Neutral Citation Number: [2022] EWHC 1624 (QB)

Case No: QB-2018-004679

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/06/2022

Before:

MRS JUSTICE HILL

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Between:

MANUEL MATHIEU	**Claimant**
- and -	
(1) TONY MARTIN HINDS	**Defendants**
(2) AVIVA PLC	
(No. 2: Costs)	

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Theo Huckle QC and **Kara Loraine** (instructed by Powell & Co) for the **Claimant**
Marcus Dignum QC, **Hugh Hamill** and **Andrew Roy** (instructed by DWF Law LLP) for the **Second Defendant**

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.
Covid-19 Protocol: this judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time of hand-down is 12 noon on 23 June 2022

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MRS JUSTICE HILL

Mrs Justice Hill:

1: Introduction

1. This is a claim for damages for personal injuries arising out of a serious road traffic accident that took place on 28 November 2015. The Second Defendant admitted liability on behalf of both Defendants. On 5 June 2019 Master Gidden entered judgment for the Claimant with damages to be assessed. After a ten-day quantum only trial, for the reasons given in my judgment dated 13 April 2022, the Second Defendant was ordered to pay the Claimant £3,178,741.64 in damages. He succeeded in his claim for provisional damages in relation to epilepsy, but not in relation to dementia. It is now necessary to resolve the various issues raised by the parties' written submissions on costs.

2. The Claimant's position is that there is no basis for regarding him as anything other than the successful party for the purposes of CPR 44.2(2)(a), or for departing from the general rule therein, such that the Second Defendant should pay his costs, to be assessed if not agreed. He seeks an interim payment on account of costs of £725,907.40 inclusive of VAT.

3. The Second Defendant's primary position is that (i) the Claimant should recover only 50% of his costs up to 31 January 2022; (ii) the Claimant should pay the Second Defendant's costs from 1 February 2022; and (iii) the interim payment to the Claimant on account of costs should be £90,000. Alternatively, the Second Defendant invites me to consider with respect to the period after 1 February 2022 (i) ordering the Claimant to pay a percentage of the Second Defendant's costs; (ii) making no order for costs; or (iii) ordering the Second Defendant to pay a percentage of the Claimant's costs.

4. The Second Defendant argues, in summary, that (i) the Claimant did not win the dementia claim; (ii) he achieved partial success overall and his claim was exaggerated; and (iii) his conduct of the litigation is relevant, including his rejection of various offers made by the Second Defendant. 1 February 2022 is said to be a significant date because that was 3 weeks after an offer of £3,555,000 was made to the Claimant which he rejected and which he has not "beaten" at trial.

2: The facts

5. The detailed factual background to the claim is set out in the quantum judgment dated 13 April 2022. The following reflects only the factual matters which I consider to be pertinent to the costs issues that I now need to resolve.

6. The Claimant's final Schedule of Loss provided before the trial sought damages of CAD (Canadian) $56,028,428, in total, equivalent to £33,617,057: [4] of the quantum judgment.

7. Prior to the trial, the parties had engaged in extensive attempts to settle the claim, including at a joint settlement meeting and a mediation. The parties had made

'*Calderbank*' offers (i.e.. offers made without prejudice save as to costs, outside Part 36) and Part 36 offers, as follows:

(i) On 19 October 2018 the Claimant made a Part 36 offer in the sum of £235,000. This was withdrawn on 3 October 2019.

(ii) On 13 December 2021 the Claimant made *Calderbank* offers of (i) £10,950,000 excluding his provisional damages claims in relation to epilepsy and dementia; and (ii) £17,050,000 including the provisional damages claims. Both offers were open until 20 December 2021 and were then automatically withdrawn.

(iii) On 11 January 2022 the Second Defendant made (i) a Part 36 offer of £3,125,000; and (ii) a *Calderbank* offer of £3,550,000. Both were said to be in full and final settlement of all the Claimant's claims. The latter offer was open until 18 January 2022 and was then automatically withdrawn.

(iv) On 13 and 19 January 2022 the Claimant made further *Calderbank* offers of £8,050,000 and £7,250,000, including his provisional damages claims. These offers were open until, respectively, 19 and 26 January 2022, and then automatically withdrawn.

(v) On Saturday 5 February 2022, with the trial due to start on Tuesday 8 February 2022, the Second Defendant made a further *Calderbank* offer of £4,000,000.

8. The following is also relevant to understanding the settlement process:

(i) In making his £10,950,000 offer on 13 December 2021, the Claimant proposed that if his offer was accepted the provisional damages claims could be determined as a "standalone" issue by the court during the upcoming trial listing. Further correspondence suggests that this was the approach the Claimant had taken throughout the negotiations. The Second Defendant would not agree to this course.

(ii) By letter dated 13 January 2022 the Claimant's solicitor said the following to the Second Defendant: "It is clear to us that the sticking point in relation to settlement is our client's claim for provisional damages in relation to the risk of our client developing dementia as a result of his [Traumatic Brain Injury]. You have refused to agree an award of provisional damages. Further it is apparent that when calculating your offers, you have included no allowance for the costs of "buying off" the provisional damages claim…We believe your refusal to agree or engage in any way in our offer to deal with the claim for provisional damages as a single issue at trial is wholly unreasonable. We therefore put you on notice that we reserve the right to refer to our offers in this regard and the contents of this letter in due course in relation to costs".

(iii) By letter dated 19 January 2022 the Claimant's solicitor referred to the basis of the provisional damages claim in relation to dementia as being Dr Orrell's evidence that he had a 20% chance of developing dementia at age 60, following which he would be unable to paint, and would likely not survive beyond a further 6 years. The importance of the claim to the Claimant was reiterated. The letter continued: "Our client is extremely reluctant to agree to the claim being

"brought off". He will only agree to do so if any settlement properly reflects the significant risk he faces in later life. Clearly, your only offers of settlement make no or no adequate allowance for the provisional damages claim. Our instructions then are to proceed to trial in the event that our client's final offer is not accepted".

