Case Note

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CPR Pt 36—Enhanced Interest Should Not Function as Punitive Damages for Malicious Defence

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Abstract— This note critically comments on the Court of Appeal’s decision in *OMV Petrom SA v Glencore International AG*. By introducing a penal element to the enhanced interest rate pursuant to CPR Pt 36, the Court of Appeal has extended the justificatory reasons for those awards beyond compensation. This note argues that *Petrom*-like awards should not be ordered in the future and that the Civil Procedure Rule Committee should amend the CPR accordingly. One issue is that the *Petrom* award was based on analogical application of the CPR, which implies that the Court of Appeal’s reasoning was in fact not governed by CPR Pt 36. Another issue is that the existing common law principles—as the next best source of law for the Court of Appeal’s decision—do not support the ruling either. This is because, first, the *Petrom* award was made in respect of the defendant’s malicious defence even though malicious defence does not constitute a common law tort. Secondly, the penal element in *Petrom* functioned as punitive damages even though the existing common law principles regarding punitive damages prevent courts from making such awards in similar cases.

Keywords: penal interest; procedural sanctions; exemplary damages; malicious defence; CPR Pt 36; *OMV Petrom SA v Glencore Intl AG* [2017] 1 WLR 3465; *Rookes v Barnard* [1964] AC 1129

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In March 2017, the Court of Appeal (‘the Court’) handed down its decision in *Petrom*¹ allowing for a penal rate of enhanced interest pursuant to CPR Pt 36. This approach to the CPR was unprecedented and has substantially altered our understanding of the CPR settlement rules (Section A). This note submits, however, that *Petrom*-like awards should not be ordered in the future and that the *Petrom* ruling calls for an intervention by the Civil Procedure Rule Committee. In support of these claims, I show that the punitive award in *Petrom* was based on analogical application of the CPR. In other words, the award was made by way of filling in a gap that was not covered by the CPR provisions. Contrary to how *Petrom* is widely understood,² this implies that the Court’s reasoning in *Petrom* was in fact not governed by CPR Pt 36 and the appeal should have thus failed on the CPR grounds (Section B). I then argue that the existing common law principles—as the next best source of law for the Court’s decision—do not support the ruling either. This is because, firstly, the *Petrom* award was made in respect of the defendant’s malicious defence even though malicious defence does not (yet) constitute a common law tort (Section C). Secondly, the penal element in *Petrom* served essentially the same function as punitive damages even though the existing common law principles regarding punitive damages prevent courts from making such awards (Section D).

¹ *OMV Petrom SA v Glencore Intl AG* [2017] EWCA Civ 195, [2017] 1 WLR 3465 (*Petrom* case). Note that there was another Court of Appeal judgment on the same case concerning the measure of damages in deceit: *OMV Petrom SA v Glencore Intl AG (No 2)* [2016] EWCA Civ 778, [2017] 3 All ER 157. I will discuss only the first *Petrom* decision.

² See, eg, P.T. Hurst, S. Middleton and R. Mallalieu, *Costs & Funding following the Civil Justice Reforms: Questions & Answers* (4th edn, London: Sweet & Maxwell 2018) vol 1, Section A, para 36-17; J. O’Hare and K. Browne, *O’Hare & Browne: Civil Litigation* (18th edn, London: Sweet & Maxwell 2017) para 29-031.

A *Petrom* and the CPR

The defendant, a crude oil supplier, made fraudulent representations about the quality of oil that it was selling, which representations caused the claimant company significant damage. One-and-a-half years of litigation inconvenience later, the claimant made an offer to settle under CPR Pt 36, which the defendant rejected. Instead, the defendant put the claimant through ‘the hoops of having to establish liability, in a very flagrant case of fraud, in a manner which was wholly unreasonable’.³ After yet another year of litigation, the claimant won and obtained judgment for over US\$40 million in compensatory damages.⁴ By virtue of CPR r 36.17(4), the court ordered the defendant to pay the claimant’s costs plus enhanced interest on both the costs and damages. According to the claimant’s appeal, the court wrongly concluded that the essential function of enhanced interest was compensatory.⁵ The Court agreed that the court’s discretion to award interest at an enhanced rate was exercised on a wrong basis, because ‘[t]he court undoubtedly has a discretion to include a non-compensatory element to the award [... at a level that] must be proportionate to the circumstances of the case’.⁶

The immediate impact of *Petrom* on the CPR was straightforward and has already been confirmed in several cases:⁷ *Petrom* has extended the justificatory rationale of CPR Pt 36 awards to non-compensatory goals. Departing from the traditional view that the enhanced rate

³ n 1 above, at [1] citing Flaux J’s judgment on interest.

