Neutral Citation Number: [2021] EWHC 513 (QB)

Case No: QB-2019-004601

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**MEDIA AND COMMUNICATIONS LIST**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/02/2021

**Before** :

**HIS HONOUR JUDGE LEWIS**
**(sitting as a Judge of the High Court)**

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**Between :**

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| **MARTIN GILHAM** | **Claimant** |
| **- and -** | |
| **MGN LIMITED**<br>**REACH PLC** | **Defendants** |

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**Jacob Dean** (instructed by **Carter-Ruck**) for the **Claimant**
**Christina Michalos QC** (instructed by **Reach PLC Legal Department**) for both **Defendants**

Hearing date: 23 October 2020

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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.

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HIS HONOUR JUDGE LEWIS

**His Honour Judge Lewis:**

1. In a judgment dated 12 August 2020, the court determined the amount to be paid to the claimant by way of compensation pursuant to s.3(5) of the Defamation Act 1996, following his acceptance of a qualified offer of amends. I must now consider the question of costs.

2. The parties have agreed that:

    a. The defendants will pay the claimant's costs of the proceedings, to be subject to detailed assessment if not agreed.

    b. The costs should be assessed on the indemnity basis from a certain date.

3. The issues between the parties are:

    a. The date after which costs should be assessed on the indemnity basis. The claimant says this should be 12 July 2019, which was 21 days after the date on which the claimant made a "without prejudice save as to costs" offer. The defendants say it should be 10 January 2020, which was 21 days after the date on which the claimant made his Part 36 offer.

    b. Whether the claimant is entitled to 10% additional damages in the sum of £4,900 pursuant to CPR rule 36.17(4)(d).

    c. Whether the claimant is entitled to an award of enhanced interest on damages. It is agreed that if an award is payable then it should run from 10 January 2020 and be at a rate of 2% above base.

4. I am not being asked to summarily assess costs, although have been provided with some schedules of costs. As of 17 June 2020, the claimant's costs (excluding any additional liabilities) were just over £165,000, and the defendants' costs were just short of £30,000.

Settlement negotiations in "offer of amends cases"

5. The "offer of amends" procedure is a creature of statute, namely ss. 2-4 Defamation Act 1996. An offer is one to make a suitable correction of the statement complained of and a sufficient apology to the aggrieved party, to publish the correction and apology in a manner that is reasonable and practicable in the circumstances, and to pay to the aggrieved party such compensation (if any), and such costs, as may be agreed or determined to be payable, see s.2(4).

6. In many cases, the offer of amends process should avoid the need for there to be contested court proceedings. The statute does, however, provide the following:

a. If the parties do not agree on the amount to be paid by way of compensation, it shall be determined by the court on the same principles as damages in defamation proceedings, s.3(5).

b. If the parties do not agree on the amount to be paid by way of costs, it shall be determined by the court on the same principles as costs awarded in court proceedings, s.3(6).

7. Both parties have relied in correspondence on the well-known decision of Eady J in ***Cleese v Clark and Associated Newspapers Limited*** **[2003] EWHC 137 (QB)**, which makes clear the need for both parties to engage in proper and meaningful negotiations in "offer of amends" cases:

> "19. It is fair to say, perhaps, that the whole of the "offer of amends" regime is predicated upon the parties' willingness to negotiate meaningfully and thus to give and take, where necessary, in order to achieve a reasonable compromise as quickly and inexpensively as the circumstances permit.
>
> 20. By the time such an offer has been made and accepted, the full extent of the complaint will have crystallised and the task of the professionals involved is simply to assist the parties in the light of their experience in arriving at the appropriate level of compensation and means of correction, for the claim as notified: see ***Abu v MGN Limited*** **[2002] EWHC 2345 (QB)** at [8] and [9]. As has always been the case, the amount of financial compensation is likely to be assessed partly by reference to the timing, scope and effectiveness of any apology made, or proffered, and it clearly makes sense for the two matters to be on the agenda for discussion at the same time. The two are intimately related. Discussion about monetary compensation is likely to remain hypothetical until a defendant's best offer for vindicating the complainant is on the table. The relationship between these two issues is also embodied in s.3(5) of the 1996 Act. The court is enjoined to take account of any steps carried out in fulfilment of the offer and (so far as not agreed between the parties) the suitability of any apology and the reasonableness of the manner of publication. It is obvious that where such matters cannot, for some reason, be agreed a defendant (or potential defendant) will generally be well advised to publish as prompt and generous an apology as the circumstances permit, with a view to moderating the level of compensation which the court may ultimately award."