(iv) The Second Defendant's position is that the provisional damages claim in relation to dementia was "…of enormous importance to [the Second Defendant] and other such insurers and large institutional defendants' industry wide. Establishing that [provisional damages] are not normally recoverable for dementia is [a] very important standalone victory for [the Second Defendant] in its own right…. Indeed [the Second Defendant's] success on this issue was much more important than the precise level of damages payable to [the Claimant] in this case (which was of no wider significance)".

9. The total claimed on the Claimant's Schedule of Loss included a sum of CAD $8,203,123, equivalent to £4,921,873, for immediate damages in relation to dementia. The introduction to the Schedule stated the following: "The Claimant claims a provisional damages award but includes here computations based upon [the chances of the Claimant developing dementia advanced by Dr Orrell] if immediate award were considered appropriate by the court and/or desired by the Defendant". During his opening of the trial on 8 February 2022, Mr Huckle QC indicated that the immediate damages claim was not being pursued, and the claim in respect of dementia advanced solely as one for provisional damages.

10. The final sum awarded to the Claimant of £3,178,741.64 equates to around 9.5% of the amount claimed on the final Schedule of Loss provided before trial.

11. The most recent approved costs budget for the Claimant is dated 16 November 2020. It totals £518,088.50 of which £55,050.50 were incurred and unapproved costs and £463,038 were approved budgeted costs. On 24 September 2021 the Claimant applied to increase this budget by £273,875 on the basis that a Pre-Trial Review and updating witness evidence from the Claimant and the gallerists were required. Although the application was listed there was insufficient court time to address it before the trial.

12. The Claimant submits that an application to depart from the budget in further respects will be needed in any event because (i) the budget only provided for a 5-day trial whereas the trial in fact took 9 days of evidence with further oral and written submissions thereafter; and (ii) the budget did not provide for a Pre-Trial Review (which the court eventually ordered) or a mediation which the parties had engaged in.

13. The Second Defendant's position is that there are strong arguments to the effect that the additional costs incurred reflect a failure by the Claimant's side to anticipate what were predictable litigation contingencies such that a departure from the budget should not be permitted.

3: The legal framework

14. The Court's general discretion in relation to costs is derived from CPR 44.2, which provides in material part as follows:

"44.2

(1) The court has discretion as to –
(a) whether costs are payable by one party to another.
(b) the amount of those costs; and
(c) when they are to be paid.

(2) If the court decides to make an order about costs –
(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
(b) the court may make a different order…

(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
(a) the conduct of all the parties.
(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

(5) The conduct of the parties includes –
(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol.
(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
(c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
(d) whether a Claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.

(6) The orders which the court may make under this rule include an order that a party must pay –
(a) a proportion of another party's costs.
(b) a stated amount in respect of another party's costs.
(c) costs from or until a certain date only.
(d) costs incurred before proceedings have begun.
(e) costs relating to particular steps taken in the proceedings.
(f) costs relating only to a distinct part of the proceedings; and
(g) interest on costs from or until a certain date, including a date before judgment.

(7) Before the court considers making an order under paragraph (6)(f), it will consider whether it is practicable to make an order under paragraph (6)(a) or (c) instead".

3.1: Costs orders in partial success cases

15. In *Pigot v The Environment Agency* [2020] EWHC 1444; [2020] Costs LR 275 at [6] Stephen Jourdan QC, sitting as a deputy High Court Judge, summarised the following principles from the authorities addressing the situation where one party has succeeded overall but has lost on one or more issues:

> "(1) The mere fact that the successful party was not successful on every issue does not, of itself, justify an issue-based cost order…
>
> (2) Such an order may be appropriate if there is a discrete or distinct issue, the raising of which caused additional costs to be incurred. Such an order may also be appropriate if the overall costs were materially increased by the unreasonable raising of one or more issues on which the successful party failed.
>
> (3) Where there is a discrete issue which caused additional costs to be incurred, if the issue was raised reasonably, the successful party is likely to be deprived of its costs of the issue. If the issue was raised unreasonably, the successful party is likely also to be ordered to pay the costs of the issue incurred by the unsuccessful party…
>
> (4) Where an issue-based costs order is appropriate, the court should attempt to reflect it by ordering payment of a proportion of the receiving party's costs if that is practicable.
>
> (5) An issue-based costs order should reflect the extent to which the costs were increased by the raising of the issue; costs which would have been incurred even if the issue had not been raised should be paid by the unsuccessful party.
>
> (6) Before making an issue-based costs order, it is important to stand back and ask whether, applying the principles set out in CPR 44.2, it is in all the circumstances of the case the right result. The aim must always be to make an order that reflects the overall justice of the case".

16. In *McKeown v Langer* [2021] EWCA Civ 1792; [2022] 1 WLR 1255 at [36-37] Green LJ noted that:

> "… there is a general "salutary" rule that costs follow the issue rather than the "event". This is because an overly robust application of a principle that costs should follow the final event discourages litigants from being selective as to the points they take in litigation and encourages an approach whereby no stone or pebble, howsoever insignificant or unmeritorious, remains unturned…
>
> …the making of discrete issue-based costs orders encourages professionalism in the conduct of litigation, which is an objective sought to be achieved by the Overriding Objective in CPR 1.1 and 1.2".

17. The Second Defendant argues that this reasoning applies equally to a percentage reduction in lieu of an issue-based order: see *Bonsor v Bio Collectors Limited* [2020] EWHC 918 (QB); [2020] Costs LR 673 at [15] and [23]-[28].

18. In accordance with CPR 44.2(7), the parties agree as a point of principle that a percentage reduction is preferable to an issue-based order. Further, as per the White Book at paragraph 44.2.8:

> "In numerous cases the Court of Appeal has stressed that the courts should be ready to make proportionate (or percentage) costs orders which reflect, not merely the overall outcome of the proceedings, but also the loss on particular issues…The difficulties inherent in making a percentage costs order have been noted by judges in a number of cases and it has been stressed that the exercise 'has to be a broad-brush one'".

3.2: The relevance of offers and conduct

19. CPR Part 36 provides for specific adverse costs consequences to a Claimant who fails to obtain a judgment "more advantageous" than a Defendant's Part 36 offer. CPR 36.17(2) provides that in relation to any money claim or money element of a claim, "more advantageous" means "better in money terms by any amount, however small".

