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Case No: QB-2019-003580

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5th December 2022

Before:

HIS HONOUR JUDGE TINDAL
(Sitting as a Judge of the High Court)

- -

Between:

DOROTHY MORADI	**Claimant**
- and –	
THE HOME OFFICE	**Defendant**

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

The Litigation

1. This is my short judgment on costs following the last-minute settlement of this claim just before 5pm on Friday 14th October 2022. This was the working day before trial was due to start before me at the Royal Courts of Justice on Monday 17th October 2022. On the latter, I approved a *Tomlin* Order which vacated the trial and settled the claim on terms that the Defendant would pay the Claimant £15,000 in full and final settlement and also pay the Claimant's costs. However, as the nature of the costs order was not agreed, the order provided that would be dealt with on papers after written submissions.

2. Of course, all Courts welcome all settlements. But some settlements are more welcome than others. This particular settlement, at the last possible moment, effectively wasted two days of valuable Court time which could not be used for other work. It also did not even resolve proceedings as it left costs wide open – and the parties were miles apart in written submissions on 14th November. So, I gave an initial judgment with a provisional 'middle way' on 16th November but invited submissions I received on 28th November. For ease, I have incorporated my original judgment into this final one.

3. By way of brief context, the Claimant is a German national who was convicted and imprisoned in the UK for an immigration offence in 2017 and made subject to a notice of intention to deport. She was released part-way through her sentence and returned to Germany. But she returned to the UK on 14th May 2018 to pursue her appeal against deportation and was detained by the Defendant under immigration powers. Her appeal was allowed and on 4th July 2018 she was transferred to the custody of the Ministry of Justice ('MOJ') who released her on 8th October 2018: in total 46 days' imprisonment.

4. A year later, on 8th October 2019, the Claimant issued a Claim Form against the Defendant and the MOJ claiming unlawful detention. In her Particulars of Claim served on 3rd July 2020, she claimed she was kept in custody longer than she should have been as the Defendant had detained her without promptly transferring her to the custody of the MOJ to continue serving her sentence; and had it done so she would have been released earlier. The statement of value in her Claim Form totalled £30,000. On 5th August 2020, the MOJ entered a Defence admitting unlawful detention from 5th-8th October 2018 but otherwise denying it. On 20th August 2020, the Defendant's Defence denied liability completely, on the basis its own detention was lawful and it could not be liable for causing allegedly unlawful detention by another public authority.

5. I understand that 'routine' detention claims issued in the Royal Courts of Justice are frequently transferred to the Central London County Court. However, this case was not transferred as it was not routine – as reflected in a 24-page trial Skeleton from the Claimant and a 19-page one from the Defendant - raising issues of some complexity. Indeed, whilst the Claimant's costs submissions pre-empted an argument that the claim should have been brought in the County Court, the Defendant did not then argue that. This is relevant to the conduct of the claim by all three parties. For the Claimant, the claim was really about compensation, but it had wider implications for the defendants.

6. In Autumn 2020, the parties filed Costs Budgets with some considerable disparity: the MOJ's budget was c.£35,000, the Defendant's initial budget was c.£27,000 (although Hill J in September 2022 approved it at c.£70,500) but the Claimant's was just under £100,000, in September 2022 approved by Hill J at £94,467.69. There are three points from this. Firstly, the size of the Claimant's initial cost budget relative to the value of the claim of £30,000 and their own initial budgets meant the defendants had considerable incentive to settle early. Secondly, the fact that Hill J just before trial approved budgets far in excess of the claim value is some indication that she herself viewed the claim as complex. Thirdly, this disparity between costs and claim value also explains why the claim itself settled but there is such a trenchant argument on costs.

7. Be that as it may, the Claimant at an early stage was keen to settle and on 27th May 2021 proposed mediation. The CCMC listed for 24th August 2021 was vacated and the claim was stayed until 30th November for the parties to mediate. It appears common ground that the Defendant agreed to mediate and in fact did so with the Claimant, but it was unsuccessful. No doubt it did not help that even though the MOJ admitted liability, it refused to mediate. Had the MOJ still been a party before me, it would have questions to answer about that. In any event, the case did not resolve and on 30th November 2021, the Defendant made a Part 36 Offer to settle the Claimant's claim against it for £10,000 That Part 36 offer was not accepted and expired on 21st December 2021. As I will explain below, the Defendant proposes a split costs order before and since that date. As the Defendant points out, not only did the Claimant not accept its Part 36 Offer, it made no counter-offer until 23rd September 2022 – nine months later and less than a month before trial on 17th October. The Claimant's costs submissions do not explain why, having initially proposed settlement, she then did not pursue it for nine months. That fact is central to the costs issue in this case.

