JUDGMENT : Mr Justice Tomlinson: Commercial Court. 17th March 2003.

1. The argument on costs in this case has thrown up what may be a novel point on the interaction between CPR 36.21, which deals with the costs consequences of a Claimant doing better at trial than it had proposed in a Part 36 offer made before trial, and the new approach to costs whereby, in the light of the introduction of the CPR, the court must be more ready than once it would have been to depart from the general rule that the unsuccessful party will be ordered to pay the costs of the successful party. The court must be more ready than once it would have been to consider where appropriate the making of different orders for costs on discrete issues the effect of which may be that the party who has been generally financially successful in the litigation will end up not simply not recovering all of his own costs but also paying to his opponent a substantial part of the opponent's costs.

2. In this case the outcome of the debate is of considerable significance to the parties since their combined costs approach the amount at stake in the litigation. I was told that each side has incurred costs of the order of £850,000, whereas the claim, in which the Claimants have been successful, was for US$3 million. Notwithstanding that success, which additionally was in an amount substantially greater than that for which the Claimants had in their Part 36 offer made before trial been prepared to compromise, it was the submission of Mr Berry QC for the Defendants that the just order on costs would be for the Claimants to pay to the Defendants 80% of their costs of the action. At first sight that might seem a surprising outcome to the litigation, as Chadwick LJ observed of a similar outcome in ***Summit Property Ltd v Pitmans*** 2001 EWCA Civ2020, 19 November 2001. Since that case and an earlier decision of the Court of Appeal to which it followed, ***Johnsey Estates Ltd v Secretary of State for the Environment, Transport and the Regions*** 2001 EWCA 535, 11 April 2001 give guidance as to what is in effect a change of practice, as Aldous LJ described it in ***Stena Rederiaktiebolag v Irish Ferries Ltd*** 2003 EWCA Civ 214 13 February 2003, I have taken time to consider my judgment. In view of their importance it is slightly surprising to find that the two earlier decisions of the Court of Appeal which I have just referred have not been reported.

3. Following a four week trial in July 2002 I gave judgment for the Claimants on 4 December 2002 for the full amount of their claim, US$3 million due under a valued policy of marine insurance. The claim arose out of the total loss of the vessel "Kastor Too" in March 2000, in respect of which the Claimants brought this action on 1 November 2000 claiming an indemnity in respect of the actual total loss of the vessel allegedly caused by fire. In my judgment I concluded that the Claimants were not entitled to recover for an actual total loss caused by fire. They had failed to prove that the fire caused sufficient water to enter the vessel to cause it to sink within 15 hours of the outbreak of the fire. However on 17 August 2001 the Claimants had amended their pleadings so as to introduce a claim for an indemnity in respect of the constructive total loss of the vessel caused by fire, on the footing that the vessel had become a CTL by fire before she sank. Once introduced that was logically the primary claim to which the claim for an actual total loss by fire became an alternative. In my judgment I concluded that this primary claim succeeded and it is on this basis that the Claimants obtained judgment. There was no claim in respect of damage or partial loss short of total loss. The claim was only brought in respect of the total loss of the vessel, so that the only possible outcomes of the litigation were either that the Claimants would recover US$3 million or that their claim would simply fail.

4. I do not propose to repeat here what I said in my judgment of 4 Decemeber 2002 as to the course of the litigation and the manner in which the battle lines were ultimately drawn. It is worth highlighting that it was only on 1 May 2002 that underwriters served the report of their relevant expert, Mr Todd, in the course of which he accepted that the likely cost of repairing damage of the type which is likely to have been sustained by Kastor Too prior to her sinking would have appreciably succeeded the insured value, US$3 million. However underwriters continued to deny that the vessel had become a CTL, since their admission as to the cost of repairs related only to the scintilla temporis prior to sinking, at which time they said the vessel was doomed to become an actual total loss by reason of the incursion of seawater. Furthermore it was only on 3 May 2002 that underwriters indicated through their solicitors that they would not dispute that there had been a fire, a matter as to which at all times previously there had simply been a non-admission. Further points emerged at trial as to the ability of the Claimants to claim for a CTL in the absence of service of notice of abandonment prior to the vessel becoming an actual total loss, and in circumstances in which the Claimants had initially claimed for an actual rather than a constructive total loss.