20. In *Brit Inns Ltd (In Liquidation) v BDW Trading Ltd (Costs)* [2012] EWHC 2489 (TCC) [2013] 1 Costs L.R. 72 at [42] Coulson J (as he then was) summarised the pertinent principles as follows:

> "(a) In a commercial case, the successful party will usually be the party that recovers money from the other (*Multiplex* and *Gibbon*).
>
> (b) The only certain way for a defendant to shift its potential costs liability is to make a Part 36 offer which it then betters at trial (*Gibbon* and *Fox*).
>
> (c) The pursuit of exaggerated claims may deprive the Claimant of some or all of its costs (*Islam* and *Fulham Leisure*), but it is usually only where the exaggeration is deliberate that the Claimant has been ordered to pay the defendant's costs (*Painting* and *Ford*).
>
> (d) In general terms, for costs to be shifted as a result of conduct, so that the Claimant who recovers something at trial still has to pay the defendant's costs, there needs to be more or less total failure on the issues that went to trial (*Hullock*) or a failure to accept a Part 44 offer that would have put the Claimant in a better position than going on (*Fulham Leisure*)".

21. At [55], he noted that certain offers which were irrelevant for Part 36 purposes were nevertheless:

> "…relevant to considerations of conduct at least to this extent, namely that the defendant's Part 36 offer was far closer to the final recovery

> than either of the Part 36 offers made by the Claimants. That was just one of many signs that, from the outset, the defendant took a much more realistic view of these proceedings than the Claimants ever did".

3.3: Payments on account in respect of costs and departure from costs budgets

22. Under CPR 44.2(8), where the court orders a party to pay costs subject to detailed assessment "it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so".

23. In determining whether to order any payment on account and its amount, account needs to be taken of all relevant factors including the likelihood (if it can be assessed) of the claimants being awarded the costs that they seek or a lesser amount; the difficulty, if any, that may be faced in recovering those costs; the likelihood of a successful appeal; the means of the parties; the imminence of any assessment; any relevant delay and whether the paying party will have any difficulty in recovery in the case of any overpayment: *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm), *(Christopher* Clarke LJ), cited in the White Book at paragraph 42.2.12.

24. The court can only depart from a costs budget if there is a good reason to do so. However, costs judges "should…be expected not to adopt a lax or over-indulgent approach to the need to find 'good reason': if only because to do so would tend to subvert one of the principal purposes of costs budgeting and thence the overriding objective": *Harrison v University Hospitals Coventry and Warwickshire NHS Trust* [2017] EWCA Civ 792; [2017] 1 WLR 4456 at [44] per Davis LJ.

4: Discussion and conclusions

25. Under CPR 44.2(1), the court has a discretion as to whether costs are payable by one party to another and if so the amount of those costs and when they are paid. In respect of the period up to 31 January 2022, the Second Defendant agrees that a costs order is appropriate. Beyond that date, one option I am asked to consider is to make no order for costs. Because of this, and because discrete arguments apply in respect of the later period, it is sensible to consider the costs issues by reference to these two distinct temporal phases of the litigation.

4.1: Costs up to 31 January 2022

26. Under CPR 44.2(2), the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. In this context, the successful party is the party successful in the proceedings, and not a party successful on a particular issue: *Kastor Navigation v AGF MAT* [2004] EWCA Civ 277; [2005] 2 All E.R. (Comm) 720 at [43], cited in the White Book at paragraph 44.2.13.

27. Determining this issue requires the court to "…identify the successful party as a matter of substance" and to recognise that when doing so, "the court may well conclude that there was no overall winner". Where a Claimant recovers only a fraction of the amount claimed, this can be relevant to whether they are properly considered to be the successful party (as well as to the extent of success): *Brent London Borough Council v Davies & Ors* [2018] EWHC 3129 (Ch) at [46]-[48], per Zacaroli J.

28. Although the Second Defendant referenced the latter of these principles in submissions, I did not understand there to be any serious argument that the Claimant was not the successful party in respect of the period up to 31 January 2022. That is a sensible position to take. The Claimant clearly was the successful party as a matter of substance throughout this time. He had secured the Second Defendant's admission of liability to him on behalf of both Defendants at an early stage of the litigation. In respect of the claims he was pursuing, he would go on to win all the key factual disputes at trial and secure very substantial immediate damages and a provisional damages award in relation to epilepsy. This was not, in my view, a case akin to those cited in *Brent* at [47] where the level of damages recovered by the Claimants was so "small or insignificant in comparison with the total amount claimed" that they were no longer to be considered the successful party.

29. The starting point is therefore that the general rule in CPR 44.2(2)(a) applies, such that the Second Defendant should pay the Claimant's costs for the period up to 31 January 2022.

30. However, the Second Defendant submits that there should be a different order made under CPR 44.2(2)(b) in the form of a significant reduction to the Claimant's costs for this period because of (a) his lack of success and conduct with respect to the dementia claim; and (b) his partial success overall, conduct and alleged exaggeration of his claim. Reliance is placed on CPR 44.2(4)(a) and (b) and all four types of conduct referred to in CPR 44.2(5).

(a): The dementia claim

(i): The parties' submissions

31. The Second Defendant argues that the Claimant's lack of success on the dementia claim makes this a "paradigm case" for a percentage reduction to his costs. This claim was undoubtedly a discrete issue. It necessitated a full-scale review of the literature relating to the existence of a causal relationship between traumatic brain injury and dementia. The neurologists had had to prepare additional written evidence exclusively on the issue and there was extensive cross-examination of them on it. Applying the observations of Green LJ in *McKeown* at [36]-[37], a percentage reduction would be consistent with the overriding objective.

32. The Second Defendant draws support from *Bonsor* where the Claimant in a road traffic accident personal injury claim was deprived of 10% of her costs because she failed in respect of three "specific and separate" allegations about additional safety equipment which it was contended should have been fitted to the Defendant's lorry. Two of these had been abandoned prior to the trial commencing and one had failed at trial. The additional issue had generated a material increase in trial time and costs. It is argued that the case for a percentage reduction is even stronger here than in *Bonsor* because (i) the dementia issue was a "truly distinct standalone issue" in this case aimed at securing a separate remedy, unlike the defective equipment allegations in *Bonsor* which formed part of the Claimant's overall case on liability; (ii) the issue was of enormous wider importance to the Defendant; and (iii) the issue was of very significant importance to the Claimant, as was evidenced by the correspondence and the fact that the claim had been valued at £4,921,873 on an immediate damages basis.

