Neutral Citation Number: [2020] EWHC 1380 (QB)

Case No: QB-2017-005208

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London WC2A 2LL

Date: 05/06/2020

Before :

THE HON MR JUSTICE KERR

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Between :

MR AMJAD RIHAN	**Claimant**
- and -	
(1) ERNST & YOUNG GLOBAL LIMITED	**Defendants**
(2) ERNST & YOUNG EUROPE LLP	
(3) ERNST & YOUNG (EMEIA) SERVICES LIMITED	
(4) EYGS LLP	

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Ben Hubble QC and Matthieu Grégoire (instructed by **Leigh Day Solicitors**) for the **Claimant**
Daniel Toledano QC, Nehali Shah and Joshua Crow (instructed by **Orrick Herrington & Sutcliffe (UK) LLP**) for the **Defendants**

Hearing dates: 24, 27-28, 31 January, 3-6, 12-13 February and 17 April 2020

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Approved Judgment (2) on Consequential Matters

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.

The Hon Mr Justice Kerr :

Introduction

1. This is my judgment on consequential matters following the trial of the action and my main judgment handed down remotely on 17 April 2020. This supplemental judgment should be read together with the main judgment and uses the same abbreviations and definitions.

2. After the main judgment was handed down, the parties made written submissions on consequential matters and it was agreed that a further oral hearing could be dispensed with and that I would give my supplemental judgment in writing after considering the parties' written submissions.

3. I am grateful to the parties for those written submissions and authorities and for coming close to observing the length limits I sought to impose on the exercise, in the interests of concise expression. I have carefully considered these materials but do not incorporate them at length into this judgment and concentrate on the main points.

Judgment Sum and Interest

4. The claimant asks me to enter judgment against all four defendants jointly and severally for the sums awarded, which on a provisional basis (subject to tax considerations) are $10,843,941 and £117,950. I agree that judgment should be entered against all four defendants jointly and severally.

5. He invites me to convert the portion awarded in US dollars to pounds sterling. I am content to do so, on the understanding that the source of the conversion rate is agreed; but the rate should be as at 17 April 2020, when I handed down my main judgment. It was on that date that the amount of money destined for the claimant's pocket as a consequence of the tort was formally ascertained.

6. The claimant seeks interest on the judgment sum at 8 per cent per annum from 17 April 2020 to the date of payment, pursuant to the Judgments Act 1838, section 17(1), and the Judgment Debts (Rate of Interest) Order 1993. I agree and do not accept that interest under section 17(1) of the 1838 Act should run from the date of the court's final order.

7. I consider that the effect of CPR rule 40.8(1) (setting the date from which interest runs under section 17 of the 1838 Act) is that my main judgment is the "judgment" in the phrase "the date that judgment is given". If I were wrong about that and the "judgment" in question is this one and not the main judgment, I direct pursuant to rule 40.8(2) that interest under section 17 shall run from 17 April 2020.

8. I consider that the judgment debt rate should apply from the date of the main judgment, for two reasons: because it was on that date that the amount of compensation to be received by the claimant for his own use was formally determined, subject to consequential matters; and because interest on past losses was, therefore, calculated up to that date.

9. It is agreed that the date for payment of the judgment sum should be 21 days from the date of the court's final order (not my order made on 17 April 2020); and that the defendants will pay the claimant 10 per cent of the sums referred to in the main judgment, with the award of $10,843,941 in US dollars being converted into pounds at the exchange rate on the date of the court's final order (not as at 17 April 2020) - a rate I hope, as I have said, will be agreed.

10. This is subject to an undertaking from the claimant, which he gives, to repay the defendants if and to the extent that the award of damages is reversed on appeal. The defendants agree to pay into court the other 90 per cent of the sums referred to in the main judgment (after conversion of the dollars) with interest thereon at 8 per cent per annum paid quarterly, pending final determination of the appeal or further order. After the currency conversions all further proceedings will involve pounds only and no longer US dollars.

11. The claimant submits that the damages could be subject to income tax or capital gains tax (**CGT**) and, if the latter, Her Majesty's Revenue and Customs (**HMRC**) cannot be relied upon to accept that the damages fall within the exception under section 51(2) of the Taxation of Chargeable Gains Act 1992 (**TCGA 1992**) whereby "sums obtained by way of compensation or damages for any wrong or injury suffered by an individual in his person or in his profession or vocation are not chargeable gains."

12. The claimant points out that in a publication called CG13030, HMRC expresses the view that the words "in his profession or vocation" refer to damages "suffered … in a professional capacity such as unfair discrimination, libel or slander … as distinct from 'in his finances'…". He says the doubt should be resolved in his favour: *Stoke on Trent City Council v. Wood Mitchell & Co Ltd* [1980] 1 WLR 254, per Roskill LJ (judgment of the court) at 259G.

13. The claimant argues that the judgment sum should be the amount that protects him against the risk of under-compensation if the damages are taxed in his hands, since the defendants cannot show it is clear "beyond peradventure" (*ibid.* per Roskill LJ at 259G) they will not be. In reply submissions, the claimant relied on two First-tier Tribunal tax cases as authority against the applicability of the exception in section 51(2) of the TCGA 1992.

14. He offers an undertaking in the same terms as in *4Eng Ltd v Harper* [2009] Ch 91 at [105] (per David Richards J as he then was) that "if all sums by way of damages, interest and costs are paid to it [him], it [he] will seek a ruling from HMRC as to its [his] liability to tax on these damages, and, if either no tax is payable or tax is payable in a smaller sum than the grossed-up element ordered by the court, it [he] will return the sum paid on account of tax or the excess".

