Neutral Citation Number: [2012] EWCA Civ 1053

Case No: A2/2011/3325

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEENS BENCH DIVISION
MR JUSTICE POPPLEWELL
HQ11X03124

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/08/2012

Before :

LORD JUSTICE PILL
LADY JUSTICE ARDEN
and
LADY JUSTICE BLACK

- -

Between :

SG	**Appellant**
- and -	
HEWITT	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Mr Michael Soole QC & Mr Paul Dean (instructed by **Blake Lapthorn**) for the **Appellant**
Mr Ben Browne QC & Mr Roger Harris (instructed by **Clyde & Co claims LLP**) for the **Respondent**

Hearing dates : 3rd & 4th July 2012

- -

Judgment
As Approved by the Court

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Lady Justice Black :

1. In March 2003, when he was 6 years old, the appellant/claimant was injured in a road traffic accident caused by the negligence of the respondent/defendant. He sustained facial scarring and a severe head injury with damage to the frontal lobes of the brain. Medical and other reports were obtained with a view to a claim for damages being made but the experts felt unable to predict what the impact of the injury would be until the claimant matured. No proceedings were commenced, the limitation period not being due to expire until January 2018.

2. On 2 April 2009, the defendant made a pre-action CPR Part 36 offer in the sum of £500,000 by way of full and final settlement of the claimant's claim. The offer was never withdrawn and it was ultimately accepted by the claimant in 2011. CPR Part 8 proceedings were issued on 22 August 2011 applying for the court's approval of the settlement. The application was accompanied by counsel's advice commending the settlement to the court.

3. On 2 December 2011, Popplewell J approved the settlement. He was also required to resolve a dispute between the parties as to costs. There was no difficulty about the costs of the Part 8 claim for approval of the settlement which it was agreed would be paid by the defendant; I need not concern myself with those costs and nothing I say hereafter refers to them. There was agreement also that the defendant would pay the claimant's costs of the main claim up to and including 22 April 2009 (21 days after the Part 36 offer was made).

4. However, each party contended that their costs incurred from 23 April 2009 should be paid by the other party. The defendant relied upon the normal costs rule in CPR Rule 36.10(5); the claimant argued that because of the particular circumstances of the case, the court should order otherwise. Popplewell J decided in favour of the defendant and ordered the claimant to pay the defendant's costs incurred from 23 April 2009 including the costs relating to the issue over the costs. The claimant now appeals from that determination.

Some further factual background

Medical and other expert opinions

5. Medical and allied assessments of the claimant were carried out in 2004. There was agreement that it was not possible to predict the likely path of his development at that stage because in children with head injuries such as his, problems may not manifest themselves until puberty/adolescence.

6. The various reports reveal that this uncertainty continued for some years.

7. When he was seen by the consultant clinical psychologist in November 2007, the claimant was noted to be showing some signs of problems but the psychologist's advice was that it was very much an evolving case.

8. A paediatric neurologist instructed by the defendant saw the claimant, then aged 12, in March 2009. He referred to the assessment of Mr Whitfield (a neuropsychologist whose report the defendant has chosen not to disclose to the claimant) whose

conclusions included that a final prognosis could not be formed until the age of 16 when the development of the frontal lobes was complete. The paediatric neurologist also took the view that the claimant was still too young for there to be any final conclusions drawn as to whether there would be any long-term neuropsychological deficits as a consequence of the injury. He thought it probable that some deficits would continue to be demonstrated on further testing in the future but considered that they were likely to be relatively minor though they may affect the claimant's executive functioning and hence be seen in aspects of his behaviour and personal relationships in adolescence and adulthood.

9. In December 2009, the paediatric neurosurgeon instructed on the claimant's behalf remained of the view that there may still be long term problems and said that neurological evaluations were required then and at age 16. The same doctor remained cautious about the long term prognosis in January 2010, as did the educational consultant in July 2010.

10. In January 2011, when the claimant was 14 years old, the clinical psychologist said that it was now "possible to state with increased confidence that the current profile reflects a level of relative stability on which a final prognosis can be tentatively assessed" although she continued to have some concerns and said that from a neuropsychological perspective, it is always prudent to monitor a young person's development into early adulthood as "unanticipated anomalous behaviours can evolve". Finally, in July 2011, having reviewed the position the claimant's paediatric neurosurgeon agreed that accepting the Part 36 offer was to the claimant's advantage.

Action by the claimant's advisors

11. Following the Part 36 offer in April 2009, the claimant was advised by counsel. His advice dated July 2009 has been disclosed. In it, he said that it was impossible to put a definitive value on the claim at that stage and that it would be difficult to advise the court for approval purposes. However, counsel went on to, as he put it, "attempt the impossible". He gave an estimate of general damages but thought the bulk of the claim likely to be made up of loss of future earnings. His calculations suggested that "the sum on offer may well represent not unrealistic compensation in the event of a 'worst case scenario' and, if [the claimant's] problems prove to be relatively minor and considerably less serious than it is feared they could be, may well constitute a very generous offer which [he] would do well to accept". In the light of the expert views then available, he advised that further investigations should be undertaken and that meanwhile "the offer should not be rejected but D told that it is being actively considered and that further expert input is being sought". He considered that if the future reports continued to be optimistic, it may be appropriate to accept the offer, subject to the approval of the court.

12. Following counsel's advice, the claimant's solicitors wrote to the defendant's solicitors inviting attention to the evidence that the claimant was still too young for final conclusions to be drawn, explaining that they were not able to advise on the reasonableness of the offer and setting out the further investigations they intended to carry out. They neither rejected the offer nor asked for the defendant's agreement to extend the time during which it would remain open for acceptance. Equally, the defendant did not withdraw it.

13. There was correspondence and telephone contact between the two sides' solicitors in late 2009 and through 2010. It is clear from this that the position being taken by the claimant's solicitors was that they were seeking further reports in view of the uncertainty but would like to resolve the matter by agreement. The correspondence charts the obtaining of further reports before the offer was finally accepted in August 2011.

