Neutral Citation Number: [2020] EWCA Civ 1374

Case No: A4/2019/1327

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BUSINESS & PROPERTY COURTS OF ENGLAND & WALES COMMERCIAL COURT (QBD)
Adrian Beltrami QC Sitting as a Deputy High Court Judge
CL-2018-000301

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 October 2020

Before:

LORD JUSTICE PETER JACKSON
LORD JUSTICE ARNOLD
and
LORD JUSTICE PHILLIPS

- -

Between:

TELEFÓNICA UK LIMITED — **Claimant/ Appellant**

- and –

THE OFFICE OF COMMUNICATIONS — **Defendant/ Respondent**

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Benjamin Williams QC (instructed by **DWF Law LLP**) for the **Appellant**
Ajay Ratan (instructed by **The Office of Communications**) for the **Respondent**

Hearing date: 1 July 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on 29 October 2020.

Lord Justice Phillips:

Introduction

1. CPR 36.17(4) provides that, where a claimant has obtained judgment against a defendant which is at least as advantageous as the proposals contained in a Part 36 offer made by the claimant, the court must, unless it considers it is unjust to do so, order that the claimant is entitled to four specified forms of enhanced relief. This appeal concerns the circumstances in which the award to the claimant of some or all of the specified relief may be considered to be unjust.

2. On 17 May 2019 Adrian Beltrami QC, sitting as a deputy judge of the Commercial Court ("the Judge") gave judgment, following a trial, in favour of the appellant ("Telefónica") against the respondent ("Ofcom") in the principal sum of £54,379,489.05 together with simple interest of £2,995,007.55.

3. It was common ground that Telefónica had thereby obtained a judgment more advantageous than an unaccepted Part 36 offer that it had made on 6 April 2018. The Judge accordingly awarded Telefónica indemnity costs from 28 April 2018 pursuant to CPR 36.17(4)(b) and an "additional amount" of £75,000 pursuant to CPR 36.17(4)(d). The Judge refused, however, to award an enhanced rate of interest (above the agreed commercial rate of 2% above base rate) on either the principal sum for which judgment was entered (CPR 36.17(4)(a)) or the costs Telefónica incurred after 28 April 2018 (CPR 36.17(4)(b)), holding that it would be unjust to do so.

4. Telefónica now appeals that refusal, contending that the Judge, having accepted that the Part 36 offer was a genuine attempt to settle (and having awarded two of the four "enhancements"), articulated no proper basis for regarding the award of an uplifted rate of interest as unjust. In particular, Telefónica contends, the Judge failed to recognise or consider that there was a discretion as to the level of uplift to be awarded (provided the rate, after the uplift, does not exceed 10% above base rate), and that concerns as to the proportionality and fairness of an uplift could and should have been addressed in that way. Telefónica seeks an uplift of 3% in the rate of interest, making a total rate of 5% on both the principal judgment sum and costs.

5. Ofcom resists the appeal, contending that the Judge had a wide discretion on the issue of costs which he exercised without erring in principle, taking into account the wrong matters or reaching a perverse conclusion. In the alternative, Ofcom argued that, even if there was a basis for setting aside the Judge's decision, any uplift in interest rate should be nominal only.

The background facts

6. Telefónica's claim was one of four claims brought by mobile network operators for restitution of annual licence fees paid to Ofcom between 2015 and 2017 pursuant to a

fee-setting regulation[1] that had been quashed in judicial review proceedings (on appeal to this court[2]). The four claims were ordered to be heard together, each turning on the same question of law regarding the appropriate measure of restitution.

7. On 6 April 2018, prior to the commencement of the proceedings, Telefónica made a Part 36 offer on the basis that Ofcom would pay Telefónica £52.82 million together with compound interest for the relevant period at an annual rate of 0.56%. The offer was in the same principal sum as Telefónica had demanded in a Letter of Claim of the same date.

8. The offer was not accepted and Telefónica issued the claim form on 8 May 2018.

9. On 25 July 2018 the Supreme Court handed down judgment in *Prudential Assurance Co Ltd v Revenue and Customer Commissioners* [2018] UKSC 39, deciding that compound interest is not available in unjust enrichment claims for restitution of money payments.

10. As a result, on 8 August 2018, Telefónica made a second Part 36 offer, this time on the basis of payment of £52.82 million without any interest. That offer was also not accepted.

