SUPPLEMENTARY MATERIAL TO WEBINAR ON PART 36: 3rd MAY 2023

Almost immediately after the webinar finished a new case on Part 36 was reported. This case was directly relevant to some of the questions that were asked in relation to seeking approval on behalf of a child when a Part 36 offer was accepted late.

I set out the case in full below. By way of balance – and a complete contrast I also attach a copy of the decision in *MRA -v- The Education Fellowship Limited* [2022] EWHC 1069 (QB).which, as I mentioned, featured in the webinar on Part 36 last February. Together these show the issues lawyer's have to deal with when facing a Part 36 offer made when the claimant is a child.

I am glad you enjoyed the webinar and thank you for your helpful comments.

CIVIL LITIGATION BRIEF

PART 36: NORMAL COSTS PROVISIONS DISAPPLIED WHEN A CHILD ACCEPTED A PART 36 OFFER LATE:

May 4, 2023 · by gexall · in Civil Procedure, Part 36, Personal Injury Edit This

Yesterday I gave a webinar on recent developments in Part 36*. Almost inevitably a new case was reported as soon as the webinar finished. Further that case addresses, directly, some of the interesting questions that arose in the webinar. In IEH v Powell [2023] EWHC 1037 (KB) Senior Master Fontaine considered whether the normal Part 36 consequences should apply in the case of a brain damaged child who had accepted a Part 36 offer some 18 months after it was made. It was held that the the normal costs provisions would not apply. However it is made clear that a party, even a child, asking for an exception to be made has to demonstrate that it was "unjust" for the normal costs consequences to apply. This involves a close scrutiny of the claimant's conduct, and the claimant's solicitors conduct in particular. Delay will have to be justified and the steps taken after the offer made explained. Further there is a suggestion that, if a claimant is seeking a different costs order, it may be prudent to arrange

for approval to take place before, and at a different hearing, to the application under CPR 36. There may be consequences where a claimant seeking a "different order" may have to consider waiving privilege on some documents.

It would be wrong, very wrong, to assume from this judgment that an injured child or protected party refusing a Part 36 offer has a guaranteed and safe passage against the normal consequences of late acceptance. The judgment makes it clear that each case is fact specific and the solicitor's conduct, in particular, came under close scrutiny. The failure to be fully open with the defendant in the period after the relevant period had expired, may well lead to costs penalties (although this was not decided).

"The result of this failure to disclose relevant evidence has been that the Defendant has approached the application without knowledge of crucial information. The failure of the Claimant's solicitors to provide this information to the Defendant's solicitors, both as a matter of reasonable conduct to keep the Defendant informed as to the steps being taken following receipt of the offer, and as a failure to serve such evidence in good time before the hearing of the application, is conduct that is relevant both to the decision I make on the application and to the costs of the application. *If the Claimant's legal advisors had concerns about disclosing privileged documents to the Defendant prior to the approval hearing they should have asked for the approval to be heard first, and separately, from the application to disapply rule 36.13 (5).*"

* Details of the webinar are here .

It will shortly be available for general viewing on YouTube. The link will be updated when this happens.

THE CASE

The claimant minor brought a claim for personal injury damages. The Defendant made a Part 36 offer on the 20th November 2020, it was not accepted until 27th July 2022.

THE ISSUE

The offer was accepted late. The court approved the offer. The issue was whether the court should disapply the provisions of CPR 36.13 (5).

THE REVIEW OF THE PRINCIPLES

The judge reviewed the relevant principles of CPR 36.13.

1.

(4) Where –

(a) a Part 36 offer which was made less than 21 days before the start of a trial is accepted; or

(b) a Part 36 offer which relates to the whole of the claim is accepted after expiry of the relevant period; or

(c) subject to paragraph (2), a Part 36 offer which does not relate to the whole of the claim is accepted at any time,

the liability for costs must be determined by the court unless the parties have agreed the costs.

36.13(5) Where paragraph (4)(b) applies the parties cannot agree the liability for costs, the court must, unless it considers it unjust to do so, order that –

(a) the claimant be awarded costs up to the date on which the relevant period expired; and

(b) the offeree do pay the offeror's costs for the period from the date of expiry of the relevant period to the date of acceptance.

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

36.17(5) In considering whether it would be unjust to make the orders referred to in paragraphs (3) and (4), the court must take into account all the circumstances of the case including –

(a) the terms of any Part 36 offer;

(b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;

(c) the information available to the parties at the time when the Part 36 offer was made;

(d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and

(e) whether the offer was a genuine attempt to settle the proceedings.

4. The Claimant seeks his costs of the action. ***In order to obtain an order for his costs after the date of expiry of the Part 36 offer made on 20 November 2020 he must demonstrate that it would be unjust to make the order specified in CPR 36.13(5) (b). The Claimant accepts that he has the burden of making that case.*** The Defendant opposes the application and submits that the usual order specified in CPR 36.13.(5)(a) and (b) should apply.

REVIEW OF THE CASE LAW

The relevant case law was reviewed in some detail.