14. The necessary application for court approval was supported by an advice from the claimant's counsel. In it he said:

> "….though the precise outcome of [the claimant's] brain injury is still somewhat unclear, it seems highly probable that his recovery will be such that the offer of £500,000 considerably overestimates what he would be likely to recover at trial."

15. Counsel's breakdown of the claim was as follows. He considered that general damages would be likely to attract an award in the region of £60,000. There would be a modest care claim in the sum of about £10,000 in relation to past care of the claimant but no requirement for future care. The largest element of the claim was in relation to loss of future earnings/pension. If the claimant were never to work at all, his claim for lost earnings would be £486,400. If he was able to find some work but at a lower level than would otherwise have been the case, the figure would depend on whether he was found to be disabled which would affect the mitigation multiplier. If he was not disabled, his loss of earning claim would be £248,400, whereas if he was disabled it would be £329,000. Counsel considered it not really feasible to undertake a loss of pension claim but in round terms he put this element of the claim at £50,000. Putting the elements of the claim together, the total was £368,400 if the claimant was not disabled and found work (£60,000 + £10,000 + £248,400 + £50,000). If he was disabled and found work it would be £449,000, and if he never worked it would be £606,400. Counsel viewed the last possibility as highly improbable.

16. Liability had never been contested but counsel referred to the defendant having raised an issue over whether the claimant was wearing a seat belt and said that whilst the evidence seemed likely to despatch that point conclusively in the claimant's favour, there was some additional litigation convenience in settling the claim. He advised settlement and observed that even if the costs question were to go against the claimant, this would not affect the merits of the settlement.

<u>The legal principles</u>

17. There is a lot of common ground as to the basic legal principles which are applicable in a situation such as this.

18. CPR Rule 36.10(4) provides:

> "Where –
>
> (a) ….
>
> (b) a Part 36 offer is accepted after the expiry of the relevant period,

> if the parties do not agree the liability for costs, the court will make an order as to costs."

19. Rule 36.10(5) provides:

> "Where paragraph 4(b) applies, unless the court orders otherwise –
>
> (a) the claimant will be entitled to the costs of the proceedings up to the date on which the relevant period expired; and
>
> (b) the offeree will be liable for the offeror's costs for the period from the date of expiry of the relevant period to the date of acceptance."

It thus establishes what might be described as "the normal order" but confers upon the court a discretion to depart from it. It does not provide any guidance as to when the court should do so.

20. It was held in *Lumb v Hampsey* [2011] EWHC 2808 (QB) (@ §6) that the approach should be similar to that under Part 36.14(4). Neither party sought to persuade us to differ from this. The Court of Appeal took an analogous view in *Matthews v Metal Improvements Co Inc* [2007] EWCA Civ 215 (@ §29), in relation to Part 36 as it was before it was revised in 2007.

21. Rule 36.14 concerns the costs consequences of a Part 36 offer following judgment. So far as material, it provides:

> "(1) 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) ……
>
> (2) Subject to paragraph (6), where rule 36.14(1)(a) applies, the court will, unless it considers it unjust to do so, order that the defendant is entitled to –
>
> (a) his costs from the date on which the relevant period expired;
>
> and
>
> (b) interest on those costs.
>
> (3) ….

> (4) In considering whether it would be unjust to make the orders referred to in paragraphs (2) and (3) above, the court will 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; and
>
> (d) the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer to be made or evaluated."

22. Accordingly, in the present case, the court had to make the normal order unless it considered it unjust to do so and in deciding whether it was unjust, it had to take into account all the circumstances of the case including the four matters expressly set out in Rule 36.14(4). I will refer to this loosely as "the test" that had to be applied.

23. In the parties' written submissions and in argument, other formulations of the test made their appearance. Although they were based on the authorities, it became clear that they did not actually add anything to the wording of Rule 36.14(4).

24. One formulation (based on what Longmore LJ said in §9 of *Kunaka v Barclays Bank* [2010] EWCA Civ 1035) was that the normal order was to be made unless it was "unjust or unfair" to do so, but some exploration produced agreement that there is no appreciable difference in meaning between "unjust" and "unfair" so the addition of the word "unfair" did nothing to illuminate the issue of how the discretion should be exercised. Nevertheless, the way in which Longmore LJ encapsulated the task in that case is of note. He said (§9) that "where the court has a discretion pursuant to 36.10(5), it is open to the court to assess what the fairness of the situation demands".

25. The other formulation was that there should only be a departure from the normal order "in exceptional circumstances". Reference to "exceptional circumstances" has been known to create difficulties in some areas of the law, having a tendency to give rise to the idea that circumstances must be at the extreme end of the spectrum before they will count. After some discussion, it was clear that neither party contended for anything like that in this context. As Lang J said in *Lumb v Hampsey*, all that is meant is that an order other than the normal order "would be the exception rather than the rule" (§6).

<u>The purpose of the normal rule in relation to costs following Part 36 offers</u>

26. The defendant stressed the importance of the normal rule in achieving certainty and encouraging early settlement of disputes by conferring costs benefits on parties who make realistic offers of settlement, thus benefitting individual litigants and the administration of justice as a whole. This was one of the matters he sought to draw from *Abada v Gray and the Motor Insurers Bureau* (CA, 25 June 1997, unreported) in

which Lord Woolf, then Master of the Rolls, made observations which remain relevant despite having been made in relation to the provisions of the Rules of the Supreme Court.

27. The function of a Part 36 payment or offer was also considered in the *Matthews* case at §33 and in *Gibbon v Manchester City Council* [2010] EWCA Civ 726 (see particularly §§2-6).

28. The defendant submitted that in order to preserve the benefits of the Part 36 provisions it was important to confine the scope of the cases in which it was seen to be unjust to depart from the normal rule and that a court should be very slow to make exception to it. Indeed, whilst the defendant accepted that the situations in which the court may depart from the normal rule cannot be definitively prescribed, he submitted that they are principally likely to involve scenarios in which there has been an element of unreasonable or unconscionable conduct on the part of the defendant or a claimant has been misled in some way. Part 36 balances the interests of the claimant and the defendant, giving advantages to each, the defendant said. The claimant may accept the Part 36 offer at any time until it is withdrawn, even if he or she has expressly rejected it and irrespective of whether the circumstances have changed since it was made; this may lead to the claimant getting more generous damages than would otherwise be the case. The defendant's advantage is that if the claimant accepts the offer out of time, the claimant will normally pay the costs incurred after the time for acceptance expired. The defendant submitted that an order in the claimant's favour in this case would disrupt the balance between the parties, leaving the claimant with his advantage but depriving the defendant of his. He reminded us that the problems in this case were not necessarily confined to offers by defendants but may also affect offers by claimants.

