Neutral Citation Number: [2020] EWHC 1749 (QB)

Case No: C90BM293

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY

Date: 2 July 2020

Before :

MR JUSTICE CAVANAGH

- -

Between :

MARTIN GEORGE SCALES	**Claimant**
- and -	
MOTOR INSURERS' BUREAU	**Defendant**

- -
- -

Matthew Chapman QC (instructed by **Irwin Mitchell**) for the **Claimant**
Lucy Wyles (instructed by **Weightmans**) for the **Defendant**

Hearing dates: 18-21 May 2020

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SUPPLEMENTARY JUDGMENT ON COSTS

Mr Justice Cavanagh :

1. I have, today, handed down my judgment on quantum in these proceedings. I have awarded compensation and penalty interest to Mr Scales in the sum of £539,096.83.

2. In the normal way, I provided the parties with a copy of my judgment in draft and invited them to see if they could agree upon the form of the order and any consequentials. The parties agreed a number of matters, but they were unable to reach agreement on three matters which will affect the order in relation to costs and, in one respect, the sum to which Mr Scales is entitled. Mr Chapman QC, for the Claimant, and Ms Wyles, for the Defendant, have helpfully provided me with written submissions on the outstanding issues, and the parties have agreed that I should determine them on the basis of the written representations. These matters are:

   (1) Whether there should be an issue-based costs order;

   (2) The Part 36 consequences to which Mr Scales is entitled; and

   (3) The quantum of an interim payment as to costs.

3. The issue arise only in relation to the quantum hearing. A costs award has already been made by His Honour Judge Cooke in relation to the liability hearing.

4. It is common ground that English law and procedure applies to these issues. I will deal with them in turn.

Should there be an issue-based costs order?

The MIB accepts that, in the main, costs should follow the event in these proceedings. Mr Scales has recovered substantial compensation. The MIB did not make a Part 36 Offer in these proceedings. On 5 June 2020 (after the hearing of the quantum stage but before the Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

was received), the MIB made a "without prejudice save as to costs" offer in full and final settlement in the sum of €440,068.11 (£393,076) gross of CRU and interim payments. Mr Scales "beat" this offer by something over £150,000 and so the MIB does not suggest that I should take account of this offer when determining costs.

5. However, Ms Wyles, on behalf of the MIB, submits that this is a case in which an issue-based costs order should be made, pursuant to CPR 44.2 for costs before 1 April 2020 and pursuant to CPR 36.17(4) for costs thereafter. The significance of the date

of 1 April 2020 is that this was 21 days after Mr Scales made a Part 36 offer (on 11 March 2020). In his Part 36 offer, Mr Scales offered to settle his claim for the sum of £500,000, inclusive of interest. He has "beaten" this offer also. The MIB had until 1 April 2020 to accept the offer. Needless to say, the MIB did not do so.

6. CPR 44.2, of course, sets out the Court's general discretion as to costs. CPR 44.2(2) provides that the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but that the Court may make a different order. CPR 44.2(4)(b) provides that in deciding what order to make about costs, the Court will have regard to all of the circumstances including whether a party has succeeded in part of its case, even if the party has not been wholly successful.

7. CPR 36.17(4) applies where, as here, the judgment against the Defendant is at least as advantageous to the Claimant as the proposals contained in a Claimant's Part 36 Offer. CPR 36.17 (4) provides that the Court must, unless it considers it unjust to do so, award costs on the indemnity basis, and interest on those costs, from the date when the offer expired. In addition, the Court must, subject to the proviso, award an additional amount, which shall not exceed £75,000, calculated by applying the "prescribed percentage" to the sum awarded to the Claimant by the Court. The "prescribed percentage", in a case such as this where the Court has awarded more than £500,000, is 10% of the first £500,000 and (subject to the limit of £75,000) 5% of any amount above that figure.

