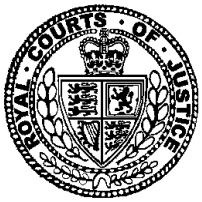

Neutral Citation Number: [2019] EWHC 1970 (QB)

Case No: QB/2018/0277

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/08/2019

Before :

MRS JUSTICE MCGOWAN

- -

Between :

MR	**Appellant**
- and -	
Commissioner of Police for the Metropolis	**Respondent**

- -
- -

Stephen Cragg QC (instructed by **Imran Khan & Partners**) for the **Appellant**
Charlotte Ventham (instructed by **Metropolitan Police Legal Services**) for the **Respondent**

Hearing date: 02/05/2019

- -

Approved Judgment

Mrs Justice McGowan :

The Issue

1. This appeal, on costs alone, is from the order of HHJ Baucher of 14 September 2018 making no order for costs. This appeal raises the issue of who succeeded in the claim and whether the successful party should have been awarded its costs. Further, how the making of Part 36 offers by both sides should affect the order for costs made in the case. The Appellant was awarded damages but the Judge made no order for costs.

Background

2. The Appellant has been granted anonymity in these proceedings. The Appellant is well known in international financial circles.

    i) 12 January 2010 the Appellant was arrested on suspicion of having committed an offence of harassment. The appellant was released without charge.

    ii) 23 December 2010 he issued a claim for false imprisonment and assault.

    iii) 28 February 2011 the claim form was served.

    iv) 19 April 2011 the defence was served

    v) 24 May 2011 the Respondent made a Part 36 offer to settle the entire claim in the sum of £4,000 and provided a draft letter of apology in the following terms,

    > *"I have considered the papers and evidence in connection to your client's claim. It does appear that an error has occurred……. whilst the Metropolitan Police Service strives to maintain the highest standards……. I would like to express my regret at the distress you have suffered."*

    vi) 15 June 2011 that offer was rejected by the Appellant. He travels extensively in the course of his work. On entry to certain countries, he would have been obliged to declare the fact of his arrest, even though the matter did not proceed to prosecution.

    vii) 28 September 2012 the Appellant made a Part 36 offer to settle the claim in the sum of £5,000, on condition that the Respondent admitted liability.

    viii) 9 May 2013 the Appellant made a further Part 36 offer to settle this claim, and another claim for judicial review, in the total sum of £5000 on condition that the Respondent admitted unlawful arrest and ensured that all records of his arrest be removed from police records, that the record of the harassment warning be removed from all police records, that his DNA, fingerprints and custody photographs be deleted from all police records.

    ix) 11 June 2014 that offer was rejected by the Respondent.

x) 20 July 2017 the Appellant made another offer under Part 36 that the matter be settled in the sum of nil pounds with an admission of liability plus reasonable costs, to be assessed if not agreed.

xi) 6 December 2017 the Respondent wrote to the Appellant inviting a *without prejudice* discussion as to the resolution of the case. The Respondent also offered that each party should bear their own costs and that the Respondent was willing to provide a letter which the Appellant could show to any authority, the draft of which stated,

> *"I confirm that following your arrest on 12 January 2010 on suspicion of harassment, no action was taken by the Metropolitan Police Service to prosecute you for that or any other offence."*

xii) No answer was ever given to that offer.

xiii) 26 June 2018 following a trial the Appellant was awarded damages of £2,750.

xiv) 14 September 2018 the Judge heard arguments and made no order as to costs.

xv) The Respondent appealed against the finding on the substantive point of the hearing: *Commissioner of Police for the Metropolis v MR* [2019] EWHC 888 (QB). That appeal failed.

The Hearing

3. In her judgment given on 14 September 2018 Her Honour Judge Baucher identified the issues for her determination on costs as follows:

   i) Firstly, has the Appellant failed to obtain a judgment more advantageous than the Defendant's Part 36 offer of 24 May 2011?

   ii) Secondly, if so, should the normal Part 36 consequences apply, namely those set out in CPR 36.17(3)?

   iii) Thirdly, if the answer to either of those questions is no, was the Appellant's offer of 20 July 2017 a valid Part 36 offer and, if so, should the normal Part 36 consequences apply?

