Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson, Betesh & Co
[2002] ADR.L.R. 06/12

CA before Woolf LCJ; Waller LJ; Laws LJ : 12th June 2002

1. **THE LORD CHIEF JUSTICE:** This appeal raises an issue of some importance to the run of general litigation as to when it is appropriate to make an order for costs on an indemnity basis. It arises in a case where the defendants made a joint payment into court of £100,000, and where the claimant recovered nominal damages of £2 against the **fifth** defendant, and failed entirely against the other defendant who was then involved in the proceedings.

2. The appropriate order as to costs to be made is usually a question which is determined having regard to the facts of the particular case and having regard to the relevant provisions of the Civil Procedure Rules. For that reason it is important where there is an appeal on an issue of costs for this court to have well in mind the facts of the particular case in determining the appeal. In many situations an order for costs which may seem initially surprising becomes readily explicable when the particular facts are examined. In my judgment that is true of this case. Fortunately in this appeal this court is greatly assisted by the judgment of His Honour Judge Bradbury in the court below. Mr Davidson QC, for whose submissions we are immensely indebted, appropriately acknowledged how well and carefully reasoned was the judgment of Judge Bradbury. That judgment enables us to deal with the facts more succinctly than otherwise.

The Facts

3. The claimant purchased a company which owned Wesley Mill, at Bamber Bridge near Preston on 9 March 1992. Prior to the company being purchased, the mill was substantially destroyed by fire. In view of the fire, the amount of the insurance payable for the damage to the mill clearly was an important factor in assessing the value of the company. £1.32 million was recovered from the insurance company. The claimants contend that if the mill had been fully insured approximately £1 million more would have been payable by the insurers. The first defendants were the loss assessors in relation to negotiating the claim on behalf of the company. It is suggested that the first defendants represented that the mill was fully insured. The other (the fifth) defendant with whom we are concerned were the solicitors for the claimant in relation to the acquisition by the claimant of the company, namely William Coupe (Bamber Bridge) Ltd ("Coupe").

4. The claimant contended that the fifth defendants failed to carry out their retainer and failed to ascertain that the mill was not fully insured. The fifth defendants contend that their retainer did not require them to perform that task. On that issue the **fifth** defendants were unsuccessful. However, nominal damages of £2 only were awarded by the judge for two reasons. First, the judge was satisfied that the failure of the fifth defendants to ascertain that the mill was not fully insured did not affect the conduct of the claimant. They would in any event have wanted to proceed with the purchase. The second basis upon which the judge came to his conclusion, that only nominal damages were payable, was because the claimant had not suffered any loss in consequence of the breach of duty by the fifth defendants. We were shown the relevant figures by Mr Stewart QC who appeared before us and in the court below on behalf of the fifth defendants. On those figures it is not surprising that the judge should have come to the conclusions to which I have just referred. This was an attractive proposition for the claimant, and it is clear that they would have wished to have proceeded with it. The additional sum which, if the property had been fully insured, would have been payable would have been a windfall because the claimant's proposal in relation to the property meant that the sum of money for insurance actually received was ample to enable the claimant profitably to carry out the transaction upon which they were intent.

5. The first and fifth defendants made a Part 36 payment into court of £100,000 on 7 June 2001. After a lengthy trial, on 18 July 2001 His Honour Judge Bradbury dismissed the claim against the first defendant. He concluded that the claimant was entitled to judgment against the fifth defendant in the sum of £2 as nominal damages. Thirdly, he concluded that the claimant should pay the first defendant's costs of the action on the standard basis up to 8 June 2001, the day after the Part 36 payment, and on an indemnity basis thereafter, such costs to be the subject of detailed assessment if not agreed. He also came to the conclusion that the claimant should pay the fifth defendants' costs of the action on the standard basis up to 8 June 2001, and on an indemnity basis thereafter, such costs to be the subject of detailed assessment if not agreed. He also made an order for payment out of the sum which had been paid into court.

6. There had originally been 14 defendants. It is unnecessary to go into the reasons why by the time of the trial the action proceeded against only the first and fifth defendants.

7. The judge was asked to give permission to appeal. He was prepared to give only limited permission to appeal against the order for the indemnity costs in favour of the first defendant and against the order for costs which was made in respect of the fifth defendant.

