part 36 regime incentivises the making (and acceptance) of constructive offers of settlement, i.e. those which can be said to have a meaningful impact upon the chances of avoiding a trial or further consuming curial resources towards trial.

18. The summary in the White Book at 36.17.6 is helpful. I adopt the " broad brush " approach endorsed in that commentary. A trial judge is uniquely placed to operate within such evaluative margin: they will have a feel for how strong the claim was, especially in an 'all or nothing' situation like the present case, and (therefore) how close the successful claimant was to 'losing' or failing to equal or better its own offer.
19. The fact that a judge in another case upheld a 99.7% offer (Rawbank SA v Travelex Banknotes Ltd [2020] EWHC 1619 (Ch); [2020] Costs LR 781) or a 95% offer (Jockey Club Racecourse Ltd v Willmott Dixon Construction Ltd [2016] EWHC 167 (TCC); [2016] 4 WLR 43) or a 90% offer (JMX v Norfolk & Norwich Hospitals NHS Foundation Trust [2018] EWHC 185 (QB); [2018] 1 Costs LR 81) does not inform, still less dictate, how I should approach my evaluation of the Part 36 Offer in the present case. These decided cases provide illustrative guidance, no more."
25. In my evaluation of the present case, the relevant considerations here are as follows. The value of the claim was a relatively small one compared to the value of the counterclaim as originally pleaded, less than 8%. Whilst recognising that counterclaim was pleaded as a set off, the fact pattern and the issues which fell for consideration under the claim and counterclaim respectively were entirely discrete. Whilst the offer did not permit ABM to accept an offer in respect of the claim alone, separate from the counterclaim, it is clear to me that the most obvious way of construing the offer was that it represented an offer to accept c.88% of the value of the claim including interest¹ but allowed nothing for the counterclaim. There is nothing on the face of the offer to suggest it made any monetary allowance, other than nil, for the counterclaim. The statement relied on by Mr Lixenberg, set out above, informs the interpretation that a nil allowance was made.
26. Mr Lewis submits that Matière was right to be confident in its defence on the merits of the counterclaim. I do not agree. A key reason why I disagree is that Matière knew (or should be taken to have known) that the nature of its own conduct was of a type that was likely to place it in breach. The fact that, at the time of the offer, the correct legal basis of the duty had not been set out by ABM should not have played a significant part in its thinking because there was always a risk that that basis could have been improved upon. In any event, at the date of the offer, Matière could not have been so confident about its prospects that the counterclaim would fail that it was worth offering a nil amount in respect of it. An offer of 'nil' in respect of the counterclaim, if accepted, would have amounted to total capitulation.
27. I reach the conclusion that the offer was not a genuine attempt to settle the proceedings to the extent that the proceedings included the counterclaim. On the other hand, it was a genuine attempt to settle the claim. I see no reason why the provisions of CPR 36.17(5)(e) cannot be interpreted flexibly to take account of this distinction in an appropriate case.

28. Having reached the conclusion that the Part 36 Offer was not a genuine offer to settle the entire proceedings but was, instead, only a genuine offer to settle the claim, I remind myself that CPR 36.17(5)(e) requires me to consider all the circumstances of 1 £350,00/£394,944 (being £373,295 plus interest up to 25 April 2022, which I calculate at c £21.6k). the case. The genuineness of the offer is only one of the consequences to be considered.
29. The parties were not agreed as to whether, in the context of the counterclaim, I should be considering all the circumstances of the case by reference to the standard set out in Part 36, as Matière submitted, or by reference to Part 44, as ABM submitted. The difference between them is because Part 36 requires a demonstration of injustice (seen as a formidable obstacle) in respect of the relevant circumstances whereas Part 44 has no such requirement. Mr Lixenberg submitted that, once I had decided that the full consequences of Part 36 should not apply to the counterclaim then the requirements in CPR 36.17(5) should cease to apply to the counterclaim and I should be guided by Part 44 alone in that respect. I do not agree. In my view, I should apply CPR 36.17(5) in the ordinary way. Information
30. I am wholly unpersuaded by Mr Lixenberg's submission that the information available to ABM at the time of the Part 36 Offer is a factor to be taken into account. He prayed in aid that disclosure had not yet happened so ABM could not properly evaluate the extent of dealings between Matière and EKJV to which it was not privy. On ABM's case, it was both reasonable and necessary for ABM to consider disclosure, witness evidence and even to test the evidence at trial before it could evaluate the merits of its position.
31. Whenever a Part 36 Offer is made, the offeree will not have as much information available to it as will ultimately have been available to the Court at the end of the trial process. But that can rarely be a relevant reason in the sense contemplated by CPR Part 36(5)(c). To engage that provision, one would expect the offeree to show why the information unavailable to it mattered to its decision not to accept the offer at the time it was made.
32. ABM's submission fails for three reasons. Firstly, it was surely for ABM to determine the robustness, or otherwise, of its own counterclaim. On the basis of the information it already had, ABM decided to issue a counterclaim having, presumably, evaluated that it was a claim worth pursuing. Its own pleading, supported by a statement of truth, alleged breach, causation and loss. ABM pleaded that case without the information which it now contends was lacking in April 2022 and which it says precluded its ability to determine whether a 'nil' offer was worth accepting. Secondly, shortly before trial, but long after the disclosure which it lacked at the time of the Part 36 Offer, ABM offered to accept £5m in respect of its counterclaim. It is, therefore, fanciful to suggest it might have accepted the 'nil' offer made in April 2022 if it had had access to more information at an earlier stage. Its own offer shows that ABM had a degree of confidence about its counterclaim and, moreover, did not need the trial process to evaluate its prospects. Thirdly, at the time of the Part 36 Offer, ABM already had sufficient information of its own to enable it to consider whether to accept a 'nil' offer in respect of the counterclaim. It was copied in on, or provided by Matière with, email exchanges which indicated EKJV's views on contracting with ABM/Matière JV and concerns

