CA on appeal from Manchester Court (Mr Recorder Berkley QC) before Tuckey LJ; Keene LJ; Wilson LJ. 12th January 2006.

JUDGMENT : LORD JUSTICE TUCKEY:

1. This is an appeal by the defendant, the Ministry of Defence, from an order for costs made by Mr Recorder Berkley QC in the Manchester County Court at the end of a trial on quantum in this personal injury claim. There was £150,000 in court. The judge awarded the claimant, Mr Jackson, £155,000 and ordered the defendant to pay 75% of his costs on the standard basis, to be subject to a detailed assessment. The defendant says that it was the successful party in the litigation and the judge's order took no account of this. It further says that the 25% reduction did not reflect the fact that the defendant had itself incurred costs in meeting a wholly exaggerated claim.

2. On 17th February 1998 the claimant, as a 17-year old recruit into the Royal Engineers, suffered a serious injury to his right knee during training whilst jumping from a bridge into a river. His patella was fractured and two years later had to be removed. He was left with variable pain in the joint and problems with kneeling, bending, prolonged standing and walking. He was discharged as medically unfit from the army but was capable of full-time work, although handicapped in the labour market. The judge awarded him £40,000 for pain, suffering and loss of congenial employment and a further £30,000 for handicap in the labour market. There were further awards for past loss of earnings and employment benefits, including pension, which totalled about £62,000.

3. Proceedings were issued in late 2001. The defendant denied liability and a split trial was ordered for January 2003. Shortly before that trial, however, liability was admitted and judgment was subsequently entered for damages to be assessed. As well as the heads of claim to which I have referred, which were or became largely uncontroversial, the claimant advanced claims for future loss of earnings of over £400,000 and specially adapted accommodation of more than £250,000. These claims were based on the claimant's account of his residual disabilities which were not borne out by the agreed medical evidence. In support of them expert evidence was obtained from experts on care, accommodation and employment, and from accountants.

4. The claimant's first schedule of loss served in February 2004 claimed more than £1 million. The defendant took issue with much of the claim with a good deal of success, since the claimant's final schedule of loss served about a year later claimed only about £240,000. The claims for future loss of earnings, apart from the **Smith v Manchester** claim, and special accommodation were abandoned.

5. On 24th February 2005 the defendant made a Part 36 payment into court of the equivalent (taking account of earlier interim payments) of £150,000. The parties had been ordered to attend a pre-trial Joint Settlement Meeting. Such meetings were part of a pilot scheme for personal injury actions in the Manchester area where the claim exceeded £100,000. The scheme was promulgated by the Presiding Judge of the Northern Circuit, following the report of a working party. Its purpose, as stated in the published guidelines, was: *"... to facilitate settlement of the case or the narrowing of the issues but such a result is not made compulsory by reason of the order."*

   The guidelines also stated: *"The JSM is a confidential process. However in cases in which the court has ordered a JSM to take place, the parties will be expected to report on the JSM in accordance with the attached JSM Outcome Monitoring Form to the extent that completion of the Report is not inconsistent with the confidentiality of the process."*

6. The working party report which was also published makes clear that the meetings were to be confidential. Under the heading "***Part 36 Payments and Offers***" it recognised that the parties might simply use such a meeting solely to gauge their own level of Part 36 payment in or offer. Nevertheless, the report said: *"... the members considered that there could be no reference to the contents of any discussions which took place during a Joint Meeting by a party wishing at a later stage to make good an allegation of misuse of the process on the issue of costs. The members considered that the confidential (without prejudice) basis of the discussions is of paramount importance."*

7. The meeting in this case took place on 10th March 2005. Suffice it to say that no settlement was reached.

8. The trial took place on 14th and 15th April 2005. Although as I have explained substantial parts of his claim had been abandoned, the claimant gave evidence about his disability which went beyond the agreed medical evidence. In his costs ruling the judge was to say:

"12. ... He sought to paint a picture of significant residual disability, not only through the statements of case and the manner in which the case was presented, but also, regrettably, when he gave evidence. I formed the view when he gave his evidence that there was a significant degree of exaggeration."

9. I have already noted the outcome of the trial. The claimant obviously had only just beaten the payment into court, which was much closer to the sum awarded than the amount claimed by the final schedule of loss to which I have referred. It was this and his finding that the claimant had exaggerated his disability and advanced a claim which went far beyond that to which he was entitled which persuaded the judge to make a reduction of 25% from the costs to which the claimant would otherwise have been entitled.

10. CPR Rule 44.3(1) provides that:

"(1) The court has discretion as to –
(a) whether costs are payable by one party to another; ...

(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 36).

(5) The conduct of the parties includes –
(a) conduct before, as well as during, the proceedings and in particular ...
(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; and
(c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and
(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim."

It was the claimant's conduct which led the judge to make the reduction he did.

11. In the course of the argument before the judge Miss Tania Griffiths, for the defendant then as now, invited him to take into account what had happened at the settlement meeting on the basis that there had been an admissible offer to settle within the meaning of CPR 44.3(4)(c). The judge's response was to say (and I paraphrase), generally speaking a without prejudice offer that is made which is not accepted is not admissible, unless it is made on the basis that it is without prejudice save as to costs. This was an entirely accurate statement of the law, as Miss Griffiths now accepts. There was and is no suggestion here that any offer of settlement made at the meeting had been expressed as without prejudice save as to costs, and so there was no admissible offer within the terms of CPR 44.3(4)(c).

