IN THE HIGH COURT OF JUSTICE **[2022] EWHC 1069 (QB)**

QB-2017-001675 / HQ17P01988

QUEEN'S BENCH DIVISION

MASTER MCCLOUD

BETWEEN

MRA

And

THE EDUCATION FELLOWSHIP LIMITED (aka RUSHDEN ACADEMY)

Keywords - costs – Part 36 – offers – settlement – child abuse – damages

Plain language summary (not part of judgment but must accompany it):
The claimant claimed damages for historic child abuse by a teacher. On 19 January 2018 the Defendant offered to settle the claim by paying £80,000 to the Claimant. On 2 April 2020 the Claimant accepted the offer. Because the period for accepting the offer under Part 36 of the Civil Procedure Rules had expired and the parties had not agreed who should pay costs after its expiry, the court had to decide whether it would be unjust to order the Claimant to pay costs after expiry. The Claimant argued that it would be unjust to make that order because the late acceptance was due to uncertain prognosis. The Defendant argued that the normal rule should apply. The court decided after looking at all the circumstances that it would not be unjust to order the Claimant to pay costs after expiry of the offer.

List of Authorities before the Court (whether referred to in judgment or not):

AA v CC [2013] EWHC 3679 (QB)
Cartwright v Venduct [2018] EWCA Civ 1654

Ho v Adelekun [2021] 1 WLR 5132; [2021] UKSC 43
Matthews v Metal Improvements Co Inc [2007] EWCA Civ 215
SG v Hewitt [2012] EWCA Civ 1053; [2012] 5 Costs LR 937
Briggs v CEF Holdings Ltd [2018] 1 costs LR 23
Downing v Peterborough & Stamford Hospitals NHS Foundation Trust [2014] EWHC 4216
Smith v Trafford Housing Trust [2012] EWHC 3320 (Ch)

Representation:

James Counsell QC for the Claimant (instructed by Bolt Burdon Kemp)

Nicholas Bacon QC for the Defendant (instructed by DAC Beachcroft Claims Lrd)

JUDGMENT

1. This case is a claim arising from a serious instance of child sexual abuse by a female teacher who exploited her position of trust to abuse a child with autistic spectrum disorder and ADHD, controlling the child among other things by way of exploiting his love of animals such as rabbits as a means to entice him into her home. As such cases go – and the QB Masters see many serious abuse claims so are probably hardened to them – it is one which carries with it a degree of shock at the manner in which it was carried out, quite apart from the abuse itself. It was greatly harmful to the child who is now an adult.

2. The Defendant is the school, not the original abuser. The abuse was discovered by the abuser's husband who contacted the police. The abuser went to prison.

3. This judgment relates to a matter of importance to both sides, for very different reasons, and raises difficult questions as to how to operate the Part 36 regime in circumstances such as occurred here. Counsel for the Defendant described it as 'important' on day two of the hearing before me.

4. The backdrop (and there is an issue between the parties as to whether as a matter of law I can take this into account in my decision, so I state it neutrally) is that if the outcome of this judgment is that the Claimant must pay the Defendant's costs after the date of expiry of an accepted Part 36 Offer, the abuse victim's damages will be impacted because the Defendant's costs will come out of the damages for the period after expiry of the offer unless the court orders otherwise. If money equates to the main form justice in an abuse claim – which under the present system is in effect the presumption however distasteful that may appear to many victims – such justice as is done here will be impacted accordingly. The settlement was £80,000 and – whilst there seemed to be significant debate as to the exact sum – the amount likely to be deducted from those damages was of the order of £45,000 if the Claimant had to pay the costs of the Defendant after the date of expiry of the offer. A potentially large impact.

5. Conversely, if the decision is that the Defendant must pay the Claimant's costs then the Defendant will say that the protection of Part 36, where an early and well-judged offer is made (which according to Defendant was a deliberately generous one to protect itself and aim to settle the case) is rendered ineffective contrary to the policy behind the Part 36 mechanism and that the Defendant will have suffered an injustice, and that may have repercussions for insurers in such cases by weakening the Part 36 regime especially given the presumed payment by the Defendant of its own costs in a QOCS[1] case such as this.

6. It will be apparent therefore that of all cases this is a prime example where a Judge has to try to have the humility to apply the law wherever it leads irrespective of sympathy at a human level whether for victims or insurers. This decision is one reached with the benefit of skilled submissions from leading counsel on both sides, instructed by experienced solicitors.

7. Some few years ago there was discussion within the legal industry among specialists in this field, in which I was involved at arms' length judicially, via a forum called at the time the Historic Abuse Lawyers' Forum as to whether

[1] Qualified One Way Costs Shifting.

preaction processes in abuse cases might be subject to a specialist, psychologically informed integrated process or protocol geared to providing practical support and assistance for (admitted) abuse victims with an investigative approach to collaborating in the court process so as to enable one to learn from organisational failures where institutions are sued for the acts of their employees. The concepts were I believe discussed briefly in evidence at the IICSA[2] inquiry.

8. In view of the role which clarity (or otherwise) of prognosis and medical evidence generally played in this case and which became the focus of argument before me, perhaps, had there been a specific abuse-related collaborative process before the claim began, tailored to the specific nature of historic abuse cases, things may have proceeded differently.

What happened

9. The Claim was issued on 7 June 2017 and served on 7 September 2017. I was the assigned judge throughout. Breach of duty had been admitted before issue of the claim, on 27 February 2017, with (the extent of) causation and quantum of damages in issue. This was therefore not a claim about liability.

10. By agreement, a sum of £30,000 on account of costs was paid as an interim payment defraying some of the Claimant's legal costs pursuant to an application issued on 11 January 2018.