1.

I. I***t is submitted that the key authority is SG v Hewitt*** [2012] EWCA Civ 1053 (Costs), where the factual basis is similar and there are similar considerations between that case and the one before the court. In *SG v Hewitt* the claimant was age 6 when he suffered a severe brain injury and the experts felt unable to predict the impact of the injury until the claimant matured. The Part 36 offer was made when the Claimant was aged 12 and accepted two years and four months later when he was aged 14 (the same age as IEH when the offer here was accepted). It was also agreed by the experts that problems may not manifest themselves until puberty /adolescence. The effect of counsel's advice in *SG v Hewitt* was the same as that in this case, and the response to the Defendant's Part 36 offer was as Leading Counsel had advised. The claimant's solicitors in *SG v Hewitt* sought further reports, as here. At [33] of the judgment of Black LJ

there is reference to "*three issues which are of importance in the present case*" being:

i) The implications of the claimant being a patient;

ii) the relevance of reasonableness of the claimant's conduct in relation to the Part 36 offer; and

iii) the problem of uncertainties in the value of the claim.

1.

I. ***At [36] Black LJ said that the mere fact that proceedings were brought on behalf of a patient would not, "of itself, always be sufficient to displace the costs protection normally available to a defendant from a Part 36 offer", but it is relevant. T***he fact that the claimant is a child or protected party may make it unjust that a costs order is made against him.

1.

I. ***It is noted that if the claimant is a child, rather not protected party, that is especially important because, if the Part 36 offer is made before puberty/adolescence, there is an added uncertainty in relation to the litigation because it is unpredictable, in the case of a brain injury, what effect that may have, and it is submitted that is not a "normal risk of litigation".***

1.

I. At [43] the court held that reasonableness is relevant but not necessarily determinative. It could be a sufficient factor to justify departure from the normal rule, depending upon the facts of the particular case. In the present case it is submitted that the Claimant and his solicitors actually did act entirely reasonably in accepting Leading Counsel's advice. It is further submitted that, unless that advice was negligent, it was reasonable for the Claimant's litigation friend to accept it, and that is a relevant factor.

1.

I. ***At [45] and [46] the Court rejected the suggestion that because certain events in the litigation could be described as "the standard contingencies inherent in litigation", that is necessarily determinate. It was accepted that each case is fact sensitive, but it is said that, in relation to the decision in Matthews v Metal Improvements [2007] EWCA Civ 215, that "It was not just the contingencies of litigation that had led to the plaintiff being in the position that he was in but also the way in which his solicitors had responded to them.***" In the present case, the Claimant's solicitors asked for the offer to be left open until 11th March 2022 by e-mail of 4 December 2020. They also asked the Defendant to extend the costs protection to that date in an e-mail of 19 January 2021. In the meantime they got on with further investigation of the claim and assessing it.

1.

I. The court by order of 11th December 2019 directed witness statements and expert evidence in the fields of Paediatric Neuropsychology and Speech and Language Therapy to be served by 11 March 2022. There was no provision for updating neurology evidence. This deadline was delayed a number of times by orders until 6 August 2022. A CMC was arranged for 18th October 2022. The Defendant had to apply at the CMC if they wished for permission for medical evidence.

1.

I. It is submitted that it is clear from these dates that it was apparent that medical evidence could not be completed before 2022 and the case could not be properly assessed until then. Even then a prognosis may not have been available. The case was to be reviewed at the CMC otherwise the Defendant would have had to disclose any medical evidence by the same date.

23. The court is also referred to paragraphs 51-53, 70-71 77, 82, 85-86 and 92 of the Court of Appeal's judgment in *SG v Hewitt*.

APPLICATION OF THE PRINCIPLES TO THIS CASE

1.

I. ***It is apparent from SG v Hewitt at [22] and [29], and from the rule itself, that the factors set out at CPR 36.17(5), together with all the circumstances, constitute the test that the court must apply in determining whether it would be unjust to make the usual order.***

1.

I. It is worth noting Black LJ's cautionary words in *SG v Hewitt* at [47]:

"That a feature such as this had the capacity to alter the outcome underlines just how fact sensitive costs decisions of this kind are and how difficult it is to determine one case by comparing it with another. The defendant rightly invited us to be careful in reaching our decision that we did not condemn the courts to intensive investigations in every Part 36 case as to how the parties should have approached an offer; I ***would be equally resistant to encouraging a time consuming practise of citing authorities on costs for the purpose of persuading courts to follow decisions on the facts as if they were precedents…***…. I would therefore hope that a firm distinction is made between, on the one hand, principle and guidance which can be valuably transported from one case to another and, on the other, consideration of the individual facts which cannot."

1.

I. That was echoed by Gross LJ in *Briggs* at [36] as set out above. ***I have therefore avoided where possible analysis of the facts in other authorities, concentrating on the principles referred to and the facts in this case.***

1.