15. The claimant then produces tables supported by spreadsheets which, he says, show what the worst tax position for him would be, on the basis found in the main judgment at [845], that he would have worked for the EY organisation in the Middle East for a further 10 years or so and then continued working for the organisation up to retirement in the UK or elsewhere in Europe.

16. Taking his worst case tax scenario combined with the offered undertaking, he seeks judgment in the grossed up sums of $14,944,941 and £184,057. This takes into

account the absence of income tax liability in various countries in the Middle East and liability from 2026 onwards to income tax in the UK, as a proxy for the UK and elsewhere in Europe.

17. The defendants submit that the income the claimant would have earned from 2023 to 2035 would have been subject to UK income tax and should be reduced by the amount of tax that would have been payable, in accordance with the principle in *British Transport Commission v Gourley* [1956] AC 185; but that the damages, which should be treated as a capital asset, will not be taxed because of section 51(2) of the TCGA 1992.

18. The defendants have also done a tax computation supported by spreadsheet entries and, on the basis of it, they submit that the award in US dollars of $10,843,941 should be reduced by $4,016,451.27 to account for UK income tax and national insurance the claimant would have had to pay, producing the revised figure $6,827,489.73.

19. The defendants submit that the tax position is not uncertain. It is incontestable, they say, that the damages are capital not income and that they fall within the exception in section 51(2) of the TCGA 1992. They bring into account the whole of the claimant's likely future earnings of $1.4 million (see the main judgment at [875]), rather than a netted down equivalent. The defendants also make certain submissions about CGT relief.

20. They submit in the alternative that if the tax position is uncertain the claimant should be protected by an undertaking from the defendants to pay any tax liability in respect of the damages levied by HMRC, subject to safeguards to permit the defendants to join in the process and comment on any submissions from the claimant against any tax assessment, in the following terms:

> "upon C providing confirmation (with supporting documentary evidence) of the tax liability determined by HMRC in this regard (with Ds being provided with the opportunity to comment in advance on any submissions by C to HMRC and to be consulted prior to any outcome being agreed between C and HMRC)."

21. The defendants say that, on the claimant's approach, the defendants would have to pay into court an amount probably in excess of their true liability, with interest running at 8 per cent thereon. The claimant should not, they say, have the benefit of that money, and the interest on most of it, where he cannot be out of pocket unless and until HMRC obtain payment of tax on the damages.

22. Subject to two qualifications, I prefer the claimant's submissions on this issue for the following reasons. First, the tax position is uncertain. The main judgment establishes, subject to appeal, the existence of the audit duty for the first time. It is novel, as the defendants submitted at trial. The nature of the present damages award has therefore not yet been considered from a tax (or any other) perspective.

23. Discussion about the nature of the injury done to the claimant could occupy many pages of skeleton arguments in contested tax proceedings. No clear authority (the claimant's two tax cases are not on all fours) elucidates "any wrong or injury suffered by an individual in his person or in his profession or vocation" in the TCGA section 51(2). It is not clear whether HMRC is right to differentiate damages "suffered … in

a professional capacity such as unfair discrimination, libel or slander …" from damages suffered "'in his finances'".

24. There was a further debate between the parties about whether HMRC might grant relief from CGT. It is common ground that the first £500,000 of damages is exempt from CGT but there is a difference over whether amounts above that sum may be granted relief. For the avoidance of doubt, I regard that issue too as unpredictable, except in relation to the first £500,000.

25. Secondly, the claimant's approach accords with that of the unanimous Court of Appeal in the *Stoke on Trent City Council* case and of David Richards J, as he then was, in *4Eng Ltd v Harper*. The interest of the successful receiving party in avoiding under-compensation prevails over that of the unsuccessful paying party in avoiding over-compensation, provided suitable undertakings are given to prevent any over-compensation once the tax position is known.

26. Third, subject to two qualifications, the claimant's suggested practical way forward is workable and acceptable. It keeps to a minimum his likely involvement in a tax assessment process in which he has no real interest, in which he can maintain a neutral stance and, as far as possible, get on with his life. He must seek a ruling from HMRC but, having done so, can step aside and let the defendants make the running in contesting it if it is adverse.

27. The defendants are better placed to do so, although they are not the party liable to the tax. They have a direct financial interest in the outcome. They can make submissions to HMRC. The latter would be well advised to entertain such submissions; if they do not, they would be at risk of judicial review at the suit of the defendants who are the *de facto* tax paying parties, though they may lack standing to challenge a tax assessment directly in the First-tier Tribunal.

28. The defendants' suggested solution is unsatisfactory. It would start an awkward process in which the claimant would be caught in the middle in a potential dispute in which he has no financial interest. He might well be subjected to hostile lawyer correspondence and submissions from the defendants (of which there has been enough already) and perhaps from HMRC as well.

29. My acceptance of the claimant's solution is subject to two points. The first is that the tax element of the calculated judgment sum, in sterling after conversion, should remain in court until after determination of the tax issues, subject to the outcome of the defendants' appeal or further order. There is no need for the tax element of the award to be in the claimant's hands.

30. Secondly, on resolution of the tax issues, the parties should have liberty to apply to a Queen's Bench Master for directions as to payment out; and to resolve any dispute over the calculations or the rightful destination of the interest element. That will include whether the claimant or the defendants should receive part or all of the accrued interest element on the monies to be paid out of court. HMRC has powers to charge interest on tax paid late and may therefore also become involved, subject to permission of the Master.

31. How should the final judgment sum be calculated? I will address next the disputes between the parties affecting this issue, so that they can agree the final figure on the basis of my decisions on those points.

32. Firstly, my decision in the main judgment was that the claimant would have started working in the UK or elsewhere in Europe after "10 years or so". I apologise for not specifying a date for the purposes of calculating the tax implications. The calculation date from which UK tax would become payable should be taken to be 1 July 2024, i.e. the start of FY 25.

