



Neutral Citation Number: [2019] EWHC 3443 (QB)

Case No: QA-2019-000035 AND QA-2019-000044

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/12/2019

Before :

MR JUSTICE SAINI

Between :

(1) ESSEX COUNTY COUNCIL
(2) HAVERING COLLEGE OF FURTHER
AND HIGHER EDUCATION
(3) THE GOVERNING BODY OF SAWYERS
HALL COLLEGE
- and -
JOANNE DAVIES
& 8 OTHERS

Appellants

Respondents

Craig Carr (instructed by **Essex Legal Services**) for **Essex County Council and The**
Governing Body of Sawyers Hall College
Adam Chambers (instructed by **Weightmans LLP**) for **Havering College of Further and**
Higher Education
Catherine Foster (instructed by **Slater and Gordon**) for the **Respondents**

Hearing dates: 5 December 2019

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.

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MR JUSTICE SAINI

MR JUSTICE SAINI :

This judgment is divided into 7 sections as follows:

- I. Overview: paras [1-6]
- II. The Facts: paras [7-16]
- III. The Cavalier v Pope Appeal: paras [17-31]
- IV. The Damages Appeal: paras [32-39]
- V. The Interest on Costs Appeal: paras [40-56]
- VI. Conclusion: paras [57-59]

I. Overview

1. This is an appeal against a number of orders made by His Honour Judge Roberts (“the Judge”) consequent upon his judgment (“the Judgment”) in favour of the Respondents in respect of their claims for injuries arising out of carbon monoxide poisoning.
2. These injuries were suffered by the Respondents when employed on the premises of the Second Appellant (“the College”), the tenant of Sawyers Hall Lane Campus in Brentwood, Essex (“the Premises”). The Third Appellant (“the Governing Body”) was the landlord of the Premises until 31 August 2012 and the First Appellant (“Essex CC”) was the landlord of the premises from that date onwards. The Judge held all three Appellants liable to the Respondents for damages.
3. The main issue of law which arises on appeal is the scope of the well-known, but controversial, principle in Cavalier v Pope [1906] AC 428 (HL) which was itself drawn by the House of Lords from the earlier statement of Erle C.J in Robbins v Jones (1863) 15 C.B. (N.S):

“A landlord who lets a house in a dangerous state is not liable to the tenant’s customers or guests for accidents happening during the term: for, fraud apart, there is no law against letting a tumble-down house, and the tenant’s remedy is upon his contract if any.”
4. The Judgment was delivered on 13 December 2018 in the Central London County Court following a lengthy, hard fought and substantial trial at which the Appellants contested all issues of liability and quantum. The Judge heard extensive factual and expert evidence. The complexity of the claim is evidenced by the fact that the impressive and comprehensive Judgment numbers well in excess of 100 pages and nearly 500 numbered paragraphs (not to mention appendices).
5. The Judge decided that the principle in Cavalier v Pope did not stand in the way of the Respondents succeeding in their claim under the Occupiers Liability Act 1957 (“the 1957 Act”) against the two landlords, Essex CC and the Governing Body who he found to be “occupiers” for the purposes of the Act. The Judge distinguished Cavalier v Pope and the main issue before me is whether he was right to do so. I will call this the “Cavalier v Pope Appeal”. The College (the tenant of the Premises) does not appeal against the Judge’s finding that it was liable as an occupier under the 1957 Act. So,

whatever the outcome of the appeal the College will be liable to the Respondents for damages.

6. There are two additional issues on the appeal. First, the Appellants each argue that the awards of general damages were excessive (“the Damages Appeal”). Second, they argue that the Judge erred in awarding the Respondents interest on costs at the rate of 10% above the base rate under CPR 36.17(4)(c) (“the Interest on Costs Appeal”). The reasons for that award were given in a consequential issues judgment dated 13 December 2018 (“the Supplemental Judgment”).