over ABM. It therefore had enough material to evaluate the risks it faced on causation. Further, ABM was able to evaluate for itself the reasons given in the termination letter, without further information from Matière. Yet further, it was ABM alone who was in a position to evaluate that its case may fail because it was never in a position to fund the Scunthorpe factory. Measure of success

33. I now address the point that Matière did not succeed on all the material issues that arose in the case, as reflected in the Court's judgment. At paragraph 27 of Webb, the Court of Appeal approved an observation of Gloster J, as she was, in *HLB Kidsons (a firm) v Lloyds Underwriters* [2007] EWHC 2699 (Comm), in which she said: "[11] There is no automatic rule requiring reduction of a successful party's costs if he loses on one or more issues. In any litigation, especially complex litigation such as the present case, any winning party is likely to fail on one or more issues in the case."
34. In my judgment, it is not enough for ABM to point to its successes at trial in demonstrating the scope of Matière's contractual obligations and breaches by Matière. These were just stepping stones along the way to proving the loss of chance contended for. ABM failed at the one of the last stepping stones, in respect of causation, for three separate reasons. I do not consider it appropriate to divide the case into separate issues of obligation, breach, causation and loss when they all formed part of a single claim for damages for loss of a chance. As Matière point out, this is not a case in which ABM was successful in making recovery on a discrete head of claim or loss, or in defending a head of claim.
35. A further reason for rejecting the suggestion that I should take account of these features was the considerable degree of overlap between the evidence necessary to establish that Matière breached its duty of good faith and that, concurrently, such breaches did not cause the loss contended for. The narrative which occupied much of the judgment addressed both together such that, when it came to causation, not much further elaboration was needed: see [299]. This reflected the position both in evidence and in submissions at the trial.
36. Even if I had been minded to take account of ABM's success in respect of sub-issues, they did not all go in ABM's favour. The case on contractual interpretation which succeeded at trial only did so by reason of a new legal approach developed at trial and ABM did not even succeed in respect of all its breaches. ABM's case on breach also relied on matters which ought to have been the subject of amendment. Its alternative claim for the account also failed in its entirety.
37. Taking into account the two preceding paragraphs, any reduction in costs would not have been anywhere near 70%, as sought by ABM. However, it is not necessary to address any assessment. Conduct
38. Separately, there remains the question of whether Matière's conduct, both in its underlying sense and in respect of its subsequent failure to admit it in the context of proceedings, warrants a reduction in the amount of costs to which it is entitled. ABM's submission is that Matière's conduct, and its pursuit of the denial of breach, occasioned additional legal costs

and fuelled the dispute. It is also said that the Court in any event ought to mark its disapproval of Matière. On 5 October 2023, ABM's solicitors wrote to Matière's solicitors inviting them to admit breach of contract but, on 13 October 2023, Matière's solicitors said they had no intention of doing so.

