CA on appeal from Mr Recorder P.Clarkson QC. Yeovil County Court before Simon Brown LJ, Sir Anthony Evans. 15th November 2000.

JUDGMENT : SIR ANTHONY EVANS:

1. This appeal is against a Costs Order made by Mr Recorder Clarkson QC in the Yeovil County Court on 30 April 1999.

2. He had previously given judgment for the Claimant for a total sum of £2,321.16 including interest after a three-day hearing. The claim was for £7,579.86. Both sums include VAT. He also dismissed the counterclaim.

3. The outline facts can be shortly stated. The Claimant is a contractor and supplier of new and second-hand equipment to the catering trade. The Defendant is a butcher at premises in High Street, Somerton, Somerset. In August 1997 the Claimant carried out works to refurbish the meat preparation area in a separate building at the rear of the Defendant's shop, and to supply equipment for it.

4. No price was agreed and so a reasonable sum became due. The Claimant rendered his invoice dated 2 September 1997 –

   "Clad out Room Rear of Shop sort out Electric and Plumbing Fit Sliding Door Clad [1¼] Walls in Small Room Leave Clean & Tidy

PRICE	*£6,450.95*
VAT 17½%	*£1,128.91*
	£7,579.86"

5. The County Court summons was issued on 24 September 1997. The Recorder described the Claimant as "*unnecessarily precipitate*". The Defendant challenged the amounts claimed for different items of work and goods supplied, with a major degree of success. The Recorder found that the reasonable due was no more than £1,751.94 plus VAT, a total of £2,058.52. That sum together with interest produced the figure of £2,321.16 for which judgment was given.

6. The Defendant paid £2,000 into Court on 7 August 1998 and a further £1,000 making a total of £3,000 on 20 January 1999. It was not disputed that the Claimant was rightly ordered to pay the Defendant's costs from the date of the second payment in, notwithstanding that the claim succeeded to the extent that it did.

7. The appeal arises because the Recorder also ordered the Claimant to pay the Defendant's costs for an earlier period, from 1 October 1997. On that date the Defendant's solicitors wrote to the Claimant's solicitors in reply to their letter dated 23 September, which was effectively their letter before action although the summons was issued on the following day. In the course of a two-page letter and a detailed reply, the Defendant's solicitors said this –

   "Before we launch into a Defence and the Request for Further and Better Particulars of the Claim, we are instructed to put forward a proposal that our Client will settle the claim at £4,000 plus VAT plus the Court fee and Solicitors costs on summons to see an end to the matter.

   If your Client is not prepared to agree then we will advise our Client to pay this sum into Court and to bring in his Quantity Surveyor and the matter will be litigated most vehemently."

8. On 10 October, the day the Defence and Counterclaim was filed, the Claimant's solicitors responded to this letter, and they concluded - *"In summary, our Client does not accept your contentions and is not going to accept the sum of £4,000 plus VAT etc whether paid into Court or otherwise."*

9. No payment into Court was made then nor at any time until 7 August 1998 when as stated above the sum was £2,000 only.

The Counterclaim

10. By his counterclaim, which the Recorder dismissed, the Defendant counterclaimed £675 for the cost of dismantling part of the work and further contended that the value of the works was no more than £1,500.

11. The Recorder dismissed the counterclaim and expressly rejected any contention that the work done was worthless (p.8A).

The Costs Order

12. Having heard submissions from Counsel, the Recorder made the following Costs Order – *"The Claimant to pay the Defendant's costs from 11 February 1999 and from the date of the Defendant's letter of 1 October 1997."*

    He gave the following reasons, referring to the letter – *"I consider that the plaintiff was given a very good offer then. I consider that it is quite clear from the way he conducted himself that he was precipitate in bringing this action, the Defendant was conciliatory ..... I consider that it was a genuine offer. It was a generous offer. If it had been sensibly accepted on 1st October 1997, Mr Stacey and indeed Mr Amber would have been put to much less costs and much less concern. The opportunity should have been taken then, grasped and the matter finalised. I consider this litigation was ill-advised to proceed on the basis it did ...."*

The Appeal

13. Mr Sharp for the Claimant submits that the Recorder erred in treating the offer made by the letter as if it was, in effect, a payment into Court on the date it was written. No such payment was made. Moreover, the Defendant's solicitors stated expressly that one would be made, if the offer was refused, and it was not. The Recorder, he submitted, was not entitled to deprive the successful Claimant of his costs, or to order him to pay the Defendant's costs, before the effective payment into Court on 11 February 1999, whether under the Civil Procedure Rules or under the old Rules of the Supreme Court.

