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Case No: HQ13X01121
TLQ131323

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/7/2017

BEFORE:

LADY JUSTICE THIRLWALL
(Sitting as a Judge of the High Court)
- -

Between:

JAMES MARSH **CLAIMANT**

- and -

MINISTRY OF JUSTICE **DEFENDANT**

- -
- -

Mr Andrew Roy and Ms Vanessa Cashman (instructed by **Anthony Gold Solicitors**) for the **Claimant**
Mr Timothy Holloway (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 31st July 2017
Reporting Restrictions Applied: No

Judgment

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Lady Justice Thirlwall:

Costs

1. The claimant has succeeded in his claim and judgment has been given in the sum of just over £286,000. He failed on his application to strike out the defence as an abuse of the process of the Court. I received very lengthy written submissions from Mr Roy on the issue of costs and lengthy submissions from Mr Holloway in reply. I read them both with care and elucidated certain aspects of the defendant's submissions in a hearing last Friday.

2. The parties agreed that there were four questions which needed to be determined. First, whether or not the claimant should recover his costs of the action in full having won the case or whether, as Mr Holloway submits, he should recover only a proportion, he suggests 70%. Second, whether the claimant is entitled to costs on the indemnity basis, whether as a result of the defendant's conduct or as a result of the provisions of Part 36 or both. Third, whether any further awards should be made in accordance with Part 36 and, fourth, whether there should be a payment in respect of costs on account and, if so, in what amount.

3. Before dealing with the four headings in detail, it is important to look at the course of this litigation and the way it has been conducted. It has, I understand, consumed some 34 days of court time, more than double the length of the trial about which I expressed my views in the judgment and I do not repeat. My views have not changed.

4. I turn to the chronology prepared for this hearing by the claimant and I take account of the various observations made by the defendant. It is not necessary for me to resolve the disputes about certain incidents or events during the course of the litigation, in particular about the various directions. They are simply part of the background.

5. The claimant's Letter of Claim was sent on the 16th March 2012. At that stage, the claimant was still employed by the defendant. He was still subject to suspension and disciplinary procedures. The defendant responded to the letter of claim on the 27th July 2012. There is a dispute about whether and to what extent the defendant complied with the pre-action protocol but I do not propose to take any time over that. In the context of this claim, it is not of sufficient importance. In any event, on the 1st

November 2012, the claimant sent a further letter of claim which set out the case in detail. There was no response, notwithstanding the claimants agreeing to an extension, first, to the 27th November 2012 and then to the 5th February 2013.

6. In the meantime, on the 11th January 2013, the claimant wrote to the defendant asking for an extension of the limitation period which otherwise would expire on the 18th March 2013. On the 1st March 2013, the defendant replied and refused this request with no reasons. Protective proceedings were issued on the 18th March 2013 and served on the 7th June 2013. The defence was served on the 5th August 2013. Then, during the course of 2013 and 2014, there were a number of directions hearings. It is not necessary to investigate or analyse them in any detail. During the course of 2013 and 2014, there were a number of extensions of time for the defendant to comply with various directions.

7. By a letter of the 20th March 2014, the claimant made a Part 36 offer in the sum of £223,500. On the 26th March of 2014, the defendant first contacted the police to request documents by way of disclosure. This was some two years after the first intimation of the claim and one year after the particulars of claim had been served.

8. On the 14th April 2014, the period for the acceptance of the claimant's first Part 36 offer expired and, on the 17th April 2014, the defendant applied for an indefinite extension of time for disclosure and for non-party disclosure from the police. I shall return to the question of disclosure later in this judgment. There were further hearings during 2014 in respect of directions.

9. On the 19th November 2014, the case came before the High Court for orders in respect of police disclosure and other matters. On the 5th December 2014, the Chief Constable made an application to withhold disclosure. The application was adjourned because it had not been properly presented and the Chief Constable was ordered to pay the costs thrown away. The case came before the High Court again on the 30th April for a number of issues to be considered in relation to disclosure, inspection and other matters. It was adjourned, part heard, to the 6th May 2015.