8. The claimant wished to advance other arguments on the appeal and therefore sought permission from this court. Permission was refused on the papers by Latham LJ who gave his decision on 19 October 2001, and by Rix LJ who considered the matter on 30 November 2001. In respect of the decision of Rix LJ, a copy of the transcript of which is before us, it is to be noted that, whereas he considered in relation to the fifth defendant there was no arguable grounds for appealing the issue of causation, he was not as emphatic about the position in relation to the proposed appeal in respect of quantum. Rix J said that as the claimant could not succeed on the point of causation, it was not necessary to go into the question of quantum because clearly in order to succeed on an appeal as to quantum the claimant would have to succeed on the question of causation.

The Argument on the Appeal

9. Before coming to the main matter on this appeal, it is convenient to consider Mr Davidson's argument in support of the appeal in relation to the part of the judge's order which required the claimant to pay costs to the fifth defendant throughout the proceedings. As has already been indicated, those costs were on two separate bases: one on the standard basis up to the payment into court; and thereafter, on the indemnity basis. Mr Davidson correctly submits that the claimant was partly successful against the fifth defendants. The fifth defendants had argued that their retainer did not require them to go into the adequacy of the insurance. In that they were found to be wrong. Again it was not surprising that Judge Bradbury should have come to that conclusion because the contemporary documents supported the claimant's contention that that was a matter on which they were required to advise. However, this is a case where Mr Stewart submits that the fact that the fifth defendants were contesting the issue of their liability to the claimant did not significantly affect the costs. That argument was canvassed before the judge who heard the case. He was well aware of all the relevant circumstances and he accepted Mr Stewart's arguments. It is very difficult for this court to second-guess a decision of that sort. The trial judge is in by far the best position to do so. In my judgment it would be inappropriate for this court to try and establish that this was a case where a separate order for costs should have been made, having regard to the decision in relation to the issue as to the terms of the retainer.

Partial Orders for Costs.

10. Mr Davidson referred to the decision of this court on special orders for costs in **AEI Rediffusion Music Ltd v Phonographic Performance TA [**1999] 1 WLR 1507, and relied in particular on a passage in my judgment in that case at page 1522. If the factual situation had been different from that which was contended for by Mr Stewart, it seems to me that this could well have been a case where it would have been appropriate to have recognised the failure of the claimant on a particular issue and reflected that in the costs. But if Mr Stewart was right in the argument that he advanced (which, as I have indicated, the judge was in the best position to determine), then it would not be an appropriate case in which to take that view. Putting the matter shortly, Mr Stewart is saying that in a practical sense the fact that the terms of the retainer was in issue did not affect the evidence which would have had to be called before the hearing. I am not satisfied that the judge's approach to that was other than appropriate so I would not disturb his order.

Indemnity Orders for Costs

11. In relation to the principal issue on the appeal it is necessary to turn, first, to the relevant provisions of the CPR. Whilst not forgetting the general provisions of Part 1 the CPR, it is convenient, first, to go to the provisions of Part 44.3 which, so far as relevant, read:

"44.3(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 to be 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 must have regard to all the circumstances, including -

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and

(c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 3).

(Part 36 contains further provisions about how the court's discretion is to be exercised where a payment into court or an offer to settle is made under that Part.)

(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 his case or a particular allegation or issue;

(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his 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."

12. The provisions of Part 44.3 make it clear how wide and generous is the discretion of the court in making orders as to costs. Equally it is made clear that, in exercising its judicial discretion, it is the obligation of the court to look at the circumstances of the case in general, and here I make particular reference to the wide terms of paragraph 44.3(5).

13. Part 44.4(1) sets out the two bases of assessment, namely the standard basis and the indemnity basis. In addition to drawing attention to those two different bases it provides:
".... the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount."

14. I draw attention particularly to that passage of 44.4 because it emphasises the general requirement that costs which are to be ordered to be paid must not be unreasonably incurred or unreasonable in amount.

