Carver v BAA Plc [2008] APP.L.R. 04/22

CA on appeal from Central London County Court (HHJ Knight QC) before Ward LJ; Rix LJ; Keene LJ. 22nd April 2008

Lord Justice Ward:

Introduction

1. The issue in this appeal boils down quite simply to this: if a claimant beats a payment of money into court by a modest amount, even £1, has she obtained a judgment more advantageous than the defendant's Part 36 offer or is the Court entitled to look at all the circumstances of the case in deciding where the balance of advantage lies? His Honour Judge Knight QC sitting in the Central London County Court on 4th June 2007 took the latter, broad view and so he ordered the claimant to pay the defendant's costs of the claim after the time for accepting the payment had expired. He also made no order for costs for the prior period covered by an earlier Calderbank offer. The claimant now appeals with permission granted by Sir Henry Brooke.

The Civil Procedure Rules

2. CPR 36 originally distinguished between Part 36 payments into court and Part 36 offers to settle. An offer to settle a money claim would not have the consequences set out in that Part unless it was made by way of a Part 36 payment. The costs consequences where a claimant failed to better a Part 36 payment or obtained less advantage from the judgment than a Part 36 payment were set out in CPR 36.20 as follows:

"(1) This Rule applies where at trial a claimant –

(a) fails to better a Part 36 payment; or

(b) fails to obtain a judgment which is more advantageous than a defendant's Part 36 offer. [Emphasis added.]

(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 without needing the permission of the court."

3. It was the generally accepted practice that beating the payment-in by as little as £1 was doing better than the payment into court and the cost consequence followed: the claimant was always at risk.

4. The Rules changed with effect from April 6th, 2007. Payment into court no longer plays any role in the Part 36 offer to settle procedure since that date. Now where an offer is or includes an offer to pay a single sum of money that sum must be paid within 14 days of the date of acceptance and if not so paid judgment may be entered for the unpaid sum (see CPR 36.11(6) and (7)). The costs consequences following judgment are now set out in CPR 36.14 as follows:

"(1) This Rule applies where upon judgment being entered –

(a) a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer; or

(b) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer.

(2) Subject to paragraph (6), where Rule 36.14(1)(a) applies, the court will, unless it considers it unjust to do so, order that the defendant is entitled to –

(a) his costs from the date on which the relevant period expired; and

(b) interest on those costs.

(3) Subject to paragraph (6), where Rule 36.14(1)(b) applies, the court will, unless it considers it unjust to do so, order that the claimant is entitled to –

(a) interest on the whole or part of any sum of money (excluding interest) awarded at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;

(b) his costs on the indemnity basis from the date on which the relevant period expired and

(c) interest on those costs at a rate not exceeding 10% above base rate.

(4) In considering whether it would be unjust to make the orders referred to in paragraph (2) and (3) above, 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 including in particular how long before the trial started the 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 an offer to be made or evaluated.

...

(6) Paragraphs (2) and (3) of this Rule do not apply to a Part 36 offer –

(a) that has been withdrawn;

(b) that has been changed so that its terms are less advantageous to the offeree, and the offeree has beaten the less advantageous offer;

(c) made less than 21 days before the trial, unless the court has abridged the relevant period."

5. The commentary on this Rule in the White Book Service 2007 reads as follows:

"The Rule now uses the expressions more advantageous than a defendant's Part 36 offer and at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer. Different consequences follow.

In particular the entitlement, unless the court considers it unjust, to the enhancement provisions of r. 36.14(3) are not available to the defendant.

These provisions are designed as an incentive to encourage claimants to make and defendants to accept appropriate offers of settlement. Such incentive would be deprived of effect unless the non-acceptance of that which ultimately proves to have been a sufficient offer ordinarily will advantage the claimant in the respects set out in the rule. ..."

The brief facts of this case

6. Miss Lisa Carver was an air hostess flying in and out of Gatwick Airport. On making her way to the airport terminal building on 31st March 2003 she stepped into a lift which, due to a mechanical defect, had stopped some 2 feet below floor level. Miss Carver fell heavily on the left side of her body and injured her left ankle. She was taken to the Accident and Emergency department of the local hospital where X-rays were taken and she was told she had a ligament injury to that ankle. She attended her general practitioner and was away from work for about four weeks.

