Neutral Citation Number: [2024] EWHC 650 (KB)

Case No: QB-2021-001156

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/03/2024

Before:

MRS JUSTICE HILL DBE

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Between:

CHRISTOPHER BELL	**Claimant**
- and -	
COMMISSIONER OF POLICE OF THE METROPOLIS	**Defendant**

(No 2: Consequential matters)

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Stephen Simblet KC and Stephen Clark (instructed by **Bindmans LLP**) for the **Claimant**
Adam Clemens (instructed by **Directorate of Legal Services, Metropolitan Police**) for the **Defendant**

Written submissions: 21 and 28 February 2024 and 1 March 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 21 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE HILL

Mrs Justice Hill DBE:

Introduction

1. By a claim issued on 30 March 2021, the Claimant brought claims under the Human Rights Act 1998 ("the HRA"), s.6 for a breach of his right to respect for family life under Article 8 of the European Convention on Human Rights and in negligence. His claims arose out of the abduction of his 3-year-old son, ROC, by his former partner, ALK, on the afternoon of 26 September 2013. ALK took ROC to Brazil and has not returned with him since, such that the Claimant's relationship with his son has been irreparably damaged. The Claimant contended that not only did the Defendant's officers fail to act, but they assisted and enabled ALK in carrying out the abduction

2. By a judgment handed down on 21 February 2024 with neutral citation reference [2024] EWHC 379 (KB) ("*Bell (No. 1)*"), I upheld both the Claimant's claims and ordered that the Defendant pay him **£137,999.49** in damages. This sum comprised (a) £28,000 for non-pecuniary loss; (b) £76,399.49 for past pecuniary loss; and (c) £33,600 for further past and future pecuniary loss.

3. This judgment addresses issues relating to consequential matters that were the subject of post-judgment written submissions. Neither party has contended that a further hearing would be proportionate and I agree that these issues can fairly be determined on the papers.

The parties' approach to settlement prior to trial

4. I have now been provided with a comprehensive bundle of without prejudice correspondence.

5. This makes clear that the Claimant made two Part 36 offers prior to the trial of his claims. These were made on 30 August 2019 (in the sum of £95,000) and 17 June 2020 (in the sum of £50,000).

6. The correspondence also indicates that the Claimant invited the Defendant to consider sensible settlement of the claim on several occasions, but that the Defendant failed to engage in settlement in any meaningful way; and made no offers of his own.

7. The Claimant became eligible for civil legal aid during the course of the proceedings. Accordingly both parties were publicly funded. The Defendant's budgeted costs were £129,129.80; and the Claimant's were £262,167.80, although both parties are likely to have exceeded these budgeted sums.

The issues

8. In light of the two Part 36 offers the Claimant obtained judgment against the Defendant that was "at least as advantageous" to him as his two offers, thus bringing his case within CPR 36.17(1)(b).

9. CPR 36.17 continues as follows in material part:

> "**Costs consequences following judgment**

36.17

(4)…where paragraph (1)(b) applies, the court must, unless it considers it unjust to do so, order that the claimant is entitled to—

(a) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;

(b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;

(c) interest on those costs at a rate not exceeding 10% above base rate; and

(d) provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below to an amount which is—

(i) the sum awarded to the claimant by the court; or

(ii) where there is no monetary award, the sum awarded to the claimant by the court in respect of costs—

Amount awarded by the court	Prescribed percentage
Up to £500,000	10% of the amount awarded
Above £500,000	10% of the first £500,000 and (subject to the limit of £75,000) 5% of any amount above that figure.

(5) In considering whether it would be unjust to make the orders referred to in paragraphs (3) and (4), the court must take into account all the circumstances of the case including—

(a) the terms of any Part 36 offer;

(b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;

> (c) the information available to the parties at the time when the Part 36 offer was made;
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> (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
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> (e) whether the offer was a genuine attempt to settle the proceedings.
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> (6) Where the court awards interest under this rule and also awards interest on the same sum and for the same period under any other power, the total rate of interest must not exceed 10% above base rate".