<u>How should the court approach the question of whether it is unjust to make the normal order?</u>

29. I do not think it wise to attempt to prescribe or restrict in the abstract the circumstances in which the court may reach the conclusion that it is unjust to make the normal order. Rule 36.14(4) requires that, in considering whether it is unjust to make the normal order, the court must take into account all the circumstances of the case. The four factors specifically identified as relevant cast quite a wide net on their own but they are not the only matters that fall for consideration and anything else which is relevant must be considered as well. Costs decisions are particularly sensitive to the facts of the individual case.

30. That is not, of course, to say that guidance cannot on occasion be obtained from decided authorities. In this case, the *Matthews* case was a particular focus of attention. The facts of *Matthews* are of importance both in understanding what was said by the Court of Appeal and because the defendant sought to draw parallels between the facts there and the facts of the present case with a view to supporting a similar outcome here. Subsequent amendments to the costs provisions of Part 36 have not made any difference to the provisions which is material to the issues arising in this appeal.

31. The claimant in *Matthews* suffered a head injury at work in consequence of which he developed a disabling psychiatric disorder and he was therefore a patient within the meaning of CPR Part 21. Before he commenced his claim against his former employer for negligence and breach of statutory duty, he was diagnosed with

lymphoma which was unrelated to his accident. The initial prognosis in relation to the lymphoma was that he had a 70% chance of surviving for 10 years. It was predicted that the symptoms attributed to the work injury would have resolved within that period so the lymphoma was of relatively little relevance to the quantification of the claim.

32. On 8 August 2005, the defendant made a payment into court pursuant to CPR Part 36. The precise sequence of events before and after this is important. On 6 July 2005 a lymph node had been found during a medical examination of the claimant and a biopsy of it was taken on 2 August 2005. When the defendant made the payment in on 8 August 2005, it was in ignorance of these developments. 20 days after the payment in, the claimant's expert expressed his concern that recent events may herald a transformation of the lymphoma with a much poorer prognosis. On 22 September 2005, the claimant's advisors rejected the payment in, referring in their email to a proposed joint experts' report on life expectancy but not to recent developments in relation to the claimant's health. It was not until January 2006 that the results of the biopsy became available. They indicated that the lymphoma had become aggressive. The experts instructed for both sides advised that the claimant's life expectancy was reduced. Although they had viewed the amount offered as insufficient on full life expectancy, the claimant's advisors now concluded that the amount offered would have to be accepted. Approval of the settlement was given by the court. The deputy district judge ordered the defendant to pay the claimant's costs including his costs incurred after the expiry of 21 days from the payment in. The defendant appealed to the Court of Appeal and there succeeded in its contention that the claimant should have been ordered to pay its costs for the period following the payment in.

33. Stanley Burnton J (as he then was) gave the main judgment in *Matthews*; the other two members of the court agreed. He addressed three issues which are of importance in the present case, that is (i) the implications of the claimant being a patient within the meaning of the then CPR Rule 21 (ii) the relevance of the reasonableness of the claimant's conduct in relation to the Part 36 offer and (iii) the problem of uncertainties in the value of the claim.

The status of the claimant

34. I turn first to the status of the claimant. Stanley Burnton J said at §26:

> "Neither [counsel] suggested that any special rule applied to patients, other than that resulting from the need for the Court's approval of any settlement and for its permission to accept the money in court….. In addition, in some cases it will be necessary for those acting for a patient to request additional time to consider a Pt 36 offer and payment into Court beyond the 21 days provided by r 36.11."

35. He said that it was common ground between the parties (and rightly so in his opinion, see §27) that

> "the incidence of costs in the present case is not affected by the fact that the claimant is a patient. In principle, a defendant in proceedings brought on behalf of a patient is entitled to the

> same costs protection from his Pt 36 offer or payment as a defendant against whom a claim is brought by a competent claimant." (§28)

36. I do not think that in §28 of his judgment Stanley Burnton J was dismissing the status of the claimant and the requirement to seek court approval as necessarily irrelevant in all cases. He was certainly rejecting the notion that the mere fact that the proceedings were brought on behalf of a patient would of itself always be sufficient to displace the costs protection normally available to a defendant from a Part 36 offer but that is not the same as saying the factor is irrelevant. When he said that "[i]n principle" a defendant in proceedings brought by a patient is entitled to the same costs protection from his Part 36 offer as a defendant against whom a claim is brought by a competent claimant, Stanley Burnton J was setting out the starting point but the court is, of course, obliged to consider all the circumstances of the case and the fact that a claimant is a patient/protected party or child differentiates his case from the usual case of a competent claimant and cannot just be ignored. Two differences arising from the claimant's status as a patient were set out in Stanley Burnton's judgment at §26, to which reference back is made in §28, and later in his judgment he in fact went on, himself, to consider the difficulties of those advising the claimant (see particularly §36 et seq). In *Matthews*, these considerations were not such as to disrupt the normal rule, but that does not mean that the implications of the claimant being a child or protected party may not be such in other cases as to make it unjust that a costs order is made against him.

37. The position under the RSC seems to have been similar as can be seen from *Abada v Gray and the Motor Insurers' Bureau* (above). There, the plaintiff suffered from schizophrenia and was therefore a patient for litigation purposes. Whilst the plaintiff's status did not, on the facts of that case, displace the normal rule as to costs following (as it was then) a payment into court, the Court of Appeal made clear that in other circumstances it may have had an impact on the outcome.