8. Instead, in those intervening nine months, the Claimant lodged an application to amend the Particulars of Claim to address points the Defendant made in its Defence, but not to amend the statement of value of £30,000. For reasons which are unclear, this was not listed by the Court until December 2022, after the proposed trial date and so was abandoned. In accordance with the August 2021 directions (as slightly varied), the parties undertook disclosure in March 2022 and exchange of witness statements in May. Yet still no offer was forthcoming from the Claimant (or indeed either defendant).

9. However, the pre-trial review listed before Hill J on 26th September 2022 did prompt the Claimant finally to re-engage with settlement. On 23rd September, the Claimant settled her claim against the MOJ in the sum of £1,000 (presumably reflecting its admitted unlawful detention of a few days) plus costs of £1,250. On that date the Claimant also made a liability-only Part 36 Offer which the (now only remaining) Defendant rejected. As noted above, at that PTR, Hill J effectively approved the Claimant's budget at £94,467.69 (the Defendant says it should have been £91,437) and in response to the Defendant's application for approval of an increased costs budget, Hill J on 12th October on the papers approved it in the sum of £70,505.03. In the meantime, on 30th September 2022 the Claimant made a Part 36 Offer to settle for £40,000: £10,000 more than the statement of value in the Claim Form. Unsurprisingly, the Defendant did not accept it. On 5th October, in a without prejudice discussion, the Claimant's solicitor asked the Defendant's solicitor whether they would be prepared to settle between £10,000 and £20,000 and the latter suggested the Claimant make an offer. However, the Claimant did not and so the Defendant prepared for trial. Had the matter settled then, not only would the Defendant have been spared that expense, there would have been sufficient time for the Court to place other work instead of the trial.

10. Nevertheless, on Thursday 13th October, two working days before trial, the Defendant tried again, making a revised Part 36 offer of £15,000. The next day, the last day before trial at around noon, the Claimant made her own revised Part 36 Offer of £22,500 – her first in the proceedings under the stated value in the Claim Form. The Defendant rejected it and the Claimant revised her offer to £18,000 which again the Defendant rejected. The Claimant finally accepted the Defendant's offer of £15,000 shortly before 5pm on 14th October. The Court was notified the trial would not proceed but I directed the parties file a consent order. This was lodged on 17th October with costs still in dispute and the timetable for written submissions and paper resolution detailed above.

The Principles

11. Surprisingly, neither party's submissions took me to the rule specifically governing the costs consequences of acceptance of a Part 36 Offer: CPR 36.13 which materially states

> "*(1) Subject to paragraphs (2) and (4)….where a Part 36 offer is accepted within the relevant period the claimant will be entitled to the costs of the proceedings… up to the date on which notice of acceptance was served on the offeror.*
>
> *(3) Except where recoverable costs are fixed by these Rules, costs under paras (1) and (2) are…assessed on the standard basis if the amount of costs is not agreed.*
>
> *(4) Where— (a) a Part 36 offer which was made less than 21 days before the start of a trial is accepted; or (b) a Part 36 offer which relates to the whole of the claim is accepted after expiry of the relevant period; or (c)...a Part 36 offer which does not relate to the whole of the claim is accepted at any time, the liability for costs must be determined by the court unless the parties have agreed the costs.*
>
> *(5) Where paragraph (4)(b) applies but the parties cannot agree the liability for costs, the court must, unless it considers it unjust to do so, order that— (a) the claimant be awarded costs up to the date on which the relevant period expired; and (b) the offeree do pay the offeror's costs for the period from the date of expiry of the relevant period to the date of acceptance.*
>
> *(6) In considering whether it would be unjust to make the orders specified in paragraph (5), the court must take into account all the circumstances of the case including the matters listed in rule 36.17(5).*"

12. Clearly, this case falls into CPR 36.13(4)(a): where '*A Part 36 offer which was made less than 21 days before the start of a trial is accepted'*. However, unlike late acceptance of a Part 36 Offer at an earlier stage of proceedings, CPR 36.13 does not lay own specific consequences of acceptance within 21 days of trial. It simply states: '*the liability for costs must be determined by the court unless the parties have agreed'*. There is no 'steer' as to the approach to be taken in those circumstances, indeed CPR 36.13(3) standard basis assessment does not even explicitly apply to costs under (4)(a). Nor is there any real help to be found in the authorities or in the White Book.