33. The claimant resigned in January 2014. I do not accept any necessary logical link between a move to Europe and a slowing down from 8 per cent to 4 per cent per annum in the annual pay increase. Bearing in mind that it takes a few months to relocate and start work, the start of FY 25 seems an appropriate calculation date for the start of the claimant becoming liable to UK tax.

34. Next, the claimant criticises the defendants' calculation method, pointing out that they have calculated loss of earnings year on year rather than using an average figure and applying the relevant multiplier as I did. I uphold the defendants' calculation method. The use of an average figure was a convenient calculation method for the main judgment but the year on year method is appropriate for tax calculation purposes and affects the tax figures.

35. Next, the claimant is correct to point out that the $1.4 million of earnings, which I attributed to the claimant as replacement income he will be likely to earn during the rest of his career, is a gross amount, not a net amount. In my main judgment at [850] I said that the figures below were "gross figures". That includes the $1.4 million. The defendants accept, on that footing, that $348,083.80 should be deducted from the $1.4 million.

36. Next, the defendants complain that the claimant's tax calculation is wrong because he has used a £0-50,000 band for the 20% basic rate of tax as opposed to the correct band of £0-37,500. The defendants are correct in this. I accept that the issue depends on the availability of a personal allowance and that the allowance is effectively zero where annual income exceeds £125,000. As the annual income in the calculations exceeds £125,000 for each of the years affected, there would be no available personal allowance.

37. The next point is that the defendants have performed their CGT calculation using the exchange rate as between dollars and pounds on 27 April 2020. That is 10 days after the main judgment was handed down. I cannot see why the exchange rate should not be the rate as at the date of judgment, 17 April 2020. The final calculation should be based on the exchange rate on that date, which the claimant correctly used in his calculations.

38. In relation to the part of the award in pounds sterling, the defendants submit that the claimant has deducted tax on the future loss of medical cover and life assurance cover for FY26 to FY35. The defendants accept that there should be a deduction, but say the figure should be £24,518.55, while the claimants have deducted £20,400. The difference between the parties is small. The deduction will need to be calculated and

agreed on the basis that UK tax would have become payable from 1 July 2024, as I have stated above.

39. Finally, the claimants point to a relatively small discrepancy of about £5,000 which is said to arise from the use by the claimant, but not the defendants, of HMRC's online calculator. I regard that tool as a suitable way of ascertaining tax, provided it includes a function able to perform the relevant calculation. It is appropriate for the online calculator to be used where that is the case.

40. I conclude this part of this judgment by inviting the parties to agree a final judgment figure in pounds sterling, calculated on the basis set out above, and to submit the agreed figure to the court for inclusion in my final order. The parties are also asked to provide agreed figures for the amounts (in sterling) to be paid into court and to the claimant.

Costs: Basis of Assessment

41. The claimant asked for his costs of the action on the indemnity basis. To be clear, I regard that application as subject to leaving undisturbed certain costs orders already made during the interlocutory phase of the proceedings, before the trial, which I have (as far as I am aware) no power to revisit. The claimant says, first, that he is (as the defendants accept) the successful party and the defendants are liable to pay the costs of the action.

42. In support of the indemnity basis, the claimant relies on the defendants' unethical and improper conduct before the proceedings were issued; their conduct of the trial; and their conduct after the trial. These, individually and even more so collectively, amount to conduct or circumstances which take the case out of the norm (*Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson* [2002] CP Rep 67 CA at [31]).

43. The claimant relies on the following matters. During the underlying history, the defendants behaved unethically and improperly throughout the Kaloti audit, as found in the main judgment. They were willing to mislead end users of the assurance report by concealing or diluting Kaloti's wrongdoing. They sought to abdicate responsibility for this by invoking the supremacy of the DMCC despite knowing that it was hopelessly conflicted. They then exerted improper pressure on the claimant to acquiesce in their own wrongdoing.

44. In their conduct of the trial, the claimant relies on my findings that they made an unjustified attack on the claimant's character, truthfulness and integrity, portraying him without warrant as an opportunist and workshy liar and publicity seeker; that they tried to impugn his veracity without cause, while putting forward incomplete and misleading evidence from their own witnesses. The detail of these findings is set out in the main judgment.

45. Further, the claimant says the defendants relied on privilege in an unsatisfactory manner, using it to mask evidence of their reasons for treating the claimant as they did, deliberately keeping relevant evidence verbal not in writing and failing to retain written evidence on computers which, or whose data, did not survive up to disclosure. They failed to bring forward the absent witnesses who had relevant evidence to give

on important issues in the trial. And they sought to deny the existence of a duty to act in an ethical manner.

46. In relation to the post-judgment phase, the claimant criticises the defendants for a lack of contrition in statements to the press, including dismissing some of the court's findings as "completely inaccurate" and trying to take the credit for the claimant's work in exposing Kaloti's wrongdoing by attributing to "our people" the reporting of irregularities to the "proper authorities", i.e. encouraging publication of a version of events at odds with my findings.

47. The defendants accept that they should pay the claimant's costs, but not on the indemnity basis because there is "nothing to take this case out of the norm"; because the claimant did not succeed on every issue and because he breached his disclosure obligations in relation to mitigation of loss. In their reply submissions, the defendants developed these arguments in more detail.

48. In relation to success at trial, the defendants reminded me that the claimant had not made out the existence of the safety duty, nor the allegations of criminal conduct which I declined to determine, nor the case that the claimant's disclosures were not an offence under the law of the UAE. They referred me to some authorities found in the notes in the White Book, summarised by Coulson J (as he then was) in *Elvanite Full Circle Ltd v AMEC Earth & Environmental (UK) Ltd* [2013] 4 All ER 765, at [16].