5. Once the interviewing of the crew had been completed it was inevitable, if the Claimants were minded to pursue a claim against underwriters for indemnity in respect of the actual total loss of the vessel, and if they were minded to deploy in support thereof such evidence as had been elicited from the crew, that the principal problem with which they would have to grapple would be the question how a fire in the engine room and such explosions as may have been caused in consequence thereof could have been responsible for the introduction of sufficient seawater to cause the vessel to sink within 15 hours of the outbreak of fire. The casualty was in this regard unprecedented in the experience of anyone who had to consider it.

6. On 9 January 2001 the Claimants applied for summary judgment on their claim in respect of the actual total loss. In support thereof they deployed the witness statements taken from the officers and crew in 2000 which were in due course relied upon at trial, albeit in some cases supplemented by further statements. The Claimants also relied upon a report of a Mr Charlton, a partner of Dr Foster in the firm of Dr J H Burgoyne & Partners. This report sought to overcome the Claimants' principal problem by suggesting that there might have occurred an explosion in a topside tank, which it was suggested may have contained a particularly "gassy" residual fuel oil, i.e. an oil which contained a higher than normal amount of light fractions which might slowly be released leading to the accumulation of an explosive atmosphere in the ullage space. This theory had the merit that the no.4

starboard topside tank, the preferred candidate, shared a common bulkhead with the engine room and was at about the waterline. An explosion in this tank could have ripped open the side shell both forward and aft of the engine room bulkhead at or below the waterline. The theory however lacked any other merit. The explosion was alleged to have occurred at a time when crew members were alongside in the starboard lifeboat. They had not noticed it. Information was available as to the source of the oil in the relevant tank, demonstrating that it was not a residual fuel oil and disproving the speculation that it might have contained light fractions. At all events, it can have come as no surprise when on 23 May 2001 the application for summary judgment was dismissed by His Honour Judge Michael Dean QC. The reserved judgment of Judge Dean served to highlight, if it needed highlighting, the implausibility of a modern vessel sinking within 15 hours as a result of a fire in the engine room.

7. Although the Claimants introduced their claim for a CTL in August 2001, they persisted in their claim based upon an actual total loss. On 6 March 2002, four months before trial, the Claimants amended again. They deleted their pleaded case on causation, which had amounted to reliance upon Mr Charlton's report, leaving only the bare assertion that the fire caused the sinking. Particulars of any case to be advanced on causation were refused but on 22 March 2002 Toulson J ordered that they be furnished. When furnished on 28 March 2002 the Particulars abandoned Mr Charlton's theories in their entirety. The Particulars were accompanied by reports from Dr Foster and Mr Bevis (and Mr Parry). Included amongst the new theories was Dr Foster's thesis that the engine room bulkhead had "melted" or been the subject of "carburisation." The Claimants strenuously resisted the introduction of evidence from metallurgists to deal with this point. When eminent metallurgists were consulted by each party they agreed that this theory was untenable.

8. On 11 June 2002 the Claimants made their Part 36 offer. No point arises as to its form or out of the fact that that was less than 21 days before trial. The trial was in fact due to begin on 1 July. Mr Berry for the Defendants has proceeded upon the basis that this was an effective offer under Part 36 to settle for US$2.8 million inclusive of interest.

9. On the first day of the trial the Claimants invited me to hear argument on and to determine the claim for indemnity in respect of a CTL as a preliminary issue, without hearing either factual or expert evidence. I rejected this invitation, which was opposed by underwriters, essentially because it came too late to be practical. Arrangements had been made for ships' witnesses to be taken off their ships in order to attend to give evidence and there had been incurred all the costs of preparation for a full blown four week trial at which the claim for the actual total loss would be considered.

