



Neutral Citation Number: [2023] EWHC 1547 (KB)

Case No: QB-2021-002248

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 June 2023

Before:

DEXTER DIAS KC
(Sitting as a Deputy High Court Judge)

Between:

MGS
**(a protected party by KWM, his mother
and Litigation Friend)**

Claimant

- and -

**University Hospitals Bristol and Weston NHS
Foundation Trust**

Defendant

Mr McCullough KC (instructed by **Enable Law**) for the **Claimant**
Ms Ayling KC (instructed by **DAC Beachcroft**) for the **Defendant**

Hearing dates: 7 June 2023

Approved Judgment
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DEXTER DIAS KC

Dexter Dias KC:

(Sitting as a Deputy High Court Judge)

[CS/DS: claimant/defendant skeleton argument]

1. This is the judgment of the court.
2. In this personal injury claim, the court must rule upon two issues (1) whether damages agreed in the compromised claim in respect of a protected party should be approved by the court; (2) what interest is payable on a Part 36 (settlement) offer that was accepted by the defendant out of time.
3. The claimant is a child and a protected party (CPR 21.2(1); PD21). There is an anonymity order in place. Therefore, the claimant will be known as MGS. He appears by his litigation friend, who is his mother, and who shall be known as KWM. The claimant is represented by Mr McCullough KC. The defendant is the University Hospitals Bristol and Weston NHS Foundation Trust. The defendant is represented by Ms Ayling KC.
4. I recognise that anonymity orders have a dehumanising effect and risk reducing the living, breathing human beings at the heart of this sad case, some of whom are present at court before me today, to ciphers. While acknowledging the vital importance of the open justice principle and the “public watchdog” function of the press (*Thoma v Luxembourg* [2001] ECHR 240 at [5]), I judge that the Article 8 ECHR right privacy and private life imperatives here significantly outweigh the Article 10 ECHR freedom of expression rights of the press and public.

Background

5. In October 2009, a child was born by emergency caesarean section at the St Michael’s Hospital, Bristol. That child is claimant in this case. Although he had a low birth weight of 2.89 kilograms, he was otherwise in good health. However, overnight on 2 to 3 October, and the following morning, the Claimant became progressively more hypoglycaemic and as a result sustained permanent brain injury. This has impacted virtually every aspect of his life. He brings a claim for personal injuries against the treating hospital in the form of the Trust that operates it.
6. There has been full admission of liability by the defendant. Liability was accepted in the defendant solicitors’ letter dated 17 May 2018. There the defendant admitted that overnight on 2-3 October 2009 inadequate steps were taken to ensure that the claimant was feeding adequately and that a blood sugar reading should have been taken earlier than 05.00 hours on 3 October 2009. By reason of these failures, the child was exposed to two avoidable periods of hypoglycaemia during the morning of 3 October 2009. These caused him to suffer brain injury. The case thus resolved into a question of quantum of damages.

7. As to the pain and suffering and loss of amenity (“PSLA”) he suffered, the claimant has learning difficulties as well as significant social and behavioural issues that make his care and safe management challenging. He lives with epilepsy that is not reliably medically controlled. He is now 13 years old.
8. Judgment was entered on 12 September 202 by Master Thornett and the case was set down for a trial on damages due to start on 19 June 2023. There was a Joint Settlement Meeting (“JSM”) in September 2022. Both parties made Part 36 offers after the JSM. The claimant’s Part 36 offer was dated 17 October 2022 and stated that the claimant would accept in full and final settlement a lump sum of £9.3 million to include a pro rata sum for care and case management until 14 December 2022, and periodical payments (“PPOs”) starting on 15 December 2022 at £190,000, rising to £238,000 from 15 December 2028.
9. I will deal with the interest dispute first, then turn to the overall approval, as I wish in conclusion to direct a few words to MGS and his mother.