4. Her order was judgment for the Appellant in the sum of £2,750 and she later made no order in respect of costs. On the costs hearing she made the following findings:

   i) At a very early stage in the proceedings the Respondent made a very sensible offer in monetary terms. There was also the offer of a letter of apology but no admission of liability.

   ii) The Appellant's whole purpose in the litigation was to establish that the arrest had been unlawful, in the absence of such an admission, he felt that he was forced to proceed to a hearing. Therefore, the question was not whether it was reasonable for the Appellant to refuse that offer, rather whether it would be unjust to apply the provisions of CPR 36.17.

iii) She identified the question as, *"Who is the unsuccessful party and who has been responsible for the fact that the costs have been incurred?"* She went on to find, *"I am satisfied the purpose of this litigation, for the claimant, was not to recover compensation but to clear his name and hopefully to clear it in such a manner that he could travel freely without restriction or otherwise without declaration to various parts of the world. Therefore, the claimant felt obliged to continue with the proceedings."*

iv) She identified an issue as to whether or not the Appellant should have engaged in any way with the *without prejudice* discussions to see if the case could be resolved. *"He may have been able to secure something similar had he engaged further with the defendant."*

v) She found at paragraph 29 of her judgment, *"In terms of the successful party, I am satisfied the claimant was the successful party and the unsuccessful party was the defendant. I am satisfied that the defendants could, especially in light of that letter of apology, have gone further in some way but, as I say, I will return to this without prejudice meeting."*

vi) At paragraph 31 of her judgment she found, *"I consider it would be unjust to apply the provisions under 36.17. I consider that the real winner in this case is the claimant. He had to proceed with the case to maintain his reputation and to sustain his travel. Whether or not the judgement has satisfied the authorities I do not know. However I consider that distinguishes his case from the ordinary run-of-the-mill case, namely the standard personal injury cases or where somebody just wants to have their matter ventilated in court. There was a real purpose for this litigation."*

vii) At paragraph 32 of her judgment she went on to say, *"The Part 36 regime is designed to try and compromise the proceedings but, as I have said, the claimant was forced to proceed to trial because it was not about quantum. The essential purpose of Part 36 is to visit costs consequences on parties on whom it can properly be said they ought to have settled by accepting the other party's offer. The claimant could not accept the other party's offer, in the monetary sense, because he wanted an admission. Had he accepted that offer, the real issue would still have been outstanding and he still would not have restored his reputation. He is the successful party. It is the case that he was entitled to pursue, that is clear from* ***Ashley****, and the acceptance of the Part 36 offer would not achieve the purpose of the litigation."*

viii) At paragraph 33 she went on to say, *"I also consider it would be unjust because of the entrenched terms which the defendant adopted throughout in relation to its position in respect of liability, including their last letter: 'My client cannot and will not admit liability', set against the background of the letter of apology which had admitted an error and expressed regret for the distress. One struggles to see why something a little further could not have been advanced."*

ix) She found that the mandatory provisions should not apply. Having rehearsed the opposing arguments she went on at paragraph 39 to say, *"What was the defendant supposed to do? It clearly, for whatever reason decided to take a very robust stance in respect of liability and was not prepared to make any*

concession, even going so far as to say that it could not. Therefore, it was prepared to take the matter to trial and to face the consequences if there was an adverse finding. However, that did not mean the defendant could not protect itself by a Part 36 offer. It was made at an early stage and advanced on a proper basis." She observed that it was then a decision for the appellant as to how the matter should proceed. *"Just because the claimant was entitled to proceed with the claim to court does not mean that the claimant was entitled per se to his costs. Against the background of a Part 36 offer and the letter of apology, the claimant decided to, nonetheless, proceed to trial."*

x) Paragraph 40 of the judgment says, *"In my view, it would be unjust to order, in those circumstances, that the defendant should pay the claimant's costs throughout the hearing when they could not, for whatever reason, make the requisite admission. They were prepared to make a sensible offer but as that offer was not accepted they proceeded to trial, and on some aspects of the evidence presented, as is evident from the judgment, the defendant's evidence was accepted by the court. Therefore, there may well be a view that there was some vindication on their part, albeit that the final determination was adverse to the defendant. Further they invited the claimant to a without prejudice meeting. The claimant solicitors did not even respond to that invitation. Whilst Mr Cragg sought to persuade me that I could infer that nothing would have been gained by such a meeting the reality is that that is mere conjecture. The claimant may have been offered an admission that actually reflected the judgment he secured."*

