Neutral Citation Number: [2023] EWHC 1037 (KB)

Case No: QB-2018-005836

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/04/2023

Before :

SENIOR MASTER FONTAINE

- -

Between :

IEH	**Claimant**
- and -	
John Ross Powell	**Defendant**

- -
- -

John Foy KC (instructed by **Bolt Burden Kemp LLP**) for the **Claimant**
Andrew Davis KC (instructed by **DWF Law LLP**) for the **Defendant**

Hearing date: 13 December 2022

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Approved Judgment

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Senior Master Fontaine :

1. This was the hearing of the Claimant's application dated 10 October 2022 for approval of a settlement of the Claimant's claim and for an order that the Defendant pay the Claimant's costs of the claim and for an interim payment on account of costs. The application was supported by the evidence set out in the application notice, and a witness statement of Cheryl Abrahams dated 30 November 2022 (Abrahams 3). The application was responded to by the Defendant by the witness statement of David Andrew Young dated 9 December 2022 (Young 1). The summary of the procedural and factual background to the claim is taken from these statements and from the other evidence filed.

2. The claim was settled by acceptance of the Defendant's Part 36 offer made on 20 November 2020. The court was able to approve the settlement. The Part 36 offer was not accepted until 27 July 2022, so that the provisions of CPR 36.13.(4), (5) and (6) apply. Although the application notice did not expressly state that an order disapplying the order specified in CPR 36.13 (5) was sought, the hearing proceeded to deal with the application on that basis.

3. The relevant parts of the rule are as follows:

CPR 36.13(4)

Where -

(a) a Part 36 offer which was made less than 21 days before the start of a trial is accepted; or

(b) a Part 36 offer which relates to the whole of the claim is accepted after expiry of the relevant period; or

(c) subject to paragraph (2), a Part 36 offer which does not relate to the whole of the claim is accepted at any time,

the liability for costs must be determined by the court unless the parties have agreed the costs.

36.13(5) Where paragraph (4)(b) applies the parties cannot agree the liability for costs, the court must, unless it considers it unjust to do so, order that -

(a) the claimant be awarded costs up to the date on which the relevant period expired; and

(b) the offeree do pay the offeror's costs for the period from the date of expiry of the relevant period to the date of acceptance.

36.13(6) In considering whether it would be unjust to make the orders specified in paragraph (5), the court must take into account all the circumstances of the case including the matters listed in rule 36.17(5).

> 36.17(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.

4. The Claimant seeks his costs of the action. In order to obtain an order for his costs after the date of expiry of the Part 36 offer made on 20 November 2020 he must demonstrate that it would be unjust to make the order specified in CPR 36.13(5) (b). The Claimant accepts that he has the burden of making that case. The Defendant opposes the application and submits that the usual order specified in CPR 36.13.(5)(a) and (b) should apply.

Factual and Procedural Background

5. The Claimant is a child (DOB 21 February 2008). He is now 14. He was involved in a road traffic accident on 1 September 2016 when he was 8 years old, and suffered multiple injuries, the most serious of which were a femoral fracture to his right leg and a traumatic brain injury. Proceedings were issued on 16 February 2016, a defence was served on 2 March 2018, but subsequently the Defendant admitted liability on 11 June 2018 and judgment was entered for the Claimant on 9 August 2018.

6. Medical reports were served with the Particulars of Claim, namely those of Dr Agrawal, Consultant Paediatric Neurologist dated 26 July 2017 and of Mr Tim Theologis Consultant Orthopaedic Surgeon, dated September 2017. Dr Renee McCarter, Consultant Neuropsychologist, was instructed to assess the Claimant and prepare a condition and prognosis report. Her report is dated 25 October 2017. Dr McCarter prepared a supplementary report dated 5 March 2018 and a supplementary letter dated 7 September 2018.

7. A case management conference took place on 4 October 2018, at which rolling disclosure was ordered and a stay imposed until October 2019. There was a second CMC on 11 December 2019 at which an order was made for the Claimant to serve witness statements and medical expert reports by 11 March 2022. The Defendant was directed to seek any order for permission to obtain their own expert evidence at the next CMC, which was directed to be listed for the first available date after 15 April

2022, but subsequently delayed by agreement between the parties and listed on 18 October 2022, by which time the claim had settled, subject to the court's approval.

8. The Part 36 Offer was made on 20 November 2020. In response the Claimant's solicitors sent an email dated 4 December 2020 requesting that the offer be kept open until 11 March 2022 to give sufficient time to establish the Claimant's likely prognosis and the value of the claim. On 8 December 2020, the Defendant's solicitors responded to say that they "*do not have instructions to leave the offer open, nor to withdraw it after it expires*". The offer was accepted on 29 July 2022.

9. The Claimant lives in a relatively remote part of Morocco with his aunt, grandmother and siblings and attends school in Morocco. His father is originally from Morocco and his mother is of Pakistani Asian heritage. His parents continue to live and work in the UK, but his mother started to spend 6 months of the year in Morocco from 2013 when the children of the family were enrolled in school in Nador in Morocco. During term time they lived with and were cared for by the children's aunt and grandmother, and in the school holidays, primarily the summer school holidays, they returned to the UK. The Claimant's mother has bipolar disorder, which was controlled by medication, but in about October 2021 she stopped taking her medication and was hospitalised. As a result of her mental health difficulties she was no longer able to act as Litigation Friend and, there being no other relative whom it was thought was suitable, the Official Solicitor agreed to act as Litigation Friend and was so appointed on 26 May 2022.