II. The Facts

7. The Respondents claimed damages for exposure to carbon monoxide at their workplace. They were all members of staff employed by the College (lessee) at The Lanes Health and Beauty College in Essex, situated on the first and second floor of building 4 at Sawyers Hall Lane Campus.
8. The Governing Body owned the freehold to the entirety of Sawyers Hall until 31 August 2012 and operated a grant-maintained school at the remaining parts of the building not demised to the College and third parties. On 1 September 2012, Essex CC, as the Local Authority, took over the freehold, the operation of the school, and the College’s lease.
9. The Premises was heated by a boiler located in the boiler room below which was not part of the leased property. In respect of the Premises, the College was at all material times in occupation as tenant.
10. In broad terms, the Respondents alleged that, for the purposes of the 1957 Act, all three Appellants were occupiers of the Premises throughout the Period of exposure. At trial, it was common ground between the Appellants that:
 - (a) As landlords of demised premises, the Governing Body and subsequently Essex CC were not occupiers of the Premises and did not owe a statutory duty under the 1957 Act to the College (the tenant) or visitors of the College
 - (b) The College, as tenant, was the occupier of the Premises.
 - (c) The Respondents were employees and visitors of the College.
11. The Judge rejected these contentions. As well as finding that the College was an occupier, which was accepted by all, he found that the Governing Body was an occupier until 31 August 2012 and that Essex CC was an occupier of the Premises before and after that date. These findings against Essex CC and the Governing Body give rise to the Cavalier v Pope Appeal.
12. On 20 November 2012 the flue to the boiler suffered a catastrophic blockage resulting in the escape of very high levels of carbon monoxide. In issue at trial was whether, as contended by the Appellants, the blockage of the flue to the boiler and escape of carbon monoxide was an acute event limited to 20 November 2012 or, as contended by the Respondents, there had been a gradual blockage and carbon monoxide leak from late 2010 causing them to suffer personal injury.

13. The Judge accepted the lay and expert evidence (both medical and engineering) adduced by the Respondents. He found that there had been a carbon monoxide leak over a period of two years. There is no appeal against those findings of fact.
14. The Judge went on to find all three Appellants in breach of their duty under the 1957 Act and the College was additionally found in breach of the duties it owed to the Respondents as employer.
15. The Respondents were awarded sums of General Damages ranging from £7,000 to £15,000, generally in accordance with the length of exposure (£15,000 representing exposure over a period of a little over two years). Those awards give rise to the Damages Appeal to which I have made reference above.
16. Six of the Respondents were awarded damages exceeding Part 36 offers they had made to Essex CC and the College. Pursuant to CPR36.17(4) they were awarded (1) an additional 10% on damages (2) interest on damages at 10% above base rate (3) costs on an indemnity basis and (4) interest on costs at 10% above base rate. This specific award of interest on costs gives rise to the Interest on Costs Appeal.

III. The Cavalier v Pope Appeal

17. Before turning to consider the issues argued before me in more detail, it is appropriate to identify the shape of the Respondents' case based on the pleadings below. It was common ground that the sole cause of action being pursued against the First and Third Appellants was based on the 1957 Act and a breach of the duty owed to visitors under that Act. Specifically, the Appellants pleaded that *each* of the Respondents was an occupier of the Premises and that they, the Claimants, were visitors to the Premises. The First Appellant (Essex CC) and Third Appellant (the Governing Body) pleaded that they were simply landlords (at different times) of the Premises and were not "occupiers" owing the material duties under the 1957 Act.
18. I pause here to emphasise that there was no case pleaded by the Respondents that there were *other* duties owed by the First and Third Appellants to the Respondents such as for example under common law negligence or the Defective Premises Act 1972.
19. The first issue which arose was accordingly whether Essex CC and the Governing Body were occupiers for the purposes of the 1957 Act. If they were not that would be an end of the case against them without more.
20. The Judge addressed this question in some detail and I have quoted this part of the Judgment at length because submissions were made to me about various aspects of the reasoning and the Respondents have rightly focussed on the fact that the Judge made important findings of fact which are not in issue on the appeal. It is also only fair to set out fully how the Judge arrived at his conclusions in what was clearly a carefully prepared judgment.
21. The Judge's reasons were as follows:

"First and Third Defendants' case

145. In the Amended Defence of the First and Third Defendants it is alleged at paragraphs 2c-d,

“c It is denied that the First Defendant owed the Claimants any duty, whether statutory, at common law or otherwise, prior to the transfer in (sic) 31.8.2012. Any claim on such basis is denied.

d It is denied that after 31.8.12 the First Defendant, and prior to 31.8.12 the Third Defendant, qua landlord/owner, owned the Claimants any common law duty or any duty pursuant to the Occupiers’ Liability Act 1957:

A Landlord is not an Occupier. The Occupiers for the purposes of the Act was the tenant(s) of the premises.

The various Claimants were not invited to the premises by the First Defendant.

A Landlord is not liable, at common law, for negligent nonfeasance.”

146. The First Defendant’s case is that they could have no liability before 31 August 2012, when legal title of the Premises was transferred to them. The First Defendant’s witness Leslie Pilkington, who was employed by the First Defendant as Head of Facilities Management, Strategy says in his witness statement dated 16 November 2017, at paragraph 7,

“Prior to 01/09/2012, Essex County Council was not the freeholder of this site and had no involvement in the running and inspection/maintenance of the site. This would have been undertaken by Sawyers Hall College.”