13. Nevertheless, in my judgment, this lack of a 'steer' on CPR 36.13(4)(a) does not mean that 'anything goes' for the Court to determine costs on acceptance of a Part 36 Offer

just before trial. Whilst CPR 36 is a 'self-contained code', where, as here, it is silent as to costs consequences, it should be applied consistently and in harmony with CPR 44.

14. CPR 44.2 on the Court's general approach to costs states so far as material:

> "*(1) The court has discretion as to (a) whether costs are payable by one party to another; (b) the amount of those costs, and (c) when they are paid.*
>
> *(2) If the court decides to make an order about costs: (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but (b) the court may make a different order….*
>
> *(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including (a) the conduct of all the parties; (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful, and (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.*
>
> *(5) The conduct of the parties includes: (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed…any relevant pre-action protocol; (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; (c) the manner in which a party has pursued or defended its case or a particular allegation or issue, and (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.*
>
> *(6) The orders which the court may make under this rule include an order that a party must pay (a) a proportion of another party's costs; (b) a stated amount in respect of another party's costs; (c) costs from or until a certain date only; (d) costs incurred before proceedings have begun; (e) costs relating to particular steps taken in the proceedings; (f) costs relating only to a distinct part of the proceedings, and (g) interest on costs from or until a certain date, including a date before judgment….*"

15. The Claimant referred me to a familiar case on the application of CPR 44.2 generally: *Fox v Foundation Piling [2011] 6 Costs LR 961 (CA)*. In *Fox*, a personal injury claimant originally pleaded a claim at just under £300,000 and rejected an offer of £23,550. However, a year later, following disclosure of video surveillance evidence, he accepted an offer of £31,700. The first-judge instance judge found the defendant was

the successful party from the point of the rejected offer. The Court of Appeal allowed the appeal and found the claimant was the successful party throughout. Jackson LJ said:

> "*62. There has been a growing and unwelcome tendency by first instance courts and, dare I say it, this court as well to depart from the starting point set out in rule 44.3(2)(a) too far and too often. Such an approach may strive for perfect justice in the individual case, but at huge additional cost to the parties and at huge costs to other litigants because of the uncertainty which such an approach generates. This unwelcome trend now manifests itself in a (a) numerous first instance hearings in which the only issue is costs and (b) a swarm of appeals …. 46. A not uncommon scenario is that both parties turn out to have been over-optimistic in their Part 36 offers. The claimant recovers more than the defendant has previously offered to pay, but less than the claimant has previously offered to accept. In such a case the claimant should normally be regarded as "the successful party" within rule 44.3(2). The claimant has been forced to bring proceedings in order to recover the sum awarded. He has done so and his claim has been vindicated to that extent.*
>
> *47. In that situation the starting point is the successful party should recover its costs from the other side: CPR 44.3(2)(a). The next stage is to consider whether any adjustment should be made to reflect issues on which the successful party has lost or other circumstances. An adjustment may be required to reflect the costs referable to a discrete issue which the successful party has lost. An adjustment may also be required to compensate the unsuccessful party for costs it was caused to incur by reason of unreasonable conduct [by] the successful party.*
>
> *48. In a personal injury action the fact the claimant has won on some issues and lost on others is not normally a reason for depriving the[m] of part of his costs…*
>
> *49. Nevertheless in other cases (as stated above) the fact that the successful party has failed on certain issues may constitute a good reason for modifying the costs order in his favour. This is commonly achieved by awarding the successful party a specified proportion of its costs. In Widlake v BAA [2009] EWCA Civ 1256, the facts were so extreme the successful party was ordered to bear all its own costs*."

16. In *Widlake* the Claimant had deliberately concealed her medical history and exaggerated her claim (in a situation which today would be tantamount to 'fundamental dishonesty') and although she beat the defendant's offer, there was no order as to costs.

That deliberate exaggeration was plainly 'conduct' within (now) CPR 44.2(5) and the Court has to consider the extent to which such 'conduct' caused additional costs.