⁴ *OMV Petrom SA v Glencore Intl AG* [2015] EWHC 666 (Comm).

⁵ See CPR r 36.17(4)(a)(c). According to the law applied in *Petrom*, the relevant provisions were contained in CPR r 36.14(3)(a)(c). Although I will only refer to the new provisions in this case note, my arguments apply to the older wording of the CPR too.

⁶ n 1 above, at [38].

⁷ See *Jordan v MGN Ltd* [2017] EWHC 1937 (Ch), [2017] 4 Costs LR 687; *Mohammed v Home Office* [2017] EWHC 3051 (QB), [2018] 1 WLR 1780; *Bruma v Hassan* [2018] EWHC 248 (QB).

of interest pursuant to CPR r 36.17(4)(a)(c) compensates the claimant for ‘the disruption and what might be described as the problems and difficulties which this litigation has inevitably caused’,⁸ Sir Geoffrey Vos C (with whom Kitchin and Floyd LJ agreed) thus recognised the court’s discretion to award a non-compensatory penal element of the rate. In *Petrom*, the enhanced rate reached 10 per cent, which is the highest level permitted by the CPR. Consequently, the claimant obtained judgment for interest worth several million US dollars to penalise the defendant for ‘advancing a dishonest and unreasonable defence [...] and simply ignoring a proper offer’.⁹

B *Petrom* and Analogical Application of the CPR

Perhaps the most contentious aspect of *Petrom* is that the Court applied the CPR by analogy when introducing the penal element to the rate, instead of relying on interpretation and application of the CPR. It should be noted up front that the use of analogy is considered inappropriate because courts do not have a legitimate power to extend the words of a legislated provision to situations not covered by them.¹⁰

To substantiate the claim that Sir Geoffrey Vos C’s argument in favour of the punitive element of the enhanced interest rate relied on analogical application of the CPR, let me reconstruct the core argument by the Court and scrutinise it vis-à-vis the text of the CPR and its purpose. After all, purposive interpretation of the enacted words is the leading method of construction. The Court’s first premise was that CPR Pt 36 demands the court to have regard to all circumstances in determining the just rate of enhanced interest. The second premise was that

⁸ n 1 above, at [30].

⁹ *ibid* at [44].

¹⁰ See P. Atiyah, ‘Common Law and Statute Law’ (1985) 48 MLR 1, 7–8, 19; A. Burrows, ‘The Relationship Between Common Law and Statute in the Law of Obligations’ (2012) 128 LQR 232, 241–42, 48.

all awards of enhanced interest belong to a scheme of penalties and rewards intended to sanction CPR Pt 36. Based on those premises, the conclusion in *Petrom* was that the court has a discretion to have regard to penal considerations and include a penal element to the rate of enhanced interest pursuant to CPR r 36.17(4)(a)(c).¹¹

The most difficult issue regarding the Court’s first premise concerns the purpose for which the court is required consider all the circumstances of the case. It seems as if the Court implied that the CPR conditions *against* an award to be made and *for* an award to be made must be the same. This is clearly absurd. Whilst CPR r 36.17(4) expressly states that the purpose of the rule is to consider whether it would be ‘unjust’ to make any of the orders pursuant to this provision, *Petrom* ruled that all the circumstances of the case must be taken into account when determining the justly awarded interest rate. This allowed the Court analogically to extend the scope of mischiefs sanctioned by CPR Pt 36 to include not only a refusal to settle but also the defendant’s malicious defence. *Petrom* overturned the purpose of CPR r 36.17(4) and instead of considering all the circumstances as a ‘negative’¹² test that prohibits unjust awards, *Petrom* considered all the circumstances (including the defendant’s malicious defence) as a positive test based on which any justly made awards and their measures must be determined. The Court did not provide any reasons—and I cannot think of any either—why the expressed CPR rule which

¹¹ CPR r 36.17(4)(a)(c): ‘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 [...]; (c) interest on those costs at a rate not exceeding 10% above base rate’.