11. On 18 February 2019 Telefónica notified Ofcom that it had undercalculated its claim by £1.56m, bringing the total claimed to £54.38m. Notwithstanding that increase in the amount claimed, the Part 36 offers were not withdrawn and so remained open for acceptance without penalty.

12. At the trial, which commenced on 1 May 2019, Ofcom did not dispute that £54.38m was the sum Telefónica had paid under the (invalid) 2015 Regulations, less what would have been payable under the 2011 Regulations.

13. A reserved judgment was handed down in all four claims on 17 May 2019, determining the issue of law in favour of the mobile network operators[3]. Telefónica was therefore awarded the full amount of its revised principal claim, plus simple interest at 2% above base rate.

14. After handing down his judgment on the substantive claims, the Judge heard argument on consequential issues, including Telefónica's entitlement to enhanced relief under CPR 36.17(4). The Judge proceeded to determine that entitlement in an *ex tempore* judgment, to which I shall return below.

The relevant provisions of CPR Part 36

15. The rule provides, so far as relevant, as follows:

> "(1)… this rule applies where upon judgment being entered—

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[1] The Wireless Telegraphy (Licence Charges for the 900 MHz frequency band and the 1800 MHz frequency band) (Amendment and Further Provisions) Regulations 2015 ("the 2015 Regulations"), purporting to amend the previously applicable regime under The Wireless Telegraphy (Licence Charges) Regulations 2011 ("the 2011 Regulations").

[2] *EE Ltd. v Office of Communications* [2018] 1WLR 1868

[3] [2019] EWHC 1234, upheld on appeal at [2020] EWCA Civ 183.

……

(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.

….

(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…

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

(a) the terms of any Part 36 offer;

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

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

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

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

> (6) Where the court awards interest under this rule and also awards interest on the same sum and for the same period under any other power, the total rate of interest must not exceed 10% above base rate…"

The authorities

16. Lord Woolf MR explained the purpose of and approach to the enhancements under (what is now) CPR 36.17 in *Petrotrade Inc v Texaco Ltd (Note)* [2002] 1 WLR 947 as follows:

> "64. The power to order indemnity costs or higher rate of interest is a means of achieving a fairer result for the clamant. If a defendant involves a claimant in proceedings after an offer has been made, and, in the event, the result is no more favourable to the defendant than that which would have been achieved if the claimant's offer had been accepted, without the need for those proceedings, the message of [r.36.17] is that, prima facie, it is just to make an indemnity order for costs and for interest at an enhanced rate to be awarded. However, the indemnity order need not be for the entire proceedings, nor …need the award of interest be for a particular period or at a particular rate. It must not however exceed the figure of 10% [above base rate] referred to in Part 36.
>
> 65. There are circumstances where a just result is no order for costs or no interest even where the award exceeds an offer made by a claimant. [Rule 36.17] does no more than indicate the order which is likely to be made by the court unless it considers it is unjust to make the order. The general message of [r.36.17], when it applies, is that the court will usually order a higher rate of interest than the going rate. As to what the additional rate of interest should be, it is not possible to give specific guidance…"

17. In *Webb v Liverpool Women's NHS Foundation Trust* [2016] 1 WLR 3899, the Court of Appeal stated that, in exercising its discretion under CPR 36.17(4), the court must take into account that the unsuccessful defendant could have avoided the costs of the trial if it had accepted the claimant's Part 36 offer, as it could and should have done. The Court then set out, with approval, the following summary of the relevant principles by Briggs J in *Smith v Trafford Housing Trust* [2012] EWHC 3320 (Ch) at [13], addressing the approach to a defendant's (rather than a claimant's) Part 36 offer:

> "(a) The question is not whether it was reasonable for the claimant to refuse the offer. Rather the question is whether, having regard to all the circumstances and looking at the matter as it affects both parties, an order that the claimant should pay the costs would be unjust…(b) Each case will turn on its own circumstances, but the court should be trying to assess 'who in reality is the unsuccessful party and who has been responsible for the fact that costs have been incurred which should not have been'…(c) The court is not constrained by the list of potential relevant factors in [r.36.17(5)] to have regard only to the circumstances of the making of the offer or the provision or otherwise of the relevant

> information in relation to it. There is no limit to the types of circumstances which may, in a particular case, make it unjust that the ordinary consequences set out in [the rule] should follow... (d) None the less, the court does not have an unfettered discretion to depart from the ordinary cost consequences set out in [r.36.17]. The burden on a claimant who has failed to beat the defendant's Part 36 offer to show injustice is a formidable obstacle to the obtaining of a different costs order. If that were not so, then the salutary purpose of Part 36, in promoting compromise and the avoidance of unnecessary expenditure of costs and court time, would be undermined."

