CA on appeal from Central London County Court (Mr Recorder Sapsford QC) before Peter Gibson LJ, Lady Justice Arden : 7th December 2001

JUDGMENT : LORD JUSTICE PETER GIBSON

1. I will ask Arden LJ to give the first judgment.

LADY JUSTICE ARDEN:

2. This is an appeal with the permission of the Right Honourable Sir Martin Nourse against the order of Mr Recorder Sapsford QC, sitting at the Central London County Court, dated 26th March 2001 whereby, in addition to the order that the defendant pay the claimant the sum of £13,463.95, being as to £12,143.95 the principal sum and as to £1,320 agreed interest thereon, the defendant was ordered to pay two-thirds of the claimant's costs of the action. It is from the order as to costs which the defendant now appeals on the grounds that the decision was perverse, particularly in the light of a letter dated 17th January 2001, and was without prejudice as to costs.

3. The appellant seeks an order that she should pay the claimant's costs up to and including 10th March 2000 and that the claimant should pay the defendant's costs thereafter. She further seeks an order on appeal that the payment of the sum of £13,463.95 be postponed until the costs have been agreed or assessed so that an excise is paid by one party to the other. The defendant further seeks an order that if the claimant acts with reasonable expedition in agreeing or assessing the costs, she will pay interest at the judgment rate at the date of judgment until final payment.

4. This action was begun in September 1999, and in it the claimant sought to recover sums expended on behalf the defendant in providing her with the use of a car and training which it was agreed should be repaid if her engagement with the claimant terminated. The agreement was first pleaded as an original agreement, and on that basis the defendant paid £3,800 court on 18th February 2000.

5. The matter was due to come on for trial in November 2000, but on the day before the trial the claimant applied to amend the particulars of claim to plead that the agreement was an oral agreement recorded in writing. Permission was granted on the usual terms as to costs, that is to say the order which His Honour Judge Butter made as to costs was that the costs of the application and the costs of and occasioned by the amendment should be paid by the claimant to the defendant. The judge assessed the costs of the application at £1,400 plus VAT and directed that they should be paid within 14 days. But there was no assessment of the costs of and occasioned by that application.

6. On 17th January 2001 the defendant made an offer to the claimant marked "without prejudice save as to costs". This offer made a further sum of £8,810 in addition to the sum paid into court, which, on the defendant's calculations, would make the total sum offered to the claimant the same amount as that claimed, including interest. The offer said that the defendant would pay the claimant's costs up to and including 10th March 2000, and stated that it was a term of the offer that the claimant should pay the defendant's costs from 11th March 2000 up to 14th November 2000 and that after that date each side should pay its (or her) own costs. The letter stated that the offer was open for acceptances for 21 days from the date of receipt. The offer was not accepted.

7. The matter came on for trial on 28th March 2001. The trial ended on the third day, when the Recorder made the order referred to above. In his judgment on costs the Recorder recorded that he had been told that the costs of both sides were approaching £46,000. I interpose that that sum is, of course, far in excess of the sum actually being claimed in the litigation. The Recorder referred to the amendments of the particulars of claim and stated that those amendments made a fundamental difference to the case and afforded the claimant an arguable case. He added that without the amendments it appeared to him that the claim would have failed. The Recorder accepted that if the defendant had been faced with the case as then pleaded back in February 2000, she would have made a sensible commercial decision to settle the claim at that stage. The Recorder held that: *"Whilst reflecting the fact that the claimant has won the case, I do really feel that some heads should have been put together at an earlier stage to avoid what I see here is the costs far outweighing the final amount of the claim as I have added."* (That is the word which occurs in the Recorder's judgment.) Having given those reasons, the Recorder awarded the claimant two-thirds of its assessed costs.