10. In the event the Claimants succeeded at trial to the extent I have described. There were some complications both in the Part 36 offer and in the calculation of the interest which should be awarded on the principal sum for which judgment was given arising out of the fact that underwriters had soon after the loss agreed to make a payment on account equivalent to their respective proportions of US$1.6 million. Pursuant to a later agreement these payments on accounts were in fact made only on various dates in 2001 and would have been repaid had the Claimants failed at trial. For present purposes I can ignore this complication. On the basis of a conventional award of interest on the principal amount at US prime rate plus 1% from 11 April 2000 until judgment which I made on 4 December 2002, the Claimants recovered US$ 3.45 million, which included interest on US$ 3 million from 11 April 2000 to 3 July 2001 and on US$1.4 million only from 4 July 2001 until judgment. When I handed down judgment I reserved for later argument the Claimants' claim pursuant to CPR 36.21(2) for an enhanced award of interest on US$1.4 million for the period 1 July 2002 to 4 December 2002. Thus the Part 36 offer at US$2.8 million was 81% of the amount for which judgment was given, leaving out of account any question of enhanced interest.

11. The argument on costs and the outstanding point on enhanced interest took place on 21 February 2003. In fact Mr Berry for underwriters did not oppose a further award of additional interest on the Defendants' proportions of US$1.4 million at 3% for the period 1 July 2002 to 4 December 2002, thereby adding to the Claimants' recovery the Defendants' proportions of US$18,000 odd.

12. The starting point of the debate is now CPR 44.3 which, so far as material, provides as follows:-

"Court's discretion and circumstances to be taken into account when exercising its discretion as to costs.

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 of 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).

(Part 36 contains further provisions about how the court's discretion is to exercised where a payment into court or an offer to settle is made under that Part.)

(5) The conduct of the parties include –
(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;
(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.
(6) The orders which the court may make under this rule include an order that a party must pay –
(a) a proportion of another's party's costs;
(b) a stated amount in respect of another party's costs;
(c) costs from or until a certain date only;
(d) costs incurred before proceedings have begun;
(e) costs relating to particular steps taken in the proceedings;
(f) costs relating only to a distinct part of the proceedings; and
(g) interest in costs from or until a certain date, including a date before judgment.
(7) Where the court would otherwise consider making an order under paragraph (6)(f), it must instead, if practicable, make an order under paragraph (6)(a) or (c)."

13. I will also for convenience here set out CPR 36.21. This provides: -

"Costs and other consequences where claimant does better than he proposed in his Part 36 offer.

36.21 (1) This rule applies where at trial –
(a) a defendant is held liable for more; or
(b) the judgment against a defendant is more advantageous to the claimant, than the proposals contained in a claimant's Part 36 offer.
(2) The court may order interest on the whole or part of any sum of money (excluding interest) 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 courts may also order that the claimant is entitled to-
(a) his costs on the indemnity basis from the latest date when the defendant could have accepted the offer without needing the permission of the court; 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 paragraph (2) and (3) unless it considers it unjust to do so. (Rule 36.12 sets out the latest date when the defendant could have accepted the offer.)
(5) In considering whether it would be unjust to make the orders referred to in (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 or Part 36 payment was made;
(c) the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer or payment into court to be made or evaluated.
(d) Where the court awards interest under this rule and also awards interest on the same sum and for the same period under any other power, the total rate of interest may not exceed 10%above base rate.

14. ***In Phonographic Performance Ltd v AEI Rediffusion Music Ltd*** 1999 1 WLR 1507 Lord Woolf MR said of the then prospective new CPR 44.3,at pp.1522-3:

" The most significant change in emphasis of the new Rules is to require courts to be more ready to make separate orders which reflect the outcome of different issues. In doing this the new Rules are reflecting a change of practice which has already started. It is now clear that too robust an application of the "follow the event principle" encourages litigants to increase the costs of litigation, since it discourages litigants from being selective as to the points they take. If you recover all your costs as long as you win, you are encouraged to leave no stone unturned in your effort to do so."

In ***Gwembe Valley Development Ltd v Thomas Koshy & Ors,*** unreported, 17 February 2000 Rimer J observed that he did not find it easy to detect in CPR 44.3 anything reflecting the change in emphasis to which Lord Woolf had referred. However that may be, the debate has moved on and the Court of Appeal in the two decisions to which I referred earlier, ***Johnsey*** and ***Summit,*** has made clear that the approach advocated by Lord Woolf is that which is now to be followed.