8. The reality is that in virtually every "offer of amends" case, before proceedings are issued there will have been negotiation between the parties about the level of compensation and costs payable. Liability is not in issue, and so the focus of such discussions will have been on quantum. There will also have been discussions on the

form of a suitable correction and apology, although the statute provides that in the absence of agreement the person making amends must do what they consider to be appropriate. In addition to the matters that form part of an offer of amends, there will often be negotiation over undertakings, the wording of any statement in open court and consideration of whether this might be a joint statement.

9. Claimants will not be able to settle on a figure for compensation until they know the detail of what is proposed by the defendants in terms of the publication. The wording will also be important to a defendant, who will want to ensure that it does not publish something that is misleading (see para 77 of the 12 August 2020 judgment) or undertake not to repeat things in the future that are true or otherwise lawful to publish.

10. There is an expectation under the statute that the level of costs payable will form part of any negotiation. Where the claimant's solicitors are acting under a conditional fee agreement in a defamation case which was entered into before 6 April 2019 (as in this case), success fees and ATE premiums are recoverable from an unsuccessful opponent. As a result, both parties will be aware that any delay in resolving issues might lead to a steep increase in overall costs (given the recoverability of such additional liabilities), sometimes making the compromise and settlement of a claim more difficult to achieve. Defendants will also be aware of the risk of exacerbating the harm caused to a claimant by the way in which they respond to a claim, and that this can potentially affect the level of any compensation eventually awarded.

This case

11. The correspondence in this case reflects the complexities that I have just identified. The judgment of 12 August 2020 refers to some of the "open" discussions and alongside these there was extensive "without prejudice save as to costs" (WPSATC) correspondence.

12. The articles complained of were first published in December 2018. We know that the claimant's solicitors first wrote to the defendants on 22 December. Matters then went quiet until early April 2019 when the claimant's solicitors sent letters of claim and notices in respect of ATE insurance premiums.

13. The claimant opened negotiations on a WPSATC basis on Monday 29 April 2019 and was prepared to settle for £42,500 but covering a wider number of publications. He also sought costs, an apology and an undertaking, to be agreed. The offer was time limited to that Friday. 3 May 2019. On 2 May, the claimant's solicitors clarified that this sum was based on the defendants providing a suitable apology and undertakings and took into the Burstein factors identified by the defendants (see the judgment of 12 August 2020).

14. The next day the defendants wrote to the claimant's solicitors to seek clarification of various matters. The claimant would have realised from this letter that there were going to be significant difficulties agreeing the wording of an apology, with the defendants even asking whether the claimant wished to be named in the apologies at

all and suggesting that he reflect on the content of the corrections and apologies that had already been published.

15. On Tuesday 7 May 2019, the claimant's solicitors wrote to remind the defendants that the claimant had taken out an ATE policy and that there is a "42-day grace period before the initial ATE premium is incurred. This grace period expires a week from tomorrow, on Wednesday 15 May 2019".

16. A counter-offer was made by the defendants after close of business on Wednesday 8 May 2019 offering £22,500 damages for all publications, plus an apology. Wording was provided. The defendants agreed to consider changes but made clear their view of the meaning of the articles complained of. They offered a limited undertaking. There was also an offer made for costs, but excluding any additional liabilities (success fees, ATE), the defendants disputing the need for the claimant to be represented under a Conditional Fee Agreement at all. This time limited offer was said to expire at 1pm on Friday 10 May 2019.