33. Further, it is argued that the Claimant's conduct of the dementia claim was unreasonable. Any proper analysis of the evidence showed that it was unsustainable or at least very weak, making it comparable to *Bonsor*, where the inadequacy of the Claimant's evidence was considered such as to render it unreasonable to have pursued the allegations based on it. The Barnes paper on which Dr Orrell had initially placed reliance was "conceded to be an outlier with little or no resistance". The immediate damages claim in relation to dementia was "dropped without ceremony" at the outset of the trial. The Second Defendant's position is that the dementia claim, not only proved a barrier to settlement but led to the trial taking place.

34. The dementia issue accounted for around 16% of the quantum judgment, which is a helpful if not definitive yardstick of the time spent on, and the significance of, each issue in a large and complex case such as this: *TMO Renewables Ltd v Yeo & Ors* [2021] EWHC 2773 (Ch) at [23], per Joanna Smith J. However, the Second Defendant argues that this percentage figure should be increased further to reflect (i) the Claimant's withdrawal of the immediate damages claim in relation to dementia; and (ii) the fact that the Second Defendant's costs of this issue were lower than the Claimant's. For these reasons a 30% reduction from the Claimant's costs for this period of time would be appropriate, if the dementia issue was the only basis for reducing his costs.

35. The Claimant argues that his loss on the dementia claim amounted to no more than a scenario where a party in a complex and high value claim loses on one issue of many, to which the general rule is designed to apply. The dementia claim was not a truly discrete issue and it would be "quite impossible" to entangle the costs of it from the costs associated with the other issues on which the Claimant had been wholly successful, such as the impact of his injuries on him, the mitigation of loss issue and the epilepsy claim. No additional witnesses had been called just on the dementia issue. The costs associated with the dementia claim amounted to a "very small, essentially negligible" proportion of the costs of the action. It would therefore not be practicable or fair to make a percentage reduction in the alternative to an issue-based order.

36. Further, he had conducted himself entirely reasonably in bringing the claim given the supportive evidence he had from Dr Orrell and its importance to him. This case was fundamentally different to cases such as *Welsh v Walsall Healthcare NHS Trust* [2018] EWHC 2491 (QB); [2018] 5 Costs LR 1025. There, Yip J made a percentage reduction to the Claimant's costs not simply because she had lost on a particular issue, but because it had taken up two days of court time, involved six witnesses who would not have otherwise attended and was "not just weak…[but]…not properly arguable", such that it was not reasonable for the Claimant to have maintained it through to trial.

37. The Claimant argues that it had been entirely appropriate to include the immediate damages claim for dementia in the Schedule of Loss for the purposes of assisting with settlement discussions, notwithstanding that immediate damages were "not being sought as an award at trial" due to the difficulties in establishing causation, such that "immediate damages would not be payable by the court". The Defendant's refusal to concede any of the factual points on which the Claimant later won, to make allowance for either of the provisional damages claim in the offers made (especially when the claim in relation to epilepsy was not really contested) or to agree to the provisional

damages issue being determined as a separate point were the reasons the trial took place.

38. If there is to be any percentage reduction to his costs to reflect the fact that he lost the dementia claim, this should be no more than 5%.

(ii): Analysis and conclusion

39. The case-law as summarised in *Pigot* makes clear that the fact that the Claimant lost the dementia claim should not, of itself, lead to adverse costs consequences for him. Rather, factors that can be taken into account include the "discrete or distinct" nature of the issue, the extra costs associated with it and the reasonableness of the failed issue. Overall, what is important is a consideration of all the circumstances and the need to do justice taking those into account, and stepping back.

40. I do not accept the Second Defendant's submission that the evidence in relation to the dementia claim was "unsatisfactory and insufficient to prove the allegations" as had been the case in *Bonsor* (see [30]).

41. In respect of *Willson* question (1), the Claimant was supported in his claim by Dr Orrell's interpretation of what is complex and developing scientific research. It was appropriate that his evidence, and Dr Foster's, be tested at trial. I did not accept the criticisms of Dr Orrell's evidence advanced at trial by the Second Defendant. I simply preferred Dr Foster's analysis of the research.

42. In my view there is a better argument that post-TBI dementia is akin to osteoarthritis or certain psychiatric conditions, which were considered by Irwin J in *Kotula v EDF Energy Networks (EDN) PLC* [2011] EWHC 1546 (QB), based on established principles, to be unsuitable for provisional damages. For this reason, there is more force in the suggestion that a provisional damages claim in relation to dementia was highly unlikely to succeed under *Willson* question (3), even if the "chance" evidence was clearer.

43. On balance, however, I conclude that insofar as the provisional damages claim failed on *Willson* (3), this was a finding appropriately made after hearing all the evidence and submissions.

44. I also take into account that this was a novel claim, of real significance to both parties and of potentially wider impact. As I made clear at [116] of the quantum judgment further cognitive decline in the form of dementia is something the Claimant would find particularly hard to tolerate, given the impact this would have on his art, which is the focus of his life. The dementia claim was therefore of real importance to him personally, which no doubt explains the stance taken in the correspondence summarised at [8](i)-(iii) above. The Second Defendant has made clear (see [8](iv) above) how significant resolution of this issue was to insurers and other institutions in the field. It follows that if the Claimant had succeeded, this would have been of wider significance to potential Claimants who have sustained traumatic brain injuries.

45. For these reasons I do not consider that the Claimant behaved unreasonably by raising and pursuing the dementia claim, for the purposes of CPR 44.2(4)(a) and 44.2(5)(b).

46. However, in my view there are series of other factors which militate in favour of reflecting the issues arising from the dementia claim by way of a departure from the general rule in CPR 44.2(2)(a).