15. In ***Johnsey*** Chadwick LJ said, at paragraph 21 of his judgment:-

"The principles applicable in the present case may, I think, be summarised as follows: (i) costs cannot be recovered except under an order of the court; (ii) the question as to whether to make any order as to costs – and, if so, what order – is a matter entrusted to the discretion of the trial judge; (iii) the starting point for the exercise of discretion is that costs should follow the event; nevertheless, (iv) the judge may make different orders for costs in relation to discrete issues – and, in particular, should consider doing so where a party has been successful on one issue but unsuccessful on another issue, and, in that event, may make an order for costs against the party who has been generally successful in the litigation; (v) the judge may deprive a party of costs on an issue upon which he has been successful if satisfied that the party has acted unreasonably in relation to that issue…"

16. Implicit in Chadwick LJ's fourth proposition is that it is no longer a prerequisite of an order that a party who has been financially successful overall in the litigation should nonetheless pay the costs of the other party of a particular issue on which he, the first party, has failed that it be demonstrated that the first party has acted unreasonably or improperly. This point was expressly confirmed by the Court of Appeal in ***Summit*** – see in particular the judgment of Longmore LJ at paragraph 16. Subject to that gloss, the court should still as I read the various decisions of the Court of Appeal follow the approach of Nourse LJ ***In re Elgindata Ltd (2)*** 1992 1 WLR 1207 where he said, at p.1214:-

" The principles are these. (i) Costs are at the discretion of the court. (ii) They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made. (iii) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs. (iv) Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but may order him to pay the whole or the part of the unsuccessful party's costs."

Obviously that passage must now be read subject to the qualification that, as has been expressly decided by the Court of Appeal in ***Summit,*** an order such as that described in the fourth of Nourse LJ's principles may be made in the absence of improper or unreasonable raising or pursuit of issues or allegations. Subject to that, I consider that the starting point of my approach must be to consider whether the fact that the Claimants made and pursued a claim for an actual total loss caused a significant increase in the length or cost of the proceedings. It seems to me that the answer to that question is likely to be determinative of the question whether there should be a departure from the principle that costs follow the event and, in consequence, the making of an issue based order.

17. Before turning to that issue, I would however just note that the extent of the sea change in the court's approach to costs is demonstrated by the fact that Nourse LJ in ***Elgindata*** described an order of the kind made ***in Summit,*** and of the kind that Mr Berry invites me to make here, as "*such an unusual order to make,*" – see p. 1213. A similar order made by the trial judge in that case was overturned. Yet in ***Budgen v Andrew Gardner Partnership*** 2002 EWCA Civ 1125, 3 July 2002, Simon Brown LJ said this:-

"[23] In advancing this appeal Mr Livesey relies on a number of passages in Lord Woolf's final report Access to Justice as well as upon the two authorities to which Buxton LJ referred when granting permission (see paragraph 4 above). As to the Access to Justice report it is sufficient, I think, to quote only from paragraphs 24 and 25 of Chapter 7:

[24]" Orders for costs should reflect not only whether the general outcome of the proceedings is favourable to the party seeking an order in his favour but also how the proceedings have been conducted on his behalf… Judges must therefore be prepared to make more detailed orders than they are accustomed to do now. The general order in favour of one party or another will less frequently be appropriate. Different orders will need to be made on different issues, eg, where… an offer to settle that issue has been unreasonably refused.

[25] Unless the court is prepared to take the time necessary to elevate decisions as to costs above the conventional approach adopted at present, the parties will not take as seriously as they should the obligations which a managed system will place on them…."

*[24] In **AEI Rediffusion Lord Woolf** said at pp.1522-1523:*

" The most significant change in emphasis of the new Rules is to require courts to be more ready to make separate orders which reflect the outcome of different issues."

*[25] Brooke LJ's judgment in the unreported case of **Winter v Winter** was to similar effect:*

"..before the Civil Procedure Rules came into effect… if a Claimant substantially succeeded he was likely to be awarded an order for costs even though he failed on certain issues. The new Rules provide a break from that tradition and enable a court to do greater justice if a party has caused court costs to be expended on an issue on which he ultimately fails."

