JUDGMENT : The Hon. Mr Justice Langley: QBD Commercial Court **:** 8th July 2004

1. There are disputes between Wasps and LSH on costs issues following my judgment dated 6 May 2004. In that judgment, read with a further ruling made on 28 May, I decided that Wasps succeeded in their claim to the extent of a principal sum of £2,417,500 representing the difference between LSH's valuation of the Sudbury ground of £832,500 and my conclusion that a proper valuation would have been in a sum of £3.25m.

2. There are three other significant matters which are material to the costs issues which now arise.

The Contingency Fee Agreement.

3. Wasps conducted the litigation under a Contingency Fee Agreement with their solicitors (NGJ) made on 5 June 2002 which provided for a success fee of 100% uplift on Basic Costs. A copy of that agreement, redacted to excise privileged advice, has recently been disclosed to LSH.

4. Subject to anything which might arise from the redacted part of the CFA, LSH has accepted that there is no point to be taken on the enforceability of the CFA as between Wasps and NGJ. It is also accepted that the redacted advice need only be disclosed (if at all) in any detailed assessment proceedings and if any points do then arise they should be considered in that context.

5. However LSH has taken a point that "*Wasps have a problem with the recoverability of their success fee*" because of a failure to comply with the disclosure rules for such fees. The point arises because one of the issues before the court is whether or not Wasps should be awarded an interim payment in respect of their costs. If Wasps are not entitled to recover the success fee that would plainly affect the amount of any such award. In any event the point is one which I should address.

6. The Practice Direction –Protocols requires a person who enters into a CFA to fund litigation to "inform other potential parties to the claim that he has done so": paragraph 4A-1.

7. Paragraph 19.2 of the Costs Practice Direction requires a claimant who has entered into a CFA to file and serve with the claim form *"a notice containing the information set out in Form N251"*.

8. Form N251, so far as material to the present case, would have been completed by giving notice that in respect of the claims brought the case of Wasps "is now being funded by a conditional fee agreement dated …. which provides for a success fee". The form provides for it to be signed by the solicitor for the claimants. Although Mr Johnson, for LSH, suggested the form also requires disclosure of the existence of any insurance policy for the fees of the opposing party, I do not read it that way and no rule or practice direction requires such disclosure. I think the rule is directed only to the funding of the fees of the party giving the notice.

9. CPR Rule 44.3B provides that:

   "(1) A party may not recover as an additional liability-

   (c) any additional liability for any period in the proceedings during which he failed to provide information about a funding arrangement in accordance with a rule, practice direction or court order."

   The success fee is an "*additional liability*".

10. Wasps never served a Form N251 upon LSH or its solicitors. However the letter before action, dated 15 April 2002, stated in terms "*this claim is now being funded by a conditional fee agreement which provides for a success fee"*. In fact the CFA was not finally entered into until 5 June 2002 and costs are claimed only after that date. It is clear that LSH was at all times aware and believed that the claim was being funded by a CFA which provided for a success fee. By 5 June proceedings had been issued but it had been agreed that they would not be served pending the completion of pre-action protocols.

11. The court was informed of the existence of the CFA at the first Case Management Conference held on 7 February 2003.

12. LSH submits that there have been breaches of the relevant practice directions. I agree. As to paragraph 4A.1 of the Protocols Practice Direction the letter did not relate to a CFA which had in fact then been concluded. As to paragraph 19(2) of the Costs Practice Direction no Form N251 was served with the claim form or at all. On the other hand, the objective of the practice directions to inform LSH of the CFA and success fee was effected.

13. Paragraph 10.1 of the Costs Practice Direction provides (so far as material) that:
"10.1 In a case to which rule 44.3(B)(1)(c) … applies the party in default may apply for relief from the sanction. He should do so as quickly as possible after he becomes aware of the default. An application, supported by evidence, should be made under Part 23 to a costs judge … of the court which is dealing with the case. (Attention is drawn to rules 3.8 and 3.9 which deal with sanctions and relief from sanctions)."