14. Mr Hickmet responded that the Recorder was entitled to deprive the Claimant of his costs, and to order him to pay the Defendant's costs from 1 October - effectively, the whole costs of the action - both under the old rules and under the new.

"Without prejudice"

15. Mr Sharp raised a further submission, that the relevant paragraphs of the 1 October 1997 letter were written "without prejudice" and therefore were privileged and should have been ignored by the Recorder. The fact that the letter could have been headed, but was not, either "without prejudice" or "without prejudice as to costs", is not of course fatal to this objection. Nor is the fact the whole letter was included in the agreed bundle without objection from either party. We were told a certain amount about references made by both counsel to the status of the letter in the course of the trial, but no transcript of that part of the proceedings was available. It was never suggested, it seems, that the £4,000 plus VAT (total £4,700) offer should be regarded as an admission of liability by the Defendant, by whom it was made. In the result, the letter was treated as if it was expressly marked "without prejudice as to costs".

16. Although Mr Sharp did not formally abandon this submission, he accepted that it was not raised at the trial and that for that reason no evidence was directed towards it. We consider that it ought not to be raised on this appeal and that in any event it appears to be ill-founded, on the material available to us, for the reasons indicated above.

New or old Rules?

17. The C.P. Rules became effective on 26 April 1999, only four days before the Recorder's judgment in this case. The `old' C.C.R. were in force throughout the relevant period from 24 September 1997 when the summons was issued until 11 February 1999 when a sum exceeding the amount of the judgment was paid into Court.

18. Both parties' counsel accepted before us that the Recorder was entitled and bound to apply the `new' C.P.R. when the Costs Order was made on 30 April 1999, but they also agreed, as we understand it, that the Recorder was correct to approach the exercise of discretion under the C.P.R., as he felicitously put it in the course of argument – *"... as part of the discretion it will only be appropriate to look at the conduct at the time under the old rules. I think that is the fair way of looking at it"* (p.14B).

19. Order 11 Rule 10 of the C.C.R. was in the following terms –

    "(1) A party to proceedings may at any time make a written offer to any other party to those proceedings which is expressed to be `without prejudice save as to costs' and which relates to any issue in the proceedings.

    (2) ... the Court shall, in exercising its discretion as to costs, take into account any offer which has been brought to its attention; Provided that ... the court shall not take such an offer into account if, at the time it is made, the party making it could have protected his position as to costs by means of a payment into court."

20. Order 22 rule 14 of the Rules of the Supreme Court was to the same effect.

21. Also under the old Rules, the judgment of this Court in **In re Elgindata (No.2)** [1992] 1 W.L.R. 1207 recognised that as a matter of general principle and in the exercise of the Court's discretion there were circumstances in which a successful party might be deprived of his own costs and even might be ordered to pay the costs of an unsuccessful party. That was a case where the party which succeeded in the litigation overall had raised other allegations on which he had failed. He had raised them unreasonably and improperly, and the length and costs of the proceedings had expanded accordingly. In the present case, it could not be said that superfluous issues were raised or contested by the Plaintiff, but if the old Rules had applied, it would have been necessary to consider whether the Recorder's findings, that the whole litigation was precipitate and unnecessary, entitled the Court to apply the same principle and to deprive the Plaintiff of his costs, even order him to pay the Defendant's costs.

22. The principles of **In re Elgindata** have been held to apply under the `new' C.P. Rules (see **Gwembe Valley Development Co. Ltd. (In Receivership) v Kosky (No.2),** The Times 30 March 2000, to which Mr Sharp helpfully referred us). Our starting point under the new Rules, however, must be the relevant express Rules, which are found in Parts 36 and 44.

23. Part 36.3(1) may be regarded as equivalent to the former C.C.R. O.11 R.10 and R.S.C. O.22 R.14 –
"36.3 (1) Subject to rules 36.5(5) and 36.23 [neither of which applies in the present case], an offer by a Defendant to settle a money claim will not have the consequences set out in this Part unless it is made by way of a Part 36 payment."

24. A Part 36 payment is a payment into Court (Part 36.2(1)(a)). Part 36 begins with the following introductory rule, headed "*Scope of this Part*" –
"36.1 (1) This Part contains rules about –
(a) offers to settle and payments into Court; and
(b) the consequences where an offer to settle or payment into Court is made in accordance with this Part.
(2) Nothing in this Part prevents a party making an offer to settle in whatever way he chooses, but if that offer is not made in accordance with this Part, it will only have the consequences specified in this Part if the Court so orders."