49. I was thus reminded that unreasonable conduct does not mean conduct that is merely wrong or misguided with hindsight; that the conduct must be unreasonable to a high degree; that pursuit of a weak case does not usually of itself justify indemnity costs, if the case is arguable; that the court is more concerned with the paying party's conduct of the case than the substantive merits of its position. Here, the defendants said, the threshold was not met.

50. In particular, the defendants reminded me of my finding that they took care and legal advice in deciding how to proceed (see the main judgment at [699]). They stressed that preferring the evidence of one party's witnesses to the other's is not outside the norm; that reliance on privilege cannot incur the disapproval of the court or found any adverse inference; and that not calling certain witnesses is not outside the norm.

51. The defendants denied that there was any ill intent to manipulate evidence by failing to keep records or preserve laptop data; these matters had been fully explained during the disclosure process and in the defendants' opening submissions (at Annex B). They also said the claimant's criticisms came ill from one who was himself in breach of his disclosure obligations and had lied to his solicitors about having destroyed his laptop.

52. Finally, as regards the post-judgment statements to the press, the defendants deny any disrespect to the court and point out that they are entitled to express disappointment with the judgment and to maintain their position that they did not behave wrongly, despite the court's contrary findings.

53. I turn to my reasoning and conclusion on the application for costs on the indemnity basis. I take into account all my findings in the main judgment, both those in the claimant's favour and those in the defendants' favour. Like the parties who sensibly

avoided repeating detailed findings in the main judgment, I do not need to do so either. They are there to be seen.

54. I would not award indemnity costs based on my findings about the defendants' conduct of the Kaloti assurance audit, i.e. their dealings with Kaloti and with the DMCC. The defendants' behaviour was not good for reasons I have given in detail. But they were entitled to make the bold case that it did not produce liability in tort. Had I ruled against the existence of the novel audit duty, the tables would have been turned despite the dim moral view most normal people would take of the defendants' conduct. The court is one of law not morals.

55. However, some aspects of the defendants' conduct towards the claimant when he complained about the Kaloti audit take the case outside the norm. The improper pressure on him to acquiesce in the conduct of the Kaloti audit included pressure to prevent him from holding the defendants and the EY organisation accountable for their conduct. That was not done just to protect Kaloti. Furthermore, after the claimant's public disclosures, Mr Otty encouraged the dissemination of a misleading account of events.

56. I do not hold against the defendants that they and the EY organisation have invoked privilege and not waived it. That is normal and is their right. Nor do I find highly unreasonable conduct in their failure to call relevant witnesses whose cross-examination could have been awkward for them. It was for the defendants to select which witnesses to call from among those whose attendance they were in a position to secure. They have taken the consequences of calling the witnesses called and not calling those not called.

57. In relation to the sparse documentary record, I find conduct by the defendants taking the case out of the norm. It was a theme during the Kaloti audit that points should not be put in writing and that written records of conversations should be avoided. The email record was manifestly incomplete. It is part of the accepted culture of professional life that proper records of events should be kept. The defendants, at times, deliberately avoided keeping proper records.

58. Nor do I accept that the non-survival of laptops and laptop data has been satisfactorily explained. In my main judgment at [74] I referred to the document retention policy in the Transparency Report 2012, which required EY member firms to retain and preserve documents in accordance with legal requirements, including:

> "whenever any person becomes aware of any actual or reasonably anticipated claim, litigation, investigation, subpoena or other government proceeding involving a member firm or one of its clients that may relate to a member firm's work".

59. The defendants' systemic failure to adhere to that policy was conduct taking the case outside the norm. Although Mr Otty confidently predicted that EY entities would sue the claimant, his was among the laptops whose data was not preserved (see my main judgment at [223]). Other laptops or their data were also non-survivors, as set out elsewhere in the main judgment, *passim*.

60. I am not impressed with the defendants' "pot calling the kettle black" argument. The claimant's belated disclosure of six documents about mitigation of loss mainly

reinforced evidence in documents already disclosed. His late disclosure is venial compared to the shortcomings of the defendants' disclosure. Nor, for reasons given in the main judgment, do I attach much weight to the episode relating to the claimant's laptop and Blackberry, of which the defendants unsuccessfully sought to make much at trial.

61. I attach little weight to the defendants' argument that the claimant did not succeed on every issue and that the allegations of criminal conduct were not made out. It is trite that the failure of a party to succeed on every point is not a bar to an award of costs. The defendants accept that they should pay all, not merely a proportion, of the claimant's costs even though he did not succeed on every issue. His failure on some issues does not affect my findings of conduct by the defendants taking the case out of the norm.

62. I come next to the trial itself. In opening submissions, the defendants mounted a sustained attack on the claimant's character and integrity. It continued in his cross-examination. I have set out the position in more detail in the main judgment. The attack was maintained in closing written and in oral submissions after the evidence was completed. Mr Hubble in closing submissions described it as "character assassination".

63. In response, Mr Toledano said that the defendants:

> "stand by everything we've said in writing. We haven't in any way, in my submission, gone over the top. We've referred to the specific matters that we say lead to the criticisms that we levelled, and in my respectful submission, they were all entirely justified for the reasons that we've set out in writing. So it is not a character assassination. It's simply a critique of the evidence that was put before the court."

64. In my judgment, the attack on the claimant's character and integrity was unfair and unjustified. It was conduct taking the case well outside the norm. It was not just the ordinary forensic rough and tumble of hard fought litigation. In my judgment, it was vindictive and must have reflected the rancour and ill will the defendants bore the claimant.