11. **The Part 36 Offer.** On 19 January 2018, which it will be noted was early in the claim, the Defendant made a Part 36 Offer in the sum of £80,000. The Claim form Statement of Value was limited to £100,000 and at least going by the Statement of Value this was therefore an offer to pay the bulk of the claim at an early stage. By rule 16.3(7) of the CPR however the Statement of Value does not limit the

[2] Independent Inquiry into Child Sexual Abuse. See para. 68 of the report at https://www.iicsa.org.uk/reportsrecommendations/publications/investigation/accountability-reparations/part-c-civil-justice-system/c7-initialstages-claim

actual potential recovery by the Claimant[3]. Often the Schedule served with Particulars of Claim can be a better guide to the value than the Statement of Value, and can alert the Judge managing the case as to whether notwithstanding the Statement of Value a claim might as the claim progresses trigger an upwards amendment to that statement.

12. The Schedule served with the Claim is mostly pleaded as 'TBC' as is common but the narrative in it sets out core aspects of the basis of the damages claim. The Claimant's Autism and ADHD are referred to, and in terms of injury it is pleaded that the Claimant had a Moderate Depressive Episode and PTSD, citing intrusive memories, distress, hyper-vigilance poor self esteem (and other items). Reports of Dr Boris Iankov, Psychiatrist, of 10 January 2017 and Mr Alex Griffiths, Educational Psychologist are referred to and relied upon with the Claim. The Psychiatrist advised that the Claimant needed anti-depressants and talking therapy (CBT) and counselling. The Schedule records that *"Dr Iankov is currently unable to comment on prognosis. Dr Iankov concludes that the Claimant's long term prognosis is likely to depend on ongoing pharmacological treatment and psychological intervention. It is not currently clear whether the Claimant's symptoms will respond to treatment."*

13. The Schedule continues: *"Mr Griffiths concludes that as a result of the abuse the Claimant's education and earning potential have been affected. … [he] concludes that in the absence of the abuse the Claimant would have been capable of undertaking and obtaining low level vocational qualifications to enable him to work in the field of animal care for example as an animal technician. Thereafter the Claimant is unlikely to have been capable of finding at least parttime work in this field. … the Claimant is now unlikely to obtain the qualifications necessary … likely to spend all or at least a large part of his time unemployed."* (However, the report referred to also stated that '*It would in all honesty have been difficult for*

[3] "(7) The statement of value in the claim form does not limit the power of the court to give judgment for the amount which it finds the claimant is entitled to."

him' to have found work in his preferred areas anyway and it was unlikely that he would have gone into further education irrespective of the abuse.

14. The Schedule further recites that the Claimant had initially experienced suicidal ideation. After modest out of pocket expenses the future losses are then "TBC" and expressed to depend on the prognosis which is stated as "not yet known".

15. It will be apparent then that the above represented the state of the case at the time when the Part 36 offer was made.

16. On 30 January 2018, (just) during the period of validity of the offer, the psychiatrist produced an addendum report for the Claimant, which was broadly indicative that symptoms of PTSD had worsened and expressed a pessimistic view and indicated that a specialist in autism and learning disability would be needed to input into his care.

17. The expert had been instructed to opine on prognosis. The current position was that the Claimant reported suicidal thoughts albeit without intention to complete, and repetitive nightmares and hearing a voice telling him to kill himself. The report stated (4.4) "… *prognosis, at this time, is poor. This is based on the fact that his symptoms are deteriorating and he has not been able to access adequate treatment.*" Medication was sub-optimal dosage. Generic interventions were unlikely to help. The likely cost of specialist treatment was indicated. However it was opined that the Claimant would be able to engage with specialist help, that there had been minimal psychiatric help so far by the NHS and that "*Whether he will be able to achieve sufficient recovery will depend on his ability to engage with treatment and to maintain his motivation levels.*" (4.13). "*I am hopeful that with the right intervention [his] mental state will improve to the point where he will be able to go back to college and achieve some qualifications.*" (4.16), "… *if his current needs are not addressed urgently, his level of social functioning will continue to decline … might not be able to engage in education but be disabled to the point where he is unable to hold employment.*" (4.17). (But note that this is a more optimistic view than the pessimistic one already

expressed by the Educational Psychologist, in as much as Dr Iankov holds out some chance of education and employment if treatment is obtained).

18. On 2 February 2018 the Claimant's solicitors replied to the Part 36 Offer asking for an extension of the offer validity until 20 February 2018 to enable instructions to be taken from the Litigation Friend. The email expressed that the reasonableness of the offer would be difficult to consider as prognosis was 'so unclear'. There does not seem to have been a reply to that request.
19. On 20 February 2018 Bolt Burdon Kemp for the Claimant responded substantively to the Part 36 offer. In that letter they asked the Defendant to consent to an extension of time in which to accept the offer on the ground that prognosis was 'so uncertain that the value of the claim cannot yet be ascertained.' The Offer was expressly 'neither accepted nor rejected'.

20. The letter summarised some of the points noted above from the (then recent) addendum expert report of Dr Iankov, and said '*it is quite impossible to advise him and his mother … on the appropriate level of general damages … or for future pecuniary losses. Our client is currently 17 years old. An additional complication is that … once he has attained the age of 18… we anticipate that our client will become a protected party and any proposed settlement will continue to require court approval. We have no doubt that the court would not approve a settlement in circumstances where the judge could not reach a conclusion on whether or not the offer was a reasonable one without a prognosis.*' The letter continued that a further report had been directed for October 2018 by which time prognosis might be clearer. The case of SG v Hewitt was referred to where a Part 36 offer was permitted to be accepted out of time in what were said to be circumstances similar to those here.

21. Perhaps oddly, there seems to have been no response to the above proposal for an extension, and likewise no chaser. The Defendant therefore points out that the time for acceptance was never extended and nor was any stay of proceedings applied for or obtained by the Claimant. Both sides obviously knew that.