147. The First Defendant was not liable after 31 August 2012 to the Claimants because they were the landlord of the Premises. Mr Carr referred me to the well-known case of *Cavalier v Pope* [1906] AC 428. Lord Macnaghten said at 430,

“A landlord who lets a house in a dangerous state is not liable to the tenant’s customers or guest for accidents happening during the term: for, fraud apart, there is no law against letting a tumble-down house; and the tenant’s remedy is upon his contract, if any.”

148. The Defendants also referred me to the cases of *Rimmer v Liverpool Corp* [1985] QB 1, *Drysdale v Hedges* [2012] EWHC 4131 and *Dodd v Raebarn Estates* [2016] EWHC 262.

149. Mr Carr submitted that the Claimant’s cause of action was under Section 4 of the Defective Premises Act 1972 and not the OLA 1957.

Should the First and Third Defendant be considered as acting separately or jointly?

150. I find that the First and Third Defendants presented themselves as one entity throughout the litigation, with a commonality of:

- i) Legal representation;
- ii) Insurance;
- iii) A joint Defence;
- iv) A joint engineering expert, Mr Hardy;
- v) Lay witnesses.
- vi) The First Defendant acted as the Local Education Authority for Sawyers Hall College.

151. The live question is whether the First and Third Defendants were, as a question of fact, jointly in control of the Premises, including the boiler room and the installation for the supply of gas heating and hot water to the Premises, including the Lanes Health and Beauty College.

152. I find that the First Defendant's evidence has been wholly misleading as to their position prior to 31 August 2012. Mr Pilkington says at paragraph 9 of his witness statement,

“I believe a number of employees of the old school may have been transferred to the new school.”

This statement was untrue because the caretakers' evidence was that they were employed by Essex County Council before and after 1 September 2012. I find that Mr Pilkington's statement that Essex County Council had no involvement in the running/maintenance of the site is untrue. It was established in cross-examination that all of the witnesses (Mr Styles, Mr Culliton, Mr Chaplin, Mr Wilson) were interviewed for their job by the First Defendant, and were employed and paid by the First Defendant. It is disappointing that this information had to be elicited in cross-examination. Further, even after their evidence had been elicited, Mr Carr referred to these witnesses as paragraph 32 of his submissions as 'employees of D3', when this is plainly not so.

153. Further, it is apparent from Mr Styles' evidence that his job entailed organising maintenance of the entire building, which was a large site housing the school/college. He said a number of times that the work he did involved the whole of the Premises and he would not isolate a little part of it. He said in cross-

examination that he was also responsible for ensuring that maintenance of services such as heating and plumbing and the pipework connecting the buildings. If there was a problem with the radiators, the caretakers would fix it if they could, if they could not, they would get outside contractors in. In his witness statement he says at paragraph 2,

“My job entailed organising maintenance of the entire building, which was a large site housing the school/college, Later, sections of the main building were leased to other organisations, for example Havering college. I was also responsible for ensuring the maintenance or services such as heating and plumbing, which connected the entire building. I led a small team between 4 and 5 maintenance operatives and worked in this role for a period of 13 years until I retired in 2012.”

154. The First and Third Defendants’ witness Keith Chaplin said in cross-examination that the First Defendant was the Local Education Authority in respect of Sawyers Hall College. I accept Ms Foster’s submission that the First Defendant thereby assumed a duty to maintain the Premises.

155. The oral evidence confirmed that the caretakers had access to the Premises at all times and would regulate the radiators. If expert engineering was required, they would arrange for the same.

156. I find that the First Defendant’s employees were working with the Third Defendant. The precise nature of the relationship is unclear because neither the First nor the Third Defendants have put in any evidence as to their relationship. However, I conclude that the First and Third Defendants were jointly in control of the Premises and the boiler room.

Findings as to whether the First and Third Defendants were occupiers under the OLA 1957?

157. I find that the leading case of *Cavalier v Pope* (supra) is distinguishable. The present case is dealing with a large commercial site, which included, inter alia, a senior school and a Health and Beauty College. The boiler room in question in this case provided heating and hot water throughout the site, including the Premises. There was a full-time dedicated maintenance team of approximately four employees of the First Defendant permanently on site, who provided maintenance, which included work in the boiler room and visiting the school and the Health and Beauty College on a regular daily basis. This included checking upon the radiators in the rooms of the school and the Health and Beauty College. This is a very different factual scenario to that in *Cavalier v Pope*, which concerned a

dwelling house where there were no permanent staff on site with regular access to the dwelling house. The evidence of the caretakers was that they were responsible for maintenance of the whole of the heating system comprising the boiler, the pipes and the radiators and that they had access to the ground floor and first floor of block 4 as required in order to correct any problems that might arise. This picture was reinforced by the fact that the boiler room served other parts of the premises and could not be isolated to cater specifically for the Second Defendant's part of the building. In my judgment, all of the evidence shows that the First and Third Defendants were at all relevant times occupiers of the whole site, which included control of the boiler room and control of the installations for the supply of gas throughout the site and each room of the Premises. The installations for the supply of gas in the Premises were a fixed structure within the meaning of Section 1(3)(a) of the OLA 1957. In short, the issue of occupation turns on a question of fact of control and I conclude that the First and Third Defendants were at all relevant times were jointly in control of the Premises until 31 August and occupiers within the meaning of the OLA 1957.

