CA on appeal from the Central London County Court (HHJ Collins) before Ward LJ; Dyson LJ. 20th October 2005.

JUDGMENT : LORD JUSTICE DYSON:

1. This is an appeal from the decision of His Honour Judge Collins made on 9th December 2004 whereby, having dismissed Miss Daniels' claim, he ordered that she pay the successful defendant's costs. It raises a point of some importance as to the circumstances in which it is proper for a court to deprive a successful defendant of some or all of his costs.

2. At all material times, the claimant was a serving police officer in a mounted police unit of the Metropolitan Police based at Great Scotland Yard stables. She was required to attend a two week annual training course in January 2000. On January 14th she was riding a horse called "Albany" when she was thrown sideways out of the saddle to the ground and suffered personal injury. In 2003 she started proceedings in which she alleged that the injury was caused by the defendant's negligence. The allegations of negligence included that the horse was known by the defendant's inspector to be unreliable and impulsive, and that the claimant had been instructed by PC White to remove from the horse's girth the martingale which limited the height at which the horse could carry its head.

3. The defendant denied negligence and alleged that the accident was caused or contributed to by the claimant's own negligence.

4. The value placed on the claim in the claim form was a sum not exceeding £15,000. Although the natural home for such a claim is the fast track, this claim was allocated to the multi-track because it was estimated that the trial would last five days: three witnesses were to be called to support the claimant's case, and the defendant intended to call ten witnesses. In fact, the trial was completed (including judgment) within three days. This was because both counsel and the judge conducted the case in an expeditious and economical manner.

5. Although Miss Perry has drawn attention to the large number of witnesses called by the defendant, she did not rely upon this feature of the case in her submissions to the judge in relation to costs. Nor, as I understand it, has she relied on it before this court.

6. Damages were agreed by the parties on the first day of the trial in the sum of £7,000. In a detailed judgment, Judge Collins found comprehensively in favour of the defendant on all issues of liability. He found that the claimant was a much better rider that she claimed to be, and that Albany was not a difficult horse to train and was a perfectly appropriate ride. He rejected the claimant's evidence that she was required by her superiors to ride Albany, and accepted the defendant's case that she had actually asked for the horse to be assigned to her for the training. He found PC White to be a ***"highly impressive witness"***. Finally, he decided that the martingale issue was irrelevant to liability in that it would have made no difference whether Albany had been wearing one or not.

7. The total costs incurred by both parties taken together fell just short of £50,000. It is therefore not surprising that the liability for costs has assumed great significance. Mr Cory-Wright submitted to the judge that there was no reason why the general rule, that the unsuccessful party should be ordered to pay the costs of the successful party, should not apply.

8. On behalf of the claimant, Miss Perry argued that there were reasons for departing from the general rule. She drew the attention of the judge to certain correspondence from which it was clear that, as she put it, the defendant showed an "absolute determination" to take the case to trial and an adamant refusal to contemplate any form of negotiations. This behaviour, she submitted, justified a departure from the general rule.

9. On 6th April 2004 the claimant's solicitors had made a Part 36 offer to settle on terms that the defendant pay £7,500 plus costs. This offer was rejected by the defendant's solicitors' letter, dated 27th April, in which they wrote: *"We confirm that we would be defending this claim to trial."*

10. On 13th May 2004 the claimant's solicitors wrote again making a further Part 36 offer to settle on terms that the defendant pay £5,000 plus costs. This offer was rejected by a letter dated 28th May. On 30th September the claimant's solicitors made yet another attempt to settle, this time offering to accept £4,000 plus costs. This offer was rejected by letter dated 8th October.

CPR 44.3

11. So far as material CPR 44.3 provides:

"44.3(1) The court has discretion as to –
(a) whether costs are payable by one party to another;
(b) the amount of those costs; and
(c) when they are to be paid.
(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 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; and
(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim."

The judgment

12. The judge dealt with the question of costs in a full judgment. He said that he saw no reason to depart from the ordinary rule that costs should follow the event. He said that he was required to have regard to the conduct of the parties and, in particular, conduct in relation to attempts to settle the case. He noted that the defendant had not made a payment into court or a Part 36

offer, and that the Part 36 offers made by the claimant had all been rejected by the defendant. Despite the disproportionate amount of costs in comparison with the value of the claim, he said that there were two reasons why the defendant was justified in taking the stance that he did. The judge said:

"Firstly, this was part and parcel of an on going dispute between the claimant and defendants in relation to which there is other litigation about which I know very, very little, but if the defendants had offered to settle this one for a bit of money and some costs they are really putting themselves in a very similar position in the other case as well. Civil Procedure Rules and the strictures about costs are not designed to provide a situation where claimants can - I do not mean blackmailing actions in the sense they are deliberately dishonest - but that one is familiar with a situation where many insurance companies will settle for a small amount of money in cases which they do not really [think] are meritorious because it is cheaper to get rid of cases on their nuisance value. I do not think the defendants were unjustified in taking the view that that approach did not apply to them in this particular action.