65. I also characterise as well outside the norm the content of the defendants' witness evidence and the manner in which it was given. I have explained my views in more detail in the main judgment. It was not evidence given to help the court make true findings about what happened. It is no answer that they took care and obtained copious legal advice before the evidence was given.

66. In my judgment, those matters taken together make this a very plain case for an award of costs on the indemnity basis.

67. I do not find anything further to criticise in the defendants' statements to the press after my judgment was made public. The court is not infallible, the case is subject to appeal and the defendants have as much right of free speech as anyone else. The claimant has also fairly invoked his right to free speech in public statements after the judgment was made public.

68. It would be naïve to expect these defendants to be meekly contrite and to agree with my findings. They are not bound to do so. Few parties who lose cases agree with the

judge and it is not disrespectful to the court to say so publicly. The authors of the statements quoted in the press reports produced by the claimant may genuinely believe that the EY organisation is very concerned about ethics and doing the right thing. They are entitled to their opinion.

Interim Payment on Account of Costs and Detailed Assessment

69. This aspect of the case is now agreed. The defendants will pay an interim payment on account of the claimant's costs, amounting to 70 per cent of the amount of the claimant's approved costs budget, plus VAT at 20 per cent on that amount. The total interim payment is £1,920,880.34 including VAT, payable within 21 days of my final order.

70. That agreement is reached on the basis that the claimant's solicitors undertake to the court that if any of the defendants succeed in their appeal with the result that the costs orders in the claimant's favour are set aside or varied, the solicitors will be responsible for repaying and will repay to the defendants (and each of them), such sums as may be due, as directed by the court.

71. It is agreed, further, that the deadline for commencing detailed costs assessment proceedings will be postponed pursuant to CPR rule 3.1(2)(a) and 47PD6.1 until three months from the date of any final determination or discontinuance of the defendants' appeal.

Effect of Part 36 Offers

72. The claimant made two Part 36 offers. The parties have agreed, pursuant to an agreement in writing under CPR rule 36.16(3)(c) disapplying sub-rule (2), that I can be told about these offers now.

73. The first was an offer made on 1 November 2018, with an acceptance deadline of 22 November 2018, to settle for £8.5 million, including any tax liability the claimant may incur in consequence of receipt of the sum, which would be borne by the claimant (**the first offer**).

74. The second was made on 20 December 2019, with an acceptance deadline of 10 January 2020, to settle for £5 million, also including any tax liability incurred from receipt of the sum (**the second offer**).

75. It is agreed that the claimant beat the second offer and that (subject to consideration of interest rates) the normal Part 36 consequences should flow from that, in accordance with rule 36.17(4)(a)-(d). However, the defendants questioned in written submissions whether, as the claimant asserts, the outcome of the trial is such that he has beaten the first offer.

76. In relation to the first offer, the defendants relied first on their submissions as to tax considerations, which I have not accepted. They also rely, in any event, on a comparison between the £8.5 million settlement figure in the first offer and the provisional judgment amounts (in US dollars and pounds) in my main judgment.

77. They argue that if, as I have now decided in this judgment, the claimant's submissions on tax are to be preferred, the court should nonetheless for the purposes of the comparison required under rule 36.17, use the provisional figures in the main judgment as these are the amounts which the court intends the claimant to receive for himself. It is wrong to include in the comparison amounts the claimant would only receive to transmit to HMRC or give back.

78. If that comparison is made, the defendants accept (on the authority of Leggatt J, as he then was, in *Novus Aviation Ltd v Alubaf Arab International Bank BSC* [2016] EWHC 1937 (Comm) at [22]) that the claimant has beaten the first offer at trial because the exchange rate between US dollars and pounds as at the main judgment date meant the judgment sum is higher than £8.5 million after exchanging the dollars for pounds.

79. However they say that, applying the reasoning of Leggatt J in the same case, it would be "unjust" within rule 36.17(4) to impose the normal consequences of that rule where an offer is beaten. Rather, those consequences should flow only from 10 January 2020 by reason of the second offer. That contention arises from fluctuating exchange rates as between US dollars and pounds.

80. The defendants point out that in considering whether it would be unjust to make the orders referred to in CPR 36.17(4), the court must take into account all the circumstances, including the matters listed at (a)-(e) in sub-rule (5). The defendants' submission on the exchange rate fluctuations is as follows:

> "C has always beaten the First Offer from 11 March 2020 onwards (the date on which the WHO announced that coronavirus was a pandemic). However, he did not do so: (i) when it was made; (ii) on 13 of the days of the 21-day period for acceptance of the offer; (iii) on some of the days between the date after the relevant period expired and the start of trial; (iv) between the start of trial (24 January 2020) and 5 February 2020, from 11-18 February 2020, from 21-23 February 2020, on 25 February 2020, and from 5-10 March 2020. …. In the circumstances, again by analogy with *Novus Aviation*, Ds submit that, if the judgment sums are not netted down to take account of tax as per their submissions above, it would be unjust to order the Part 36 consequences in respect of the First Offer (or alternatively, there should only be interest at the enhanced rate under CPR 36.17(4) for part of the relevant period)."

81. I do not agree that it would be "unjust" for the normal rule 36.17(4) consequences to apply in the case of the first offer. I assume in the defendants' favour that the exchange rate they have used produces the results stated. I assume also that the *xe.com* exchange rate used by the defendants is an appropriate rate to use, though the claimant counters that if "the official Bank of England exchange rate" is used:

> "C has in fact beaten the First Offer for 416 days out of 551 (not 351 as asserted by Ds), i.e. for the great majority of these proceedings, and in particular on the date of the Judgment (17 April 2020). Thus, *Novus Aviation v Alubaf* supports C's case, not Ds."