158. Therefore, I conclude that the First and Third Defendants were occupiers of the Premises within the meaning of the OLA 1957 and owed the Claimant the common duty of care under Section 2 of the Act”.

22. Before considering whether the Judge was right in his conclusions, I should identify that the part of the judgment which I have underlined immediately above (“The installations for the supply of gas in the Premises were a fixed structure within the meaning of Section 1(3)(a) of the OLA 1957”) can be ignored. It is not clear how or why this was relevant and Counsel for the Respondents told me that she did not rely on or support this aspect of the decision on appeal (it apparently being a matter which had not been raised in submissions). Neither the boiler nor the boiler room was a ‘fixed structure’ and, even if it were, the Respondents did not visit the boiler (in the way one might visit a vessel, vehicle or aircraft - the particular examples of structures described in s.1(3)(a)). I will say no more about this and will turn to the substance of what the Judge decided by beginning with the legal principles.
23. Standing back from the detail, it seems that the following points were identified by the Judge as material to the Judge’s conclusion that Essex CC and the Governing Body owed duties as occupiers:
 - i) As regards Essex CC, maintenance of the premises, including the boiler and heating system was undertaken by it (paragraph 141i). Maintenance was of the entire site i.e. Part A and Part B (paragraph 153). Essex CC had access to Part A and would regulate /check the radiators there (paragraph 155, 157).
 - ii) In cross-examination witnesses (caretakers employed at the school) stated that they were employed by Essex CC (not the Governing Body) prior to 31 August 2012 (paragraph 141 ii – v), which was contrary to the (misleading) case Essex CC had advanced at trial (paragraph 152).

- iii) Essex CC carried insurance in respect of the Premises (paragraph 141 vi).
 - iv) Essex CC was a Local Education Authority (paragraph 141 vii and 150 vi) and by this ‘assumed a duty to maintain the premises’ (paragraph 154). I pause here to note that no authority or statutory provision is cited to support this assertion (nor indeed was any such material cited to me on the appeal) and I do not consider it to be established.
 - v) In light of Wheat v Lacon [1966] AC 552 and Collier v Anglian Water Authority [1983] WL 21836 (CA), there can be more than one occupier of premises (paragraphs 143 – 144).
 - vi) Essex CC and the Governing Body ‘presented themselves as one entity throughout the litigation’ with common legal representation, insurance, a joint defence, joint expert evidence and lay witnesses (paragraph 150). Essex CC’s employees were working with the Governing Body and they were jointly in control of the premises and the boiler room (paragraph 156).
 - vii) Cavalier v Pope was distinguishable as this claim is dealing with a large commercial site (paragraph 157).
24. Although the Judge was clearly entitled to make the findings of fact that he did, those findings did not give rise to a proper basis for distinguishing Cavalier v Pope and the cases following it. In my judgment, it is established (and binding) law that a landlord (acting *qua* landlord) does not owe a duty of care at common law or under the 1957 Act to its tenant or visitors of its tenant (in short, he is not an occupier owing duties when acting *qua* landlord). Those results follow from the rule in Cavalier v Pope [1906] AC 428 (HL) at pages 430 and 431.
25. The 1957 Act did not alter the rules of the common law as to the persons on whom a duty of care is imposed as an occupier, or to whom it is owed; what it did was to replace different levels of duty owed by an occupier towards different classes of visitor with a uniform “common duty of care” owed to all lawful visitors: see Shtern v Cummings [2014] UKPC 18, per Lord Toulson at [17]. Further, as explained in Clerk and Lindsell (22nd Edition) at para. 12-09, it is established that a landlord who lets premises to a tenant is treated as parting with all control and is not an occupier under the 1957 Act.
26. In my judgment, the rule operates even when a landlord undertakes to maintain the demised premises (and indeed if he makes regular use of his rights to enter and maintain a property). Although it is controversial, Cavalier v Pope is a decision of the House of Lords that binds me and bound the Judge. Further, the Court of Appeal in Boldack v East Lindsey DC (1999) 31 HLR 41 noted that Cavalier v Pope was entrenched and remained binding on that court (as it binds me and was binding on the Judge).
27. A landlord’s duty in tort was previously contained in s.4 of the 1957 Act, long since repealed. It is now to be found in the Defective Premises Act 1972. It is not covered by s.2 of the 1957 Act. See Drysdale v Hedges [2012] EWHC 4131 at paragraphs 74 and 77.