[26] For my part I have no doubt whatever that judges nowadays should be altogether readier than in times past to make cost orders which reflect not merely the overall outcome of proceedings but also the loss on particular issues. If, moreover, the "winning" party has not merely lost on an issue but has pursued an issue when clearly he should not have done, then there are two good reasons why that should be reflected in the costs order: first, as a sanction to deter such conduct in the future; secondly, to relieve the "losing" party of at least part of his costs liability. It is one thing for the losing party to have to pay the costs of issues properly before the court, another that he should have to pay also for fighting issues which were hopeless and ought never to have been pursued."

In the same case Mance LJ, in the course of a judgment which dissented in the result but not as to the principles to be applied, observed:-

*" It is not "**very draconian**" to mark the outcome of a particular issue by ordering that the losing party on that issue bears, in whatever way, both parties' costs of that issue. It is on the contrary in full accord with the principles underlying the new Civil Procedure Rules, which aim at making: "**orders for costs a more effective incentive for responsible behaviour and a more compelling deterrent against unreasonable behaviour**" and "**to discourage unreasonable conduct**" (cf. paragraphs 5(d) and 8 of Access to Justice Final Report by Lord Woolf, July 1996, as well as paragraphs 24-5 of that Report which Simon Brown LJ has quoted)."*

Chadwick LJ spelled out the consequences of that approach in ***Summit*** at paragraph 27 of his judgment:-

" An issue based approach requires a judge to consider, issue by issue in relation to those issues to which that approach is to be applied, where the costs on each distinct or discrete issue should fall. If, in relation to any issue in the case before it the court considers that it should adopt an issue based approach to costs, the court must ask itself which party has been successful on that issue. Then, if costs are to follow the event on that issue, the party who has been unsuccessful on that issue must expect to pay the costs of that issue to the party who has succeeded on that issue. That is the effect of applying the general principle on an issue by issue based approach to costs."

The Court of Appeal described that as a "*suitably exceptional case*" with *"special and particularly strong circumstances."* I am not sure whether that indicates that, in the new climate, an order which requires a financially successful party to pay to his opponent the costs of issues on which he has lost should be regarded as unusual and exceptional, although of course the starting point remains that costs follow the event, so that one must look for special circumstances to justify a departure. Lastly, I bear in mind Chadwick LJ's reminder that :-

" It is, of course, still necessary to stand back and ask whether the result is so plainly wrong that it must be regarded as perverse."

That was said in the context of appellate review of a judge's exercise of discretion, but it is no doubt a useful injunction to which I should have regard when exercising that discretion.

18. I turn then to the question whether the making and pursuit of the claim for indemnity for an actual total loss caused a significant increase in the length or cost of the proceedings. To some extent this is an exercise in rewriting history. However I entertain no real doubt that if the Claimants had never made a claim for an actual total loss, restricting themselves to a claim for a constructive total loss, the course of the litigation would have been different. Naturally the initial evidence-gathering exercise, involving the interviewing of the crew members, would have been the same. But had the proceedings issued in November 2000 related only to a claim as for a CTL, the whole focus of the debate would have been different, and in particular it would never have been necessary to investigate at such length and at such expense implausible theories as to how, in consequence of the fire, sufficient water might conceivably have been admitted in sufficient time to cause the vessel to sink within 15 hours of the outbreak of fire.

19. It is of course true that it was the Defendants' case that one reason why the CTL claim must fail is because the vessel was doomed to sink by reason of substantial water ingress from unknown causes. However this point was only the corollary of their very limited concession to the effect that, on the figures, the cost of repairing damage exceeded the value of the vessel only in the scintilla temporis before sinking. The point was therefore a limited one. On the figures it was not a point of any substance. I dealt with it fairly summarily at paragraph 19 of my judgment. Furthermore the fact that some of the machinery in the engine room, particularly in the lower part, must be presumed to have been damaged by seawater, possibly in addition to being damaged by fire, adds little to the debate. On the figures it is obvious that an uncontrolled fire burning in the engine room and in the accommodation block in the manner described by the witnesses would readily and quite quickly cause damage the cost of repair of which would exceed the insured value.