¹² n 1 above, at [33].

prevents unjust awards (r 36.17(4)) can be expanded as if it implicitly included a rule that is intended to promote just awards.¹³

An alternative interpretation of the CPR—which I think the Court should have adopted—is that the requirement to achieve just results stems from CPR r 1.1. Pursuant to CPR r 1.1, the overriding objective of the CPR is to enable ‘the court to deal with cases justly and at proportionate cost’, which means to ensure that the case is dealt with ‘fairly [...] and] in ways that are proportionate [...] to the complexity of the issues’.¹⁴ By interpreting and applying this provision, it would have been possible for the Court to argue that the courts are required to have regard to all the circumstances of the case when determining the just and fair rate of enhanced interest. However, the court did not refer to CPR r 1.1 in its judgment. Instead, it analogically applied r 36.17(4) to determine the just rate of enhanced interest.

Another difficulty regarding the first premise of the Court’s argument is whether the court shall have regard to all the circumstances of the case only in respect of decisions on whether to award enhanced interest or also in respect of decisions as to the rate of the enhancement. The Court clearly stated that *Petrom* is a decision on the level of interest rather than a decision on whether to make an award at all, and it repeatedly stressed that decisions on the availability of the award must be regarded separately from decisions on the measure of the award.¹⁵ Surprisingly, however, *Petrom* expanded the words of the relevant CPR provision (‘the court must take into account all the circumstances of the case [...] in considering whether

¹³ Similarly, see Law Commission, *Pre-Judgment Interest on Debts and Damages* (Law Com No 287, Norwich: TSO 2004) para 8.6, discussing the negative limits of the court’s discretion to order the award.

¹⁴ CPR r 1.2.

¹⁵ n 1 above, at [24], [29].

it would be unjust to make the orders referred to in [CPR r 36.17(4)]’¹⁶ also to the rate of the award.¹⁷

Unless we accept that the CPR phrase ‘to make the orders’ can have the same meaning as a phrase ‘to determine the level of the enhancement’, we are bound to conclude that *Petrom* extended the scope of the rule pursuant CPR r 36.17(4) by analogy. Again, the Court was not transparent about the reasons that led it to this reading of the CPR. Perhaps the Court thought that any decision on whether to make an order pursuant to CPR r 36.17(4) is by definition superior to all decisions on the measure of the award and that the CPR requirements on decisions relating to the award must therefore analogically apply to decisions relating to their measure. But even this argument amounts to an analogy. By analogy to how the court must have regard to all the circumstances of the case when considering the availability of enhanced interest, it must also have regard to all the circumstances when determining the level of enhancement.

The Court’s second premise was that all awards of enhanced interest belong to a scheme of penalties and rewards intended to sanction CPR Pt 36. The key question underlying the second premise was whether the court’s power to include a penal element to the additional award pursuant to CPR r 36.17(4)(d)¹⁸ also extends to the rate of enhanced interest pursuant to CPR r 36.16(4)(a)(c). This issue arose from the changes made by the Civil Procedure

¹⁶ CPR r 36.17(5).

¹⁷ n 1 above, at [38].

¹⁸ CPR r 36.17(4)(d): ‘the court must, unless it considers it unjust to do so, order that the claimant is entitled to [...] an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below’.

(Amendment) Rules 2013/262 which resulted from Jackson LJ's reform proposals.¹⁹ That amendment gave the court a new discretionary power to order an additional amount of up to £75,000 next to the original three types of award, ie next to CPR r 36.17(4)(a) enhanced interest on the whole or part of damages, CPR r 36.17(4)(b) costs on indemnity basis, and CPR r 36.17(4)(c) interest on those costs. While CPR r 36.17(4)(d) does not specify whether it promotes compensatory or non-compensatory aims,²⁰ evidence on the intellectual history of that provision shows that rule-makers wanted to 'encourage early settlement of claims'.²¹ Also, according to Jackson LJ's final report, the additional award was designed to reward the claimant and penalise the defendant for a refusal to settle.²² It was thus sufficiently clear that the purpose of the additional award was penal, and this was confirmed by *Petrom*.