15. 44.4(2) and 44.4(3) draw a distinction between the difference in substance between a standard order for costs and an indemnity order for costs. The differences are two-fold. First, the differences are as to the onus which is on a party to establish that the costs were reasonable. In the case of a standard order, the onus is on the party in whose favour the order has been made. In the case of an indemnity order, the onus of showing the costs are not reasonable is on the party against whom the order has been made. The other important distinction between a standard order and an indemnity order is the fact that, whereas in the case of a standard order the court will only allow costs which are proportionate to the matters in issue, this requirement of proportionality does not exist in relation to an order which is made on the indemnity basis. This is a matter of real significance. On the one hand, it means that an indemnity order is one which does not have the important requirement of proportionality which is intended to reduce the amount of costs which are payable in consequence of litigation. On the other hand, an indemnity order means that a party who has such an order made in their favour is more likely to recover a sum which reflects the actual costs in the proceedings. The question of whether an order for costs on a standard or indemnity basis is made in litigation of the sort with which we are here concerned may be a matter of substantial financial significance. That no doubt explains why in this case the claimants have considered the matter one which justified the appeal which is now before us.

16. Having referred to the parts of the CPR which I have done so far, it is next necessary to refer to Part 36 insofar as it deals with questions of costs. However, before doing so it is appropriate to draw attention to the language of 44.4 again, and in particular the passage in brackets which refers to the fact that Part 36 contains further provisions about how the court's discretion is to be exercised where a payment into court or an offer to settle is made under that Part. I may not be doing justice to Mr Davidson, but I detected in his submissions a suggestion that in this case it was not necessary for this court to go further than to examine the terms of Part 36. If that was part of Mr Davidson's submissions then I would, with respect, suggest that

he is wrong because Part 44 is of general application and it continues to be applicable in relation to cases to which Part 36 applies.

17. Part 36.20 deals with the situation which we have here. It provides:

"(1) This rule applies where at trial a claimant -

(a) fails to better a Part 36 payment; or

(b) fails to obtain a judgment which is more advantageous than a defendant's Part 36 offer.

(2) Unless it considers it unjust to do so, the court will order the claimant to pay any costs incurred by the defendant after the latest date on which the payment or offer could have been accepted without needing the permission of the court."

18. The language of 36.20 has to be contrasted with the language of Part 36.21. Part 36.21 deals with the situation where a claimant has made a Part 36 offer. The significance of 36.21 is that, unlike 36.20, it refers specifically to the court being entitled to order costs on the indemnity basis from the latest date when the defendant could have accepted the offer which had been made. Equally, it refers to interest on a higher rate than normal in the case of situations where it applies. When Part 36.20 is compared with 36.21, light is thrown on the appropriate approach to the application of Part 36.20.

19. The clear inference from the absence of any reference to an indemnity basis in 36.20 is that, in normal circumstances, an order for costs which the court is required under that Part to make, unless it considers it unjust to do so, is an order for costs on the standard basis. That means that if the court is going to make an order for indemnity costs, as it can in a case where Part 36.20 applies, it should do so on the assumption that there must be some circumstance which justifies such an order being made. If I may here adopt the way it was put in argument by Waller LJ, there must be some conduct or (I add) some circumstance which takes the case out of the norm. Mr Davidson's argument on this part of the appeal is that there was here not found by the judge any such circumstance.

20. As is to be expected, the decision of the judge in relation to costs was expressed succinctly. A judge is not expected to give a detailed decision as to why he is making an order. However, if he is going to make an order for costs which is not the normal order expected under the particular provisions of the CPR, then the parties are entitled to know the basis of that order and the judge is required to explain that so far as is necessary to do.

21. Having heard the arguments on both sides, Judge Bradbury's response was as follows:

"I have heard nothing in the submissions about costs to justify, in my mind, any substantial variation of the general rule, which is that the unsuccessful party will be ordered to pay the costs of the successful party.

Plainly there could be really nothing to be said in relation to the costs sought by Salisbury [the first defendant]. They are entitled to their costs on a standard basis, certainly to the 8th June, and I am satisfied in the circumstances of this case that they are justified in seeking an order for costs on an indemnity basis from the 8th June, and I make that order."

22. I will return to the part of that statement where the judge dealt with the making of the indemnity order, but so far as he dealt with the order on a standard basis, Mr Davidson does not criticise his decision.