xi) Paragraph 42 of the judgment, *"I have taken the view that it would be unjust for the defendant to recover their costs. I consider it would also be unjust for the defendant to pay the claimant's costs, and it follows that the order which, in my view, gives justice for the parties, for the reasons set out within this judgment, would be one of no order in respect of costs".*

xii) Paragraph 43 of the judgment, *"It follows that, having made those determinations in relation to matters one and two, that there is no need for me to proceed in relation to three, the freestanding offer in respect of the claimant. For the avoidance of doubt, I have made it clear that that is a factor I have taken into account in reaching my decision in respect of the first and second issues. In relation to whether it was a concession, it has to be viewed against the background, as I've already stated, of the fact that there were preceding Part 36 offers. Whilst it was a concession in respect of damages, it was not a concession in respect of costs."*

The Rules

5. **Part 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 the claimant's Part 36 offer.

(2) for the purposes of paragraph (1), in relation to any money claim or money element of the 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 paragraph (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) on the indemnity basis from the date on which the relevant period expired;

(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—

(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."*

Submissions on Appeal

6. **Ground 1**. The learned Judge erred in failing to find (a) that the Appellant had achieved a judgment against the defendant 'at least as advantageous' to the Appellant as the proposals contained in the Appellant's Part 36 offer of 20 July 2017 (for the purposes of CPR Pt 36.17(1)(b)), and (b) therefore he was entitled to his costs and other benefits listed in CPR Pt 36.17(4), 'from the date the relevant period expired'.

7. **Ground 2**. Further, or in the alternative, in relation to the Defendant's Part 36 offer of 24 May 2011, having found that it would be 'unjust' to order the Respondent's entitlement to costs and interest 'from the date the relevant period expired' pursuant to CPR 36.17(3), the learned Judge erred in deciding (a) that the appropriate order in the case was no order as to costs; and (b) that the Appellant should not be awarded his costs of the action either for the whole period of the claim or for part of the period of the claim.

8. In essence the Appellant's case is that the remedies provided by the law of tort are not limited to the obtaining of financial compensation. The achievement of a vindication may also be a significant part of any remedy. He relies on *Ashley v Chief Constable of Sussex [2008] 1 AC 962* to support the proposition that a public acknowledgement that the claimant has suffered a wrong may play as important a role as an award of damages. His case was that he was seeking vindication and that was, ultimately, more important than an award of damages. He wanted an admission of liability and not simply an apology for any distress caused. It is argued that this was a demand which also had practical consequences and did not merely satisfy some sense of grievance. The Appellant travelled extensively for business purposes, particularly to the USA. On entry to the USA he would be required to declare that he had been arrested for an offence of harassment, even if he could show a letter from the Metropolitan Police Service saying that no action to prosecute had been taken. He argued that was not the same as an

admission that the arrest had not been lawful and the removal from Police records of the history of the incident and its consequential recording of data.

9. Mr. Cragg QC argues that the Appellant was the victor; that the judge found he had to go to trial to achieve his remedy and that the finding that the arrest was not lawful was the remedy he sought.

10. In Ground 1 he submits, more particularly, on the Appellant's behalf that whilst the Judge properly identified the three issues; she did not go on to resolve the final one. He argues that the Judge failed to carry out the task she identified for herself and failed to follow the mandatory provisions of the CPR. Mr Cragg QC argues a rational approach would have led to the Appellant being awarded all or part of his costs. He argues that despite having said that she would go on to consider whether the Part 36 offer of 20 July 2017 was a genuine offer, she did not consider that question and that if she had, she would have concluded it was a genuine offer and resolved the costs question accordingly.

11. He anticipates the argument of Miss Ventham for the Respondent that the Part 36 offer was not a 'genuine offer' because it did not make a concession. Mr Cragg argues that there was clear concession and that it had substance. The concession was to give up any claim to monetary damages, even if not as to costs. He argues that the Judge found it was a concession, see paragraph 30 of the judgment. The Judge identified it as a Part 36 offer and she describes it as a concession. Mr Cragg submits that that is the true position; it was all the Appellant wanted and he would have taken the admission of liability and given up his claim to any financial compensation. He argues that the issue of costs at that stage was a separate issue from the claim and the absence of a concession not to pursue a reasonable determination of costs does not prevent it being a genuine Part 36 offer.