10. There were two hearings in November 2015 in relation to PII and ultimately an open judgment on the 21st December 2015 giving directions for disclosure, inspection and related necessary directions, including the identification of a trial window which was

adjourned from the 3rd October 2016, to the 11th November 2016, the trial being given a time estimate of three weeks.

11. In the meantime, on the 7th May 2015, the claimant wrote to the defendant offering mediation in the following terms:

> "*We write to engage in mediation.*
> *This is a complex case in respect of which both parties have strongly held views. It therefore seems to us that the objective input of an impartial mediator coming to the matter afresh is likely to be particularly valuable.*
>
> *Whatever the extent of the disclosure eventually ordered, both sides are about to incur significant additional costs on this exercise and on proofing witnesses. Furthermore the subsequent costs on both sides will be enormous if the matter proceeds to trial.*
>
> *This therefore seems to us a paradigm case for mediation.*
> *Both parties are of course under an active duty to consider ADR.*
>
> *We reserve the right to refer this letter to the Court in respect of costs. We refer you in this regard to* ***Laporte v Commissioner of Police of the Metropolis*** *[2015] EWHC 371 (QB) and the authorities cited therein.*

12. The defendant wrote to the claimant on the 9th June 2015 in response to that letter. The letter noted that this was:

> "*The first occasion on which mediation has been proposed.*"

It pointed out that the defendant was fully aware of the guidelines in respect of costs, as set out in the case of *Laporte & Anor v The Commissioner of Police of the Metropolis* [2015] EWHC 371 (QB). The letter acknowledged that the level of costs in the claim was high and acknowledged that further substantial costs were likely to be incurred. Already, as at 9th June 2015, the defendant said that the approximate costs to date were in the region of £340,000. I pause there. This was, as the defendant acknowledged and as the claimant was aware, a sum which reflected the significant resources that had already been devoted to the case by that stage.

13. The letter continues:

> *"We anticipate however that the Claimant's costs will not be anything like as high given that the Defendant has been required to engage in far greater investigatory work a substantial period of time after the event."*

14. Complaint is made about the breadth of the allegations made and the imprecise manner in which the claim had been framed; *"Together with the Claimant's lack of cooperation, a sensible scheme proposed for the disclosure exercise."*

15. The defendant then set out the reasons why it believed that it had a very strong defence to the claim and in particular said:

> *"Careful consideration has been given to amending the defence to plead positive averments in respect of conduct alleged against the Claimant which is evident from the police disclosure. We confirm that we have obtained witness evidence for exchange at the appropriate time from witnesses who will say that the Claimant did slap Ms Garces-Rosero as alleged by her. These witnesses are willing to attend trial."*

16. The letter goes on:

> *"But, given that the Claimant had not yet had the opportunity of seeing the weight of police disclosure 'against him' or the witness evidence in defence of the claim, mediation would not seem appropriate at this stage, albeit the Defendant remains open to discussion as to how the issues may be narrowed."*

The letter continues:

> *"There is an inevitable risk that the costs of mediation would be disproportionately high in the context of this case."*

17. Finally, the writer sets out five matters beginning with the sentence:

> *"Whilst neither party is yet in a position to know what the final evidence will be:*
>
> 1. *The police disclosure very substantially undermines the claimant's position in material respects;*
> 2. *The medical evidence very substantially undermines the claimant's position;*
> 3. *The defendant would be prepared to consider mediation directed to how the claimant might now extricate himself from this action, or, perhaps, how the issues may be narrowed, however the latter may be premature*

pending exchange of statements and amendments to the statements of case;

4. *There is particular concern in this case that serious allegations were made against the claimant and the police have disclosed evidence which is indicative of both his involvement as alleged and his knowledge of the conduct of others; that such an action has been pursued has wider implications and it would be of grave concern if public authorities were to be subject to litigation of this nature arising out of investigations into allegations of abuse and steps taken to protect third parties when there has been a series of identified failures by certain public authorities to carry out such investigations to the detriment of vulnerable individuals;*
5. *The latter fact does not form an auspicious backdrop against which to pursue a claim based in part upon the allegation that the complainant ought not to have been believed."*

18. Paragraph 4 sows the seed for what was to be a submission which was developed before me in the costs hearing. The letter concludes:

"In view of the above and in the first instance, we invite the Claimant to discontinue his claim."

