



Neutral Citation: [2017] EWHC 3051 (QB)

Case No: HQ16X01806

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**

**Before :**  
**MR EDWARD PEPPERALL QC**  
**SITTING AS A DEPUTY HIGH COURT JUDGE**

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**Between :**

**ABDULRAHMAN MOHAMMED**

**Claimant**

**- and -**

**THE HOME OFFICE**

**Defendant**

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**Mr Chris Buttler** (instructed by **Leigh Day**) for the **Claimant**  
**Mr Benjamin Tankel** (instructed by the **Government Legal Department**) for  
**the Defendant**

Hearing date: 8 November 2017  
Judgment handed down: 24 November 2017

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**Approved Judgment**

I direct that pursuant to CPR PD39A 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.

**MR EDWARD PEPPERALL QC:**

1. Abdulrahman Mohammed was unlawfully detained by the Home Office in purported exercise of the Secretary of State's powers to detain foreign criminals with a view to deportation over three separate periods totalling 445 days between 12 September 2012 and 4 March 2016. By my judgment upon

the trial of Mr Mohammed's false imprisonment claim - [2017] EWHC 2809 (QB) - I awarded him damages of £78,500. Counsel subsequently agreed interest on such damages at the rate of 2% per annum from the service of proceedings to judgment in the sum of £2,753.

2. Upon handing down judgment, Mr Buttler drew my attention to a Claimant's Part 36 offer of £70,000 made by Leigh Day's letter of 2 March 2017. Since Mr Mohammed has obtained a judgment that is more advantageous than his March offer, r.36.17(4) of the Civil Procedure Rules 1998 requires the court, unless it considers it unjust to do so, to make the following orders:
  - “(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, calculated by applying the prescribed percentage set out below [which in this case is 10%] to an amount which is –
    - (i) the sum awarded to the claimant on the claim ...”

#### IS IT UNJUST TO MAKE THE USUAL ORDERS?

3. Mr Tankel, for the Home Office, rightly accepted that it is not unjust for the court to make the usual orders under r.36.17(4). The purpose of Part 36 is plainly to encourage litigants both to make and accept reasonable settlement offers. As Briggs J. observed in Smith v. Trafford Housing Trust [2012] EWHC 3320 (Ch), at [13], such purpose is undermined if the court departs too readily from the scheme of Part 36.

#### ENHANCED INTEREST ON THE AWARD

4. Mr Tankel correctly submitted that the court's duty, pursuant to r.36.17(4)(a), is to award interest not at 10% over base, but at a rate not exceeding 10% over base. In exercising my discretion to set the rate of enhanced interest, Mr Tankel submitted that I should take into account my own observations at [66]-[67] of my main judgment, where I observed:
  - “66. Some reading this judgment might well question why a foreign citizen who has so thoroughly abused the hospitality of this country by the commission of serious criminal offences is entitled to any compensation. There are, perhaps, three answers to such sceptic:

- 66.1 First, there are few principles more important in a civilised society than that no one should be deprived of their liberty without lawful authority.
- 66.2 Secondly, it is essential that where a person is unlawfully imprisoned by the state that an independent judiciary should hold the executive to account.
- 66.3 Thirdly, justice should be done to all people .....
67. Mr Mohammed is a prolific and violent offender. I can well understand why the Home Secretary might wish to deport him. She has not, however, been able to do so, largely because of the very real risk that deportation to Somalia would pose. Like Mr Kambadzi, he is not the most wicked of men, but his presence in the UK is not conducive to the public good. Nevertheless, in a civilised society, he is entitled to justice. Specifically, he is entitled not to be falsely imprisoned and, given the Home Office's admission that he has been unlawfully detained, he is now entitled to the compensation that I have awarded."
5. Mr Tankel expressly acknowledged the force of those observations, but argued that while, for the reasons I gave, Mr Mohammed is entitled to proper compensation, the court should nevertheless temper its award of interest under Part 36 by reference to Mr Mohammed's character.
6. The Court of Appeal gave guidance as to the proper approach to awards of enhanced interest under r.36.17(4) in OMV Petrom SA v. Glencore International AG [2017] EWCA Civ 195, [2017] 1 W.L.R. 3465. Sir Geoffrey Vos C. observed, at [23] and [29], that there is a distinction between the decision to make each of the orders under r.36.17(4) and decisions as to the proper rates of enhanced interest pursuant to paragraphs (a) and (c). In respect of the rate of enhanced interest on the award, he said, at [31]-[34]:
- “31. First, I should say that I do not regard the specified rate of 10% as a starting point. The words of the rule provide for enhanced interest to be awarded ‘at a rate not exceeding 10% above base rate.’ That does not make the figure of 10% a starting point. It makes it the maximum possible enhancement.
32. Secondly, in my judgment, the objective of the rule has always been, in large measure, to encourage good practice. As Lord Woolf put it in the Petrograde case, ‘Part 36.21(2) and (3) create the incentive for a claimant to make a Part 36 offer’, and a party who behaved unreasonably ‘forfeits the opportunity of achieving a reduction in the rate of additional interest payable.’ Chadwick L.J. in the McPhilemy case said that it was ‘an incentive to encourage claimants to make, and defendants to accept, appropriate offers of settlement.’
33. In my judgment, the likelihood that the provisions for all four possible awards are not entirely compensatory is supported by the negative formulation of CPR Part 36.14(3)(a) to the effect that ‘the court will, unless it considers it unjust to do so, order