18. In *OMV Petrom SA v Glencore International AG* [2017] 1 WLR 3465, the Court of Appeal emphasised (at [29]) that decisions as to whether to award enhanced interest at all are to be regarded separately from decisions as to the rate of enhancement. In relation to the decision as to the rate of enhancement, such awards are not entirely compensatory, but using the word "penal" to describe them is probably not helpful. Sir Geoffrey Vos C explained as follows:

> "38…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 [r.36.17(4)(a)]. As Lord Woolf MR 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 the 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 it, pour encourager les autres.
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> 39. The culture of litigation has changed even since the Woolf reforms. Parties are no longer entitled to litigate forever simply because they can afford to so do. The rights of other court users must be taken into account. The parties are obliged to make reasonable efforts to settle, and to respond properly to Part 36 offers made by the other side. The

> regime of sanctions and rewards has been introduced to incentivise parties to behave reasonably, and if they do not, the court's powers can be expected to be used to their disadvantage. The parties are obliged to conduct litigation collaboratively and to engage constructively in a settlement process."

19. As for enhanced interest on costs, the Court of Appeal did not regard the aim of assessing the rate as being to achieve a fairer result for the claimant than would otherwise have the case, and once again the award is not purely compensatory. Sir Geoffrey Vos C further stated:

> "43….different factors may in practice apply to the enhanced interest under [r.36.17(4)(c)]. That is because account may need to be taken of how the costs, on which an enhanced rate of interest is claimed, were incurred. It could have been, for example, that despite the fact that it was unreasonable to refuse the Part 36 offer, the conduct of the litigation was itself reasonable, so that the costs on which enhanced interest was sought were not incurred in contesting bad points or dishonesty by the defendants. That is not this case–but in some cases, it would be a serious consideration."

20. In the *OMV* case the Court of Appeal increased the total interest on both damages awarded and costs to the maximum 10% above base rate, taking into account that the defendant had simply ignored a proper offer and had thereafter run up costs by advancing a dishonest and unreasonable defence. However, the Court emphasised (at [47]) that a judge's discretion as to the appropriate rate of enhancement is a wide one.

21. In *JLE (A Child) v Warrington & Halton Hospitals NHS Foundation Trust* [2019] 1 WLR 6498 (a decision which post-dated the Judge's judgment in this case), Stewart J recognised, as did the Court of Appeal in *OMV*, that it was open for a judge to conclude that it was unjust to order some, but not all, of the four enhancements specified in r.36.17(4). However, Stewart J expressed the view at [23(iv)] that it would be unusual for the circumstances to yield a different result for some only of the orders.

22. Stewart J also emphasised at [44] that it was not open to judges to take into account, in the exercise of the discretion under 37.17(4), the amount by which a Part 36 offer has been beaten. To do so would risk "reintroducing" the approach in *Carver v BAA plc* [2009] 1 WLR 113 (where a claimant was held not to have obtained a "more advantageous" judgment than the defendant's Part 36 offer, notwithstanding that it was for £51 more than the offer) and the consequent "unwelcome degree of uncertainty"[4] in the Part 36 regime to which it had given rise. The Rules Committee had reversed that decision on the recommendation of Jackson LJ by adding the definition in r.36.17(2) to make it clear that "more advantageous" means "better in money terms by any amount, however small" and that "at least as advantageous" shall be construed accordingly.

[4] *Review of Civil Litigation Costs: Final Report* (December 2009), Chapter 41 para 2.9.

The Judge's judgment

23. The Judge recognised the heavy burden on a defendant seeking to avoid orders in favour of a claimant under CPR 36.17(4) on the grounds of injustice, referring to the principle identified by Briggs J in *Smith v Trafford Housing Trust* (in the passage set out above) that the burden to show injustice is a formidable obstacle to the obtaining of a different costs order.

24. The Judge then identified the factors he considered to be relevant in the present case. First was the fact that the question at issue in the proceedings was "a binary one, to which there was only one answer rather than some answer meeting in the middle" which may have rendered settlement "an unlikely prospect and may have rendered any decision to that effect an understandable one". The Judge recognised that such a situation was not uncommon and that it was not a special or determinative factor, but was relevant.