I understand that the defendant adopted that same approach on a number of occasions including during the course of the litigation and during the trial.

19. I return to the chronology. On the 18th March 2016, the defendant applied to amend its defence. On the 28th April 2016, an application was made to adjourn the trial. This too came before a High Court Judge and orders were made in respect of amended particulars of claim which were to be served by 12th May 2016 and an amended defence by the 26th May of 2016. Time for exchange of witness statements was extended to the 30th June 2016.

20. The adjourned application to amend came before His Honour Judge Reddihough sitting as a High Court Judge on the 20th and 21st June 2016. He made a number of orders including the following, firstly, that the amended particulars of claim should be served by the 27th June of 2016 and the amended defence by the 23rd July 2016. He then set out a timetable for witness statements and exchange of expert medical reports. Paragraph 9 of the order reads:

"At all stages hereafter the parties must consider settling this litigation by any means of alternative dispute resolution (including mediation). Any party not engaging in any such means proposed by another must serve a witness statement giving reasons within 21 days of that proposal. Such witness statement must not be shown to the trial judge until questions of costs arise."

21. There were further applications for further directions and further directions were made and, on the 14th October 2016, the claimant made a Part 36 offer in the sum of £180,000. The claimant also invited the defendant, if the offer were not to be accepted and no counter offer was to be forthcoming, to reconsider its position and to engage in ADR/mediation.

22. During the currency of the Part 36 offer and of the request to engage in mediation, the parties attended for the PTR before me. I gave a number of directions, to some of which I have referred already in the course of the judgment and I do not repeat here. At that hearing, the claimant made a number of complaints about the state of preparedness of the defendant and its approach generally to compliance with court directions in respect of the service of witness statements. The claimant also raised questions about, in particular, the evidence of Mr Hurley. I do not need to refer further to that but recall that it was brought to the court's attention at that stage. I shall revert to that later in the judgment when dealing with the abuse of process litigation which was issued on the 4th November 2016 just before trial, notice of it having been given on the 28th October 2016.

23. On the 8th November 2016, the period for the acceptance of the claimant's second Part 36 offer expired, as did the time limit for the period of compliance with paragraph 9 of the judge's order of the 21st June 2016. The defendant had not engaged in ADR, nor had it replied to the recent invitation to which I have just referred. It did not provide a statement explaining its reasons and, indeed, has never done so.

24. A chasing letter was sent by the claimant's solicitors to the defendant for a response to the request for ADR. No reply was ever received. The trial began on the 15th November 2016 and the draft judgment was circulated on the 13th June 2017. On 29th June I heard further argument on quantum and further arguments on costs on 24th July.

Disclosure

25. Both parties have drawn my attention to the enormous disclosure exercise, an exercise which the claimant resisted on a number of occasions. It is right to acknowledge that the parties found it very difficult to work well with each other on this issue and a number of applications and counter applications were made. I do not think it helpful, and it is certainly not necessary, to labour through the various disagreements on the way disclosure was carried out at the time. It is inescapable that the police disclosed many thousands of documents, most of which were not used in the litigation, still less at trial. Detailed schedules were produced which, in the main but not entirely, did not take the case very far.

26. Mr Holloway reminded me that it is not for me to second guess the decisions of the judges who were asked to deal with this matter at the various interlocutory stages. I need no persuading of that. Decisions on interlocutory matters are dealt with on the basis of the information before the judge at the time. I acknowledge readily that the trial judge has the advantage of seeing just where the disclosure led and where it ended up. From that privileged perspective, it was plain to me, as I have said in the judgment, that it was an expensive waste of time.

