All England Law Reports/2001/Volume 4/McPhilemy v Times Newspapers Ltd and others (No 2) - [2001] 4 All ER 861

[2001] 4 All ER 861

McPhilemy v Times Newspapers Ltd and others (No 2)

[2001] EWCA Civ 933

COURT OF APPEAL, CIVIL DIVISION

SIMON BROWN, CHADWICK AND LONGMORE LJJ

12, 20 JUNE 2001

Costs – Order for costs – Indemnity costs – Power to award indemnity costs where defendant failing to beat claimant's Pt 36 offer – Purpose of power – CPR 36.21(3).

Interest – Damages – Award of interest – Enhanced interest – Power to award enhanced interest on damages and costs where defendant failing to beat claimant's Pt 36 offer – Whether power to be exercised in relation to jury awards in defamation cases – CPR 36.21(2).

In May 1996 the claimant, M, brought an action for libel against the defendants in relation to allegations made in a newspaper article. In December 1999, 21 days before the trial was due to begin, M made an offer under CPR Pt 36, offering to settle the case in return, inter alia, for a payment of £50,000 damages for the hurt and distress caused to him by the article. Under Pt 36, the defendants had 21 days to accept that offer without requiring the permission of the court. They failed to do so, and at trial the jury awarded M general damages of £145,000. In cases where, at trial, a defendant was held liable for more than the proposals contained in a claimant's Pt 36 offer, CPR 36.21[a] required the court, unless it considered it unjust to do so, (i) to order interest on the whole or any part of the sum of money awarded to the claimant at a rate not exceeding 10% above base rate for some or all of the period starting with the latest date on which the defendant could have accepted the offer without needing the permission of the court (r 36.21(2)), and (ii) to order that the claimant was entitled to costs on the indemnity basis from that date (r 36.21(3)(a)) and to interest on those costs not exceeding 10% above base rate (r 36.21(3)(b)). M duly made an application under r 36.21 for enhanced interest and indemnity costs, but the judge concluded that it would have been unjust to make an order under either para (2) or (3). In giving his reasons for refusing to award enhanced interest, the judge relied on the fact that a jury's award in a libel action traditionally took account of everything down to the moment of verdict, including aggravation caused by the defendant's conduct of the trial. In respect of his refusal to award indemnity costs, the judge referred, inter alia, to the proximity of the trial when the offer had been made. He also stated that an order for the payment of costs on the indemnity basis carried some stigma, was bound to be interpreted as an indication of the court's disapproval of a defendant's conduct and might be thought to carry punitive overtones. M appealed.

[a] Rule 36.21 is set out at [2], below

Held – (1) An order for indemnity costs under CPR 36.21(3) was not penal and carried no stigma or implied disapproval of the defendant's conduct. It was clear from the structure and language of r 36.21, that an order for the payment of costs

on an indemnity basis from the latest date when the defendant could have accepted the offer without needing the permission of the court was the order which the court could be expected to make in a case where a claimant who had made a Pt 36 offer was, nevertheless, obliged to proceed to trial—because the defendant had not accepted the offer—and then beat his own offer at trial. In those circumstances, it was only where the court considered that such an order would be unjust that it was permitted to refuse an order for the payment of costs on an indemnity basis. Properly understood, the making of such an order in a case to which r 36.21 applied indicated only that the court, when addressing the task which it was set by that rule, had not considered it unjust to make the order for indemnity costs for which the rule provided. It followed that the basis on which the judge had exercised his discretion was flawed, and the Court of Appeal was therefore required to form its own view on the question whether it would be unjust to make the orders under r 36.21(2) and (3) (see [9]–[11], [27], [28], below); *Petrotrade Inc v Texaco Ltd* [2001] 4 All ER 853 applied.

(2) Although the court had to take into account the stage of the proceedings at which a Pt 36 offer was made, the fact that such an offer had been made in the month before the trial could not of itself and without more be a reason for holding that it was unjust to make orders under CPR 36.21(2) and (3). It was important to keep in mind that the orders for which those paragraphs provided had effect only from the latest date when the defendant could have accepted the offer without needing the permission of the court. Although there might be circumstances where it would be unjust to make the orders because the offer was made so late that a defendant had no proper opportunity to consider it, or because the costs already incurred were such that there was little to be saved by bringing the proceedings to an end at that stage, that was not the position in the instant case. The fact that the offer had been made at a late stage of proceedings did not support the conclusion that it would be unjust to make the orders under r 36.21(2) and (3) (see [12], [27], [28], below).

(3) The power to award interest at an enhanced rate under CPR 36.21(2) should not be used to award interest in a case where it had to be assumed that the jury, in reaching their award, had taken into account the anxiety, inconvenience and distress of defamation proceedings. In such circumstances, an order to pay interest on the amount of the award, in respect of any period prior to its date, would risk introducing an element of double compensation and cross the boundary which separated compensation from punishment. Accordingly, it would be inconsistent with the purpose of the power conferred by para (2), namely to enable the court, in a case to which r 36.21 applied, to redress the element of perceived unfairness, otherwise inherent in the legal process, which arose from the fact that damages, costs and statutory interest would not compensate the successful claimant for the inconvenience, anxiety and distress of having to resort to and pursue proceedings which he had sought to avoid by an offer to settle (see [17]–[21], [27], [28], below).