25. Second, the Judge did not consider there was anything unreasonable in Ofcom's decision to take the case to trial or in its conduct of the litigation, but again recognised that that was not determinative, albeit relevant.

26. Third, the Judge did not accept that Ofcom had behaved unreasonably in failing to engage in the without prejudice process. Ofcom had been resistant to settlement procedures "in the belief that a court judgment would be required", although Ofcom had attended a without prejudice meeting.

27. Fourth, the Judge considered "the nature of the offers in play" as follows:

> "13...The two offers from Telefónica … demonstrate that what was being proposed was a very small discount from the full sum claimed…the interest discount being offered was in the region of £1m, maybe £1.5m at the time. Whilst that was not by any means insignificant, particularly as regards the public purse, it was a very small fraction of these substantial claims. The offer could, I suppose, have been put in a different way and I suspect it would have looked like something in the region of 96% or 97% of the total sum claimed…
>
> 14. In that respect there is an issue…under the rules as to whether the offers here were genuine attempts to settle the proceedings. I certainly cannot determine that they were not genuine attempts to settle the proceedings and I do not do so. Nevertheless it does seem to me relevant that these were offers which were at the very highest end of a settlement proposal. I would not like to think that the rules facilitated a circumstance -- I am not suggesting the claimants fall into this category but I am thinking ahead as to the consequences -- where a claimant commences litigation and can make an offer with a very small discount in the assurance that it will necessarily then have a costs protection in the future plus a certain entitlement to additional non-compensatory benefits. It does seem to me that the nature of the offers, even if genuine attempts to settle the proceedings, has a bearing on the overall question of whether the order that I am being asked to make is or is not just."

28. Turning to the four types of enhanced relief, the Judge first recorded that Ofcom had agreed that an additional sum of £75,000 was payable to Telefónica pursuant to CPR 36.17(4)(d). The Judge did not accept Ofcom's submission that that sum was sufficient to satisfy the application of CPR 36.17(4), but did regard it as "a significant starting point".

29. The Judge also awarded indemnity costs under CPR 36.17(4)(b), stating:

> "16. As I said earlier, I do not find that the offers were not genuine attempts to settle the proceedings. Therefore the normal Part 36 approach, to my mind, ought to be engaged and in the normal way, as I understand it, a standard consequence is an indemnity costs order. That is not, I emphasise, on the basis that there was any unreasonable conduct in refusing those offers, but I consider that the offers themselves entitled the claimants now to come forward and obtain that judgment."

30. The Judge declined, however, to award enhanced interest on the principal sum under CPR 36.17(4)(a) for the following reasons:

> "18. …the claim for an additional measure of interest which is permissible under the [rule] produced in this case a very large number in that….it would award over and above the current judgment, plus interest, a sum of £3.2 million in favour of Telefónica …
>
> 19. Whilst there no doubt may be cases in which, following a Part 36 offer, the award of supplementary interest is appropriate, given the circumstances of this case and in particular the very high nature of the offers…and given the other benefits which I have already referred to, it does appear to me that it would be disproportionate, and accordingly unjust, to impose this further sanction on Ofcom, in circumstances in which, as I have said, I do not regard its conduct as unreasonable albeit that it was in the event misguided."

31. The Judge also declined to award Telefónica enhanced interest on its costs pursuant to CPR 36.17(4)(c), giving the following reasons:

> "Equally, so far as the interest on costs is concerned, I consider that it is a relevant factor here to see how the case was itself conducted. I do not consider that it was conducted in any unreasonable way. I do not consider the costs that were incurred were necessarily enlarged because of the way in which the case was conducted. In those circumstances, given, as I said, the further factors which I have already referred to, I do think that it would be unjust to award an additional uplift of interest on those costs."

The parties' arguments on the appeal

32. Telefónica pointed out that all of the criteria specifically identified in CPR 36.17(5) pointed to the justice of awarding the four enhancements: the offers were clear and simple and were made at an early stage, all material was available to the parties, there

was no adverse conduct with regard to the provision of information and the offers were genuine attempts to settle.