10. The Claimant's post-judgment submissions sought payment of:

    (1) Enhanced interest on the Claimant's damages under CPR 36.17(4)(a);

    (2) An additional sum under CPR 36.17(4)(d);

    (3) Costs on the indemnity basis under CPR 36.17(4)(b) and enhanced interest on those costs under CPR 36.17(4)(c); and

    (4) A payment on account of 90% of his budgeted costs.

(1): Enhanced interest on the Claimant's damages under CPR 36.17(4)(a)

11. Under CPR 36.17(4)(a), the Claimant is entitled to "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".

12. The Claimant "beat" the first Part 36 offer which was made on 30 August 2019. Accordingly the date on which the "relevant period" expired in this case was 19 September 2019.

13. In *OMV Petrom SA v. Glencore International AG* [2017] EWCA Civ 195 at [31-[33] and [38]-[39] Sir Geoffrey Vos C (as he then was) gave helpful guidance on the considerations relevant to orders in respect of enhanced interest. He observed:

> "38. The court undoubtedly has a discretion to include a non-compensatory element to the award…but the level of interest awarded must be proportionate to the circumstances of the case. I accept that those circumstances may include, for example:
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> (a) the length of time that elapsed between the deadline for accepting the offer and judgment,
>
> (b) whether the defendant took entirely bad points or whether it had behaved reasonably in continuing the litigation, despite the offer, to pursue its defence, and

> (c) what general level of disruption can be seen, without a detailed inquiry, to have been caused to the claimant as a result of the refusal to negotiate or to accept the Part 36 offer.
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> But there will be many factors that may be relevant. All cases will be different. Just as the court is required to have regard to 'all the circumstances of the case' in deciding whether it would be unjust to make all or any of the four possible orders in the first place, it must have regard to all the circumstances of the case in deciding what rate of interest to award under Part 36.14(3)(a). As Lord Woolf said in the *Petrograde* case, and Chadwick L.J. repeated in the *McPhilemy* case, this power is one intended to achieve a fairer result for the claimant. That does not, however, imply that the rate of interest can only be compensatory. In some cases, a proportionate rate will have to be greater than purely compensatory to provide the appropriate incentive to defendants to engage in reasonable settlement discussions and mediation aimed at achieving a compromise, to settle litigation at a reasonable time, and to mark the court's disapproval of any unreasonable or improper conduct, as Briggs L.J. put the matter, *pour encourager les autres*.
>
> 39. The culture of litigation has changed even since the Woolf reforms. Parties are no longer entitled to litigate forever simply because they can afford to do so. The rights of other court users must be taken into account. The parties are obliged to make reasonable efforts to settle, and to respond properly to Part 36 offers made by the other side. The regime of sanctions and rewards has been introduced to incentivise parties to behave reasonably, and if they do not, the court's powers can be expected to be used to their disadvantage. The parties are obliged to conduct litigation collaboratively and to engage constructively in a settlement process".

14. Mr Simblet KC submitted that the payment of the maximum rate was merited in this case not simply *pour encourager les autres*, but because the Defendant's conduct of the litigation merited it. Further, payment of such a rate was necessary in order to ensure a fair result for the Claimant, who has had the strain of the litigation hanging over him for many years and when it could have been brought to an end on more advantageous terms to the Defendant nearly five years ago.

15. As to factor **(a)** in *OMV*, he calculated that the Defendant has had a very lengthy period between the deadline for accepting the first Part 36 offer and judgment, namely 1,616 days (4 years, 5 months and 2 days).

16. As to factor **(b)**, he submitted that the Defendant had continued to defend the Claimant's claims without proper regard to the risks.

17. The Defendant had persisted in litigation despite having destroyed documents he should have retained at the very outset. I agree, having already observed that the Defendant did not even attempt to explain to the court why such documents had been destroyed in apparent breach of the duty to preserve disclosable documents once litigation is contemplated: *Bell (No. 1)* at [18].