82. Of the factors relevant to the injustice issue listed in rule 36.17(5), only the first, the terms of the offer (at (a)) appears significant here. The other four factors are not the subject of any specific submissions from the defendants. I accept, in line with the reasoning in *Novus Aviation Ltd*, that exchange rate fluctuations are relevant in principle: if the only reason an offer was beaten at trial is a fall of one currency

against another, that is a powerful factor in considering the issue of injustice under rule 36.17(4).

83. However, the present case is completely different. The rates have fluctuated and it is common ground that using either exchange rate the judgment sum does lag behind the offer on at least 24.5 per cent of the 551 days between 22 November 2018 and 10 March 2020. But the exchange rate position is far from all one way. It is a swinging pendulum. The defendants' argument here has far less force than did that of the paying party in *Novus Aviation Ltd*.

84. More importantly, the trial and this supplemental judgment have confirmed that the claimant's award of damages will be protected against erosion through tax liability, while the first offer did not include that tax protection. The achievement of tax protection for the claimant's damages is a factor adding substantially to the "advantageousness" of the trial outcome, compared to that of the first offer.

85. The test in rule 36.17(1)(b) is whether the judgment is "at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer". By rule 36.17(2), "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".

86. I am prepared to accept that applying the wording of rule 36.17.4(2), the defendants are probably right to submit that the tax element of the award in the claimant's hands must, for the purposes of applying the "at least as advantageous" test in rule 36.17(1)(b), be disregarded because it is not his money but, beneficially, either HMRC's or the defendants' or a bit of both.

87. But when applying the injustice test in the opening words of rule 36.17(4) the achievement of tax protection is a more powerful factor in the claimant's favour here than the exchange rate point is against him. It enhances the value of the first offer to the point where it is, in my judgment, not unjust to impose the normal Part 36 consequences of the claimant having beaten it at trial.

88. I will therefore apply those consequences from 22 November 2018 and not from 10 January 2020. I consider next the issues that arise under rule 36.17(4)(a), (b) and (c). Under (b), the defendants accept that costs on the indemnity basis should be awarded from 10 January 2020. The same logic must apply if the relevant date is 22 November 2018. Under rule 36.17(4)(d), the parties agree that an additional amount of £75,000 must be awarded.

89. The parties disagree about the interest rate in relation to the damages for past losses (under (a)) and, separately, the interest rate in relation to interest on costs (under (c)).

90. The defendants submit that the rate of interest on damages for past losses should not exceed 3 per cent, by analogy with *Assetco plc v Grant Thornton UK LLP* [2019] EWHC 592 (Comm), relying on the analysis of Bryan J at [30]-[46] including his consideration of the Court of Appeal's decision in *OMV Petrom SA v. Glencore International AG* [2017] 1 WLR 3465 and, in particular, the guidance given by Sir Geoffrey Vos C at [38].

91. The defendants pointed out that they took part in a mediation in December 2019; that the first offer was made early in the proceedings, before disclosure; that interest rates have been low in recent years; and they reiterated points the force of which I have already effectively rejected: there was no egregious conduct by the defendants and the claimant breached disclosure obligations.

92. The claimant submitted that the rate of interest on past losses should be 9.5 per cent from 22 November 2018, which is the maximum permissible amount less the 0.5 per cent already awarded. They reiterated their submissions that the defendants' conduct had been bad and suggested the case was closer on the facts to *OMV Petrom SA* (described by Bryan J as a particularly bad case) than to *Assetco plc*.

93. I have considered the factors identified in the guidance in *OMV Petrom SA* at [38] against the facts of this case and the submissions of the parties. It is not a case where it was unreasonable for the defendants to litigate, given the novelty of the duties of care asserted. This meant it would always be difficult to settle unless on a purely pragmatic basis.

94. The defendants engaged in mediation quite late. They did not restrain the attacks on the claimant reflected in my findings in support of indemnity costs. The conduct of the defendants left more than a little to be desired in the respects I have discussed already. The claimant also had to deal with much expert evidence on whether the whole dispute was governed by the law of the UAE which turned out not to be needed, but I bear in mind that I have already made a costs order in his favour in respect of that issue.

95. On a spectrum, this case falls in between a case at the worst end calling for the maximum rate of interest such as *OMV Petrom*; and *Assetco plc* nearer the other end and calling for a relatively low award. Weighing the competing factors, I agree with the defendants that 9.5 per cent would be too high but I do not think the case can be equated with *Assetco plc* where there was no conduct taking the case outside the norm.

96. I fix the rate of interest on past losses at 7 per cent. I agree with the defendants that the relevant awards for past losses on which this interest rate bites from 22 November 2018 are those for past loss of earnings ($2,387,764), for loss of past medical cover (£18,980), for past life insurance cover (£14,216) and the business expenses award of £14,000.

97. As for interest on costs under rule 36.17(4)(c), the discussion above is also relevant to the appropriate interest rate. The claimant sought the maximum 10 per cent, while the defendants sought a nil rate award, arguing that no award was made in *Assetco plc* where there was no egregious conduct by the unsuccessful party; and that the other Part 36 consequences, including the award of an additional £75,000, were sufficient.

98. I do not accept that there should be a nil rate decision by analogy with *Assetco plc*. The costs on which interest is to run are those that led up to and included the trial. Again, the defendants were not unjustified in litigating the case at all but the way in which they did so left much to be desired.

99. In the exercise of my discretion I consider it appropriate to fix an interest rate of 6.5 per cent, which is the same as the rate fixed under (a) (see above), less the 0.5 per cent already awarded as interest on past loss damages.

Permission to Appeal

100. The defendants seek permission to appeal against my decisions on all issues that went against them. They have produced lengthy and detailed (recently amended) draft grounds of appeal. They submit that there is a real prospect of success on appeal in respect of all these matters. They also say there is "some other compelling reason" for an appeal because the case is not confined to its facts but raises broader issues worthy of the Court of Appeal's attention.