22. I have some witness statements from the months after the above exchanges, following the expiry of the offer for the purposes of the costs rules. The Claimant produced a statement signed on 15 September 2018. It is very downbeat and echoes the dim view the psychiatric expert had of the care he was receiving: *'I just want to sit in my room and sleep. … I don't think that the doctors I have seen are very good. … I don't think that they understand me … I just feel very sad and alone.'*
23. I have a statement of 13 September 2018 from his sister who mostly deals with the general impact but in terms of the Claimant's position at that point she says he struggles to speak to people or open up because he says he cannot trust anyone. A statement from the Claimant's mother and Litigation Friend dated 19 September 2018 is very substantial. In terms of his state at that date she says for example that he lacked energy and the only things he was interested in are his animals and his iPad. He had recently suffered an extended period of low mood (SRA 1st w/s para. 43). He was overeating and gaining weight. He was expressing views that he was not able to trust teachers or students. She indicated she felt that at that point he would struggle to engage with any sort of education. Some note of optimism was struck in places as to hobbies and some sign he was engaging with a lady across the road who was 67 called Val and who he had not known at the time of the abuse and who was for example helping him to go to a bowls club and do gardening.

24. On 9 October 2019 a new report was served from Dr Iankov (this date now being about 20-21 months after the Part 36 Offer which was made on 19 January 2018). The report was somewhat more optimistic. He was '*able to function a little bit better*' but was still unable to leave the family home (alone, I assume). This was a brief report. A fuller one was produced on 20 February 2020 (now more than 2 years after the Part 36 offer was made). Dr Iankov concluded that the prospect of further improvement was low and would depend on social factors rather than therapeutic interventions. The Claimant had tried to obtain employment, which was a 'positive' albeit he had not yet managed to get work.

25. On 4 March 2020 the Defendant served a psychiatric report from Professor Maden which disagreed with the diagnosis of PTSD. His view was that whilst there had been a deterioration from January 2018 for a few months, his documented problems had improved.

26. It is unfortunate in my view (to the extent that I shall comment on it) that the Defendant's expert report refers to the Claimant as having a 'crush' on his abuser. This is a child abuse case in which a teacher sexually and emotionally abused a child student who was significantly under age of consent, expressing her love for him, her desire to leave her husband, inviting him into her home, bedroom and her own child's room. Such a framing in my judgment tends to cast the child as if he were an actor with agency in his own abuse. This was a 14-15 year old child with learning, language and communication difficulties, Autistic Spectrum Disorder and Attention Deficit and Hyperactivity Disorder, and who will likely be a Protected Party once he reaches age 18.

The acceptance of the offer.

27. On 2 April 2020 the Claimant accepted the £80,000 Part 36 offer. The Claimant requested costs on the standard basis from the Defendant, which was refused in the light of the late acceptance without a stay or extension. Thereafter this came before me on the issue of what costs order to make.

The rule

28. CPR Rule **36.13(1)** states:

    "Subject to paras (2) and (4) and to rule 36.20, where a Part 36 offer is accepted within the relevant period the claimant will be entitled to the costs of the proceedings (including their recoverable pre-action costs) up to the date on which the notice of acceptance was served on the offeror."

    CPR Rule **36.13(4)** states:

"Where … (b) a Part 36 offer which relates to the whole of the claim is accepted after expiry of the relevant period[4] … the liability for costs must be determined by the court unless the parties have agreed the costs."

CPR Rule **36.13(5)** states:
"Where para 4(b) applies but 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

[4] 21 days after the date of the offer, unless extended by agreement.

(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."

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

CPR **Rule 36.17(5)** states:

"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;

[4] 21 days after the date of the offer, unless extended by agreement.

(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."

29. The effect of the rule is clear: the costs consequences favourable to the Defendant **must** apply unless it is unjust to so order. The burden is thus on the Claimant to establish that it is unjust within the meaning of the rule, to so order.

Argument

30. Counsel for the Claimant took me through the reports and exchanges of correspondence summarised above, outlining the pattern of initial deterioration, uncertainty in prognosis and ultimately the view expressed as to improved function in the penultimate report, and then prognosis in the final report by Dr Iankov at which point the offer was accepted. It was only at that stage that on the Claimant's case the offer could competently be assessed and accepted and that given the requirement for the court's approval of settlement the court itself would have likely felt unable to approve it absent the prognosis expert evidence only then to hand. The position per the Claimant's skeleton was that prognosis was completely unclear at the time the offer was made. It will be recalled from the summary at the start of this judgment that the case of *Hewitt* was cited in the letter written to the Defendant at the time.

31. I was informed of an email of 25 January 2019 in which the Defendant's solicitor said the following:

"I appreciate that per paragraph 80 of the mother's Witness Statement, you are now looking for someone else to provide appropriate psychological treatment for the Claimant. It seems to me –but please correct me if I am wrong that Professor Maden[5] cannot usefully see your client until this course of treatment has been

[5] ie the Defendant's own expert.

concluded. At present, we do not know what the prognosis is and this is no one's fault. This is a complex case and the Claimant is still a teenager....
I agree with you that the updating report that you sent to me is a little old. I note that your client has not had any treatment since May 2018. I note and accept that getting treatment/assessment for your client is going to be very difficult. You have suggested that the fourth and final report from Dr Iankov is obtained once the Claimant has had his treatment. I agree and I think that is the same point that I make insofar as Professor Maden is concerned. Presumably, we can agree that both experts see your client at around the same or at least in the same month? I am very much in your hands in that respect. I think it is important that you have sufficient time to try and arrange appropriate treatment. This would be to the benefit of both your client and the Court."

32. Unsurprisingly, the Claimant relies on the above as an indication that this was not simply the Claimant being uncertain of prognosis but that both parties recognised that it was only once treatment took place that prognosis could be assessed by either side (and I note the message refers to such also being for the benefit of the Court, in the last line quoted). (The letter by which the Claimant had 'neither accepted nor rejected' the offer it will be recalled suggested that the Court would not be in a position to approve any settlement absent advice as to prognosis such as eventually to hand in Dr Iankov's final report provided to me as part of the approval papers.)