17. Unsurprisingly, this was rejected on 10 May 2019, with the claimant's solicitors reminding the defendants that the purpose of the apology is not to repeat the subject matter of the story, but to repair the damage done. On the same day, the claimant made his first Part 36 offer for £42,500, also including the wider publications. Draft wording was provided for apologies. This Part 36 offer is not relied upon as such, presumably because it did not cover the same publications that were ultimately sued upon.

18. The qualified offer of amends was made on 13 May 2019, as outlined in the judgment of 12 August 2020 (paragraph 13), together with an offer of settlement. The offer for costs was qualified as being one to pay the claimant's "reasonable legal costs, save for the matters we mention below, to be assessed if not agreed on the standard basis. Excluded from these costs/ this offer are any additional liabilities (success fees or ATE premiums) for your firm or counsel.". On the same day, the defendants made another WPSATC offer for damages of £20,000.

19. On the 16 May 2019, the defendants made another 'snap' offer, only available for acceptance for a day, for £36,000, but this time to include costs including any VAT and additional liabilities. Given that the defendants had offered £20,000 in damages a few days earlier, this was in effect an offer to pay £16,000 in respect of the claimant's legal costs and any other additional liabilities. In many other fields of litigation this sort of sum for costs would be quite reasonable at a pre-action stage, but here the costs of the claimant (including the additional liabilities) were already higher.

20. The qualified offer of amends was accepted on 22 May, but the defendants' offer of settlement was rejected. The claimant made a fresh counter offer for a sum of damages, costs (including any additional liabilities), an apology (for which wording was provided) and undertakings. The claimant's solicitors reminded the defendants that "if the claim can be settled in its entirety today, 22 May, the initial ATE premiums in relation to our client's claim will not be incurred". The claimant made a lower WPSATC offer on the same day for £30,000 and costs.

21. The defendants made a further WPSATC offer on Thursday 23 May 2019 for a global sum of £40,000, to include costs, VAT and additional liabilities, and an undertaking. This offer was open for acceptance until 9am on Tuesday 28 May 2019. The defendants' offer of costs in respect of the Mirror publications was, however, now limited to those up to 10 May 2019.

22. On 29 May 2019, Carter-Ruck wrote to the defendants' solicitors to inform them that the ATE insurer had granted a "final extension" of the 42-day deadline, at which point premiums would be incurred. This was 4pm on 31 May 2019, later extended (on the day itself) to midnight. There was a WPSATC meeting between lawyers on Friday 31 May 2019.

23. On 5 June 2019, the defendants provided some revised wording on a WPSATC basis.

24. On 11 June 2019, the claimant's solicitors explained that the defendants' proposed wording was, in fact, worse than that already published. The claimant made two alternative offers to settle. If the defendants were prepared to publish a suitable apology and correction, he would accept £30,000 damages plus costs. If, however, the defendants were not prepared to publish something suitable, the claimant's solicitors explained that the claimant would do without and rely on those already published but seek damages of £42,000. It was made clear that if the defendants were to publish their inflammatory apologies, the claimant would seek a higher sum than this.

25. On 18 June 2019, the defendants made an open offer to publish revised apologies and a sum by way of damages. However, the costs offer made was now limited to the defendants paying the claimant's costs (excluding additional liabilities) for the period up to 10 May 2019, and the claimant paying the defendants' costs for the period after this date. They made a concurrent WPSATC offer to pay damages of £16,000 for the publications that form the subject of this claim, with alternative offers to pay £20,000 to include some additional articles.

26. On 21 June, the claimant's solicitors explained that the proposed apologies were inadequate and were "effectively rubbing salt into our client's wound". Revised wording was provided, and it was made clear that if this cannot be agreed, the claimant did not want anything further published and will rely on what was published in December 2018. A concurrent WPSATC offer was sent on the same day, confirming that the level of compensation sought was £30,000.