38. The plaintiff in *Abada* had claimed damages for personal injuries against the defendants. The principal issue in the case was whether the schizophrenia was attributable to the accident. The defendants made a payment into court which took account of the plaintiff's orthopaedic injuries but only incorporated a sum equivalent to about 5% of the very substantial damages that the plaintiff would have expected to recover for the schizophrenia if his claim in relation to that had succeeded. At trial, the judge preferred the medical evidence of the defendants' experts. Although the plaintiff recovered some damages, he did not establish causation in relation to the schizophrenia and he failed to beat the payment into court. The Court of Appeal was concerned with the costs consequences of this.

39. The plaintiff argued that he could not have accepted the payment in because it would not have been possible for him to have obtained the court approval he needed under RSC Order 80 rule 10 and therefore he sought an order that the defendants should pay the costs after the date of the payment in.

40. The Court of Appeal was not persuaded by this argument. Lord Woolf said that the plaintiff's next friend should have been in a position to form a judgment on the basis of the advice which he received as to whether or not to accept the payment into court. Unless the next friend would have been minded to have accepted the payment but was

prevented from doing so because of the difficulty of obtaining approval under Order 80 rule 10 (which was not in fact the position), Order 80 rule 10 did not materially alter the situation from that which normally existed where a payment into court has not been beaten. Lord Woolf said

> "I regard this case, so far as principle is concerned, as therefore being no different from the very many cases where a payment into court is made and everyone appreciates that, if the plaintiff succeeds on a particular issue, the payment will be inadequate. Equally, if the plaintiff fails on an issue, the payment will be more than sufficient to meet the claim."

41. Lord Woolf made plain, however, that there could be circumstances in which the requirement for court approval could have made the position very different. This would have been so, he said, if the plaintiff had decided to accept the sum in court, through his next friend, and the court had then prevented him from doing so.

Reasonableness of claimant

42. I will consider next the question of the reasonableness of the course taken by a claimant's advisors in relation to the Part 36 offer.

43. In *Matthews*, Stanley Burnton J held that the deputy district judge had wrongly identified the question whether it was unjust to make the normal order with the question whether the claimant's advisors had acted reasonably in rejecting the Part 36 payment at first and later accepting it. He said that their reasonableness, "while it may be relevant to the question whether it would be unjust to make the usual costs order, cannot be identified with it" (see §§32 and 34). Nobody argued before us for a different formulation. Neither party in *Matthews* had acted unreasonably; neither party did so here either. Reasonableness was relevant but not necessarily determinative, as Popplewell J held. However, rightly in my view, he did not accept the defendant's submission that it could not ever be a sufficient factor to justify departure from the normal rule. It would all depend on the facts of the particular case.

The contingencies of litigation

44. The third issue from *Matthews* with which I must deal is that of the contingencies of litigation. Stanley Burnton J found nothing that justified depriving the defendant of the protection against costs conferred by their Part 36 payment, seeing the claimant's problem as part and parcel of the usual contingencies inherent in litigation. He said firstly (§33) that the function of a Part 36 payment was to place the claimant on risk as to costs if, as a result of the contingencies of litigation, he failed to beat the payment. He then said of the *Matthews* facts (§35):

> "Essentially, what happened is that events have justified the defendant's assessment of the total value of the claim, and falsified the claimant's assessment. Changes in circumstances between the date of a Pt 36 payment and trial are contingencies inherent in litigation. They cannot of themselves normally justify a conclusion that the defendant should be deprived of

> the benefit of his payment. It follows that there was no reason to depart from the normal rule."

45. At first sight it looks from this as if the claimant's argument failed simply because he had been unlucky with the standard contingencies inherent in litigation. In fact, it appears from the judgment that there was probably more to it than that. It is important to note that in §36 Stanley Burnton J went on to add what he said was a further reason why the usual order was the correct one. The reason was that although he endorsed the claimant's advisor's view that they could not settle until the results of the biopsy were known, he was critical of them for rejecting the Part 36 payment when the claimant's prognosis was uncertain. He then added:

> "37. The result might have been different if the claimant's solicitors had requested, and the defendant's solicitors had refused, a stay until the results of the biopsy were known. But that did not happen."

46. Although Stanley Burnton J had expressed §35 in terms which suggested that it was a complete answer to the issue he had to determine, this acknowledgment in §37 that things might have been different if the parties' advisors had acted differently seems to me to indicate that the circumstances identified in §§36 and 37 must, in fact, also have played a significant part in his overall reasoning. It was not just the contingencies of litigation that had led to the plaintiff being in the position he was in but also the way in which his solicitors had responded to them.

47. That a feature such as this had the capacity to alter the outcome underlines just how fact sensitive costs decisions of this kind are and how difficult it is to determine one case by comparing it with another. The defendant rightly invited us to be careful in reaching our decision that we did not condemn the courts to intensive investigations in every Part 36 case as to how the parties should have approached an offer; I would be equally resistant to encouraging a time-consuming practice of citing authorities on costs for the purpose of persuading courts to follow decisions on the facts as if they were precedents. This too has the capacity to lead to intensive investigations designed to demonstrate similarities and differences between the two sets of facts. I would therefore hope that a firm distinction is made between, on the one hand, principle and guidance which can valuably be transported from one case to another and, on the other, consideration of the individual facts which cannot.

<u>Popplewell J's judgment</u>

48. Popplewell J set out the principles in a very clear judgment which attracted no real criticism from the claimant in this respect. The appeal was based upon the way in which he applied the principles. It was argued that he attributed the wrong weight to the factors and arrived at a conclusion which was perverse.