I. With regard to the factors enumerated in CPR 36.17(5), The position in relation to this case is as follows:

a) ***the terms of the offer were straight forward;***

b) ***the offer was made at a relatively early stage in proceedings;*** the first case management conference was held on 18th October 2018, there was a stay in proceedings until 3rd October 2019 to await views on prognosis, and a second CMC on 11th December 2019, at which witness statements and medical expert reports were ordered to be served by the Claimant by 11th March 2022. The next CMC was listed on 18th October 2022, by which time the claim had settled.

c) ***The information available to the parties at the time when the Part 36 offer was made is relevant*** and is considered in more detail below;

d) ***The conduct of the parties with regards to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated is relevant and is considered in more detail below;***

e) ***it is accepted by both parties that the offer was a genuine attempt to settle the proceed***ings.

1.

I. The circumstances that are relevant to the consideration as to whether it would be unjust to make the order specified in rule 36.13 (5) in this case, are, in my judgment as follows:

i) the fact that the Claimant is a child;

ii) whether the litigation friend had sufficient evidence to enable an informed decision to be made in respect of the offer in November/December 2020;

iii) the particular factual circumstances relating to the Claimant, namely the fact that he lived and was being educated in Morocco, the effect of the pandemic and the necessity for appointment of a new litigation friend;

iv) whether the approach that the Claimant's solicitors took in responding to the offer was reasonable;

v) the Claimant's conduct in the litigation;

vi) the fact that the Part 36 costs regime is intended to encourage settlement and discourage disputes on costs.

THE RELEVANCE OF THE CLAIMANT'S AGE

The Claimant's Age and its Relevance

1.

I. In *SG v Hewitt* at [36] the court addressed the approach of Stanley Burnton J. in *Matthews* towards this factor. Black LJ said:

"….the court is, of course, obliged to consider all the circumstances of the case and the fact that a claimant is a patient/protected party or child differentiates his case from the usual case of a competent claimant and cannot just be ignored….. in *Matthews*, these considerations were not such as to disrupt the normal rule, but that does not mean that the implications of the claimant being a child or protected party may not be such in other cases as to make it unjust that a costs order is made against him."

1.

I. Commenting on the judgment of Stanley Burnton J. in *Matthews*, Pill LJ said in *SG v Hewitt* at [92]:

"Qualified in that way, as they are, I do not disagree with those statements but would respectfully say that, in their application, both require some explanation. To ignore the lack of capacity of the claimant and to downplay the reasonableness of the conduct of his

legal advisors as relevant factors will in this and many other cases divert the court from the requirement to do justice on the particular facts."

1.

I. The Claimant's date of birth is 21.2.2008, so he was 8 and a half at the time of the accident. At the date of the offer he was 12 years and 9 months old. Dr McCarter gave advice in a letter dated 7th September 2018. She stated that:

"IEH presents as a boy who has suffered neuro psychological impairments of a nature consistent with his brain injury……IEH has sustained impairments in the verbal sphere, specific declines in his literacy and written language capacity, slowed processing speed and attention deficits. His behaviour/personality has very markedly changed with impulsivity, disinhibition and recklessness. Academically his standing has measurably dropped. Given the timing of his injury and the potential for his brain damage to negatively interact with development overtime, he is at risk of increasing problems in education and social-behavioural function. He will need appropriate management and intervention. It is not possible to provide a firm prognosis for his final outcome at this stage and we will have to monitor his development and review the situation later. Useful time points for assessing the trajectory of development, and for helping to predict long term outcome and future needs, are at the ages of 13, 16 and 18 years although in some cases the outcome remains unclear until some years thereafter." (Emphasis added)

1.

I. The Claimant was seen in Morocco by Dr James Tonks, Paediatric Consultant Clinical Neuropsychologist and Clinical Psychologist in 2019 when the Claimant was aged 11. Dr Tonks states in his Initial Assessment Report dated 7 August 2019 at §25 page 23:

"[IEH] is a very pleasant young man, and I was really impressed by his dedicated family. I am wondering how his brain injury will impact upon his development as he crosses the threshold between childhood and adolescence. Especially given the nature of his injury. I consider that it would be important to ensure that the family are supported. They could face various challenges in the coming years."

1.

I. ***The fact that a Claimant is a child may not always be relevant to an issue under CPR 36.13(5), but in this case the relevance is as stated in the medical evidence, that the long term effects of a traumatic brain injury usually cannot be known until a child reaches***

and/or passes through puberty and adolescence.

1.

I. ***I note that the Court of Appeal in SG v Hewitt at [49] and [71] rejected the conclusion of the judge at first instance that the uncertainty of the claimant's developing condition and prognosis was "simply one of the ordinary contingencies of litigation".*** The Court of Appeal also recognised this in *Briggs*, where Gross LJ stated at [36]:

"……..As observed in the note in the Civil Procedure (set out above), it is important not to undermine that salutary purpose. Nothing in these observations is in anyway at odds with *SG v Hewitt*. For my part, with respect, *SG v Hewitt* was a very clear case on the other side of the factual line. It was a very extreme case concerning brain damage to a small child. That is a very different situation from that prevailing here where, as one of the contingencies of litigation, it was perhaps difficult to work out how it might go……"

1.