27. When I asked Mr Holloway to explain why such broad disclosure had been sought, his starting point was, and remained, that it was necessary to meet the wide ranging allegations that the claimant had made in respect of the defendant's failure to provide to the police all exculpatory material before the search (I paraphrase and summarise).

28. I pause there. The documents which it was said by the claimant should have been provided to the police were the defendant's own documents. Despite a number of questions from me, Mr Holloway was not able to explain why it was necessary to seek disclosure from the police of documents that belonged to the defendant. Either the defendant had provided them to the police or not. By way of example, the ‘use of force’ forms which figured somewhat largely in the trial were generated by the defendant's employees and they were ultimately provided to the police.

29. It was never suggested to me that the disclosure exercise was necessary because the defendant had simply handed over all its documents without keeping a record of the documents or even of their contents, but, even if that were the case, the documents

were ultimately the defendant's documents. There was no need for an application for disclosure to retrieve them once the criminal trials were over. It was a matter of asking the police to return them.

30. It was the claimant's case that the defendant had been under a duty to provide exculpatory material to the police before the search of his home. The existence and scope of that duty was a matter of law. The evidential starting point was what the defendant had itself provided (or not provided) to the police. The very wide ranging disclosure which was in fact obtained was not directed to that issue. What was obtained were documents (including Section 9 Criminal Justice Act statements) containing information from people who had something to say about the claimant's conduct at some stage. This information was then used as the basis for the comprehensive attack on the claimant which I deal with in the judgment.

31. It would have been perfectly acceptable to ask the police what the effect of the exculpatory material would have been, or was, upon their approach to the claimant (depending on whether or not the defendant had in fact provided the material). That did not require further disclosure. It emphatically did not require disclosure on the scale that occurred.

32. It was evident that the defendant struggled to deal with disclosure given the resources that were available to it. As I said elsewhere in the judgment, that led to the problems with the court-imposed deadlines and other errors. On any view, it is inescapable that the disclosure exercise had a very profound effect on the length of trial and its expense.

ADR

33. It is well known that personal injury claims by an employee against his or her employer are often amenable to mediation or some other form of alternative dispute resolution. This is because an independent person can approach the case dispassionately and without the history and emotion that can colour judgment in relation to claims by an employee against an employer. On the face of it, this was a claim in respect of which alternative dispute resolution, and in particular mediation, was appropriate.

34. In his written submissions, Mr Holloway points out that the claimant fails to recognise the full context in which the defendant was facing and addressing the litigation. He submitted orally and also in written argument that this litigation was out of the

ordinary. What takes it out of the ordinary, as I understand the argument, is the fact that the MOJ is a public body which found itself at the centre of a police investigation in a prison at a time when many other public bodies were, and indeed are, under investigation in respect of allegations of abuse brought by those to whom the state owes, or may owe, a duty. For example, there are claims of historic sexual abuse against a raft of different institutions across the public and private sectors at the moment and a number of enquiries into them and other alleged failings of various institutions. Mr Holloway referred in particular to the Goddard/Jay enquiry (his nomenclature). This he says correctly has led to widespread public concern. That is true but I fail to see how widespread public concern about the abuse of people in care or in other settings can properly be said to affect the conduct of the defendant in personal injury litigation brought against it by a member of staff. It does not take this litigation out of the ordinary run. Claims against government departments for personal injury are not uncommon. The greater public context, if that truly exists, does not entitle the defendant to conduct itself without regard for the need to conduct litigation proportionately and without regard for a court order in respect of mediation. If the defendant did not wish to engage in mediation for what it erroneously saw as public policy reasons, it must be prepared to take the costs consequences of that approach.

35. In a nutshell, it was the defendant's submission that there should be no adverse consequences from its refusal to engage in mediation, or indeed any settlement discussions at all, nor should there be any adverse consequences arising out of the Part 36 payments. I cannot agree. I shall return to those matters in due course.