8. It is clear from CPRs 44.2 and 36.17 that, different tests can apply to the award of costs for the period before and after 1 April 2020. For the period before 1 April 2020, the normal approach under CPR 44.2 applies. For the period after 1 April 2020, Mr Scales is entitled to all of his costs unless it would be unjust, in all the circumstances, to award him some or all of his costs: **Webb v Liverpool Women's NHS Foundation Trust** [2016] EWCA Civ 365; [2016] 1 WLR 3899, paragraph 38.

9. Ms Wyles points out that Mr Scales was unsuccessful in two parts of his claim. He was unsuccessful in his contention that he was entitled to care costs and to future costs. Ms Wyles submits that he lost on these issues because of the application of established principles of Spanish law. Moreover, had these issues not been pursued, the care expert evidence, which dealt not only with care costs but also with services and future case management, none of which, in the event, was recoverable, would not have been necessary. The care expert evidence alone occupied one day of the trial. In those circumstances, Ms Wyles submits that a conservative and fair approach to reducing the costs accordingly would be an order that the Claimant should not recover costs in the expert phase in respect of the care expert evidence and that the Claimant's costs in the trial preparation and trial phases should be reduced by 25%.

10. The correct approach to issue-based costs awards under CPR 44.2 has recently, and very helpfully, been set out by Stephen Jourdan QC, sitting as a Judge of the Chancery Division, in **Pigot v Environment Agency** [2020] EWHC 1444 (Ch), at paragraph 6 of his judgment:

> "(1) The mere fact that the successful party was not successful on every issue does not, of itself, justify an issue-based cost order. In any litigation, there are likely to be issues which involve reviewing the same, or overlapping, sets of facts, and

> where it is therefore difficult to disentangle the costs of one issue from another. The mere fact that the successful party has lost on one or more issues does not by itself normally make it appropriate to deprive them of their costs.
>
> (2) Such an order may be appropriate if there is a discrete or distinct issue, the raising of which caused additional costs to be incurred. Such an order may also be appropriate if the overall costs were materially increased by the unreasonable raising of one or more issues on which the successful party failed.
>
> (3) Where there is a discrete issue which caused additional costs to be incurred, if the issue was raised reasonably, the successful party is likely to be deprived of its costs of the issue. If the issue was raised unreasonably, the successful party is likely also to be ordered to pay the costs of the issue incurred by the unsuccessful party. An issue may be treated as having been raised unreasonably if it is hopeless and ought never to have been pursued.
>
> (4) Where an issue based costs order is appropriate, the court should attempt to reflect it by ordering payment of a proportion of the receiving party's costs if that is practicable.
>
> (5) An issue based costs order should reflect the extent to which the costs were increased by the raising of the issue; costs which would have been incurred even if the issue had not been raised should be paid by the unsuccessful party.
>
> (6) Before making an issue-based costs order, it is important to stand back and ask whether, applying the principles set out in CPR r.44.2 , it is in all the circumstances of the case the right result. The aim must always be to make an order that reflects the overall justice of the case."

11. In the present case, it would not, in my judgment, reflect the overall justice of the case to deprive Mr Scales of any part of his costs.

12. It is true that Mr Scales was unsuccessful in relation to some of the points of Spanish law that were argued before me. However, he was successful in other respects. In particular, he was successful in the argument that, under Spanish law, the award for permanent incapacity, also known as the "corrective factor" award, could be "bumped up" to include compensation for costs or expenses that would not otherwise be recoverable under the *Baremo*. The argument on this issue effectively overlapped with the argument about whether, in any event, Mr Scales was entitled to recover heads of losses that were not specifically mentioned in the *Baremo*, such as future costs and care costs. I do not think that it would be just, or appropriate, to treat the argument on the points of law on which Mr Scales was unsuccessful as being a discrete aspect of the case. The reality of the position was that Mr Scales, through counsel and his Spanish law expert, was advancing two alternative arguments,

respectively embodying a more ambitious and a less ambitious position, and he was successful on the less ambitious of his two alternative arguments.

