

Neutral Citation Number: [2011] EWCA Civ 790

Case No: B3/2010/1177

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
SHEFFIELD COUNTY COURT
HIS HONOUR JUDGE BULLIMORE
6CL03054

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/07/2011

Before :

LORD JUSTICE WARD
LORD JUSTICE MOORE-BICK
and
LORD JUSTICE JACKSON

Between :

MR TREVOR MICHAEL FOX
- and -
FOUNDATION PILING LIMITED

Appellant

Respondent

Mr. Matthew Stockwell (instructed by **Atherton Godfrey**) for the **Appellant**
Mr. Peter Burns (instructed by **DWF Solicitors**) for the **Respondent**

Hearing date : 9 June 2011

Judgment

Lord Justice Jackson :

1. This judgment is in five parts, namely:

Part 1 Introduction,

Part 2 The Facts,

Part 3 The Appeal to the Court of Appeal,

Part 4 The Law,

Part 5 Decision.

Part 1. Introduction

2. This is an appeal by the claimant in a personal injuries case against an order that he pay a substantial part of the costs of the action. The basis of this appeal is that the claimant recovered a larger net sum in the final settlement than the defendant had been willing to pay at any earlier stage. Accordingly, it is said that the claimant should recover the entire costs of the action.
3. In this judgment I shall refer to the Compensation Recovery Unit as “the CRU”.
4. It should be noted that the term “*Calderbank* offer” is a term used to describe an offer made without prejudice save as to costs. This term is named after a matrimonial case in which that device was first used. The term is commonly applied to any offer outside Part 36 of the Civil Procedure Rules (“CPR”).
5. It should also be noted that Part 36 of the CPR underwent some significant amendments on 6 April 2007. When considering decisions on costs, it is always necessary to note whether the relevant Part 36 offer was made before or after that date.
6. After these introductory remarks, I must now turn to the facts.

Part 2. The Facts

7. The claimant was born on 6 June 1949 and so is now aged 62. In 2003 the claimant was employed by the defendant as a foreman/winch driver.
8. On 11 April 2003 the claimant suffered a fall whilst carrying a piece of heavy equipment across a building site. The claimant made a claim for damages against his employers for injuries sustained in that accident. The claimant maintained that his place of work was unsafe. The defendant and its insurers decided to make some independent investigations. Accordingly, they obtained a video of the claimant’s activity on 29 September 2004. This video showed that the claimant was able to walk normally and that his general mobility and the mobility of his lumbar spine were generally good. There was no evidence of limping. He was able to get in and out of a car on several occasions with ease.

9. On 6 April 2006 the claimant commenced proceedings in the Central London County Court, alleging that his accident had been caused by the defendant's negligence and breach of statutory duty.
10. On 28 June 2006 Mr. Jan Jakubowski, the claimant's medical expert, examined the claimant for the purpose of these proceedings and prepared a report. Mr. Jakubowski was not aware of the video surveillance. He therefore relied upon the claimant's description of his symptoms. Mr. Jakubowski's conclusions were as follows:

“As a result of the accident which occurred on 11 April 2003, Mr Fox suffered from a lumbar back injury. He developed acute lumbar back pain and bilateral sciatica. In spite of conservative treatment this has not improved and he is still suffering from severe back pain and pain in both legs. The MRI scan has reported that there is lumbar disc protrusion at L4/5 level but there are also some degenerative changes in other disc spaces. The past medical history shows that Mr Fox suffered from lumbar back problems in the 1980's and also had a lumbar back strain in August 1996. There is no history suggesting any lumbar back problems subsequently and he was free of complaints from 1996 until the accident. The past medical history and radiological appearance suggest that Mr. Fox suffers from degenerative problems in his lumbar spine and the present accident appears to have aggravated seriously a pre-existing condition. In order to be able to consider the prognosis and possible treatment, I will need to review the lumbar spinal MRI scan.

As things are at present, it is unlikely that Mr. Fox will return back to his previous employment.”