Summary of the Parties' Submissions

Submissions of the Claimant

10. The Claimant was and remains a child. The medical evidence relating to the brain injury from both Dr Agrawal and Dr McCarter in 2017 and 2018 advised that it was too soon to provide a reliable prognosis in respect of the brain injury and that the Claimant should be re-assessed, in 3-4 years' time (Dr Agrawal) and at the ages of 13, 16 or 18, depending upon progress, (Dr McCarter). Dr McCarter also advised that a "*severe brain injury sustained in childhood may result in further latent disability, not evident until later stages in development and higher demands of secondary education come into play*". (Report dated 25 October 2017, para. 6.3). It is agreed that the medical evidence of Mr Theologis is not relevant to the application, as the orthopaedic injuries have stabilised. The Claimant's legal advisors therefore acted reasonably in waiting to obtain updated medical evidence in 2021. In any event, the Claimant lived and was being educated in Morocco, and he could not attend a face-to-face examination until the summer holidays of 2021.

11. It is accepted that reasonableness is not sufficient on its own to meet the test of a costs order being unjust, but is a relevant factor. It is submitted that the effect of the brain injury which will not be fully manifested until a child reaches adolescence and completed puberty, is not a normal risk of litigation.

12. The Claimant's solicitors took all appropriate steps to ascertain the Claimant's condition following the Part 36 offer. They instructed Leading Counsel to advise and obtained that advice on 27 November 2020 . They instructed medical experts to prepare further reports. Draft reports were available to the court when the application

for approval was made, that of Dr Agrawal dated August 2021, a draft supplementary letter received on 5 May 2022 and a draft supplementary report dated May 2022 from Dr McCarter, a draft report of Dr Berelowitz, Child and Adolescent Psychiatrist and a draft report of Dr Price, Speech and Language Therapist dated November 2021. A solicitor from the Claimant's solicitors had a telephone conversation with the Claimant's English teacher on 26 May 2022 (following a visit to the school by the Claimant's solicitor and a French speaking paralegal in November 2019) and held a WhatsApp Call with the Claimant and his sister on 29 May 2022. Counsel's Advice was sought in about June 2022, after receipt of letters from Mr Theologis dated 16 May and 14 June 2022, confirming that injuries associated with the Claimant's bilateral flat feet and everted alignment in both feet were unlikely to be related to the accident. Upon receipt of Leading Counsel's Advice the Claimant's solicitors then considered that they could recommend acceptance of the offer to the Litigation Friend in July 2022.

13. Counsel's Advice in November 2020 had advised that it would be premature to accept the Defendant's offer because of the considerable uncertainty about the effects of the head injury and how it would affect the Claimant's future, was the correct approach. In any event the court would have been reluctant to approve a settlement at that date in the circumstances.

14. The Claimant's academic progress was affected by the pandemic. His school's examinations in June 2020 were cancelled, which meant that the Claimant's advisors did not have the results of such examinations so as to measure the Claimant's academic performance against his peers.

15. The Claimant's solicitors wrote to the Defendant's solicitors on 4 December 2020 explaining why they did not consider that it could be accepted, and asked the Defendant's solicitors to extend time for acceptance to 11 March 2022, when the further expert evidence would be available. They referred to Dr Agrawal's report (see Paragraph 10 above) and stated that they had a draft report from a neuro psychologist suggesting further review when the Claimant is aged 13, 16 and 18. They explained that they proposed to obtain updates from their expert neurologist and psychiatrist in time for the next CMC. They stated that this further expert evidence was required in order to have a better idea of prognosis and to enable them to value the claim.

16. It is submitted that the key authority is *SG v Hewitt* [2012] EWCA Civ 1053 (Costs), where the factual basis is similar and there are similar considerations between that case and the one before the court. In *SG v Hewitt* the claimant was age 6 when he suffered a severe brain injury and the experts felt unable to predict the impact of the injury until the claimant matured. The Part 36 offer was made when the Claimant was aged 12 and accepted two years and four months later when he was aged 14 (the same age as IEH when the offer here was accepted). It was also agreed by the experts that problems may not manifest themselves until puberty /adolescence. The effect of counsel's advice in *SG v Hewitt* was the same as that in this case, and the response to the Defendant's Part 36 offer was as Leading Counsel had advised. The claimant's solicitors in *SG v Hewitt* sought further reports, as here. At [33] of the judgment of Black LJ there is reference to "*three issues which are of importance in the present case*" being:

    i) The implications of the claimant being a patient;

ii) the relevance of reasonableness of the claimant's conduct in relation to the Part 36 offer; and

iii) the problem of uncertainties in the value of the claim.

17. At [36] Black LJ said that the mere fact that proceedings were brought on behalf of a patient would not, "*of itself, always be sufficient to displace the costs protection normally available to a defendant from a Part 36 offer*", but it is relevant. The fact that the claimant is a child or protected party may make it unjust that a costs order is made against him.

18. It is noted that if the claimant is a child, rather not protected party, that is especially important because, if the Part 36 offer is made before puberty/adolescence, there is an added uncertainty in relation to the litigation because it is unpredictable, in the case of a brain injury, what effect that may have, and it is submitted that is not a "normal risk of litigation".

19. At [43] the court held that reasonableness is relevant but not necessarily determinative. It could be a sufficient factor to justify departure from the normal rule, depending upon the facts of the particular case. In the present case it is submitted that the Claimant and his solicitors actually did act entirely reasonably in accepting Leading Counsel's advice. It is further submitted that, unless that advice was negligent, it was reasonable for the Claimant's litigation friend to accept it, and that is a relevant factor.

20. At [45] and [46] the Court rejected the suggestion that because certain events in the litigation could be described as "*the standard contingencies inherent in litigation*", that is necessarily determinate. It was accepted that each case is fact sensitive, but it is said that, in relation to the decision in *Matthews v Metal Improvements* [2007] EWCA Civ 215, that "*It was not just the contingencies of litigation that had led to the plaintiff being in the position that he was in but also the way in which his solicitors had responded to them.*" In the present case, the Claimant's solicitors asked for the offer to be left open until 11th March 2022 by e-mail of 4 December 2020. They also asked the Defendant to extend the costs protection to that date in an e-mail of 19 January 2021. In the meantime they got on with further investigation of the claim and assessing it.