28. Accordingly, I respectfully disagree with the Judge in his distinguishing of Cavalier v Pope on the grounds he set out between paragraphs 150 to 157 of the Judgment in finding Essex CC and the Governing Body were occupiers.
29. In view of the Judge's detailed consideration of this matter, I should address each of his specific reasons for coming to the contrary conclusion:
- (a) The fact that Cavalier v Pope concerned residential rather than commercial premises is not a good or recognised reason to distinguish the case. The rule in the case is not dependent on the demised premises being residential, Lord Macnaghten expressly refers in his speech at p.430 to a landlord not being liable to the tenant's 'customers or guests' (which appears expressly to cover commercial as well as residential premises). It would be odd if the duty of a commercial landlord to a tenant's visitors was more onerous (i.e arising under both the 1957 Act and the Defective Premises Act) than that of a residential landlord, or if there were different statutory regimes to be applied depending on whether the landlord was residential or commercial. No such distinction arises from the statute or is elsewhere recognised in the case law.
 - (b) At paragraph 150, the Judge referred to the fact that Essex CC and the Governing Body were jointly represented, insured, and had joint expert and lay witnesses in the proceedings. These matters are not relevant to the question of whether they controlled the demised premises so as to be an occupier for the purposes of the 1957 Act. Unsurprisingly, it also formed no part of the Respondents' pleaded claim that these Appellants should be classed as occupiers on that basis.
 - (c) The Judge found that Essex CC was a Local Education Authority and thereby 'assumed a duty to maintain the premises'. This formed no part of the pleaded claim. The reasons for finding that a Local Education Authority assumes a duty to maintain premises demised by school governors, running a grant maintained school, to a commercial third party are not identified by the Judge. No provision, be it statutory or otherwise, is cited in support of such a bold proposition. Nor was any such provision cited to me on appeal.
 - (d) The Judge found that caretakers working at the school were always employees of Essex CC based on evidence they gave in cross examination (and found that Essex CC had been wholly misleading in this respect as the case advanced at trial was that the caretakers were employed by the Governing Body prior to 31 August 2012). The Appellants do not appeal that finding of fact (which was open to the Judge given the answers from the caretakers when cross-examined). However, in my view, the question of who employed the caretakers is not relevant to the question of occupation under the 1957 Act.
 - (e) That fact that the caretakers undertook maintenance and repairs across the entire site did not give rise to control rendering Essex CC and the Governing Body occupiers of the Premises. As I have already identified above, the rule in Cavalier v Pope expressly applies where a landlord has access to premises for the purposes of maintenance and repair.
30. Finally, I should record that I have not overlooked the Respondents' reliance on Greene v Chelsea BC [1954] 2 QB 127 and Rimmer v Liverpool City Council [1985] Q.B. 1.

In my judgment, those cases do not support the Judge's approach and are not concerned with the nature of an occupier under the 1957 Act. Greene is not a landlord and tenant case but a requisitioning case (see Denning LJ at p.138). Further, Rimmer expressly affirms the continuing importance of Cavalier v Pope and was decided on the basis of the landlord being a designer and builder of the premises (as opposed to landlord of the type in issue in the present appeal). See also the analysis of Rimmer by May LJ in Boldack v East Lindsey DC (1999) 31 HLR 41 at page 49.

31. In my judgment, the claim against Essex CC and the Governing Body should have been dismissed. Any claim under the 1957 Act lay solely against the College.

IV. The Damages Appeal

32. The essential argument in relation to this appeal was simple. It is said by the Appellants that the sums awarded by way of general damages were excessive (given the absence of physical damage) when compared with other brackets in the JC guidelines (14th ed.) on the assessment of damages.
33. It was accepted however that there were no specific guidelines addressing the injuries in issue and comparators were of necessity approximate. I asked Counsel for the First and Third Appellants at the outset of his oral argument what the alleged error of law was in relation to the Judge's decision on what was essentially a factual question on general damages. He candidly accepted that the basis of this appeal was that the amounts were simply too high. He also accepted that the amount by which he submitted the awards should be reduced (one third) was essentially arbitrary.
34. That acceptance was both appropriate and telling. If one can arbitrarily "knock off" one third of the damages what is the appealable error in the Judge having decided to award that extra third? For the reasons set out below I have no hesitation in dismissing this appeal having had regard to Flint v Lovell [1935] 1 KB 354 at p.360, and to the principles which guide a court on such an appeal as summarised in *McGregor on Damages* (20th Edition) at para. 53-026.
35. The Respondents clearly suffered serious symptoms during their periods of exposure to carbon monoxide ("CO"). Their symptoms varied and included severe headaches, nausea, lethargy, irritability, vomiting and loss of concentration in association. In particular, the Judge had the benefit of extensive cross-examination of all Respondents with reference to their lifetime medical records and their occupational records. Furthermore, it is clear from the Judgment that the Appellants (who were determined to minimise the effects of the CO poisoning) left no stone unturned. That enabled the Judge to have full insight into the daily effects of the Respondents' exposures to CO.
36. As well as being taken to the medical and occupational records and receiving full accounts of the context of the various entries therein, the Judge also had the benefit of assessing the witnesses for himself and understanding the wider effects and impact of their exposure to CO.
37. In those circumstances, the Judge's assessment of PSLA derived from the application of his findings of fact and his impression of the Respondents in the context of the recorded contemporaneous and expert medical evidence, gave him a unique position. I

