Neutral Citation Number: [2023] EWHC 1871 (KB)

Case No: QB-2020-000913

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20th July 2023

Before :

MRS JUSTICE HILL

- -

Between :

ROSEMARY CHAPMAN

Claimant

- and –

Defendant

MID AND SOUTH ESSEX NHS FOUNDATION TRUST

Re: Costs

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- -

Anna Beale (instructed by **Stewarts Law**) for the Claimant
Andrew Post KC (instructed by **Browne Jacobson LLP**) for the Defendant

Written Submissions: 31 May 2023 and 15 June 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 20/07/23 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE HILL

Mrs Justice Hill:

Introduction

1. By a judgment handed down on 30 May 2023 at [2023] EWHC 1290 (KB) ("the liability judgment") the Claimant's clinical negligence claim in respect of her examinations by Dr Bopitiya, Consultant in the Department of Chronic Pain Management at Southend University Hospital, on 24 December 2009 and 30 September 2010 succeeded. No finding of contributory negligence was made on the Claimant's claim in relation to Dr Bopitiya.

2. The Claimant's claim arising out of her attendance at the Emergency Department at Basildon University Hospital on 9 March 2017, when she was assessed by an Emergency Nurse Practitioner ("ENP"), Becky Nice, was dismissed. However I concluded that had it succeeded, the Claimant would have made out her case on causation and no finding of contributory negligence would have been made.

3. It is now necessary to resolve the costs issues between the parties, which have been addressed in helpful written submissions from both parties, supported by the relevant authorities and a bundle of inter partes correspondence.

4. The issues that require determination are as follows:

    (1) What general order should be made as to costs. The Claimant contends that the Defendant should pay her costs of the claim. The Defendant's primary position is that there should be no order for costs; alternatively that the Defendant should be ordered to pay only a percentage of the Claimant's costs.

    (2) Whether the Part 36 offer made by the Claimant on 22 December 2022 to settle her claim for 90% of damages assessed on a 100% liability basis was an effective Part 36 offer.

    (3) If it was an effective Part 36 offer, whether it would be unjust in all the circumstances of the case to order Part 36 consequences under CPR 36.17.

5. In *Webb v Liverpool Women's Hospital NHS Foundation Trust* [2016] EWCA (Civ) 365; [2016] 1 WLR 3899 the Court of Appeal highlighted the need to address separately the costs incurred before and after the effective date for the purposes of CPR Part 36. The time for accepting the Claimant's Part 36 offer in this case expired on 13 January 2023. It is therefore appropriate to consider the appropriate costs order by reference to the periods of time before and after that date. I include within my consideration of the costs order for the latter period the prior issue of whether the Part 36 offer was an effective one.

The appropriate costs order in relation to the period up to 13 January 2023

6. The parties agreed that the costs order for this period should be determined by reference to the court's general discretion in relation to costs, as set out in CPR 44.2, which provides in material part as follows:

> "**Court's discretion as to costs**
> **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".

7. Accordingly, under CPR 44.2(2), if the court decides to make an order about costs, the "general rule" is that the unsuccessful party will be ordered to pay the costs of the successful party, although the court may make a different order.

8. In *Welsh v Walsall Healthcare NHS Trust* [2018] EWHC 2491 (QB); [2018] 5 Costs LR 1025, Yip J cited the following principle relied on by Sir Stanley Burnton (with whom Gloster LJ and Simon LJ agreed) in *Webb* at [38], which she considered useful in exercising the discretion under CPR 44.2:

> "Each case will turn on its own circumstances, but the court should be trying to assess "who in reality is the unsuccessful party and who has been responsible for the fact that costs have been incurred which should not have been"…".

9. The parties agreed that this was the appropriate starting point in this case for the consideration of the costs order in relation to this period.

10. Mr Post sought to persuade me that a matter of substance the Claimant had brought two separate claims. The allegations in relation to Dr Bopitiya and those in relation to ENP Nice had originally been claims against two separate trusts. It was sheer chance that they had merged. The allegations related to periods seven years apart and concerned quite different clinical specialisms. As the liability judgment had noted, there was little factual dispute in the Dr Bopitiya claim but significant factual disputes in the ENP Nice claim. He contended that the Claimant had only been the successful party and should only recover her costs in one of the claims (that relating to Dr Bopitiya). However she should be expected to pay the Defendant's costs of the ENP Nice claim. As CPR 44.2(6)-(7) discourages issue-based costs orders, and on the pragmatic basis that the costs of the two claims balanced each other out, the appropriate order would be no order as to costs.