11. On 27 July 2006 the claimant's solicitors sent a copy of Mr. Jakubowski's report to the defendant's solicitors. They also served a schedule, claiming damages of £82,000 to date and a continuing loss of £23,000 per year. On 20 March 2007 the court made an order for a split trial.
12. On 14 December 2007, the day before the liability hearing, it was agreed that the defendant was liable for the claimant's injuries caused by the accident, subject to a discount of twelve and a half percent for contributory negligence. This apportionment of responsibility was subsequently embodied in a consent order.
13. In January 2008 the defendant made an interim payment of £7,500 to the claimant. On 15 April the claimant's solicitors served a schedule claiming damages of £280,000 up to 31 March 2008.
14. On 22 May 2008 Mr. J. B. Williamson, the medical expert instructed by the defendant, prepared a report based upon a review of the documents. The materials supplied to Mr. Williamson comprised the claimant's statement, Mr. Jakubowski's initial report, a report by a clinical psychologist and the claimant's schedule of

expenses and losses. Somewhat surprisingly, the defendant and its insurers did not see fit to furnish Mr. Williamson with the video surveillance evidence which they had obtained.

15. On the basis of the evidence before him, Mr. Williamson concluded that the claimant had suffered from degenerative changes of the spine before April 2003 and that the effect of the accident was to accelerate a disc prolapse which was inevitable.
16. On 28 May 2008 the defendant applied for permission to adduce expert evidence from Mr. Williamson at the quantum hearing. On 13 June 2008 that application was granted.
17. Somewhat surprisingly, the claimant appealed against the order allowing the defendant to call expert evidence. I say “somewhat surprisingly”, because by June 2008 it was clear that there was an issue between the experts as to the extent of the injuries which had been caused by the claimant’s accident. The claimant’s notice of appeal was filed on 27 June 2008. The appeal was heard and dismissed on 2 October 2008. The claimant was ordered to pay costs of £2,750 in respect of that inappropriate appeal.
18. In the meantime, on 29 September 2008 the defendant had made an offer under CPR Part 36 to settle the claimant’s claim for £63,000. Out of this sum £39,449.21 would be paid to the CRU and the balance would be paid to the claimant. In other words the defendant was offering to pay a net sum of £16,050.79 in settlement to the claimant, inclusive of the previous interim payment of £7,500. By letter dated 16 October 2008 the claimant’s solicitors rejected that offer, but made a counter-offer under Part 36 to accept £150,000 in settlement, which sum would include the monies repayable to the CRU.
19. On 20 or 30 November 2008 (the precise date is unclear) the claimant attended Mr. Williamson’s clinic for examination. The defendant and its insurers obtained video surveillance evidence of the claimant’s conduct on that day. This showed the claimant to be generally free of disability, except when he approached the spine clinic. At that point the claimant started to use a walking stick and was limping.
20. Mr. Williamson duly carried out his examination of the claimant and prepared a report dated 18 December 2008. In that report Mr. Williamson concluded that the accident on 11 April 2003 precipitated a disc prolapse, which would have occurred subsequently in any event. Mr. Williamson also stated that the claimant’s clinical presentation was exaggerated, which might indicate an attempt to inflate his claim. On 23 December 2008 Mr. Williamson examined the claimant’s medical records. He reported that these showed a significant history of low back problems and that the x-ray showed severe degenerative change.
21. On 2 March 2009 the defendant’s solicitors disclosed their video surveillance evidence. On 27 March 2009 the defendant applied for disclosure of the claimant’s MRI scans. This material was provided to them on 20 April 2009.
22. On 14 May and 10 September 2009 Mr. Jakubowski and Mr. Williamson met and produced two joint reports. They agreed that the accident on 11 April 2003 had accelerated spinal degeneration which would have occurred in any event. Mr.

Jakubowski considered that the period of disability caused by the accident was two years. Mr. Williamson considered that the period of disability caused by the accident was one year.