14. Wasps has applied for relief. It did so on 14 June, the day before the hearing of these issues. It is agreed that I should deal with the application. A witness statement of a partner in NGJ was provided in support of the application. It is there said, I am sure correctly, that the suggestion that there had been a breach of the practice directions was first made and first came to NGJ's attention on Friday 11 June 2004 on receipt of LSH's skeleton argument for the present hearing. It would seem, therefore, that LSH was itself not alive to (or at least not concerned about) the breaches until very recently.

15. CPR Rule 3.9 sets out the circumstances which the court may consider on an application to grant relief from a sanction. I see no need to address them in any detail. Essentially, in my judgment, LSH has from the outset had the information to which it was entitled and I cannot see any conceivable prejudice to LSH from the breaches of the practice directions nor has any prejudice been suggested save the failure to inform LSH whether or not there was an insurance policy available to Wasps in respect of the costs of LSH. But, as I have said, I do not think LSH was entitled to that information. The fact that there is no insurance was stated by Mr Railton QC, for Wasps, in the course of the hearing.

16. In those circumstances I think Wasps are entitled to relief from the sanction provided for by Rule 44.3(B)(i)(c) and so are not to be deprived of the opportunity in principle to recover the agreed success fee if it is otherwise appropriate for an order for costs to be made in favour of Wasps.

Amendments to the Claim

17. The second significant matter relates to amendments to the claim. The Points of Claim were served on 21 October 2002 following disclosure by Wasps sought by LSH. At that time the claim relied on what is referred to in my Judgment as the DTZ July 1996 Valuation (which valued the ground at £5.7m) as the correct valuation. Thereafter (on 23 September 2003) the parties sought unsuccessfully to mediate the dispute, and, on 31 October 2003, Wasps served an amended claim relying on the expert valuation from Mr Lomax in the sum of £3.420m. This valuation (and Mr Pryor's valuation for LSH) had been disclosed in August prior to the mediation. The application to amend was opposed by LSH. It was, or should have been, obvious to LSH from the report of Mr Lomax that the claim (if it was not mediated) would have to be amended to reflect the report. Indeed they were told as much in July 2003. It must have been equally obvious to LSH and Wasps that the defence would require adjustment to reflect the report of Mr Pryor which stated that a proper valuation would have been only £1.163m or possibly £1.534m.

18. The application to amend came before Tomlinson J on 28 November 2003. He was critical of Wasps for the delay in making the application. The primary claim itself was not amended in the sense that it was still alleged that with a proper valuation Wasps would have achieved the financial outcome in fact achieved by Loftus Road plc which after various credits would have resulted in a loss of something in excess of £8m. An alternative claim was also put forward in effect for the difference in valuations.

19. Tomlinson J gave permission for the amendments. He also ordered Wasps to pay the costs occasioned by the amendments and of the application. LSH submits that it is appropriate to describe this as Wasps "getting away with" the amendments. I do not, however, accept that sort of description. Plainly the court thought it was appropriate for the amendments to be made and for the trial date to remain and so to commence when it did. The amendments are not of an unfamiliar nature in cases of this sort. What was unfortunate was the timing; but even there LSH had been alive to what the case was for some months prior to the application and I can see at least some sense in avoiding further costs in the hope of a successful mediation. I would add that whilst the extent and effect of the costs order made by Tomlinson J is in dispute, it is LSH's case that the sum involved is the not insignificant amount of £45,830.

Settlement offers

20. The third significant matter is that no Part 36 offer has at any time been made by LSH. In contrast Wasps did make a Part 36 offer. Both parties have made without prejudice save as to costs offers. The sequence of these events is as follows.