<u>The amended pleadings</u>

36. The amended defence was served in July 2016. It contained the allegations which I have described in the judgment that are set out at paragraphs 11(i) and 11(ii) of the defence and following. The pleading at 11(i) was drafted in the knowledge that the complainant did not want to pursue the complaint. Mr Holloway observed on many occasions in the trial that the fact that the original complainant did not wish to pursue the allegation did not mean that it was not true. That of course is correct but the fact that someone does not wish to pursue an allegation does not mean that the allegation is true.

37. I have set out my views of the complainant in my judgment. It is plain that she did not withdraw, nor could the defendant have thought that she had withdrawn as a result of any pressure from the claimant or from anyone else. She decided not to pursue it. It followed from that and from the quality of the available evidence such as it was, that the defendant was not in a position, realistically, to rely on her for a finding against the claimant of very serious misconduct nor could the other information be relied on for the reasons that I have given.

38. The complainant did want to pursue the slapping allegation. It was tested in the disciplinary process and the governing governor exonerated the claimant, ie, the case was not proved on the balance of probabilities. That was a very clear message as of June 2012 that the complainant would not make a good witness on this issue. In the event she was not called at trial.

39. From time to time in the trial and during submissions on costs, Mr Holloway floated the submission that the decision by the governing governor in 2012 at the disciplinary hearing was taken without all relevant material. What that overlooks is that the defendant had from the beginning, firstly, the letter written by KQ to the Corruption Unit and secondly, all of the materials that were subsequently used by the defendant to justify the claimant's suspension and its continuation.

40. There seems to be an unspoken assertion that if what was known after disclosure had been known at the time of the disciplinary hearing, the decision would have been different. This is untenable. The governing governor heard the witness herself. She heard other witnesses and she heard the claimant. It was a matter for the defendant to decide to what extent it relied on other information at the disciplinary hearing. It does not assist me now on the question of costs for it to be said that somehow something was left out. The defendant had all the material upon which it relied in support of its case on suspension and upon which the governors must have relied in the continuation of the suspension.

41. But, in any event, I have looked at all of the relevant documents and I have come to precisely the same conclusion as Miss Spencer on the slapping and to the same conclusion as was come to by Ms Pearce on the other allegation. It was apparent to me, notwithstanding the reference to the fact that the defendant accepted my judgment and was not seeking to go behind it, the argument (that the decision might have been

different had the other information been considered) was still being relied on in relation to costs.

42. The effect of this pleading, apart from extending the length of the trial, was to subject the claimant to a prolonged process at the end of which he knew that the allegations would have to be dealt with at a public hearing. Of course it was open to him, if he wanted to do so, to drop his claim and that was something which he was encouraged to do by the defendant, but I have not found it easy to understand why this allegation, the 11(i) allegation, was held over the head of the claimant all the way to final submissions. I regret that the defendant's conduct in the ways I have described is at best dispiriting. It has consequences in costs.

43. I turn then to the first of the issues that I was asked to deal with and to which I referred earlier in the judgment, that is whether the claimant should recover his costs of the action in full or whether he should recover only a proportion.

44. The usual rule is that costs follow the event. Mr Holloway argues for a 30% reduction because the claimant did not succeed in establishing a number of his allegations. He has set down in writing every matter upon which he says the claimant failed. In my judgment, most of the issues raised by the claimant were at least arguable, save for the allegation that it was as a result of the defendant's negligence that the search occurred in the manner in which it did. I indicated as early as the PTR that this was unlikely to succeed, and so it proved, once I had heard the evidence and considered submissions on the law. That having been said, I have also found, and will not repeat, that the allegation at 11(i) was hopeless and should not have been brought.

45. I then look at the result of the pleading at paragraph 11 more generally. In most respects the defendant failed in its positive claim. It also ultimately failed in respect of the claim for negligence. As the authorities require, I have stepped back and looked at this case in the round. I have had the opportunity of re-reading the judgment. I consider that any fair reading of the judgment leads to the conclusion that the claimant was successful. Accordingly, I am satisfied that the claimant should have the whole of his costs of the trial without any reduction.

46. Should the claimant recover costs on the indemnity basis, as a result of the provisions of the Part 36 or the defendant's conduct? I have already set out in some detail my

view of the defendant's conduct of the litigation and the dates of the Part 36 offers.