23. On 19 October 2009 the claimant's solicitors served a schedule of loss and damage based upon a period of two years' disability, in accordance with Mr. Jakubowski's revised opinion. This schedule set out a claim for £59,451.56 in respect of financial losses between 11 April 2003 and 11 April 2005.
24. By letter dated 25 November 2009 the defendant's solicitors withdrew the defendant's previous Part 36 offer and made a new offer to settle on the following terms: the defendant would pay to the claimant £31,702.53, inclusive of the previous interim payment of £7,500; the defendant would also pay £5,797.47 to the CRU in respect of national insurance benefits previously paid to the claimant. The defendant's offer to the claimant and the defendant's proposed payment to the CRU were both based upon the assumption that the accident of 11 April 2003 had caused a period of 18 month disability. In respect of costs, the defendant proposed that the defendant should pay the claimant's costs up to 20 October 2008 and the claimant should pay the defendant's costs thereafter. The basis of this proposal was that the defendant's final offer was lower than the defendant's offer dated 29 September 2008. Therefore in respect of the period after the expiry of the defendant's first offer, the defendant should be regarded as the successful party.
25. In due course the action was settled on the basis that the claimant accepted the substantive sums offered by the defendant on 25 November 2009, but all questions of costs would be determined by the court. The parties asked the court to deal with the question of costs and the court agreed to do so.
26. His Honour Judge Bullimore heard argument about costs on 15 January 2010 and delivered his reserved judgment on 28 January 2010. In that judgment the judge held that the defendant was the successful party in respect of the period after 20 October 2008. Accordingly he ordered the claimant to pay the defendant's costs in respect of that period. The judge added that even if he was wrong on that issue, nevertheless the claimant's conduct warranted an order that the claimant should pay costs after 20 October 2008.
27. The claimant was aggrieved by the order for costs. Accordingly he appealed to the Court of Appeal.

Part 3. The Appeal to the Court of Appeal

28. The claimant appeals to the Court of Appeal on two grounds. The first ground is that the claimant, not the defendant, should be regarded as the successful party. The second ground is that the claimant's conduct does not justify any departure from the normal order that the defendant, as losing party, should pay the entire costs of the action.
29. Both parties have changed counsel for the purposes of the appeal. Furthermore the shape of the case has changed since the matter came before Judge Bullimore for consideration. The defendant now concedes that the claimant should be regarded as the successful party. Nevertheless Mr. Peter Burns, who now appears for the

defendant, contends that the existing costs order should be upheld on the judge's alternative ground. In other words, the claimant's conduct was such that he should be ordered to pay the costs of the action after 20 October 2008.

30. Before I address the grounds of appeal against the background of this new landscape, I must first review the relevant law.

Part 4. The Law

31. Part 36 of the CPR provides a formal framework within which any party to litigation may make an offer to settle. If one party makes such an offer and the final judgment accords with or is less advantageous to the other party than the offer, then the offeror will (subject to the court's discretion) receive the rewards set out in rule 36.14. Where the defendant is offeror, the normal reward is that he receives his costs from a date 21 days after the offer was made.
32. Part 36 underwent radical revision on 6 April 2007. Prior to that date a Part 36 offer could only be withdrawn or reduced with the permission of the court: see the former rule 36.6 (5). The position now is that after the expiry of 21 days a Part 36 offer can be withdrawn or reduced without any need for the permission of the court: see the present rule 36.3 (6). It should be noted, however, that if a Part 36 offer is (a) withdrawn or (b) reduced so that it is less advantageous than the final judgment, then the offeror will not receive the rewards set out in rule 36.14.
33. In personal injury cases rule 36.15 requires a defendant's offer to specify the gross sum offered and how that sum will be split as between the claimant and the CRU. Rule 36.10 (8) states that in determining whether the claimant has obtained a more advantageous result than the defendant's Part 36 offer, one looks at the net sum paid to the claimant, not the gross sum including monies payable to the CRU.
34. Rule 44.3 provides that the court has a discretion in respect of costs. Rule 44.3 (2) provides:

“(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.”

35. Rule 44.3 (4) provides:

“(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, and which is not an offer to which costs consequences under Part 36 apply."

It should be noted that the wording of rule 44.3 (4) has remained very similar both before and after the reforms of April 2007.