21. On 23 December 2003 Wasps made a Part 36 offer for the principal sum by way of damages of £2,163,001. That is some £0.25m less than the sum awarded to Wasps by my judgment. On 23 January 2004 LSH made a without prejudice save as to costs offer to pay Wasps a sum of £1.1m for damages, interest and costs. It need hardly be said that Wasps has done much better than that. Lastly on 20 February 2004 (that is after 3 days of the trial) Wasps made a without prejudice offer save as to costs of an all-in figure of £3.1m. This offer expired on the morning of 23 February without any response from LSH. The offer was renewed the next day and rejected.

22. Both the letter in which Wasps made the original Part 36 offer and the letter on behalf of LSH dated 23 January 2004 sensibly explained in detail the basis of the figures each put forward. Wasps' offer was in substance based on the difference in the LSH valuation and the valuation of Mr Lomax and so the basis on which Wasps have succeeded in their claim. The offer in the January letter was based on the lower of Mr Pryor's valuation figures whilst, of course, maintaining that there was no liability because of scope of duty and causation issues.

Are Wasps entitled to costs?

23. The first issue which arises is whether or not Wasps are entitled to an order for all or part of their costs of the claim. In a sense it is surprising that it should be submitted, as it is, by LSH, that there should be any doubt about this. Wasps has unquestionably won. It has beaten the Part 36 offer it made. LSH has made no such offer and the letter offer it made does not come close to the amount to which Wasps is entitled.

24. It is LSH's submission that "the old days of successful parties being able to recover their costs of an action, whatever the mismatch between the case as presented and the final result, are well and truly over". I do not have any difficulty with such a proposition. The question is whether it has any real relevance to this case. The basis for the submission by LSH that it does is the supposed "wholesale amendment" of Wasps' case from reliance on the DTZ Valuation to reliance on the lower figure supported by Mr Lomax, the submission that the case on scope of duty changed and continued to do so right up to the commencement of the trial, and the fact that the outcome of the trial was that, far from recovering on the basis that the Club would have realised for itself the value of the ground which Loftus Road plc realised, Wasps only recovered the difference in the valuations.

25. I am not impressed by these submissions. The material considerations seem to me to be these:

    i) This is commercial litigation. It was and always has been about money. Wasps has succeeded in recovering damages and interest of more than £3.5m.

    ii) "*The general rule*" is that the loser pays the winner: CPR 44.3. In a commercial case the winner is the payee: see **A.L. Barnes Ltd v Time Talk (UK) Ltd** [2003] EWCA Civ 402 per Longmore LJ referred to (with approval) in **Kastor Navigation Co. Ltd v Axa Global Risks (UK) Ltd** [2004] EWCA Civ 277 at para 146.

    iii) In considering whether to depart from the general rule the court is directed to the further matters set out in CPR 44.3(4) and (5).

    iv) I do not consider that either Wasps or LSH acted unreasonably in (respectively) advancing the claims and defences which they did either from the outset or as the matter progressed. No doubt Wasps' case did change when they had an expert valuation. The sanction for the delay in formally making that case is the costs order made by Tomlinson J. Equally LSH could be criticised for the belated admission of negligence, but that was also a consequence of their own expert report. Nor do I find it unusual that the primary damages claim has failed when both parties were aware of the possibility of an alternative and lower claim. The very nature of Wasps' claim required consideration of circumstances which were hypothetical as they had to assume a valuation which was not in fact provided.

v) The essence of Wasps' case on scope of duty did not change. There was, to use Mr Railton QC's expression, no "forensic mugging" of LSH. There was further evidence in support of the case which came late but I do not think it can fairly be described as making a new case.

vi) It is rarely a simple task to draw up a "balance sheet" of which party has won or lost on the issues in a given case. But, in simple terms:
   a) Wasps won on the key issue, scope of duty. This was the issue to which the bulk of the factual evidence was directed.
   b) Wasps established that Mr Rigby said planning permission for the ground was not a realistic possibility.
   c) Negligence was conceded in January 2004.
   d) Wasps won on valuation issues. The court substantially accepted the expert evidence of Mr Lomax and rejected the expert evidence of Mr Pryor.
   e) Wasps won on reliance and causation issues. LSH failed in its allegation that Wasps would have entered into the Share Sale Agreement whatever the valuation.
   f) Wasps won on the expert accounting issues.
   g) Wasps lost on the "hypothetical circumstances" necessary to establish the primary claim.
   h) Wasps won on all issues of mitigation and contributory negligence.