49. Popplewell J gave careful consideration to the expert advice that adolescence might bring significant changes attributable to the brain injury and rejected the defendant's criticism of the claimant and his advisors for failing to accept the offer sooner. He said:

> “19. …. It seems to me that it would have been difficult for those advising the Claimant at the time of the Part 36 offer to have prepared an advice for approval by the court which expressed the view that at that stage the offer should be accepted if there were a reasonable alternative strategy available of keeping the offer alive and waiting for further investigations. Of course, it might have been that that was regarded as a strategy which itself involved some risks; and in some cases the court might have to decide whether or not to approve a settlement, taking into account those risks. But the validity of the strategy has been proved by subsequent events in that the offer was indeed kept open pending further investigation.
>
> 20. It seems to me that this is a case in which I have to balance two competing considerations. On the one hand I am satisfied that the claimant has acted reasonably throughout. On the other hand, the defendant is entitled to invoke the function and purpose of Part 36, as explained in *Matthews* and above, in treating the uncertainty as to [the claimant’s] developing condition and prognosis as simply one of the ordinary contingencies of litigation; and as a contingency the costs risk of which it is the function of Part 36 to cause the claimant to have to bear.
>
> 21. Balancing those considerations, I am not satisfied that this is an exceptional case or that it would be unjust for the normal order in relation to costs to be made. Notwithstanding the reasonableness of the claimant’s conduct, the defendant is entitled to the normal costs protection of Part 36 where, as in this case, the uncertainties of the prognosis are contingencies which fall within the usual litigation risks of claims of this kind.”

The arguments

50. Both parties were in agreement that the approach of this court to an appeal such as this was encapsulated in *Summit Property Ltd v Pitmans* [2001] EWCA Civ 2020. It is not a question of whether we would have made the order which the judge made. He had a wide discretion and his decision should not be interfered with unless his exercise of discretion was flawed in that he erred in principle by taking into account the wrong matters or reached a conclusion which was so plainly wrong that it could be described as perverse.

The claimant’s submissions

51. The claimant submitted to us that it was clearly unjust in the plaintiff’s case not to depart from the normal rule and that in declining so to find, the judge had given no weight, or insufficient weight, to the difficulties caused by the need to wait for the claimant to go through puberty/adolescence. It was not the same as *Matthews* or *Lumb v Hampsey* and it could not be said that what happened was a change in circumstances

or contingency inherent in litigation. The claimant's life expectancy did not reduce significantly during the litigation thus reducing his claim (*Matthews*) nor was it a case in which the parameters of the claimant's condition were known but his response to rehabilitation during the course of the litigation was awaited (*Lumb*). Here proceedings had not even been begun. Everyone knew that the claimant was awaiting the natural evolution of the injury which the defendant had caused by his negligence in order to be able to make a sufficiently reliable assessment of the extent of the brain damage and its practical implications for the claimant's life. The defendant made a pre-action offer when the claimant had not yet reached an age when a firm enough prognosis for his condition could be given to enable his advisors to advise acceptance of the sum offered. He had no choice but to wait and to incur costs in obtaining reports on his condition until the point was reached when a more reliable prediction could be made as to the future and the court could be satisfied that it was appropriate to approve a settlement. Meanwhile, his lawyers did not fall into the errors of the claimant's advisors in *Matthews.* They did not reject the offer and they were open with the defendant.

52. The claimant submitted that whilst Popplewell J acknowledged the material factors, he failed to give them weight and, had he done so, the inevitable conclusion of his judgment would have been that it was unjust for the claimant not to have his costs. Instead he wrongly treated the inability to make a safe prognosis as merely one of the contingencies of litigation in relation to which the offeree must bear the costs risk. The reasonableness of the claimant's conduct and the obstacle that the need for court approval placed in the way of settlement were not properly put into the balance.

53. Rule 36.14(4)(c) specifically required the court to take into account the information available to the parties at the time when the Part 36 offer was made. The claimant was lacking in essential information here. The defendant was firmly in the driving seat, able to make the offer when he chose to do so without having to deploy any money and then to withdraw it at any time whereas the plaintiff had no choice but to wait for the reports which the defendant knew were going to be necessary. It was not that there was a change of circumstances during the process but that the relevant circumstances could not yet be known. Whereas an offeree with capacity can choose to take a gamble and accept an offer without full information, the child claimant cannot. On the facts of this case, not only was it a reasonable course for those advising the claimant not to advise settlement until they did, it was the only reasonable course.

The defendant's submissions

54. The defendant supported the judge's exercise of his discretion as appropriate for the reasons he gave or at least as not such as to justify interference with it by this court. The judge not only referred to the relevant factors but also gave them appropriate weight, arriving at a decision that was within the band of decisions to which he was entitled to come. In particular, the fact that court approval was required was not powerfully determinative of the issue.

55. As I have said earlier, the defendant also argued that there were good policy reasons not to depart readily from the normal rule. If the normal order were to be departed from here, it would potentially upset the clarity and balance of the Part 36 provisions leading to frequent arguments about whether a party (claimant or defendant)

could/should have taken an offer earlier which the court would have to investigate. He invited us to draw parallels between this case and both *Abada* and *Matthews*.

56. The defendant also supported the judge's decision on three additional grounds. First, he said that the claimant could in fact reasonably have accepted the offer at the time it was made. Although there was still uncertainty, the probability was even then that there would not be significant adverse developments. The offer had built into it a very substantial contingency for things going wrong for the claimant and, if all went well, it was significantly too high. Secondly, he said that it was material that the claimant received a significant windfall in damages, which the defendant put at in excess of £130,000, by being able to accept the Part 36 offer. Thirdly, he said that the claimant's legal advisors could and should have asked the defendant to agree to the extension of the time for acceptance of the offer so as to allow him to mature sufficiently.

57. The defendant raised for the first time during oral argument the possibility that the claimant could have sought provisional damages in order to cater for the uncertainty of his situation. If the defendant sought to rely upon this, the point should have been taken very much earlier. As it was, it took the claimant by surprise and we did not permit it to be pursued.

Discussion

58. I will deal first with the defendant's second and third additional grounds.

59. The windfall argument was based on the claimant's counsel's November 2011 advice for the application for approval (see §§14 and 15 above) to the effect that the claim was worth about £368,400 if the claimant was not ultimately disabled and found work. This was what was likely to happen in future so, the argument went, in recovering £500,000 the claimant had a windfall of £130,000.

60. The claimant's answer to this was that until the end of his adolescence it is too early to say whether he has received a windfall. In any event, he submitted, the fact that a settlement sum has turned out to exceed the value of a claim is no more relevant to the exercise of the discretion in relation to costs than the fact that there is a shortfall. If this claimant has in fact received generous damages, that is a consequence of the defendant choosing to make that offer in the first place and then not withdrawing it as he could have done at any stage after the 21 day period for acceptance had passed.