(4) In contrast, an order under CPR 36.21(3) for indemnity costs did not give rise to a risk of double compensation. The purpose of the power under para (3)(a) was to enable the court to address the perceived unfairness arising from the fact that an award of costs on the standard basis would almost invariably lead to the successful claimant recovering less than the costs which he had to pay to his solicitor. In reaching their award of damages, the jury were not concerned with costs, and there was no reason to think that their award took any account of the probable shortfall if costs were subsequently ordered on the standard basis. It

followed in the instant case that there was no injustice in making an order under r 36.21(3)(a) that M was entitled to his costs on an indemnity basis from the latest date when the Pt 36 offer could have been accepted without the permission of the court. Nor was there any injustice, in principle, in an order under para (3)(b) for the payment of interest on costs which would be made the subject of the order under para (3)(a). The purpose of the power to award interest on costs under that paragraph was to redress the element of perceived unfairness which arose from the general rule that interest was not allowed on costs paid before judgment. Accordingly, the court would order payment of interest at 4% over base rate on the costs to which the order applied, from the date on which the work had been done or liability for disbursements had been incurred. However, paras (2) and (3) were not intended to confer on the court powers to vary the rate at which interest was payable on a judgment debt. Thus the court had no power to make an order under para (2) for the payment of interest on the amount of the jury's award in respect of any period after judgment, or under para (3)(b) for the payment of interest on costs in respect of any such period. It followed that M's appeal would be allowed to the extent indicated (see [22]–[25], below).

Cases referred to in judgments

Hunt v R M Douglas (Roofing) Ltd [1988] 3 All ER 823, [1990] 1 AC 398, [1988] 3 WLR 975, HL.

Petrotrade Inc v Texaco Ltd [2001] 4 All ER 853, CA.

Thomas v Bunn, Wilson v Graham, Lea v British Aerospace plc [1991] 1 All ER 193, [1991] 1 AC 362, [1991] 2 WLR 27, HL.

Wall v Lefever [1998] 1 FCR 605, CA.

Cases also cited or referred to in skeleton arguments

All-In-One Design & Build Ltd v Motcomb Estates Ltd [2000] TLR 260.

Ford v GKR Construction Ltd [2000] 1 All ER 802, [2000] 1 WLR 1397, CA.

Maltez v Lewis (1999) 16 Const LJ 65.

Phonographic Performance Ltd v AEI Rediffusion Music Ltd [1999] 2 All ER 299, [1999] 1 WLR 1507, CA.

Tanfern Ltd v Cameron-MacDonald [2000] 2 All ER 801, [2000] 1 WLR 1311, CA.

Cross-appeal

By writ issued on 3 May 1996 the claimant, Sean McPhilemy, a journalist and managing director of Box Productions Ltd, sought damages for libel from the defendants, Times Newspapers Ltd, Liam Clarke and Andrew Neil, in relation to an article published in the Sunday Times on 9 May 1993 concerning a television programme, 'The Committee', produced by Box Productions and broadcast on Channel 4 on 2 October 1991, which had alleged the existence in Northern Ireland of a committee known as 'The Central Co-ordinating Committee' (The Committee) whose members were alleged to be co-conspirators in the assassination of suspected Republicans by Loyalist paramilitary

organisations. The article claimed that the programme was a hoax and suggested that the quality of its sources was so poor that no respectable broadcaster would have considered putting it out. On 21 December 1999 the claimant made, under CPR Pt 36, an offer to settle the action for, inter alia, a payment of £50,000 damages for the hurt and distress caused by the article. At a pre-trial review on the same day, he produced a document, purporting to be a notice under CPR Pt 14, stating that for the purpose of the proceedings he did not challenge the matters pleaded in

para 10A of the defendants' particulars of justification—namely that 'none of those identified … has ever conspired to commit any murders and are not members of any organisation such as The Committee described in the programme'—and that he did not put the defendants to proof of the same. However, that notice was subsequently withdrawn following a ruling by Eady J. On 30 March 2000, following a 38-day trial before Eady J and a jury and five days of jury deliberations, judgment was given for the claimant, on the jury's unanimous verdict, for general damages of £145,000. In giving their verdict, the jury found (1) that the article was defamatory of the claimant, (2) that the defendants had not proved on the balance of probabilities that there was no such Committee as described in the programme, (3) that they had not proved that the claimant had deliberately set out to mislead viewers as to the case put forward in the programme for the existence of The Committee, (4) that they had not proved on the balance of probabilities that the claimant had had been reckless as to the truth of the programme's allegations concerning the existence or activities of The Committee and (5) that they had not succeeded in proving that the article had been substantially accurate. The defendants appealed against the jury's award with permission of Eady J on the ground that the jury's second finding had been perverse, while the claimant cross-appealed against the judge's refusal to make orders, under CPR 36.21(2) and (3), for the payment of enhanced interest on the award and for indemnity costs. On 12 June 2001 the Court of Appeal ([2001] EWCA Civ 871, [2001] All ER (D) 90 (Jun)) dismissed the defendants' appeal and then proceeded to hear argument on the cross-appeal. The facts, so far as material to the cross-appeal, are set out in the judgment of Chadwick LJ.