27. Notwithstanding this, on 30 June 2019, the defendants unilaterally published their versions of the apology. I consider these apologies in some detail in the judgment of 12 August, and the impact that they had on the overall level of compensation, as forewarned by the claimant's solicitors in their letter of 11 June.

28. On 7 November 2019, the claimant confirmed to the defendants that Part 8 proceedings had been prepared and would be issued in 7 days. On 15 November

2019, the claimant's solicitor confirmed that if agreement was not reached by 29 November, then proceedings would be issued without further notice.

29. There were then further negotiations. On Friday 6 December 2019, the claimant's solicitors wrote on a WPSATC basis to notify the defendants that they will be issuing proceedings at 4pm on Tuesday 10 December 2019 and that upon issue the success fee will increase to 50% and the applicable ATE insurance premiums will increase to £14,280 on each of the two insurance policies. Discussions continued until 17 December 2019.

30. Part 8 proceedings were issued on 19 December 2019 and served on the defendants by hand the same day. A Part 36 offer was made that day for £25,000 plus costs. The deadline for acceptance was 9 January 2020.

The rules

31. The starting point is CPR rule 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.
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> (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.
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> (3)…
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> (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.
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> (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.

32. Part 36.17 deals with the costs consequences following judgment of a Part 36 offer:

"(1) Subject to rule 36.21, this rule applies where upon judgment being entered— (a)…; 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)…
(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)… [There is no dispute that the prescribed percentage under the rules for this case is 10% of the amount awarded.]

(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
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> (e) whether the offer was a genuine attempt to settle the proceedings.
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> (6) Where the court awards interest under this rule and also awards interest on the same sum and for the same period under any other power, the total rate of interest must not exceed 10% above base rate.

Issue 1 – indemnity costs

33. The claimant made a Part 36 offer on 19 December 2019 for an amount lower than the judgment sum. The relevant period for acceptance of this offer was 10 January 2020. This is the date from which the defendants accept that costs should be assessed on the indemnity basis.

34. There are no other relevant offers made pursuant to CPR rule 36. The claimant says that indemnity costs should, however, be payable from the earlier date of 12 July 2019, being the date 21 days after the claimant's WPSATC offer of 21 June 2019.

35. Both parties rely on different parts of the judgment of Davis LJ in ***F&C Alternative Investments Ltd v Barthelemy (No 3)*** **[2013] 1 WLR 548**. In this case the Court of Appeal considered the situation where a settlement offer did not meet the requirements of Part 36, and whether the court could still make an award of indemnity costs if the offer was beaten.

36. The court found that an offer which was expressly stated not to be a CPR Part 36 offer and which did not comply with Part 36 in all other respects was not a Part 36 offer and therefore jurisdiction as to costs fell to be exercised under CPR rule 44.3. The costs regime of CPR rule 36 could not properly be invoked, whether indirectly or by analogy:

> "….. Rule 36.14 represents a departure from otherwise established costs practice. It imposes a deliberately swingeing costs sanction, by rule 36.14(3), on a claimant who fails at trial to beat a defendant's Part 36 offer. That is, for policy reasons, designed to encourage a sensible approach of claimants to offers and to promote settlement (that defendants do not get corresponding benefits under Part 36 may be for reasons in part explained by Simon Brown LJ in para 6 of his judgment in ***Kiam v MGN Ltd (No 2)*** **[2002] 1 WLR 2810**). But there is no reason or justification, in my view, for indirectly extending Part 36 beyond its expressed ambit. Indeed to do so would tend to undermine the requirements of Part 36 and the repeated insistence of the courts that intended Part 36 offers should be very carefully drafted so as to comply with the requirements of

> Part 36. As Mr Browne observed, Part 36 is highly prescriptive with regard to both procedures and sanctions." [56]