"Also, I am now aware of the wider implications in relation to other claims in relation to accidents to mounted police officers. It seems to me that the defendants were entitled to take the view that cases should be tested in court if it came to it rather than any officer who had an accident believing all he or she needed to do was bring a claim in order to get a settlement of something."

13. As regards the first of these reasons, the judge was shown a letter, dated 10th January 2003, from the claimant's solicitors to the defendant, which referred to earlier proceedings by the claimant, asserting a claim based on alleged bullying and harassment at work. Those proceedings were settled, but, according to the letter, the situation had not improved. The letter contained details of further complaints. These had resulted in further proceedings which had not been resolved at the date of the trial before Judge Collins.

14. In relation to the second point, the judge was shown a memorandum which had been prepared on behalf of the defendant in response to comments made by the judge on the first day of the trial. It was in these terms:

"The Metropolitan Police entirely accept that, viewed in isolation, it would not normally make economic sense to defend this case to Court. However over a period of 3 - 4 years we have received a significant number of claims from officers based in the Mounted Branch (17 in total of which 10 resulted from horse riding accidents). The majority of these claims have been successfully defended and as a result the number of claims emanating from officers in this area have virtually grounded to a halt. Virtually all the officers have been represented by solicitors instructed by the Police Federation and it is the Police's Accident Claims Branch's experience that they will not hesitate to support claims even where there is no evidence of negligence on the part of the Commissioner. In addition we are dealing with a relatively small close-knit community where 'the grapevine' works well. Had we conceded in this case the result would have been common knowledge within that group.

In the present case the Metropolitan Police have taken the view that this was simply a fall from a horse that was either an accident or resulted from negligence on the part of the rider. As the Court will no doubt appreciate this is very much an occupational hazard in this area of work, with a number of similar accidents occurring each year. Were they to concede liability in this case it would, in their view, only result in a flood of claims from other officers who experienced a similar misfortune to the claimant.

"In the circumstances the branch took the view that the question of principle was worth the expense."

Grounds of appeal

15. Miss Perry submits that the judge's exercise of discretion is flawed in two principal respects. She says that the judge failed to take any or any proper account of (i) the late production of a document by the defendant; and (ii) the attempts by the claimant to settle the case and the defendant's refusal to contemplate any negotiations.

Late production of evidence

16. On the morning of the first day of the trial, the defendant disclosed the notebook of PC White. It contained what purported to be a contemporaneous statement of the events which culminated in the claimant's fall from the horse on 14th January 2000. This statement contained a detailed account of the entire training session, but included no reference to an instruction to remove the martingale.

17. When giving evidence, PC White relied on his notebook and said that if he had instructed the claimant to remove the martingale he would have recorded this in his notebook. This was the only contemporaneous record made by any witness of a matter about which evidence was given.

18. Miss Perry says that, until the disclosure of the notebook, the claimant and her advisers believed that PC White was relying on his recollection of events, more than three years after the event, unaided by any written record, as were all the other witnesses. She contends that, if the notebook had been disclosed earlier in the proceedings (in accordance with the CPR) as it should have been, the claimant's advisers may have taken a less sanguine view of the prospects of proving that she had been instructed to remove the martingale (an important issue in the case), as well as of the prospects of her evidence being accepted more generally.

19. I accept that a material failure to comply with the CPR is a circumstance which may properly form the basis of a decision by a court to depart from the general rule that costs should follow the event. The difficulty facing Miss Perry is that this point was not advanced before the judge. She responds by saying that the judge was well aware that the notebook had been disclosed on the first day of the trial and that it was an important document. In these circumstances, Miss Perry submits that the judge should have taken the point of his own initiative.

20. I cannot agree. Regrettable though the late disclosure was, it has not been suggested that this was attributable to anything other than oversight on the part of PC White. I acknowledge that the judge might have deprived the defendant of some part of his costs to mark his disapproval of the failure to disclose the notebook, but, to put it no higher, it is by no means obvious that such an order ought to have been made. In these circumstances, and in view of the fact that Miss Perry did not take the point at the time, although she made other points very fully, I cannot see how the judge could reasonably be criticised for failing to take it into account when he exercised his discretion.