However, by extending the penal rationale to the awards of enhanced interest, the Court breached the principle against doubtful penalisation.²³ According to this principle, '[t]hose who contend that the penalty may be inflicted [...] must fail, if the words are merely equally capable of a construction that would, and one that would not, inflict the penalty.'²⁴ Although it may be true that by the amendment of the CPR in 2013 the Civil Procedure Rule Committee wanted to

¹⁹ See Jackson LJ, *Review of Civil Litigation Costs: Final Report* (Norwich: TSO 2010) 420–27.

²⁰ CPR r 36.17(4)(d): 'the court must, unless it considers it unjust to do so, order that the claimant is entitled to [...], 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'.

²¹ The Ministry of Justice, *Explanatory Memorandum to The Civil Procedure (Amendment) Rules 2013/262 (L 1)* s 7.1.

²² n 19 above, 425.

²³ See, eg, *ESS Production Ltd (in administration) v Sully* [2005] EWCA Civ 554 at [78]; D. Bailey and others, *Bennion on Statutory Interpretation* (7th edn, London: LexisNexis 2017) 715.

²⁴ *Dickenson v Fletcher* (1873) LR 9 CP 1 at 7 (Brett J).

include a penal element to CPR Pt 36, this does not mean that the penal rationale can extend to the awards of enhanced interest, which is what *Petrom* suggests.²⁵ The only argument put forth by the Court in support of this view relied on a single line in the Jackson final report. The report stated that CPR Pt 36 is already ‘backed up by a scheme of penalties and rewards’.²⁶ At the same time, however, the report did not specify which of the three original awards was meant to penalise the defendant and which to reward the claimant. Hence, one could easily imagine an interpretation according to which the only penalty was the award of costs on indemnity basis pursuant to CPR r 36.17(4)(b) while the awards of enhanced interest were designed as a reward for the claimant. If the Court in *Petrom* indeed attempted to interpret the CPR, we should criticise it for not avoiding interpretation that inflicts a penalty.

Even then the second premise is easier to understand as a result of an analogical application of the CPR, because if that premise resulted merely from an interpretation of the CPR it would lead to some striking absurdities. For example, should we accept that the court orders regarding enhanced interest on damages, enhanced interest on costs, and the additional amount pursuant to CPR r 36.17(4) are all designed to penalise the defendant, then all these awards would overlap each other. This interpretation is very hard to accept as it would effectively give the court a power to impose a single, double, or treble punishment on the defendant by ordering one, two, or all three of these awards. In other words, it seems absurd to think that the three types of award serve the same penal function in response to the same set of facts (ie the defendant’s malicious defence and his blank refusal to settle) and, at the same time, can be regarded as distinct sanctions that can be made next to each other. In this light, it seems more plausible to understand *Petrom* as a case of an analogical application of the penal rationale

²⁵ cf n 1 above, at [21].

²⁶ *ibid* at [37] (referring to n 19 above, 420).

from CPR r 36.17(4)(d) to the orders of enhanced interest, rather than as a case of a broad interpretation of CPR r 36.17(4)(a)(c).²⁷

Another paradox is that the Court's interpretation of CPR r 36.17(4)(a)(c) would imply that the CPR prohibits punitive awards and, at the same time, allows awards to be made in the punitive measure. In other words, *Petrom* would imply both that enhanced interest cannot be ordered on a penal basis and that the rate of the enhancement can be determined on a penal basis. This paradox springs from the Court's treatment of previous authorities interpreting CPR r 36.17(4). According to the leading cases which pre-dated Jackson LJ's reforms (*Petrotrade*²⁸ and *McPhilemy*²⁹), the awards of enhanced interest were not intended to be penal but were only 'a means of achieving a fairer result for a claimant'.³⁰ They were intended to 'redress [...] the element of perceived unfairness'³¹ on the claimant's side and did not aim to punish the defendant.³² Surprisingly enough, *Petrom* avoided direct confrontation with these authorities although it admitted that *McPhilemy* would have been binding on the Court had *Petrom* been a judgment on the function of the award and not on the function of its measure. Hence, by reinforcing its own distinction between decisions on the award and decisions on the measure of the award, *Petrom* had manoeuvred itself into the unhappy contradiction which makes it

²⁷ To the extent that the penal rate of enhanced interest was determined by an analogical application of CPR r 36.17(4)(d), we can argue that this penal element (which was worth several million US dollars in *Petrom*) should have been subjected to the £75,000 limit imposed by the CPR on the non-compensatory award of an additional amount. cf n 1 above, at [22].