vii) In the overall context of this claim and the issues to which it gave rise I think the circumstances surrounding the Part 36 offers and without prejudice save as to costs offers are of the greatest importance. Wasps put a value on their claim in that context not much different from the sum they have recovered. LSH put a much lower valuation on it. It would be wholly unrealistic to suppose that LSH would have placed any greater value on the claim or acted differently in any other relevant way if the claim had been conducted by Wasps in any other manner. The claim was fought with conviction on scope of duty, valuation and damage issues. The second Part 36 offer produced no response when there could be no doubt at all as to the full nature of Wasps' case. To my mind, the nature of this claim from the outset has been one in respect of which protection by way of a Part 36 or other offer was plainly available to LSH and nothing material has occurred which affected the judgment made by LSH about whether to seek that protection or at what level to do so.

26. In my judgment these considerations point overwhelmingly to the conclusion that Wasps are entitled to the costs of the proceedings without any deduction and in accordance with the general rule.

CPR 36.21

27. The second issue is whether Wasps should be awarded additional interest on their damages and costs. The third issue is whether the costs should be assessed on a standard or an indemnity basis.

28. CPR 36.21 applies where (as here) a defendant (LSH) is held liable for more than the proposals contained in a claimant's (Wasps) Part 36 offer. The latest date on which Wasps' original Part 36 offer could have been accepted without a court order was 13 January 2004. The rule provides that:

"*(2) The court may order interest on the whole or part of any sum of money … awarded to the claimant at a rate not exceeding 10% above base rate for some or all of the period starting with the latest date on which the defendant could have accepted the offer without needing the permission of the court.*

(3) The court may also order that the claimant is entitled to –
(a) his costs on the indemnity basis from the latest date …., and
(b) interest on those costs at a rate not exceeding 10% above base rate.

(4) Where this rule applies, the court will make the orders referred to in paragraphs (2) and (3) unless it considers it unjust to do so.

(5) In considering whether it would be unjust to make the orders … the court will take into account all the circumstances of the case including –
(a) the terms of any Part 36 offer;
(b) the stage in the proceedings when any Part 36 offer … was made;
(c) the information available to the parties at the time when the Part 36 offer … was made; and

(d) the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer … to be evaluated…."

Interest on damages

29. The first question is, therefore, whether or not Wasps should be awarded interest on the principal sum I have awarded them at a rate greater than 1% above base rate (which the court has already said would otherwise be appropriate) and if so at what rate provided 10% is not exceeded. The offer was straightforward, made at a time when no doubt the future substantial costs of a trial would be uppermost in minds, and no further information was required or sought to evaluate it. It was also made after a failed mediation. Nor do I see any reason why it would be "unjust" to make such an order. The rule is intended to provide an incentive to appropriate settlements. It also provides some redress for the fact that the law offers no compensation for the stresses and strains of litigation: **R v Bryn Alyn Community (Holdings) Ltd [**2003] EWCA Civ 383 at para 22. That consideration, however, has less relevance to proceedings such as these albeit I do not doubt that it would be wrong to discount it entirely. The claim has required a substantial commitment for Wasps and there remains a dispute as to whether the personal assets of the Trustees of the Club are at risk. In my judgment the justice of this case, taking into account these considerations and the matters to which I have referred in addressing the first issue, is that Wasps should be awarded enhanced interest at a rate of 6% on the principal sum which they have recovered from 13 January 2004 to the 28 May 2004 when the amount of the judgment was determined.