James Price QC and *Matthew Nicklin* (instructed by *Bindman and Partners)* for the claimant.

Andrew Caldecott QC and *Caroline Addy* (instructed by *H2O Henry Hepworths)* for the defendants.

Cur adv vult

20 June 2001. The following judgments were delivered.

CHADWICK LJ

(giving the first judgment at the invitation of Simon Brown LJ).

[1]

The underlying facts which have given rise to these proceedings are set out in the judgment of Simon Brown LJ on the principal appeal. It is unnecessary for me to rehearse them. For the reasons which we gave on 12 June 2001, we dismissed the appeal of Times Newspapers Ltd and others (to whom, for convenience, I will refer in this judgment collectively as The Times or the defendants) against the order made by Eady J on 31 March 2000. We have now heard argument on the claimant's cross-appeal against so much of that order as dismissed his application under CPR 36.21. It is to that cross-appeal that the judgment which I now give relates.

[2]

CPR Pt 36 contains rules about offers to settle and the consequences—in particular, the consequences in relation to costs—where an offer to settle is made in accordance with its provisions. Rule 36.21 is in these terms:

> '(1) This rule applies where at trial—(a) a defendant is held liable for more; or (b) the judgment against a defendant is more advantageous to the claimant, than the proposals contained in a claimant's Part 36 offer.
>
> *[2001] 4 All ER 861 at 865*
>
> '(2) The court may order interest on the whole or part of any sum of money (excluding interest) awarded to a claimant at a rate not exceeding 10% above base rate for some or all of the period starting with the latest date on which the defendant could have accepted the offer without needing the permission of the court.
>
> '(3) The court may also order that the claimant is entitled to—(a) his costs on the indemnity basis from the latest date when the defendant could have accepted the offer without needing the permission of the court; and (b) interest on those costs at a rate not exceeding 10% above base rate.
>
> '(4) Where this rule applies, the court will make the orders referred to in paragraphs (2) and (3) unless it considers it unjust to do so …
>
> '(5) 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 or Part 36 payment was made; (c) the information available to the parties at the time when the Part 36 offer or Part 36 payment 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 or payment into court to be evaluated.
>
> '(6) Where the court awards interest under this rule and also awards interest on the same sum and for the same period under any other power, the total rate of interest may not exceed 10% above base rate.'

In that context and for the purposes of paras (2) and (3) of the rule, 'the latest date [on which/when] the defendant could have accepted the offer without needing the permission of the court' is prescribed by CPR 36.12. Where the offer is made not less than 21 days before the start of the trial, it means the date not later than 21 days after the offer was made.

[3]

It follows that, in a case where the claimant who has made a Pt 36 offer (which has not been accepted) is successful at trial, the court is required to consider whether the defendant has been held liable for more than the amount for which the claimant has offered to settle, or whether the judgment against the defendant is more advantageous to the claimant than the proposals contained in the offer to settle. If the outcome of the trial is that, to adopt the phrase commonly used in this context, the claimant has 'beaten' his own Pt 36 offer, then r 36.21 applies and the court is required to make an order for the payment of interest under para (2), and for the payment of costs under para (3), unless it considers it unjust to do so (see para (4)).

[4]

The offer relied upon by the claimant in the present case is contained in a letter dated 21 December 1999 which was sent by his solicitors to the solicitors acting for The Times. The terms of settlement proposed in that letter were as follows:

> '1. A payment of £50,000 damages to our client for the hurt and distress caused by the article; 2. damages for the financial losses incurred by our client to be assessed if not agreed; 3. a retraction and apology to be placed prominently in the pages of the Sunday Times in appropriate terms to be agreed with us on our client's behalf; 4. a statement in open court; 5. an undertaking not to repeat the libel; 6. all costs incurred up to the date of receipt of notice of acceptance of the offer as per rule 36.14.'

The letter concluded with a statement that those proposals were intended as a Pt 36 offer; that the offer would remain open for acceptance for a period of 21 days; and that the offer related to the whole of the claim in the action. The period of 21 days from 21 December 1999 came to an end on 11 January 2000.

[5]

CPR 36.5 sets out the requirements, as to form and content, which must be satisfied if proposals are to be treated as comprised in a Pt 36 offer for the purposes, inter alia, of r 36.21. It was not suggested before the judge—and it has not been submitted in this court—that those requirements were not satisfied. Nor has it been suggested that the other requirements in para (1) of r 36.21 were not satisfied. It is accepted that the fact that the claimant was awarded £145,000 by the jury in respect of general damages, as against the amount (£50,000) which he had offered to accept in the letter of 21 December 1999, suffices to satisfy sub-para (a) of that paragraph. It is unnecessary, therefore, to consider whether the judgment was more advantageous to the claimant than, for example, the lesser amount of general damages coupled with a retraction and an apology would have been. This is not a case in which it is said that sub-para (b) of r 36.21(1) has any relevance.