21. The court by order of 11th December 2019 directed witness statements and expert evidence in the fields of Paediatric Neuropsychology and Speech and Language Therapy to be served by 11 March 2022. There was no provision for updating neurology evidence. This deadline was delayed a number of times by orders until 6 August 2022. A CMC was arranged for 18th October 2022. The Defendant had to apply at the CMC if they wished for permission for medical evidence.

22. It is submitted that it is clear from these dates that it was apparent that medical evidence could not be completed before 2022 and the case could not be properly assessed until then. Even then a prognosis may not have been available. The case was to be reviewed at the CMC otherwise the Defendant would have had to disclose any medical evidence by the same date.

23. The court is also referred to paragraphs 51-53, 70-71 77, 82, 85-86 and 92 of the Court of Appeal's judgment in *SG v Hewitt*.

24. It is submitted that there are additional factors which have made the assessment of the value of this claim more difficult; as follows:

    i) The Claimant has made an unexpected and unpredicted improvement in his performance.

    ii) The Claimant attended school in Morocco and was in England only during some of the vacations. The Claimant's solicitors visited Morocco in November 2019 but were given little help by the Claimant's school. They arranged the trip to coincide with a parents evening but this was cancelled a few days before the visit. They were able to meet few of the teachers. A global examination, which would have assisted in assessing the Claimant's academic performance and which was due to be held in June 2020, was subsequently cancelled.

    iii) The pandemic caused some delays and made assessments for the Claimant's performance at school more difficult. Lessons were conducted remotely but there was an inadequacy of computers and telephones for the Claimant and his siblings.

    iv) The litigation friend's mental health deteriorated with the result she was an inpatient in hospital and she made allegations of domestic abuse against her husband (the Claimant's father) with results that the Official Solicitor had to be substituted as a litigation friend.

    v) The Defendant has at no stage disclosed any medical evidence.

    vi) The Claimant's solicitors kept the Defendant's solicitors informed at all stages.

Submissions of the Defendant

25. The Defendant's primary submission is that the reasons advanced on behalf of the Claimant for the late acceptance, namely:

    i) the Claimant was a child; and

    ii) the Claimant acted reasonably in delaying whilst the effects of the injury became clearer;

    are not compelling points, and neither can be made good on the evidence.

26. The Defendant submits there are a number of other authorities as well as *SG v Hewitt*, such as those referred to in the White Book Volume I at pages 1294-5 and 1305-6; in particular the court is asked to note:

    i) *Matthews v Metal Improvements* [2007] EWCA Civ 215: "*the question is not whether the offeree had reasonable grounds for not accepting the offer as if there were some unfettered discretion as to cost, but to consider whether the usual order would be unjust*."

ii) *Downing v Peterborough & Stamford Hospitals NHS Foundation Trust* [2014] EWHC] 4216 (QB): "*There must be something about the particular circumstances of the case which takes it out of the norm*.";

iii) *Smith v Trafford Housing Trust* [2012] EWHC 3320 (Ch), which postdates *SG v Hewitt*, where Briggs J. (as he then was) set out the following principles:

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, and order that the claimant should pay the costs would be unjust: see Matthews.

b) Each case will turn on its own circumstances, but the courts 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 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 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 (judgement on costs) [2012] EWHC 1056 (Ch) at paragraph 16.

d) Nonetheless, the court does not have 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, than the salutary purpose of part 30 6, in promoting compromise and the avoidance of unnecessary expenditure of costs and court time, would be undermined.

iv) *Briggs v CEF Holdings* [2017] EWCA Civ 2363, where §(d) above was cited with approval by the Court of Appeal at [20]. Gross LJ went on to state at [36]:

> "In my judgment, it is very important not to undermine the salutary purpose of Part 36 offers. It is important too that in considering often attractively advanced submissions as to uncertainty the court should not be drawn into microscopic examination of the litigation details. It is true that every case in this area is fact-specific but the important point is that there is a general rule which emerges from Part 36, namely, that if the offer is not accepted within time then the claimant bears the costs of the defendant until such time as the offer is accepted. If, of course, the offeree can show injustice, then a different situation will prevail - but it is up to the offeree to show injustice, not simply that it may have been difficult to form a view as to the outcome of the litigation. The whole point of the

> Part 36 offer is to shift the incidence of risk as to costs onto the offeree. As observed in the note in the Civil Procedure (set out above), it is important not to undermine that salutary purpose. Nothing in these observations is in anyway at odds with *SG v Hewitt*. For my part, with respect, *SG v SG v Hewitt* was a very clear case on the other side of the factual line. It was a very extreme case concerning brain damage to a small child. That is a very different situation from that prevailing here where, as one of the contingencies of litigation, it was perhaps difficult to work out how it might go"

27. The Defendant submits that is of some relevance because first, it was a case regarding prognosis and secondly, it is plain from his analysis that Gross LJ was looking for something out of the ordinary outside the ordinary risks of litigation and it is plain that the risks of prognosis were part of the "*uncertainties in litigation and the usual contingencies of litigation risks*": see [38].

28. The Defendant submits that the court should exercise caution in relation to the fact that the Claimant is a child. It is submitted that it is a relevant factor but not a defining factor; see [36] of *SG v Hewitt*. Arden LJ said at [78]:

> "The fact that the claimant is a child is not in my judgment in general a strong enough factor of itself because the child has the protection of a litigation friend and approval by the court of any settlement."