37. When considering the case under CPR rule 44.3, the court said at [70]:

> "There may be special cases where refusal to accept offers of settlement is capable of justifying an award of indemnity costs: see ***Epsom College v Pierse Contracting Southern Ltd*** **[2012] 3 Costs LT 451**. But as Rix LJ there emphasised, the failure to accept such offers, or to accede to an approach for settlement, must be unreasonable…. . He referred to the judgment of Simon Brown LJ in ***Kiam v MGN Ltd (No 2)*** **[2002] 1 WLR 2810**. In the course of his judgment (with which Waller LJ and Sedley LJ agreed), Simon Brown LJ had said:
>
> > "12. I for my part, understand the court there to have been deciding no more than that conduct, albeit falling short of misconduct deserving of moral condemnation, can be so unreasonable as to justify an order for indemnity costs. With that I respectfully agree. To my mind, however, such conduct would need to be unreasonable to a high degree; unreasonable in this context certainly does not mean merely wrong or misguided in hindsight….
> >
> > 13. It follows from all this that in my judgment it will be a rare case indeed where the refusal of a settlement offer will attract under Part 44 not merely an adverse order for costs, but an order on an indemnity rather than standard basis . . . It is very important that the *Reid Minty* case [2002] 1 WLR 2800 should not be understood and applied for all the world as if under the CPR it is now generally appropriate to condemn in indemnity costs those who decline reasonable settlement offers."

38. The claimant says that by 21 June 2019 there was a clear offer on the table in respect of the relevant publications that was open for acceptance. The terms of this offer were beaten by the subsequent award. Furthermore, the claimant takes issue with the way in which the defendants sought to conduct negotiations, with every offer seeking to restrict what could be recovered by way of costs or seeking global sums that the claimant says were unrealistic. If the defendants have issues with the payment of additional liabilities, the claimant says that the proper course was for the defendant to have accepted the offer and then argued the points on detailed assessment. Complaint is also made of the unreasonable deadlines that the defendant sought to impose.

39. The defendants say that to allow indemnity costs on a WPSATC offer would be wrong as a matter of principle. The defendants' position is that the correspondence shows that there was real compromise on their part during the negotiations, and the defendants' conduct cannot be characterised as unreasonable.

40. When considering the negotiation in this case, it is important to keep in mind that this was not a routine piece of litigation simply about money. Many of the criticisms made of the defendants arise out of fundamental differences between the parties, for example about what the defendants should be correcting and apologising for, the defendants having made only a qualified offer of amends and put forward a list of *Burstein* particulars. There were also fundamental differences about the principle of a claimant being able to recover a success fee and ATE premium in an "offer of amends" case, where liability has been conceded promptly and there is a statutory entitlement to an award of costs. Whatever the merits of the defendants' position on these points, they were entitled to raise them and did so in good faith.

41. Whilst the correspondence shows a degree of "give and take" between the parties on the form of apology and damages, the claimant did not approach costs issues in the same way. Any attempt by the defendants to explore a way of reaching a deal on costs was simply rejected. Whilst it is correct that costs issues can always be deferred to a detailed assessment, the whole point of the offer of amends regime is that parties are meant to try and avoid court and resolve <u>all</u> the matters between them through negotiation, proportionately and with a spirit of co-operation. In this case the correspondence shows a claimant unwilling to negotiate on costs. It should not be the norm for costs issues simply be put off so they can be resolved later by assessment.

42. I am not satisfied that the defendants' conduct justifies indemnity costs pursuant to CPR rule 44.3. Costs will be awarded on the indemnity basis as agreed from 10 January 2020.

Issue 2 – award of an additional amount

43. As noted above, pursuant to 36.17(4)(d), I am required to award an additional amount of 10% of the assessed compensation unless I consider it unjust to do so.