23. The judge then went on to deal with the fifth defendant. He said:

"In relation to Betesh, I am satisfied that, notwithstanding the areas of negotiation in relation to case management that have been brought to my attention, that it is still appropriate to make an order that the claimant pay the costs of Betesh on a standard basis ...."

24. As I understand his decision, the judge clearly rejected the argument which Mr Davidson put forward before him as to why there should be a special order for costs made and accepted the approach of Mr Stewart. As I have already said, I do not think that part of his decision can be faulted. The judge continued:

".... I have seen and heard nothing to suggest that I should make any different order than that which I made in relation to Salisbury. So they too will be entitled to their costs on an indemnity basis from the 8th June."

25. I fully accept that that does not provide any clear exposition as to why an order was being made on an indemnity basis. When he sought permission to appeal, Mr Davidson very properly indicated that perhaps this court would be helped by knowing more about the particular circumstances which the judge had in mind when making the order which he did. To that the judge said:

"I can tell you the circumstance I had in mind is that from the 8th June the claimants were aware of the payment into court of £100,000."

Mr Davidson says that, in view of that statement, the judge was making the order on the basis of the payment into court.

26. In considering the judge's approach it is also important to bear in mind that, initially, he was under the impression that the CPR might require him to make an indemnity order. However, moments before the judge made the order which he did, he was told in clear terms by Mr Stewart, most appropriately, that that was not the situation; that there is no rule about indemnity costs so far as payment into court is concerned in these circumstances; and that the claimant has 21 days to accept the payment in on the basis that he gets the full costs of the claim. In my judgment, the judge was saying that, having regard to the background circumstances of this case, the payment into court should have been accepted and the fact that it had not been accepted meant that it was appropriate to make an indemnity order for costs. I have no doubt that the judge was aware that there had to be something to justify his exercising his discretion out of accord with what would be the norm in regard to the particular facts of this case.

27. Approaching the matter in that way, it seems to me that the judge was entitled to come to the conclusion which he did. The evidence on behalf of the claimant as to the matters of significance was given by the director, Mr Smith. It is clear that the judge accepted that the approach that he adopted in advancing the claim on behalf of the claimant was not justified. Mr Smith must have known that he intended to go on with this purchase in any event and would not have been affected by knowledge that the property was not fully insured. So far as he was concerned, the additional sum which could have been payable by the insurance company would have been a windfall. To pursue a claim in those circumstances against either defendant in the way that he did was conduct which it seems to me, in my judgment, would justify a judge saying that if the sum of £100,000 is not accepted out of court, that is a standard of behaviour which makes it appropriate for an order for costs to be made which is not the norm.

28. The court was referred to a number of authorities in the course of argument on this subject. I would only briefly refer to two cases so far as this issue is concerned. The first is **Reid (a firm) v Gordon Taylor** [2002] 2 All ER 150. In that case May LJ approached a different factual situation from that which we are considering in a way which I find wholly appropriate. He said:

"31. Thus, in my view, the letter of 3 December 1999 may be rather more persuasive than the letter of 1 September 1999 -- although I emphasise that the court has to take all relevant circumstances into account.

32. There will be many cases in which, although the defendant asserts a strong case throughout and eventually wins, the court will not regard the claimant's conduct of the litigation as unreasonable and will not be persuaded to award the defendant indemnity costs. There may be others where the conduct of a losing claimant will be regarded in all the circumstances as meriting an order in favour of the defendant of indemnity costs. Offers to settle and their terms will be relevant and, if they come within Pt 36, may, subject to the court's discretion, be determinative."

29. As May LJ emphasised, all relevant circumstances must be taken into account.

30. In **Kim v MGN Ltd (No 2)** [2002] 2 All ER 242, this court was concerned about a possible assumption that if an offer of payment into court was not accepted by a claimant, then automatically the claimant would be liable for costs on an indemnity basis as opposed to a standard basis. This court made it clear that such an approach is wrong. In the course of his judgment, with which the other members of the court agreed, Simon Brown LJ in paragraphs 12 and 13 said as follows:

"12. I for my part, understand the court there to have been deciding no more than that conduct, albeit falling short of misconduct deserving of moral condemnation, can be so unreasonable as to justify an order for indemnity costs. With that I respectfully agree. To my mind, however, such conduct would need to be unreasonable to a high degree; unreasonable in this context certainly does not mean merely wrong or misguided in hindsight. An indemnity costs order made under Pt 44 (unlike one made under Pt 36) does, I think, carry at least some stigma. It is of its nature penal rather than exhortatory. The indemnity costs order made on the principal appeal in ***McPhilemy's*** *case was certainly of that character. We held ([2001] 4 All ER 361 at [29]) that the appeal involved an abuse of process on the footing that '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'.*

13. It follows from all this that in my judgment it will be a rare case indeed where the refusal of a settlement offer will attract under Pt 44 not merely an adverse order for costs, but an order on an indemnity rather than standard basis. Take this very case. No encouragement in the way of an expectation of indemnity costs was required for him

to make his offer to accept £75,000; its object was to reduce the damages to that level. Where, as here, one member of the court considered the jury's award 'wholly excessive', and thought that £60,000 would have been the highest sustainable award, it seems to me quite impossible to regard the appellant's refusal to accept the £75,000 offer as unreasonable, let alone unreasonable to so pronounced a degree as to mention an award of indemnity costs. It is very important that the ***A.E.I.*** *case should not be understood and applied for all the world as if under the CPR it is now generally appropriate to condemn in indemnity costs those who decline reasonable settlement offers."*

31. In the context of that case I see that those paragraphs set out the need for there to be something more than merely a non-acceptance of a payment into court, or an offer of payment, by a defendant before it is appropriate to make an indemnity order for costs. Insofar as that is the intent of those paragraphs, I have no difficulty with them. However, I would point out the obvious fact that the circumstances with which the courts may be concerned where there is a payment into court may vary considerably. An indemnity order may be justified not only because of the conduct of the parties, but also because of other particular circumstances of the litigation. I give as an example a situation where a party is involved in proceedings as a test case although, so far as that party is concerned, he has no other interest than the issue that arises in that case, but is drawn into expensive litigation. If he is successful, a court may well say that an indemnity order was appropriate, although it could not be suggested that anyone's conduct in the case had been unreasonable. Equally there may be situations where the nature of the litigation means that the parties could not be expected to conduct the litigation in a proportionate manner. Again the conduct would not be unreasonable and it seems to me that the court would be entitled to take into account that sort of situation in deciding that an indemnity order was appropriate.

32. I take those two examples only for the purpose of illustrating the fact that there is an infinite variety of situations which can come before the courts and which justify the making of an indemnity order. It is because of that that I do not respond to Mr Davidson's submission that this court should give assistance to lower courts as to the circumstances where indemnity orders should be made and circumstances when they should not. In my judgment it is dangerous for the court to try and add to the requirements of the CPR which are not spelt out in the relevant parts of the CPR. This court can do no more than draw attention to the width of the discretion of the trial judge and re-emphasise the point that has already been made that, before an indemnity order can be made, there must be some conduct or some circumstance which takes the case out of the norm. That is the critical requirement.

33. In this case I am satisfied there was such a circumstance as I have indicated. That being so, it seems to me that the appeal in respect of the indemnity issues should be rejected. In view of what I have already said about the other issue, in my judgment this appeal should be dismissed.

34. **LORD JUSTICE WALLER**: I agree, but as a party to the judgment in **Kim v MGN Ltd (NO 2),** much relied on by Mr Davidson, I should perhaps add a word. The Court of Appeal has been concerned to put right certain misconceptions following the coming into force of the CPR and to give some guidance to courts at first instance in four recent authorities. But it does so by reference to the circumstances of the individual cases with which it is concerned.

35. The first, **Petrotrade Inc v Texaco Ltd** [2002] 1 WLR 947, was concerned to give general guidance on the approach to Part 36.2(1), but also dealt with the circumstances where there had not been a trial and gave encouragement to the courts to consider awarding higher rates of interest and indemnity costs in such cases by way of analogy.

36. The second, **McPhilemy v Times Newespapers Ltd (No 2)**[2002] 1 WLR 934, was concerned to dispel the myth that an order for indemnity costs under Part 36.2(1) was a penal measure to punish unreasonable conduct.