I. That is confirmed in the Claimant's case by Dr McCarter's evidence. ***That is sufficient in my view to take the case "out of the norm" (as referred to in Downing, White Book Vol. I Note 36.17.5). It also, in my view, would point strongly in favour of injustice if the usual order as to costs were applied. This is because it is not the Claimant's fault that he sustained the accident when a child, and has to wait to pass through puberty before the long term effects of his injury can be assessed with more certainty, nor is it "a normal contingency of litigation".*** With regard to the reference to Arden LJ's comments in *SG v Hewitt* at [78], (cited above), i***t is also not the litigation friend's fault that this is the case, and the litigation friend, in exercising her duty to protect the child's interest, could not be expected to accept the offer in the light of the current medical evidence in November 2020 and the advice given by Leading Counsel.***

47. I note that, although I recognise the caution indicated in the authorities against applying the facts of one case to another, this was a factor, as was the requirement for approval to be obtained, that all members of the Court of Appeal in *SG v Hewitt* accepted amounted to circumstances which made it unjust not to depart from the general risk-shifting rule in Part 36: see Black LJ at [70] – [72], Arden LJ at [77] and Pill LJ at [82] – [86].

THE LITIGATION FRIEND'S POSITION

Whether the litigation friend had sufficient evidence to enable an informed decision to be made in respect of the offer in November/December 2020

1.

I. Another report was obtained from Dr McCarter dated 19 March 2019, (by which time the Claimant had reached the age of 11), commenting on translated school summaries from the Claimant's Moroccan school which covered the years 2014-15 to the first semester of the Fifth elementary year 2018-19. Dr McCarter repeated her previous view that the Claimant had been a generally above average student prior to the accident falling below the class average in the year post injury (third elementary school year), but in the years post injury his personal strengths changed, but he was still above class average in language subjects Arabic and French and was strong in Islamic education. Her view was that his brain injury had affected his educational progress. With regard to the updated records she noted that although in the year following his injury he had substantial absences from school which she assumed related to his recovery from the injury following his first period of recovery his school attendance has returned to excellent levels with zero absenteeism. She noted that the Claimant was not quite as far behind his classmates as he was in the first post injury year of recovery and seemed to be largely on a par with others in terms of his final overall average score. But she noted that he had not shown the superiority to many of his classmates that he showed pre-injury. She noted also that he consistently attains lower scores in his understanding of what he has read compared to his general reading skills. She concluded that there was some evidence that the Claimant was regaining some ground academically and reverting to his pre injury profile of strengths and weaknesses in many

areas, though he had not regained the general level of superiority over his classmates that pertained preinjury. She made an assumption on the evidence that the Claimant has persistent difficulties in the language domain consistent with his brain injury, and signs of acquired language impairments or dysphasia. She noted with approval the involvement of a case manager, a speech and language therapist and a paediatric neuropsychologist, and stated that she hoped a full treatment management and consultation plan would follow.

1.

I. In a letter dated 26 April 2020 when the Claimant was 12, Dr McCarter encouraged the use of IT solutions to deal with the Claimant's acquired dysgraphic problems. She noted that certain IT and communication systems are useful for supporting individuals with acquired brain injury.

1.

I. There are also reports on condition and prognosis from a consultant paediatric neurologist, Dr Agrawal, dated 26 July 2017, and of Mr Theologis consultant in orthopaedic surgery dated 29 September 2017.

1.

I. The Claimant's solicitors had obtained further evidence when they visited the Claimant in Morocco from 24 to 26 November 2019, in order to interview his teachers about his progress and obtained copies of his education records for disclosure (because previous attempts to obtain the documents had proved unsuccessful). Although an expected parents' evening had been cancelled, they had meetings with the School director and several subject teachers.

1.

I. I note that the authorities make it clear that simply because a Claimant, or those advising them, has acted reasonably, is not sufficient, on its own, to make the usual order in CPR 36.13 (5) unjust, but it is of relevance when considering all the circumstances, see *SG v Hewitt* at [43].

1.

I. ***In my view it was appropriate for the Claimant to refuse to accept the Part 36 offer within 21 days on the evidence then available. The Claimant was aged 12 at the date of the offer (not effectively 13 as the Defendant puts it).*** The Claimant reached the age of 13 in February 2021, the first age at which Dr McCarter had advised reassessment. However, the Claimant's solicitors would have had to obtain further evidence and arrange for the Claimant to be examined by Dr McCarter and Dr Agrawal before a further report could be commissioned. At the time that the offer was made they were working towards obtaining updated evidence for service on 11 March 2022, when the Claimant would have been 14, but would have been, (and was in fact) aged 13 at the date that he was further examined by the medical experts (see Paragraph 54 below).