29. It is submitted that the views of Pill LJ in *SG v Hewitt* appear to differ from the approach of the other two Lord Justices and from the later cases, and must be approached with caution. Further, "the contingencies of litigation" must be seen in the light of subsequent cases.

30. It is submitted that when applying the authorities to the facts of this case, the facts of *SG v Hewitt* do not help the court because the facts in *SG v Hewitt* were far more extreme, as there was advice that a firm prognosis could not be given until the Claimant had attained the age of 16, whereas the Claimant's own evidence here was that the trajectory could be considered at the ages of 13, 16 and 18. The Claimant was effectively 13 at the date of the offer; The offer was accepted before either age 16 or 18 so those ages are irrelevant to the issue.

31. In any event it was clear before the acceptance of the offer that the Claimant was doing very much better than might have been expected as:

    i) the Claimant was not at a special needs school, he was trilingual, his educational achievements were above those of his peers and the results of neuropsychological testing were average;

    ii) the witness statements taken in early 2020 all demonstrate clear improvements in the Claimant's cognitive and physical capability;

    iii) a year before the offer there was clear evidence that the Claimant was doing well, and better than his peers.

iv) the response to the offer was to rely on evidence from 2017, three years earlier, suggesting reassessment in July 2020 or 2021; the former date had already passed.

32. With regard to the Claimant's reliance on the advice of Leading Counsel in November 2020, the Defendant submits as follows:

i) Leading Counsel can only have been advising on the evidence before him (which the Defendant's Leading Counsel has not seen);

ii) In considering whether the position is unjust, the court must consider how the expert evidence changed after the offer, as to which the following is relevant:

a) there is no brain injury expert evidence postdating April 2020, seven months before the offer;

b) there is little orthopaedic evidence post the offer; only the letters from Mr Theologis which it is agreed are irrelevant; in any event that is evidence that could have been sought before 2022.

33. There is nothing which takes this case out of the ordinary and there is no new or material evidence which substantially or materially changed the position after the offer was made. There is no explanation given as to why no steps were taken in 2020 or early 2021. There is a complete absence of steps for the whole of 2020 and only the evidence of Mr Theologis is referred to after that date. All the other expert and other evidence predates the offer. The improvement in the Claimant's performance occurred before the offer: see Young 1.

34. The fact that the Claimant was in Morocco does not assist because the Claimant's solicitors must take their client as they find him and make appropriate arrangements. In any event the evidence does not disclose any attempt to take instructions in the period immediately after the offer. The other factors relied upon are irrelevant namely:

i) the Claimant's mother's deterioration in mental health, as this took place 11 months after the offer;

ii) there is no evidence that the pandemic made a material difference in this case nor is there evidence of the Claimant relying on the pandemic at the time, or indeed taking steps to take instructions within time. This does not take the case out of the ordinary because it affected many claims and it made no difference to determining the Claimant's prognosis in late 2020;

iii) It does not assist the Claimant that the Defendant has not served medical evidence because the Claimant has seen fit to accept the offer without the Defendant having served medical evidence.

Discussion

35. It is apparent from *SG v Hewitt* at [22] and [29], and from the rule itself, that the factors set out at CPR 36.17(5), together with all the circumstances, constitute the test

that the court must apply in determining whether it would be unjust to make the usual order.

36. It is worth noting Black LJ's cautionary words in *SG v Hewitt* at [47]:

> "That a feature such as this had the capacity to alter the outcome underlines just how fact sensitive costs decisions of this kind are and how difficult it is to determine one case by comparing it with another. The defendant rightly invited us to be careful in reaching our decision that we did not condemn the courts to intensive investigations in every Part 36 case as to how the parties should have approached an offer; I would be equally resistant to encouraging a time consuming practise of citing authorities on costs for the purpose of persuading courts to follow decisions on the facts as if they were precedents……. I would therefore hope that a firm distinction is made between, on the one hand, principle and guidance which can be valuably transported from one case to another and, on the other, consideration of the individual facts which cannot."

37. That was echoed by Gross LJ in *Briggs* at [36] as set out above. I have therefore avoided where possible analysis of the facts in other authorities, concentrating on the principles referred to and the facts in this case.

38. With regard to the factors enumerated in CPR 36.17(5), The position in relation to this case is as follows:

a) the terms of the offer were straight forward;

b) the offer was made at a relatively early stage in proceedings; the first case management conference was held on 18th October 2018, there was a stay in proceedings until 3rd October 2019 to await views on prognosis, and a second CMC on 11th December 2019, at which witness statements and medical expert reports were ordered to be served by the Claimant by 11th March 2022. The next CMC was listed on 18th October 2022, by which time the claim had settled.

c) The information available to the parties at the time when the Part 36 offer was made is relevant and is considered in more detail below;

d) The conduct of the parties with regards to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated is relevant and is considered in more detail below;

e) it is accepted by both parties that the offer was a genuine attempt to settle the proceedings.

39. The circumstances that are relevant to the consideration as to whether it would be unjust to make the order specified in rule 36.13 (5) in this case, are, in my judgment as follows:

i) the fact that the Claimant is a child;

ii) whether the litigation friend had sufficient evidence to enable an informed decision to be made in respect of the offer in November/December 2020;

iii) the particular factual circumstances relating to the Claimant, namely the fact that he lived and was being educated in Morocco, the effect of the pandemic and the necessity for appointment of a new litigation friend;

iv) whether the approach that the Claimant's solicitors took in responding to the offer was reasonable;

v) the Claimant's conduct in the litigation;

vi) the fact that the Part 36 costs regime is intended to encourage settlement and discourage disputes on costs.