61. I accept the claimant's argument in this respect. There may often be uncertainty as to whether the claimant has or has not done well out of the settlement – it so often depends on factors which will not be known until a future date (here how the claimant's condition will crystallise once his development is completed) or which, in the light of the settlement, will never be ascertained (for example whether, if there had been a trial, a claimant would have succeeded in establishing liability or causation or the full extent of his claim). Not only is a perceived windfall not relevant to the question of costs in my view, I am afraid that if it were to be taken into account that may have the undesirable consequence of opening the door to potentially complex argument and require the court to conduct an investigation into the circumstances which would be disproportionate to the issue at stake and potentially costly in itself.

62. As to the argument that an extension of time for acceptance should have been sought, the claimant responded that the natural inference from the defendant's advisor's conduct was that they would have refused if asked. As the point was explored in argument, it became clear that this may well have been the defendant's response because, had he agreed to keep the offer open for acceptance until a future event occurred (for example, puberty) or for a period of time fixed with a view to catering for that, he would have been unable to withdraw it for a long time, whatever the developments in the interim period. So an agreement to extend the period for acceptance of the offer would have put the defendant at a significant disadvantage without any corresponding advantage in relation to the costs position.

63. The defendant will have been aware that, absent any agreement to keep the offer open, it could be withdrawn at any time if, for instance, he no longer wished to make it or the claimant appeared to be dragging his feet. He would have known when the claimant was likely to be approaching puberty and he was made aware, following the offer, of reports being obtained and so on. He can be said therefore, in my view, to have chosen to leave it available for acceptance. There are, of course, many factors involved in the decision of a defendant as to the timing and amount of an offer such as this; Stanley Burnton J set out some of them in §33 of *Matthews*. It would be naïve to think that similar factors do not also enter into the decision of whether to leave an offer on the table or to withdraw it.

64. In all the circumstances, I am not persuaded that there is anything in the defendant's third additional ground.

65. That takes me to the main issue of whether the judge erred in the exercise of his discretion.

66. Before I look at the matter overall, I will deal with the defendant's argument that, notwithstanding the uncertainty, the claimant could reasonably have accepted the offer when it was made and should have been at risk as to costs if he chose not to do so (the defendant's first additional ground). I do not accept this argument. It was based on the passage in the claimant's counsel's 2009 opinion where he said that the sum on offer potentially represented not unrealistic compensation in the event of a 'worst case scenario' (see §11 above). This must be seen in context. Counsel said that in the light of the neuropsychological views that had been expressed as to the possibility of unexpected problems developing as the claimant matured, it was "impossible to put a definitive value on [the claimant's] claim at this stage and, therefore, it would be difficult to advise the court for approval purposes". His quantification of the claim was an attempt to do the impossible. He referred to a cautious passage in the claimant's psychologist's 2007 report. She said (I will quote a little more than counsel did in his opinion):

> "it is important to bear in mind that [the claimant] does have documented damage to the frontal lobes of the brain and is therefore at risk of developing problems as he enters maturity. Currently his behaviour and concentration problems constitute risk indicators of frontal lobe dysfunction which may later further manifest itself in social ineptness and the inability to embrace full independence".

Given material of this sort and given the universal advice that a firm conclusion could not be reached as to whether there would be any long term neuropsychological deficits until the claimant was older, it is not at all surprising that counsel advised that further investigations should be undertaken involving further consultation with the clinical psychologist and the educational psychologist and in relation to epilepsy.

67. The conclusion to which Popplewell J came, having recorded that both the claimant's experts and the defendant's paediatric neurologist advised that there may be significant changes in adolescence, was that it would have been "difficult" for those advising the claimant at the time of the Part 36 offer to have advised acceptance if there was a reasonable alternative strategy available which there was (see his §19, set out above). I entirely agree with that assessment. Indeed it is arguable that it would have been more than just "difficult" for them to have advised acceptance, let alone to have persuaded the court to sanction it.

68. To demonstrate this, it is perhaps helpful to analyse the decision that would have faced the court if approval had been sought when the offer was originally made in 2009. The court would have been concerned to ensure that the claimant was obtaining proper damages for the injury he had sustained, not only for his pain and suffering but also taking account of the probable impact of the injury on his earning capacity and on his ability to look after himself independently. Here, there was no issue as to liability and the nature of the claimant's injuries was not in dispute. He would therefore recover damages in due course. Apart from the uncertainty of how his brain would develop with age, the only factor that might reduce the level of those damages was the seat belt issue and counsel was confident that this would resolve in the claimant's favour so it might properly have been viewed as a minimal litigation risk. If the offer was not accepted and the claimant waited to see how his brain injury evolved and in fact developed significant problems as the experts warned that he might, he would recover damages at trial which would compensate him for this. Suppose however that he waited to see and problems did not develop, and suppose that the offer had meanwhile been withdrawn, he would not recover as much as the £500,000 that had been available. But equally he would not require compensation at that level because time would have demonstrated that his injuries were more limited. He would therefore have lost what the defendant has termed "a windfall" but he would have recovered damages commensurate with his injury. On such an analysis, it seems likely that the judge would have determined that the proper course was to await developments so as to ensure that the claimant might recover full compensation for his actual injury and counsel had to have that in mind when advising whether approval could/should be sought.

69. At §10 of his judgment, whilst dealing with the principles, Popplewell J adopted what was said in §28 of *Matthews* and said that "the fact that any settlement would require the approval of the court is not of itself a relevant factor". The nearest that he came thereafter to giving the question of approval consideration in his determination as to what the correct order was in the present case was his acknowledgement that it would have been difficult to have prepared an advice for approval by the court and that the claimant had acted reasonably throughout, including in not accepting the offer earlier. It seems to me that more was required on the facts of this particular case and that the judge erred in taking this approach, with the result that the issue did not enter into his determination as it should have done.