²⁸ *Petrotrade Inc v Texaco Inc* [2000] EWCA Civ 512, [2002] 1 WLR 947 (*Petrotrade* case).

²⁹ *McPhilemy v Times Newspapers Ltd and others (No 2)* [2001] EWCA Civ 933, [2002] 1 WLR 934 (*McPhilemy* case).

³⁰ n 28 above, at [64]. See also the views expressed by Chadwick LJ in n 29 above, at [19].

³¹ n 29 above, at [23] (Chadwick LJ).

³² *ibid* at [28] (Simon Brown LJ and Longmore LJ).

impossible to read *Petrom* as a case that construed CPR r 36.17(4)(a)(c) merely by way of interpretation.

Other elements of *Petrom*'s reasoning also indicate that the second premise was construed by analogy. In Sir Geoffrey Vos C's view, the award of enhanced interest can pursue non-compensatory goals because the Civil Procedure Rule Committee presumably did not intend to prohibit them.³³ As he put it, '[i]f the rule-makers had intended to say that all or any of the [CPR Pt 36] awards were only to be made if they represented compensation for litigation inconvenience, it would have been very easy to say so'.³⁴ This interpretation assumes that 'the enactment of certain provisions represents a considered rejection by [the rule-makers ...] of other provisions',³⁵ which plainly is a myth. Accordingly, the penal nature of CPR r 36.17(4)(a)(c) must have been construed by analogy rather than by interpretation.

This brings us to the Court's conclusion that the court has a discretion to have regard to penal considerations and include a penal element to the rate of enhanced interest pursuant to CPR r 36.17(4)(a)(c). Again, this conclusion seems clearly to contradict the principle against doubtful penalisation as set out above, because the words of CPR r 36.17(4) are equally capable of an interpretation that does, and an interpretation that does not, inflict penal interest. It is thus rather surprising that *Petrom* permitted—without any consideration of the principle against doubtful penalisation—the penal element to the rate of enhanced interest. At the same time, it is rather unsurprising that the Court did not discuss the principle against doubtful penalisation when making the penal order once we realise that the Court in fact did not interpret CPR r 36.17(4)(a)(c) but analogically applied other CPR provisions as explained above.

³³ n 1 above, at [33].

³⁴ *ibid* at [33]. Note that the Court referred to the rule-makers' intention, rather than to the purpose of the CPR Pt 36.

³⁵ Burrows (n 10) above 244–45.

Provided that the rule allowing for the penal rate of enhanced interest was created by analogy in *Petrom*, one must ask why the analogy was not drawn from common law principles. Analogy by common law is generally permissible and may be used to fill in gaps in law (ie where a statute or previous cases do not give any answer to the legal question) or even to interpret the meaning of statutes and statutory instruments.³⁶ In *R v Morris*, for example, Byles J stated that ‘it is a sound rule to construe a statute in conformity with the common law, rather than against it, except where or so far as the statute is plainly intended to alter the course of the common law’.³⁷ But *Petrom* neither followed nor considered any relevant common law principles. This makes it extremely hard to read the case and anticipate its impact on our law. On the one hand, it is hard to pretend that *Petrom* was interpreting the CPR since it was in fact analogically handing down an original rule not contained in the CPR. In this light, the rule-making Civil Procedure Rule Committee should either confirm, clarify, or strike out this new rule. On the other hand, it is also hard to read *Petrom* as a decision rooted in common law rationales as it was devoid of any common law arguments and references to common law principles. In this light, until the rule-makers will intervene, we should seek to determine how best to integrate *Petrom* into the wider body of existing case law, especially the law regarding malicious defence and punitive damages, as will be explained below.

C *Petrom* and the Tort of Malicious Defence

The penal measure of interest in *Petrom* was made in respect of the defendant’s blank refusal to settle, ie by way of sanctioning the CPR Pt 36 procedural rules on settlement. So far, so good.

³⁶ *ibid* 234–36.

³⁷ (1867) LR 1 CCR 90 at 95. See also *Wisely v John Fulton (Plumbers) Ltd*, *Wadey v Surrey County Council* [2000] UKHL 24, [2000] 1 WLR 820 at 823, 824, and *Burrows* (n 10) above 243.