25. The cost consequences of a Part 36 payment which the Claimant fails to beat are set out in rule 36.20(2) –
"(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 ...."

26. This consequence does not follow the Claimant's refusal of the offer made in the 1 October letter, however, because no Part 36 payment was made in respect of that offer of £4,000 plus VAT: rule 36.3(1) so provides.

27. The General Rules about costs are found in Part 44. Rule 44.3(1) reads –
(1) The Court has a discretion as to –
(a) whether costs are payable by one party to another;
(b) the amount of those costs; ...
(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.
(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 the 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) [followed by express reference to further costs provisions in Part 36].
(5) The conduct of the parties includes –
(a) conduct before, as well as during the proceedings ...
(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."

28. The inter-relationship between the payment into Court provisions in Part 36 and the general rules stated in Part 44 was considered by this Court, sitting in Cardiff, in **Ford v. GKR Construction Ltd.** [2000] 1 All E.R. 802. That was the converse of the present case. The Claimant recovered less damages than the amount of the payment into Court. (Judgment was given before the C.P.R. came into force). The Defendants nevertheless were ordered to pay the whole of the Claimant's costs, including those incurred after the date

of the payment in. The initial reaction of Judge L.J. who gave the leading judgment was that the judge was wrong to make that order (see 807b). However, he considered that "the judge reaching his decision about costs is required to take into account all relevant aspects of the litigation" (807d), and the Court held that the order was justified in the circumstances of that case, in particular because of the late introduction of evidence by the Defendants which had the effect of reducing the amount of the judgment below that of the payment in. Judge L.J. concluded – *"Indeed, [the judge's] judgment has served to underline [not "undermine"] the importance, rightly and increasingly, to be attached to civil litigation being conducted openly between the parties with the real issues between them efficiently and quickly identified and investigated without, as it now seems to me, any unfairness to these defendants in this case."* (808j).

29. Lord Woolf M.R. added this, after referring to C.P.R. Part 36 – "I also draw attention to the fact that the rules refer to the power of the court to make other orders and make it clear that the normal cost consequences of failing to beat the sum paid in does not apply when it is unjust that it should do so. If a party has not enabled another party to properly assess whether or not to make an offer, or whether or not to accept an offer which is made, because of non-disclosure to the other party of material matters, or if a party comes to a decision which is different from that which would have been reached if there had been proper disclosure, that is a material matter for the court to take into account in considering what orders it should make." (810g).

30. The circumstances of the present case of course are wholly different. But the Recorder had the wide discretion permitted by C.P.R. 44.3, and Lord Woolf's statement of principle is relevant also.

31. The background to the Recorder's conclusion, quoted above, that the offer made on 1 October was a genuine and generous offer was his finding that the Claimant grossly exaggerated almost all the individual items of his claim. Overall, he found that the Claimant undertook to produce a professional job but the product rated no more than 80 per cent on a DIY scale and 25 per cent on a professional basis. For cladding, the claim was £1,875.50, later reduced to £1,800. This involved a "ridiculous" mark-up of 74%. £493.79 was allowed. The cold store door was invoiced at £1,000. It was second-hand and acquired by the Claimant for £20. The door had "some short-term value" and the judge allowed £200. A sink that was provided was scrap and had no value. The claim for labour was 134 hours at £22.50p per hour, a total of £3,015. The judge allowed 50 hours at £12.50, total £625. He found the Defendant's expert, Mr Carruthers, a persuasive and helpful witness, and it appears from the judgment that the Plaintiff's expert "declared himself unable to challenge Mr Carruthers' opinion as to installation, fixing and sealing" (judgment 3B).

32. On the other hand, the judge rejected the Defendant's contention that the work done was worthless and his claim for £675 removal costs. He also found that the reasonable sum due was rather more than the valuation of £1,500 which the Defendant also put forward.

33. The judge's reference to the Claimant having been "precipitate" in bringing the action is supported by the evidence we have seen regarding the circumstances in which the summons was issued. The Claimant's original brief invoice, quoted above, was followed by a meeting at the Defendant's home, at which some details were given. The Defendant wrote a reasoned and, in the light of the judge's findings, reasonable letter dated 23 September, which his solicitors referred to in theirs of 1 October which contained the £4,000 plus VAT offer. The Claimant's response, however, had been to instruct his solicitors to issue the summons on 24 September, and it was served between then and 1 October.