101. The defendants also seek permission to appeal against my finding that if, contrary to my decision, the safety duty was owed to the claimant, it was breached. This arises because the claimant intends, if there is an appeal, to file a respondent's notice contending that I was wrong to decide against the existence of the safety duty.

102. The defendants' submissions are to the effect that the main judgment is hopelessly flawed; that the audit duty is novel and not already established on authority; that the court should have found that the duty does not exist; that even if it did exist, the court should have found that it was not breached; that there are various findings of fact and judicial evaluations of factual issues that would not survive scrutiny in the Court of Appeal, even allowing the usual latitude to a judge of first instance who sees and hears the witnesses.

103. The defendants remind me that where there is a challenge to an evaluative decision of a first instance judge, the appeal court must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, "such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion" (*Re Sprintroom* [2019] EWCA Civ 932, at [76], judgment of the court (McCombe, Leggatt and Rose LJJ).

104. The claimant submits that permission to appeal should be refused outright or, if permission to proceed is granted to any extent, the grounds should be short and narrowly confined; they should not extend to all the points in the wide-ranging amended draft grounds of appeal. The claimant criticises what he calls the "scattergun" approach of the defendants, suggesting that the draft grounds are an attempt to reargue the facts in the Court of Appeal.

105. The claimant reminds me that it is not open to the defendants to "approach the matter by seeking to persuade the appellate court what the facts are and then inviting a conclusion that the appeal should be allowed because the judge came to a different conclusion and therefore erred" (per Birss J in *Price v Cwm Taf University Health Board* [2019] EWHC 938 (QB) at [7]).

106. To be overturned on appeal, the claimant points out, a finding of fact must be one no reasonable judge could reach; and that means normally "only where there was no evidence at all to support the finding that was made, or the judge plainly misunderstood

the evidence in order to arrive at the disputed finding" (per Coulson LJ in *Wheeldon v Millenium Insurance Co. Ltd* [2018] EWCA 2403, [2019] 4 WLR 56, at [10]).

107. If permission to appeal is granted to the defendants, the claimant applies for permission to appeal against my finding that he failed to prove the loss of an end of service payment at the close of his notional completed career within the EY organisation.

108. In addition, as part of any respondent's notice, the claimant would ask the Court of Appeal to uphold the main judgment for reasons different from or additional to those given in the judgment, including on the basis that the court should have decided that the safety duty existed, sounded in pure economic loss and was owed to the claimant.

109. Turning to my reasoning and conclusions: I accept, first, that the "real prospect of success" test is met in relation to paragraphs 2(1), 2(2), 2(3) and 2(4) of the amended draft grounds of appeal. These challenge, respectively, my decisions on the existence of the audit duty; whether it was breached; the recoverability of damage for any breach; and contributory negligence.

110. The audit duty is novel and its existence dependent on the law taking the incremental step of accommodating its existence on the facts here, where the statutory protection of Part IVA of the Employment Rights Act 1996 must elude the claimant's grasp because of territorial restrictions on its scope.

111. Although it is difficult to see why unethical conduct such as found here should escape the notice of the law of tort, I do not rule out the possibility that the Court of Appeal may take a different view. I do not agree with the claimant's suggestion that the three stage *Caparo* assessment is one of pure fact; the assessment is of the facts but the conclusion that emerges from it (that the duty exists or does not exist) is one of, at least, mixed fact and law.

112. The arguments about breach of duty, causation, remoteness and contributory negligence are weaker due to their heavy factual content set against established and uncontroversial legal principles; but I am prepared to accept that there may be arguable legal points in relation to those issues; and that they may be sufficiently connected by subject matter to the assessment of whether the audit duty should exist at all, as to make it difficult or inconvenient for the Court of Appeal to consider the existence of the duty without also considering the consequences for this case if it does exist.

113. I also grant permission to appeal on the ground set out in paragraph 3 of the amended draft grounds. That does not add anything to the substance of the appeal but it sets out the consequences of winning it: that the court should have dismissed the claims in their entirety or at least reduced the damages substantially for contributory negligence, and ordered the claimant to pay the defendants' costs.

114. I would not have accepted that, if the appeal had no real prospect of success, it should be heard anyway for some other compelling reason. The only reason I can think of for an appeal to be heard is if it has a real prospect of success.

115. The points made in paragraphs 5-29 of the amended draft grounds and the sub-paragraphs within them, seem to me to be part skeleton argument and part attacks on findings of fact and evaluations of facts found. I refuse permission to advance those matters as grounds of appeal.

116. In so far as they comprise argument, they are points on which the defendants rely to support the grounds of appeal in paragraphs 2(1)-2(4) inclusive, which I have allowed to proceed. They will be able to deploy those points in argument to support those grounds. Those points of argument are not themselves free standing grounds. Their inclusion as grounds of appeal as if they stood on their own two feet would add nothing except prolixity.

117. In so far as they constitute a challenge to findings of fact and evaluations of factual issues, I do not think they have a real prospect of success as free standing grounds of appeal; nor that there is any other compelling reason why an appeal against those findings of fact should be heard. The threshold is quite high and not, in my judgment, arguably reached here.

118. Paragraph 4 of the amended draft grounds seeks to challenge my finding that if the safety duty was owed, it was breached by requiring the claimant to return to Dubai and work there after what had happened. I do not think the point is likely to arise because I do not think it arguable that the safety duty was owed. If it were a matter for me, I would have refused permission to the claimant to appeal on that ground.