18. He argued that the Defendant had also continued to litigate the claim despite having no proper explanation for the absence of relevant witness evidence. Again, I agree, having already held that the absence of witness evidence provided by the Defendant was even "more stark" than the position in *Wisniewski v Central Manchester Health Authority* [1998] EWCA Civ 596; [1998] PIQR 324: *Bell (No. 1)* at [143].

19. Mr Simblet noted that the Claimant succeeded on his case on the basis of the documentary evidence alone, despite my finding that adverse inferences could be drawn under the *Wisniewski* approach. This was entirely accurate: *Bell (No. 1)* at [144].

20. He observed that the evidence of the Claimant on the representations of PC Abery, the evidence of Alison Shalaby OBE and the Claimant's reliance on *Hedley Byrne & Co. Ltd v Heller & Partners Ltd* [1964] AC 465 and *Al-Kandari v JR Brown & Co* [1988] 1 QB 665 had been drawn to the Defendant's attention at a very early stage. That much is apparent from the correspondence bundle with which I have now been provided.

21. He contended that the Defendant had predicated much of his Defence on the assertion that the passport could not be retained. However, the Defendant had singularly failed to properly plead this issue in breach of CPR 16.5(2)(a) or address it in the Skeleton Argument before trial: *Bell (No. 1)* at [145] and [147].

22. Finally, Mr Simblet relied on the Defendant's failure to engage with the process of settlement, simply insisting in stark terms that the matter would go to trial. The second offer, of £50,000, in particular, was, he said, "now truly dwarfed by the combined recoverable damages and costs". In my judgment that characterisation of the position is entirely fair.

23. As to factor **(c)**, it was plain to me that the Claimant has suffered profound and enduring distress due to the Defendant's officers' failings. The Defendant's intransigent conduct of these proceedings, contrary to the obligation on all parties to engage meaningfully with settlement possibilities, has compounded the failures that underpinned the Claimant's claims. I have no difficulty in accepting that the Defendant's conduct of the litigation has prolonged and exacerbated the Claimant's distress. That is a relevant factor when the court is considering the use of compensatory powers in relation to interest.

24. Mr Simblet also relied on the "level of disruption" caused to the wider public by the Defendant's conduct of the litigation. He argued that the lengthy internal police complaints procedure (which identified several key failings by the Defendant's officers), the extensive involvement of the Defendant's lawyers and the significant court time required to determine the claims meant that the expenditure of public resources on this litigation, was "truly eye-watering". It is hard to argue with that assessment.

25. He relied on the principle that there is no special rule for public authorities when conducting civil litigation: see, by analogy, *R (on the application of Hysaj) v. Secretary of State for the Home Department* [2014] EWCA Civ 1633 at [42].

26. Overall, Mr Simblet contended that each of these matters taken on their own would justify the selection of a rate of interest close to the maximum, but that considered cumulatively, the case for such a rate was even greater.

27. In my judgment these submissions are entirely sound. Having read them, I was minded to accept them in full. In fact, in responsive submissions, the Defendant conceded that the maximum enhanced interest rate of 10% should apply to all the Claimant's damages, save for the award of "general" (non-pecuniary) damages. Accordingly, it appears that the Defendant accepts the force of the criticisms made of his conduct of the litigation, albeit providing no context or, as far as I am aware, apology to the Claimant, or indeed the court.

28. However, the Defendant argued that only a 5% enhanced interest rate should apply to the £28,000 non-pecuniary loss award. Mr Clemens submitted that this reduced rate would properly reflect the fact that non-pecuniary damages are of a different kind to special or pecuniary damages, where a claimant has in fact expended a sum of money and been deprived of its use. This explained why the interest rate for general damages is flat at 2% rather than the variable special account rate, from the date of service of the claim form.

29. I pause to observe that the introductory words to CPR 36.17(4) make clear that the court must order the enhanced interest rate on the Claimant's damages under subsection (a) unless it considers it "unjust" to do so. Mr Clemens did not suggest in terms that payment of a rate of 10% enhanced interest on the non-pecuniary award would be "unjust" to the Defendant. Nor did the submissions he made address any of the discrete factors set out in CPR 36.17(5) which the court must take into account.