44. The defendants say that as a matter of principle, "additional damages by way of sanction" should not be payable in defamation cases where an offer of amends has been made and accepted. They say that payment of such a sum would be unjust and undermine the statutory process. This is because in every offer of amends case there will have been attempts to agree compensation, with most costs having been incurred by the time that proceedings have been issued. The defendants say that to add a "penalty" to use a process provided for by statute undermines the use of that process. On the facts of this case, the defendants point out that the offer was made nearly a year after the claimant's solicitors were first instructed, and the offer was made late, on the day proceedings were issued. The defendants also say that it is unjust that the sum is fixed at 10% and cannot be adjusted to reflect the fact that an offer was made so close to trial or the other circumstances of the case.

45. It is important to note that this additional sum is not intended to be compensatory in nature. The court has already assessed the level of compensation due in this claim, and there is no question here of double counting. The additional sum is payable for policy reasons as an incentive for parties to settle cases upon the making of a Part 36 offer:

> "The Jackson reforms undoubtedly introduced a penal award of up to £75,000 as an additional sum calculated on the basis of the amount of the courts award… Jackson LJs final report had said expressly at paragraph 1.1 of Chapter 41 that the existing Part 36 was 'backed up by a scheme of penalties and rewards in order to encourage the making of reasonable settlement offers and the acceptance of such offers'", see the Chancellor in ***Omv Petrom SA -v- Glencore International SA*** **[2017] EWCA Civ 195** at [37].

46. The costs consequences of a Part 36 offer apply in "offer of amends" cases. The purpose of Part 36 is to encourage settlement through the use of "both the carrot and the stick". In offer of amends cases, there will almost always be negotiations, and there does not seem to be any reason to find that it would, as a matter of principle, be unjust for additional sums to be awarded in such cases. I cannot see how it could be said that this would undermine the offer of amends regime in any way – if anything, it would seem consistent with encouraging parties to settle.

47. This is a case where the claimants made a Part 36 offer at a point when a significant proportion of his costs had been incurred, for an amount that it would have been apparent the claimant was likely to beat. This would have placed a defendant in an invidious position – aware of the consequences under Part 36, but also conscious that they could be facing a six figure costs bill. If this had been a case without any pre-action negotiation, I can see why a defendant might argue that it is unfair for an additional sum to be awarded in some circumstances. The case before me is, however, very different. There had been very extensive and protracted negotiations between specialist solicitors for many months. During these negotiations, the claimant put forward a series of reasonable offers. The Part 36 offer appears to have been made in good faith, six months before trial and at a time when the apology had been published and the only dispute was over money. It seems to me that the defendants had every opportunity to settle this claim if they had wanted to, and they declined the Part 36 offer in full knowledge of the likely consequences.

48. The additional sum is fixed at 10% regardless of when the Part 36 offer is made. Considered against the background of this case, and the policy objectives underpinning Part 36, the additional sum is proportionate and fair. Whilst I accept that there may be offer of amends cases where it would be unjust to impose an additional sum by way of damages, this is not in my view one of them.

Interest on damages

49. There is a dispute about whether the defendants should pay interest on damages at an enhanced rate. If the court considers that such an award is appropriate it is agreed that it should be at a rate of 2% above base from 10 January 2020.

50. The claimant says that there is a concluded agreement between the parties that interest will be paid, and so it is not for the court to seek to re-open the agreed position. It certainly appears that the defendants conceded this point in WPSATC

correspondence. Nevertheless, the fact remains that an overall deal was not concluded. It will often be the case that during negotiations a party might concede a point with a view to seeking to reach an overall deal, just as it is often the case that the party might maintain different positions in open and WPSATC correspondence. If a deal is not concluded, there does not seem to be any reason in principle why a party should not be able to withdraw concessions made during negotiations, although the late hour at which it happened in this case was unhelpful.

51. The starting point is CPR rule 36.17(4)(a) which provides that the court must order that the claimant is entitled to interest on the sum (or part of sum) awarded at a rate for some or all of the period, starting with the date on which the relevant period expired.