20. Mr Baker for the Claimants also pointed out that, by an amendment made at trial, underwriters advanced a positive case to the effect that by the time the vessel was abandoned there was water forward of frame 36 the presence of which could not be accounted for by the fire. This was not however directed towards underwriters' attempt to show that the vessel could not be regarded as a CTL because doomed to become an actual total loss – rather it was put forward as indicative that something other than the fire was responsible for the ingress of seawater. I very much doubt if this point would ever have been raised had the claim been confined throughout to one in respect of a CTL.

21. Valiantly though Mr Baker strove to persuade me that the issue whether the fire sank the vessel did not significantly increase costs overall, I am afraid that I regard that submission as wholly unreal. Had the claim been confined to the CTL issue the action would have assumed an entirely different shape. In many ways that that is so is demonstrated by the fact that the Claimants were able to say on the first day of the trial that the CTL claim involved no disputed issues of fact and required no further evidence for its determination. It is of course true that that position had only finally and formally been reached by trial and confirmed by the underwriters' skeleton argument, but in an action confined to a claim for a CTL that position would have been reached very much earlier and in wholly different circumstances. It is I think almost certain that an application would have been made at an early stage for summary determination of the CTL claim, an application which would have been far less ambitious than that which was in fact made and which would have relied upon, so far as necessary, the same factual evidence as did that. Even if the matter had proceeded to trial I consider it inconceivable that the Claimants would have called oral factual evidence in support of a claim confined to that for a CTL. Expert evidence would have been confined to the extent and cost of repairs issue on which there would have been little if any scope for debate.

22. I have no doubt that the greater part of the costs expended on both sides will have been directed to proof and disproof of the suggestion that the ingress of seawater that caused the vessel to sink was caused by the fire and such explosions as that may in consequence have caused. That was the purpose of the great bulk of the experts' work. The work of the naval architects (and of the metallurgists although their cost must pale into insignificance) was devoted to nothing else and the issue as to the extent and cost of the fire damage was only a very small part of the work of the fire experts and of the marine engineers. At trial the argument as to the CTL was entirely of a legal nature, without the need even to refer to the factual or expert evidence. According to Mr Berry's

calculation, with which Mr Baker did not quarrel, the argument on the CTL issues, including the application that they should be dealt with first, occupied only about 1½ out of the 17 days of the trial. The rest of the time, including days of expert evidence, was spent in investigation of the claim that the fire caused the vessel to sink.

23. I am therefore satisfied that the making and pursuit of the claim for an actual total loss substantially lengthened and increased the costs both of the action and of the trial. An action directed simply toward recovery as for a CTL would have been completely different in nature. It is simply inconceivable that it would have generated costs on anything like the scale which has in fact occurred.

24. It was suggested by Mr Baker that such a claim would still have been met by underwriters making the minimum possible concession at the latest possible moment in the hope that something might eventually turn up which would justify them in making an allegation of scuttling. I consider that there is some force in that point as a general observation. However the answer to it is that an action so confined would have presented underwriters with a very limited opportunity to pursue such a strategy, since attention would very quickly have been focused on the minimal effort required from the Claimants to prove the facts on which their case would have depended. Unless underwriters were prepared to allege a wilful casting away, it would very quickly have become apparent that the only real point of substance dividing the parties was the question whether the Claimants could recover for a CTL in the absence of notice of abandonment served before the vessel was actually lost by sinking.

25. For all these reasons I am satisfied that this a case in which I should make different orders for costs in relation to discrete issues. I should emphasise that I have reached that conclusion simply upon the basis that the Claimants raised and pursued an issue which significantly increased the length and cost of the action and of the trial and upon which they lost. That does not involve a finding that the Claimants acted unreasonably or improperly in that regard. Should such considerations be relevant however I would have to record that the Claimants' case as to sinking caused by fire was supported by expert evidence which was seriously flawed in that it failed to address the question how, realistically, sufficient water can have entered the ship within the required time scale in consequence of damage caused simply by fire and explosion.