30. In fairness to the Defendant I have assumed that Mr Clemens' submission was intended to suggest that payment of the 10% interest rate would be unjust. I have also assumed that the point set out at [28] above is relevant to the overall "circumstances of the case" which must also be taken into account under CPR 36.17(5) (albeit that it could credibly be said that this is an argument of general application, and not in fact specific to the circumstances of this case).

31. Having done so, I reject the argument. In my judgment all the considerations set out at [15]-[26] above, which relate the various factors discussed in *OMV* to the circumstances of this case, apply with equal force to the non-pecuniary damages award. I also agree with Mr Simblet that it is inaccurate for the Defendant to characterise the very significant anguish and distress the Claimant has suffered for over 10 years, from the date of ROC's abduction in 2013 to the judgment in this matter, as "akin to future loss".

32. For these reasons I conclude that enhanced interest at the maximum rate of 10% should apply to the entire award, save for the £33,600 element of it which Mr Simblet was content to exclude from this calculation (as much of that figure relates to estimated future losses). That gives a damages figure of £104,399.48.

33. Mr Clemens also argued that the enhanced raise of interest should only run from the date of service of the claim form, not the expiry of the relevant period. That submission reflects what would have happened if the Claimant had not beaten his Part 36 offer. However, as he did, he is entitled by CPR 36.17(4)(a) to "interest … for some or all of the period starting with the date on which the relevant period expired." That approach reflects the fact that the Defendant chose not to accept an offer to settle the claims at an early stage, for both general and special damages. On that basis the enhanced interest rate runs from 19 September 2019.

34. Accordingly, the Defendant is ordered to pay enhanced interest at a rate of 10% above base rate on damages in the sum of £104,399.48, from 19 September 2019. That gives a figure of **£54,675.58**.

(2): An additional sum under CPR 36.17(4)(d)

35. As noted above, CPR 36.17(4)(d) requires the payment of an additional sum, not exceeding £75,000, calculated by applying a prescribed percentage to the total sum awarded to the Claimant by the court. As the total sum awarded here was below £500,000, the appropriate percentage is 10%.

36. The Defendant could not realistically resist the Claimant's application for this sum and did not seek to do so.

37. The Claimant was again content for the £33,600 element of the award to be excluded from this calculation. Accordingly the parties agreed the figure for this sum at **£10,439.95**, as 10% of £104,399.48, that being the amount awarded for general damages and past losses.

(3): Costs on the indemnity basis under CPR 36.17(4)(b) and interest on those costs and enhanced interest on those costs under CPR 36.17(4)(c)

38. CPR 36.17(4)(b) provides that the Claimant is entitled to "costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired". As noted above, that period expired on 19 September 2019. CPR 36.17(4)(c) provides that the Defendant shall pay "interest on those costs at a rate not exceeding 10% above base rate". Mr Simblet relied on the same factors as are set out under issue **(2)** above to contend that the enhanced interest rate on these costs should be 10% above base rate.

39. The Defendant accepted both of these principles but contended that the Claimant was not entitled to costs on an indemnity basis, or enhanced interest on costs, insofar as they related to the £33,600 element of the award.

40. Again, it is important to remember that the introductory words to CPR 36.17(4) make clear that the court must order the costs on an indemnity basis and enhanced interest on those costs under subsections (b) and (c) unless it is "unjust" to do so. Again, Mr Clemens did not address this test, or any of the factors in CPR 36.17(5).

41. However, again, I am content to take his central argument as intending to do so. This was to the effect that that Claimant's solicitor had "sat on" information about the £33,600 claim and failed to explain the position to the court, such that the Defendant had incurred additional costs in responding to that element of the claim.

42. The information in question had not been "sat on" for any length of time: the letter which set out the details of the claim was received on 17 November 2023, the Friday before trial, and was provided to the Defendant as soon as realistically possible after taking instructions on it, a matter of days later. The trial was not unduly disrupted by it.