39. ABM draws to my attention the observations of Foxton J in *ABFA Commodities Trading Ltd v Petraco Oil Company SA* [2024] Costs LR 623 in which he said: "[17] As to the second, there are two reasons why the court may wish to make an order addressing the consequences of dishonest conduct in litigation: to mark its disapproval of that conduct, and to reflect the causative effect of the dishonesty on the length and cost of the trial (*Sulaman v Axa Insurance plc* [2009] EWCA Civ 1331, [17] – [18]. My decision not to enforce the Undertaking to the full extent of Petraco's loss reflected the first of those factors, but not the second. Petraco's dishonest case on its knowledge clearly prolonged the case and occasioned additional legal costs. It also served to fuel the dispute, leading to an understandable sense on VTB Commodities' part that it had been "wronged" and was entitled to recompense."
40. In *Hutchinson v Neale* [2012] EWCA Civ 345 the Court of Appeal stated that there was no general rule that a finding of dishonest conduct by the successful party will replace the usual starting point that costs should follow the event. What is required is an evaluation of the nature and degree of the misconduct, its relevance to and effect upon the issues arising in the trial and its tendency to create an unwarranted increase in the costs of the action to either or both of the parties. That is the approach which I intend to follow.
41. I accept, of course, that it is open to the Court to reduce Matière's costs of the counterclaim to take account of the conduct which the Court has concluded was unacceptable. I did indeed conclude that Matière acted dishonestly and deceived ABM in various ways. It also acted in breach of the duty of good faith. However, in all the circumstances, I have concluded that it is not appropriate for the Court to 'mark its disapproval' of Matière's conduct either in respect of the original narrative or by reason of its failure to admit to it in the subsequent litigation. Whilst dishonesty can never be justified, this conduct was not at the most egregious level. It was, to a degree, caused by the position which EKJV sought to impose upon it. It was also inherent in the nature of the allegations made by ABM that these sorts of issues would have to be investigated. I do not regard this case as one in which Matière's conduct materially fuelled the dispute beyond what it otherwise would have entailed, given the pleaded case against it. As I have also said, there was a good deal of overlap between the evidence of breach (caused by Matière) and the evidence in respect of causation so it is not a case in which the dishonest conduct materially added to the length of the trial process. I accept there will have been a modest increase in the time taken at trial caused by that part of (particularly) Mr Matière's evidence which I did not accept but I do not consider it sufficient to reflect that in any separate way.

42. I do not consider there are any other relevant features to weigh in the scales in considering whether it would be unjust to apply the full effect of CPR Part 36.17(4).
 43. Whilst recognising the formidable nature of the obstacle (see above) I am wholly satisfied that the feature in CPR 36.17(5)(e) is sufficient, in and of itself, to mean that it would be unjust to apply the full effect of CPR 36.17(4) in respect of the Part 36 Offer.
 44. I therefore decline to order that ABM should pay indemnity costs in respect of the counterclaim. Instead, it will be liable to pay costs of the counterclaim on a standard basis, to be assessed if not agreed.
 45. If I were required to determine all the circumstances of the case within the 'routine' context of Part 44 alone (i.e., without facing the "formidable obstacle" posed by the unjustness criterion in CPR 36.17(4)), I would reach the same conclusion that it was not appropriate to make any reduction in the costs to which Matière was otherwise entitled.
 46. In conclusion, in respect of costs, I decide that Matière will be entitled to its costs of the claim on a standard basis up to the relevant date and on an indemnity basis thereafter but that Matière will be entitled to its costs of the counterclaim on a standard basis throughout.
- Other Consequences
47. ABM accepts that Matière is entitled to the 10% uplift on the value of the claim, in accordance with CPR 36.17(4)(d). ABM also accepts that it is entitled to enhanced interest in accordance with CPR 36.17(4)(a). I agree that both of these consequences flow from the reasoning set out above.
 48. ABM does not accept that enhanced interest should be awarded on costs, pursuant to CPR 36.17(4)(c) for the analogous reasons set out above, whereas Matière contends that it should have enhanced interest on all its costs under that provision.
 49. In my judgment, the appropriate course is to adopt the same distinction as that applied above. Thus, enhanced interest on the costs of dealing with the claim will be allowed from the end of the relevant period whereas no enhanced interest on the costs of dealing with the counterclaim will be allowed.
 50. I now turn to the rate of interest. CPR 36.17(4)(a) and (c) provide that, unless it considers it unjust to do so, the Court must order that the claimant is entitled to interest at a rate not exceeding 10% above base rate on both the amount awarded in respect of its claim and in respect of costs. ABM submits that the fact that a rate not exceeding 10% above base rate is provided for does not mean that the Court ought to impose the full extent of that 10%. It submits that a rate of 4% above base rate should be adopted both as regards the sum awarded on the claim and as regards costs of the claim.