CPR 36.17(1)(b) and (4) provide:

(1) Subject to rule 36.21, this rule applies where upon judgment being entered-
(a)…
(b) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer…

(4) Subject to paragraphs (7) where paragraph (1)(b) applies, the court must, unless it considers it unjust to do so, order that the defendant 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 thee has not been a previous order under this subparagraph, an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below, to an amount which is

i) the sum awarded to the claimant by the court; or

(ii) …

The prescribed percentages are then set out.

Sub paragraph (5) sets out the matters the court must take into account when considering whether it would be unjust to make the orders, namely 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 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) …

47. I shall deal first with the first Part 36 offer. Mr Holloway began his submissions by reference to the nature of this litigation and the fact that it is out of the ordinary. I have rejected that argument. It is of no avail on the Part 36 issue. The question that I have to decide is whether the various consequences of paragraph 1(b) should follow and whether it is unjust that they should.

48. At the heart of Mr Holloway's submission is this: but for the change in the discount rate in March of this year, the claimant would not have exceeded the offer of £223,500 made on the 20th March 2014. He relies in particular on the decision of Mr Justice Leggatt in the case of *Novus Aviation Ltd v Alubaf Arab International Bank* [2016] EWHC 1937 (Comm). In that case, the judge concluded that it would be unjust for the consequences of Part 36 to flow when the reason that the sum had been exceeded was because of a dramatic fall in Sterling just after the EU referendum on the 23rd June 2016. That had the effect of significantly reducing the dollar value of the Part 36 offer. Leggatt J went on to say:

> "If judgment had been entered at any time between the start of the trial . . . [and the referendum, the Claimant] would not have beaten his offer. In those circumstances it would be unjust to make orders for an enhanced rate of interest and indemnity costs for any part of the period between the offer and the incident date."

49. In his reply to that submission, Mr Roy says that that is not the case here. £286,572.87 was at all times worth more than £180,000 and £223,500. That is true but had the matter reached trial earlier, or indeed had judgment been given at any stage before March of 2017, the damages would have been less than the amount of the Part 36 offer.

50. Mr Roy further submits that the position is no different from that which occurs when medical evidence changes in a way that cannot be foreseen; for example, the changes in the computation of life expectancy as a result of scientific research led to a major shift in the levels of damages in some cases. These are the vicissitudes of litigation and do not make it unjust for Part 36 consequences to flow. However, it seems to me

that a change in the discount rate is somewhat different in kind. True it is, as Mr Roy pointed out that, since 2012, it has been known that the Lord Chancellor was reviewing the discount rate but I think, in considering the whole of the context of this case, it would not be just for the usual consequences to flow from the offer in 2014.

51. There is no answer to the Part 36 offer made in October 2016. Like the earlier offer it was clearly a genuine attempt to avoid a trial. It was not accepted. The claimant has done better than the second offer by a very significant margin irrespective of the change in the discount rate. There is no arguable injustice for the prescribed consequences to flow from that date.

52. Between the dates of the two offers was the amendment of the defence in July of 2016. There is no need to repeat that which appears earlier in the judgment and in the judgment in the substantive case. Taking that together with my earlier criticisms of the way the defendant conducted the litigation and the refusal to take part in any form of ADR it is clear to me that indemnity costs must be paid from the date of the amended defence and so I order that the defendant do pay the claimant's costs to be subject to a detailed assessment on the standard basis up to 27th July 2016, thereafter on the indemnity basis and, pursuant to Part 36, the defendant is to pay interest on those costs at 10.5% from 8th November 2016.

53. I shall order that the defendant do pay to the claimant additional sums pursuant to Part 36 of the CPR as follows. Additional interest from 8th November 2016 on general damages at 8.5%, on past losses at 10%. I also make an order that the additional award should be made in the sum of 10% of the damages as prescribed by Part 36, namely £28,657.29, and that the defendant do, by the 28th August, pay to the claimant the total of the sums at paragraph 1, 2.1 and 2.2 of the order.