8. I now turn to the appellant's submissions.

9. Mr Alloway (for the appellant) submits the defendant should have her costs down to the date of the late amendment under the general rule stated by the Court of Appeal in **Beoco v Alfa Laval Co** [1995] QB 137 at 154A. Stuart-Smith LJ, with whom Peter Gibson LJ and Balcombe LJ agreed, said this: *"As a general rule, where a plaintiff makes a late amendment as here, which substantially alters the case the defendant has to meet and without which the action will fail, the defendant is entitled to the costs of the action down to the date of the amendment. There may, of course, be special reasons why this general rule should not be applied."*

10. Mr Alloway has referred us to the notes in Civil Procedure (Autumn 2001) page 295, paragraph 17.3.4, in which the comment is offered that it is likely that the same general principles as are set out in the passage I have read from the report will be applied under the Civil Procedure Rules.

11. However, Mr Alloway seeks an order for the defendant to receive her costs calculated from an earlier date, namely March 2000, because that was the last date for making a payment in. He emphasises the Recorder's finding that if the case had been properly pleaded at the outset the defendant would have made a commercial decision to settle. But Mr Alloway contends that the offer of 17th January 2000 was in fact a more generous offer than the Beoco principle would have suggested, since the defendant was to pay the claimant's costs down to March 2000 rather than that the claimant should pay all the costs down to the date of amendment.

12. Mr Alloway also points out that the defendant had explicitly warned the claimant in correspondence of problems with the claimant's case. The defendant put in a full defence. It was not just a holding defence. But she denied in her amended defence the claimant's claim even, as I say, once that claim had been amended.

13. Mr Alloway, as I have said, emphasises that the Recorder found that the defendant would have made an offer to settle the case if faced with the amended form of claim in February 2000. Mr Alloway submits that, after making the payment in, the defendant incurred very considerable costs in preparing her case that would not have been incurred had the claim been properly pleaded. However, there are no details of what those claims were. Mr Alloway submits that the defendant should not have to pay the judgment sum before the costs have been agreed or assessed as there is a risk that she would not be able to recover her costs against the claimant. The claimant is a small private company, which is apparently no longer trading, in the computer business.

14. We have not called upon counsel for the respondent, Mr Hammerton, but we have read his skeleton argument. He submits that the case raised by the amendment was first raised in Mr Channon's witness statement dated 13th March 2000, which I take it would have been served shortly thereafter. It was also repeated and amplified in Mr Channon's second witness statement dated 9th August 2000. Accordingly, had the defendant wished to do so, she could have increased her payment in before significant costs were incurred.

15. Mr Hammerton also submits in his skeleton argument that the defendant was criticised for her approach to the management for litigation at a hearing on June 2nd 2000. In that connection our attention has been drawn to the fact that in her allegation questionnaire the defendant stated that she would wish to call six witnesses; and indeed the claimant also wanted to call four witnesses, one of whom was Mr Channon, who was a director of the claimant. Mr Hammerton says that it was because of the defendant that the case was allocated to the multi-track rather than to the fast-track.

16. Mr Hammerton further submits in his skeleton argument that the amendments that are sought in this case were made to ensure that the statement of case reflected Mr Channon's evidence, as set out in his witness statements, and to plead an alternative claim in quasi contract. He submits that although the amendment was fundamental, in the sense that it was necessary for the claimant to succeed, it did not introduce a new factual case which was different from that set out in the witness statements. Moreover, Mr Hamilton submits that the claimant was ordered to pay the costs of the application for amendment together with the costs of and occasioned by that amendment so that that compensates the defendant for the fact that the amendment led to wasted costs.

17. Mr Hammerton distinguishes the Beoco case on the basis that it was decided before the CPR; and, on the facts, the amendments in that case were made at trial and reduced the claim from approximately £1 million to only £22,000. The amendment in this case, however, was made four months before the trial and reflected the claims already made in witness statements.