33. There was no issue as to the way in which Part 36 operates by default in this case, subject to the question of whether it is unjust to so order.

34. *Hewitt* was a case concerning a 6 year old with head injuries, where the Defendant made a pre-action offer in a pre-QOCS case, where the experts were not able to opine as to prognosis until the child had matured. Six years after the accident an offer was made. Two years later the offer was accepted. At first instance the judge ordered that the Claimant should pay the Defendant's post offer costs. That was reversed on appeal, so that the Defendant would pay. In this case the Claimant argued the facts are similar, it was not possible for the

parties properly to assess the value of the case without prognosis information. This was not a case where the parties had been able to make an assessment until far later in the case than the date of the offer. The Court of Appeal stressed the fact specific nature of the exercise. Thus, said the Claimant here, as in *Hewitt*, at the time of the offer, neither party had any evidence as to the likely prognosis for this Claimant. This was not a case where both parties had been able to make an assessment of quantum but where one party's assessment had turned out to be wrong by further evidence, for example as happened in the case of *Briggs* referred to by the Defendant.

35. Further it was said that (quoting the Claimant's skeleton) both parties were aware and recognised that it was not possible to assess quantum and to arrive at a sensible settlement figure without it. The Defendant had recognised this at an early stage in its email of January 2019 and the Claimant had set this out even earlier in its letter in response to the offer and that position had not been challenged.

36. Thirdly when receiving the offer, in declining to accept or reject the offer, the Claimant set out his reasons for taking this course and expressly invited the Defendant to extend time to accept the offer. No response was received at all to that request. In *Matthews* a case where an offer was rejected (rather than 'neither accepted nor rejected') in circumstances where prognosis was sufficiently uncertain that advice either way could not be given, Stanley Burnton J said in deciding that the usual consequences must continue to apply: *"37. The result might have been different if the claimant's solicitors had requested, and the defendant's solicitors had refused, a stay until the results of the biopsy were known. But that did not happen.*" Whilst in this instance there was no '*refusal'* by the Defendant of an extension of time for acceptance, the Defendant plainly did not agree to it.

37. Fourthly, and again effectively quoting from the Claimant's skeleton, in cases involving children or protected parties, the Court has to approve a settlement. In performing its role of protecting those not capable of giving consent to a settlement, a judge has a duty not to approve a settlement unless it is

reasonable and appropriate. Absent prognosis advice it was said that this court could not approve such a settlement. I was referred again to *Hewitt* per Black LJ at 68: *"To demonstrate this, it is perhaps helpful to analyse the decision that would have faced the court if approval had been sought when the offer was originally made in 2009. The court would have been concerned to ensure that the claimant was obtaining proper damages for the injury he had sustained, not only for his pain and suffering but also taking account of the probable impact of the injury on his earning capacity and on his ability to look after himself independently.*"

38. I was also referred to observations by Pill LJ in the same case, at 85 to the effect that the existence of the protections for minors in relation to the need for court approval pointed to the Claimant's advisers being reasonably entitled to wait until there was (in that case) firm expert evidence as to diagnosis.

Taking into account the effect of the deduction?

39. It was argued that a further factor going to the issue of injustice was the impact (referred to as 'disastrous') which deducting the Defendant's post-offer costs (of the order of £45,000) would have on the damages recovered by this victim of abuse. Undoubtedly the level of costs if deducted, subject to assessment, would very significantly reduce the damages recovered and that was described as a 'completely unjust' outcome. However there was disagreement between the parties as to whether as a matter of principle it is open to me to take the impact on damages into account. The Defendant's position was that such would be impermissible in principle.

QOCS disadvantaging those who need the court's approval?

40. It was argued that under the QOCS regime a Defendant can only set off its costs, in the circumstances here, where there had been a judgment or order for damages. In this case, if the Claimant had not been a minor or lacking in capacity, he would not face the need for a decision of the court approving the payment of damages (and hence an order for the above purposes) when a person not requiring the approval of the court would not necessarily have an

'order' for damages and hence not be exposed to that risk. That it was said cannot have been the intention of the rule makers. Counsel for the Claimant proposed that if I was minded to avoid such an outcome I could approve the settlement by way of the preamble to the order, so as to avoid making an order for damages. I observed that such an approach would presumably only arise in principle if I had formed the view that it was unjust to require the Claimant to pay costs, hence it would not be necessary for me to use such a device but rather to hold that the deduction of costs would be unjust and hence reverse the presumption under the rules. It was generally agreed between counsel that perhaps this aspect of argument was not one which needed at this stage to be considered further but it was mooted that (in addition to 'injustice') the rule might be seen as operating discriminatorily. That was not considered further.

Defendant's position.

41. The Defendant's position was very different to that of the Claimant in terms of its thesis of the case. Mr Nicholas Bacon QC characterised it entirely differently from the Claimant, and indeed also in certain respects differed on the law.
42. The claim form contained a statement of value limited to £100,000, and the offer was said to be a high one, at £80,000 made at an early stage. The very highest awards for PTSD in the guidelines even in severe cases are £86,000-£94,000. The Hewitt case cited by the Claimants had been treated by the Court of Appeal as being 'a very clear case … very extreme case concerning brain damage to a small child'. There the question was whether attainment of adolescence would make a significant difference, but there was no proper basis to equate this case with the facts in *Hewitt*. The key point about *Hewitt*, per Black LJ, was that experts on both sides were agreed that until age 18, another 12 years, one had to 'wait and see'. Prof Maden's relatively late instruction was not, on the Defendant's part a sign of inability to opine but simply that at that stage the Defendant had been served with updated evidence and the offer had not been accepted.