47. *First*, the dementia claim was clearly a "discrete" and "distinct" issue. It was an entirely separate claim for a different kind of damages to the claim for immediate damages for losses due to the traumatic brain injury. It was wholly different from the scenario in *Pigot* where the unsuccessful claim for breach of statutory duty was simply a different legal basis for the Claimant's claim, such that there was no impact on costs (see *Pigot* at [7(1)]). It was also even more discrete or distinct an issue than the unsuccessful allegations in *Bonsor*, as highlighted by the Second Defendant.

48. *Second*, it was one of the most complex, significant and disputed issues in the case; indeed, the Claimant's Case Summary had identified it as one of only three "primary" issues for the court to determine at the trial (the other two being the earnings claim and the taxation issue). As I explained at [5] of the quantum judgment, the dementia claim was heavily contested by the Second Defendant not least because the underlying science is complex and controversial.

49. *Third*, I am satisfied that the dementia claim did lead to material additional costs. For the period up to 31 January 2022 these additional costs would have primarily comprised (i) the initial reports of the neurologists that addressed the dementia issue alongside the other issues in the case; (ii) the further reports they were directed to prepare in January 2022 specifically on the dementia issue, having collated and reviewed the research on the issue; and (iii) the work of solicitors and counsel in instructing the experts, reviewing their reports, preparing their respective positions on the legal principles and their application to the evidence and factoring these into the settlement negotiations. For the period after 1 February 2022, these costs comprised the discrete questions on dementia asked of the neurologists at trial and the separate submissions on the law and evidence with respect to the claim made by counsel.

50. *Fourth*, the correspondence summarised at [8] above makes clear that the dementia claim was a significant barrier to settlement of the claim in the period leading up to 31 January 2022. I do not accept that it was the only such barrier, as it is clear to me that the parties had widely different perceptions of the value of the earnings claim. However, the dementia claim was a real sticking point, with the Claimant being unwilling to accept a settlement that did not make due allowance for this element and the Second Defendant being unwilling to make any offer which openly did so, or to agree to settlement of the immediate damages claim and separate determination by the court of the provisional damages claim.

51. *Fifth*, while I do not consider that the Claimant behaved unreasonably in bringing the dementia claim, I agree with the Second Defendant that two aspects of the manner in which it was conducted were unreasonable, for the purposes of CPR 44.2(4)(a) and 44.2(5)(c).

52. The disparity between the two offers made by the Claimant on 13 December 2021 indicates that his team was valuing the combined effect of both provisional damages claims at £6,100,000. I accept the Second Defendant's submission that "[n]o sensible basis for this figure has been or can be identified", given that the Claimant's Schedule

of Loss had valued the dementia claim on a full, immediate basis at £4,921,873 and when due allowance is made for the epilepsy claim. This strongly suggests that no litigation risk at all was being applied to the dementia claim for the purposes of settlement.

53. In addition, the immediate damages claim was expressly included in the Schedule on the basis that the court might be persuaded to make such an award but was then withdrawn at the start of the trial on the basis that "immediate damages would not be payable by the court" [my emphasis]: see [9] and [37] above. I accept the Second Defendant's submissions that (i) the summary withdrawal of this claim suggests that it should never have been advanced in the way that it was in the first place; and (ii) the existence of this claim was likely to have contributed to the difficulties with settlement experienced by the parties, not least as it increased the total claimed on the Schedule of Loss by nearly £5,000,000.

54. *Sixth*, in all the circumstances, this is a case where reflecting the Claimant's loss on the dementia issue would, overall, be consistent with the overriding objective: see Green LJ in *McKeown.*

55. In light of these factors, considering all the circumstances of the case, having regard in particular to CPR 44.2(4)(a) and (b), and 44.2(5)(a) and (c), and standing back, I am satisfied that a departure from the general rule under CPR 44.2(2)(b) to reflect the dementia claim is the right result, to achieve overall justice.

56. As to the nature of that departure, *Pigot* at [6](3) addresses the situation where, as here, a discrete issue causing additional costs has been identified on which the otherwise successful party did not succeed. It posits two consequential scenarios. The first is where the issue was raised reasonably, in which case the successful party is likely to be deprived of its costs of the issue. The second is where the issue was raised unreasonably, in which case the successful party is also likely to be ordered to pay the costs of the issue incurred by the unsuccessful party.

57. On balance I am satisfied that the first of the two *Pigot* situations applies here. I have explained at [41]-[46] above that I consider that the dementia claim was raised reasonably. I do not consider that the issues I have raised about the reasonableness of how the claim was conducted under [51]-[53] above are so persuasive as to justify ordering the Claimant to pay the Second Defendant's costs of the dementia issue. No argument to this effect was pressed by the Second Defendant.

58. On this basis the Claimant should be deprived of some of his costs to reflect the dementia issue. It is preferable in principle to effect this way of a percentage reduction to his costs rather than an issue-based order. Setting the level of the percentage is, as the case law recognises, by definition a very broad-brush, impressionistic approach.

59. In respect of the work done before 31 January 2022, I do not have costs figures for the specific work done by the neurologists on the dementia issue in January 2022 as this work was not catered for in the budgets. However, I can see that the written evidence on dementia from the neurologists and the research literature occupied around 400 pages of the approximately 4,000-page trial bundle (10%). It is hard for me to estimate how much of the settlement discussions were expended on the dementia claim, but it is clear that this claim did feature significantly in the negotiation process. As noted

above the Claimant's Case Summary which was prepared during this period identified the dementia claim as one of the three primary issues in the case (33%). Some indications of the significance of the dementia claim in the period up to 31 January 2022 can also be drawn from events thereafter. As to those, my best estimate is that the evidence on dementia from the two neurologists took a total of half a day, out of nine days of evidence (5.5%). The dementia arguments occupied around 20-30% of the written and oral closing submissions at the end of the evidence and 16% of the judgment.

60. Bearing in mind all these factors and doing the best I can in what is very much an art not a science, I consider that an appropriate percentage reduction of the Claimant's costs to reflect the dementia issue for the period up to 31 January 2022 is **15%**.

(b): Partial success overall, conduct and the alleged exaggeration of the claim

(i): The parties' submissions

61. The Second Defendant argues that a further reduction to the Claimant's costs should be made for this period to reflect the Claimant's 9.5% success overall, which is "outside any reasonable margin of error" and illustrates that the claim was exaggerated throughout. In *Brit Inns,* despite the absence of dishonest or deliberate exaggeration, the Claimant's costs were reduced by 40% in circumstances where recovery had been around 20% of the damages sought: see [57] and [68].