119. However, in the event that the Court of Appeal does consider whether the safety duty exists, I think the defendants should be allowed to assert that my finding that the duty was breached was not open. Again, the argument is weak because it is one of fact; but it is connected by subject matter to the assessment of whether the duty should exist and the Court of Appeal could be incommoded if it had to consider the duty in isolation from breach of it.

120. Finally, I will refuse the claimant permission to appeal against my decision dismissing his claim for an award of damages representing loss of an end of service payment. I think the claimant's proposed appeal has no real prospect of success. I agree with the defendants that this is a purely factual point, not tied up with any arguable issue of law or principle, but simply a contention that failed on the facts because the loss was too speculative to be proved.

Disposal

121. The parties are asked to submit agreed calculated sums in the light of my decisions in this supplemental judgment. A draft of the court's final order should be provided with those sums included.

122. I have already ordered (see paragraph 3 of my order made on 17 April 2020) that the 21 day time limit for appealing will run from the date of my final order, subject to further order. However, I am now minded to order that the deadline for appealing will be 14 days and will run from 8 June 2020.

123. That is because I think further delay is not necessary. The work on grounds of appeal has clearly been done and I think the defendants are comfortably in a position to file,

by 22 June, their appeal together with any application for permission to appeal on further grounds I have not allowed to proceed.

Postscript

124. After I had made available to the parties a draft of this judgment as set out above, they helpfully provided me with a few typographical corrections and their competing versions of the draft final order of the court, supported by brief further written submissions. I am grateful for that additional help, and now make the following further observations in this postscript.

125. First, interest on costs should run up to payment, not just up to the end of the ordinary three month period for commencement of detailed assessment proceedings. That period is extended by agreement to permit the appeal process to take place. If the appeal is successful, the Court of Appeal is likely to alter the costs position substantially anyway. If the appeal fails, there is no reason for interest on costs not to continue running during the appeal process.

126. Next, there is a disagreement about whether the additional Part 36 amount of £75,000 should be grossed up to take account of future tax liability in respect of the claimant's receipt of that sum. I do not feel able to accept the claimant's argument that it should be grossed up, in the absence of authority to that effect either in directly applicable case law or in the wording of Part 36.

127. I understand the argument of principle that the claimant should receive the whole £75,000 and not only that sum less tax payable as a result of receiving it. But I do not think the general case law on taxation of damages can be read across to apply it to the specific Part 36 provision for adding the sum of up to £75,000. I would have expected the legislature to have specified that the tax consequences should fall on the paying party, if that had been intended.

128. A disagreement arose over the scope of the liberty to apply to a Master for directions in relation to monies remaining in court (see paragraph 30 above of this judgment). I prefer the claimant's form of words. I think the defendants' suggested wording could cause confusion; it reads as if the Master could become involved in procedural questions about resolving issues of tax liability, which are the province of the First-tier Tribunal.

129. Finally, the defendant submits that I should reopen the case after provision of my draft judgment and that I should reconsider and reverse my decision (see above at paragraphs 72-99) that the claimant has beaten the first offer. The claimants say the issue was decided in the draft of this judgment issued last week (minus this postscript) and that it is now not open to the defendants.

130. The defendants now seek to submit that the correct comparison is between the amount of the first offer - £8.5 million - and the £6,219,522 which is the net sum the claimant will actually receive.

131. I find the logic of this difficult to understand because the £8.5 million, had it been accepted, could then have been subject to CGT, while the £6,219,522 is calculated as net of any CGT. To compare like with like, the £6,219,522 would have to be

compared not to £8.5 million but to £8.5 million plus the claimant's possible CGT liability on that sum in his hands.

132. The defendants' first submissions on consequential issues were made in writing on 4 May 2020. The defendants do not, as I understand their position, assert now that the point they now wish to take, after provision of the draft judgment on consequential issues, was taken in those written submissions.

133. The defendants focussed in those written submissions on (inter alia) the comparison they now ask me to reject, between the provisional judgment sum and £8.5 million. They accepted that, in that comparison, the first offer was beaten at the relevant time, which was the date of the court's order at the end of the trial. Hence their focus on exchange rates at various times and on the injustice test in the opening words of rule 36.17(4).

134. The defendants say the submission they now make is the "submission the Defendants sought to make in the first sentence of paragraph 22(1) of their reply consequentials submissions." That paragraph, however, was prefaced by paragraph 21, which stated: "Ds' position as to the effect of the Part 36 offers was set out in their submissions of 4 May 2020."

135. The first sentence of paragraph 22, which the defendants say embodied their submission, then stated: "There is no basis for C's assertion … that '*The permutations for the possible incidence of tax do not change the analysis in light of the established position being that the more favourable approach to C is adopted"*". I do not see how that sentence takes the point now sought to be taken.

136. In any case, if the submission now made had been made in that sentence, it would have been a new argument first advanced in reply submissions, which the claimant has had no opportunity to rebut. If I were to accede to the invitation now to reopen the case and if I were attracted by the defendants' submission, the claimant would in fairness have to have the opportunity to meet the new point.

137. I reject the defendants' attempt to reopen this issue after provision of the draft judgment. The attempt is made too late and it is now time to hold the parties to their earlier arguments and to reach finality. The reopening of the issue would be likely to lead to a grossing up exercise in respect of the £8.5 million, to permit a like for like comparison.

138. The defendants, in the alternative, ask for permission to appeal on the additional ground that the court "erred in concluding that the Claimant obtained a judgment at least as advantageous as the first offer for the purposes of CPR r.36.17."

139. I will refuse permission to appeal on that ground. I do not think it would have a real prospect of success; first, because it was not argued before me until, at the earliest, reply submissions on consequential issues (though I do not see how the sentence relied on by the defendants adequately raises the point); and secondly, because I think the defendants were incontestably right not to advance the argument in their initial submissions on consequential matters.