§I. INTEREST DISPUTE

10. What, if any, interest is payable to a claimant when the defendant accepts the Part 36 offer out of time?
11. A dispute arose between parties about the effect of the defendant accepting the claimant’s Part 36 offer after the 21-day relevant period specified in the offer. The offer was made in compliance with the provisions of CPR Part 36 on 17 October 2022 and was accepted by the defendant on 4 May 2023, the relevant 21-day period having expired on 7 November 2022. The relevant net capital lump sum is £7.4 million (£9.3 million minus interim payments) plus the first PPO of £190,000. About this the parties agree.
12. The claimant’s offer was put in these terms:

“The offer is deemed to include interest up to the 21 days of service of this notice.
Thereafter, interest will accrue up to the date it is accepted.”
13. The defendant’s objection to paying interest is not because such a contractual term is inherently invalid. Indeed, the validity of such a term is confirmed by authority, including *Calonne Construction Limited v Dawnus Southern Limited* [2019] EWCA Civ 754. Following *Calonne*, CPR r.36.5 was amended on 6 April 2021 to provide:

“(5) A Part 36 offer to accept a sum of money may make provision for accrual of interest on such sum after the date specified in paragraph (4) [i.e. 21 days after it was made, as specified within the offer pursuant to r.36.5(1)(c)]. If such an offer does not make any such provision, it shall be treated as inclusive of all interest up to the date of acceptance if it is later accepted.”
14. The *White Book* notes:

“Claimants might well wish to include some such provision in their offers since otherwise they will not be able to recover any additional interest upon late acceptance.” (36.5.1)

15. While the claimant submits that this was the objective of his offer, the true nature of the term is hotly contested. To my mind, the dispute between parties is reducible to two issues:
 - (1) Whether interest is payable at all and on what – the question being one of contractual interpretation of the offer term;
 - (2) If (1), what the applicable interest rate should be.
16. The stances of parties are clear and irreconcilable. However, the parties do agree that whenever the offer was accepted, there was likely to be a given amount of time before the matter came before the court and was approved, the claimant being a protected party, such court approval was unavoidable. Parties agree that the period would have been the same whether the offer was accepted on Day 21 or later (confirmed at DS §24). Thus, we can take this set block of time out of the analysis – it would be the same either way. The focus instead is on the extra time caused by the delay in acceptance.
17. There are, in fact, two delay periods, parties agree, as there was a PPO due on 15 December 2022, with a consequent shorter period of delay (the “delay period”). Thus, the delay period for the net lump sum was 178 days and 141 days for the PPO.

Issue 1: contractual interpretation

18. **Submissions.** The claimant submits that interest must be payable on the whole lump sum offer given the explicit terms of the Part 36 offer – in other words, this was the contractual agreement between parties. Thus, interest should be payable for such extra period as the claimant was kept out of the money he was owed. The defendant submits that while the term may be valid, the net effect of the precise arrangements is that no monies are payable to represent interest. That is because the contractual term does not specify that the interest would be payable on the whole net offer sum on any different basis to the way it had already accrued from issue of the claim form (on general damages) or from the date of loss (on past losses). That being so, it is payable for the delay period on “conventional personal injury principles” settled and recognised in personal injury litigation (DS §41). These are set out clearly in the *White Book 2023* (p.500). Interest to trial is awarded on PSLA at 2% from date of service of the claim form, on special damages from the date of injury to the date of judgment at one half of the special investment account (“SIA”) rate on continuing losses and at full rate on crystallised pre-trial losses. Once judgment has been obtained, the judgment attracts interest pursuant to s.17 Judgments Act 1838. Since interest had accrued in this way until the point of offer, this is how it should continue until acceptance: 2 per cent on PSLA from the date of service of the claim form and one half SIA for continuing past losses over the period during which they were incurred. It is irrelevant that acceptance was outside the 21-day limited offer period. However, in this case the historic interim payments which must be offset, exceed these figures, so there is no interest to pay.

19. **Analysis.** The court's role is to construe a contract. It is not to exercise a discretion. There is no special or favourable allowance made because the claimant is a child and protected party. The court should not ordinarily disapply the usual rules of Part 36 (*Matthews v Metal Improvements* [2007] EWCA Civ 215; *IEH v Powell* [2023] EWHC 1037 (KB) (Senior Master Fontaine) applying *SG v Hewitt* [2012] EWCA Civ 954).
20. The defendant submits and the court accepts that the contract must be interpreted in the context of Part 36. While that is a self-contained code (CPR 36.1(1)), it seems to me that a Part 36 offer term that forms the essential part of a contract should be read in the context of the principles of Part 36. The defendant is correct about that. The offer term is simply a contractual term the meaning of which is disputed by parties. It is the duty of the court to interpret it.
21. The orthodox canons of contractual interpretation apply. The court must establish objectively what the term means. In *Ho v Adekun* [2019] EWCA Civ 1988, each side approached the case on the basis that the respondent had accepted the appellant's Part 36 offer made by a letter dated 19 April 2017. The Court of Appeal applied the well-known dicta in *Wood v Capita* and *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] Q WLR 896 at 912:

“ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.”
22. It seems clear to me that such an informed and reasonable observer would understand the offer term to mean that after 21 days interest would accrue on the entire offer sum. The way to understand it is to imagine a black box. The amount the claimant offered to compromise the claim and that the defendant accepted to pay is in that black box. By accepting the claimant's offer, the defendant agrees to give the black box to the claimant. But there is a delay in giving the claimant the box. If the claimant had been given the box with the full sum on the Day 21, he could have invested it and received interest. But he did not get it. Instead, the defendant kept the money for that extra period. In that delay period, two things happened. The defendant benefited from the monies and the claimant was deprived of them. It seems to me obvious that the claimant should receive interest for the net sum for the delay period (or periods, strictly).
23. The defendant's argument about future loss is misconceived. One understands the sensitivity of the issue for the defendant as future loss comprises “a very substantial part of the lump sum” (DS §16). It is true that courts do not award interest on future losses as the interest has not accrued (*Jefford v Gee* [1970] 2 QB 130 (per Lord Denning MR (as then was) reading out the judgment prepared by Lord Justice Salmon). But that is not the case here. What is in the black box is the sum that represents the damages the claimant is willing to accept to meet his future losses. The interest due is not some unquantifiable future loss interest. Instead, it is interest for the period of delay that the claimant was deprived of the total loss figure - a different matter entirely, which includes the future loss, naturally. If the defendant had accepted the offer in a timely way on Day 21, the claimant could have taken

possession of the clearly ascertainable total loss sum and invested it earlier by the period of the untimely delay. Instead, he was deprived of its use for the delay period. That is the interest due on the total loss sum, including interest on the amount that represents the future loss.

24. This analysis is supported by the Court of Appeal in *Jefford*. There the court stated that interest was not payable on future economic losses because the loss not having occurred, the claimant had not been kept out of any sum. Here, the claimant had been kept out of the offer sum, including its future loss constituent element, for the delay period. Viewed another way, interest is payable is to compensate a party for money that she or he has been kept out of (*Sycamore Bidco Ltd v. Breslin* [2013] EWHC 174 (Ch)); *Bristow v Judd* [1993] PIQR Q117 CA). Interest is not punitive or condemnatory. It functions solely to repair the loss of possession of the monies for the delay period. That can be viewed as the loss of ability to invest the money or the depreciation in value over time of money or an element of both.

Issue 2: interest rate

25. **Submissions.** The claimant submits that the rate payable should be the judgment debt rate – 8 per cent (s.17, Judgments Act 1838). That is because the delay by the defendant is conceptually equivalent to a default in payment post-judgment: the claimant has lost “the value of a consent judgment” (CS §15). The claimant’s alternative case is that the rate should be the SIA. The defendant argues that delay following Part 36 offer expiration is entirely distinguishable from judgment debt. The rate should be SIA.
26. **Analysis.** I can deal with this shortly. There is no authority to support the claimant’s submission that the due rate should be 8 per cent. Thus the matter must be decided on first principles. The rate claimed is a very significant uplift from the SIA rate. It was open to the claimant to specify this rate in the offer term. He did not. In *Calonne* ([8]), the 8 per cent rate was spelled out in terms:

“3. The Settlement Sum is inclusive of interest until the relevant period has expired. Thereafter, interest at a rate of 8% per annum will be added.”

27. I cannot see how an informed reasonable observer would read that far higher rate into the term of the offer, which is silent about it. The observer would not conclude that the parties agreed to 8 per cent. That is because it is such a departure from the rate at which interest had been accruing that the reasonable observer would expect, as would the court, that it should be spelled out. Thus, I cannot accept that the judgment debt rate can be read into the contract. If this ambitious submission fails, the claimant accepts that the rate should be the SIA rate. This is what the defendant submits. It is also what the court finds.

II. APPROVAL

28. Turning to the question of approval, I am grateful to both legal teams for the great care with which they have prepared this case and the obvious sensitivity with which they have presented it.