11. I respectfully disagree with this characterisation of the case. The two trusts the Claimant had initially sued had merged in April 2020, less than a month after the claim was commenced. On that basis the Defendant had been a single entity for almost the entire three-year duration of the claim. I accept Ms Beale's submission that a claim that proceeds against a single Defendant justifies a different strategic analysis by a claimant compared with a claim that proceeds against two separate entities. The fact that the two sets of allegations in the claim involved different periods of time, different expert disciplines and different levels of factual dispute does not mean that they were properly considered as two separate claims.

12. Given that this was in substance one claim, the Claimant was in reality, the successful party. Of the seven key issues addressed in the liability judgment, the Claimant succeeded on six of them. She made out her primary case in relation to breach of duty against Dr Bopitiya (albeit that she failed in relation to one relatively minor aspect, namely that relating to hypochondrial/iliac fossa pain: see [79]-[81] of the liability

judgment). She succeeded in her causation claim in respect of her treatment by Dr Bopitiya. This was because the experts accepted during the trial that absent Dr Bopitiya's breaches of duty an MRI scan would have been carried out which would have shown the thoracic disc prolapse; and because the Claimant proved that the prolapse was symptomatic in 2009/10, such that she would have been offered surgery for it at that point; and that she would have elected to undergo this surgery. Although she failed to establish a breach of duty in respect of ENP Nice, she succeeded on her causation case in relation to these allegations and she successfully rebutted the allegations of contributory negligence in respect of both parts of the claim.

13. As Sir Stanley Burton reiterated in *Webb* at [27], it is "not unusual for a claimant to succeed on some but not all allegations particularly in a personal injury case". Further, as he said at [28], citing *Fox v Foundation Piling* [2011] EWCA Civ 790; [2011] 6 Costs LR 961, at [48]:

> "In a personal injury action the fact that the Claimant has won on some issues and lost on other issues along the way is not normally a reason for depriving the Claimant of part of his costs: see *Goodwin v Bennett UK Ltd* [2008] EWCA Civ 1658. For example, the Claimant may succeed on some of the pleaded particulars of negligence, but not on others. Indeed the fact that the Claimant has deliberately exaggerated his claim may in certain instances not be a good reason for depriving him of part of his costs: see *Morgan v UPS* [2008] EWCA Civ 1476."

14. In *Webb*, the Claimant had succeeded in establishing full liability but had lost on one of her two principal allegations of negligence which had been considered at length at trial. This had entailed the instruction of an expert from a different discipline (midwifery) who would not otherwise have been required: [12] and [25]. The Court of Appeal overturned the order of the first instance judge who had excluded from recovery those fees solely attributable to the unsuccessful allegation of negligence. At [29], the Court concluded that there was "nothing in this case to take it out of the ordinary or to justify the Claimant being deprived of part of her costs." In my judgment Ms Beale was right to draw similarities between the facts of *Webb* and this case.

15. For these reasons, I consider that the starting point under CPR 44.2(2)(a) is that the Defendant, as the unsuccessful party, will be ordered to pay the costs of the Claimant, as the successful one.

16. The issue then is whether to depart from that order under CPR 44.2(2)(b) by reference to any of the matters set out in CPR 44.2(4).

17. Neither party made any offer to settle the claim within this period, and so 44.2(4)(c) does not apply.

18. Ms Beale asserted that the Defendant's conduct was material under CPR 44.2(4)(a) because the Trust had failed to engage meaningfully in settlement discussions: they could have made appropriate admissions in respect of Dr Bopitiya and avoided a trial and thus their own costs liability. Mr Post responded by highlighting that the Claimant made no offer during this period of time either; and was adamant that her allegations against the ENP Nice in relation to fabricating her notes would not be withdrawn. In

my judgment neither party's conduct in relation to settlement was so adverse that I should take it into account under CPR 44.2(4)(a).

19. Mr Post relied on the fact that the Claimant's allegations against ENP Nice went beyond mere negligence and were of the most serious kind, namely dishonesty in recording clinical findings for examinations that had not taken place and fictitiously inventing the Claimant's ability to walk. If proven these would have been likely to have led to ENP Nice being dismissed from her job and struck off. Further, her claim in relation to ENP Nice had not failed because of some new developments in the case but because the Claimant's allegations were inconsistent with the ambulance/triage records and Mr Chapman's complaint letters, his evidence at trial and my broader concerns about the Claimant's evidence including the failings with regard to disclosure: see [132]-[135], [142], [152] and [165] of the liability judgment. He effectively advanced these as material elements of the Claimant's conduct under CPR 44.2(4)(a) and the fact that she had been unsuccessful on this element of her claim under CPR 44.2(4)(b).