17. Another aspect of CPR 44.2(5) 'conduct' is failure to negotiate by the successful party. The Defendant referred to *Halsey v Milton Keynes [2004] EWCA Civ 576* ps.16/20:

> "*The question whether a party has acted unreasonably in refusing ADR must be determined having regard to all the circumstances of the particular case. We accept the submission of the Law Society that factors which may be relevant to the question whether a party has unreasonably refused ADR will include (but are not limited to) the following: (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success. We consider these in turn. We wish to emphasise that in many cases no single factor will be decisive, and that these factors should not be regarded as an exhaustive check-list…. [As to (c)]…[t]he fact that settlement offers have already been made, but rejected, is a relevant factor. It may show that one party is making efforts to settle, and that the other party has unrealistic views of the merits of the case. But it is also right to point out that mediation often succeeds where previous attempts to settle have failed. Although the fact that settlement offers have already been made is potentially relevant to the question whether a refusal to mediate is unreasonable, on analysis it is in truth no more than an aspect of (f).*"

18. Whilst I was not referred to it, in *PGF v OMFS [2014] 1 WLR 1386 (CA)*, Briggs LJ (as he then was) held a refusal of ADR or even more seriously refusal even to discuss ADR (unless on reasonable grounds) is generally unreasonable CPR 44.2(5) 'conduct'. However, he stressed the Court has a wide discretion and there is no automatic costs consequence for a successful party for such conduct. The Court may make no reduction of their costs, or disallow some or even all of them. But Briggs LJ at p.59 stressed that requiring the guilty winner to pay any of the loser's costs was a draconian sanction that should be reserved for the most serious and flagrant failures to engage in ADR.

19. Finally, whilst again I was not referred to it, one analogy from CPR 44 which seems relevant, especially in the context of a claim about unlawful detention, is the guidance on determining the incidence of costs on settlement of claims in the Administrative Court (where I also sit), as discussed *R(M) v Croydon LBC [2012] 1 WLR 2607 (CA)* and as clarified in *R(Tesfay) v SSHD [2016] 1 WLR 4853 (CA)*.

20. To summarise *R*(*M)/Tesfay* there are three categories: (1) where a Claimant has been wholly successful in terms of the relief sought, he will generally recover all costs unless there is some good reason; (2) where a Claimant has only succeeded in part, the judge will consider the extent of success and reasonableness of pursuing the unsuccessful part and what costs were expended on it; and (3) where there has been some compromise which does not actually reflect the Claimant's claims, the default position is no order for costs unless it is tolerably clear who would have won if the matter had not settled. However, as I was not addressed by the parties on these principles, I do not make my decision based upon them (but as I explain my decision is fortified by them).

My Conclusions

21. The Defendant's original submissions pitched its case very high. It was argued the Claimant was guilty of unreasonable litigation conduct in failing to make any meaningful settlement attempt for nine months from December to September. The Defendant submits that had the Claimant behaved reasonably by negotiating in late 2021, the claim is likely to have settled. Had it done, costs would have been saved on both sides totalling over £70,000 over the last year for an additional £5,000 above the Defendant's £10,000 Offer. Indeed, the Defendant submits even in September-October 2022, the Claimant behaved unreasonably prior to accepting the £15,000 offer: initially making an unreasonable offer to settle for more than the pleaded value of the claim and settling the claim against the MOJ for a very small amount without really endeavouring to recover her costs. Indeed, the Defendant contends that the Claimant is effectively seeking to recover her costs from it rather than apportioning them with the MOJ.

22. Therefore, the Defendant submitted that I should (i) order it to pay 50% of the Claimant's reasonable costs up to 21st December 2021, to be assessed on the standard basis if not agreed; (ii) make no order for costs in respect of the period between 21st December and 14th October 2022; and (iii) disallow the Claimant's costs of the costs management process. I say immediately that I am not in a position to order (iii) which both seeks to go behind Hill J's order and if even open to the Defendant at all, is more properly a question for a Costs Judge on detailed assessment if necessary. Moreover, in my judgment the Defendant's position on point (i) is fundamentally misconceived and whilst have some sympathy on (ii), I also disagree, although will go some way to address its concerns by disallowing some costs for (ii). I consider (i) and (ii) in turn.