51. Matière claims interest at the full 10% over base rate on the basis that there is no reason why it should not be at the maximum amount. Matière submits that this case was outside the norm because ABM had retained money from EKJV which should have been paid to Matière under the arrangement they had.
52. In *OMV Petrom SA v Glencore International AG* [2017] EWCA Civ 195 the Court of Appeal provided some useful guidance. The specified rate of 10% was not a starting point but was the maximum possible enhancement. The objective of the rule has been, in large measure, to encourage good practice. The court has a discretion to include a non-compensatory element but the rate had to be proportionate to the circumstances of the case. Factors might include the length of time between the deadline for acceptance and judgment; whether the defendant (the offeree) took entirely bad points or whether it had behaved reasonably in continuing the litigation; and what general level of disruption could be seen to have been caused to the claimant as a result of the refusal to accept the offer.
53. In *BXB v Watch Tower and Bible Tract of Pennsylvania* [2020] EWHC 656 (QB), Chamberlain J said that the wording of CPR 36.17(4) (“not exceeding”) makes plain that an enhanced rate of 10% above base rate would not always be appropriate and did not imply that 10% was the default position. The applicable rate was a matter for the Court taking into account all of the circumstances. In that case he allowed a rate of 4% above base where the defendant’s conduct could not be said to have been unreasonable other than in refusing to engage in ADR.
54. Focussing entirely on the claim, there is force in a number (but not all) of the points made by Matière. It now seems clear that ABM never really had any defence to the claim. It initially admitted liability (subject to set off) in the sum of £157,241, and closer to trial abandoned its defence to all but £35,000 of the sum claimed. At trial, no meaningful effort was made to defend that balance either. The claim could have been conceded a good deal earlier, subject to set off. There was a mediation on both claim and counterclaim which failed. ABM never made an offer to settle the claim.
55. I doubt that Matière’s case in respect of interest is significantly stronger simply because ABM held onto money from EKJV that should have been passed down. What mattered was that ABM did not pay Matière but retained the money for its own use.
56. In all the circumstances, I conclude that the appropriate rate to award is 7% above base rate on both the principal sum and in respect of the costs of the claim from the expiry of the relevant date.
57. As regards interest on the claim in the period prior to the relevant date, Matière claims interest at a rate of 4% over base rate. ABM did not suggest reasons for not applying that rate. I propose to adopt it.

58. As regards interest on the costs of the counterclaim, which I have said should be paid on a standard basis, Matière claims interest on standard costs at the rate of 2% above base rate. Again, ABM did not suggest reasons for not applying that rate. I agree that is an appropriate rate. Payment on account
59. The last issue concerns Matière's claim for a payment on account of its costs pursuant to CPR 44.2(8). By way of principal sum, it seeks 95% of the total amount of its cost budget amounting to £935,000. In support of this, Mr Lewis points to four matters which I deal with in turn.
60. Firstly, he submits that the cost budget was approved so it is unlikely that Matière would recover significantly less than that amount. I accept that is an important factor because the Court will not depart from the approved budget unless satisfied there is a good reason to do so.
61. Secondly, he points to the claim for indemnity costs and notes that Matière's actual costs were in excess of £1.8m. The claim for indemnity costs is no longer relevant for the reasons given but the amount incurred may, perhaps, be relevant to the level of confidence that Matière will not get less, or much less, than the budgeted amount.
62. Thirdly, he points out that the case was only subject to cost budgeting because the counterclaim had been pleaded at £5m. Had it been pleaded in the sum ultimately claimed, £19m, these proceedings would have fallen outside the cost budgeting regime. Whilst that may be so, it is difficult to see how it impacts the amount that Matière is now likely to recover on detailed assessment.
63. Fourthly, he says that disclosure was more extensive than envisaged at the CCMC. ABM refused an invitation to agree an increase in the budget to reflect this. A request for a split trial of liability and quantum, which would have saved costs, was refused both by ABM and then the Judge. I do not see how these points materially assist in setting the level of the payment on account of costs.
64. Mr Lixenberg accepted that, if the amount is limited to that set out in the cost budget, a percentage of 85 to 90% would be appropriate for standard costs and that 95% would not be unreasonable if the costs were being assessed on an indemnity basis.
65. I conclude that there should be a payment on account of costs in the sum of 90% of the budgeted costs, which I consider is a reasonable payment in all the circumstances.
66. Matière claims interest on those costs as part of the sum applied for by way of payment on account. Taking a broad brush, which accounts for the relative proportion of costs incurred in respect of both claim and counterclaim, I conclude that interest on costs should accrue at the rate of 2% over base rate. Costs of consequential hearing

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67. Neither party specifically applied for the costs of the consequential hearing on 2 July 2025 although ABM had submitted a schedule of costs. On my understanding, the costs of attending a consequential hearing form part of the general costs of the proceedings and, absent any particular reason for making a different order, are subsumed within the general order for costs. I make no separate order. Order
68. Matière has asked that all sums awarded are paid to it within 7 days. ABM made no particular submissions as to timing. I conclude that payment should be made within 21 days of the order to allow time for computation of the interest amounts.
69. The parties are invited to draw up an order reflecting the principles above.
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Prepared on 24 October 2026 · Esheria