36. A large number of authorities have accumulated around the provisions of Part 36 and their interrelationship with rule 44.3. This is not a welcome development, since Part 36 is intended to provide a clear and simple framework within which parties can settle litigation. In *Multiplex Constructions (UK) Ltd v Cleveland Bridge (UK) Ltd* (No. 7) [2008] EWHC 2280 (TCC); [2009] 1 Costs LR 55. I attempted (as a first instance judge) to summarise the principles which had emerged from the authorities to date. I did so without enthusiasm, since those authorities did not always promote the clarity and simplicity which Part 36 was designed to achieve. Some authorities had the opposite effect: for example, *Carver v BAA* [2008] EWCA 412, the effect of which will be reversed by a new rule 36.14 (1A) with effect from 1 October 2011.
37. Let me turn now to the authorities which bear upon the present appeal and which have been cited by counsel. *Painting v University of Oxford* [2005] EWCA Civ 161 was a personal injuries action in which liability was admitted, subject to a 20% deduction for contributory negligence. The case was fought out on quantum. The defendant succeeded in its defence that the claimant was exaggerating her claim, but nevertheless the claimant recovered more than the payment into court. The Court of Appeal held that the claimant should pay the defendant's costs after the payment into court. The claimant's conduct in greatly exaggerating her claim, would appear to have been the justification for the adverse costs order made in that case. In *Trustees of Stokes Pension Fund v Weston Power Distribution (South West) Plc* [2005] EWCA Civ 854; [2005] 1 WLR 3595, the defendants trespassed on the claimants' land and cut down four hundred trees. The defendants made a *Calderbank* offer of £35,000, which was open for acceptance for a period of twenty one days. The claimants rejected that offer and issued proceedings, at the end of which they recovered only £25,600. The judge ordered the defendants to pay half the claimants' costs of the action. The Court of Appeal allowed the defendants' appeal, holding that the claimants should have accepted the defendants' offer within the twenty one day period. That offer, although outside Part 36, fell within rule 44.3 (4) (c). The judge had erred in the exercise of his discretion under rule 44.3. The Court of Appeal, exercising afresh the discretion under that rule, ordered the claimants to pay the defendants' costs from the date when the *Calderbank* offer expired.
38. *Hall v Stone* [2007] EWCA Civ 1354; [2008] 3 costs L.R 450 was a personal injuries action. The claimants recovered substantially less than they claimed. On the other hand, the defendant failed in his defence alleging that the claimants were dishonest and that nothing was due. The Court of Appeal held that the claimants were entitled to recover their costs. The key factor in this decision was the characterisation of the claimants as winners because they had defeated the defendant's blanket defence.
39. In *Sampla v Rushmoor Borough Council* [2008] EWHC 2616 (TCC) Coulson J said that the rejection of a Part 36 offer did not preclude subsequent acceptance of that offer, subject to the usual costs consequences: see paragraphs 34 and 35.

40. *Morgan v UPS* [2008] EWCA Civ 1476; [2009] 3 Costs LR 384 was a personal injury action in which the claimant exaggerated the effect of her injuries, but her true condition was revealed by video surveillance evidence. The claimant nevertheless recovered more damages than the defendant had offered under Part 36. The recorder in Southampton County Court ordered the defendant to pay the claimant's costs of the action. The Court of Appeal upheld that order. At paragraph 21 Longmore LJ said:

“I regard this case as different from *Painting*. In that case Mrs Painting, as claimant, made no attempts to negotiate despite her obvious exaggeration of her claim. In this case, however, the claimant did accept the effect of the contents of the video evidence that had been procured and reduced his claim accordingly, both openly and in the course of “without prejudice” negotiations. The exaggeration and untruthfulness which the Recorder found in this case was taken into account by him, and although some judges might well have reduced the claimant's entitlement to all his costs, without reason I cannot say, for my part, that any reasonable judge must have done so. This is matter which, in para. 26 of *Painting*, I said did need to be addressed. The judge did not address the matter but concluded that nevertheless, for reasons which he gave, the defendants should pay the claimant's costs. That was within the broad discretion which any judge has on the matter of costs”

41. *Widlake v BAA Limited* [2009] EWCA Civ 1256; [2010] PIQR P4 was a personal injuries action in which the claimant had exaggerated her claim and deliberately concealed her medical history from the medical experts. The judge awarded damages in a much lower sum than claimed, albeit rather more than the defendant's Part 36 offer. The judge ordered the claimant to pay the defendant's costs. The Court of Appeal reversed the judge's decision and substituted an order that each side should bear its own costs. At paragraph 39 Ward LJ. said this:

“The way in which regard is to be had to that conduct is principally to enquire into its causative effect: to what extent did her lies and gross exaggeration cause the incurring or wasting of costs? It is obvious that she should recover nothing in respect of the reports she obtained from Miss Porter and the costs judge would disallow anything arising from that. On the other side of the balance sheet the defendant should have some compensation for wasted costs incurred by having to consider those reports and to deal with the case on the basis that they formed part of the pleaded claim which it had to meet. The lie was short-lived: on receipt of its own medical report in January 2007 the defendant knew of the pre-existing injury and was able to judge how to run its own case. The defendant was able to protect itself by making a proper Pt 36 offer. Nevertheless the schedule of loss before the court, and thus the case the defendant still had to meet, on paper at least, was one valued by the claimant in the sum of about £160,000. The defendant was

entitled to protect itself against a claim of that magnitude or even a claim of some £35,000, which it became three weeks before the trial. The claimant was not treating it as a claim which should be measured at about £5,000. Small claims are not worth contesting, are not worth engaging enquiry agents to carry out covert surveillance and small claims are often not worth fighting and so are much more likely to settle. Here the defendant was put to expense arising out of the manner in which the case was unreasonably being conducted, certainly up until the final schedule of loss was served in October. Some compensation for the defendant put to the expense of defending such an exaggerated claim should be entered on the notional balance sheet.”

42. *Pankhurst v White* [2010] EWHC (QB); [2010] 3 Costs LR 402 was a personal injuries action in which MacDuff J held that the claimant’s Part 36 offer retained its potency under Part 36 despite having been withdrawn. The case went to the Court of Appeal, but not on that issue. There were special features in *Pankhurst* and also that case was governed by the old version of Part 36 before the April 2007 amendments. In my view, *Pankhurst* is not authority for the proposition that a party which withdraws its Part 36 offer under what is now rule 36.3 (6) can reap the benefits of rule 36.14. In *Gibbon v Manchester City Council* [2010] EWCA Civ 726; [2010] 1 WLR 2081 two appeals concerning the interpretation and effect of Part 36 were heard together. Moore-Bick LJ gave the leading judgment, with which the President of the Queen’s Bench Division and Carnwath LJ agreed. Moore-Bick LJ approved the judgment of Coulson J in *Sampla*. In the general section of his judgment he gave the following guidance as to the effect of Part 36 offers and the interrelationship between Part 36 and rule 44.3:

“4. It can be seen from Part 36 as a whole, as well as from the extracts cited above, that it contains a carefully structured and highly prescriptive set of rules dealing with formal offers to settle proceedings which have specific consequences in relation to costs in those cases where the offer is not accepted and the offeree fails to do better after a trial. In cases where there has been no Part 36 offer or a Part 36 offer has been bettered the judge has a broad discretion in dealing with costs within the framework provided by Part 44. Rule 44.3 (4) provides that when exercising its discretion as to costs the court will have regard to the general rule that the unsuccessful party should pay the costs of the successful party, but will also have regard to the conduct of the parties and any payment into court or admissible offer to settle made by one or other party which falls outside the terms of Part 36. In seeking to settle the proceedings, therefore, parties are not bound to make use of the mechanism provided by Part 36, but if they wish to take advantage of the particular consequences for costs and other matters that flow from making a Part 36 offer, in relation to which the court’s discretion is much more confined, they must follow its requirements.

5. Part 36 is drafted as a self-contained code. It prescribes in some detail the manner in which an offer may be made and the consequences that flow from accepting or failing to accept it. In some respects those consequences reflect broadly the approach the court might be expected to take in relation to costs; in others they do not; for example, rule 36.14 (3) allows the court award a claimant who has obtained a judgment at least as advantageous as his offer interest on the sum for which he has obtained judgment at an enhanced rate of up to 10% over base rate, costs on the indemnity basis and interest on those costs at an enhanced rate as well.”