7. Her solicitors notified Gatwick Airport of her claim complaining that she had suffered torn ligaments to her left foot which was severely bruised and swollen. On 24th July BAA, as the body responsible for the safety of the airport, conceded liability and indicated a willingness to consider any reasonable claim. On 17th November 2003 Miss Carver's solicitors sent a medical report from a Dr Goves of soft tissue injuries and they submitted a schedule of loss amounting to £2,170. On 9th February 2004 BAA made an interim payment in the sum of £520 to cover the costs of physiotherapy and chiropractor treatment. Time passed. In the summer of 2004 Miss Carver consulted her chosen orthopaedic expert, Mr Chohan and his reports were referred to BAA. On 17th November 2005 BAA wrote making what was called a "Part 36 offer" observing that Miss Carver had not appeared to suffer a significant injury although on the basis of those medical reports she would suffer some ache or discomfort from time to time from what was a soft tissue injury to the left ankle. BAA took the view that the appropriate amount of general damages was £3,000 and they offered a global settlement of £3,486 on a Part 36 basis open for acceptance for 21 days, that sum being in addition to the £520 already paid, so that offer was worth £4,006.

8. Miss Carver was not content with that offer and considered it necessary to instruct another expert with specialist knowledge of ankle injuries. In March 2006 her solicitors submitted Mr Gillham's report and on 21st March 2006 brought her claim for damages in excess of £5,000 but less than £15,000 against BAA. She relied on Mr Gillham's reports and submitted a schedule of her past and future expenses and losses in an amount of £2,170.30.

9. Mr Gillham's opinion was that she had suffered disruption of the lateral ligament complex of the left ankle which had healed with significant instability. He considered that she would need reconstruction of the lateral ligament complex of her left ankle to restore stability of her ankle followed by extensive physiotherapy. On 6th June 2006 the defendant made a Part 36 payment of the sum of £4,000 into court, subsequently making it plain by letter of 24th July 2006 that the payment into court was in addition to the interim payment previously made, thus making a total offer of £4,520.

10. That offer was rejected on 18th September 2006 when the claimant's solicitors filed a further schedule of losses which had increased to a sum in excess of £19,000. The case was reallocated from the fast track to the multi-track. In March 2007 the defendant's obtained a report from their expert Mr Boston who diagnosed a mild sprain to the ankle which would resolve in 2-3 years. He was unable to find any ankle instability and did not recommend surgery.

11. The medical experts met on 8th April and Mr Gillham agreed with Mr Boston that any ligamentous instability at the date of his examination had been due to Miss Carver's pregnancy and that the effect of the accident was limited to seven weeks off work and no more than mild symptoms thereafter.

12. As a result of that agreed position, the claimant served a further revised schedule of loss reducing the claim back to a sum in excess of £2,700.

13. In May 2007 there were some acrimonious telephone calls between the solicitors, each of them refusing to budge, the defendant refusing to make any further offer and the claimant being adamant that the money in court was unrealistic to settle the claim. In the correspondence that followed, the defendant's solicitors complained on 11th May 2007 about the claimant having made no counter-proposal throughout the four year life of the action. On 22nd May 2007 the defendant's solicitors repeated their view that the parties had a duty to use all efforts to attempt to settle the claim and to avoid wasting the court's valuable time, complaining again that no proposals whatever had been received from the claimant. The defendant's solicitors wrote:

"In so far as our client's payment into court is concerned, how far apart are we? Surely you must have valued your client's claim now and have some idea as to how much she seeks to recover – perhaps you would enlighten us. What value does your client place on general damages?"

14. On 25th May there was a flurry of correspondence. The defendant's wrote without prejudice save as to costs:

"In an attempt to bring this case to a conclusion now our clients are prepared to offer your client the sum of £20,000 in full and final settlement of her claim all inclusive of damages, interest and costs."