62. The Claimant submits that this was a complex case to which it is not possible to apply a set formula. It was therefore "worlds away" from commercial cases such as *Brit Inns* which was not an appropriate comparator. He achieved success on all the factual issues in the trial which the Second Defendant had chosen to contest in full. He also recovered very substantial immediate damages and an important provisional damages award for epilepsy.

(ii): Analysis and conclusion

63. As the quantum judgment makes clear the Claimant did succeed on all the factual issues that underpinned his immediate damages claim. This was particularly significant for his earnings claim. However, despite the court taking a highly favourable view of him and his evidence, he recovered less than 10% of damages claimed. The Second Defendant argues that the way in which the Claimant's earnings claim was advanced, based solely on a multiplicand of £614,687 for most of his working life, was unrealistic. I also formed that view during the trial.

64. There were a number of factual hurdles for the Claimant in his earnings claim, primarily in proving the impact of his symptoms and the level of any shortfall in his productivity. If he had failed in either of these respects, or if the Second Defendant had succeeded in any of the mitigation of loss arguments, his loss of earnings claim would have been extinguished entirely or only made out to a small degree. Further, the written evidence of the Claimant's own art expert, Mr Francis, was to the effect that predicting the evolution of any artist's work, its value and pricing beyond the next two to three years involves speculation: see [258] of the quantum judgment. The report of Mr Sainty, for the Second Defendant, also potentially substantially undermined the earnings claim.

65. My overall impression was that the very realistic possibility that the court would find that the Claimant's ability to sell any shortfall in his art would reduce over his working life had not been properly accounted for in the way in which the claim was advanced. As noted at [267] of the quantum judgment I was provided with no alternative percentage scenarios, nor chronologically graduated scenarios, which could have illustrated an acceptance of these risks. I do not consider it fair to describe this as an "exaggeration" of the claim but the advancing of one, high case alone was, in my view, unrealistic.

66. I am therefore satisfied that factors 44.2(4)(a) and (b), and 44.2(5)(c), are in principle applicable.

67. However, looking at all the circumstances of the case, and standing back, I do not consider it appropriate in the exercise of my discretion to reduce the Claimant's costs for the period up to 31 January 2022 to reflect these issues.

68. I have reached this view primarily because the most obvious impact of the Claimant's approach to the earnings claim was on the prospects of settlement, and that impact was most stark once the Second Defendant had made its Part 36 and *Calderbank* offers.

69. Further, to the extent that *Brit Inns* is a comparator case (and there is a limit to which any costs decisions are genuine comparators, given their inevitably fact-sensitive and discretionary nature) there were a series of serious criticisms made of the Claimant's conduct which justified the percentage reduction: [58]-[60]. The same is not true here.

70. I therefore consider that these issues relating to the Claimant's partial recovery and conduct of the claim are more appropriately catered for in the costs after 1 February 2022.

71. For these reasons I make no further percentage reduction to the Claimant's costs for the period up to 31 January 2022 to reflect partial success, conduct and alleged exaggeration.

4.2: Costs after 1 February 2022

(a): The parties' submissions

72. In respect of this period both parties repeat the arguments made about the period up to 31 January 2022.

73. In addition, the Second Defendant relies on the fact that the Claimant did not beat the Second Defendant's *Calderbank* offer of £3,550,000. On that basis, it is said that (i) the Second Defendant is properly to be regarded as the successful party from 1 February 2022 onwards; and (ii) reflecting the overriding objective, the Claimant should have accepted the offer so to prevent further costs and use of court resources, such that the Claimant should pay the Second Defendant's costs for this period: see *Brit Inns* at [69]-[72].

74. The Claimant points to *Coward v Phaestos Ltd* [2014] EWCA Civ 1256; [2014] 6 Costs LR 843 at [101]-[102] for the proposition that the Part 36 regime is not of rigid application to *Calderbank* offers. In *Coward*, the Court of Appeal found that a

Calderbank offer which was substantially higher in money terms (£50,000 versus the £1,000 recovered) could not be regarded as a "better" outcome where there was a claim for an injunction, the offer did not deal with that part of the claim and an undertaking was subsequently achieved in the terms sought.

75. The Claimant argues that *Coward* illustrates that merely achieving a better result in money terms than a *Calderbank* offer is not sufficient to justify a departure from the general rule where the monetary sum does not adequately encompass the claim. Here, the fact that the Claimant also recovered provisional damages in relation to epilepsy needs to be taken into account as well as the immediate sum of damages awarded in assessing whether or not the Claimant has beaten the £3,550,000 offer. Further, the Claimant was entitled to seek and obtain the peace of mind that he can be fully compensated by the court in the event that the risk of epilepsy materialised in the future.

76. The Second Defendant relies on the terms of CPR 36.17(2), highlighting that the rule was introduced given the widespread concerns about including non-financial considerations in the "more advantageous" assessment, derived from *Carver v BAA plc* [2008] EWCA Civ 412; [2009] 1 WLR 11: see Jackson LJ's Review of Civil Litigation: Final Report, at [2.1]-[2.9]. To revert to consideration of non-financial elements would be to reinstate the discredited *Carver* approach.

77. In any event it is argued that *Coward* can be distinguished on the basis that the offeree in that case secured several very significant elements of non-financial relief which were not within the offer, which were plainly much more important than the modest amounts of money in issue. That is not the case here: the provisional damages for epilepsy in this case were "very much a tertiary consideration at best". Further, the chance of the Claimant developing uncontrolled epilepsy is very small, in the region of 2.2%. Thus, if the epilepsy award is taken into account, for the Claimant to have beaten the £3,550,000 in money terms, any epilepsy award would have to be in the region of £16,875,000 (100/2.2 x £371,258.36) which was unrealistic.

78. The Second Defendant points to their further offer of £4,000,000, as evidence of a continued realistic approach to settlement, in contrast to the Claimant's. Mr Huckle QC for the Claimant highlights that the timing of this offer coincided with his client having just arrived from Canada for the trial. The Claimant gave evidence of having had several headaches since his arrival in London for the trial. I accepted that the Claimant finds travel mentally draining and that his headaches appear to be linked with times when he is particularly tired or fatigued: see [54] and [60] of the quantum judgment.