that the claimant is entitled to [the four awards].’ If the rule-makers had intended to say that all or any of the awards were only to be made if they represented compensation for litigation inconvenience, it would have been very easy to say so.”

7. After referring to the thrust of the CPR after the Jackson reforms, the Chancellor dismissed the argument that the award of enhanced interest under what is now r.36.17(4)(a) was intended to be entirely compensatory and made plain, at [36], that first instance judges are not required to engage in the complex and unnecessary exercise of identifying the cost of the prolongation of the litigation. He then gave this guidance in respect of the assessment of enhanced interest under r.36.17(4)(a), at [38]-[39]:

“38. The court undoubtedly has a discretion to include a non-compensatory element to the award ..., 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 Part 36.14(3)(a). As Lord Woolf said in the Petrograde case, and Chadwick L.J. 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 defendants to engage in reasonable settlement discussions and mediation aimed at achieving a compromise, to settle litigation at a reasonable time, and to mark the court’s disapproval of any unreasonable or improper conduct, as Briggs L.J. put the matter, *pour encourager les autres*.

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 do so. 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."

8. Applying that guidance, the Court of Appeal substituted the full 10% enhancement for the trial judge's own lower award. That was, however, an extreme case. As the Chancellor recorded, at [1], the defendant's case had "rested in large measure on the evidence of witnesses who were liars and Glencore put Petrom through the hoops of having to establish liability, in a very flagrant case of fraud, in a manner which was wholly unreasonable."
9. I turn then to the proper award under r.36.17(4)(a) in this case. While judges are required to take into account "all of the circumstances" it does not follow that each circumstance prayed in aid will necessarily be relevant to the exercise of the court's discretion under Part 36. As I explained in my main judgment, the fact that Mr Mohammed is a criminal who had been lawfully imprisoned on a number of occasions did not mean that he was not entitled to compensation for false imprisonment, but it did moderate the award. The focus of the enquiry under Part 36 must be upon the conduct of the litigation, as indeed each of the three points identified by the Chancellor (at [38] of his judgment in OMV) indicates, and not on whether the claimant had led a blameless life up until the moment when a tort was committed against him.
10. In my judgment, the following matters are relevant in this case:
  - 10.1 The level of the offer:
    - (a) The Part 36 offer was £70,000. Counsel have helpfully provided me with an interest calculation to the end of the relevant period and agree that the gross value of my award at that date was £80,264 (being £78,500 together with interest of £1,764).
    - (b) The Home Office's own submissions on quantum (as recorded in my main judgment) valued the case very much in the region of the Part 36 offer. Accordingly, it should always have been recognised as a reasonable offer that put the Home Office at risk under Part 36 in the event that liability was established.
  - 10.2 Time between offer and judgment: The deadline for accepting the offer was 23 March 2017. Just over 7 months elapsed between that deadline and trial.
  - 10.3 The claimant's conduct of the case: Whatever his criminal background, Mr Mohammed has, through the skill of his legal team, prosecuted this claim reasonably. A proper application for interim relief was made successfully to Hayden J. A fair and properly reasoned settlement offer was made and, when it was not accepted, Mr Buttler and his instructing solicitors presented this claim fairly and moderately.
  - 10.4 The defendant's conduct of the case:
    - (a) In my judgment, the Home Office should have recognised the weakness of its defence significantly earlier than 4.03 pm on the afternoon before trial. The judgment handed down by Hayden J.

on 3 March 2016 clearly demonstrated the difficulties with the Home Office's case and should have led to an earlier concession of liability.

- (b) Specifically, the Home Office should have re-evaluated this case on receipt of the Part 36 offer. Had it done so, it should, in my judgment, have recognised that the offer should be accepted. That said, it is plainly more desirable that a party should undertake a last-minute reassessment and make a late concession of liability than that it should persist in a bad defence.
- (c) This is nowhere near an extreme case like OMV in which a defendant pursued a dishonest defence by calling witnesses who lied to the court. Indeed, through Mr Tankel, the Home Office adopted a thoroughly reasonable and realistic approach to the matter before me.