43. The issue in *CvD* [2011] EWCA Civ 646 was whether an unhappily worded offer letter could be so construed as to constitute a Part 36 offer. This court, reversing the decision of Warren J, held that it could be so construed. Rix LJ, giving the leading judgment, held that a Part 36 offer, in order to attract the consequences set out in rule 36.14 “has to be an offer which has not been withdrawn, but which has remained on the table.” See paragraph 40.
44. From this review of authority I draw the following conclusions. First, where one party makes a Part 36 offer and then achieves a more advantageous result than that proposed in his offer, the provisions of rule 36.14 modify the court’s general discretion in respect of costs. This is important because parties who choose to use the Part 36 mechanism in their settlement negotiations need to have a clear understanding of the legal effects of making, accepting and rejecting offers under Part 36.
45. Secondly, parties are quite entitled to make *Calderbank* offers outside the framework of Part 36. Where a party makes such an offer and then achieves a more advantageous result, the court’s discretion is wider. Nevertheless it may well be appropriate to order the party which has optimistically rejected the *Calderbank* offer to pay all costs since the date when that offer expired. This was what the court ordered in *Stokes*.
46. A not uncommon scenario is that both parties turn out to have been over-optimistic in their Part 36 offers. The claimant recovers more than the defendant has previously offered to pay, but less than the claimant has previously offered to accept. In such a case the claimant should normally be regarded as “the successful party” within rule 44.3 (2). The claimant has been forced to bring proceedings in order to recover the sum awarded. He has done so and his claim has been vindicated to that extent.
47. In that situation the starting point is that the successful party should recover its costs from the other side: see rule 44.3 (2) (a). The next stage is to consider whether any adjustment should be made to reflect issues on which the successful party has lost or other circumstances. An adjustment may be required to reflect the costs referable to a discrete issue which the successful party has lost. An adjustment may also be required to compensate the unsuccessful party for costs which it was caused to incur by reason of unreasonable conduct on the part of the successful party.
48. In a personal injury action the fact that the claimant has won on some issues and lost on other issues along the way is not normally a reason for depriving the claimant of part of his costs: see *Goodwin v Bennett UK Limited* [2008] EWCA Civ 1658. For example, the claimant may succeed on some of the pleaded particulars of negligence,

but not on others. Indeed the fact that the claimant has deliberately exaggerated his claim may in certain instances not be a good reason for depriving him of part of his costs: see *Morgan v UPS*. A defendant who has obtained video surveillance evidence is perfectly well able to protect his position on costs by making a modest offer under Part 36.

49. Nevertheless in other cases (as stated above) the fact that the successful party has failed on certain issues may constitute a good reason for modifying the costs order in his favour. This is commonly achieved by awarding the successful party a specified proportion of its costs. In *Widlake* the facts were so extreme that the successful party was ordered to bear all of its own costs.
50. Emboldened by this review of authority, I must now decide the issues in the present case.

Part 5 Decision.

51. The gross sum which the defendant offered on 29 September 2008 amounted to £63,000.00, inclusive of payments to the CRU. The gross sum which the defendant ultimately paid amounted to £37,500.00, inclusive of payments to the CRU. At first blush, therefore, it may be thought (as the defendant argued below) that the claimant failed to beat the defendant's Part 36 offer. However (as the defendant concedes in this court), that analysis is not correct. The net sum which the defendant offered to pay to the claimant in September 2008 was £23,550.79. The net sum which the claimant finally recovered was £31,702.53. Accordingly, as the defendant now accepts, the claimant is the successful party in this litigation. Therefore the starting point must be that the defendant should pay the claimant's costs of the action.
52. The next question which arises is whether the circumstances of the case or the claimant's conduct make it appropriate to depart from the starting point and to award less than full costs to the claimant.
53. In relation to the circumstances of the case, there has been much debate about whether the defendant's Part 36 offer can be taken into account at all. In my view, it plainly can be considered. A Part 36 offer which is subsequently withdrawn ceases to attract the consequences set out in rule 36.14. Such an offer then constitutes an "admissible offer to settle" within rule 44.3 (4) (c).
54. Mr Burns has developed an argument that the claimant could have achieved a better outcome than the final decision in this case by accepting the offer dated 26 October 2008 and then appealing against the assessment of sums due to the CRU. It appears that the fruits of any such appeal would have inured to the claimant's benefit, because of the manner in which the defendant's solicitors had drafted their Part 36 notice.
55. I am not persuaded by this argument. It would have been hypocritical if the claimant had accepted the defendant's original offer on the basis of several years' disability and had then appealed against the CRU assessment on the basis that his disability benefits were not referable to the accident of 11 April 2003. In any event, as Moore-Bick LJ pointed out in argument, the outcome of any appeal was uncertain. The prospect of such an appeal hardly made it appropriate to accept the defendant's initial offer.