70. In saying that, I do not mean that the mere fact that approval was required was definitive in the claimant's favour but that the implications of it needed to be put into the balance, related to the specifics of this case, along with the rest of the relevant factors. Not only was there considerable doubt as to whether it would have been possible to obtain approval before adolescence, the requirement to seek approval also had clear practical implications in costs - all the costs incurred after the making of the offer were incurred exclusively in investigating the acceptability of the offer and obtaining the evidence necessary to obtain approval.

71. Other matters that were relevant were that the offer had been made before the claimant had commenced proceedings (see Rule 36.14(4)(b)), at a time when the prognosis was uncertain (see Rule 36.14(4)(c)), for a reason which is necessarily present when frontal lobe damage is caused to a child as was known to both parties throughout. The two stage process of the development of the consequences of that particular injury – initial damage and damage developing as the brain evolved in puberty/adolescence – and the resulting lack of a safe prognosis do not seem to me to fit easily under the rubric "an ordinary contingency of litigation" and in categorising the facts in that way without more in his §§20 and 21 ("the usual litigation risks of claims of this kind"), the judge fell into error in my view. Furthermore, it seems to me material that the inherent uncertainty in prognosis would have resolved well before the limitation period expired by the passage of time so the claimant would not need to commence proceedings before the position was clear. The offer was not rejected and the defendant knew that further expert reports were being obtained as to the claimant's development. These were not designed to improve or expand the claimant's claim, merely to ascertain whether the deterioration that could occur with puberty/adolescence was in fact occurring or likely to occur. The defendant knew the nature of the variables intrinsic in the head injury that had the capacity to affect the quantum of damages and he knew the timescale that would render the claim more certain. Not only did he have the advantage of choosing when to make the offer, he also had the option to withdraw it at a later stage but chose not to do so.

72. Popplewell J's conclusion acknowledged that the claimant had acted reasonably throughout but did not give weight to the particular features of this case which should have been put into the balance against the normal order. It is necessary for us to reconsider the question of the order that should have been made. In my judgment, the consequence of omitting to give weight to matters that were in favour of the claimant was that the normal rule dominated when it should not have done because it was in fact unjust to make the normal order. I would, therefore, set aside the costs order that the judge made and substitute an order that the claimant should have his costs throughout, including in relation to the period from 23 April 2009.

73. Some words of caution: as I have already said, costs decisions are particularly fact sensitive. The view I have formed of this case, albeit a clear one, is an amalgam of all of its features. It is unlikely that they would be replicated precisely in another case. The various factors interact with each other and just as Stanley Burnton J identified in *Matthews* that a particular change in the circumstances there may have led to a different result, so differences between the facts of this case and the facts of other cases may mean that the result in the other case should differ from the result in this one.

Lady Justice Arden:

74. I agree with the judgments of Lady Justice Black and Lord Justice Pill that the order made by the judge should be set aside.

75. In my judgment, *Matthews v Metal Improvements Co. Inc.* [2007] EWCA Civ 215 decides the following point. A Part 36 offer is designed to be a means whereby a party may normally throw the risk of having to pay the other side's costs on to the other side if the other side fails to accept the offer within the 21-day period allowed, or to beat it at trial. The other side then has to satisfy the court that it is unjust for this consequence to follow and not to make some other order, that is, an order as to costs other than that he has to pay all the offeror's costs.

76. To my mind, the power of the court in this regard is a deliberate and important safety valve. For a case to be within the safety valve, however, the judge will in general need to find that the case has features which take it out of the ordinary principle and which demonstrate that it is unjust to impose the normal shifting of the costs risk. I would therefore, as Lady Justice Black has done, interpret the existing CPR 36.10(4)(b) consistently with CPR 36.14(2) and thus as requiring the court to find that it is unjust not to order otherwise. Where those circumstances are present, however, the judge has a wide discretion as to the form of order that he substitutes.

77. In this case, the time that elapsed between the date on which the Part 36 offer expired and the date on which that offer was accepted was needed to enable those advising the child to be satisfied that the offer could properly be accepted. This was because the prognosis for the claimant's injury could only accurately be determined by waiting until he neared or reached adolescence. In my judgment, these are circumstances which make it unjust not to depart from the general risk-shifting rule in Part 36. In my judgment, this is, therefore, a case in which the court can be satisfied that it is unjust not to "order otherwise" under CPR 36.10(5).

78. I reach this conclusion without relying on the ways in which the law protects children in relation to litigation to enforce their rights. The fact that the claimant is a child is not in my judgment in general a strong enough factor of itself because the child has the protection of a litigation friend and approval by the court of any settlement. Thus the fact that the claimant is a child is not necessarily of itself sufficient to bring the case within the safety valve: see *Abada v Gray & MIB* Court of Appeal, 9 May 1997 unreported.

79. For these reasons, and for the other reasons given by Lady Justice Black and Lord Justice Pill, I too would direct that the defendant should pay the claimant all his costs of his claim.

Lord Justice Pill:

80. I gratefully adopt Black LJ's recital of the facts. The claimant has not obtained a judgment more advantageous than the defendant's offer and the defendant is entitled to costs from the expiry of 21 days after the offer "unless the court considers it unjust to make such an order" (CPR r.36.14(2)). Under r.36.14(4), the court, in considering whether it would be unjust, "will take into account all the circumstances of the case." These include, by virtue of r.36.14(4)(c) "the information available to the parties at the time when the Part 36 offer was made". The court must, of course, do justice to both parties.

81. In *Kunaka v Barclays Bank Plc* [2010] 2 Costs LR 179, Longmore LJ, with whom Wilson LJ and Sir John Chadwick agreed, referred to an order made in pursuance of the "unless" provision as an "otherwise order", an apt expression in my view, and preferable to seeking a test based on exceptionality. In that case, Longmore LJ considered the facts to be exceptional but a gloss need not be placed on the test provided by the Rules. Longmore LJ stated that "it is open to the court to assess what the fairness of the situation demands" and it is agreed that "fairness" and "justice" have the same meaning in this context.