10.5 The general level of disruption: Any claimant whose reasonable offer is not accepted and who is put to the trouble of pursuing the matter to trial will suffer some inconvenience. Here, much of the argument upon liability would have revolved around submissions of law upon the documents and Mr Mohammed's evidence on quantum was brief. Mr Mohammed's legal costs will be higher because he was put to proof of his claim, but he has not suffered particular inconvenience.

- 11. Drawing all of these matters together, I award enhanced interest on the award at the rate of 6% over base from 23 March 2017 until judgment.

#### INDEMNITY COSTS

- 12. It is common ground, and I order, that Mr Mohammed is entitled to his costs on an indemnity basis from 23 March 2017 until judgment.

#### ENHANCED INTEREST ON COSTS

- 13. In McPhilemy v. Times Newspapers Ltd [2001] EWCA Civ 871, [2002] 1 W.L.R. 934, Chadwick L.J. explained that the power to award interest on costs under what is now r.36.17(4)(c) was designed to redress the unfairness that arises from the rule that interest is not ordinarily awarded on costs before judgment. In fact, as the White Book points out at para. 36.17.4.3, the court has power to award pre-judgment interest on costs in any event pursuant to r.44.2(6)(g).
- 14. In McPhilemy, interest on costs was awarded at 4% over base; a rate that Chadwick L.J. described, at [23], as reflecting "(albeit generously) the cost of money." Over the following 16 years, the McPhilemy award of 4% over base became something of a convention.
- 15. In OMV, the Chancellor held, at [26], that the Court of Appeal was bound by McPhilemy to award interest on costs so as to achieve a fairer result for the claimant. Referring to his earlier discussion as to the proper approach to r.36.17(4)(a) (which I have already cited at paragraph 7 above), the Chancellor then added, at [43]:

“That does not, however, indicate that some of the factors I have already mentioned may not be relevant. Moreover, once again I do not regard the award as purely compensatory. As I have also said, different factors may in practice apply to the enhanced interest under [rules 36.17(4)(a) and (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.”

16. In this case, the costs since March 2017 were largely incurred in unreasonably maintaining a bad defence on liability until the afternoon before trial. That said, this is again not an extreme case like OMV. Taking into account these matters, together with those already analysed at paragraph 10 above, I award interest on costs at 6% over base. Such interest will run on costs incurred on or after 23 March 2017 from the date when the work was done or liability for the disbursement incurred.

#### ADDITIONAL AMOUNT

17. Finally, it is common ground that Mr Mohammed is entitled, pursuant to r.36.17(4)(d), to an additional amount of 10% of the “amount awarded.” The parties are, however, in dispute as to whether on the true construction of the rule the additional amount is 10% of:
- 17.1 the gross award including interest under the Senior Courts Act 1981; or
- 17.2 just the net award of damages.
18. Mr Buttler submitted that the additional amount should be assessed on the gross award because the draftsman would otherwise have expressly excluded interest as he did in r.36.17(4)(a). Against this, Mr Tankel argues that the natural construction of “the amount awarded” is the capital sum excluding interest.
19. There is, in fact, conflicting High Court authority on the approach to this rule:
- 19.1 In Watchorn v. Jupiter Industries Ltd [2014] EWHC 3003 (Ch), [2015] 3 Costs L.O. 337, His Honour Judge Purle QC assessed the additional amount as 10% of the net award.
- 19.2 In Bolt Burdon Solicitors v. Tariq [2016] EWHC 1507 (QB), [2016] 4 W.L.R. 112, Spencer J. assessed the additional amount as 10% of the award including interest.

#### Watchorn

20. In Watchorn, there had already been an award of enhanced interest upon damages of 10% over base. Judge Purle QC referred to what is now r.36.17(6), which provides:

“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.”

21. This, the judge reasoned, might be thought to create a difficulty in the gross approach since the effect would be to make an additional award of 10% on interest already awarded at 10% over base, thereby taking the total award of interest to over 11%. Having made this point, Judge Purle QC, correctly in my view, held that the additional amount under r.36.17(4)(d) is not an award of interest and that the restriction in r.36.17(6) is not therefore engaged. He nevertheless said, at [80]-[81]:

“80. .... However, the commercial effect would be to turn what is a maximum interest rate of 10% above base (when ordered) into 11% above base, which is surprising.

81. In those circumstances it seems to me that what the court is looking at under (d)(i) is the basic monetary award not including interest. Accordingly, in my judgment, [r.36.17(4)(d)] does not require the court to apply the prescribed percentage to an award of interest, in just the same way as (except in the case of a non-monetary claim, where costs are expressly mentioned) the prescribed percentage does not, on the concession made before me, apply to costs.”