Attempts by the claimant to settle the case

21. Part 44.3(4) requires the court to have regard to all the circumstances, including the conduct of the parties. Part 44.3(5) contains a non-exhaustive list of what "conduct" includes. Refusal to accept a Part 36 offer or payment is not in the list. This is not surprising since Part 36.20 and 36.21 contain detailed provisions as to the cost consequences of Part 36 offers and payments.

22. I find it difficult to envisage circumstances in which it would ever be right to deprive a successful defendant of some or all of his costs solely on the grounds that he refused to accept a claimant's Part 36 offer. Take the present case, which is in many ways a paradigm case. The claimant alleges negligence and claims damages which are agreed at £7,000. The defendant is strongly of the view that the claim is without foundation and makes no Part 36 payment or offer. The claimant makes a Part 36 offer of £4,000 which the defendant rejects. The claim is dismissed by the judge. In my judgment there is no basis for saying that the defendant's refusal of the claimant's Part 36 offer is conduct which should be taken into account by the judge to deprive the defendant of some or all of his costs.

23. The inference to be drawn from Parts 36 and 44.3 is that (notwithstanding the terms of Part 44.3(4)(c)) the mere fact that a successful defendant has refused a claimant's Part 36 offer cannot of itself be a sufficient reason for departing from the general rule and depriving the defendant of costs.

24. Another way of putting the same point is to say that it is only unreasonable conduct by a successful party that may be relied on by a court to deprive him of costs. I refer to ***Halsey v Milton Keynes General NHS Trust*** [2004] EWCA Civ 576, [2004] 1 WLR 3002. That case concerned the question of the circumstances in which it is appropriate to deprive a successful party of costs on the grounds of a refusal to participate in an ADR, and in particular a mediation. At paragraph 13 the court said that the fundamental principle is that a departure from the general rule is not justified unless it is shown (the burden being on the unsuccessful party) that the successful party acted unreasonably in refusing to agree to ADR.

25. Although no question of mediation has been raised in the present case, in my judgment the same general approach should be adopted. I do not see how an unsuccessful claimant can show that a successful defendant acted unreasonably simply on the grounds that he refused to accept the Part 36 offer.

26. In the course of her submissions, Miss Perry made it clear that this was not in fact how she was putting her argument. Her case is that the court can depart from the general rule where a defendant unreasonably refuses even to enter into negotiations to attempt to settle a case. I would accept this general proposition, but I would emphasise the word "unreasonably". The difficult question is: in what circumstances is a refusal to negotiate unreasonable? This will depend on all the circumstances of the case.

27. It seems to me that Halsey helps to provide an answer in a case such as the present. It is true that Halsey was concerned with the costs consequences of the refusal by the successful party to agree to mediation. But as was made clear at paragraph 5 of the judgment, "Alternative Dispute Resolution" is defined in the Glossary to the CPR as a "Collective description of methods of resolving disputes otherwise than through the normal trial process". I do not see why this definition should not be understood as extending to include any kind of negotiations between the parties, whether direct or indirect, and, as I understood it, Miss Perry was inclined to agree.

28. The fundamental question, therefore, is whether by indicating to a claimant that he has no wish to negotiate at all (as occurred in the present case), a defendant is acting so unreasonably that he should be deprived of some or all of his costs even though he is the successful party. In Halsey the court identified, at paragraph 16, a number of factors which may be relevant to the question whether a party has acted unreasonably in refusing ADR. Some of those are plainly not applicable where the issue is whether the party has acted unreasonably in refusing to negotiate. But I would mention two of the factors which, in my view, *mutatis mutandis*, are of some relevance in the present context. At paragraph 18 the court said this:

> *"(b) The merits of the case. The fact that a party reasonably believes that he has a strong case is relevant to the question whether he has acted reasonably in refusing ADR. If the position were otherwise, there would be considerable scope for a claimant to use the threat of costs sanctions to extract a settlement from the defendant even where the claim is without merit. Courts should be particularly astute to this danger. Large organisations, especially public bodies, are vulnerable to pressure from claimants who, having weak cases, invite mediation as a tactical ploy. They calculate that such a defendant may at least make a nuisance-value offer to buy off the cost of a mediation and the risk of being penalised in costs for refusing a mediation even if ultimately successful."*

29. Paragraphs 25 and 26, where, in relation to the question whether mediation has a reasonable prospect of success, the court said this:

> "25. In our *view, the question whether the mediation had a reasonable prospect of success will often be relevant to the reasonableness of A's refusal to accept B's invitation to agree to it. But it is not necessarily determinative of the fundamental question, which is whether the successful party acted unreasonably in refusing to agree to mediation. This can be illustrated by a consideration of two cases. In a situation where B has adopted a position of intransigence, A may reasonably take the view that a mediation has no reasonable prospect of success because B is most unlikely to accept a reasonable compromise. That would be a proper basis for concluding that a mediation would have no reasonable prospect of success, and that for this reason A's refusal to mediate was reasonable.*
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> *"26. On the other hand, if A has been unreasonably obdurate, the court might well decide, on that account, that a mediation would have had no reasonable prospect of success. But obviously this would not be a proper reason for concluding that A's refusal to mediate was reasonable. A successful party cannot rely on his own unreasonableness in such circumstances. We do not, therefore, accept that, as suggested by Lightman J, it is appropriate for the court to confine itself to a consideration of whether, viewed objectively, a mediation would have had a reasonable prospect of success..."*

30. The first of these factors is particularly germane in the present case. It seems to me to be entirely reasonable for a defendant, especially a public body such as the police, to take the view that it will contest what it reasonably considers to be an unfounded claim in order to deter other, similarly unfounded, claims. It is well-known that large organisations often make payments to buy off claims which they consider to be speculative, if not wholly without foundation, in order to avoid the trouble and expense of contesting them. This propensity, coupled with the fact that claims are now funded on a "no win no fee" basis may, in part, be responsible for fuelling what has been described in some quarters as a "compensation culture".

31. If defendants, who routinely face what they consider to be unfounded claims, wish to take a stand and contest them rather than make payments (even nuisance value payments) to buy them off, then the court should be slow to characterise such conduct as unreasonable so as to deprive defendants of their costs, if they are ultimately successful.

32. As the judge recognised, this may mean (and in the present case did mean) that litigation is sometimes contested whose costs are wholly disproportionate to the sums claimed. The court will always seek to ensure that all litigation is conducted in a reasonable and proportionate manner. But that does not mean that, in a case where costs are necessarily disproportionate to

the amount claimed, a defendant is acting unreasonably and should be penalised in costs if he reasonably considers that the claim is without foundation and insists on a trial, any more than it means that a claimant is acting unreasonably and should in some way be penalised for issuing proceedings in respect of a claim, the cost of which is unavoidably out of all proportion to its size.

33. In my view, the judge's exercise of discretion in this case was unimpeachable. He was fully entitled to decide the issue of costs in the way that he did. Claimants who bring unfounded claims may, in certain circumstances, persuade a court to deprive successful defendants of their costs. But they will only succeed on the basis of a refusal to negotiate if that refusal was unreasonable. In the present case, the judge was amply justified in holding that the defendant's refusal was not unreasonable.

34. For these reasons I would dismiss this appeal.

35. **LORD JUSTICE WARD**: Judges up and down the land are likely to be exasperated in circumstances like this where £50,000 has been spent by the parties fighting over £7,000. It is hard to resist the temptation to say that the costs incurred are disproportionate to the sum in issue. It may, however, be quite another thing to say that the conduct of the litigation must, by reason of that fact alone, have been conducted so unreasonably that the winning party should be deprived of all or a proportion of his or her costs.

36. If the parties reasonably believe that they have a real prospect of success each is entitled fully and properly to advance his or her case or defence, but neither can then complain that the fight is taken to the bitter end of a judgment of the court. Each will have to accept that those who live by the sword must risk dying by the sword as well. That is the inevitable risk of litigation.

37. What can the court do to prevent what, to those outside the litigation, may seem like an unseemly, or at least un-commercial, squabble? We can and we do encourage mediation, the earlier the better. It does have an extraordinary knack of producing compromise, even where the parties appear, at the start, to be intractably opposed. The profession is encouraged to do what habitually it does do; namely try and settle the case.

38. What else can the court do? It seems to me that if a party has behaved unreasonably then this may amount to conduct within CPR 44 which will justify departure from the usual order that costs follow the event. Unreasonable conduct is the keystone. What is unreasonable depends, inevitably, on all the circumstances of the case. Judge's should not fear to investigate the question.

39. Here Judge Collins was mindful from the start of the trial that such an enquiry should be undertaken. He carried it out. For reasons given by my Lord, with which I agree, the judge did not err. Nothing unreasonable occurred here which justified an exception being made to the general rule.

40. In the result I too would dismiss the appeal.

ORDER: appeal dismissed; costs to respondent of £4,500.

MISS J PERRY (instructed by Follett Stock Solicitors) appeared on behalf of the Appellant
MR C CORY-WRIGHT (instructed by Weightmans) appeared on behalf of the Respondent