43. There was a very clear diagnosis early on in the Claimant's expert evidence as to the nature of the injury, stating that his problems would probably get worse. It

was placed in the ‘moderate to severe’ (nb, not severe) bracket. PTSD was diagnosed as was depressive episode of moderate severity. His long-term prognosis was said to depend on interventions and it was said that whether he would improve would depend on those. The long-term prospects of improvement were thus uncertain as were improvement prospects, not worsening. Yet the offer made by the Defendant was based (as is clear from the size of the offer) on a more or less worst case evaluation, in other words discounting the prospect of improvement. The settlement sum here was characterised by the Claimant in his skeleton as including general damages and past losses in the range £47,500£52,000. When the offer was made in January 2018 and based on the then extant expert opinions, they should have been well able to evaluate the offer as being an offer at the high end assuming a lack of improvement. It would have been possible to advise the Court for settlement purposes that accordingly the offer should be accepted at the time.

44. Furthermore the Claimant’s expert at the outset advised a re-evaluation of the Claimant’s condition and prognosis in a year’s time but that did not happen, per para 18 of the Claimant’s skeleton it was ‘unfortunate’ that the recommendation to re-evaluate at that rather earlier stage was not followed up. The Claimant did not take up the opportunity. It was not until later that the Claimant was persuaded, a year later, to see a psychologist. It would on any view be unjust to hold that delay against the Defendant.

45. The Claimant’s addendum report of 30 January 2018 obtained during the period of validity of the offer indicated having now seen GP records that there was a deterioration of condition (ie, consistent with, it was said, the Defendant’s approach to the offer, no improvement). In that report’s opinion section there was reference to significant deterioration and he stood by his earlier report on causation. His instructions as summarised in the report included to opine on prognosis (para. 2.2). He opined that it depended on psychological progress and interventions. At 4.1 diagnosis showed no change. Prognosis was said (at 4.4) to be ‘poor’ because he had not accessed appropriate treatment. It <u>had</u> been

possible, contrary to the Claimant's case, for their own expert to opine on prognosis.

46. The POC schedule did not consider any question of future lost employment and indeed the educational psychologist's report of 2017 gave a clear analysis of the position that (p224) MRA needed support as suggested by the psychiatrists, and could be considered as disabled. He concluded that the Claimant would have been '*capable of undertaking and obtaining low level vocational qualifications to enable him to work in the field of animal care for example as an animal technician. Thereafter the Claimant is unlikely to have been capable of finding at least part-time work in this field. … the Claimant is now unlikely to obtain the qualifications necessary … likely to spend all or at least a large part of his time unemployed*'. '*It would in all honesty have been difficult for him' to have found work in his preferred areas anyway and was highly unlikely that he would have gone into further education irrespective of the abuse, said the expert.*

47. There was accordingly a clear statement of opinion as to the issue of how to approach future losses. This was rather cut across by the view expressed by Dr Iankov of 30 January 2018 perhaps trespassing to some extent on the Educational Psychologist's territory, which was that he was concerned that unless the Claimant received treatment he might end up not only unable to engage in education but to be disabled to the point where he could not find employment. Dr Iankov was perhaps therefore slightly less conclusive, in the 'pessimistic' direction than the educational psychologist, but, again, the Defendant's offer was plainly one predicated on a high end valuation, in other words assuming against itself that prognosis was and would remain poor.

48. I questioned whether perhaps the pessimistic view as to employment etc expressed on 30 January 2018 by Dr Iankov, if treatment was not obtained or not effective, might be understood as something implying that if things went poorly in treatment terms the claim might have become one of rather higher value than suggested by the £100,000 statement of value, leaving the door open for a larger claim. In other words, prognosis was poor but could get even poorer

taking the case out of the £100,000 valuation. Responding however the Defendant pointed out that as at the start of the case based on the educational psychologist's report there was a prospect of disability in the marketplace. That was in play when the offer was made. This was a case where the situation would at best remain in the generally moderate range and not move clearly into 'severe'.

49. The report of Dr Iankov of 9 October 2019 took into account treatment then received. The opinion was that there had been no change. This was more than a year after the offer (around 20-21 months). Hence there was in any case an alternative line of argument that even if (contrary to the Defendant's main case) acceptance was not viable as at 30 January 2018, it could have been reconsidered in the light of the 9 October 2019 report and accepted.

50. Whichever date one looks at, the Court could have been advised that the Claimant was at risk on costs, thanks to the offer, and that the offer was at the high end. By the time the 'good news' of the report of 20 February 2020 was obtained that the Claimant was improved, that was the 'icing on the cake' which simply underscored that the Defendant's offer had been generous at the start and had remained so. It changed nothing.

51. Where a defendant makes an offer and there are requirements to exchange evidence and so on, and simply because medics often express some uncertainty as to prognosis, as is often true, that does not amount to a reason to hold off on acceptance or for the court to disentitle the Defendant to its costs.

52. As to the law, the case of *Matthews* was a case where a claimant in late 60's had minor head injury but developed a dissociative disorder, disabling and episodic, making him lack capacity. 20 days after a payment into court an expert opined that prognosis may be good but there were concerns about a lymph node which might signal disease transformation and a need for chemotherapy. In other words a sudden and large uncertainty depending on tests and biopsy results, crucially. The offer was rejected because assuming a full life expectancy

it was too low. In the event, the biopsy had a poor (negative) outcome which meant that the Claimant had a short life expectancy, and the offer seen in that light was generous. The test remained whether it was unjust to apply the costs consequences, and not a test of 'reasonableness' of acceptance or rejection. One should not conflate the two.

53. The court on appeal held that the judge below had applied the wrong test legally, but went on to observe that the fact that the Claimant was a patient made no difference in principle to how the matter should be approached, a Defendant is entitled to the same cost protection in a case concerning a patient.

54. The question was whether there were grounds to depart from the usual order on grounds of injustice. The approach was not to ask whether it had been reasonable to reject the offer, and one could not evaluate injustice simply on the Claimant's advisers' views that they could not evaluate it. The judge below could not decide injustice by reference only to the Claimant's position but the Defendant's assessment of the value was relevant. The Defendant might make a conservative or a generous payment, said the Court of Appeal. Such things were always factors in cases just as was the uncertainty of the judge's own evaluation at trial, counsel argued before me. The range of possible prognosis in this case was simply a contingency of litigation in the usual way against which Part 36 offers serve to protect parties. If one could not find in favour of a Defendant unless one was certain about prognosis one would be in a 'wholly unrealistic world' as counsel put it before me.