[6]

It follows, therefore, that the judge was required to make orders under paras (2) and (3) of r 36.21 unless satisfied that it was unjust to do so. The judge was satisfied that it would be unjust to make an order under para (2) for the payment of interest on the general damages awarded by the jury. He explained why he took that view in a short passage of the judgment which he gave on 30 March 2000:

> 'It is traditionally the case that the jury's award in libel takes account of everything down to the moment of their verdict, including any aggravation caused by the defendant's conduct of the trial. Accordingly, it has never been the case that damages for libel carry interest. It seems to me that it would be unjust to award interest on the sums fixed by the jury, whether from 13 January or at all. Special damages might well be treated differently in this respect, but that does not arise today.'

He was satisfied, also, that it would be unjust to make an order under para (3) of r 36.21 for indemnity costs. He referred to 'the unique circumstances of this case'. He expressed doubt whether, as a matter of construction, there was power under sub-para (b) of para (3) to make an order for the payment of interest on costs unless the costs themselves were the subject of an order under sub-para (a) of that paragraph. But, if there were power to do so, that is to say, power to order the payment of interest on costs which were to be assessed on the standard basis, he did not think it appropriate to exercise that power.

[7]

There is no doubt that the question whether or not it was unjust to make orders under paras (2) and (3) of r 36.21 was a question for the judge to determine in the exercise of his discretion. In exercising that discretion he was obliged to take into account all the circumstances of the case; including, in particular, the specific matters referred to in para (5) of that rule. If the judge took into account the matters which he ought to have taken into account, and left out of account matters which he ought not to have taken into account, it would be wrong in principle for this court to interfere with his decision. It could only do so if satisfied that the decision was so perverse that the judge must have fallen into error. This court must respect the judge's exercise of the discretion which has been entrusted to him. The court must resist the temptation to substitute its own view for that of the judge unless satisfied that his discretion has been exercised on a basis which is

wrong in law; or that the conclusion which he has reached is so plainly wrong that his exercise of the discretion entrusted to him must be regarded as flawed.

[8]

I turn, then, to examine the basis upon which the judge reached his conclusion that it would be unjust to make any order under paras (2) and (3) of r 36.21. He identified four reasons which may be summarised as follows: (i) the proximity of the trial when the offer was made; (ii) the fact that the defendants were funding the preparations for trial of the claimant's action, in particular, in connection with the compilation and copying of the trial bundles; (iii) what the judge described as 'an unusual public interest element', in that the defendants were taking on the burden of proving that the committee of alleged conspirators did not exist; and (iv) the fact, described by the judge as being 'of great significance', that the Pt 36 offer, contained in the letter of 21 December 1999, required the defendants to publish a retraction and apology in their newspaper and also to join in a statement in open court. But, having identified, and elaborated upon, those reasons, the judge said:

> 'The question is whether in these unusual circumstances I consider that it would be unjust to follow the modern presumption in favour of indemnity costs, which still carries something of a stigma and is bound to be interpreted as an indication of the court's disapproval of the defendant's conduct.'

That passage reflected an observation earlier in the judgment, that an order for indemnity costs 'might be thought to carry punitive overtones'.

[9]

In my view the judge was wrong to take into account—as, plainly, he did—his belief that an order for the payment of costs on the indemnity basis made under r 36.21(3) implied disapproval by the court of a defendant's conduct; carried some stigma; or could properly be regarded as punitive. It is, to my mind, clear from the structure and language of r 36.21, and, in particular, from para (4) of that rule, that an order for the payment of costs on an indemnity basis (from the latest date when the defendant could have accepted the offer without needing the permission of the court) is the order which the court can be expected to make in a case where a claimant who has made a Pt 36 offer is, nevertheless, obliged to proceed to trial, because the defendant does not accept the offer, and then beats his own offer at trial. In those circumstances, it is only where the court considers that such an order would be unjust that it is permitted to refuse an order for the payment of costs on an indemnity basis. To make the order carries no implied disapproval of the defendant's conduct; nor any stigma. Properly understood, the making of such an order in a case to which r 36.21 applies indicates only that the court, when addressing the task which it is set by that rule, has not considered it unjust to make the order for indemnity costs for which the rule provides.

[10]

In *Petrotrade Inc v Texaco Ltd* [2001] 4 All ER 853 this court explained why an order for the payment of indemnity costs, made under r 36.21, should not be regarded as penal. Lord Woolf MR, with whom the other members of the court (Clarke and Latham LJJ) agreed, said (at 856):

> '62. However, it would be wrong to regard the rule as producing penal consequences. An order for indemnity costs does not enable a claimant to receive more costs than he has incurred. Its practical effect is to avoid his costs being assessed at a lesser figure. When assessing costs on the standard basis the court will only allow costs “which are proportionate to the matters in issue” and [will] “resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in
>
> *[2001] 4 All ER 861 at 868*
>
> favour of the paying party”. On the other hand, where the costs are assessed on an indemnity basis, the issue of proportionality does not have to be considered. The court only considers whether the costs were unreasonably incurred or for an unreasonable amount. The court will then resolve any doubt in favour of the receiving party. Even on an indemnity basis, however, the receiving party is restricted to recovering only the amount of costs which have been incurred (see CPR 44.4 and 44.5).
>
> '63. The ability of the court to award costs on an indemnity basis and interest at an enhanced rate should not be regarded as penal because orders for costs, even when made on an indemnity basis, never actually compensate a claimant for having to come to court to bring proceedings. The very process of being involved in court proceedings inevitably has an impact on a claimant, whether he is a private individual or a multi-national corporation. A claimant would be better off had he not become involved in court proceedings. Part of the culture of the CPR is to encourage parties to avoid proceedings unless it is unreasonable for them to do otherwise. In the case of an individual, proceedings necessarily involve inconvenience and frequently involve anxiety and distress. These are not taken into account when assessing costs on the normal basis. In the case of a corporation, corporation senior officials and other staff inevitably will be