33. Further, Telefónica submitted, none of the factors identified by the Judge justified a finding that an award of enhanced interest was unjust. In particular:

    i) the fact that the dispute was "binary" could not be relevant: many disputes could properly be compromised (and Part 36 offers made in that regard), notwithstanding that the result at trial would be "all or nothing";

    ii) the reasonableness of Ofcom's conduct, whilst relevant in the broad sense, was not remotely sufficient to render the award of enhanced interest unjust;

    iii) equally, the fact that the offers were at the very highest end of the spectrum of genuine offers did not render it unjust to order enhanced interest.

34. However, Telefónica placed most weight on the Judge's mistaken assumption that the enhanced interest on the principal amount of the judgment would amount to about £3.2m and so would be disproportionate. Telefónica argued that the Judge thereby completely failed to recognise that he had a wide discretion as to the level of any enhanced interest, was certainly not bound to enhance the rate to 10% above base rate, but could award a lower rate which would not be disproportionate. Contrary to the clear guidance in *OMV*, the Judge thereby failed to distinguish between the question of whether it was just to award enhanced interest and what level of enhanced interest to award.

35. Finally, Telefónica submitted that something had obviously gone wrong with the Judge's decision: Telefónica had bettered its first Part 36 offer by over £4.25 million (circa 8%) and its second Part 36 offer by over £4.5 million (circa 9%), yet was awarded no more interest than it would have been awarded had it made no offer at all.

36. Ofcom emphasised that the question of whether it was unjust to order one of the enhancements under CPR 36.17(4) was a value judgment for the first instance judge, itself creating a formidable obstacle on appeal of his decision: see *Dutton v Minards* [2015] EWCA Civ 984 per Lewison LJ at [26] and [27]. In this case the Judge was uniquely well placed to make that value judgment.

37. Further, Ofcom submitted, the Judge did not confuse any particular factor (such as "reasonableness" or "proportionality") with "justice", but rather took into account all the circumstances of the case (as he was bound to do pursuant to CPR 36.17(5)) and formed the broad value judgment that an award of indemnity costs and £75,000 was sufficient and that any more would be unjust. Those circumstances properly included the high level of the offers (the terms of offers being a compulsory criterion) and the reasonableness of the Ofcom's decision to take the matter to trial. In the latter respect, Ofcom contended that it was reasonable for a public authority to seek to pursue a point of principle to judgment where the outcome might significantly affect how much (if any) public money was recoverable.

38. Ofcom also argued that the Judge was entitled to take into account the "all or nothing" nature of the dispute, pointing out that in *Ritchie v Joslin* [2011] 1 Costs LO 9 HH Judge Behrens took the view that in such "binary" cases it was necessary to assess the

prospects of success on the claim in order to determine the reasonableness of the refusal of the offer and whether it was unjust to follow Part 36. In reply, Telefónica questioned the correctness of the decision in *Ritchie*, but it is unnecessary to decide that issue because the Judge did not place any real weight on the binary nature of the dispute, nor did he consider the reasonableness of the offers, expressly stating that he was not in a position to do so.

39. As for the discretion as to the level of any enhanced interest, Ofcom rejected the suggestion that the Judge had forgotten that power, pointing to discussion in that regard in the transcript of argument at the hearing.

40. In summary, Ofcom contended that the decision was a value judgment, one which the Judge had reached considering all the circumstances and without erring in principle.

Discussion

41. The Judge did not consider that the factors he identified rendered it unjust to award Telefónica both indemnity costs and the maximum additional sum. Indeed, in relation to indemnity costs, he considered that the "normal Part 36 approach" ought to be engaged, and that the "standard consequence" was an indemnity costs order. The Judge was rightly not persuaded that the fact that Ofcom was a public body (and that public money was at stake) excused Ofcom from the consequences of failing to accept a Part 36 offer which it failed to beat after a trial. The decision to continue to litigate was in Ofcom's own hands and its status as a public authority could not relieve it of the normal consequences of that decision.

42. In that context, the question arises as to why the position was any different in relation to the award of the other standard consequences, namely the award of additional interest on the principal judgment and costs. I agree with Stewart J's observation in *JLE* that it would be unusual for the circumstances to yield a different result for some only of the consequences. The question is particularly acute in the case of a judgment for £54 million (following a relatively short trial under Part 8), where an award of indemnity costs and an additional £75,000 was an almost trivial uplift and any significant enhancement in overall relief would only have been achieved by the award of additional interest on the principal sum.