55. The Court of Appeal in *Matthews* found that there was no reason to disapply the usual rules. Indeed it went on to suggest that the uncertainty of value itself at the time of the offer might be a matter supporting applying the costs rules. At para 36 the Court (per Stanley Burnton J with whom the rest of the court agreed) stated:

"I would however go further. Once they had received Professor Dyer's letter of 28 August 2005, it was apparent to the Claimant's advisors that his life

expectancy depended on the results of the biopsy that had recently been taken. His life expectancy was most material to the valuation of his claim. On receipt of that letter, the Claimant's advisors could, and I think should, have asked for an extension of time to consider the Part 36 payment until the results of the biopsy were known; and the parties should have agreed a stay of proceedings until that time. Mr Main rightly said that until the results of the biopsy were known, he could not advise acceptance of the payment. But, as Chadwick LJ pointed out in the course of argument, it was equally the case that he could not advise that it be rejected. But rejected it was. Indeed, the Claimant's schedule of damages dated as late as 2 February 2006 was expressly based on a normal life expectancy and stated that the Claimant's lymphoma was indolent. Sadly, that was not the case, as the joint advice of the parties' oncologists confirmed. The rejection of the Part 36 payment when the Claimant's prognosis was uncertain in my judgment is a further reason why the usual order is the correct order for costs."

56. In this case I observe that the offer was not 'rejected', but was allowed to expire in terms of the 21 day period for acceptance, without a stay being agreed.

57. Distinguishing *Hewitt*, counsel for the Defendant pointed out that it was a very different type of case, where there was agreement among experts on both sides that it was not possible even to diagnose conditions at all until the child turned 18 years old, which is a common issue in head injury claims for children. That was not this case: this case evolved towards improvement of condition and prognosis, but the case was clear in terms of diagnosis and the offer had been made on that diagnosis and on a *pessimistic* prognosis at the high end of the pleaded claim.

58. *Briggs* was referred to and relied on as a more recent and better exemplar than the *Hewitt* case. There, a Claimant with a foot injury issued a claim in 2010 with medical evidence showing a poor prognosis. The Defendant made a Part 36 offer in 2012. The offer was (as in this case) neither accepted nor rejected. Proceedings were stayed in 2013 whilst he had surgery. The stay was lifted in

2014 with an improved but still unfavourable prognosis. Subsequent expert evidence from both sides was much more optimistic. The offer was accepted before trial, in 2015. At first instance the judge disapplied the usual operation of Part 36 and ordered the Defendant to pay the Claimant's costs up to 2014. The basis given was that the prognosis was uncertain until then and that it would be unjust to allow the usual rule to apply. That decision was reversed on appeal, and the decision was that the uncertain prognosis did not make it unjust to reverse the usual application of the rule. It was held not to be enough to show that it was difficult to form a view as to likely outcome of the claim. *Hewitt* should be distinguished as being a different type of case, on the footing that *Briggs* concerned difficulty of evaluating likely outcome, not inability to diagnose, said the Defendant. The court (per Gross LJ) observed that:

"it is very important not to undermine the salutary purpose of Part 36 offers" and that a '*heavy burden*' fell on the appellant to prove injustice.

Taking into account the effect of the deduction?

59. Counsel for the Defendant wholly opposed as a matter of principle the notion that it could go to the justice of the case to take into account the impact of the deduction of costs required by the rules. Not only was that not a factor in the list of matters to consider, but also the Court when making an order for costs does not consider the impact of making a costs order. The protection for a protected party having to pay too high a level of costs was the process of detailed assessment required by the rules. It was acknowledged that the impact might affect a judge's 'heart' in a case such as this but should not affect her 'head.' Indeed it would be manifestly unjust to the Defendant to disapply the rules and would undermine the point of Part 36 in such cases, and this case should not become authority for the notion that uncertainty over prognosis makes a case sufficiently exceptional to disapply the rules.

Reply

60. In reply, the Claimant's counsel reminded me that a statement of value on a Claim form does not limit the eventual sum recovered. The claim had been

pleaded not exceeding £100,000 'on current evidence'. One looks at the evidence one has and then if necessary one can increase the value of the claim. For example the Claimant had declined relative to the position at the start of the claim. If that had continued this would have been higher in value. I was taken to a reference to him having suicidal thoughts as an indication of that worsening such that if that had continued the claim may have been more valuable. (I note also that in the report of 30 January 2018, in which the further suicidal thoughts are referred to, at 3.7, there is also reference to hearing voices and to him taking an overdose) [6]. Besides general damages there was a claim for aggravated damages and there may still have been a loss of earnings claim. The provisional schedule of loss referred to prognosis and treatment but also quoted Mr Griffiths report that the Claimant would have been in a better position but for the abuse and would have been able to undertake low level qualifications to obtain work but that his employment opportunities were now severely limited – this was a pointer to the possibility that the ultimate claim at trial may have recovered lost earnings. The offer of £80,000 was not a therefore necessarily a generous one.

61. As to *Hewitt*, this case was said to be on all fours and this was stronger. *Briggs* was a different type of case, where one party made a different assessment of the case from the other and where an expert changed view.