The claimant wrote without prejudice but as a formal offer to settle pursuant to Part 36.2 of CPR:

"We refer to previous correspondence and can confirm that we have now quantified our client's claim and formally offer to settle at £12,500 on a global basis plus the claimant's costs on a standard basis ... "

The solicitors with conduct of the case then spoke following which conversation the claimant's solicitors withdrew her Part 36 offer of £12,500 but then indicated a willingness to accept £20,000 plus the claimant's costs on a standard basis.

15. No agreement having been reached, the matter went to trial.

The hearing before His Honour Judge Knight QC

16. The judge found that the claimant had endeavoured to give her evidence very fairly and had answered the questions to the best of her ability, but in terms of certain of the items of special damage she was unable to be specific. The claim for general damages was eventually put on her behalf at £5,500, the defendant submitting that the appropriate figure was of the order of £3,000. The judge held:

"In my judgment this claim is a modest claim. It is not, I think, one which would warrant an award of the order of £5,500 at all. I think that would be excessive. And making due allowance for the continuing discomfort, and that is a critical matter in my view, the appropriate award which I make is £3,500."

He made no award for *Smith v Manchester* damages and awarded £935.30 for special damage and future loss. Judgment was accordingly entered for the claimant for £4,686.26 inclusive of interest.

17. It will be recalled that the payment into court together with the interim payment amounted to £4,520 and counsel have agreed that making allowance for the interest at the date of the payment in and at the date of the judgment, the judgment exceeds the payment in by £51. With the judge observing, "The real issue now is who is the winner", considerable argument ensued about costs. The claimant's solicitors had indicated on 30th May 2007 that their base costs were £35,000 plus disbursements of £10,000 but that the success fee under their conditional fee arrangement was 100%, that would mean that they were seeking costs in the region of £80,000 plus VAT.

18. Mr Snowden, for the defendant, submitted that in Part 36 terms, the defendant was the winner. He also, however, relied on CPR 44 to submit that the claimant's conduct should be taken into account to determine the appropriate order for costs.

19. Mr Coughlan, for the claimant, sought first to clarify the amount of costs incurred by the claimant. According to the summary assessment of costs, her costs were a little in excess of £24,000 so that, with the 100% uplift, her claim would be for £48,000 plus £9,000 for disbursements plus VAT. He submitted the claimant had done better than the payment in, that the result was more advantageous to her and that there was, accordingly, no reason to apply Part 36.14 against her. Neither her conduct, nor the conduct of her solicitors, disentitled her from asserting that the costs should follow the event.

20. In the course of these submissions the judge was taken in detail to the relevant correspondence which I have summarised above. He was properly referred to CPR 36 and CPR 44. He expressed his conclusions as follows:

"13. So far as the claimant's position is concerned, I take the view that this is a claim where they have not succeeded in obtaining a judgment more advantageous than the defendant's Part 36 offer. Having regard to such exchanges and conduct which I am entitled to, this case, it seems to me, ought never to have been fought and that the lack of response following the Part 36 offer and the way in which the matter has been conducted between June 2006 and today, in my view, has been highly regrettable and it is that which I have regard to in coming to the conclusion that the claimant has failed to secure a judgment more advantageous than the position it was in upon receipt of the Part 36 payment into court. On no view does it seem to me can it be said that for an excess of a few pounds within a margin of £50-£87 odd could it be said that the monetary judgment obtained today is more advantageous than the position in June of last year. I say that, of course, without making any judgment upon the responsibility for the change in approach by the claimant upon receiving different advice.

14. It seems to me that this was always a fast track case and it should have proceeded accordingly. If the claimant has changed her position on receipt of different advice from different consultants, that is a risk she has to assume and in my judgment that cannot affect or colour the view that I have taken, that in this case the position of the claimant today is not more advantageous than it was in June of last year. And I would invoke the rule in 36.14(2) and find that it would be unjust to make the defendants pay the cost. In my view, they are in practical terms the successful party in this litigation and I think what flows on from that is that they should get their own costs and they have applied for their costs from 27th June last year at the latest and I propose to award them their costs. I propose to award them though on the standard basis and not on the indemnity basis. Although a lot can be said about the conduct of the claimant in pursing this litigation the way it has been concluded, I am not persuaded that under CPR 44 it would warrant an award of indemnity costs.