54. I

consider it extremely doubtful that the court would have been able to approve the Claimant's acceptance of the offer in late 2020, on the basis of the evidence as it was, and it would have been most likely that the approval hearing would have been postponed and directions given to obtain updated factual and expert evidence. That is not the only relevant factor, but as in SG v Hewitt, it is relevant to the question of injustice: see [67] – [69] where the court concluded that the judge below had erred in not treating this as a relevant factor.

THE REASONABLENESS OF THE CLAIMANT CONDUCT FOLLOWING REFUSAL OF THE OFFER

1.

I. The Claimant's solicitors took the following steps after receipt of Counsel's opinion dated 27 November 2020, which advised against accepting the offer at that stage:

i) Obtained some documentation from the Claimant's school, which although appeared incomplete, they concluded was all they were likely to be able to obtain as there seemed

to be only limited documentation, and what was provided was “random and disorganised”;

ii) Taken a witness statement from the Claimant’s after school tutor;

iii) Obtained a letter from Dr McCarter dated 16 April 2021 in which she confirmed that she supported the purchase of appropriate software and hardware accessories to enable the Claimant to complete school work, in class and at home using his own dedicated laptop.

iv) Had a telephone call with the Claimant’s English teacher in Morocco on 26 May 2021

v) Obtained a second [draft] report from Dr Agrawal, Paediatric Neurologist, dated August 2021 after seeing the Claimant with his mother on 21 August 2021.

vi) Arranged for a report from a speech and language therapist, Dr Katie Price, following an assessment of the Claimant on 6 September 2021, which concluded that the Claimant had made some good recovery in his communication skills since the accident, but continued to have some difficulty with language abilities, particularly in the area of receptive language processing. It concluded that his speech was intelligible, if occasionally slightly slowed and slurred by a mild motor coordination deficit, and he had some good social communication skills. It was recommended that he would benefit from some regular, although not intensive, input from speech and language therapy intervention.

vii) Arranged for the Claimant to be interviewed remotely by Dr McCarter via video link from Morocco on 29 and 30 July 2021 which enabled Dr McCarter to provide an updated draft report dated May 2022. In that draft report she stated:

“7.2 The updated documents to 2020 including the lay witness statements suggested that the alteration in character, behaviour and temperament persisted. Some slight improvements in his condition were relayed to Dr Tonks in 2019 but the position and concerns were largely as reported in the immediate post injury phase.

7.8 My observations of IEH in 2021 nonetheless also indicated a more cooperative boy with greater tolerance and perseverance than in 2017, but some tendencies to expediency and rule breaking if he thought he would getaway with it. Some interrupting and noisy behaviour in the home was noted.

7.27 **Conclusion on progress:** a tentative conclusion drawn from the evidence as a whole is that there has been recent improvement and settling of some of the labile, disinhibited, and defiant behaviours that appeared following his injury. A sudden late improvement is unexpected in cases of severe childhood brain injury.

7.40. This has occurred at a point in time just before IEH entered puberty. Whether it will be maintained over the course of adolescence remains to be seen.

7.41. The Claimant is now entering adolescence. This is the period of final maturation of the brain and the time at which the most rapid developments in higher level thought, executive and adaptive function, and social and communication competence take place. These capacities are key to success as an autonomous, independent and competent member of adult society, to the success of interpersonal relationships, the maintenance of good mental health and they substantially contribute to ultimate educational success and employment outcome."

Dr McCarter had some reservations as to the Claimant's progress as he passed through adolescence into adulthood, but was able to conclude:

"7.47 On the balance of probabilities, on the current evidence, it is my opinion that his final capacities will have been capped below the pre-injured potential but probably not to the degree that he will be unable to obtain some useful qualifications and find remunerative employment".

(There is no evidence as to why there was such a delay between the Claimant's examination by Dr McCarter and her draft report).

viii) Following receipt of Dr McCarter's draft report, in the light of her conclusions, obtained a report from Dr Mark Berelowitz, Consultant Child and Adolescent Psychiatrist, dated November 2021. Having seen the Claimant together with his mother at the offices of the Claimant's solicitors on 17th August 2021. Dr Berelowitz stated:

"g. When I first saw [IEH] I thought it would be desirable to review [IEH] in mid-adolescence, because any significant deterioration ought to have emerged by then. In fact the opposite seems to have applied, and he has improved significantly.

e…. However, and to my surprise, he has improved significantly, relatively recently. I cannot readily explain the improvement and it is not yet clear that it is going to be sustained. At minimum we need more time to lapse before we conclude that his condition as remitted fully."

Dr Berelowitz also concluded that the Claimant did not need any additional support based on his presentation when he was seen in August 2021, and on his and his mother's preferences. He also concluded that although when he had seen the Claimant previously he had fulfilled the criteria for disability under the Disability Discrimination Act 1995, based on the description of his current state in August 2021 he no longer met those criteria.

ix) On 29 May 2022 the Claimant's solicitors had a WhatsApp call to the Claimant's elder sister (SSEH) and to the Claimant in Morocco. (It is not clear from the evidence why this did not take place earlier).

x) Leading Counsel had a conference with Dr McCarter, date not provided, but presumably after her draft report was received.

xi) On 16 June 2022 Leading Counsel for the Claimant, armed with this information, was able to provide an opinion advising acceptance of the Defendant's offer.

