Before Lord Justice Mumery, Lord Justice Laws. CA. 6th July 2001.

1. **LORD JUSTICE LAWS**: Although the grounds of appeal were at first put wider, this case now proceeds as an appeal with permission granted by Kay LJ on 22 February 2001 only against the order for costs made in the action by His Honour Judge Grenfell in the Halifax County Court on 1 September 2000.

2. The action was a claim for damages for personal injury. Liability had been conceded. The judge had to try the issue of damages only. He made an order that the appellants (the defendants in the action) should recover 75 per cent of their costs incurred after the date of a Part 36 payment made by them. That order is the subject matter of the appeal.

3. The respondent (the claimant in the action) has not appeared before us today. His solicitors came off the record earlier this year. However, we have seen a letter dated 5 April 2001 sent by the Civil Appeals Office to the respondent giving clear notice of today's date. It therefore seemed right to us to proceed with the appeal in his absence.

4. In order to see how the issues on the appeal arise, it is necessary briefly to outline the facts and summarise the course of the litigation. The respondent claimant was employed as a scaffolder on an oil platform in the North Sea owned by the appellant. On 27 May 1996 he fell while working on a slippery ramp on the platform. This was the accident giving rise to his claim. He was 38 years old at the time. Particulars of claim were filed on his behalf in the county court on 20 September 1999. He personally signed a statement of truth attached to these particulars. That of course is in accordance with the procedure now prescribed by the Civil Procedure Rules. Paragraph 4(c) of the particulars stated as follows:
"The Claimant was unable to work for some 2 years 5 months after the date of the accident and claims loss of earnings as a scaffolder for that period. He attempted to re-train as a bus driver but his back was not strong enough to enable him to complete the course. He re-trained as a fork lift truck driver and obtained employment in that capacity on or about 19th October 1998."

5. On 8 December 1999 the appellants gave notice of a payment under Part 36 of the Civil Procedure Rules. The notice stated that £15,000 had been paid in but that the gross amount of the compensation payment was £20,009.20 and it was said that the appellants had reduced that sum by £5,009.20 under the material provisions of the Social Security (Recovery of Benefits) Act 1997 to take account of the interest of the Compensation Recovery Unit in incapacity benefit which had been paid to the respondent. A schedule of loss put in on the respondent's behalf on 27 June 2000 claimed over £300,000 for past and future loss of earnings. The sum claimed for future loss of earnings in the document was £232,128. The schedule included this assertion:
"The Claimant has attempted to mitigate his loss by retraining as a bus driver in September 1998 and applying for other occupations unsuccessfully."

6. The obvious implication was of course that there had been no question of his being able to return to the oil rigs.

7. However, as the judge was to record, a matter of days before the trial date of 1 September 2000 the appellants discovered that the respondent had indeed returned to work as a scaffolder on the oil platforms as early as 30 July 1997 and had worked as such on a fairly regular basis, as the judge put it, "ever since". While it was no doubt admirable for the respondent to return to work, it was equally entirely plain that the claim had been grossly and deliberately exaggerated by him. In the result a revised schedule of loss was put in and ultimately the judge awarded an overall sum of no more than £18,897. That was of course less than the gross amount referred to in the notice of the Part 36 payment. It comprised £3,500 general damages for pain, suffering and loss of amenity together with the sum for loss of earnings calculated by reference to a twelve-month period only from the date of the accident. Finally there was also a modest award of interest.

8. As the judge recorded the respondent had grossly deceived doctors who had examined him. He had deceived his general practitioner or general practitioners in obtaining sick notes and his particulars of claim were spectacularly dishonest. In all these circumstances the appellants submit that the judge

went wrong in principle in awarding to them only 75 per cent of their costs after the date of the Part 36 notice.