15. The defendant has also submitted that between November 2005 and June 2006 there should be no order as to costs. The reason for that was that there was a pre-issue offer of £4,006, which again is adjacent to the sum awarded in this case. I find that a very powerful argument and certainly one which of itself and in conjunction with the other matters, indicates a failure to pursue this claim in the way I think it should have been pursued between admission of liability and issue, and justifies me in acceding to that suggestion and I make no order as to costs between November 2005 and June 2006.

16. The costs prior to that, as from the letter of claim, up to November 2005 I propose to award to the claimants on the fast track costs basis."

Discussion

21. Payment was made into court on 6th June 2006. The amended rule came into effect nearly a year later on April 6th 2007. The Civil Procedure (Amendment No. 3) Rules 2006 which effected the change enacts the following transitional provision:

> *"7(2) Where a Part 36 offer or Part 36 payment was made before 6th April 2007, if it would have had the consequences set out in the Rules of Court contained in Part 36 as it was in force immediately before 6th April 2007, it will have the consequences set out in Rules 36.10, 36.11 and 36.14 after that date."*

It is, therefore, common ground that the new rule governs the outcome of this case.

22. Mr Coughlan, for the appellant, submits that giving the language of CPR 36.14(1)(a) its ordinary meaning, a claimant does not fail to obtain a judgment more advantageous than the defendant's Part 36 offer if the judgment is for a penny more than the offer, albeit that the advantage there is a slim one. The purpose of Part 36 is to draw a clear line in the sand so that the parties know where each stands and the court can determine the costs consequence with ease and without all the uncertainty attendant upon an analysis of non-monetary advantage and disadvantage inherent in the trial process. When the payment was rejected the claimant reasonably thought in the light of the medical advice received that the claim was one worth in the region of £20,000. It is said to be unfair to judge with the benefit of hindsight.

23. Mr Snowden, for the respondent, submits that the change in the wording of the rules must involve a change in approach to the issue of costs. The new rule expands the judge's area of discretion beyond a strictly financial comparison of payment in and judgment debt.

24. We were referred to a number of authorities. In ***Neave v Neave*** [2003] EWCA Civ. 325, an unhappy family dispute between mother and son, mother sought the recovery of nine vehicles. The judge upheld her claim in respect of five of those vehicles. The effect of the judgment was that mother recovered four of the five vehicles which she sought under a Part 36 offer she had made and two more. The question was whether that offer was more advantageous than the judgment. Chadwick L.J. approached that question as follows:

> *"35. In order to decide whether the judgment was more advantageous to her than the proposals it is necessary, as it seems to me, only to ask whether the recovery of the two vehicles which she had not sought by her proposals - vehicles (a) and (d) - together with £3,000 by way of damages, was more advantageous than the recovery of the single vehicle - vehicle (h), the Norton motor cycle - which she had sought by the proposals but had not recovered by the judgment. On a simplistic level it might be thought that to recover £3,000 and two vehicles was likely to be more advantageous to the person making the recovery than recovering no money and one vehicle. But, if the matter is to be dealt with on a more refined basis then it is necessary to attribute some value to the two vehicles which Mrs Neave did recover under the judgment and the one vehicle which she had sought and did not recover under the judgment.*
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> ...
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> *38. ... On the basis of the material that was before the judge, what Mrs Neave recovered under the judgment was at least £2,500 more advantageous to her than what she had been prepared to accept under the proposals made in 2001."*

This case, submits Mr Coughlan, supports his submission that the question whether the judgment is more advantageous has to be answered in strictly financial terms and here the claimant recovered more money than was in court.