1.

I. Thus, the factual and medical evidence available by the end of May 2022 demonstrated a significant improvement from what appeared originally to be a significant head injury, but there was still some uncertainty about the prognosis for the Claimant.

57. ***My view is that it was reasonable for the Claimant solicitors to take the steps that they did after the Part 36 offer was made, given the Claimant's age at the date when the offer was made, and the uncertain prognosis in the medical reports available at that date. It is not in dispute that the long term effects of traumatic brain injury suffered by young children are often not known until after the child has gone through puberty*** and that is confirmed by Dr McCarter's report of 2017, her draft report of May 2022 and Dr Berelowitz's report. I do not accept that the Claimant's legal advisors would or should have known in November 2020 what the long term prognosis was likely to be at that date. ***Even if it were the case that the Claimant was not likely to recover further after November 2020, the Claimant's legal advisers were in no position to know that in November 2020, and not at all unless they obtained updated medical and factual evidence***. But in any event it is apparent from the evidence above that the Claimant made a significant and (according to Dr Berelowitz and Dr McCarter) unexpected, improvement between the date of his last assessments in 2017 and mid 2021, when most of the further factual and medical evidence was available.

58. ***I conclude that the steps taken by the Claimant's solicitors following their request for an extension for acceptance of the Part 36 offer were reasonable and proportionate. However, that conclusion is subject to my comments about conduct, below.***

CONDUCT

1.

I. Rule 36.17(5) (d) contains one of the factors that the court must take into account when deciding whether it would be unjust to make the order in rule 36.13(5), namely:

"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;"

1.

I. ***Unfortunately, none of the information relating to steps taken and evidence obtained following the offer, referred to in Paragraph 55 above, which was provided to the court in a privileged bundle for the approval hearing, was provided to the Defendant's solicitors, nor were any of these steps or evidence mentioned in Abrahams 3 or Leading Counsel's skeleton argument for the hearing of the application.*** When I read the Defendant's evidence and their Leading Counsel's outline submissions on the day before the hearing I realised that the Defendant was unaware of this evidence. I accordingly sent an mail to the Claimant's solicitors on 12th December 2022 as follows:

"I have now read the Defendant's Outline Submissions in relation to the costs issue listed to be heard at the approval hearing tomorrow, received this morning from Mr Andrew Davis KC. It is apparent that the Defendant relies on there having been no new evidence in relation to the Claimant's prognosis since the Part 36 offer was made in November 2020. It therefore appears that the Defendant is unaware of the fact of the further draft reports from experts and the further inquiries made of the school and lay witnesses. I appreciate that privilege has not been waived in respect of the evidence obtained after the Part 36 offer was made, but the fact of such evidence being obtained is relevant to the determination of the application to be heard tomorrow, and I will need to know the position as to whether the Defendant has been informed of this before I can determine it."

1.

I. I sent a copy of that e-mail to the Defendant's solicitors at 7:40 am on 13 December 2022, the day of the hearing. At 5.31 pm on 12th December 2022, after receipt of my email, the Claimant's solicitors sent to the Defendant's solicitors the following documents:

Note of telephone conversation with the Claimant's English teacher, dated 26.5.22

Note of WhatsApp call with the Claimant and his sister, SSEH, dated 29.5.22

Draft Report of Dr Shakti Agrawal, Consultant Paediatric Neurologist, dated August 2021

Draft Supplementary Report of Dr McCarter, Consultant Clinical Neuropsychologist, dated May 2022.
However, this was only a limited part of the information that I have referred to above. No explanation has been provided to the court for the failure to provide this information.

1.

I. Young 1 at §§62-63 confirms this lack of disclosure as follows:

"62. At the time of preparing this witness statement, I have received no further medico-legal evidence other than those reports served with proceedings and the short letter from Dr McCarter [dated 9th September 2018]…..

63. I assume that Leading Counsel for the Claimant has advised approval of the settlement based on the same or similar evidence as was available to us when the Part 36 offer was made – some four years post accident. In my experience of brain injury and other personal injury claims, claimants have often reached a point of stability before that period after the accident."

1.