Abuse of Process

54. I turn then to the question of the costs of the abuse of process argument. Adopting the same approach as I took in relation to the main judgment, I have reviewed my decision in relation to the abuse of process argument. I remind myself that I did not think it unreasonable that the application was made given the state of the evidence in the period just before trial and the dismissive approach taken by the defendant to the claimant's legitimate concerns which were expressed in clear terms at the pre-trial review. I have now reminded myself that I had at the PTR specifically said that I expected a response

to what had been said by Mr Hurley to the claimant's solicitors. None came until I directed the substantive response to the claimant's application. In fairness to the defendant, that response came sooner than would otherwise have been required by the Rules but it was a matter about which I wished to have some clarity before the trial started.

55. Mr Holloway complains that the defendant's preparations for trial were disrupted by this application. I fear that was the inevitable result of the way the litigation had been conducted up to that point. All that having been said, the heart went out of the application once Mr Hurley had given evidence and had been cross-examined and re-examined. To pursue it to the very end, whilst understandable given the background, was wasteful of time and resources, legal and judicial, albeit at a very late stage of the trial. Standing back, it is quite clear to me that the defendant was successful in resisting that application and the defendant may have its costs in defending the abuse of process argument.

Payment on account of costs

56. Finally then, I turn to the question of a payment on account of costs. The starting point is CPR 44.2(8) as amended:

> "Where the Court orders a party to pay costs subject to detailed assessment it will order that party to pay a reasonable sum on account of costs unless there is good reason not to."

57. The issues are, i) is there a good reason not to order that the MOJ pay a reasonable sum on account of costs and, if not, ii) what is a reasonable sum? I have ordered that the defendant pays costs subject to detailed assessment and I have no doubt there will be significant argument about the final sum payable but that is not a good reason not to order the defendant to pay a reasonable sum on account. Mr Holloway did not raise any argument in principle against such a payment. His submissions were directed, firstly, to the overall level of the costs which he submits are far too high but that will be a matter for the judge who determines the costs. He also submits that a reasonable sum should be calculated on the basis of base costs without reference to uplift or to the insurance premium.

58. I do not accept the argument about the uplift. There is no evidence that any technical issue might arise with the CFA and the overwhelming likelihood is that this is a case where there will be 100% uplift; the case could scarcely have been harder fought.

59. A further submission is made that the claimant's team was much larger than that of the defendant. The question of the adequacy of resources on either side will be a matter for the costs judge to decide but he will be bound to consider the size of the claimant's team relative to the size of the exercise which was required at trial. I say no more about that.

60. I have looked at the costs bills on both sides. The costs are enormous compared with the sum recovered. In the listing questionnaire the defendant estimated its costs at £734,615. Mr Roy points out that if one strips from the claimant’s figure the uplift and other additional components the defendant’s costs are higher than those of the claimant. Towards the end of his oral submissions Mr Holloway submitted that it was likely that the defendant’s costs would be in the region of £550,000. That is surprising given the sum which had been incurred by mid 2015 and the fact that the costs to date on the document were £530,286. But Mr Holloway says, and I accept, that there may have been some problem or some errors in the billing process, perhaps something to do with timing, and I say no more about that. It would not be fair in any event simply to do a direct comparison between the costs incurred on each side.

61. Doing the best that I can, on a somewhat rough and ready basis, I cannot see that there is any likelihood that the ultimate costs on the claimant's side will be less than £900,000 and accordingly, I take a reasonable proportion of that which I determine to be £600,000. I therefore order that the defendant pay to the claimant the sum of £600,000 on account of costs by the date set out in the draft Order, 28th August 2017.

62. Paragraph 7 will read, the claimant's application dated the 4th November 2016 be dismissed. The claimant shall pay the defendant's costs of the application to be assessed on the standard basis, if not agreed.

63. Then I see there was a query in relation to paragraph 8, the costs of the hearings on the 21st July and the 31st July be in the case. Is that now agreed? Thank you very much indeed.

This Transcript has been approved by the Judge.

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