18. I now turn to my conclusions.

19. First, the question of the incidence and the amount of costs are a matter to be determined by the trial judge in the exercise of his discretion, and this court should only interfere if he was plainly wrong. Under the Civil Procedure Rules the general rule is that the unsuccessful party would be ordered to pay the costs of the successful party; and indeed that was the general rule before the Civil Procedure Rules. Moreover, under the Civil Procedure Rules, in addition to deciding what order to make about costs, the court has to have regard to all the circumstances, including the conduct of the parties and whether an admissible offer to settle was made by any party. Furthermore, under Civil Procedure Rule 44.3, paragraph 6, the orders which the court may make as to costs include an order that a party may pay a proportion of another party's costs, or a stated amount in respect of another party's costs, or costs from or until a certain date only, and so on.

20. In his short judgment the Recorder took into account the fact that the particulars of claim had been substantially amended in March 2000 and, as I have already noted, he discounted the claimant's costs by one third. The Recorder would have had in his mind the conduct of the case and, in particular, the fact that the trial had taken three days. He noted that the costs far exceeded the amount at stake. Having regard to the fact that the Recorder had conducted the trial, he would have been fully aware of the extent to which it ought to have been possible for the defendant to make a proper evaluation of the strengths and weaknesses of the case before the trial.

21. I accept that the Recorder did not refer to the offer of 17th January 2001; but he was referred to it by counsel. Moreover, the view that he took went in some respects further than the offer. He accepted that the claimant would have settled the claim in March 2000 if the claim had then been properly pleaded. That was one of the factors which he took into account when he made his assessment of the proportion of costs which the defendant should bear. Accordingly, no point can be made about the lack of a reference to the letter.

22. In addition, the Recorder did not note, but it was in fact the case as Mr Hammerton pointed out in his skeleton argument, that on the application to amend the defendant received an order not only for the payment of the costs of the amendment and the application for amendment but also the costs occasioned by the amendment; so that the court had already recognised that she should be compensated for the fact of a late amendment to that extent.

23. As I see it, the Recorder started from the correct starting point, namely that the claimant should get its costs. He then took into account all the relevant considerations that worked in the defendant's favour. He chose the option of awarding a proportion of costs. As I see it, he was entitled to do that on the basis of CPR 44.3(6). It cannot be said that by taking that course he was plainly wrong. He had no break down of the costs incurred by either party; indeed we did not have any such break down.

24. As I see it the **Beoco** principle when read with the Civil Procedure Rules does not mean that there is only one way of reflecting the fact that there has been a fundamental amendment of the case. There are other ways of producing a principled result. In this case it was open, as I see it, for the Recorder to take the view that, even if the amendment was fundamental and even if the defendant would have made an offer at an earlier point, nonetheless the right course to take was the course that he took of awarding the claimant two-thirds only of its costs. Mr Alloway rightly emphasises the Recorder's finding that the defendant would have made an offer had the case been pleaded originally. But the Recorder clearly thought that it was right to look not just at what would have happened in those events, but also at what actually happened in this case. His view was "some heads should have been put together at an earlier stage" so as to avoid costs - he clearly thought that there was fault on both sides - and the holding that the defendant would have settled in February 2000 if the case had been properly pleaded then was not inconsistent with the conclusion that she ought to have settled on some other day.

25. Accordingly, I would dismiss this appeal.

26. Sir Martin Nourse in his order made an order for a stay of execution of the judgment debt and costs. In the light of my decision on the appeal, I do not consider that it is appropriate that that stay should be continued.

LORD JUSTICE PETER GIBSON:

27. I agree.

Order: Appeal dismissed with costs summarily assessed at £5,000 including VAT.

MR T ALLOWAY (Instructed by Fairchild Greig, 199 Acton High Street, Acton, London, W3 9DD) appeared on behalf of the Appellant.
MR A HAMMERTON (Instructed by Brain Chase Coles, Haymarket House, 20/24 Wote Street, Basingstoke, Hants RG21 7NC) appeared on behalf of the Respondent.