<u>The award of enhanced interest under CPR 36.17(4)(a)</u>

43. In relation to enhanced interest on the principal award (CPR 36.17(4)(a)), the Judge's reasoning was that such an award would have been "disproportionate" given the "very high nature of the offers" and the other benefits he was awarding. In my judgment that reasoning does not bear scrutiny.

44. First, it is difficult to see the relevance of the level of the offers given that the key factor is that the defendant could have avoided the need for the proceedings (or most of the proceedings) by accepting one of the offers, and been in as good a position as it was after the trial. The fact that the amount of an offer is a very high percentage of the maximum a claimant could be awarded after judgment may justify the court in finding that it is not a genuine attempt to settle the proceedings (the purpose for which CPR 36.17(5)(c)) was added in April 2015) and therefore find that the award of enhancements would be unjust. The offers in this case, based on payment of 100% of

the principal sum then claimed and discounting only some or all of the interest claimed, might have been in that territory. However, once the Judge had accepted that the offers were genuine attempts at settlement (his negative formulation that he could "not determine that they were not genuine attempts to settle" amounting to the same finding, in my judgment), the level of the offers could not, in itself, form the basis of an assessment of the "proportionality" of enhanced interest, let alone a finding that any enhanced interest would be unjust. In making no order for enhanced interest in that situation, the Judge awarded the claimant no more interest than would have been awarded if the claimant had not made or not beaten a Part 36 offer, apparently on the basis that the margin between the offer and amount claimed (and for which judgment was granted) was small and the award of enhanced interest proportionately too large to be just. In my judgment, in so doing, the Judge "reintroduced" the overturned approach in *Carver*, effectively and improperly declining to implement Part 36 because of the small margins involved.

45. Second, since the court has a wide discretion as to the rate of enhanced interest to award, there is limited (if any) scope for consideration of disproportionality in deciding whether it is unjust to make any such award. As emphasised in *OMV*, the level of enhanced interest awarded must be proportionate in all the circumstances, entailing that the court can and must ensure that the award of enhanced interest is not, by definition, unjust on the grounds of disproportionality. For example, 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.

46. Third, I see no justification for the Judge's approach of treating the award of the additional amount of £75,000 and of indemnity costs as factors rendering it unjust also to award enhanced interest on the principal sum, whether as a matter of "proportionality" or otherwise. The rule provides for the successful claimant (in the terms of CPR 36.17(1(b)) to receive each of the four enhancements and there is no suggestion that the award of one in any way undermines or lessens entitlement to the others. In this case the Judge regarded the award of the two more trivial enhancements as a reason why it was unjust to award the major enhancement. I consider he was not entitled to do so.

<u>The award of enhanced interest under CPR 36.17(4)(c)</u>

47. The Judge considered it unjust to award an uplift of interest on costs because the case was not conducted by the defendant in an unreasonable way and so costs were not enlarged by such conduct.

48. However, as identified by Briggs J in *Smith v Trafford Housing Trust*, the key question is which party was responsible for costs being incurred when they should not have been. In a case such as the present, the costs were incurred because the defendant could have, but did not, accept the claimant's offers, deciding instead to fight the case but failing to do better than the offers. That is the basis of the claimant's entitlement to enhanced interest on costs and is not displaced in the present case.

49. Again, and as emphasised in *OMV*, a defendant's conduct of proceedings after rejection of the claimant's offer may be a major factor in increasing or decreasing the

level of interest awarded. But, in my judgment, reasonable conduct on the part of the defendant is not sufficient, in itself, to render it unjust to make an award at all.

Conclusion

50. In summary, although the Judge accepted that the claimant was entitled to enhanced relief under CPR 36.17(4), the effect of his decision was to deprive the claimant of any significant enhancement under that rule, doing so on the basis of a combination of factors which did not give rise to injustice as contemplated by the rule and so did not justify that result. Although the decision involved a value judgment and an exercise of discretion, the Judge took into account irrelevant considerations, contrary to clear statements of principle in the authorities, and failed to take into account his discretion as to the rate of interest.

51. It follows that I would allow the appeal and award the claimant enhanced interest on both the principal sum awarded and its costs. Exercising the discretion in that regard afresh, and taking into account all relevant circumstances (including those identified by the Judge in refusing to make any award of enhanced interest) I would award an additional 1.5% per annum (equating, as I understand it, to about £900,000), making the total interest payable 3.5% above base rate, on both principal and costs, from the relevant date.

Lord Justice Arnold:

52. I agree.

Lord Justice Peter Jackson:

53. I also agree.