> diverted from their normal duties as a consequence of the proceedings. The disruption this causes to a corporation is not recoverable under an order for costs.
>
> '64. The power to order indemnity costs or higher rate interest is a means of achieving a fairer result for a claimant. If a defendant involves a claimant in proceedings after an offer has been made, and in the event, the result is no more favourable to the defendant than that which would have been achieved if the claimant's offer had been accepted without the need for those proceedings, the message of r 36.21 is that, prima facie, it is just to make an indemnity order for costs and for interest at an enhanced rate to be awarded. However, the indemnity order need not be for the entire proceedings nor, as I have already indicated, need the award of interest be for a particular period or at a particular rate. It must not however exceed the figure of 10% referred to in Pt 36.'

The guidance contained in those paragraphs was not available until the end of May 2000; in particular, it was not available to Eady J on 30 March 2000, when he made his order in the present case.

[11]

It follows that this is a case in which the basis on which the judge exercised his discretion can now be seen to have been flawed. The judge thought, wrongly, that the order for indemnity costs which he was invited to make under r 36.21 was punitive in nature; and would be seen as indicating some measure of disapproval of the defendants' conduct which he did not regard as merited and which he did not intend. Those considerations were unfounded and should have been left out of account. This, then, is a case in which this court is entitled, indeed, bound, to set aside the view reached by the judge; and to form its own view on the question whether it would be unjust to make the orders for which paras (2) and (3) of r 36.21 provide.

[12]

The Times, as respondents to this cross-appeal, rely on the factors identified by the judge and to which I have already referred. First, it is said that the Pt 36 offer was made at a very late stage in the proceedings. It was, in fact, made just 21 days before the trial was due to begin (on 11 January 2000); although, in the event, the commencement of the trial was postponed, for other

reasons, until 25 January 2000. It is plain that the stage of the proceedings at which a Pt 36 offer is made is a factor which a court must take into account; see para (5)(b) of r 36.21. But, as it seems to me, the fact that the offer is made in the month before the trial cannot, of itself and without more, be a reason for holding that it is unjust to make orders under paras (2) and (3) of that rule. It is important to keep in mind that the orders for which those paragraphs provide have effect only from the latest date when the defendant could have accepted the offer without needing the permission of the court. So, in a case (such as the present) where the Pt 36 offer is made more than 21 days before the start of the trial, orders under paras (2) and (3) cannot relate to costs incurred or interest accruing before 12 January 2000. They cannot relate to any period before the offer was made; and they allow, necessarily, for a period of at least 21 days following the offer, during which The Times had the opportunity to consider whether or not to accept the offer or to seek clarification of its terms. It is not difficult to imagine circumstances in which it would be unjust to make orders under paras (2) and (3) of r 36.21 because the offer was made so late that a defendant had no proper opportunity to consider it; but, making due allowance for the intervention of the Christmas holidays and millennium celebrations, I am not persuaded that that was the position in the present case. Nor is it difficult to imagine circumstances in which it might be unjust to make orders under those paragraphs because the offer was made so late that the costs already incurred were (in proportion to the costs yet to be incurred) such that there was little to be saved by bringing the proceedings to an end at that stage. But, again, that is not this case. In my view, the

fact that the offer was made at a late stage in the proceedings, although a factor which the court must take into account, does not support the conclusion, in the present case, that it would be unjust to make orders under paras (2) and (3) of r 36.21.

[13]

Second, it is said that it was unjust to make orders under r 36.21 in the circumstances that the defendants' solicitors had taken upon themselves the burden of preparing the bundles for trial. For my part, although we were told that there was a limited concession below that the point had some relevance, I find that submission difficult to understand. It was not pressed in argument before us; and I need say little about it. It is sufficient, I think, to point out that, because the defendants' solicitors took upon themselves the burden of preparing bundles for trial, there can be little or no element in the claimant's costs (whether assessed on the standard or on the indemnity basis) which can relate to the preparation of bundles; and that, if the defendants' solicitors had not taken that burden upon themselves, then an amount equivalent to the costs which they incurred in carrying out that exercise would have been incurred by the claimant's solicitors and would have been recoverable from the defendants under an order for costs in the event (which happened) that the claimant succeeded in the action. The most that can be said, as it seems to me, is that The Times have had to pay their own solicitors, sooner and on an 'own client' basis, for work for which they would otherwise have had to reimburse the claimant, later and on a standard basis. I cannot think that that factor should lead to the conclusion that it would be unjust to make orders under paras (2) and (3) of r 36.21.