23. On (i), it is far from clear why the Defendant contends that it should only pay 50% of the Claimant's costs even up to the expiry of the Defendant's Part 36 Offer of £10,000 in December 2021. The Defendant makes no criticism – and can make no criticism – of the Claimant's attitude to settlement until that point. She had raised the question of mediation in May 2021 and had undertaken it with the Defendant in November 2021, shortly before the Defendant's offer. If any party's attitude to settlement can be criticised at that stage, it is only the MOJ: who refused to mediate. Moreover, whilst the Claimant's submissions anticipated arguments that the claim should not have been brought in the High Court or was exaggerated, the Defendant has not made them.

24. Ultimately, as the Claimant's submissions argue, following *Fox*, the Claimant recovered more than the Defendant was previously prepared to pay and so was the successful party under CPR 44.2 even if she did not recover what she had been previously prepared to accept or the full value of her claim. The Claimant had to bring a claim to recover damages which she has done in the settlement. In an unlawful detention where General and Aggravated Damages are assessed broadly, it is not surprising the Claimant was content to settle for £15,000 bearing liability was disputed and there was some litigation risk. Nor was any addition costs caused by her pleading her claim at £30,000 rather than £15,000 (even bearing in mind *R(M)/Tesfay*). Moreover, as a claim in tort arising from personal liberty, there is also an analogy with personal injury claims where, as stated in *Fox*, partial recovery is not normally itself a reason to reduce a successful claimant's costs and was not in *Fox* itself. Up to December 2021, there is no proper basis to deprive her of any of her costs against the Defendant (the extent to which those costs were incurred on suing the Defendant rather than the MOJ is for detailed assessment and I cannot determine that now).

25. However, the Defendant is on stronger ground at least in seeking a different costs order on period (ii): from 21st December 2021 to 14th October 2022. In *Fox* itself, Jackson LJ stated that where both parties had been over-optimistic in previous offers, the starting point was that a claimant who had recovered damages was the successful party, subject to the extent of success (which I have just addressed), but also specifically said that:

> "*An adjustment may also be required to compensate the unsuccessful party for costs it was caused to incur by reason of unreasonable conduct [by] the successful party*."

The issue is whether the Claimant was guilty of any 'conduct' justifying 'adjustment'.

26. Contrary to the Claimant's submissions, it is not 'conducting a quasi-trial' to say that she did not engage in settlement negotiations for nine months and then made a liability-only offer then an offer above the pleaded value of her claim. That is a fact. Moreover, no explanation is given by the Claimant for this or the earlier failure to negotiate. Her costs submissions seek to deflect attention away from this issue by focussing on the brevity of the Defendant's Defence, or its opposition to her application to amend the Particulars or new points taken by the Defendant in its Skeleton before trial. None of that explains why the Claimant did not continue to negotiate after the December 2021 offer for almost nine months. Given that the Claimant herself had earlier initiated mediation, her abrupt abandonment of attempts to settle was unreasonable, so justifies some 'adjustment' to the Claimant's costs, especially as substantial costs were incurred.

27. However, as stressed in *Halsey* and *PGF*, there is no automatic costs consequence from an unreasonable failure to negotiate and it depends on all the circumstances of the case. *Halsey* and *PGF* were concerned with a failure to mediate. The Claimant did instigate mediation but then unreasonably ceased to negotiate for nine months. This is therefore certainly not amongst the most serious and flagrant failures to engage in ADR discussed in *PGF*. Indeed, in my judgment, it is not even a case 'one step down' from that of disallowing the Claimant's costs from December 2021. It is unduly simplistic and mechanistic to say that because the Claimant eventually settled for only £5,000 more and that cost the parties c.£70,000, all her costs should be disallowed for that whole period. Applying the *Halsey* criteria, whilst the nature of the dispute was ripe for mediation, the Claimant had instigated that, it failed and was also entitled to pursue vindication of her claims for unlawful detention which the MOJ admitted in part. This was complex and important litigation where 'proportionality' cannot be equated with the value of the claim, which is only one proportionality factor, alongside importance and complexity, within the over-riding objective in CPR 1.1(c). Likewise, especially given the MOJ's admission, the Claimant was entitled to consider she had good merits against it and indeed an arguable case against the Defendant and I have not been addressed on the merits. On the other hand, the Claimant had already tried settlement and the Defendant (if not the MOJ) was interested in it, so she could have pursued it with minimal delay and costs. Yet she did not negotiate and even when she re-started in September 2022, she made an inflated offer. Overall, this is neither the most trivial nor most egregious case of failing to negotiate. I would call it 'moderately unreasonable'.