20. However, as Ms Beale highlighted, I made no finding that the Claimant's case in respect of ENP Nice's examination was unreasonably pursued or that it was not properly arguable. Indeed not all of the ENP Nice's evidence was accepted and the dispute as to whether or not the Claimant had been able to take steps during the examination was one I had found to be "finely balanced": see [124]-[127] and [148] of the liability judgment. There was no finding that the Claimant or her family had been deliberately dishonest. The Claimant had simply failed to make out her claim in this respect on the balance of probabilities. The circumstances of this case were very different to *Welsh*. There, Yip J made a 15% reduction to the Claimant's costs in circumstances where the Claimant had unreasonably pursued an issue as to consent which was not properly arguable and was then withdrawn during the course of the trial: see [15]-[29] [36]-[43].

21. For all these reasons I do not consider it appropriate to depart from the general rule. I therefore order the Defendant to pay the Claimant's costs of the claim for the period before 13 January 2023, on the standard basis, to be assessed if not agreed.

The appropriate costs order in relation to the period after 13 January 2023

(i): The legal framework

22. The relevant provisions are set out in CPR 36.17 which provides in material part as follows:

> "**Costs consequences following judgment**
> **36.17**
>
> (1) Subject to rule 36.21, this rule applies where upon judgment being entered -
> (a) a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer; or
> (b) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer…

(2) For the purposes of paragraph (1), in relation to any money claim or money element of a claim, "more advantageous" means better in money terms by any amount, however small, and "at least as advantageous" shall be construed accordingly.

(3) Subject to paragraphs (7) and (8), where paragraph (1)(a) applies, the court must, unless it considers it unjust to do so, order that the defendant is entitled to—
(a) costs (including any recoverable pre-action costs) from the date on which the relevant period expired; and
(b) interest on those costs.

(4) Subject to paragraph (7), where paragraph (1)(b) applies, the court must, unless it considers it unjust to do so, order that the claimant is entitled to—
(a) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;
(b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;
(c) interest on those costs at a rate not exceeding 10% above base rate; and
(d) provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below to an amount which is—
(i) the sum awarded to the claimant by the court; or
(ii) where there is no monetary award, the sum awarded to the claimant by the court in respect of costs—

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

(5) In considering whether it would be unjust to make the orders referred to in paragraphs (3) and (4), the court must take into account all the circumstances of the case including—
(a) the terms of any Part 36 offer;
(b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;

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

(ii): The nature of the Claimant's 22 December 2022 offer

23. The Claimant's 22 December 2022 offer to settle her claim was described in the letter from her solicitor as follows: "an offer to settle the liability and causation issues in this action for 90% of damages assessed on a 100% liability basis, that is with a deduction of 10% from the full value of the claim".

24. The Defendant sought clarification of the offer. This was arguably unnecessary. The letter could only have been understood as offering to settle the full value of the pleaded breach and causation case against this defendant. Further, the Amended Particulars of Claim at [68] and [70] made clear that the Claimant's case as to the likely outcome but for the alleged negligence in relation to both elements of the claim was essentially the same, namely that with timely intervention she would have been neurologically normal albeit with her ongoing lower back pain caused by the spondylolisthesis.

25. The Claimant's solicitor nevertheless clarified the position in correspondence as follows:

> "Insofar as there is a material distinction between the outcomes based on the causation cases against your client as set out at paragraph 67 to 68 and 69 to 70 of the Particulars of Claim, which is not admitted, for the avoidance of doubt this offer is based on the causation case against your client which is set out at paragraph 67 to 68 of the Amended Particulars of Claim (diagnosis in 2009/10)".

26. The liability judgment found at [189]-[190] that had surgery been performed in 2010, as it would have been absent Dr Bopitiya's breach of duty, the Claimant would have enjoyed a full neurological recovery, with normal bladder, bowel and sexual function, but persisting pain and disability arising from her spondylolisthesis. This is clearly more favourable to the Claimant than her offer. She has succeeded fully on her causation case as pleaded.