(b): Analysis and conclusion

(i): Whether the Claimant "beat" the offers made

79. There was only one Part 36 offer made by the Second Defendant in his case, that of £3,125,000. The Claimant beat that offer. It does not matter for the purposes of Part 36 that he "only" beat it by £53,741.64, a relatively small figure in the scheme of this case as the Second Defendant highlights: CPR 36.17(2) makes specific provision for beating an offer in monetary terms "however small" the difference between the award and the offer.

80. As to whether the Claimant beat the *Calderbank* offer £3,550,000, in *Coward* the Court of Appeal rejected (obiter) the submission made to me by the Second Defendant that, as a matter of principle the effect of a *Calderbank* offer is to be assessed by analogy with the terms of CPR 36.17(2).

81. However even if the more flexible approach contended for by the Claimant is applied, I do not consider it realistic to argue that the Claimant did better at trial than the offer. By going to trial he recovered £371,258.36 less in damages than the offer. Although by going to trial he also secured the peace of mind of the provisional damages for epilepsy, I accept the Second Defendant's arguments that the additional £371,258.36 in the offer accommodated that claim. It follows that the Claimant did not beat the offer of £3,550,000 or the Second Defendant's last offer £4,000,000.

82. The position is therefore that the Claimant did beat a Part 36 offer but did not beat two non-Part 36 offers. The result is that the costs regime in CPR 36 is of no application, but regard must be had to the general discretion in relation to costs under CPR 44.2(4). As part of the exercise of that discretion, any admissible offers fall for consideration under CPR 44.2(4)(c).

(ii): The applicable discretion

83. The nature of the discretion in these circumstances was considered by David Richards LJ in *Coward* at [93]-[98]. He noted that the Part 36 and Part 44 are separate regimes with separate purposes. Further, while Part 36 is highly prescriptive in its terms, and highly restrictive of the exercise of any discretion by the court in any particular case, CPR 44.2 confers on the court a discretion in "almost the widest possible terms and contains no rules as to the way in which the court is to have regard to admissible offers".

84. The White Book also notes the following at paragraph 44.2.19:

> "Before the enactment of the CPR the exercise of the court's costs discretion in [these] circumstances was a fairly simple matter; if the claimant ought reasonably to have accepted the defendant's offer generally the defendant was entitled to all his costs from the date of the offer. The innovations introduced by the CPR, in particular the more flexible application of the costs follow the event rule encouraged by the terms of r.44.2 and the offers to settle regime in Pt 36, complicated matters. No longer could a successful party generally assume that he would be awarded all of his costs, and no longer could a party who made an admissible offer generally assume that he would be awarded all of his costs from the date of the offer. Under r.44.2 the court is required to have regard to all the circumstances; it will be an unusual case where the only circumstance is an admissible offer within r.44.2(4)(c). In a given case it is highly likely that in determining an order about costs the judge will have to take into account the proper effect of the circumstance of an admissible offer (whatever that effect might be) together with the effect of other circumstances, with the result that

> the normal consequences of the admissible offer are diffused" [my emphasis].

85. Further, in *Capita (Banstead 2011) Ltd v RFIB Group Ltd* [2017] EWCA Civ 1032; [2017] C.P. Rep. 38; [2017] 4 Costs L.R. 669, CA, the Court of Appeal explained that whether or not a case is an appropriate one for a *Calderbank* letter from a Defendant to be treated as having the same costs protection effect as a Part 36 offer "is quintessentially a matter for the discretion of the trial judge" ([45]).

(iii): CPR 44.2(2)

86. Turning then to the CPR 44.2 discretion, it is again necessary to determine who the successful party was for this period under CPR 44.2(2). In my view this is a finely balanced issue. On the Claimant's side, as at 1 February 2022 all the factors set out at [28] above continued to apply. He was facing a trial which would inevitably lead to him being awarded some damages due to the admission of liability. At that trial, as we now know, he would win all the substantive factual issues, and achieve very substantial immediate damages and a provisional damages award in relation to epilepsy. However, there is a good argument that by failing to accept the £3,550,000 offer, the Claimant no longer had the status of the successful party.

87. On balance, I consider that the proper approach here is to work on the basis that the Claimant continued to be the successful party period after 1 February 2022, such that the general rule in CPR 44.2(2)(a) applies. However, his failure to beat the offers made must form part of the overall assessment of whether to depart from that general rule under CPR 44.2(2)(b), and if so how. That departure could be to the extent of an order requiring him to pay the Second Defendant's costs.

(iv): CPR 44.2(4) and (5)

88. Looking at all the circumstances on this case, I consider the following factors are relevant to the exercise of my discretion on costs for this period.

89. *First*, all of the matters discussed in section 4.1(a) above in respect of the dementia claim continued to apply throughout the period from 1 February 2022. The points about conduct I identified at [51]-[53] above and the Claimant's lack of success on this issue mean that CPR 44.2(4)(a) and (b) and 44.2(5)(c) are relevant to this period.

90. *Second*, as explained in section 4.1(b) above, I consider it is appropriate to factor into the costs decision for this period the fact that the Claimant recovered less than 10% of his pleaded claim overall, despite having succeeded on all the factual points underpinning the earnings claim. This is pertinent to CPR 44.2(4)(b).

91. *Third*, there are a series of admissible offers which fall to be considered under CPR 44.2(4)(c). The conduct of the parties with respect to the settlement process, including these offers, is also relevant under CPR 44.2(4)(a).

92. The first admissible offer was one made by the Claimant in October 2018 for £235,000. I agree with the Second Defendant that this offer can properly be characterised as a "historical footnote" to the litigation which has no material bearing on the costs issues I now need to decide. The Claimant's Schedule of Loss in January

2019 valued the claim at £233,026. An offer which exceeded the pleaded value of the entire claim could not be said to be realistic. In any even the Claimant very significantly increased the value of his claim from this figure and should not be permitted to "derive a costs advantage by dramatically shifting the goalposts".