52. The defendants rely upon decisions in *McPhilemy* of Eady J (at first instance) and Chadwick LJ (within the appeal) that any award of interest at an enhanced rate pursuant to Part 36 was intended to be compensatory in nature, and so would be unjust to award in defamation cases where any award of damages already reflects the compensatory position up to trial.

53. The issue in that case was about the payment of interest on general damages awarded by a jury. At first instance, Eady J had said:

> "It is traditionally the case that the jury's award in libel takes account of everything down to the moment of their verdict, including any aggravation caused by the defendant's conduct of the trial. Accordingly, it has never been the case that damages for libel carry interest. It seems to me that it would be unjust to award interest on the sums fixed by the jury, whether from 13 January or at all."

54. On appeal, Chadwick LJ said:

> "the power to award interest under paragraph (2) of rule 36.21 at an enhanced rate, that is to say, at a rate higher than the rate (if any) which would otherwise be chosen under section 35A of the 1981 Act, is conferred in order to enable the court, in a case to which rule 36.21 applies, to redress the element of perceived unfairness, otherwise inherent in the legal process, which arises from the fact that damages, costs (even costs on an indemnity basis) and statutory interest will not compensate the successful claimant for the inconvenience, anxiety and distress of having to resort to and pursue proceedings which he had sought to avoid by an offer to settle on terms which (as events turned out) were less advantageous to him than the judgment which he achieved. But, if that is the purpose for which the power has been conferred, then it should not be used to award interest in a case where it must be assumed that the anxiety, inconvenience and distress of defamation proceedings have already been taken into

> account by the jury in reaching their award. To order the payment of interest on the amount of the award, in respect of any period prior to the date of the award, would be to risk introducing an element of double compensation. It would be to risk crossing the boundary which separates compensation from punishment", see ***McPhilemy v Times Newspapers Ltd & Ors*** **[2001] EWCA Civ 933** at [21].

55. The claimant says that matters have moved on in the twenty years since *McPhilemy.* An award of interest on damages at an enhanced rate pursuant to Part 36 is not purely compensatory, and the level of the award must take into account all the circumstances of the case.

56. The claimant relies on the more recent Court of Appeal decision in *Omv* (supra) in which the Chancellor considered the *McPhilemy* decision in some detail, albeit not in the context of a defamation case. The Chancellor considered Chadwick LJ's view that any order under CPR r 36.21(2)(3) was compensatory rather than penal, and determined that this was obiter, at least so far as concerned the circumstances in which an award of interest at an enhanced rate might be considered unjust.

57. The Chancellor said the following about interest on damages under Part 36:

> "29. I repeat that the decisions concerning whether to award enhanced interest at all are to be regarded separately from decisions as to the rate of the enhancement….
>
> "32. … in my judgment, the objective of the rule has always been, in large measure, to encourage good practice. As Lord Woolf put it in the Petrotrade case, "Part 36.21(2) and (3) create the incentive for a claimant to make a Part 36 offer", and a party who has behaved unreasonably "forfeits the opportunity of achieving a reduction in the rate of additional interest payable". Chadwick LJ in the McPhilemy case said that it was "an incentive to encourage claimants to make, and defendants to accept, appropriate offers of settlement".
>
> "33 In my judgment, the likelihood that the provisions for all four possible awards are not entirely compensatory is supported by the negative formulation of CPR Part 36.14(3)(a) to the effect that "the court will, unless it considers it unjust to do so, order that the claimant is entitled to [the four awards]". If the rule-makers had intended to say that all or any of the awards were only to be made if they represented compensation for litigation inconvenience, it would have been very easy to say so." …
>
> "36. If it were right to say that the provision for additional interest were entirely compensatory, the 10% cap would only rarely be engaged (as the judge's order demonstrates), and then probably only in unusual cases where, for example, the period of