26. Before considering what order I should make I must however deal with the impact of the Claimants' Part 36 offer. Mr Baker submitted that the effect of the rule is that the Claimants are entitled as of right or at any rate should be awarded the entirety of their costs incurred after 1 July 2002 (and moreover on an indemnity basis) unless the court considers it unjust to make such an order. He also submitted that it is insufficient to justify a finding of injustice that, had the Claimants not made a Part 36 offer upon which they had improved at trial, the court would not otherwise have awarded them their full costs incurred after 1 July 2002. This raises two distinct issues. The first is whether, as Mr Berry submits, *"his costs*" in CPR 36.21(3)(a) means such costs as would ordinarily be awarded to him applying the principles set out in CPR 44.3, i.e. without regard to the impact of Part 36.The second issue is whether the policy underlying Part 36 requires what is in effect an arithmetical approach. A Claimant who succeeds to an extent greater than his Part 36 offer has demonstrated that the trial need never have taken place. In such circumstances it cannot be unjust that the Claimant should recover the costs of an exercise which should not and need not have occurred – the rule prescribes what is in such circumstances the just result. So proceeded Mr Baker's argument.

27. On the proper construction to be given to the rule I prefer Mr Berry's argument. There is a contrast between CPR 36.20 and CPR 36.21. CPR 36.20, dealing with the case where a Claimant fails to better a Defendant's Part 36 offer redefines success or failure. When the Claimant fails to beat a Part 36 offer *" unless it considers it unjust to do so, the court <u>will</u> order the Claimant to pay <u>any</u> 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"* – 36.20(2) – emphasis supplied. Even then no doubt the approach is not simply mechanistic. There will no doubt be cases in which it would not be appropriate to award to the defendant all of his costs incurred during the relevant period. But it is worthy of note that CPR 36.21 uses very different language. It does not refer to *" any costs incurred"* but rather to *" his costs."* That to my mind is a pointer to the reference being to such costs as are or would otherwise be awarded to the Claimant. Thus the rule is concerned with the basis of assessment of such costs as are ordered to be paid not with the basic incidence of costs. It would be surprising if a rule drafted in terms which appear to focus on the basis of assessment should have been intended to bring about a rebuttable presumption as to the incidence of all costs incurred after a certain date, irrespective of the issue upon which they have been expended and of the relative success of the parties on that issue.

28. In the light of that conclusion the second issue does not arise. However in my judgment it would be unjust to award the Claimants the entirety of their costs at trial and, in the light of the modern approach to costs, it would be unjust to order the Defendants to bear their own costs of successfully resisting the claim to recover as for an actual total loss. It may be that that latter consideration cannot permissibly be taken into account since the only factor mentioned in CPR 36.21(4) is whether it would be unjust to order that the Claimant has <u>his</u> costs on an indemnity basis. That is perhaps another pointer to the correctness of Mr Berry's construction of the words " his costs." In any event it is sufficient that I conclude that it would be unjust to award to the Claimants all of their costs incurred after 1 July 2002. I do not consider that the decision of the Court of Appeal in ***Huck v Robson*** 2002 3 All ER 263 compels me to a different conclusion. That case was concerned, and concerned only, with the question whether a Claimant in a case arising out of a road traffic accident should upon succeeding 100% at a trial on liability be awarded indemnity costs having offered under Part 36 to apportion liability 95%-5%, an acceptance of 5% contributory negligence. The Court of Appeal held, by a majority, that it is nothing to the point that no judge