12. Mr Cragg submits that the Judge's identification of this as a Part 36 offer and as a genuine concession is determinative because CPR 36.17(4) says in those circumstances that costs should follow unless 'it is unjust". Accordingly, given her findings that the Appellant was the successful party and that he had made a genuine Part 36 offer, there was no reason for the Judge to have found that it would be unjust to deny the appellant his costs from 14 August 2017.

13. Miss Ventham, on behalf of the respondent argues that the Appellant's submissions misunderstand and therefore misinterpret the effect of the judgment. The judgment found that the arrest was unlawful because it was unnecessary, and that does not provide a sufficient vindication of the Appellant's position to the extent of justifying his being awarded his costs. She submits that the judgment might not provide greater comfort than the letter previously offered by the Respondent, even if it did not include an admission of liability.

14. She rightly points out that the Judge had a generous margin of discretion on the issue of costs, that she had had regard to the entire chain of events including the offers made to settle. In particular the fact that the Respondent had made a generous offer to settle at a sum greater than that eventually awarded some considerable time later.

15. She relies, with some force, on the failure of the Appellant to respond to the suggestion of a *without prejudice* discussion in an attempt to resolve the issues made on 6

December 2017. That, she submits was a factor which the Judge was right to take into account.

16. Further Miss Ventham submits, in reliance upon *AB v CD [2011] EWHC 3320 (Ch)* at paragraphs 22-23 that the 20 July 2017 offer was not a genuine Part 36 offer because it did not "contain some genuine element of concession". She argues that an offer to settle for no financial compensation was not a concession because it included a proposal as to costs which negated any concession and which completely ignored the earlier offers made by the Respondent. She says that it should be compared and contrasted with the Respondent's suggestion as to costs in the 24 May 2011 offer and that should be taken into account when looking at the offer. Any such offer has to be seen in the context of costs implications. This, she argues, was not a genuine concession because any offer was cancelled by the effect of costs.

Discussion

17. As a matter of principle, the implications of costs should never overwhelm the issue at the centre of litigation. That remains so, notwithstanding the huge impact costs currently has on the conduct of litigation. This Appellant wanted to 'clear his name', the Judge found that to achieve that aim he had to pursue the litigation to trial. He was never going to obtain the admission he wanted from the Respondent by pre-trial negotiation and settlement. At trial, his arrest was found to be unlawful, albeit on limited grounds. He was vindicated and the Judge described him as the 'successful party'. In addition, he won limited financial compensation, even though it was less than a previous offer made by the Respondent.

18. In the protracted course of the litigation the Appellant made an offer to forgo any financial remedy, if he could obtain the admission as to liability he sought, further that he would accept a reasonable order for costs by agreement or assessment, if agreement was not possible. Giving up any and all claim to a financial remedy is, in my judgment a significant concession and therefore is a genuine Part 36 offer. The Judge referred to it as such, rightly. That offer did engage the provisions of CPR 36.17 and accordingly does mean that the Appellant is entitled to his costs from the expiry of the relevant period, 14 August 2017. It is not unjust to apply CPR 36.17 in that way and to follow its provisions in the usual way, it would be unjust not to do so. The Appellant failed to respond to the offer of a without prejudice discussion and the criticism of that failure has merit, (not least as matter of courtesy). However remiss that was it does not seem to me to have had, or be capable of having, any direct effect on the course of the litigation. The Respondent was not going to make the admission sought; there was no realistic prospect of such a resolution.

19. The Judge formed a view of the offers and counter offers made before 20 July 2017, that was entirely a matter within her discretion and no valid complaint can be made of that view. She was entitled to reach the decision she did as to the position before the making of a good and genuine Part 36 offer which was not accepted by the Respondent.

20. Accordingly, the appeal succeeds in respect of that element of the costs incurred after the expiry of the relevant period on 14 August 2017 and the appellant is entitled to his reasonable costs on an indemnity basis, and the other entitlements set out in CPR Pt36.17(4) from that date, to be assessed, if not agreed. The part of the order as to no

order for costs before that date remains unaltered. To that extent only, this appeal succeeds.