The Claimant's Age and its Relevance

40. In *SG v Hewitt* at [36] the court addressed the approach of Stanley Burnton J. in *Matthews* towards this factor. Black LJ said:

> "….the court is, of course, obliged to consider all the circumstances of the case and the fact that a claimant is a patient/protected party or child differentiates his case from the usual case of a competent claimant and cannot just be ignored….. in *Matthews*, these considerations were not such as to disrupt the normal rule, but that does not mean that the implications of the claimant being a child or protected party may not be such in other cases as to make it unjust that a costs order is made against him."

41. Commenting on the judgment of Stanley Burnton J. in *Matthews*, Pill LJ said in *SG v Hewitt* at [92]:

> "Qualified in that way, as they are, I do not disagree with those statements but would respectfully say that, in their application, both require some explanation. To ignore the lack of capacity of the claimant and to downplay the reasonableness of the conduct of his legal advisors as relevant factors will in this and many other cases divert the court from the requirement to do justice on the particular facts."

42. The Claimant's date of birth is 21.2.2008, so he was 8 and a half at the time of the accident. At the date of the offer he was 12 years and 9 months old. Dr McCarter gave advice in a letter dated 7th September 2018. She stated that:

> "IEH presents as a boy who has suffered neuro psychological impairments of a nature consistent with his brain injury…… IEH has sustained impairments in the verbal sphere, specific declines in his literacy and written language capacity, slowed processing speed and attention deficits. His behaviour/personality has very markedly changed with impulsivity, disinhibition and recklessness. Academically his

> standing has measurably dropped. Given the timing of his injury and the potential for his brain damage to negatively interact with development overtime, he is at risk of increasing problems in education and social-behavioural function. He will need appropriate management and intervention. It is not possible to provide a firm prognosis for his final outcome at this stage and we will have to monitor his development and review the situation later. Useful time points for assessing the trajectory of development, and for helping to predict long term outcome and future needs, are at the ages of 13, 16 and 18 years although in some cases the outcome remains unclear until some years thereafter." (Emphasis added)

43. The Claimant was seen in Morocco by Dr James Tonks, Paediatric Consultant Clinical Neuropsychologist and Clinical Psychologist in 2019 when the Claimant was aged 11. Dr Tonks states in his Initial Assessment Report dated 7 August 2019 at §25 page 23:

> "[IEH] is a very pleasant young man, and I was really impressed by his dedicated family. I am wondering how his brain injury will impact upon his development as he crosses the threshold between childhood and adolescence. Especially given the nature of his injury. I consider that it would be important to ensure that the family are supported. They could face various challenges in the coming years."

44. The fact that a Claimant is a child may not always be relevant to an issue under CPR 36.13(5), but in this case the relevance is as stated in the medical evidence, that the long term effects of a traumatic brain injury usually cannot be known until a child reaches and/or passes through puberty and adolescence.

45. I note that the Court of Appeal in *SG v Hewitt* at [49] and [71] rejected the conclusion of the judge at first instance that the uncertainty of the claimant's developing condition and prognosis was "*simply one of the ordinary contingencies of litigation*". The Court of Appeal also recognised this in *Briggs,* where Gross LJ stated at [36]:

> "……..As observed in the note in the Civil Procedure (set out above), it is important not to undermine that salutary purpose. Nothing in these observations is in anyway at odds with *SG v Hewitt*. For my part, with respect, *SG v Hewitt* was a very clear case on the other side of the factual line. It was a very extreme case concerning brain damage to a small child. That is a very different situation from that prevailing here where, as one of the contingencies of litigation, it was perhaps difficult to work out how it might go……"

46. That is confirmed in the Claimant's case by Dr McCarter's evidence. That is sufficient in my view to take the case "*out of the norm*" (as referred to in *Downing*, White Book Vol. I Note 36.17.5). It also, in my view, would point strongly in favour of injustice if the usual order as to costs were applied. This is because it is not the Claimant's fault that he sustained the accident when a child, and has to wait to pass

through puberty before the long term effects of his injury can be assessed with more certainty, nor is it "a normal contingency of litigation". With regard to the reference to Arden LJ's comments in *SG v Hewitt* at [78], (cited above), it is also not the litigation friend's fault that this is the case, and the litigation friend, in exercising her duty to protect the child's interest, could not be expected to accept the offer in the light of the current medical evidence in November 2020 and the advice given by Leading Counsel.

47. I note that, although I recognise the caution indicated in the authorities against applying the facts of one case to another, this was a factor, as was the requirement for approval to be obtained, that all members of the Court of Appeal in *SG v Hewitt* accepted amounted to circumstances which made it unjust not to depart from the general risk-shifting rule in Part 36: see Black LJ at [70] – [72], Arden LJ at [77] and Pill LJ at [82] – [86].

Whether the litigation friend had sufficient evidence to enable an informed decision to be made in respect of the offer in November/December 2020

48. Another report was obtained from Dr McCarter dated 19 March 2019, (by which time the Claimant had reached the age of 11), commenting on translated school summaries from the Claimant's Moroccan school which covered the years 2014-15 to the first semester of the Fifth elementary year 2018-19. Dr McCarter repeated her previous view that the Claimant had been a generally above average student prior to the accident falling below the class average in the year post injury (third elementary school year), but in the years post injury his personal strengths changed, but he was still above class average in language subjects Arabic and French and was strong in Islamic education. Her view was that his brain injury had affected his educational progress. With regard to the updated records she noted that although in the year following his injury he had substantial absences from school which she assumed related to his recovery from the injury following his first period of recovery his school attendance has returned to excellent levels with zero absenteeism. She noted that the Claimant was not quite as far behind his classmates as he was in the first post injury year of recovery and seemed to be largely on a par with others in terms of his final overall average score. But she noted that he had not shown the superiority to many of his classmates that he showed pre-injury. She noted also that he consistently attains lower scores in his understanding of what he has read compared to his general reading skills. She concluded that there was some evidence that the Claimant was regaining some ground academically and reverting to his pre injury profile of strengths and weaknesses in many areas, though he had not regained the general level of superiority over his classmates that pertained preinjury. She made an assumption on the evidence that the Claimant has persistent difficulties in the language domain consistent with his brain injury, and signs of acquired language impairments or dysphasia. She noted with approval the involvement of a case manager, a speech and language therapist and a paediatric neuropsychologist, and stated that she hoped a full treatment management and consultation plan would follow.