62. I was taken to *Downing*, at 61, where it was said at first instance that it was elementary that if a judge was asked to depart from the usual operation of the rule, the case must have something about the particular circumstances of the case which takes it out of the norm. This case had a number of such circumstances: (1) the parties were unable to assess quantum here, they could not reach a prognosis when the offer was made; (2) both parties were aware and acknowledged that; (3) a court could not have approved a settlement absent prognosis evidence; (4) it was said to be relevant to take into account that costs

[6] But in rebuttal counsel for the Defendant pointed out that suicidal thoughts had been a feature previously. I refer to Dr Iankov's report of 5 September 2017 at 3.10 for example referring to two instances of suicidal thoughts. I refer by way of my own observation to a reference to hearing voices after the initial disclosure (para. 3.50) and also a reference in the report of 29th September 2017 at 3.14 to medical notes referring to a diagnosis of 'personal history of self harm' with the comment by the expert in that report that that was in line with his findings that the Claimant developed depressive symptoms as a consequence of the abuse.

would come out of and impact damages; (5) there was an additional injustice in relation to QOCS operating in relation to protected persons briefly touched on (but not fully argued); (6) a further injustice was in this instance an extension was immediately requested, something not sought in the other cases cited. In *Matthews* it was mentioned that the outcome may have been different if a stay had been requested and refused.

63. It was thus unjust for the Claimant to lose the bulk of his damages in such circumstances. It was certainly on the Claimant's argument relevant to take into account the potentially significant impact of the costs on the damages as an aspect of injustice.

64. I was briefly reminded again of the sequence of medical reports. The pattern therefore had been deterioration and then in the end improvement. It was said that only in the final and fifth report of Dr Iankov that prognosis was clear enough. There had been correspondence between the parties which acknowledged uncertain prognosis (albeit I note also that there was no suggestion in the same correspondence that the Defendant was not relying on the offer as potential protection, indeed rather the opposite was implied in correspondence).

Decision

65. I am not here going to decide the effectively 'parked' argument which was mooted at the outset of both days of hearing to the effect that there were differences in treatment of protected parties versus non-protected parties which rendered them more exposed to the situation here under QOCS. This was not fully argued before me even though it was listed in the Claimant's counsel's final comments summing up types of possible injustice in the case, but in circumstances where the issues had not been fully ventilated. If it is thought that that line of argument might change the position here, then that can be heard in due course. I will also not determine the question whether (if the rule here would work an injustice) it would be possible or proper for me to then explore a means of approving an order drafted so as to avoid that alleged difference in treatment,

if there is one, which was not argued but which I am aware would certainly be opposed by the Defendant as tantamount to being improper as a device to avoid the rule.

Part 36

66. I have recited the applicable rules above and direct myself accordingly. It is for the Claimant to show that for the normal consequences to follow would be unjust.

67. Part 36 exists to ensure that a party can ordinarily obtain some degree of costs protection by making a well-judged (and ideally early) offer to settle. It is nowadays all the more important than perhaps it has been before (which is not to say that it has not always been important) because (1) with the case loads before the court, Part 36 remains a key post-issue way to encourage settlement albeit that ever greater emphasis is being and will continue to be placed on preaction dispute resolution, neutral evaluation and technological solutions to avoid litigation and (2) in personal injury cases the invention of QOCS (Qualified OneWay Costs Shifting) means that Part 36 provides a significant tool for Defendants and insurers who would otherwise face, save in cases of dishonest claims, an inevitable costs burden in paying their own costs come what may.

68. The second of the two points especially is in play here. In my role as a case management judge when not sitting at trial, I have seen since the advent of QOCS signs that insured Defendant do take into account that it may be better for a defendant to settle a case even at the risk of slightly over-paying or indeed paying when there might be a prospect of defeating the claim, than to incur the full costs of a trial against the backdrop that the defendant would be paying its own costs come what may due to QOCS. I do not know of course what lay behind the offer in this case but evidently Part 36 coupled with QOCS would logically point in a direction encouraging a defendant to err on the generous side given the QOCS costs burdens of fighting to trial.

69. The Court of Appeal in *Briggs* rightly said that Part 36 has a salutary effect and to depart from it requires the party so seeking to discharge a heavy burden, namely to show injustice if the rules are not disapplied. A party may well act reasonably in not accepting a Part 36 offer, but it does not follow that the ultimate result if that is not the best judgment, is that one has shown 'injustice' by refusing to disapply the usual rule. See *Matthews*: one does not approach this case by asking whether the Claimant acted reasonably.

70. It seems to me that the evidence in the form of the medical reports which have been cited in some detail above makes out that as at 30 January 2018 this case concerned a young man with PTSD and depression, who had had suicidal thoughts and had self-harmed, that that was as a result of the abuse he had suffered in the quite awful circumstances of a teacher abusing a child with learning difficulties, that (per Dr Iankov first addendum) prognosis was 'poor', and that (per the educational psychology report) he was '*unlikely to have been capable of finding at least part-time work in this field. … the Claimant is now unlikely to obtain the qualifications necessary … likely to spend all or at least a large part of his time unemployed*'. '*It would in all honesty have been difficult for him*' to have found work in his preferred areas anyway and was highly unlikely that he would have gone into further education irrespective of the abuse, continued the educational psychologist expert. Dr Iankov was not quite as pessimistic and still saw some prospect of qualification or work.

71. Medically his condition as at 30 January 2018 had 'deteriorated', prognosis was poor, and he needed proper treatment if he was to get any better. That was the position during the validity of the offer. The Claimant sought an extension. However there was no meeting of minds and no extension of any sort was expressly entered into, something of which both sides were aware.

72. As it turned out, thankfully, he did improve as far as possible, as is shown by the later medical reports. It is obvious that there was uncertainty in this case as to prognosis, but in my judgment the bleak picture which appertained as at the 30th January, and which did not in any way result in a change to the statement of

value on the claim (unsurprisingly since the facts such as suicidal thoughts had pre-dated the claim and there was no change in diagnosis), was the starting point from which the Claimant might possibly (and in the event did) improve. Implicit in that is the prospect potentially of some deterioration instead, but there were clear limits to the effect that might have on this claim given the already pessimistic prognosis known at 30 January and the pessimistic employment and educational prognosis known at the time the claim was issued. This was therefore for the most part a case where the uncertainty was focussed, when one looks at the detail, on whether and to what extent the Claimant might improve, with some possible scope for deterioration.