9. The judge expressed his reasons for his order as to costs in this way:
"Essentially, there is an offer of £15,000 by the defendants which took into account some £5,000 benefits. Those benefits referred to a period of time after the 12 months on which, plainly, the payment-in was based. So, argues Mr Jones, technically the defendants are liable for the full £18,987 and in order to protect that, should have paid in an additional £4,000 or thereabouts because they would always have been able to recover the £5,000. But as I say, it is a very close thing indeed, but essentially, as I made it clear during the course of argument in relation to costs, the case was presented as a substantial claim. The defendants were essentially basing their assessment of the damages in this case very soon after they admitted liability on the basis of Mr Hamilton's report. They have succeeded in that and if I was to ask myself who has, in real terms, post-payment in, won this case, I would have to say the defendants. But to a certain extent, and to a limited extent, it can also be argued that the claimant has succeeded to a degree, and it seems to me the fair way of dealing with costs in this case – and it can only be a very general way in which I deal with it and doing the best I can – is to award the claimant his costs up to the date of the payment-in, which will have to be referred to a detailed assessment.
I undoubtedly make my order for costs post-payment in on the basis that I have considered the fraudulent aspect of this claim and the basis on which I have reached my judgment is based on the fraudulent nature of the claim as well. My order for costs, bearing in mind the conduct of the claimant post-payment into court, is for the claimant to pay a proportion of the defendants' costs which I have assessed in the sum claimed at £7,614.21, and I order the claimant to pay 75 per cent of that figure.
Regrettably, that means that the claimant will not see a great deal of his claim. I am afraid he has only himself to blame for that."

10. Mr Bagot on behalf of the appellants has two points: (1) that on a proper understanding of the Civil Procedure Rules in the context of this case's facts the respondent failed to better the Part 36 payment; (2) in any event the scale of the respondent's dishonesty in the conduct of the claim was so gross that even were it held that he had beaten the Part 36 payment that would pale into insignificance and the only just result was to award the appellants all their costs after the date of the Part 36 payment. For good measure it is said that the judge appeared to ignore the respondent's conduct before the date of the Part 36 payment whereas under Part 44(3) of the Civil Procedure Rules the whole of a party's conduct is to be taken into account in deciding what costs order to make.

11. I should set out the relevant provisions contained in Part 36 and the associated practice direction and also Part 44.3:
"36.20(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."

12. Then Part 36.23(4):
"For the purposes of rule 36.20, a claimant fails to better a Part 36 payment if he fails to obtain judgment for more than the gross sum specified in the Part 36 payment notice."

13. Practice direction for part 36, paragraph 10.5:

"In establishing at trial whether a claimant has bettered or obtained a judgment more advantageous than a Part 36 payment to which this paragraph relates the court will base its decision on the gross sum specified in the Part 36 payment notice."

14. Then part 44.3(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 36)."

15. Then 44.3(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."

16. It seems to me obvious that the respondent did not better the payment in having regard to the terms of Part 36, especially Part 36.23(4), and paragraph 10.5 of the practice direction. But even if that is wrong, in my judgment there is only one way in which the judge's discretion as to costs could properly have been exercised here and that was to award the appellants all their costs, at least all the costs incurred after the Part 36 payment.

17. This case is much more stark than **Bajwa v British Airways** [1999] PIQR Q152 in which Stuart-Smith LJ said at paragraph 38:

"I have already given my reasons for rejecting Mr Ritchie's submissions as to the effect of the payment-in. Was the judge's reason, namely that the claimant in fact recovered more than she would have done if she had accepted the money in court, sufficient to justify granting her all the costs? In my judgment it plainly was not. I accept it was a consideration. But when set against all the other factors it seems to me to pale into significance. The defendant's assessment of the overall damages was right; the claimant's was extravagantly wrong; the claimant lost on every issue in the four day trial. The inevitable inference is that the claimant was not interested in the defendant's assessment of the value of the case."

18. The judge was obliged by Part 44.3(5), as I have said, to consider the whole of the party's conduct. It does appear that he may have considered the respondent's conduct only after the date of the Part 36 payment. If that is so he fell into error. At least since the particulars of claim were filed on 20 September 1999 and until he was found out the respondent's approach to this action has been nothing sort of a cynical and dishonest abuse of the court's process. For my part I entertain considerable qualms as to whether, faced with manipulation of the civil justice system on so grand a scale, the court should once it knows the facts entertain the case at all save to make the dishonest claimant pay the defendant's costs. However, all that is sought here is an order for 100 per cent of the appellants' costs instead of 75 per cent, the costs in question being only those incurred after the date of the Part 36 payment. The appeal certainly cannot be resisted on that basis. I would allow it and make the order sought.

19. **LORD JUSTICE MUMMERY**: I agree.

ORDER: Appeal allowed with costs to be paid by the respondent to the appellants, such costs to be the subject of a detailed assessment.

(Order not part of approved judgment)

MR C BAGOT (Instructed by Hextall Erskine, 28 Leman Street, London E1 8ER) appeared on behalf of the Appellant

The Respondent did not appear and was not represented