93. The next admissible offers also came from the Claimant and were for £10,950,000 and £17,050,000 on 13 December 2021. I have explained at [52] above why I consider these were unrealistic, in allowing £6,100,000 for the provisional damages claim. It is perhaps no coincidence that the £17,050,000 offer represented around 50% of the claim as then pleaded. However, that claim was unduly high given the inclusion in the Schedule of the immediate damages claim for dementia and the sole, unrealistically high case on earnings.

94. The Second Defendant then made the Part 36 offer of £3,125,000 and the *Calderbank* offer of £3,550,000 on the same day, 11 January 2022. As set out above the Claimant beat the Part 36 offer and so it has no formal consequences under Part 36. However, I consider that it is relevant to the wider discretion under CPR 44.2 together with the *Calderbank* offers of £3,550,000 and £4,000,000. This is because, as in *Brit Inns* at [55], these offers were "far closer to the final recovery than either of the…offers made by the Claimant…".

95. The Claimant did not summarily reject this offer and take no further steps to try and resolve the claim. Indeed, he reacted very promptly and on 13 and 19 January 2022 made further *Calderbank* offers of £8,050,000 and £7,250,000, including his provisional damages claims. This indicates to me that the Claimant's team were, by this point, taking a more realistic view of the proceedings. The Claimant's proposal to have the dementia claim resolved as a discrete issue for the court was also entirely sensible. If the Second Defendant had agreed that course the prospects of settlement of the remainder of the claim, even at this stage, would have been greater and costs saved.

96. The final offer from the Second Defendant was for £4,000,000. While I appreciate the impact of travel on the Claimant's health, I do not consider this a persuasive reason for not engaging more closely with the offer, not least as on arriving in London he chose to take part in the activities with Pilar Corrias and Gagosian described at [18] of the quantum judgment.

97. Generally, I have already noted that there was significant uncertainty in the quantification of the earnings claim due to the fact that the Claimant works in a notoriously volatile industry, where initial success is not necessarily a predictor of long-term success at the same level: see [264] of the quantum judgment. Assessment of the value of the earnings claim was particularly complex here, and I therefore have some sympathy for the Claimant's argument that this case, and thus the response to the offers, could not be approached on an entirely scientific, formulaic basis as might apply in certain commercial cases.

98. However, looking at the entirety of the settlement process I consider that the case is similar to *Brit Inns* to the extent that one party (here, the Second Defendant) continued to take a much more realistic view of these proceedings than the other. All of the

Second Defendant's offers were much closer to the final figure awarded by the court than any of the Claimant's and the Claimant failed to beat two of their offers.

(v): Conclusion

99. In my view each of the factors in CPR 44.2(4)(a), (b) and (c) are engaged by the matters set out at section (iv) above, and they should all sound in adverse costs consequences for the Claimant.

100. However, considering all the circumstances, and stepping back, I do not consider that these factors are so persuasive that they justify a departure from the general rule to the extent that the Claimant should pay the Second Defendant's costs, or that no order for costs is appropriate, for this period. The effect of either order would be to deny the Claimant his costs of the final pre-trial period and the trial and (in the case of the first such order) reduce very substantially his pre-trial costs. Stand back and comparing the results of such a costs order with the overall result of the case leads me to conclude that neither such order would be appropriate.

101. Rather, in my overall assessment, the appropriate and just order is that these factors should be marked by a further, and more substantial, reduction in the costs that the Second Defendant will need to pay the Claimant for this period.

102. Again, applying a broad-brush approach, and conscious that this is not a precise task, I consider that the Claimant's costs for this period should be reduced by **60%**. In my view this figure appropriately reflects the 15% reduction applied for the dementia claim, makes further allowance for the other factors discussed in section (iv) above, and seeks as far as possible to avoid double counting across the various factors and all the circumstances of the case.

103. It follows that in the exercise of my discretion I have not accepted either of the primary costs' positions contended for by the parties. However, I have made one of the alternative orders posited by the Second Defendant.

4.3: Payment on account of costs

104. The parties agree that the Claimant should receive a payment on account to reflect (i) 60% of the £55,050.50 incurred costs; and (ii) 90% of his £463,038 approved budgeted costs on the budget dated 16 November 2020. The calculations of these figures will now need to factor in my decisions to the effect that (i) the Claimant's costs up to 31 January 2022 should be reduced by 15%; and (ii) his costs after 1 February 2022 should be reduced by 60%. The latter reduction will apply to all of the £113,500 allowed on the budget for the trial phase and those elements of the £84,750 allowed for trial preparation where the costs were incurred after 1 February 2022.

105. The Claimant also seeks a payment on account of 60% of the costs included in the application to vary the budget. In determining whether to order any payment on account and its amount, one of the factors to which I need to have regard, per *Excalibur Ventures LLC*, is the difficulty the party in question may face in recovering the costs in question. Here, I agree with the Second Defendant that there is a risk that the application to depart from the budget will not succeed, given the need for caution in this regard set out in *Harrison*. In those circumstances I do not consider it appropriate

to order that the payment on account should reflect any of the costs included in the application to vary the budget.

106. The Claimant agrees that £11,500 should be set off against the interim payment on account of costs to reflect the interlocutory order of Master Gidden dated 3 February 2021.

107. Allowance also needs to be made for the Second Defendant's costs of the three interlocutory applications dealt with at the outset of the trial. In my view the Claimant is correct that this should take place during the final costs' assessment. No costs schedules have been provided by the Second Defendant. I also do not consider that the Second Defendant's broad-brush proposal of allowing £15,000 for these three applications is realistic, not least given the very limited costs that must have been incurred in respect of one of the Claimant's applications (that for relief from sanctions in relation to the video evidence protocols).

108. I am grateful to the parties for their assistance in agreeing the final figure for the payment on account.

Conclusion

109. For these reasons I order that the Second Defendant should pay 85% of the Claimant's costs up to 31 January 2022 and 40% of the Claimant's costs from 1 February 2022, subject to detailed assessment.

110. There should be an interim payment on account of the Claimant's costs comprising 60% of his incurred costs and 90% of the Claimant's budgeted costs, subject to the percentage reductions referred to above, and less £11,500. This gives a total of £392,000.

111. I reiterate my thanks to the parties for their considerable assistance with this complex case.