But it was also made in respect of the defendant's 'dishonest and unreasonable defence'³⁸, ie by way of analogically sanctioning some unexpressed rules prohibiting malicious defence. This is problematic for two reasons. Firstly, the court is not empowered authoritatively to sanction substantive obligations beyond the CPR. The CPR give the court a discretionary power to sanction CPR Pt 36 rules and obligations stemming therefrom, but not to sanction obligations that fall outside the CPR scope. Secondly, malicious defence is not yet a recognised civil wrong.

The tort of malicious defence was first mentioned in *Willers v Joyce* in 2016.³⁹ In *Willers*, the Supreme Court had to decide whether a person can obtain compensation if they had suffered injury in consequence of a maliciously instigated prosecution of a civil claim. It was held by the majority of the Supreme Court that malicious prosecution can constitute a tort and can give rise to a successful civil claim. At the same time, the Supreme Court left open the possibility that maliciously defending a case also constitutes a tort. The *Willers* judgment contains several indications that there 'should be a right to sue for the malicious defence of a civil claim without reasonable or probable cause',⁴⁰ but no conclusive answer was given as to whether courts should allow for such claims in the future.

The *Petrom* judgment was handed down some eight months after *Willers*, which means that Sir Geoffrey Vos C could have considered whether to base the non-compensatory award on the defendant's malicious defence or on some different facts of the case. He justified it by reference to the defendant's 'lying [... and overall] deplorable, if not outrageous'⁴¹ conduct. In Sir Geoffrey Vos C's view, the essence of the defendant's punishable conduct were his blank

³⁸ n 1 above, at [44].

³⁹ *Willers v Joyce* [2016] UKSC 43, [2016] 3 WLR 477 (Willers case).

⁴⁰ *ibid* at [51]. See also *ibid* at [132], [137] and [162]; J. Sorabji, 'Malicious prosecution and abuse of process: *Willers v Joyce*' (2017) 36 CJQ 387, 391 and 393.

⁴¹ n 1 above, at [41].

refusal to settle in combination with ‘dishonest and unreasonable defence’,⁴² the fact that the defendant’s witnesses were obvious liars,⁴³ and the use of huge sums of money to obstruct the claimant’s attempts to find a compromise.⁴⁴ It is thus safe to say that *Petrom* sought to punish and deter the defendant for his outrageously unreasonable litigation and his intentionally false defence, ie for what would otherwise be probably an important element of the cause of action in the tort of malicious defence.

Still, to the extent that malicious defence does not yet constitute a common law wrong, *Petrom* (if we read it as a decision rooted in the relevant common law principles) should not have penalised it. By virtue of the CPR, the court is bound to consider whether it would be unjust to make the award of enhanced interest before it makes the decision. On this account, it is easy to see why it would be unjust to penalise conduct which is not yet tortious. Hence, I submit that in *Petrom*-like cases the courts should have regard to these considerations and exercise their discretion not to make any such awards in the future.

Moreover, if the courts will want to consider ordering any of the CPR Pt 36 awards by way of penalising conduct that is not explicitly prohibited by the CPR (as is the case in relation to malicious defence), I submit that they should generally have regard to common law rules that might otherwise apply to the defendant’s wrongful behaviour. This is perfectly in line with the courts’ authorisation analogically to apply common law when filling in a gap in the existing rules. It also sits well with the present law regarding damages claims to recover costs⁴⁵ and interest.⁴⁶ The law allows the claimant to recover CPR costs in form of damages if these costs

⁴² *ibid* at [44].

⁴³ *ibid* at [1].

⁴⁴ *ibid* at [41].

⁴⁵ *Carroll v Kynaston* [2010] EWCA Civ 1404, [2011] 2 WLR 1346.

⁴⁶ *Sempre Metals Ltd v Revenue & Anor* [2007] UKHL 34, [2007] 3 WLR 354.

could not have been awarded by the judge at trial, and interest losses can now be generally claimed as damages provided that they are substantiated by the claimant. Thus, where the court will not be able to exercise its CPR-based discretion as to the costs, interest on costs, and interest on damages pursuant to the CPR (as was again the case in relation to the defendant's malicious defence), it seems lawful to provide the claimant with a common law remedy.⁴⁷ After *Petrom*, however, it seems that the courts now have the discretion in relation to malicious defence too, which is why they should at least have regard to the relevant common law principles that have not been displaced by the CPR. While the CPR can be seen as a relatively complex system of rules and its legal authority must take priority over common law, the CPR has not displaced or invalidated common law. Accordingly, common law still serves as the next-best source of legal authority where the CPR does not provide a sufficient legal ground. I therefore submit that the courts should seek to fill the gaps in the CPR by analogically applying common law rules regarding civil wrongs and penal remedies for such wrongs. In *Petrom*-like cases where the court will be invited to penalise the defendant for wrongdoing, this would most notably concern the rules on punitive damages.