73. What then of the offer? The statement of value on the Claim was £100,000 and that was not revised up after the report of 30 January 2018, as noted. A statement of value does not bind the court as to the eventual award, and of course if a claim changes then that may be amended, but it is an indication of the value as an upper limit reasonably placed on the claim when issued, on the basis of the facts known at time of issue. The Defendant offered £80,000 early on. That is I think fairly described as a 'high end' offer given the placement of the Claimant in the moderate-severe range and not squarely in the severe range for his conditions, and in the light of the position as to modest employment and education prospects which he would have had but for the harm done.

74. As regards *Hewitt*, in my judgment it is as the Defendant argued a rather different type of case, where a key element – diagnosis – could not be reached until majority and all experts agreed that. In this instance we have clear and unchanging diagnosis at the start and a degree of uncertainty (mostly in the 'may improve') direction. That in my judgment is a risk of litigation such as one sees in many cases whether of personal injury or in other contexts where precise merits remain uncertain, possibly all the way to trial.

75. If one were to decide that uncertainty of prognosis of the sort here was sufficient to make the (important, salutary) application of rules quite deliberately created to shift risk an 'injustice', one would undermine a key aspect of balance in the

QOCS regime. Insurers would face costs even though they wisely make high and well judged early offers. Settlements would be delayed so as to enable claimants to reach a high degree of clarity as to value and the table would in my judgment become tilted by removal of one supporting leg from under the table, in the form of the protective Part 36 costs regime. This case is closer to *Briggs*, which was a case of uncertainty in prognosis such as is common in personal injury.

76. That the Claimant lacks capacity is not a basis for departing from the usual rule (cf *Matthews*). If it were, the rules committee would have provided that this regime is not applied to, or applies differently, to people lacking capacity. (One might, in place of the standard 'injustice' case, have seen for example a test based on whether on the known facts it was reasonable for a litigation friend in the best interests of the Claimant to delay acceptance: but that is not the test, it is not the approach the rules take).

77. It was said for the Claimant that per *Downing*, this case had a number of circumstances taking it out of the norm and going to the issue of injustice. I listed them in the summary of submissions in reply. However it seems to me that an assessment of the reasonable range and certainly 'best case' quantum was possible based on what was known, it is not material that the uncertainty in prognosis (largely as to degree of improvement) was known and acknowledged by both sides – absent some misrepresentation leading the Claimant to rely on not facing the 'bite' of Part 36.

78. As to the point that a court would not have approved this settlement unless prognosis was clear, this point was one which I considered carefully and perhaps at face value the most enticing one: but Masters are experienced in knowing the practical realities of litigation and injury quantification and we benefit from exposure to the start, often the trial, and then settlement or aftermath of the case. In this instance if an advice had been presented which set out the effect above, namely that on any basis reasonably likely this offer was 'high end' and that litigation risks and the risks of the offer made it prudent to settle, I believe a

judge in my position would have approved it. Were one to expect absolutely settled prognosis in such cases, the court process itself would be a spanner in the works in terms of settlement on a pragmatic basis.

79. That an extension was requested is something which was also referred to as relevant to injustice: but that cuts both ways. It was requested and no agreement was reached, something which one can take as a flag that the offer may well be relied upon and that time was passing, absent an extension or stay.

Taking into account the impact of the deduction?

80. I turn to the question whether I can take into account the 'heart' points as counsel for the Defendant put them, namely that this is an abuse case in horrific circumstances and that to decline to disapply the usual rules could – and on the face of it would, subject to assessment of costs – greatly reduce the damages recovered by the abuse victim. The parties differ diametrically on whether I can take that into account.

81. The fact that the impact is not listed as an express factor in the rule is some indication but not conclusive. The view I have come to is that, just as one does not take into account the prejudice caused to a party by its own breach, when considering the justice of granting relief, it would be to place the cart before the horse to factor into account the impact of costs on damages, when it is the very question of mitigating the impact on damages which is the essence of the issue itself: naturally the damages will always be impacted in such cases, that is the presumed 'just' outcome, unless other factors make it unjust for that to be the case. I must therefore follow, as counsel put it, 'my head' and not my 'heart'. I am of the view that it is not permissible to take into account the degree of reduction (or the fact of reduction) of damages which arise from the operation of the rule in the 'default' form. Detailed Assessment exists to ensure that excessive sums are not deducted, and that is the route to avoid injustice in that form. Taking that a step further whilst no doubt one would attract cynical derision if one considered the plight of insurers, large institutions with money, alongside the plight of an abused minor, as being in some sense directly comparable, it is

nonetheless the case that it would be overly hard-hearted (were one in the business of following one's 'heart') to say that greatly weakening the scope for insurers to protect themselves by making generous offers was not also to a degree a 'moral' issue touching on the money available to settle other cases and the impact on the court system which might arise from weakening Part 36.

The express factors in the rule

81. The rule requires me to look at all the circumstances but in particular I 'must' consider the following and will do so here:

(a)the terms of any Part 36 offer: this was clear and was a 'high offer' as I have found. Time for acceptance was not extended by agreement, as both sides knew.

(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: this was early and well judged, but not so early that no reasonable evaluation could be made by the party considering accepting it, that is to say it was not an oppressive or 'ambushing' offer expecting unreasonable feats of foresight on the part of the Claimant, given the extent of expert evidence available.

(c) the information available to the parties at the time when the Part 36 offer was made: I have I think dealt with this extensively above. Sufficient material was available to allow proper advice to be given to the Claimant and the Court as to value, in my judgment.

(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: this does not appear to be relevant here.

(e) whether the offer was a genuine attempt to settle the proceedings: plainly it was and the contrary has not been alleged.

82. I shall therefore hold that it would not be unjust to allow the rule to apply, and the Defendant (subject to assessment) may make the relevant deductions from damages under Part 36.

MASTER VICTORIA MCCLOUD

22/4/22