13. Moreover, as I made clear at paragraph 253 of the main judgment, when awarding the maximum amount for Mr Scales's absolute permanent incapacity, I took account of the sums that, ideally, Mr Scales would have been allocated for care management, third party support, gratuitous support, and future therapies. It follows that the evidence from the care experts was not wasted. Their evidence assisted me when considering the extent to which Mr Scales requires third party care, case management and other services and in placing a value on these costs (as a result of which I allocated the maximum figure payable for absolute permanent incapacity). Moreover, their expert evidence was relevant to the question of how much I should award for certain of the permanent on-going symptoms, and to the amount for temporary incapacity pre-Consolidation.

14. I agree with Mr Chapman QC, therefore, that, on any analysis, Mr Scales has won this case, and I do not consider that it would be just or appropriate to make an issue-based award, either in relation to the period before 1 April 2020 or the period after that date. The expert evidence from Spanish law experts and from care experts would, in any event, have been necessary even if Mr Scales had not advanced the arguments upon which he was unsuccessful.

15. Ms Wyles further submits that, in this regard, I should take account of the fact that the MIB has already been penalised, via the penalty interest payable under Spanish law, for failing to pay Mr Scales his compensation, for not accepting the offer, and for taking the matter to trial. Penalty interest under Spanish law imposes a much higher financial penalty than Part 36 consequences do under English law. Ms Wyles does not go so far as to submit that the imposition of Spanish penalty interest displaces the Part 36 rules, but submits that the penalty should be taken into account in considering whether it would be unjust in this particular case to apply all of the Part 36 rules.

16. I am also unable to accept this submission. It is true that the rate of interest that the MIB (and, ultimately, the CCG) will have to pay is higher than would be payable if the accident had happened in England, but on the other hand, the compensation payable to Mr Scales is lower, and probably very much lower than it would have been had the accident happened in England rather than in Spain. I do not think that the fact that I applied Spanish law, including the Spanish law relating to interest, is a factor which renders it unjust to refrain from taking an issue-based approach to the assessment of costs. Indeed, I think that this factor is wholly irrelevant to the decision which I have taken on the question whether there should be an issue-based approach to the assessment of costs.

Part 36 consequences

17. Mr Chapman QC submits that each of the consequences provided for by CPR 36.17(4) in a case in which a Claimant has "beaten" his Part 36 offer should apply to the present case. These are that:

(1) Costs should be assessed on the indemnity basis from 1 April 2020, being 21 days after the Part 36 offer was made;

(2) Interest should be awarded on those costs at 6% above base rate; and

(3) An additional award should be made to Mr Scales of £51,950. This is 10% of the damages (including interest) that I awarded up to £500,000, plus 5% on the sum above £500,000.

18. As I have said, I am required by CPR 36.17(4) to make these orders unless it would be unjust to do so. Ms Wyles says that it would indeed be unjust to make these orders in the present case.

19. She says, first, that the MIB has already been penalised to a much greater extent than the Part 36 rules alone would permit, as a result of the imposition of the Spanish penalty interest. I have already made clear that I do not think that this is a good argument.

20. Second, Ms Wyles submits that ordering the payment of this additional amount would infringe the principle established in **Moreno v MIB** [2016] UKSC 52 that the Claimant is entitled to the same compensation that he would have been entitled to against the Spanish Guarantee Fund under Spanish law. He would not have been entitled to such an additional amount under Spanish law, save in the form of the penalty interest already awarded. Ordering the additional amount would duplicate that penalty and would be unjust.

21. I do not accept that it would be unjust. The penalty interest in Spanish law deals with something different from Part 36. Spanish penalty interest is payable, in a case such as this, if the Guarantee Fund fails to pay compensation within three months of being notified of the claim. In contrast, the Part 36 consequences in this case follow because the MIB did not accept the Part 36 offer made by Mr Scales on 11 March 2020. It follows that there is no injustice in the MIB being liable both to Spanish penalty interest and to the consequences of Mr Scales "beating" the Part 36 offer.