*Bolt Burdon*

22. *Bolt Burdon* was a claim by a firm of solicitors to recover its fees. Interest was awarded pursuant to contract. In assessing the additional amount at the prescribed percentage of the gross award including interest, Spencer J. said, at [18]-[19]:

“18. ... In my view the wording of the rule is clear. The additional amount is calculated by applying the prescribed percentage ‘to an amount which is ... the sum awarded to the claimant by the court.’ Whatever the position may be in respect of interest awarded as a matter of discretion (e.g. pursuant to s.35A of the Senior Courts Act 1981), the court has awarded interest at 8% as part of the sum to which the claimant was entitled contractually. As the notes in the White Book at 7.0.10 make clear, that is to be regarded as part of the sum awarded ‘as a specific sum’.

19. Had it been the intention always to exclude interest from the calculation of the ‘additional amount’, nothing would have been simpler than to repeat the words ‘excluding interest’ which appear in sub-paragraph (a) in relation to the entitlement to enhanced interest where these special sanctions apply. As a matter of statutory construction, the inclusion of the words ‘excluding interest’ in one part of the rule but the omission of the same words in another part, is a strong indication that there was intended to be a difference. The situation in Watchorn was different in that the interest of (sic) the award was itself enhanced interest awarded under sub-paragraph (4)(a) of the rule. The judge was concerned that the



effect of allowing interest to be included in the calculation of the ‘additional amount’ would be to award a total rate of interest exceeding 10% above base rate, contrary to sub-paragraph (6) of the rule, although he acknowledged that the ‘additional amount’ could not strictly be regarded as interest at all. The circumstances of that case were so different that I feel in no way constrained to adopt the same approach.”

Discussion

23. There are three possible approaches to the inclusion of interest in the assessment of the additional amount under r.36.17(4)(d):
  - 23.1 As Mr Tankel argues, the “amount awarded” might mean the award of damages net of any interest.
  - 23.2 As Mr Buttler argues, it might mean the award of damages together with interest awarded before the court considers Part 36.
  - 23.3 As counsel sought to argue in Watchorn, it might mean the award of damages together with all interest awarded, including any award of enhanced interest under r.36.17(4)(a).
  
24. There is then the question, raised by Bolt Burdon, as to whether there is a different answer depending on whether interest is awarded pursuant to contract or the court’s discretion. As Spencer J. demonstrated in Bolt Burdon, contractual interest is part of the sum claimed and therefore obviously part of the award. Such cases will be relatively common in contractual disputes, either because there is an express provision in the parties’ contracts specifying the rate of interest upon default or because a term is implied by the Late Payment of Commercial Debts (Interest) Act 1998.
  
25. Interest in this case - as in Watchorn - has been awarded pursuant to the Senior Courts Act 1981. In my judgment, two important points were not taken in Watchorn:
  - 25.1 First, Judge Purle did not consider, no doubt because it was not argued, the middle ground urged on me in this case, namely that the court should take into account the interest awarded under the 1981 Act but not the enhanced interest awarded under r.36.17(4)(a). This omission was significant to the judge’s reasoning since he appeared to consider that the choice was between ignoring interest altogether or awarding an extra 10% upon interest already enhanced to 10% over base. Further, it is clear that the judge’s construction of r.36.17(4)(d) was driven by his distaste for the latter possibility.
  - 25.2 Secondly, the judge’s attention does not appear to have been drawn to the difference in wording between sub-paragraphs 4(a) and (d); specifically to the express exclusion of interest in the former and silence as to interest in the latter.
  
26. Accordingly, I treat Watchorn simply as authority for the proposition that enhanced interest under r.36.17(4)(a) should be left out of account. On that narrow point, I agree with Judge Purle but for slightly different reasons.

27. In my judgment, the proper construction of r.36.17(4)(d)(i) is clear. In calculating the additional amount, the court should take into account the gross award that would have been made but for Part 36. That is the sum that the court was about to award when taken to the Part 36 offer. Such assessment therefore includes basic interest, whether awarded pursuant to contract (as in Bolt Burdon) or to the court's discretionary power, but excludes any enhanced interest awarded under r.36.17(4)(a).
28. I reach these conclusions for the following reasons:
- 28.1 First, the Civil Procedure Rule Committee expressly excluded interest in sub-paragraph (4)(a) but not in (4)(d). As Spencer J. observed, the difference in language is a strong indication that the rule-makers intended there to be a difference.
- 28.2 Secondly, the rule-makers cannot have intended the answer to this issue to be determined by whether interest was awarded pursuant to contract or the court's discretionary power.
- 28.3 Thirdly, just as the "sum of money ... awarded" in r.36.17(4)(a) ignores the additional award under (d), so too the "sum awarded" in (d) ignores the enhanced interest under (a).
- 28.4 Fourthly, the restriction in r.36.17(6) is not, in my judgment, engaged for the reasons explained by Spencer J. and Judge Purle. In any event, upon my preferred construction, enhanced interest is left out of account under sub-paragraph (4)(d).
29. Accordingly, I award the additional amount of 10% of my award of damages including the agreed interest pursuant to the 1981 Act.