(iii): Was the Claimant's offer an effective one for Part 36 purposes?

27. Mr Post submitted that the Claimant's 22 December 2022 offer to settle her claim for 90% of damages, assessed on a 100% liability basis, was not an effective Part 36 offer. He relied on the recent judgement of Collins Rice J in *Mundy v TUI UK Ltd* [2023] EWHC 385 (Ch); [2023] Costs LR 153. He contended that she had held at [36]-[42] that an offer in this form is not an offer to settle the claim or a quantifiable part of or

issue in the claim and that therefore CPR 36.17 and the adverse Part 36 costs consequences should not apply. He submitted that there was no realistic possibility of a split liability order in this case because the Defendant's contributory negligence argument was not potentially effective in relation to the claim against Dr Bopitiya, for the reasons identified in the liability judgment at [198].

28. However, the factual context of *Mundy* is important. This was that the Claimant had made two separate Part 36 offers (one based on a 90/10 liability split and one to accept £20,000 pounds in settlement of the claim) and the Defendant had made a Part 36 offer of £4000 in full settlement. The Claimant was ultimately awarded £3,805.60 but nevertheless argued that the judgment was at least as advantageous to him as the proposals in his 90/10 offer: [1] and [6]-[8]. At [32], Collins Rice J identified a "particular difficulty" with the Claimant's position, namely that it seemed to:

> "…cut across the binary structure of CPR 36.17(1) by contemplating a situation in which the answer to *both* limbs could be "yes": A claimant can have failed to beat a defendant's money offer, but still have beaten or equalled his own liability offer. That raises the problematic prospect of subsections (3) and (4) *both* applying in circumstances where it is far from obvious that this is in the contemplation of the rule at all".

29. While Collins Rice J did discuss 90/10 liability offers in general terms at [36]-[42], I do not understand her judgment as purporting to hold that Part 36 consequences cannot flow from such offers made in different factual circumstances from those before her, and any such finding would be *obiter* in any event. Collins Rice J's analysis was based on the difficulty of comparing monetary offers with liability offers of this kind. While such a difficulty may arise in claims such as *Mundy* where liability and quantum issues are tried together and both liability and monetary offers have been made, the analysis does not apply in this case given that a split liability trial had been ordered and the only substantive offer made by either party was the Claimant's 90/10 liability split offer.

30. Further, in *Mundy* at [36], Collins Rice J appeared to acknowledge that a 90/10 liability offer could be effective in cases where there was a "genuine question of issues-based liability". There was, until judgment, a genuine prospect of a finding on split liability as between the parties in this case. I did not find that the contributory negligence argument in relation to the Dr Bopitiya claim was one that did not have "the slightest prospect of success" as in *Mundy* at [11]. Although Mr Post now advances that contention, the Defendant had maintained this allegation at trial and my rejection of it was based on my decision as to the point at which the Claimant would have undergone surgery but for Dr Bopitiya's negligence, all matters that were heavily contested by the Defendant at trial.

31. In any event, *Mundy* is distinguishable from this case because the manner in which the Claimant's 90/10 offer applied to the causation issue had been made clear in correspondence and was reflected in the liability judgment.

32. For these reasons I do not accept that the reasoning in *Mundy* is applicable here. In my judgment the Claimant's 22 December 2022 offer was a valid one for Part 36 purposes.

(iv): Would it be unjust for Part 36 consequences to flow from the Part 36 offer?

33. The Claimant has obtained judgment against the Defendant that is "at least as advantageous" to her as the proposals contained in her Part 36 offer for the reasons given at [23]-[26] above.

34. It follows that the next issue is whether it would be "unjust" to make those orders referred to in CPR 36.17(3) and (4) that are applicable at this stage (where there has not yet been a determination of the sum of damages to be awarded to the Claimant, so that CPR 36.17(4)(a) and (d) do not apply). Regard must be had to the factors in CPR 36.17(5).

35. As the Court of Appeal made clear in *Webb* at [38]:

> "…a successful claimant is to be deprived all or part of her costs only if the court considers that it would be unjust for her to be awarded all or that part of her costs. That decision falls to be made having regard to "all the circumstances of the case". In exercising its discretion, the court must take into account the fact that the unsuccessful defendant could have avoided the cost of the trial if it had accepted the claimant's Part 36 offer as it could and should have done".