37. **Reid Minty v Taylor** [2002] All ER 150 was concerned with the exercise of discretion under Part 44.3 and emphasised that it was not necessary for there to be conduct deserving moral condemnation for the court to have power to order indemnity costs. In that case there was an offer by the defendants that if the claimant discontinued, the defendant would pay the costs, and if the offer was not accepted a threat was made that indemnity costs would be sought. The judge in that case felt constrained to find conduct deserving of moral condemnation before awarding indemnity costs under Part 44.3, but the Court of Appeal said that he was wrong to be so constrained. It was in that context that May LJ made the

observations to which my Lord has referred in paragraphs 32 and 33. He also made the observation at paragraph 28:

"As the very word 'standard' implies, this will be the normal basis of assessment where the circumstances do not justify an award on an indemnity basis. If costs are awarded on an indemnity basis, in many cases there will be some implicit expression of disapproval of the way in which the litigation has been conducted. But I do not think that this will necessarily be so in every case."

38. In **Kim v MGN Ltd (No 2)** the court was concerned with an offer which had been made by the claimant before the appeal came on. The claimant had been awarded £105,000 by a jury. The defendant appealed on the basis that the award was too high. An offer was made to take £75,000 and the defendant refused. The appeal was pursued and lost. The majority held that the £105,000 should not be disturbed, but the minority judgment would have reduced the award to £60,000. The argument on costs was that, in the light of the majority view, it was quite unreasonable to refuse to accept £75,000. On one view, it can be seen that it was arguable that it was unreasonable to refuse to accept £75,000. But the point made by the judgment of Simon Brown LJ was that hindsight may show that it was unreasonable not to accept a better offer but that will not normally be sufficient for an award of costs on an indemnity basis. Simon Brown LJ was concerned to stress that where all that was relied upon is the failure to accept a reasonable offer, it will be to a high degree of unreasonableness before an award of indemnity costs should be made. But his language is not apposite to all circumstances, as my Lord has pointed out. My Lord has referred to the example of a test case where a litigant wishes to pursue a case to obtain a ruling, whatever steps the other party has taken to prevent himself being a party to litigation, and the ruling goes against the person bringing the desired test case. That conduct cannot, as my Lord has said, be categorised as unreasonable, never mind unreasonable to a high degree. But the case might well be one outside "the norm", thus justifying an order for indemnity costs. In agreement with my Lord, this court should strive, first, not to replace language of the rules with other phrases; and secondly, should also strive to leave the question of costs so far as possible to the discretion of judges at first instance. Certain principles have to be adhered to, as indicated by the rules. So far as relevant to this case, the first principle is that expressed by May LJ in paragraph 28 in A**.E.I,** (which I have read). "As the very word 'standard' implies, this would be the normal basis". From that first principle it is also possible to say that in the context of Part 36.20, or under Part 44.3 the mere fact that an offer of settlement or a Part 36 offer has been made by a defendant and then been bettered, will not necessarily lead to an order for costs on an indemnity basis.

39. The question will always be: is there something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs?

40. In this case, if the judge had awarded indemnity costs simply on the basis that a Part 36 offer had been made and bettered, I would be inclined to have interfered with that decision. But there are clear indications that what happened here was that the judge took the view that this was a speculative claim by the claimant which the defendants had made various attempts to resolve outside the court and in relation to which the Part 36 offer was the final straw. The key factor which demonstrates to my satisfaction that this was the judge's approach is the fact that the cut-off date he chose from which costs would be on an indemnity basis, was the date of the payment in, not the date up to which the claimant would have had the opportunity to take the money or to accept the Part 36 offer. The judge fully appreciated the 21 days which the claimant had because he was told of that immediately prior to commencing his judgment. But he still chose the date of the payment in. In my view he must have said to himself: "*This is a case which is close to being out of the norm in any event*", and once the claimant was (and I use the words that the judge himself used when explaining the matter to Mr Davidson) "*aware of the payment in*", it was a case that the claimant should only be entitled to pursue on the basis that they paid indemnity costs if they lost.

41. Thus I agree that the appeal should be dismissed.

42. **LORD JUSTICE LAWS**: I agree with both judgments.

ORDER: Appeal dismissed with costs in each case of each defendant on the standard basis on the amounts submitted less £750.