56. The argument then turned to the claimant's conduct in the litigation. I would readily accept that the claimant ought not to have appealed the district judge's order allowing the defendant to call expert evidence. But that appeal only delayed the proceedings by three months, which was a very small part of the four year period during which this action proceeded in the county court. Furthermore, the claimant was ordered to pay the costs of this inappropriate appeal. So that event did not add to the defendant's costs of the action.
57. When I survey the whole timetable of the litigation, which the judge helpfully sets out in his judgment, it can be seen that both parties were somewhat dilatory at different stages. Indeed the defendant might have speeded matters up if, at an earlier stage, it had disclosed the crucial video of 29 September 2004 or at least allowed its own expert to see that video. There is nothing remarkable in the claimant's conduct of the action, which justifies a departure from the normal order that the claimant should recover the costs of the action.
58. The next point taken by the defendant is that the claimant had exaggerated his claim. The claimant's original schedule of loss claimed £280,000 plus general damages for pain, suffering and loss of amenity. The claimant ultimately recovered only £31,702.59 in total.
59. I readily accept that the claimant's ultimate recovery fell far short of the original pleaded claim. This was in part because the video surveillance evidence showed the claimant to be less disabled than he alleged. Also it was in part because the accident of 11 April 2003 had accelerated pre-existing degenerative change, rather than caused an injury which the claimant would otherwise have escaped. The claimant realistically faced up to these matters when he accepted the defendant's final offer of £31,702.59 net. Furthermore, the judge declined to make a finding that the claimant was guilty of any misrepresentations either by omission or commission: see paragraph 34 of his judgment. It is perhaps surprising that the judge made no such finding. However, this court cannot substitute a finding of fact which the judge expressly declined to make.
60. In my view this case has much in common with *Morgan v UPS*. The defendant had video evidence from an early stage which showed that the claimant was exaggerating his disabilities. Yet the defendant failed to make any realistic offer reflecting the true value of the claim until 25 November 2009. The claimant promptly accepted that offer and the action then concluded, subject to argument about costs.
61. In my view, there is no justification for departing from the usual starting point as set out in rule 44.3 (2) (a), namely that the unsuccessful party should pay the successful party's costs. The judge exercised his discretion on the wrong basis, namely the assumption that the defendant was the successful party. It therefore falls to this court to re-exercise that discretion.
62. There has been a growing and unwelcome tendency by first instance courts and, dare I say it, this court as well to depart from the starting point set out in rule 44.3 (2) (a) too far and too often. Such an approach may strive for perfect justice in the individual case, but at huge additional cost to the parties and at huge costs to other litigants because of the uncertainty which such an approach generates. This unwelcome trend now manifests itself in a (a) numerous first instance hearings in which the only issue

is costs and (b) a swarm of appeals to the Court of Appeal about costs, of which this case is an example.

63. I hope that the forthcoming amendment to rule 36.14 will point the way to a more clear cut approach to the costs rules in future. In the context of personal injury litigation where the claimant has a strong case on liability but quantum is inflated, the defendant's remedy is to make a modest Part 36 offer. If the defendant fails to make a sufficient Part 36 offer at the first opportunity, it cannot expect to secure costs protection. Different considerations may arise in cases where the claimant is proved to have been dishonest, but (on the judge's findings) that is not this case.
64. Reverting finally to the facts of this case, I see no reason to depart from the starting point that the claimant, as the successful party, should recover all his costs assessed on the standard basis. Accordingly, if my Lords agree, this court should re-exercise the discretion under rule 44.3 and order the defendant to pay the claimant's costs of the action assessed on the standard basis, subject to any specific costs orders made during the course of the litigation.

Lord Justice Moore-Bick:

65. I agree.

Lord Justice Ward:

66. I also agree.