D *Petrom* and the English Law of Punitive Damages

In many ways the penal award of enhanced interest served essentially the same function as if the Court awarded the claimant punitive damages for the defendant's malicious defence. For example, the claimant explicitly argued in the appeal 'that the power to award enhanced interest

⁴⁷ See also A.A.S. Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (3rd edn, London: Thomson Reuters, Sweet & Maxwell 2013) para 27.7: 'this new and intense court engagement with costs [as introduced by the Jackson reforms] will have time and resource implications and may create new opportunities for disputes over costs'.

enables the court to disapprove of and to discourage unreasonable conduct'.⁴⁸ Similarly, after discussing the defendant's unacceptable behaviour, Sir Geoffrey Vos C stated that a 'blank refusal to engage in any negotiating or mediation process, and the use of a vast asset base to seek to frustrate a claimant's attempts to reach a compromise solution should be marked by the use of the court's powers to discourage such conduct'.⁴⁹ He then went on to say that the penal award of enhanced interest can be made if there is a need 'to mark the court's disapproval of any unreasonable or improper conduct'.⁵⁰ This perfectly overlaps some of the main functions of punitive damages in common law.⁵¹ Besides, if we look in the CPR's own Glossary, we see that punitive damages there are defined almost identically to how *Petrom* defines the function of the enhanced interest rate. According to the CPR Glossary, punitive damages are '[a] sum of money awarded by the court [...] which go[es] beyond compensating [...] and is] awarded to show the court's disapproval of the defendant's behaviour'.⁵²

To the extent that the *Petrom* award functioned like punitive damages, we should seek to determine how this type of award can fit with the English law on punitive damages. This question is especially important for the future penal awards of enhanced interest because the courts applying the CPR beyond its true scope should have always regard to the relevant common law principles, as was explained above. According to Burrows, 'one can strongly argue that using the common law to interpret a statute [and fill its gaps] should be positively encouraged not merely because this enhances consistency between common law and statute but

⁴⁸ *ibid* at [4].

⁴⁹ *ibid* at [41].

⁵⁰ *ibid* at [38].

⁵¹ *Rookes v Barnard* [1964] AC 1129 (Rookes case).

⁵² CPR Glossary. See also CPR r 16.4(1)(c).

also because the common law has been carefully crafted and is likely to be both principled and practically workable'.⁵³

Three challenges present themselves in this regard. For one, it proves almost impossible to match the *Petrom* award with any of the three categories to which the awards of punitive damages have been restricted by *Rookes*.⁵⁴ No heed needs to be paid to the first category of cases in which punitive damages penalise 'oppressive, arbitrary or unconstitutional action by the servants of the government',⁵⁵ because the defendant clearly did not act on behalf of the government.

Category 2 punishes and deters the defendant for conduct that 'has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff'⁵⁶ and, therefore, looks more relevant for *Petrom*. Category 2 punitive damages, much like Sir Geoffrey Vos C's non-compensatory penal element, teaches the wrongdoer that tort does not pay, especially where the wrongdoer acts 'with a cynical disregard for a plaintiff's rights'.⁵⁷ In *Petrom*, the relevant factors for 'the determination of the appropriate rate of enhanced interest were [... the defendant's] refusal to engage in settlement discussions or to respond to the Part 36 offer, the fact that the eventual award was very significantly greater than the Part 36 offer itself, and, perhaps most of all, [... the defendant's unreasonable] conduct of the litigation as described by the judge in his judgment on this issue.'⁵⁸ Thus, although Sir Geoffrey Vos C did not expressly describe the defendant's conduct in terms of Category 2, ie

⁵³ Burrows (n 10) above 243.

⁵⁴ n 51 above.

⁵⁵ *ibid* 1226.

⁵⁶ *ibid*.

⁵⁷ *ibid* 1227.