29. Today, Ms Ayling most responsibly explained how the defendant Trust is very glad to reach a mutually satisfactory agreement in this case and recognises the dedication of the claimant’s mother and immediate family. The purpose of today’s hearing is for the court to consider whether the proposed settlement of damages agreed between parties is in the best interests of the claimant.

30. The court is required to approve the terms of settlement in this particular case as MGS is a protected party. It is an elementary proposition that court approval engages questions of judgment. It must act in the interests of justice and the best interests of the protected person and have regard to the overriding objective. As stated by Lady Hale in *Dunhill v Burgin* [2014] UKSC 18, the purpose of approval hearings in accordance with CPR 21.10(1) is

“to impose an external check on the propriety of the settlement.”

31. Part 21 of the CPR includes rule 21.10. Its subheading is “Compromise etc. by or on behalf of a child or protected party”. The rule provides insofar as it is material:

21.10

(1) Where a claim is made –

(a) by or on behalf of a child or protected party;

no settlement, compromise or payment (including any voluntary interim payment) and no acceptance of money paid into court shall be valid, so far as it relates to the claim by, on behalf of or against the child or protected party, without the approval of the court.

32. Mr McCullough’s confidential advice is dated 6 June 2023 and is an invaluable and comprehensive document. It sets out with great clarity and precision why the settlement is considered by MGS’s legal team to be appropriate, by reference to an assessment of the quantum of recoverable loss, weighing the risks and uncertainties of litigation and the strengths and weaknesses of the evidence.

33. I have also read the detailed and complex expert reports that speak to this case. The structure of the settlement is as follows:

Gross lump sum		£9.3m
	<u>Plus</u> periodical payment due on 15.12.22	190,000.00
	<u>Less:</u> Interim payments	-1,900,000.00

Total:		
Net lump sum:		£7,590,000.00

34. The court has read the confidential report from the Independent Financial Adviser, Ms Ellen Davies-Kay of Frenkel Topping (annexed to the confidential advice). It confirms the advantages of periodical payments within the structure of an award that is required to meet lifetime needs that may extend over many decades.
35. I agree that this is a sensible structure from MGS’s point of view. I find that this settlement is in the claimant’s best interests. On that basis I approve the settlement under CPR 21.10. I should add that following circulation of this judgment in draft, the parties have been able to agree the calculation of damages at the SIA rate (which has itself varied) over the relevant periods. The total sum of interest agreed to be due on this basis is quantified in the final order in this case.
36. To conclude, I would like to say something about what MGS is like. Due to the disabilities he lives with, he finds reading, writing and maths very challenging compared to his peers. He is aware that he is different to his peers and this affects his self-esteem, confidence and mental health. This was particularly the case before he transferred to a specialist school that can support him more effectively. He has to take medication for epilepsy daily and will have seizures throughout his life.
37. All this has unquestionably been a tremendous strain on MGS and his mother. Her son has daily outbursts, what she calls “meltdowns”. That MGS has progressed in the way he has, is a testament to the years of devotion his mother and family have devoted to him because of their deep love for the child. His mother is a highly qualified professional, an architect. Her career has suffered as a result of her son’s injuries. The scale of the difficulties she and her son have faced can be (only dimly) understood from the sheer range of the expertise that has needed to be provided to the court: paediatric neurology, ophthalmic surgery, specialised accommodation, neuropsychology, assistive technology, educational psychology, deputyship, occupational therapy, physiotherapy and speech and language therapy. As his mother graphically and movingly put it, she has been a carer for her son 24/7, and has never had the chance to just be a mum. MGS himself continues undaunted by the tremendous challenges imposed upon him by injuries at his birth. He loves cars and especially supercars. He loves spicy food, the more chillies the better.
38. The court conveys to MGS and his family that it appreciates that no amount of money can turn back the clock and put their family in the position they would have been had the injury to MGS not occurred. Money cannot do that. It is simply the best we can do. A proxy for the quantification of the pain and suffering, heartbreak and anxiety that they all continue to experience constantly in many different ways. But I do hope that the end of these proceedings will be a relief and this long-awaited financial settlement will make life a little easier.

39. I have emphasised to MGS's mother, who with great poise and fortitude briefly addressed me today, that this judgment will be published to the National Archives so that a copy will always be available to her son - this is his case. I wish all his family, and MGS especially, the very best for the future.
40. That is my judgment.