12. The judge did not therefore take into account anything which happened at the settlement meeting. Miss Griffiths, however, says that he should have done so as part of her argument that the defendant won or was the successful party, to use the terms of the rules. She says that it can be inferred that the defendant attended the meeting with the intention of negotiating, and that if the claimant had said that he would have settled for £155,000 an increased offer would have been forthcoming and a trial would have been avoided.

13. I do not accept these submissions. The settlement scheme makes it clear that the meetings which take place are confidential. In other words, they are without prejudice. If offers are made and rejected the scheme contemplates that they will be followed by admissible Part 36 offers or payments. What happens at these meetings is generally privileged and cannot be referred to in the way that Miss Griffiths invites us to do. I do not think that any particular inferences can be drawn from the fact that

a party attends a court-ordered settlement meeting of this kind, still less that if a claimant were to indicate that he would settle for a little more a defendant would be prepared to pay it.

14. In further support of the submission that the defendant was the successful party, Miss Griffiths says that it knocked the claimant down from a claim of over £1 million to £225,000; the claimant did not come down voluntarily. The whole trial, she says, was about whether the claimant had exaggerated his claim and the defendant succeeded in establishing that he had. Unless the court was prepared to show its disapproval of such conduct by depriving a claimant of all or most of his costs, there was no disincentive against a claimant putting in a wholly unjustified and exaggerated claim where the sky would be the limit in the hope that the claimant might get away with it or more than he deserved. She referred us to **Painting v University of Oxford** [2005] EWCA Civ 161, where this court deprived the claimant of most of her costs because the claim had been exaggerated.

15. Persuasively and persistently though these submissions were put, I do not accept them. The claimant was successful in the sense that he established a claim for substantial damages and beat the payment into court, albeit by a small margin. The defendant was perfectly able to protect itself against the fact that it faced an exaggerated claim. As most defendants do in such circumstances, it had access to experienced lawyers and (if necessary) experts to evaluate the strength of the claim it faced. It could with the benefit of such advice -- and perhaps with the benefit of hindsight in this case should -- have made an earlier Part 36 payment into court, and certainly could have increased that payment into court by making a further payment after the unsuccessful settlement meeting. The judge took into account the fact that the claimant had only just beaten the payment in which had been made, as I have already said. What is more, the judge made it clear that it was open to the defendant to challenge specific items relating to the abandoned claims, such as the costs of the experts which were not relied on at trial, at the detailed assessment, where of course the claimant will only be able to recover costs which were reasonably incurred. This is in fact what has happened here, as can be seen from the defendant's points of dispute to the large bill of costs filed on behalf of the claimant.

16. The reduction which the judge made -- and the reduction which we can anticipate the costs judge is likely to make -- must act as a considerable disincentive to claimants and their advisers against making exaggerated claims. The case of **Painting** is, as Miss Griffiths accepted, an exceptional case where the claimant persisted in a claim for £400,000 at trial and was awarded about £25,000 at the end of the process. The basis upon which the court was persuaded to interfere with the judge's discretion was that the Recorder had not addressed the question as to who was the overall winner or given appropriate weight to that fact. Here there is no basis upon which it can be said that the judge failed to take account of who had been the overall winner, because he noted how close to the payment into court his ultimate award had been and did, unlike the Recorder in the case of Painting, make an appropriate reduction to reflect that fact.

17. So I do not accept the submission that we can interfere with the judge's decision because the judge did not make a proper assessment as to who was the successful party here.

18. The other point which Miss Griffiths urged on us was that the 25% reduction did not reflect the fact that in having to meet the exaggerated claim the defendant itself incurred costs. It should be noted that, unlike in some cases, the defendant did not ask for any order for costs itself. Miss Griffiths accepted that in determining the proportion by which the claimant's costs should be reduced the judge could take into account the fact that the defendant had incurred costs which the claimant should pay. That is what the court is enjoined to do in a situation like this by 44.3(7). Miss Griffiths submits that a 25% reduction was lamentably too low in the circumstances. She says it should have been at least 50%.

19. I am afraid I do not accept this submission. The judge must have been aware of the fact that in resisting the exaggerated claim the defendant itself would have incurred costs. His 25% took that into account. In such a situation the judge is best placed to make an assessment of that kind. This court will only interfere with the exercise of discretion if it can be shown to be plainly wrong. I do not think that has been shown in this case, bearing in mind that the 25% reduction was a reduction across the board relating to all costs, including the claimant's costs of pursuing the claim on liability which was not

settled at the first opportunity. It may well be that I might have made a larger reduction than the judge did here. But that is not the test for us to apply in this court. I can see no basis for interfering with the judge's order. It was well within the wide discretion which he had.

20. Accordingly, for the reasons I have given, I would dismiss this appeal.

21. **LORD JUSTICE KEENE**: I agree.

22. **LORD JUSTICE WILSON**: I also agree.

ORDER: Appeal dismissed; the defendant to pay the claimant's costs of the appeal, those costs to be subject to the same detailed assessment as is proceeding in the High Court in Manchester in relation to the costs of the trial below. (Order not part of approved judgment)

MISS TANIA GRIFFITHS (instructed by Messrs Berrymans Lace Mawer, Liverpool L2 9SU) appeared on behalf of the Appellant
MR SIMON BROWNE (instructed by Messrs Donns, Manchester M60 1DZ) appeared on behalf of the Respondent