[14]

Third, The Times rely upon what they describe as 'public interest and the problems of acceptance'. Their submissions elide what the judge regarded as distinct points: (a) that there was an unusual public interest element in the sense that The Times were taking on the burden of proving that the supposed Committee of conspirators referred to in the programme and in the claimant's book did not

exist; and (b) that the offer in the letter of 21 December 1999 required The Times to publish a retraction and apology, and to join in a statement in open court. In relation to those points the judge said:

> 'Had the defendants accepted the offer suddenly put before them on 21 December the overwhelming inference to be drawn from that by interested observers would be … that the supposed members of The Committee did not have the resolve to come to court and face their accuser. That might have been reasonably thought by the Sunday Times to be unfair to the individuals concerned and also to be contrary to public interest in having a full and open resolution of these issues. Fourthly, and of great significance, the offer of 21 December required the defendants to publish a retraction and apology in their newspaper and also to join in a statement in open court. In the light of the defendants' strongly held views about the programme and the evidence to be adduced at trial from the alleged Committee members, it is inconceivable that they would have consented to take those steps.'

[15]

It is necessary to have in mind that the Pt 36 offer was made at a time when the claimant was seeking, by means of the Pt 14 notice which was served on the same day, to litigate his defamation claim on the basis that he did not challenge the assertion, in para 10A of The Times' particulars of justification, that the supposed Committee did not exist. At the pre-trial review on 21 December 1999 the claimant sought an order that the alleged members of The Committee should not be called to give evidence; on the basis that there was no longer an issue to which their evidence could relate. In those circumstances, as it seems to me, the

claimant could not have insisted on any published retraction or apology, or on any statement in open court, which did not, in terms, make it clear that, far from the supposed members of The Committee being unwilling to face their accuser (as the judge put it), it was the claimant who did not wish to challenge the evidence which they were expected to give. I accept, of course, that if the claimant had sought to insist on a retraction and apology, or on a statement in open court, which did not make that clear, then it might well have been unjust to make orders under paras (2) and (3) of r 36.21 on the basis that the offer was one which (with hindsight) should have been accepted. But the terms of the retraction and apology which the claimant sought, or would have been prepared to accept, were never explored. Those matters were never explored because The Times chose not to respond to the offer letter of 21 December 1999. It was unreal to expect that Mr McPhilemy would, himself, make a statement withdrawing the allegations which he had made; and, in those circumstances, The Times was determined to have a decision on the question whether or not the supposed Committee did exist. Had the terms of the retraction and apology which the claimant would have been prepared to accept (or could have been prevailed upon to accept) in order to settle these proceedings been explored, the position might now appear in a different light. But the opportunity to expose the offer as one which The Times could not, in fairness to the alleged members of The Committee, accept was not taken; and, in those circumstances, I am not persuaded that the compromise of this defamation action which was on offer on 21 December 1999 could not have been presented to interested and informed observers in such a way as to make it clear that any inference that the alleged Committee members were unwilling to face the claimant in court would be wholly unfounded.

[16]

Nor am I persuaded that there was any public interest to be served in insisting on a trial in order to have 'a full and open resolution of these issues'.

[2001] 4 All ER 861 at 871

To take the view that a defamation action between a journalist and a newspaper— in which the real issue was whether the journalist had acted honestly and responsibly on the basis of the information which he claimed to have received from his sources, and to which the alleged Committee members were not parties— was a suitable vehicle for 'a full and open resolution' of the question whether there was, in Northern Ireland at the relevant time, something approaching an institutional conspiracy amongst so-called Loyalists to assassinate Republicans was, as it seems to me, misconceived from the outset. In making that observation I intend no criticism of the decision to permit the issue to be raised by The Times as an element in the defence of justification. I do no more than point out that, whatever decision the jury reached if the issue was left to them, it was never likely that there would have been 'a full and open resolution' of matters which were never capable of being fully resolved in private litigation of this nature.

[17]

There is, however, force in the final point advanced on behalf of The Times; that is to say, that it is established practice, in defamation cases, for the court to refuse to direct the payment of interest, in respect of any period prior to the date of the award, on the amount of the jury's award. The justification for that practice is that the amount of the jury's award takes account of everything down to the date of the award, including, in particular, the strain and distress caused to the claimant by the conduct of the trial and the fact that the claimant has had to wait for payment of the compensation to which he has ultimately been held entitled. It is said that it would be unjust to order the payment of interest, under para (2) of r 36.21, on any part of the jury's award in the present case, at least in respect of any period prior to the date of the award, because it has to be assumed: (i) that the award itself includes an element which reflects the loss to the claimant equivalent to the actual or notional cost of being kept out of the monetary compensation, which (on the hypothesis that the libel had been established) he should have had immediately after the libel was published, by the delay occasioned by legal proceedings and a trial; and (ii) that the award itself takes account of the anxiety and distress of the proceedings and trial to which Lord Woolf MR referred in the *Petrotrade* case. To order the

payment of interest under para (2), in respect of any period prior to the date of the award, would involve double compensation.

[18]

I find that final point persuasive. In order to explain why, it is necessary, I think, to return to an examination of the purposes for which the powers in paras (2) and (3) of r 36.21 have been conferred.