49. In a letter dated 26 April 2020 when the Claimant was 12, Dr McCarter encouraged the use of IT solutions to deal with the Claimant's acquired dysgraphic problems. She noted that certain IT and communication systems are useful for supporting individuals with acquired brain injury.

50. There are also reports on condition and prognosis from a consultant paediatric neurologist, Dr Agrawal, dated 26 July 2017, and of Mr Theologis consultant in orthopaedic surgery dated 29 September 2017.

51. The Claimant's solicitors had obtained further evidence when they visited the Claimant in Morocco from 24 to 26 November 2019, in order to interview his teachers about his progress and obtained copies of his education records for disclosure (because previous attempts to obtain the documents had proved unsuccessful). Although an expected parents' evening had been cancelled, they had meetings with the School director and several subject teachers.

52. I note that the authorities make it clear that simply because a Claimant, or those advising them, has acted reasonably, is not sufficient, on its own, to make the usual order in CPR 36.13 (5) unjust, but it is of relevance when considering all the circumstances, see *SG v Hewitt* at [43].

53. In my view it was appropriate for the Claimant to refuse to accept the Part 36 offer within 21 days on the evidence then available. The Claimant was aged 12 at the date of the offer (not effectively 13 as the Defendant puts it). The Claimant reached the age of 13 in February 2021, the first age at which Dr McCarter had advised reassessment. However, the Claimant's solicitors would have had to obtain further evidence and arrange for the Claimant to be examined by Dr McCarter and Dr Agrawal before a further report could be commissioned. At the time that the offer was made they were working towards obtaining updated evidence for service on 11 March 2022, when the Claimant would have been 14, but would have been, (and was in fact) aged 13 at the date that he was further examined by the medical experts (see Paragraph 54 below).

54. I consider it extremely doubtful that the court would have been able to approve the Claimant's acceptance of the offer in late 2020, on the basis of the evidence as it was, and it would have been most likely that the approval hearing would have been postponed and directions given to obtain updated factual and expert evidence. That is not the only relevant factor, but as in *SG v Hewitt*, it is relevant to the question of injustice: see [67] – [69] where the court concluded that the judge below had erred in not treating this as a relevant factor.

Reasonableness of the Claimant's conduct following refusal of the offer

55. The Claimant's solicitors took the following steps after receipt of Counsel's opinion dated 27 November 2020, which advised against accepting the offer at that stage:

    i) Obtained some documentation from the Claimant's school, which although appeared incomplete, they concluded was all they were likely to be able to obtain as there seemed to be only limited documentation, and what was provided was "random and disorganised";

    ii) Taken a witness statement from the Claimant's after school tutor;

    iii) Obtained a letter from Dr McCarter dated 16 April 2021 in which she confirmed that she supported the purchase of appropriate software and

hardware accessories to enable the Claimant to complete school work, in class and at home using his own dedicated laptop.

iv) Had a telephone call with the Claimant's English teacher in Morocco on 26 May 2021

v) Obtained a second [draft] report from Dr Agrawal, Paediatric Neurologist, dated August 2021 after seeing the Claimant with his mother on 21 August 2021.

vi) Arranged for a report from a speech and language therapist, Dr Katie Price, following an assessment of the Claimant on 6 September 2021, which concluded that the Claimant had made some good recovery in his communication skills since the accident, but continued to have some difficulty with language abilities, particularly in the area of receptive language processing. It concluded that his speech was intelligible, if occasionally slightly slowed and slurred by a mild motor coordination deficit, and he had some good social communication skills. It was recommended that he would benefit from some regular, although not intensive, input from speech and language therapy intervention.

vii) Arranged for the Claimant to be interviewed remotely by Dr McCarter via video link from Morocco on 29 and 30 July 2021 which enabled Dr McCarter to provide an updated draft report dated May 2022. In that draft report she stated:

> "7.2 The updated documents to 2020 including the lay witness statements suggested that the alteration in character, behaviour and temperament persisted. Some slight improvements in his condition were relayed to Dr Tonks in 2019 but the position and concerns were largely as reported in the immediate post injury phase.
>
> 7.8 My observations of IEH in 2021 nonetheless also indicated a more cooperative boy with greater tolerance and perseverance than in 2017, but some tendencies to expediency and rule breaking if he thought he would getaway with it. Some interrupting and noisy behaviour in the home was noted.
>
> 7.27 **Conclusion on progress:** a tentative conclusion drawn from the evidence as a whole is that there has been recent improvement and settling of some of the labile, disinhibited, and defiant behaviours that appeared following his injury. A sudden late improvement is unexpected in cases of severe childhood brain injury.
>
> 7.40. This has occurred at a point in time just before IEH entered puberty. Whether it will be maintained over the course of adolescence remains to be seen.

> 7.41. The Claimant is now entering adolescence. This is the period of final maturation of the brain and the time at which the most rapid developments in higher level thought, executive and adaptive function, and social and communication competence take place. These capacities are key to success as an autonomous, independent and competent member of adult society, to the success of interpersonal relationships, the maintenance of good mental health and they substantially contribute to ultimate educational success and employment outcome."