25. In ***Straker v Tudor Rose (a firm)*** [2007] EWCA Civ. 368, a case upon which Mr Snowden relies, Waller L.J. said this:

> *"2. The key issue is whether the judge misdirected himself. It is well known that this court will be loath to interfere with the discretion exercised by a judge in any area but so far as costs are concerned that principle has a special significance. The judge has the feel of a case after a trial which the Court of Appeal cannot hope to replicate and the judge must have gone seriously wrong if this court is to interfere.*
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> *3. I should perhaps start by saying that in the pre-CPR world one would have had no hesitation is saying the judge must have gone wrong. A payment into court was the touchstone in relation to costs – if it was beaten by a plaintiff, the plaintiff got their costs; if the plaintiff failed to beat it the defendant got their costs. There was hardly an exception to that rule.*
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> *4. The position under the CPR is not the same. ...*
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> ...
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> *10. Other Court of Appeal decisions were cited to us. I do not gain much assistance from them. In the area of costs, where all cases are different and fact specific, I would suggest that authorities apart from those that lay down clear principles are of little assistance. It is to the rules that one should go, and it is by reference to the rules that one should test whether the judge has gone wrong in any particular case."*

26. Such a statement of principle can be taken from Lady Justice Smith's judgment **in *Hall & ors v Stone*** [2007] EWCA Civ. 1354 where she observed in paragraph 82:

> *"... In these days where both sides are expected to conduct themselves in a reasonable way and to seek agreement where possible, it may be right to penalise a party to some degree for failing to accept a reasonable offer or for failing to come back with a counter offer."*

27. A few days after the argument before us concluded, ***Jones v Associated Newspapers Ltd*** was reported at [2008] 1 All E.R. 240. This was a case where CPR 36.14(1)(b) arose because there the claimant, a Member of Parliament, had made a Part 36 offer by which the defendant was to pay him £4,999 and publish an apology for a libellous article in the Mail on Sunday. The defendant did not respond. A jury eventually returned a verdict in the claimant's favour and awarded £5,000. In considering whether the judgment was more advantageous, Eady J. applied the following observation of Sir Thomas Bingham M.R. in ***Roache v Newsgroup Newspapers Ltd*** [1998] E.M.L.R. 161:

    "The judge must look closely at the facts of the particular case before him and ask: who, as a matter of substance and reality, has won? Has the plaintiff won anything of value which he could not have won without fighting the action through to a finish? Has the defendant substantially denied the plaintiff the prize which the plaintiff fought the action to win?"

    Eady J. took into account the concern and distress for the claimant in the eleven month period leading up to and including a public hearing during which his reputation was attacked in the process of attempting to justify the libel. In purely financial terms the jury's award would appear to be less advantageous than the figure he had proposed in his offer. It was also appropriate to compare the worth of an unqualified apology against the number of matters adverse to the claimant which emerged in the course of the trial and would not have seen the light of day had the offer been accepted. They put the claimant in a less favourable light than would a bland and unqualified apology. In the result the judge found that he was unable to conclude that the offer made was "*at least as advantageous"* as the ultimate outcome and consequently he did not consider that CPR 36.14 applied in that particular instance.

28. The primary question for us is whether the change in the language of Part 36 results in a change of approach. Under the old rule the claimant would have recovered her costs (subject to any derogation from the rule that costs follow the event under CPR 44). All one can glean from the change is that the purpose of the amendment was to replace the old system of payment in with offers to settle and to apply the same costs consequences irrespective of whether the offer was for the payment of a sum of money in a money claim or an offer of terms and conditions on which to settle non-money claims. The previous practice for the latter – the "*more advantageous*" approach – became the uniform approach for both. For money claims as well as for non-money claims the same questions arise under CPR 14(1) namely, under (a) whether the judgment is "*more advantageous"* than the offer and under (b) whether the judgment is "*at least as advantageous*" as the offer.

29. It is quite clear that in non-money claims where there is no yardstick of pounds and pence by which to make the comparison, all the circumstances of the case have to be taken into account. Why, therefore, should the rule be different where a money claim is involved? Mr Coughlan proffers a compelling answer, namely that a pure monetary comparison produces clarity and avoids placing value upon subjective elements such as the stress and anxiety involved in protracted, risky litigation. I see the force of that argument. In this case, as in so many, the amount of the costs exceeds the amount in dispute by a significant margin and any rule which reduces the scope of argument over costs is a salutary one.

30. Nonetheless, the Court must give effect to the new rule and if that has introduced a change in practice, so be it. Are the concepts of bettering a Part 36 payment and obtaining a judgment more advantageous than the Part 36 offer synonymous? Posed in that way, perhaps they are. But in the context of the new Part 36, where money claims and non-money claims are to be treated in the same way, "*more advantageous*" is, as Rix L.J. observed in the course of argument, *"an open-textured"* phrase. It permits a more wide-ranging review of all the facts and circumstances of the case in deciding whether the judgment, which is the fruit of the litigation, was worth the fight.