[19]

It is plain, as Lord Woolf MR pointed out in the *Petrotrade* case, that paras (2) and (3) of r 36.21, in conjunction with para (4), are intended to provide an incentive to a claimant to make a Pt 36 offer. The incentive is that a claimant who has made a Pt 36 offer (which is not accepted) and who succeeds at trial in beating his own offer stands to receive more than he would have received if he had not made the offer. Conversely, a defendant who refuses a Pt 36 offer made by a claimant and who fails to beat that offer at trial is at risk of being ordered to pay more than he would have been ordered to pay if the offer had not been made. But those incentives have to be set in the context that, as this court emphasised in the *Petrotrade* case, r 36.21 is not to be regarded as producing penal consequences. The powers conferred by the rule, to order indemnity costs or a higher rate of interest, are intended to provide 'a means of achieving a fairer result for a claimant' (see para 64 in Lord Woolf MR's judgment ([2001] 4 All ER 853 at 856), to which I have already referred). Exercise of the powers cannot achieve 'a fairer result' if it leads to the claimant receiving more than can properly be regarded as a full and complete recompense for having to resort to, to pursue and to endure

the strain and anxiety of legal proceedings. An exercise of the powers which led to the claimant receiving more than could properly be regarded as compensation, in that enlarged sense, would, necessarily in my view, be penal in nature. It could only be supported on the basis that there was a need to punish the defendant by requiring him to pay an amount which went beyond any amount needed to compensate the claimant. But, subject to the limitation that the powers are intended to be used in order to achieve a fairer result for the claimant and not to punish the defendant, it is plain that they are to be used in order to redress elements, otherwise inherent in the legal process, which can properly be regarded as unfair.

[20]

Two of those elements—which many would regard as obviously unfair— were identified by Lord Woolf MR in the *Petrotrade* case. First, an award of costs on the standard basis will, almost invariably, lead to the successful claimant recovering less than the costs which he has to pay to his solicitor. So, although he has been successful, he is out of pocket. Costs on an indemnity basis should avoid that element of unfairness. Second, neither costs on an indemnity basis nor interest awarded under s 35A of the Supreme Court Act 1981 will compensate the successful claimant for the inconvenience, anxiety and distress of proceedings or (where the claimant is a corporation) the disruption caused by the diversion of senior management from their normal duties. Interest at an enhanced rate, that is to say at a rate which is higher than the rate which would otherwise be ordered, under s 35A of the 1981 Act, may redress that element of unfairness. It is pertinent to note that para (6) of r 36.21 expressly recognises that the court may make an order for the payment of interest under para (2) notwithstanding that it also orders the payment of interest on the same sum and for the same period under some other power—of which the power under s 35A of the 1981 Act is an obvious example. Paragraph (6) imposes an overall limit of 10% above base rate.

[21]

I conclude, therefore, that the power to award interest under para (2) of r 36.21 at an enhanced rate—that is to say, at a rate higher than the rate (if any) which would otherwise be chosen under s 35A of the 1981 Act—is conferred in order to enable the court, in a case to which r 36.21 applies, to redress the element of perceived unfairness, otherwise inherent in the legal process, which arises from the fact that damages, costs (even costs on an indemnity basis) and statutory interest will not compensate the successful claimant for the inconvenience, anxiety and distress of having to resort to and pursue proceedings which he had sought to avoid by an offer to settle on terms which (as events turned out) were less advantageous to him than the judgment which he achieved. But, if that is the purpose for which the power has been conferred, then it should not be used to award interest in a case where it must be assumed that the anxiety, inconvenience and distress of defamation proceedings have already been taken into account by the jury in reaching their award. To order the payment of interest on the amount of the award, in respect of any period prior to the date of the award, would be to risk introducing an element of double compensation. It would be to risk crossing the boundary which separates compensation from punishment.

[22]

An order, under para (3) of r 36.21, for the payment of costs on an indemnity basis does not give rise to a risk of double compensation. The purpose for which the power to order the payment of costs on an indemnity basis is conferred, as it seems to me, is to enable the court, in a case to which r 36.21 applies, to address the element of perceived unfairness which arises from the fact that an award of costs on the standard basis will, almost invariably, lead to the successful claimant recovering less than the costs which he has to pay to his

solicitor. The jury, in reaching their award of damages, are not concerned with costs; and there is no reason to think that their award takes any account of the probable shortfall if costs are subsequently ordered on the standard basis. In my view, therefore, there is no injustice in making an order, under para (3)(a) of r 36.21, that the claimant is entitled to his costs on the indemnity basis from the latest date when The Times could have accepted his Pt 36 offer without needing the permission of the court. In the present case that date is 11 January 2000.

[23]

Nor do I see any injustice, in principle, in an order under para (3)(b) of r 36.21 for the payment of interest on the costs which are the subject of the order which I would make under para (3)(a). The purpose for which the power to order interest on costs under that paragraph is conferred is, I think, plain. It is to redress, in a case to which r 36.21 applies, the element of perceived unfairness which arises from the general rule that interest is not allowed on costs paid before judgment (see *Hunt v R M Douglas (Roofing) Ltd* [1988] 3 All ER 823 at 833, [1990] 1 AC 398 at 415). So, in the ordinary case, the successful claimant who has made payments to his own solicitor on account of costs in advance of the trial will be out of pocket even if he obtains, at the trial, an order for costs on an indemnity basis. He will get interest on his costs from the date of the order (whether he has actually paid them or not); but he will get nothing to compensate him for the cost of money (or the loss of the use of money) which he has had to bear before trial in relation to payments which he has made on account of costs. An order under para (3)(b) of r 36.21 enables the court to achieve a fairer result in that respect. Accordingly, having regard to the point which, as it seems to me, para (3)(b) is intended to meet, I would order payment of interest at a rate which reflects (albeit generously) the cost of money, say, 4% over base rate; and I would direct that interest runs, on the costs to which the order applies, from the date upon which the work was done or liability for disbursements was incurred.