Dr McCarter had some reservations as to the Claimant's progress as he passed through adolescence into adulthood, but was able to conclude:

> "7.47 On the balance of probabilities, on the current evidence, it is my opinion that his final capacities will have been capped below the pre-injured potential but probably not to the degree that he will be unable to obtain some useful qualifications and find remunerative employment".
>
> (There is no evidence as to why there was such a delay between the Claimant's examination by Dr McCarter and her draft report).

viii) Following receipt of Dr McCarter's draft report, in the light of her conclusions, obtained a report from Dr Mark Berelowitz, Consultant Child and Adolescent Psychiatrist, dated November 2021. Having seen the Claimant together with his mother at the offices of the Claimant's solicitors on 17th August 2021. Dr Berelowitz stated:

> "g. When I first saw [IEH] I thought it would be desirable to review [IEH] in mid-adolescence, because any significant deterioration ought to have emerged by then. In fact the opposite seems to have applied, and he has improved significantly.
>
> e…. However, and to my surprise, he has improved significantly, relatively recently. I cannot readily explain the improvement and it is not yet clear that it is going to be sustained. At minimum we need more time to lapse before we conclude that his condition as remitted fully."

Dr Berelowitz also concluded that the Claimant did not need any additional support based on his presentation when he was seen in August 2021, and on his and his mother's preferences. He also concluded that although when he had seen the Claimant previously he had fulfilled the criteria for disability under the Disability Discrimination Act 1995, based on the description of his current state in August 2021 he no longer met those criteria.

ix) On 29 May 2022 the Claimant's solicitors had a WhatsApp call to the Claimant's elder sister (SSEH) and to the Claimant in Morocco. (It is not clear from the evidence why this did not take place earlier).

x) Leading Counsel had a conference with Dr McCarter, date not provided, but presumably after her draft report was received.

xi) On 16 June 2022 Leading Counsel for the Claimant, armed with this information, was able to provide an opinion advising acceptance of the Defendant's offer.

56. Thus, the factual and medical evidence available by the end of May 2022 demonstrated a significant improvement from what appeared originally to be a significant head injury, but there was still some uncertainty about the prognosis for the Claimant.

57. My view is that it was reasonable for the Claimant solicitors to take the steps that they did after the Part 36 offer was made, given the Claimant's age at the date when the offer was made, and the uncertain prognosis in the medical reports available at that date. It is not in dispute that the long term effects of traumatic brain injury suffered by young children are often not known until after the child has gone through puberty and that is confirmed by Dr McCarter's report of 2017, her draft report of May 2022 and Dr Berelowitz's report. I do not accept that the Claimant's legal advisors would or should have known in November 2020 what the long term prognosis was likely to be at that date. Even if it were the case that the Claimant was not likely to recover further after November 2020, the Claimant's legal advisers were in no position to know that in November 2020, and not at all unless they obtained updated medical and factual evidence. But in any event it is apparent from the evidence above that the Claimant made a significant and (according to Dr Berelowitz and Dr McCarter) unexpected, improvement between the date of his last assessments in 2017 and mid 2021, when most of the further factual and medical evidence was available.

58. I conclude that the steps taken by the Claimant's solicitors following their request for an extension for acceptance of the Part 36 offer were reasonable and proportionate. However, that conclusion is subject to my comments about conduct, below.

The Particular Factual Circumstances relating to the Claimant

59. The Claimant lived in Morocco during the school terms, which made it more difficult to obtain some of the factual evidence, and that obtained from the school was less than satisfactory. Nonetheless I do not consider that this was a relevant factor in making a decision as to whether to accept the offer in 2020, or whether the offer could have been accepted any earlier. (save for the travel difficulties associated with the pandemic; see below).

60. Likewise, the pandemic made travel more difficult, both for the Claimant's solicitors and for the Claimant coming to England for medical assessments. The evidence in the application notice states that the Claimant usually returned to the family home in England for school summer holidays, which would not have been possible in 2020. This would also have meant that the Claimant's mother would not have been able to provide evidence that might have been expected about the Claimant's progress during

that period. Dr McCarter's report of May 2022 at para.5.2 states that the Claimant's mother had not seen the Claimant for approximately a year before the video meetings on 30 July 2021. However, the Claimant did come to England in the summer of 2021 and attended medical appointments with Dr Berelowitz and Dr Agrawal in August 2021. Dr McCarter carried out a psychometric assessment of the Claimant by video link in July 2021.

61. There is evidence about difficulties experienced in 2020 (see email from Claimant's solicitors to Defendant's solicitors dated 26 October 2020 Exhibit DY 1.4). There is evidence that the Claimant's performance at school had deteriorated in 2020 because of difficulties associated with the pandemic (email from Claimant's solicitors to Defendant's solicitors dated 4 December 2020 (Exhibit DY 1.4). That supports the position that it would not have been realistic or sensible to obtain updated medical evidence in 2020. In addition the Claimant was only 12 in 2020, and Dr McCarter had said in September 2018 that the earliest point for " *assessing the trajectory of development, and for helping to predict long term outcome and future needs*" would be at age 13, and that "*in some cases the outcome remains unclear until some years thereafter*." In any event, in 2020/2021 the Claimant's solicitors were working towards the court ordered timetable for service of witness statements and further medical evidence by 11 March 2022.

62. The necessity to obtain the appointment of a new litigation friend following the decline in the mental health of the Claimant's mother, and the allegations made against the father of domestic abuse, which meant that it was not appropriate for him to take on that role, caused some delay. The Claimant's mother informed the Claimant's solicitors on 18 October 2021 that she had been taken to a mental health facility, and was able to speak to a nurse at the hospital. She was sectioned under the Mental Health Act 1983 on 14 November 2021. After making investigations as to whether any other family members could take over the litigation friend role, and concluding that this was not possible, the Claimant's solicitor approached the Official Solicitor as a last resort on 6 December 2021. The Official Solicitor confirmed that they would act as litigation friend for the Claimant on 14th April 2022, and the court formally appointed the Official Solicitor to act on behalf of the Claimant on 26 May 2022 (Abrahams 3 §§ 29-34). However, there is no evidence that this issue caused delay in obtaining the witness statements and updated medical reports.