82. In this case, the defendant negligently caused a severe head injury to a 6 year old claimant. The nature of the injury was such that it was clear from an early stage that a firm prognosis could not be given until the claimant had attained the age of 16 when the development of the frontal lobes of the brain was complete. Doubts about the prognosis continued after the Part 36 offer in the sum of £500,000 was made on 2 April 2009. Both the paediatric neurosurgeon and the educational consultant remained cautious about the long term prognosis. In such a situation, where a defendant injures an infant claimant in such a way that the damage he has caused cannot properly be assessed until the infant has matured, justice will frequently require that those advising the claimant should not be expected to settle the claim before then on an uncertain prognosis. It is not unjust for a defendant to be expected to wait.

83. The law protects those who are under age. It protects them by providing that the limitation period for a minor to bring an action for damages will not expire until three years from the date when he ceases to be a minor (section 28 Limitation Act 1980). It protects them by the provision in CPR r.21.10 that, where a claim is made by or on behalf of a child, no settlement, compromise or payment and no acceptance of money paid into court shall be valid, so far as it relates to the claim by, or on behalf of the child, without the approval of the court.

84. The court can be expected to take its duties most seriously in such circumstances. That is demonstrated by the Practice Direction to Part 21 which provides, in so far as is material:

> "5.1 Where a claim by or on behalf of a child or protected party has been dealt with by agreement before the issue of proceedings and only the approval of the court to the agreement is sought, the claim must, in addition to containing the details of the claim, include the following –
>
> (6) in a personal injury case arising from an accident –
>
> (a) details of the circumstances of the accident,
>
> (b) any medical reports,
>
> (c) where appropriate, a schedule of any past and future expenses and losses claimed and any other relevant information relating to the personal injury as set out in Practice Direction 16, . . .

> 5.2(1) An opinion on the merits of the settlement or compromise given by counsel or solicitor acting for the child or protected party must, except in very clear cases, be obtained.
>
> (2) A copy of the opinion and, unless the instructions on which it was given are sufficiently set out in it, a copy of the instructions, must be supplied to the court."

The application in this case was appropriately heard by a High Court Judge.

85. The existence of this protection for minors in my judgment points strongly towards permitting those advising a claimant, and indeed the court, to wait until a firm prognosis is available before a claim is settled. Lawyers advising an infant claimant will often not be able properly to guide the court until then and it is not unjust for a defendant to be expected to wait.

86. The judge accepted, at paragraph 20, that the claimant, which in substance meant his legal advisers, had "acted reasonably throughout". Where the difficulty of prognosis until maturity has been clear from the start, that in my judgment, is a very strong pointer to the injustice of an infant claimant who accepts upon reaching maturity to pay costs out of his damages. It was in my judgment an error of principle by the judge to state, at paragraph 21, that "the uncertainties of prognosis are contingencies which fall within the usual litigation risks of claims of this kind."

87. Mr Browne QC, for the defendant, has sought to rely on the decision of this court in *Matthews v Metal Improvements Co Inc* [2007] CP Rep 27. In that case, the claimant had suffered a head injury at work which had caused a disabling psychiatric disorder and he was a patient within the meaning of the Rules. Prognosis was uncertain, not because of the nature of the original injury but because he had been diagnosed with lymphoma, a condition unrelated either to his accident or to his psychiatric disorder. The uncertainty was about the effect of that on his expectation of life. A Part 36 payment into court was made by a defendant unaware that, before the expiry of the 21 day period of acceptance, the claimant had received an updated medical opinion stating that, if the biopsy results then to be obtained showed that the lymphoma was aggressive, his life expectancy would be reduced dramatically.

88. Five months after the payment in had been made, the results of the biopsy became available and it was clear that the claimant's life expectancy was drastically reduced to 7 years. No application had been made to extend the time for consideration of the payment in until the biopsy results had become available.

89. It was in that context that Stanley Burnton J, with whom Lloyd LJ and Chadwick LJ agreed, gave judgment. Stanley Burnton J stated:

> "Before us, neither party submitted that the other had acted unreasonably. Essentially, what has happened is that events have justified the Defendant's assessment of the total value of the claim, and falsified the Claimant's assessment. Changes in circumstances between the date of a Part 36 payment and trial

> are contingencies inherent in litigation. They cannot of themselves normally justify a conclusion that the defendant should be deprived of the benefit of his payment. It follows that there was no reason to depart from the normal rule."

90. The circumstances in the present case are significantly different and Stanley Burnton J rightly used the expression "normally justify". In the present case, the uncertainty of prognosis was inherent in the injury caused to a child. In *Matthews*, it was unconnected with that injury and, what is more, there was a failure to notify the court or the defendant that a much clearer prognosis was imminently available.

91. Two other statements of Stanley Burnton J are relied on by the defendant, first the statement, at paragraph 28 that, "in principle", "the incidence of costs in the present case is not affected by the fact that the Claimant is a patient." The second is the statement, at paragraph 32, that the reasonableness of the claimant's conduct "while it may be relevant to the question whether it would be unjust to make the usual costs order, cannot be identified with it."

92. Qualified in that way, as they are, I do not disagree with those statements but would respectfully say that, in their application, both require some explanation. To ignore the lack of capacity of the claimant and to down play the reasonableness of the conduct of his legal advisers as relevant factors will in this and many other cases divert the court from the requirement to do justice on the particular facts.

93. First, in practice, the protection afforded to infants by the law is such that it is material that the claimant is under a disability. The law requires those advising a claimant to satisfy a court of the reasonableness of the offer. The advisers know that, in circumstances such as the present, they cannot expect a court to act on an uncertain prognosis (unless of course the offer substantially meets the worst scenario, which the present offer did not). That has a bearing on what justice requires when acceptance of a payment in or offer is deferred. Secondly, while the reasonableness of the conduct of the advisers is not to be "identified" with justice as between the parties, it is an important factor, in circumstances such as these, when deciding what justice requires.

94. Justice between the parties required, in this infant case, that the claimant should have his costs until a clear prognosis could be offered to the court and a settlement recommended. That situation did not arise until 2011. It is necessary to exercise discretion afresh and I have no doubt that it should be exercised in the claimant's favour. I agree that the appeal should be allowed.