43. It was agreed at trial that the timing of the letter was "unfortunate". I have already found that the 17 November 2023 letter was "consistent with, and the final iteration of, the

practice which the parties had hitherto adopted" for updating the Defendant as to increases in the Claimant's pecuniary losses. The Defendant was afforded time to deal with it and so suffered no unfairness in respect of this claim: *Bell (No. 1)* at [277].

44. Moreover, I have now seen without prejudice correspondence making clear that when the Part 36 offer was made on 30 August 2019, the Claimant's solicitor advised the Defendant's solicitor that the Claimant had incurred, or was in the process of incurring £87,000 in costs in the Brazilian proceedings. Further, the Claimant's solicitor made plain that "if [the Claimant's] current appeal fails (and we are advised that there is an 80% chance that it will) then further expenses of £105,000 are likely to be incurred".

45. This shows that back in August 2019, before the claim was issued, the Defendant was on notice of an overall claim relating to the Claimant's pecuniary losses of £192,000 (that being the total of the figures of £87,000 and £105,000 quoted in the Claimant's solicitor's correspondence). In fact, the final claim advanced at trial was substantially lower, namely £109,999.49 (that being the total of the £76,399.49 claimed for past pecuniary losses and the £33,600 figure). In those circumstances the submission that the Defendant was somehow ambushed or surprised by the later claim is unsustainable.

46. In those circumstances I accept Mr Simblet's submission that the £33,600 sum claimed was just one of the "vicissitudes of litigation", the possibility of which the Defendant could have avoided by accepting one of the Claimant's Part 36 offers. As he pointed out, it was "bad luck" for the Defendant that this occurred, just as it would have been "good luck" for the Defendant if the Claimant had succeeded in the Brazilian proceedings, such that he had had not incurred costs as high as he did.

47. For these reasons I do not consider that there is anything unjust in requiring the Defendant to pay indemnity costs in relation to this element of the Claimant's costs.

48. Accordingly, the Defendant is ordered to pay the Claimant's costs up to 19 September 2019 on a standard basis, but on an indemnity basis thereafter under CPR 36.17(4)(b). Interest on the indemnity costs is to be paid at 10% above base rate under CPR 36.17(4)(c).

(4): A payment on account of 90% of the Claimant's budgeted costs

49. The Defendant agreed that a payment on account of 90% of the Claimant's budgeted costs of £262,167.80 was appropriate. This was a sensible concession. It is common to order payments of account of 90% of budgeted costs in cases subject to costs and case management: see, for example, the authorities cited in *Puharic v Silverbond Enterprises Ltd* [2021] EWHC 389 (QB) at [11].

50. However, there is an even greater justification for such an order in this case given that the Claimant is entitled to his costs on an indemnity basis. This effectively means that his legal team may recover costs above and beyond those approved in the costs budget, as the limitations of CPR 3.18 no longer apply. It is likely that the Claimant's actual costs are higher than those budgeted, not least because of the volume of post-trial submissions that have been required in this case.

51. For the reasons the Defendant is ordered to pay **£235,951.02** plus VAT on account of costs to the Claimant's solicitors.

Conclusion

52. Accordingly, in addition to the **£137,999.49** the Defendant has already been ordered to pay the Claimant by way of damages, he must also pay the following within 14 days of the date of my order:

    (i) **£54,675.58** to the Claimant, that sum reflecting interest at a rate of 10% above base rate on £104,399.48 of his damages, from 19 September 2019, under CPR 36.17(4)(a);

    (ii) **£10,439.95** to the Claimant as an additional sum under CPR 36.17(4)(d); and

    (iii) **£235,951.02** plus VAT on account of costs to the Claimant's solicitors, that being 90% of the Claimant's approved costs budget.

53. In addition, the Defendant is ordered to pay the Claimant's costs up to 19 September 2019 on a standard basis, but on an indemnity basis thereafter under CPR 36.17(4)(b). Interest on the indemnity costs is to be paid at 10% above base rate from 19 September 2019 under CPR 36.17(4)(c).

54. I reiterate my thanks to all counsel for their assistance in resolving these further matters relating to this claim.