Conclusion

34. In my judgment, there was ample justification for the judge's order depriving the Claimant of his costs from 1 October 1997 until 20 January 1999, notwithstanding that no payment in which exceeded the amount of the judgment was made until the later date. The judge took account not only of the refusal of the much higher offer made in immediate response to the issue of the summons, but also of the whole of the Claimant's "precipitate" conduct in commencing the proceedings when he did. He found in effect that this conduct was unreasonable and that, if the Claimant had acted reasonably, the proceedings were unnecessary and would never have taken place. To this extent in my judgment, he was entitled to make the order that he did. I add that I would have reached the same conclusion in accordance with **In re Elgindata (No.2)** principles, even if the `old' Rules still applied. Under the C.P. Rules, the position is clear.

35. More difficult is whether the judge was entitled to order the Claimant to pay the Defendant's costs during the same period. This order means that the Defendant is put in the same position as regards costs as if a Part 36 payment was made on 1 October 1997 (actually rather better, because the Claimant would have had a short period within which to accept or refuse the payment in). Yet the Defendant did not make the payment in, although his solicitors said that he would do so. The claimant's intemperate response did not prevent him from making the payment, and if he had done so he would have been securely protected in respect of costs and partly at least in respect of loss of interest. When the first payment in was made, it was for a lesser amount. Moreover, the Defendant's counterclaim remained in issue at the trial, and on that issue the Claimant succeeded.

36. I am persuaded in these circumstances that the Recorder erred in law when he made the same costs order as he would have done if the Defendant had made the payment in and had succeeded on all issues at the trial. This seems to me to be an error of principle which is outside the wide discretion given to the Court by C.P.R. Part 44.3. I also consider that this part of the order was not consistent with the `old' C.C.R. and R.S.C. and the principles stated in **In re Elgindata (No.2).** It may well be that, if the old Rules remained in force, it would be necessary to hold that the Claimant could not be ordered to pay any part of the Defendant's costs during the period in question.

37. However, the C.P. Rules do apply and they permit the Court a wide discretion. The Recorder understandably felt that the Claimant's approach was unreasonable throughout and that a more ameliorative response to the letter would have resulted in a generous settlement for him and would have made further proceedings unnecessary. I would hold that even in this respect the order was not wholly wrong, and that to give effect to the Recorder's views on relevant matters affecting the Court's discretion, the Claimant should be ordered to pay a proportion, namely, one half of the Defendant's costs for the period from 1 October 1997 to 20 January 1999.

38. To that extent in my judgment the appeal succeeds.

Lord Justice Simon Brown:

39. I agree. Clear though it is that the claimant behaved thoroughly unreasonably from first to last, and tempting though it is therefore to uphold the Recorder's order in full measure, I share my Lord's view that it was wrong to treat the letter of 1 October 1997 for all the world as though it constituted a payment into court. There are to my mind compelling reasons of principle and policy why those prepared to make genuine offers of monetary settlement should do so by way of Part 36 payments. That way lies clarity and certainty, or at any rate greater clarity and certainty than in the case of written offers.

40. Of course payments into court are not themselves necessarily decisive: **Ford v GKR Construction Limited** [2000] 1 AllER 802 is a good illustration of that. Defendants who pay in too little or too late, just as claimants who fail to take out what ultimately proves to be enough (Mrs Ford being one such), may nevertheless be able to establish that it was their opponent's unreasonable conduct which prevented them from making a properly informed decision about their prospects in the litigation, and thus avoid what in a Part 36 case would be the usual costs order. But that was not the basis of the defendant's argument on costs here; nor, indeed, could it have been consistently with his being prepared to make the £4,000 offer in the first place and his eventual payments in, first of £2,000 and then of a further £1,000.

41. Payments into court have advantages. They at least answer all questions as to (a) genuineness, (b) the offeror's ability to pay, (c) whether the offer is open or without prejudice, and (d) the terms on which the dispute can be settled. They are clearly to be encouraged, and written offers, although obviously relevant, should not be treated as precise equivalents.

Order: Appeal allowed to the limited extent that the claimant/appellant has one half of the defendant's/respondent's costs below for the period 1 October 1997 to 20 January 1999. Appellant's to pay the Respondent's costs of the appeal. Detailed assessment within 14 days if not agreed. (Order does not form part of approved judgment.)

Mr J Sharp (instructed by Battens with Poole & Co. of Yeovil BA20 1TP) for the Appellant
Mr R S Hickmet (instructed by Messrs Alan R. Walton & Co. of Somerton TA11 7ND) for the Respondent