I. The result of this failure to disclose relevant evidence has been that the Defendant has approached the application without knowledge of crucial information. The failure of the Claimant's solicitors to provide this information to the Defendant's solicitors, both as a matter of reasonable conduct to keep the Defendant informed as to the steps being taken following receipt of the offer, and as a failure to serve such evidence in good time before the hearing of the application, is conduct that is relevant both to the decision I make on the application and to the costs of the application. ***If the Claimant's legal advisors had concerns about disclosing privileged documents to the Defendant prior to the approval hearing they should have asked for the approval to be heard first, and separately, from the application to disapply rule 36.13 (5).***

68. ***I note also that this is apparently not the first time that the Claimant's solicitors have failed to provide information to the Defendant.*** Exhibited to Mr Young's witness statement is correspondence between the parties. An email dated 3 October 2018 expresses concern about not having received "*sufficient information*

with which we and they [the insurer client] can consider the Claimant's ongoing position", and "*I have to reiterate our concerns in the hope that there can be greater cooperation in future*." It was stated that there had been "*no disclosure to date and no compliance with the Rehabilitation Code*". T***he Defendant's note for the CMC on 4 October 2018 also references the lack of disclosure and lack of co-operation in relation to an interim payment request from the Claimant. Young 1 at §4 states that an updated bundle for the application and approval hearing was not served until 8 December 2022, two and a half working days before the hearing, which included expert evidence that Mr Young had not previously seen, and a further witness statement from Ms Abrahams dated 30 November 2022, not served with the application notice.***

The Purpose of the Rule 36 Regime

1.

I. I take note of the importance of the normal rule in achieving certainty, as referred to by Black LJ in *SG v Hewitt* at [26]. I also am cognisant of the caution advised in the authorities as to the high hurdle that is considered appropriate for a Claimant to come within the provisions of CPR 36.13 (5), described as a "*formidable obstacle*" in *Smith* at [13(d)]. ***Nevertheless, the Part 36 regime recognises that the application of rule 36.13 (5) has the potential to cause injustice, and provides a mechanism for avoiding any injustice in rule 36. 13(6), in appropriate cases.***

1.

I. ***For all the reasons set out above, I have concluded that it would be unjust to the Claimant to make an order under rule 36.13 (5)(b). The costs incurred during the period of delay between September 2021 and May 2022 will be subject to the scrutiny of the Senior Courts Costs Office on detailed assessment.***

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71. ***However, it may be appropriate to make an order that the Claimant should not receive all his costs for the entirety of the period following the expiry of the Part 36 offer, because of the effect of the conduct issues***. Because I

have not heard full submissions from either party in relation to the conduct issues, I reserve my decision as to the extent to which such conduct should affect the terms of the order to be made, both as to the costs of the action following the expiry of the Part 36 offer, and the costs of the application,

PART 36: JUDGES SHOULD NOT LET THEIR HEARTS RULE THEIR HEADS: CLAIMANT ACCEPTING AN OFFER LATE FACES FULL COSTS CONSEQUENCES THAT FLOW

May 6, 2022 · by gexall · in Costs, Part 36, Personal Injury Edit This

In the judgment in *MRA -v- The Education Fellowship Limited* [2022] EWHC 1069 (QB). Master McCloud held that it was *not* unjust for the usual principles in relation to costs to apply following a claimant's late acceptance of a defendant's Part 36 offer. It is important that the courts determine these issues by reference to the rules and their "heads" rather than their hearts. The fact that the costs involved would eat heavily into the claimant's damages did not mean that it was "unjust" for the rules to apply. Further the fact that the claimant had acted reasonably did not mean that the normal principles should not apply.

"It will be apparent therefore that of all cases this is a prime example where a Judge has to try to have the humility to apply the law wherever it leads irrespective of sympathy at a human level whether for victims or insurers."

"A party may well act reasonably in not accepting a Part 36 offer, but it does not follow that the ultimate result if that is not the best judgment, is that one has shown 'injustice' by refusing to disapply the usual rule…one does not approach this case by asking whether the Claimant acted reasonably."

THE CASE

The claimant, who had autistic spectrum disorder and ADHD, had suffered abuse at the hands of a teacher employed by the defendant. The teacher was imprisoned. The claimant brought an action for damages for personal injury.

THE DEFENDANT'S PART 36 OFFER

The claim form was issued on 7th June 2017 and served on 7th September 2017. On the 19th January 2018 the defendant made a Part 36 offer to settle in the sum of £80,000. In February 2018 the claimant's solicitors asked for an extension of time to accept the offer. The defendant did not respond to this request, the claimant's solicitors did not pursue the matter further.

On the 2nd April 2020 the claimant accepted the defendant's Part 36 offer.

THE ISSUE BEFORE THE MASTER

The defendant declined to pay the claimant's costs up to the date of acceptance. The issue before the Master as to what costs order should be made.

THE RULES

The Master considered the normal principles that the party who has accepted late is responsible for their own costs, and the other party's costs, from 21 days after the offer was received up to the date of acceptance. The only exception was if it was "unjust" to do so.

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

CPR Rule 36.17(5) states:
"In considering whether it would be unjust to make the orders referred to in paragraphs (3) and (4), the court must take into account all the circumstances of the case including—
(a) the terms of any Part 36 offer;
(b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;
(c) the information available to the parties at the time when the Part 36 offer was made;
(d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and
(e) whether the offer was a genuine attempt to settle the proceedings."

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

IT WAS NOT UNJUST TO MAKE THE USUAL ORDER FOR COSTS ON THE FACTS OF THIS CASE

The Master reviewed the relevant principles and the respective arguments at length. She decided that it was not unjust for the normal costs consequences of late acceptance to apply.