36. Further, the Court continued at [38] by emphasising that the burden of showing injustice is a "formidable obstacle to the obtaining of a different costs order. If it were not so, then the salutary purpose of Part 36, in promoting compromise and the avoidance of unnecessary expenditure of costs and court time, would be undermined." As Collins Rice J noted in *Mundy* at [44], "[t]he "unjust" bar…remains a high one".

37. None of the specific factors set out in CPR 36.17(5) are particularly relevant here. However Mr Post relied on the following, effectively as part of "all the circumstances of the case": (i) the very serious nature of the allegations made against ENP Nice; (ii) the fact that they had been dismissed after trial and she had been vindicated; and (iii) the fact that acceptance of the Claimant's offer would have prevented any determination of the allegations, such that it was reasonable and proper for the Defendant to fight the case at trial rather than to accept the offer.

38. I do not consider that these points meet the formidable and high threshold for "unjust", essentially for the reasons given by Ms Beale. The Defendant could have avoided the matter going to trial and the allegations against ENP Nice being ventilated in public by making appropriate admissions as to Dr Bopitiya's negligence or accepting the offer explicitly in respect of the allegations against him, which was in fact the way it had been clarified in correspondence.

39. Mr Post contended that if CPR 36.17(4)(c) was engaged, the appropriate rate should be 2% over the base rate. Ms Beale submitted that the rapid recent rise in interest rates which has necessitated regular increases in the special account rate and the Defendant's failure to engage in ADR meant that the maximum increase of 10% was appropriate. I accept the first of these submissions but not the second for the reasons given at [18] above. In my judgment the appropriate rate would be 5% over the base rate.

A payment on account of costs

40. 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.

41. The Defendant has not advanced any good reason not to order an interim payment of costs, nor do I discern any.

42. The Claimant sought a payment of £685,000 on account of costs. This was calculated as 70% of non-budgeted costs plus 90% of budgeted post-Costs and Case Management Conference ("CCMC") costs, including an overspend of £133,000.

43. In *Gollop v Pryke* (Ch D) [2011] 11 WLUK 783 it was held that in considering the amount of a payment on account the court should make a reasonable assessment of what was likely to be awarded. In *Gollop*, the court on appeal awarded around 70% of the Defendant's (unbudgeted) costs, reducing the figure of 95% used by the Master.

44. Ms Beale also relied on (i) the fact that costs should be awarded on the indemnity basis after 13 January 2023 (an argument I have accepted); and (ii) *Thomas Pink Ltd v Victoria's Secret UK Ltd* [2015] 3 Costs LR 463 at [60] in support of her contention that an interim amount of 90% of the budgeted post-CCMC costs is appropriate.

45. The Defendant agreed this figure in principle. In my judgment it is sound, for the reasons given by Ms Beale.

46. I therefore order the Defendant to make a payment of £685,000 on account of costs.

A payment on account of damages

47. The Claimant also sought what Ms Beale described as a "relatively modest" payment on account of damages of £100,000.

48. She relied on Mr Kumar's evidence that the Claimant has T9 AIS-C paraplegia involving severe weakness in her trunk and lower limbs, a neurogenic bladder and abnormal bowel sensation and control, neuropathic pain and moderate to severe spasticity in her lower limbs. Her present accommodation is unsuitable and she requires higher levels of care than she would otherwise have needed.

49. She cited the *Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases* which indicate that awards for pain, suffering and loss of amenity in the region of £219,070-£284,260 are appropriate in cases of paraplegia. She contended that even if a significant deduction was made from such an award for the Claimant's pre-existing disability, which did not result in neurological symptoms, it is likely that any award for pain, suffering and loss of amenity will exceed £100,000.

50. The Defendant agreed that the figure sought was appropriate. In my judgment it is appropriate for the reasons given by Ms Beale. I therefore make the order sought.

Time for payment

51. The parties agree that the interim payments on account of costs and damages should be paid within 28 days. I am content with this course.

Conclusion

52. For these reasons I order that:

(i) The Defendant shall pay the Claimant's costs of the claim for the period up to 13 January 2023, on the standard basis, to be assessed if not agreed;

(ii) The Defendant shall pay the Claimant's costs of the claim for the period after 13 January 2023 on an indemnity basis; and interest on these costs at 5% above base rate from 14 January 2023 until payment thereof;

(iii) The Defendant shall pay the Claimant £685,000 on account of costs within 28 days; and

(iv) The Defendant shall pay the Claimant £100,000 on account of damages within 28 days.