22. As for the rate of interest, I have a broad discretion to determine the rate of interest on the costs from 1 April 2020, up to a maximum of 10% over base rate. Mr Chapman QC asks for 6% over base rate. Ms Wyles argues for 4% over base rate, relying on **McPhilemy v Times Newspapers (No 2)** [2001] EWCA Civ 933; [2002] 1 WLR 934 in support of her submission that this is the conventional "generous" allowance. I will award 6% over base rate. The difference between 4% and 6%, in the wider scheme of things, is likely to be small, and I do not read the Court of Appeal's judgment in **McPhelimy** as laying down any general norm. There is a broad discretion and in my judgment 6% is the better figure.

Interim payment of costs

23. In the ordinary way, the Court will, nowadays, order an interim payment of costs: see CPR 44.2(8) and **Berntsen & Richardson v Tait & Rayment** [2013] EWCA Civ 1520, at paragraph 26. CPR 44.2(8) states that, where a detailed assessment is ordered, the Court will order a reasonable amount to be paid on account of costs, unless there is good reason not to do so.

24. There is no good reason in this case to refrain from ordering an interim payment of a sum by way of costs. The MIB does not suggest that there is. The dispute is as to the amount.

25. It is clear that the Court is not required to embark on a detailed assessment exercise when determining the interim payment. There is no "standard" proportion of costs that is payable by way of interim payment, though, as a result of costs budgeting and the greater confidence that can be placed in the preliminary assessments of costs, the proportion of the total amount that is awarded by way of interim payment is generally creeping up (see, eg **Thomas Pink v Victoria's Secret** [2015] 3 Costs LR 463 (Ch), in which 90% of the budgeted costs were awarded as an interim payment). However, the Court must be careful not to award a sum that might exceed the total amount that is awarded in the detailed assessment.

26. The approved costs budget for Mr Scales for the quantum trial was £219,702.35. Mr Chapman QC submits that the likely costs award on assessment will be higher, because there was a second Spanish law experts Joint Statement which has not yet been budgeted, and because the costs will be enhanced by the Part 36 consequences. He asks for an interim payment order in the sum of £200,000.

27. Ms Wyles, in contrast, submits that an interim payment order of £100,000 would be generous. She says that the estimated costs in Mr Scales's quantum hearing costs budget included an estimate for 10 experts attending trial, when only 3 did, and £6000 for counsel's fee for a Joint Settlement Meeting when none took place. She said that applying the rule of thumb of about 70% recovery of incurred costs and 90% of estimated costs would give a figure of £170,000. However, she said that this figure should then be reduced by a further £70,000 because the Defendant has already made two payments on account of costs, in the sum of £50,000 on 19 March 2020 and £30,000 28 March 2019. If these figures were deducted from £170,000, the resulting figure would be £90,000. This is why Ms Wyles submits that an interim award of £100,000 would be generous.

28. The determination of an interim payment for costs is inevitably rough and ready. The starting point is that I think that it is likely that the final costs assessment for Mr Scales will exceed £220,000. Even if there is a reduction because there was no Joint Settlement Meeting and only 3 rather than 10 experts attended trial, this is likely to be counteracted by the second Spanish Law Joint Expert Report and, perhaps more substantially, by the Part 36 consequences.

29. Ms Wyles refers to the total sum of £80,000 having already been paid on account of costs. This is in addition to the sum of £64,000, which was paid in May 2020 on account of liability costs. The costs budget for the liability stage was £117,816.48. The liability costs have not yet been assessed, HHJ Cooke having ordered that assessment should take place at the conclusion of the action. It is not yet known, therefore, whether Mr Scales's assessed costs for the liability stage will be in line with the budgeted amount. They may be less. However, it is clear that a substantial element of the additional £80,000 which has already been paid on account of costs will go towards costs at the liability stage. This may be as much as £50,000, though there is no certainty that it will be as much as this.

30. In my judgment, taking all of the relevant considerations into account, the appropriate sum to award by way of interim payment is £175,000.