31. The answer must, in my judgment, take account of the modern approach to litigation. The Civil Procedure Rules, and Part 36 in particular, encourage both sides to make offers to settle. Compromise is seen as an object worthy of promotion for compromise is better than contest, both for the litigants concerned, for the court and for the administration of justice as a whole. Litigation is time consuming and it comes at a cost, emotional as well as financial. Those are, therefore, appropriate factors to take into account in deciding whether the battle was worth it. Money is not the sole governing criterion.

32. It follows that Judge Knight was correct in looking at the case broadly. He was entitled to take into account that the extra £51 gained was more than off set by the irrecoverable cost incurred by the claimant in continuing to contest the case for as long as she did. He was entitled to take into account the added stress to her as she waited for the trial and the stress of the trial process itself. No reasonable litigant would have embarked upon this campaign for a gain of £51.

33. It is not contested by Mr Snowden that the judge erred in invoking the rule in CPR 36(14)(2) and finding that it would be unjust to make the defendant pay the costs but, as the appellant realistically accepts, that misdirection was probably of no causative effect. On the main question of whether the judge misdirected himself when he found that that the claimant had failed to obtain a judgment more advantageous than the offer, I find in the respondent's favour for the reasons I have set out and I would dismiss this part of the appeal. The judge was entitled to order the claimant to pay the defendant's costs after the time to accept the payment in had expired.

34. As for the judge's making no order for costs for the period after the initial offer to settle and the payment in taking effect, that was very much a matter for the judge's discretion and this Court would be loathe to interfere with it unless he has erred in principle or the exercise of that discretion. The judgment is pithy on this aspect.

"Adjacent" may not be the most apposite word to compare the offer of £4,006 with the judgment of £4,435, but the word is not so inappropriate that it demonstrates that the judge has exceeded the generous ambit within which reasonable disagreement is possible. What also struck the judge as worthy of condemnation was the manner in which the litigation had been pursued. Although he did not in paragraph 15 of his judgment refer to Part 44, he had his attention drawn to it during the course of the argument and it must have been well in mind when he gave this ex tempore judgment. He is, after all, a highly experienced judge who must be assumed by this Court to be fully aware of the ordinary rule that costs follow the event, which would have given the claimant her costs, unless the court in the exercise of its discretion decides otherwise. In coming to that decision the court must have regard to all the circumstances of the case including in particular, as provided for in CPR 44.4, such matters as the conduct of the parties, whether a party had succeeded on part of the case, even if he has not been wholly successful and any offer to settle. Under CPR 44.5, conduct of the parties includes conduct before as well as during the proceedings, whether it was reasonable for a party to pursue a particular allegation or issue, the manner in which the party has pursued his claim and whether or not that claim has, in whole or in part, been exaggerated.

35. The November 2005 offer was relevant and it was a reasonable, not a derisory one. It met with no response. It met with no counter-offer. The claim was pursued and, albeit through no fault of the claimant herself, it became an exaggerated claim and she must, alas, bear ultimate responsibility for the manner in which her claim was conducted on her behalf by the different professionals advising her. Her exaggerated claim was withdrawn late in the day. Still no counter-proposals were forthcoming. The events of 25th May bordered on the farcical with offer and counter-offer, withdrawal of offer and purported acceptance of an offer which was not even on the table. This was a small claim in which the defendants admitted liability within months of the accident. To have incurred about £80,000 in costs to contest a claim under £5,000 fills one with despair. In all those circumstances Judge Knight was fully justified in marking his displeasure by making no order for costs.

36. In my judgment that part of the appeal also fails. In the result I would dismiss the appeal.

Lord Justice Rix:

37. I agree.

Lord Justice Keene:

38. I also agree.

Mr John Coughlan(instructed by Forum Law) for the Appellant
Mr Steven Snowden (instructed by Messrs Barlow Lyde and Gilbert) for the Respondent