Interest on Costs/Indemnity Costs

30. The same considerations seem to me to apply to whether or not enhanced interest should be awarded on the costs payable to Wasps and to whether or not those costs should themselves be awarded on an indemnity basis. But in my judgment there is a significant difference between the two in the circumstances of this case. Whilst I can see no injustice in awarding Wasps costs on an indemnity basis from 13 January 2004, especially so where the Part 36 offer was made when the substantial costs of a trial were largely only in prospect, I do not think in a case in which the success fee is set at 100% and is properly recoverable in principle, an award of interest on the costs would be appropriate or just. By definition those costs have not yet been paid. Whilst neither the fees of counsel nor the experts were subject to the CFA the only information before me is that those fees have been paid to the extent of £250,000 but I do not know when those payments were made. I think the rule is primarily intended to compensate the party entitled to costs for payments already made by way of costs at the time judgment is obtained: **McPhilemy v Times Newspapers (No 2)** [2002] 1 WLR 934 at paragraph 23. Whilst I note that the terms of the order referred to in that paragraph, perhaps in contrast to the principle stated, was for interest to run from "the date upon which the work was done or liability for disbursements was incurred" I think the rule is intended to compensate the client not his advisers for sums paid or for an obligation to pay which might itself carry an exposure to interest. I will therefore order that costs be assessed on the indemnity basis from 13 January 2004 but I will make no order as regards interest on those costs.

Stay/Interim payment

31. There remain two further issues. LSH submits that the costs orders in favour of Wasps should be stayed pending the appeal LSH intends to make and resists any order for an interim payment towards those costs. It is agreed that if I grant a stay the question of an interim payment does not arise.

32. I have already granted a stay on the damages award and LSH submits the same reasons apply to costs. In particular nothing has been put before LSH or the court as to the current means of Wasps and, it is said, there must be a serious risk that if LSH is successful in the appeal it will not recover from Wasps any sum it may previously have paid and, if then entitled to payment of all or part of its own costs from Wasps, may well have difficulty in obtaining payment.

33. Wasps first (before disclosure of the CFA) sought to meet these objections by limiting its application for an interim costs award to the disbursements incurred, substantially the fees of counsel and experts totalling some £640,000 of which £250,000 has been paid.

34. It is said that Wasps incurred these liabilities (in contrast to the costs the subject of the CFA) with no guarantee they would be reimbursed and so the court should conclude that they would equally be able to repay them should they subsequently be ordered to do so. It is also said that "it is right" that the professionals engaged by Wasps should now be (further) compensated for their work. Of course if Wasps were in a position to pay they could do so in any event.

35. Wasps have suggested since disclosure of the CFA that an interim award of £1m would be appropriate of which £376,000 would relate to disbursements and the balance would be retained separately in an NGJ client account pending the outcome of the appeal. It is also submitted that, whatever the outcome of the appeal, it must be likely that Wasps will remain entitled to the costs of the experts in view of this court's findings. I should note that Mr Johnson was not minded to contest the appropriateness of the figure of £1m should the court consider an interim payment should be made.

36. I am not persuaded that a limited order of the sort proposed by Wasps is appropriate. There is no suggestion that LSH is not good for whatever liability it may ultimately have. Counsel for LSH have said the appeal will be pursued expeditiously. I do think the risks of ultimate unfairness to LSH outweigh the limited benefit of a payment towards disbursements. Nor do I see anything to be gained from payment to a frozen account. It follows that I think a stay in relation to costs is appropriate provided that the appeal is pursued expeditiously or as may be agreed. I will however grant Wasps express liberty to apply to lift the stay and seek an interim award of costs should they consider that this proviso is not being honoured.

Order

37. I shall expect the parties to prepare a Draft Order(s) to reflect the rulings I have made for consideration when this judgment is handed down if the terms cannot be agreed.

Mr D. Railton QC and Mr J. Chapman (instructed by Messrs Nicholson Graham & Jones) for the Claimant

Mr E. Johnson (instructed by Messrs Williams Holden Cooklin Gibbons) for the Defendants