cannot “second-guess” his assessments unless they fell outside the bounds of reasonableness.

38. The awards were:

Respondent	Award	Period of Exposure/Symptoms	Paragraphs of Judgment
Davies	£15,000	26 months	233-239
Collins	£7,000	12 months (symptoms ‘also caused’ by unrelated matters)	273-276
Ramsey	£10,000	12 months	303-307
Rodway	£10,000	7 months (followed by five months of anxiety from her concern her unborn baby may have been harmed)	330-335
Brewer	£10,000	24 months intermittently (part time employee)	366-372
Westley	£10,000	10 months severe exposure, 14 months intermittent exposure	402-407
Townsend	£10,000	12 months	428 - 431
Cullen	£8,000	8 months	451-454
Chantler	£15,000	26 months	482-486

39. In my judgment, the Judge’s approach to the specific case of each Respondent was exemplary. Each Respondent’s award followed a detailed evaluation of their circumstances on an individual basis. The Appellants’ arbitrary “lopping off” of one third from each award is unprincipled and I find no assistance in support of it in the other guidelines to which reference was made concerning asthma, head injuries or psychiatric injuries. The Appellants have not advanced before me any judicially applicable standard by which I can conclude that the awards were excessive. They may be generous but they are not capable of being disturbed on appeal.

V. The Interest on Costs Appeal

40. This appeal raises a short point. It is said that the award of interest on costs at the rate of 10% above base was penal and unreasonably high. The Appellants argue both that no order for interest on costs should have been made and that in any event (assuming an order was justified) the rate was too high. The reasons for the costs orders were set out in the Supplemental Judgment to which I will make reference below.

41. Given the way in which this appeal was argued, I consider it important to have the relevant rule firmly in mind before entertaining an appeal on what is a matter of discretion.

42. The material words of Part 36 are as follows (my underlining):

“Costs consequences following judgment

36.17

(1) Subject to rule 36.21, this rule applies where upon judgment being entered—

(a) a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer; or

(b) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer.

(Rule 36.21 makes provision for the costs consequences following judgment in certain personal injury claims where the claim no longer proceeds under the RTA or EL/PL Protocol.)

(2) For the purposes of paragraph (1), in relation to any money claim or money element of a claim, "more advantageous" means better in money terms by any amount, however small, and "at least as advantageous" shall be construed accordingly.

(3) Subject to paragraphs (7) and (8), where paragraph (1)(a) applies, the court must, unless it considers it unjust to do so, order that the defendant is entitled to—

(a) costs (including any recoverable pre-action costs) from the date on which the relevant period expired; and

(b) interest on those costs.

(4) Subject to paragraph (7), where paragraph (1)(b) applies, the court must, unless it considers it unjust to do so, order that the claimant is entitled to—

(a) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;

(b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;

(c) interest on those costs at a rate not exceeding 10% above base rate; and

(d) provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount, which shall not exceed £75,000, 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) where there is no monetary award, the sum awarded to the claimant by the court in respect of costs—

Amount awarded by the court	Prescribed percentage
Up to £500,000	10% of the amount awarded
Above £500,000	10% of the first £500,000 and (subject to the limit of £75,000) 5% of any amount above that figure.