Conduct

63. Rule 36.17(5) (d) contains one of the factors that the court must take into account when deciding whether it would be unjust to make the order in rule 36.13(5), namely:

> "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;"

64. Unfortunately, none of the information relating to steps taken and evidence obtained following the offer, referred to in Paragraph 55 above, which was provided to the court in a privileged bundle for the approval hearing, was provided to the Defendant's solicitors, nor were any of these steps or evidence mentioned in Abrahams 3 or Leading Counsel's skeleton argument for the hearing of the application. When I read the Defendant's evidence and their Leading Counsel's outline submissions on the day

before the hearing I realised that the Defendant was unaware of this evidence. I accordingly sent an mail to the Claimant's solicitors on 12th December 2022 as follows:

> "I have now read the Defendant's Outline Submissions in relation to the costs issue listed to be heard at the approval hearing tomorrow, received this morning from Mr Andrew Davis KC. It is apparent that the Defendant relies on there having been no new evidence in relation to the Claimant's prognosis since the Part 36 offer was made in November 2020. It therefore appears that the Defendant is unaware of the fact of the further draft reports from experts and the further inquiries made of the school and lay witnesses. I appreciate that privilege has not been waived in respect of the evidence obtained after the Part 36 offer was made, but the fact of such evidence being obtained is relevant to the determination of the application to be heard tomorrow, and I will need to know the position as to whether the Defendant has been informed of this before I can determine it."

65. I sent a copy of that e-mail to the Defendant's solicitors at 7:40 am on 13 December 2022, the day of the hearing. At 5.31 pm on 12th December 2022, after receipt of my email, the Claimant's solicitors sent to the Defendant's solicitors the following documents:

> Note of telephone conversation with the Claimant's English teacher, dated 26.5.22
>
> Note of WhatsApp call with the Claimant and his sister, SSEH, dated 29.5.22
>
> Draft Report of Dr Shakti Agrawal, Consultant Paediatric Neurologist, dated August 2021
>
> Draft Supplementary Report of Dr McCarter, Consultant Clinical Neuropsychologist, dated May 2022.
> However, this was only a limited part of the information that I have referred to above. No explanation has been provided to the court for the failure to provide this information.

66. Young 1 at §§62-63 confirms this lack of disclosure as follows:

> "62. At the time of preparing this witness statement, I have received no further medico-legal evidence other than those reports served with proceedings and the short letter from Dr McCarter [dated 9th September 2018]…..
>
> 63. I assume that Leading Counsel for the Claimant has advised approval of the settlement based on the same or similar evidence as was available to us when the Part 36 offer was

> made - some four years post accident. In my experience of brain injury and other personal injury claims, claimants have often reached a point of stability before that period after the accident."

67. The result of this failure to disclose relevant evidence has been that the Defendant has approached the application without knowledge of crucial information. The failure of the Claimant's solicitors to provide this information to the Defendant's solicitors, both as a matter of reasonable conduct to keep the Defendant informed as to the steps being taken following receipt of the offer, and as a failure to serve such evidence in good time before the hearing of the application, is conduct that is relevant both to the decision I make on the application and to the costs of the application. If the Claimant's legal advisors had concerns about disclosing privileged documents to the Defendant prior to the approval hearing they should have asked for the approval to be heard first, and separately, from the application to disapply rule 36.13 (5).

68. I note also that this is apparently not the first time that the Claimant's solicitors have failed to provide information to the Defendant. Exhibited to Mr Young's witness statement is correspondence between the parties. An email dated 3 October 2018 expresses concern about not having received "*sufficient information with which we and they [the insurer client] can consider the Claimant's ongoing position*", and "*I have to reiterate our concerns in the hope that there can be greater cooperation in future*." It was stated that there had been "*no disclosure to date and no compliance with the Rehabilitation Code*". The Defendant's note for the CMC on 4 October 2018 also references the lack of disclosure and lack of co-operation in relation to an interim payment request from the Claimant. Young 1 at §4 states that an updated bundle for the application and approval hearing was not served until 8 December 2022, two and a half working days before the hearing, which included expert evidence that Mr Young had not previously seen, and a further witness statement from Ms Abrahams dated 30 November 2022, not served with the application notice.

The Purpose of the Rule 36 Regime

69. I take note of the importance of the normal rule in achieving certainty, as referred to by Black LJ in *SG v Hewitt* at [26]. I also am cognisant of the caution advised in the authorities as to the high hurdle that is considered appropriate for a Claimant to come within the provisions of CPR 36.13 (5), described as a "*formidable obstacle*" in *Smith* at [13(d)]. Nevertheless, the Part 36 regime recognises that the application of rule 36.13 (5) has the potential to cause injustice, and provides a mechanism for avoiding any injustice in rule 36. 13(6), in appropriate cases.

70. For all the reasons set out above, I have concluded that it would be unjust to the Claimant to make an order under rule 36.13 (5)(b). The costs incurred during the period of delay between September 2021 and May 2022 will be subject to the scrutiny of the Senior Courts Costs Office on detailed assessment.

71. However, it may be appropriate to make an order that the Claimant should not receive all his costs for the entirety of the period following the expiry of the Part 36 offer, because of the effect of the conduct issues. Because I have not heard full submissions from either party in relation to the conduct issues, I reserve my decision as to the extent to which such conduct should affect the terms of the order to be made, both as

to the costs of the action following the expiry of the Part 36 offer, and the costs of the application, to the handing down of this judgment.