would be likely in such a case to arrive at such an apportionment. In the present case the outcome could only be 100% or zero, but Mr Berry rightly did not contend that the Part 36 offer was for that reason to be regarded as unreal or as one which was bound to be rejected. In the context of commercial litigation an offer of the sort made in this case may amount to a discount offered to reflect the business inconvenience in witnesses having to attend court, as well as an assessment of the prospects of success and a recognition of the vagaries of litigation. However in ***Huck v Robson*** it was not in dispute that the Claimant should be awarded 100% of her costs, the only question was as to the basis of assessment upon which such costs should be recoverable. I do not consider that the decision in that case supports Mr Baker's broad submission that the philosophy underlying CPR Part 36 requires the court in a case such as this to abandon so far as concerns post offer costs the issue by issue approach which CPR 44.3 has been held to encourage. Such an approach would I think be open to an abuse more serious than is represented by the possibility of offers in an amount marginally less than the claim made for tactical purposes to secure the benefit of the incentives provided by CPR 36.21. The Court of Appeal gave some guidance in relation to that latter device in ***Huck v Robson.*** If Mr Baker were right, a Claimant with only a 50-50 case could by careful use of a Part 36 offer produce a situation in which he had a potentially free run on any number of wholly unmeritorious bases of claim which had no prospect of success whatever. A Defendant in such circumstances might be deterred from defending a 50-50 case, perhaps involving an important point of principle, by fear of the prospect of having to pay the Claimants' costs (and on an indemnity basis) on a whole raft of wholly unmeritorious makeweight points, the successful rebutting of which might even require him to call witnesses, possibly from overseas. So mechanistic a rule would completely frustrate the principles underlying the new Civil Procedure Rules to which Simon Brown and Mance LJJ referred in the ***Budgen*** case.

29. I turn finally to the order which I should make. My order must reflect that the Claimants should in principle recover their costs of the CTL issue, and moreover should recover such of these costs as were incurred on and after the first day of the trial on an indemnity basis. However since so small a part of the trial was concerned with that issue the adjustment necessary on account of the latter consideration must be very small. The Defendants should in principle recover their costs of the actual total loss issue. I do not consider it relevant that the Claimants attempted on the first day of the trial to bring about a saving in trial costs. That attempt was in the event unsuccessful and the Claimants must live with the consequences of pursuing and losing a claim which significantly increased the length and cost of the trial. I must if I can make an order that requires payment of a proportion of the costs of the other party rather than leaving to detailed (and expensive) assessment the question which costs related to which issue – see CPR 44.3 (7). Mr Berry submitted that an assessment that 10% of all of the costs of the action were attributable to the CTL issue would be generous to the Claimants and would comfortably take into account the small uplift to which they are in principle entitled pursuant to Part 36. I consider that an assessment that 15% of the Claimants' overall costs relate to the CTL claim eliminates all possibility that it might be an underestimate. It does not of course logically follow from this that 85% of the Defendants' costs relate to the claim for the actual total loss, indeed I am inclined to think that a higher figure might well be justified. However Mr Berry did not argue for a figure higher than that represented by the difference between the proportion of the Claimants' cost attributable to the CTL claim and 100%. Therefore an award to the Defendants of 85% of all of their costs involves yet further generosity to the Claimants, which is perhaps not inappropriate given that without resort to litigation they would not have recovered the US$3 million to which I have held them entitled.

30. If both parties' costs are indeed of a similar order as I was informally told they may wish to agree to give effect to my orders by simply netting off one against the other, so that the net result is that the Claimants pay the Defendants 70% of their costs of the action. That would also avoid the cost of two assessments in the event that costs cannot be agreed. However I do not think that I should without more give effect to my orders in that way, simply upon the basis of the parties' informal estimate that each had incurred costs of a broadly similar order. Should that prove not to be correct, netting off in the event of even a relatively small disparity could give rise to substantial injustice. I would of course make a "*netting-off*" order if evidence indicated that it was appropriate so to do.

31. I direct therefore that the Defendants pay to the Claimants 15% of the Claimants' costs, and that the Claimants pay to the Defendants 85% of the Defendants' costs. I must stand back and ask myself whether the outcome, effectively that the Claimants will bear all of their own costs and pay 70% of the Defendants' costs, is in the light of the Claimants' recovery of US$3 million, together with interest, so plainly wrong that it must be regarded as perverse. In the light of the considerations identified by the Court of Appeal in the cases to which I have referred which must now inform the approach of the court to questions of this sort I do not consider that this outcome can be regarded as plainly wrong. It is the logical outcome of considering costs on an issue basis. Comparisons are dangerous, but if costs are in some cases to be considered on an issue basis, it is difficult to see how the present cannot be an appropriate case for such treatment.

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Mr Steven Berry QC (instructed by Holman Fenwick and Willan) for the Defendants