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

- (a) the terms of any Part 36 offer;
- (b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;
- (c) the information available to the parties at the time when the Part 36 offer was made;
- (d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and
- (e) whether the offer was a genuine attempt to settle the proceedings”

43. In this case, the Judge decided that each of the costs consequences in CPR 36.17(4) was to follow. It is to be noted that the orders must follow unless the Judge decides it would be “unjust” in all the circumstances of the case not to make such orders. The default is accordingly that these are the normal orders unless something out of the ordinary justifies a departure. The Appellants do not complain about the first 3 of the orders which followed (the additional 10% of damages, interest on such sums at base plus 10% and costs on an indemnity basis) but do complain on appeal about the fourth consequential order (interest on costs at 10% above base).
44. The task of challenging costs orders on appeal is a difficult one, as Counsel realistically accepted. The Appellants need to identify an error of law or of principle or some form of irrational exercise of discretion by the Judge. That will be particularly onerous when challenging a decision which simply follows what the rule prescribed as a default. I was taken in some detail through OMV Petrom SA v Glencore International AG [2017] EWCA Civ 195 by Counsel for Second Appellant but do not consider that case to

support the appeal. The Court of Appeal held that the power to award interest on costs (and the enhancement of the rate) was not to be exercised on a purely compensatory basis and a court was to be guided by the aim of achieving a fair result for the Claimant.

45. As Sir Geoffrey Vos V-C explained (with my emphasis):

“36. In my judgment, the use of the word ‘penal’ to describe the award of enhanced interest under CPR Part 36.14(3)(a) is probably unhelpful. The court undoubtedly has a discretion to include a non-compensatory element to the award as I have already explained, but the level of interest awarded must be proportionate to the circumstances of the case. I accept that those circumstances may include, for example, (a) the length of time that elapsed between the deadline for accepting the offer and judgment, (b) whether the defendant took entirely bad points or whether it had behaved reasonably in continuing the litigation, despite the offer, to pursue its defence, and (c) what general level of disruption can be seen, without a detailed inquiry, to have been caused to the claimant as a result of the refusal to negotiate or to accept the Part 36 offer. But there will be many factors that may be relevant. All cases will be different. Just as the court is required to have regard to “all the circumstances of the case” in deciding whether it would be unjust to make all or any of the four possible orders in the first place, it must have regard to all the circumstances of the case in deciding what rate of interest to award under Part 36.14(3)(a). As Lord Woolf said in the Petrotrade case, and Chadwick LJ repeated in the McPhilemy case, this power is one intended to achieve a fairer result for the claimant. That does not, however, imply that the rate of interest can only be compensatory. In some cases, a proportionate rate will have to be greater than purely compensatory to provide the appropriate incentive to defendants to engage in reasonable settlement discussions and mediation aimed at achieving a compromise, to settle litigation at a reasonable level and at a reasonable time, and to mark the court’s disapproval of any unreasonable or improper conduct, as Briggs LJ put the matter, *pour encourager les autres*

46. So, as the Chancellor emphasised, all depends on the circumstances of the case and relevant factors include misconduct by the paying party. An additional factor is that an appeal court is highly unlikely to enjoy the benefit of a detailed knowledge of the conduct of the litigation, in contrast to the trial Judge.

47. Against that background, I turn to consider the arguments made to me on the appeal. There were essentially four arguments.

48. First, it was argued that the Judge erred in not “standing back” and considering whether a fourth order (enhanced interest on costs) was just when he had made the first three orders (to which I have made reference above). I reject that submission because it has a touch of unreality. The Judge clearly knew which orders he was making. Further, as will appear below, he was concerned about the conduct of all of the Appellants and that

justified his order. There is however a second reason for rejecting the submission. It was not made to the Judge. As Counsel accepted before me, one cannot complain about the unlawful exercise of a discretion on appeal by raising a point which could have been made to the Judge but was not relied upon below.

49. The second argument was that there would be a windfall to certain of the Respondents or their Solicitors as a result of this order. I was taken through a rough and ready oral financial presentation of the extent of the windfall. I reject this argument. Again, this was not a point made below and it is not open to the Appellants. In any event, I would not have regarded it as a good point. There is always a risk that the costs orders which follow under CPR 36.17 will provide an enrichment beyond actual loss. Indeed, the paradigm is the 10% additional sum under CPR 36.17(4)(d)(i) (as was awarded, without appeal, in this case). It is the deterrent effect (not just financial recompense) which motivates a court in making these orders. The Judge was entitled to make the award which was ultimately based on fairness to the Respondents who were faced (as will appear below) with Appellants who adopted what he considered was an aggressive scorched-earth approach to this litigation.
50. The third argument made before me was that the Judge erred in finding that it was just for the Appellants to pay interest on legal costs before judgment in accordance with CPR 36.17(4)(c) when the Respondents, having engaged their lawyers on a CFA basis, were not obliged to pay the fees until after judgment. I reject that argument. First, there is nothing disapplying the rule in such cases (and indeed even those who are publicly funded may benefit from the rule: KR v Bryn Alyn Community (Holdings) Limited [2003] EWCA Civ 383; [2003] C.P. Rep 39 at [23]). Further, the Respondents did in fact incur substantial expenses by way of disbursements.
51. The fourth argument was that the Judge was mainly concerned with the misconduct of the First and Third Appellants in making his draconian costs orders yet his orders were also made against the Second Appellant (who, it is argued, had not behaved in any manner calling for criticism).
52. In order to address this submission, I need to set out some parts of the Supplemental Judgment. It will be readily appreciated that the Judge had formed a negative view of the conduct of all of the Appellants:

“4. ... I bear in mind that the defendants have argued every conceivable point in this case. For example, they have argued:

Whether the first and third defendants were occupiers within the meaning of the Occupiers' Liability Act 1957 (the Act);

Whether the first and third defendants were in breach of section 2 of the Act;

Whether the first and third defendants were acting jointly;

Whether the second defendants were in breach of the Act, statutory duty and their common law duty;

Whether there was exposure for a two-year period or only on one occasion. This involved the Court spending considerable time analysing expert engineering evidence, lay evidence, legal expert engineering evidence and medical evidence;

Causation, requiring the Court to look in great depth at each of the nine claimant's medical history;

The quantum of general damages;

The quantum of special damages, with very limited exceptions.

5. Secondly, I have made findings that the first defendant's evidence has been wholly misleading and untruthful. By way of example [the Judge then set out a substantial number of extracts from the Judgment]

....

Rate of interest on additional amount

6. I conclude, having considered the circumstances of the case and having stood back and looked at the matter in the round, that the appropriate additional interest on the monies owing to the claimants is 10.75%, and I so order.

Indemnity costs on Part 36 offers

7. I order that the defendants pay costs on an indemnity basis from 21 days after the claimants' Part 36 offers expired.

Rate of interest on costs

8. The claimants are seeking interest on their costs at 10.75%. I have already observed that substantial costs were incurred by the defendants arguing every conceivable point, and I have made serious findings of misconduct by the first and third defendants. I conclude that the appropriate rate of interest on the claimants' costs by reason of the claimants beating their Part 36 offers is 10.75% and I so order.

.....

13. Finally, the claimant makes an application to depart from the costs budget pursuant to CPR 3.18(b). this is an application that would need to be made in the Senior Courts Costs Office and my comments below are to assist the costs judge when considering this application.

14. At a preliminary stage, District Judge Worthington observed at a case management hearing that this case was little more complex than an RTA. With the greatest of respect, I

profoundly disagree. This was an extremely complex multi-claimant personal injury action in both law and fact.

15. There was a complex issue of mixed law and fact as to whether the first and third defendants were occupiers within the meaning of the Occupiers' Liability Act 1957. This involved a very detailed analysis of statute law and case law, including analysing the House of Lords case of *Cavalier v Pope*. There was a need for detailed and skilled cross-examination from Ms Foster to establish that the caretakers on the site were not employed by the third defendant, but were at all times acting as the employees of the first defendant.

16. The issue of exposure was very complicated and involved analysing four streams of evidence: the lay evidence, the internal expert evidence, the legal expert engineering evidence, the legal medical evidence, and the claimant's medical records.

17. All of the breaches of statutory instruments by the second defendant were contested and had to be considered separately. Points were taken by the second defendant that the statutory regulations were not applicable for legal reasons and these juridical issues had to be resolved before considering factual issues....”

53. In my judgment, these passages show that the Judge was well aware of his own findings as to which of the Appellants had committed misconduct but he was also critical of the Second Appellant (specifically in its taking of all points it could). He was much better placed than an appellate court to make such an assessment. He was well within his discretion and I can detect no error.

54. Finally, for completeness, I should add that I consider the Judge was also well within his discretion in imposing the highest rate of interest on the costs (10% over base). His view of the poor conduct of the Appellants amply justified his orders as a proportionate response. In approaching the arguments I have considered and applied the principles identified in the Notes to the White Book Vol. 1 at 52.1.14 in relation to the limited basis for an appeal court to interfere with a costs order below.

55. Before leaving this appeal, it is appropriate to emphasise the Chancellor's observation in OMV at [47]:

“I should not leave the case without saying that, in my judgment, appeals on issues of the kind raised in this case should in future be rare. The judge's discretion as to the appropriate rate of enhancement under Part 36.14(3) is a wide one as I have explained and I would not expect the Court of Appeal often to be persuaded to interfere with it”.

56. Those comments apply with substantial force to this costs appeal.

VI. Conclusion

57. The Cavalier v Pope Appeal is allowed. The claims against the First and Third Appellants fall to be dismissed.
58. The Damages Appeal and the Interest on Costs Appeal are dismissed.
59. I will hear the parties as to consequential orders. Although the Interest on Costs Appeal has been dismissed, the success of the Cavalier v Pope Appeal may require variation of the costs orders in relation to the First and Third Appellants.