> the enhanced interest award was very short. First instance courts would be required to engage in a complex and unnecessary exercise aimed at identifying what the prolongation of the litigation has cost the successful party in terms of wasted management time and other on-costs. This would be the kind of undesirable satellite litigation, perhaps involving detailed evidence, of which the court spoke in Denton supra. Moreover, the range of possible additional costs that might be caused by the litigation would be boundless. It would all depend on the particular type of litigation and the particular situation of the claimant concerned. Such additional costs might include the loss of profitable commercial contracts, additional loan costs and many other types of damage."…
>
> "38. In my judgment, the use of the word 'penal' to describe the award of enhanced interest under CPR Part 36.14(3)(a) is probably unhelpful. The court undoubtedly has a discretion to include a non-compensatory element to the award as I have already explained, but the level of interest awarded must be proportionate to the circumstances of the case. I accept that those circumstances may include, for example, (a) the length of time that elapsed between the deadline for accepting the offer and judgment, (b) whether the defendant took entirely bad points or whether it had behaved reasonably in continuing the litigation, despite the offer, to pursue its defence, and (c) what general level of disruption can be seen, without a detailed inquiry, to have been caused to the claimant as a result of the refusal to negotiate or to accept the Part 36 offer. But there will be many factors that may be relevant. All cases will be different. Just as the court is required to have regard to "all the circumstances of the case" in deciding whether it would be unjust to make all or any of the four possible orders in the first place, it must have regard to all the circumstances of the case in deciding what rate of interest to award under Part 36.14(3)(a). As Lord Woolf said in the Petrotrade case, and Chadwick LJ repeated in the McPhilemy case, this power is one intended to achieve a fairer result for the claimant. That does not, however, imply that the rate of interest can only be compensatory. In some cases, a proportionate rate will have to be greater than purely compensatory to provide the appropriate incentive to defendants to engage in reasonable settlement discussions and mediation aimed at achieving a compromise, to settle litigation at a reasonable level and at a reasonable time, and to mark the court's disapproval of any unreasonable or improper conduct, as Briggs LJ put the matter, *pour encourager les autres*."

58. In *Omv*, the issue of non-compensatory interest was looked at in the context of the rate of interest to be awarded, not whether enhanced interest should be ordered at all,

although all the circumstances need to be taken into account at both the first and the second stages. In a more recent decision in ***Telefonica UK Ltd v The Office of Communications*** **[2020] EWCA Civ 137**, Peter Jackson LJ adopted the two stage approach and provided the following example of how the court should approach an award that might be considered disproportionate:

> "if the court considered that any significant element of enhanced interest would be disproportionate, it could award a very low or even nominal enhanced rate. But it would not be entitled to refuse to make an order for enhanced interest at all on that ground."

59. The claimant is not seeking an award of interest by way of compensation, for the reasons identified in *McPhilemy*. The claimant says, however, that *Omv* allows a discretion to make a non-compensatory award of enhanced interest, taking into account all the circumstances in the case. He accepts that one of those circumstances is the fact that the damages award includes compensation for the distress caused by legal proceedings, and the time passing before judgment is given. The claimant says that this is a matter that is reflected in the appropriate percentage, not the point of principle. Leading Counsel for the defendants accepts there is such a discretion but says that it should not be exercised in this case and that such an award would be unjust, particularly in circumstances where the claimant would not ordinarily receive interest on the award.

60. It seems to me that the claimant is right. Whilst the Court of Appeal in *McPhilemy* considered that it would be unjust to allow enhanced interest to be recovered to avoid double-recovery, things have moved on. Additional interest under Part 36 is not simply compensatory, but also fulfils an important policy objective designed to incentivise settlement.

61. Adopting the two stages identified in *Omv* and *Telefonica UK Limited*, I must look first at whether it is unjust to award a sum by way of interest at an enhanced rate. For much the same reasons as are set out in paragraph 47 above, I am not satisfied that it would be unjust to order the payment of interest at an enhanced rate. One of the circumstances that I need to take into account is the fact that the claimant has already been compensated for all loss to the point of judgment. This is, however, relevant to the rate to be applied, not whether an award should be made at all. The rate of interest payable has been agreed by the parties at 2% above base.