⁵⁸ n 1 above, at [41].

as a conduct driven by hope ‘that the money to be made out of his wrongdoing will probably exceed the damages at risk’,⁵⁹ the relevant facts in *Petrom* seem to fit with the types of conduct described under Category 2. However, on the traditional reading of *Rookes*, there is one big difficulty. Category 2 only portrays common law types of case in which the court may award punitive damages and, as we have seen earlier, the penal element of the enhanced interest rate in *Petrom* was officially awarded on the CPR Pt 36 basis as a matter of the court’s discretion, and not on a common law basis as a response to a civil claim for punitive damages. Hence, the *Petrom* scenario cannot easily match with Category 2.

Category 3 punitive damages can be awarded if the relevant legislation expressly authorises them.⁶⁰ While the CPR clearly authorise the court to award the winning party some money, it does not follow expressly from the rules that the award could be made in the punitive, or any other non-compensatory measure. In this light, the *Petrom* case does not even match with Category 3 because the CPR do not authorise punitive awards for the defendant’s malicious defence or refusal to settle.

Another challenge regarding the fit of *Petrom* with the common law is that *Petrom* did not provide any reasons why the compensatory rate of interest was inadequate to serve the non-compensatory goals. *Rookes* strictly bans damages to be awarded in the punitive measure if the compensation payable to the claimant is adequate to punish the defendant,⁶¹ but Sir Geoffrey Vos C did not explain why the pre-appeal interest rate which was awarded solely on compensatory grounds was inadequate to serve the punitive, deterrent or symbolic functions, ie non-compensatory goals that are typical to punitive awards.⁶²

⁵⁹ n 51 above, 1227.

⁶⁰ *ibid* 1227.

⁶¹ *ibid* 1228.

⁶² See n 1 above, at [40].

The third challenge is that *Petrom* did not specify how much of the enhanced 10 per cent interest rate⁶³ was meant to punish and deter the defendant. Presumably, it was the difference between the rate awarded in *Petrom* and the rate awarded in the first-instance judgment. Sir Geoffrey Vos C, however, re-examined the entire first-instance award, including the period for which the revised interest rate was due. By blurring the compensatory and punitive element into one, *Petrom* in fact conflicts with the common law principles on punitive damages and casts an unfavourable light on the entire post-appeal interest rate. According to EU law, for instance, courts of any Member State could refuse to recognise and enforce the entire award of interest if its punitive element would be deemed contrary to public policy (*ordre public*).⁶⁴

What lesson can be learnt from all of this? It is important in my view that the courts will either fully drop these non-compensatory awards when applying CPR Pt 36 or order them in line with the relevant common law principles. After all, the court has almost unlimited discretion to strike out CPR Pt 36 awards if it considers the punitive award to be unjust,⁶⁵ and it is easy to argue that it would be unjust to make the award if it did not explicitly follow from the CPR and did not fit with the existing law beyond the CPR.

E Conclusion

Petrom is undoubtedly a landmark judgment. By newly introducing orders of enhanced interest at a penal rate it significantly alters our approach to CPR Pt 36. In doing so, however, *Petrom* analogically created legal rules that cannot be construed from CPR r 36.17(a)(c), including a

⁶³ *ibid* at [42], [44] and [46].

⁶⁴ See Art 45(1)(a) of the European Parliament and Council Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1.

⁶⁵ See CPR r 36.17(4)(5) and the text to n 17 above.

rule that the CPR demands the court to have regard to all the circumstances of the case when determining the just rate of enhanced interest orders, a rule that the CPR sanctions the defendant's malicious defence, and a rule that the function of enhanced interest rate includes non-compensatory goals. The Court's decision also disregarded the interpretive principles against analogy and doubtful penalisation.

As a result, the *Petrom* judgment is difficult to justify on the principled grounds that I identified in this note and should, accordingly, be over-ruled by the intervention of the Civil Procedure Rule Committee via an amendment to CPR Pt 36. Until then, as I argued, any *Petrom*-like awards should have regard to the relevant common law principles regarding malicious defence and punitive damages when considering if it would be unjust to make the award of enhanced interest. From this viewpoint, it could be relatively easy to deny the claimant the penal award since, as we have seen, such enhanced interest pursuant to CPR Pt 36 should not function as punitive damages for malicious defence in *Petrom*-like scenarios. As the law currently stands, the CPR Pt 36 penal interest awards seem unjust.