[24]

I have not yet addressed the question whether it would be right to order interest after judgment, either (i) under para (2) of r 36.21, on the award of damages, or (ii) under para (3)(b) of that rule, on the costs which I would make the subject of an order under para (3)(a). In my view paras (2) and (3)(b) of r 36.21 are not intended to confer on the court powers to vary the rate at which interest is payable on a judgment debt pursuant to s 17 of the Judgments Act 1838. An order for costs is a judgment debt for the purposes of the 1838 Act (see *Thomas v Bunn*, *Wilson v Graham, Lea v British Aerospace plc* [1991] 1 All ER 193, [1991] 1 AC 362). The power to fix the rate at which interest is payable on judgment debts has been conferred on the Lord Chancellor by s 44 of the Administration of Justice Act 1970 and is exercisable by him with the concurrence of the Treasury. I can see no reason why Parliament should have intended to confer on the courts—indirectly through rules made by the Civil Procedure Rules Committee under s 1(1) of the Civil Procedure Act 1997—power to vary in individual cases a rate fixed under the 1970 Act; nor any reason why a power to fix the rate at which interest is payable on judgment debts could be required for the purpose of 'securing that the civil justice system is accessible, fair and efficient' (see s 1(3) of the 1997 Act). Nor can I see why a party who fails to pay a judgment debt, which (ex hypothesi) the court has ordered that he should pay, should pay more, or less, interest on that debt because, in the litigation which has led to that order, the other party has, or has not, made an offer to which r 36.21 applies. The point was not addressed at any length in the argument on the cross-appeal; but, for my part, I am not persuaded that the court has power to make an order under para (2) of r 36.21 for the payment of interest on the amount of the jury's award in respect

of any period after judgment; or to make an order under para (3)(b) for the payment of interest on costs in respect of any period after judgment.

[25]

It follows, therefore, that I would allow the cross-appeal to the extent which I have indicated. I would direct that the claimant is entitled to his costs on the indemnity basis from 12 January 2000 (which is the date for which he contends); and to interest on those costs at the rate of 4% above base rate from the date upon which the work was done or liability for a disbursement was incurred until 30 March 2000, that being the date of judgment. Interest thereafter, on damages and costs, will be payable at the judgment rate, under s 17 of the 1838 Act, in the ordinary course.

[26]

I should add that I have had the advantage of reading, in advance, the judgment which Simon Brown LJ is to hand down. I agree with him, for the reason which he gives, that the costs of the principal appeal should be paid by The Times on the indemnity basis.

LONGMORE LJ.

[27]

I agree with the judgments of both the other members of the court.

SIMON BROWN LJ.

[28]

I agree with all that Chadwick LJ has said with regard to the claimant's cross-appeal and with the order he proposes. The judge below, without the benefit of this court's judgment in *Petrotrade Inc v Texaco Ltd* [2001] 4 All ER 853, wrongly directed himself that an indemnity costs order under CPR 36.21 is of a penal nature and implies condemnation of the defendant's conduct and so would be unjust unless the defendants have behaved unreasonably in continuing the litigation after the offer. That misunderstands the rationale of the rule. It is not designed to punish unreasonable conduct but rather as an incentive to encourage claimants to make, and defendants to accept, appropriate offers of settlement. That incentive plainly cannot work unless the non-acceptance of what ultimately proves to have been a sufficient offer ordinarily advantages the claimant in the respects set out in the rule. Given that in a defamation action it would generally be unjust to award interest on the damages, let alone at an enhanced rate, it becomes even more important that a r 36.21 order is made as to costs, irrespective of whether or not the claimant is represented under a conditional fee arrangement. Otherwise the rule will simply become ineffective in this area of litigation, an area where to my mind it should play a prominent part.

[29]

When dismissing the principal appeal, we left over for decision whether Times Newspapers Ltd should pay the claimant's costs of that appeal on a standard or an indemnity basis. Clearly rather more of a stigma attaches to an indemnity costs order made in this context than in the context of a r 36.21 offer, although even then no moral condemnation of the defendants' lawyers is necessarily implied (see *Wall v Lefever* [1998] 1 FCR 605 at 617). In my judgment, however, an indemnity costs order is certainly appropriate in the circumstances of The Times' appeal here: as our judgments on that appeal make plain, to have permitted the defendants to argue their case on perversity must inevitably have brought the administration of justice into disrepute among right thinking people. I understand Chadwick and Longmore LJJ to agree with this view. We accordingly dismiss the principal appeal with costs on an indemnity basis.

Cross-appeal allowed in part.

Dilys Tausz Barrister.