28. Moreover, all of this was known to the Defendant when it made the offer which the Claimant accepted a few days before trial. The Tomlin Order did make provision for submissions on costs but also said *'Upon payment of the damages and payment of the Claimant's costs the Defendant shall be discharged'*. It is one thing to say those costs should be reduced. It is quite another (and comes closer to going behind the parties' agreement) to say that the Claimant should have no costs for the last ten months. After all, whilst the Claimant did unreasonably fail to negotiate for nine months, it is not as if the Defendant continued to raise its offer. When it did, it was accepted. That is not a criticism of the Defendant, but it contextualises its criticism of the Claimant. Moreover, by the time the Claimant accepted, she had also settled the MOJ claim and had plainly revised her expectations in the run-up to trial as so many litigants do. So, in my view it would be unreasonable to disallow all the Claimant's costs in 2022.

29. However, I felt the extent of the Claimant's unreasonableness – and its substantial impact on the costs incurred by both sides in 2022 – does warrant an adjustment to her costs from 21st December 2021 to 14th October 2022. My provisional view was that rather than disallowing all the Claimant's costs in that period, the reasonable and proportionate order reflecting her conduct and its effects would be a 'proportionate costs order' i.e. reducing her costs for that period in part under CPR 44.2(6)(a). I said that whilst I would reach that conclusion independently, that would also be consistent with the settlement being a 'Category 2' case under *R(M)/Tesfay*. However, I also bore in mind Jackson LJ's warning in *Fox* about departing too far from the starting point of full costs. Ultimately, £70,000 in costs was incurred by both sides in 2022 as the case did not settle, not just because the Claimant did not negotiate. So I stated that in my judgment, looking at the case in the round and bearing in mind my views on the *Halsey* criteria, the Defendant should pay 66% of the Claimant's costs attributable to the claim against it (not the MOJ) from December 2021.

30. However, as neither side had the chance to address this 'middle way', nor the Claimant to reply on 'failure to negotiate', I permitted both parties to make further submissions by Friday 25th November, on the basis that neither would recover its further costs if my view were unchanged and directed the Claimant to lodge a draft order on that date reflecting my decision as it stood and any other ancillary orders. I record that the Defendant did not challenge an order at this stage that it should pay the Claimant's reasonable costs up to 21st December 2021 and of costs management:

> "*First, on the basis that the proper allocation of costs attributable to the Defendant, as opposed to the MOJ, is a matter for detailed assessment (as found at paragraphs 24 and 29 of the judgment)…. 2021. Secondly, on the basis that it is a matter for a Costs Judge on detailed assessment, the Defendant no longer asks this Court to disallow the Claimant's 1% and 2% costs of the costs management process*."

However, the Defendant submitted that the appropriate percentage costs order was 50% not 66%. Predictably, the Claimant argued the reduction should be none at all as her litigation conduct was reasonable and that the Defendant raised a new point at the last minute prompting settlement, or any reduction should be only 10% as 33% would amount to a penalty aggravated by the operation of the statutory charge.

31. I reject both parties' submissions and see no reason to alter my provisional view. Of course mediation requires co-operation from both sides as the Claimant says, but the fact remains that the Defendant made an offer of £10,000 and the Claimant then did not make an offer for several months, settled for a low value with the MoJ (who had refused to mediate), then made an offer of £40,000 to the Defendant: four times its offer and nearly three times what the Claimant eventually accepted. Any development in the Defendant's argument was one of the risks of litigation: if that changed the landscape of the case, the Claimant could have argued that the Defendant should not be permitted to take the point. She did not and settled for £15,000. Overall, that reveals the Claimant's settlement strategy with the Defendant until then had been completely unrealistic and I find conduct which justifies a significant not token reduction. As for the effect of the statutory charge on the Claimant's damages, bluntly that is something the Claimant should have been advised about before pursuing an unrealistic settlement strategy. Therefore, a reduction is justified and one markedly more significant than 10%. However, 50% would be too great a reduction in the circumstances, especially as the Claimant did belatedly settle at a reasonable level. The fair, reasonable and proportionate reduction remains in my judgement 33%.

32. Therefore, my order is that the Defendant shall pay the Claimant's reasonable costs up to 21st December 2021 and 66% of the Claimant's reasonable costs thereafter. However, I agree that the payment on account of £30,000 is entirely reasonable on a costs budget of almost £100,000. I approve the draft order in the terms provided.

HHJ Tindal **5th December 2022**