65. I am not here going to decide the effectively 'parked' argument which was mooted at the outset of both days of hearing to the effect that there were

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

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

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

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

69. ***The Court of Appeal in Briggs rightly said that Part 36 has a salutary effect and to depart from it requires the party so seeking to discharge a heavy burden,***
namely to show injustice if the rules are not disapplied. A party may

well act reasonably in not accepting a Part 36 offer, but it does not follow that the ultimate result if that is not the best judgment, is that one has shown 'injustice' by refusing to disapply the usual rule. See Matthews: one does not approach this case by asking whether the Claimant acted reasonably.

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

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

72. As it turned out, thankfully, he did improve as far as possible, as is shown by the later medical reports. It is obvious that there was uncertainty in this case as to prognosis, but in my judgment the bleak picture which appertained as at the 30th January, and which did not in any way result in a change to the statement of value on the claim (unsurprisingly since the facts such as suicidal thoughts had pre-dated the claim and there was no change in diagnosis), was the starting point from which the Claimant might possibly (and in the event did) improve. Implicit in that is the prospect potentially of some deterioration instead, but there were clear limits to the effect that might have on this claim given the already pessimistic prognosis known at 30 January and the pessimistic employment and educational prognosis known at the time the claim was issued. This was therefore for the most part a case where the uncertainty was focussed, when one looks at the detail, on whether and to what extent the Claimant might improve, with some possible scope for deterioration.

73. What then of the offer? The statement of value on the Claim was £100,000 and that was not revised up after the report of 30 January 2018, as noted. A statement of value does not bind the court as to the eventual award, and of course if a

claim changes then that may be amended, but it is an indication of the value as an upper limit reasonably placed on the claim when issued, on the basis of the facts known at time of issue. ***The Defendant offered £80,000 early on. That is I think fairly described as a 'high end' offer given the placement of the Claimant in the moderate-severe range and not squarely in the severe range for his conditions, and in the light of the position as to modest employment and education prospects which he would have had but for the harm done.***

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

75. ***If one were to decide that uncertainty of prognosis of the sort here was sufficient to make the (important, salutary) application of rules quite deliberately created to shift risk an 'injustice', one would undermine a key aspect of balance in the QOCS regime. Insurers would face costs even though they wisely make high and well judged early offers. Settlements would be delayed so as to enable claimants to reach a high degree of clarity as to value and the table would in my judgment become tilted by removal of one supporting leg from under the table, in the form of the protective Part 36 costs regime. This case is closer to Briggs, which was a case of uncertainty in prognosis such as is common in personal injury.***

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

77. It was said for the Claimant that per Downing, this case had a number of circumstances taking it out of the norm and going to the issue of injustice. I listed

them in the summary of submissions in reply. However it seems to me that an assessment of the reasonable range and certainly 'best case' quantum was possible based on what was known, it is not material that the uncertainty in prognosis (largely as to degree of improvement) was known and acknowledged by both sides – absent some misrepresentation leading the Claimant to rely on not facing the 'bite' of Part 36.

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

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

SHOULD THE COURT TAKE INTO ACCOUNT THE IMPACT OF THE THE DEDUCTION ON THE CLAIMANT'S DAMAGES?

The claimant argued that the application of the rule would lead to a major deduction from their damages.

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

81. ***The fact that the impact is not listed as an express factor in the rule is some indication but not conclusive. The view I have come to is that, just as one does not take into account the prejudice caused to a party by its own breach, when considering the justice of granting relief, it would be to place the cart before the horse to factor into account the impact of costs on damages, when it is the very question of mitigating the impact on damages which is the essence of the issue itself: naturally the damages will always be impacted in such cases, that is the presumed 'just' outcome, unless other factors make it unjust for that to be the case. I must therefore follow, as counsel put it, 'my head' and not my 'heart'. I am of the view that it is not permissible to take into account the degree of reduction (or the fact of reduction) of damages which arise from the operation of the rule in the 'default' form. Detailed Assessment exists to ensure that excessive sums are not deducted, and that is the route to avoid injustice in that form.*** Taking that a step further whilst no doubt one would attract cynical derision if one considered the plight of insurers, large institutions with money, alongside the plight of an abused minor, as being in some sense directly comparable, ***it is nonetheless the case that it would be overly hard-hearted (were one in the business of following one's 'heart') to say that greatly weakening the scope for insurers to protect themselves by making generous offers was not also to a degree a 'moral' issue touching on the money available to settle other cases and the impact on the court system which might arise from weakening Part 36.***

THE EXPRESS FACTORS IN THE RULE

The Master then considered the express factors in the rule.

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

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

(b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made:

this was early and well judged, but not so early that no reasonable evaluation could be made by the party considering accepting it, that is to say it was not an

oppressive or 'ambushing' offer expecting unreasonable feats of foresight on the part of the Claimant, given the extent of expert evidence available.

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

(d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated:
this does not appear to be relevant here.

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

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