CA on appeal from Barnstaple County Court (His Honour Judge Overend) before The Master of the Rolls, Lord Phillips, Keene LJ. 23rd July 2002.

JUDGMENT : LORD PHILLIPS, MR:

1. Arguments about costs have become an unhappy area of satellite litigation, and it is no pleasure to be delivering a judgment on a second appeal in relation to an order for costs in an action which resulted in an award of no more than £784.10 to the claimant.

2. In this case, the claim was for £5,575 in respect of the balance alleged to be due in respect of building works performed by the claimant for the defendants. This claim was met by a defence and counterclaim, the latter standing, by the time of trial or shortly before that time, at £7,891.

3. On 1 May 2001, District Judge Turner, sitting at the Barnstaple County Court, gave judgment on the claim in the sum of £4,500 and judgment on the counterclaim in the sum of £3,715.90. He did not consider that there was time for him to deal with issues that were likely to arise on costs and adjourned the submissions on costs. Before the adjourned hearing, the parties submitted skeleton arguments dealing with costs. The separate hearing took place on 19 June 2001. That hearing lasted approximately half a day. There was an issue that arose then, and indeed on appeal before Judge Overend in due course, in relation to a wasted costs order. We are not concerned with that. At the end of the hearing on the issue of costs, the District Judge awarded the claimant £2,000 in respect of the costs of the claim and the defendants £5,000 in respect of the costs of the counterclaim.

4. On 17 August 2001, His Honour Judge Overend, sitting in the Plymouth County Court, gave permission to appeal against this order and allowed the appeal. He substituted an order that the defendants pay half the costs of the claim and counterclaim assessed at a total of £9,247.80, so that the award was half that total. He awarded the claimant the costs of the appeal which themselves amounted to an additional £2,332.38.

5. The defendants now appeal against this order, with permission given by Potter LJ after the hearing of an oral application. The claimant filed a Respondent's Notice, but has not appeared on this appeal, either through an advocate or in person, to support Judge Overend's judgment. We have, nonetheless, given careful attention to the points raised by the claimant.

The Nature of the Substantive Dispute

6. The defendants engaged the claimant, who was a builder, to build a house on their land for the comparatively modest figure of £16,000. This is explained by the fact that it was agreed that the defendants would provide all the materials and the claimant would simply provide his labour. Unhappily, by the time the job was complete, the parties had fallen out.

7. The defendants refused to pay the last £5,000 odd of the claimant's bill, alleging that in a number of respects the work was defective. The major item of complaint was, at least by the time of trial, the manner in which the chimney had been constructed. Other issues were raised, including a claim by the defendants for damages for delayed completion and an allegation by the claimant that the formal contract was a sham designed to assist the defendants to obtain bank finance. These issues vanished by the time of the trial. The only part of the claim which had ever been challenged was an item of £857 for materials alleged to have been supplied by the claimant. The defendants won on that issue, not merely on the basis that it was not supported by any evidence, but on the basis that those materials had not been supplied. The real bone of contention was the validity of the defendants' counterclaim.

Offers

8. The claimant made two Part 36 offers, one in October 1999 to accept £4,000, and one in November 2000 to accept £2,994.26. Both these offers were refused and, having regard to the ultimate results, they can have no bearing on costs.

9. On 20 September 1999 the defendants' solicitor, Mr Samuel, wrote making a settlement offer. His letter included some polemics on the merits which I shall ignore. The letter was headed "*Without Prejudice*". The material passages read as follows: *"We have reviewed the file with our clients. We are concerned that the costs of this litigation are quite out of control compared to the benefit that might be recovered by either client, whatever findings of fact are made. .... it is likely that neither of our respective clients will recover more than*

£2,000 whatever the findings of fact. It is impossible to conceive that this litigation will cost less than £10,000.00 each side to bring to trial. The irrecoverable costs of either client will therefore be more than the potential damages, given the Judge's current wish to introduce proportionality into litigation, even cases commenced prior to the Woolf reforms. .... Our clients are nevertheless prepared to call a halt at this stage on the basis that the action and the counterclaim are discontinued with each side bearing their own costs. Should your client wish to continue with this litigation, we shall refer this letter to the court in the context of costs and inviting the court to set aside the principles of proportionality (as it envisaged by the Rules) on the grounds of an unreasonable refusal of an overwhelmingly reasonable offer of settlement."

10. Before District Judge Turner, Mr Samuel submitted that this was a very realistic offer which should have been accepted. The District Judge did not have regard to it, perhaps because it did not comply with Part 36. CPR 36.1 provides:

"(1) This Part contains rules about-

(a) offers to settle and payments into court; and

(b) the consequences where an offer to settle or payment into court is made in accordance with this Part.

(2) Nothing in this Part prevents a party making an offer to settle in whatever way he chooses, but if that offer is not made in accordance with this Part, it will only have the consequences specified in this Part if the court so orders."

11. Mr Samuel's offer was, in my view, both sensible and realistic. It was quite obvious that the cost of litigating this dispute was going to be out of proportion to the amount at stake. If Mr Gould had had any sense, he would have accepted the offer. Had District Judge Turner weighed that offer in the defendants' favour when he awarded costs, I do not consider that he could have been criticised.

12. On appeal, Judge Overend was referred to this letter, but he indicated that he did not think it proper to have regard to it as it was written without prejudice. In this I think he was wrong, for the letter made it plain that it was written without prejudice "save as to costs". Although the defendants' skeleton argument in support of their application for permission to appeal relied on this letter, their Appellant's Notice did not found on it and I do not consider that, in the absence of the claimant, it would be fair to take it into account.

District Judge Turner's Judgment

13. The costs hearing before District Judge Turner finished at 5.30pm. He gave a short ex tempore judgment from which I shall read the relevant passages:

"I have been asked today to make a decision on the principle of who should be paying the costs of this most unfortunate litigation and then to make an assessment of those costs. I found the exercise fairly difficult, because there are so many pieces of argument that can be put for or against the payment of costs by both sides.

One starts, I think, on this basis, that I have a complete discretion about costs. Within that discretion, I have to consider a number of matters, and those are set out under CPR 44.3, but there are other provisions to consider as well."

14. Having dealt with the wasted costs order he continued:

"I am bound to say that the majority of litigation involved an assessment of the counterclaim. The counterclaim was for more than the claim itself. The Defendants did not succeed in exceeding it. However, the claim itself was virtually admitted, except for legal argument. In my assessment, the time involved at Trial on the claim at the hearing was about an eighth of the hearing time for that day. Also, in my assessment, about a quarter of the action preparation time that the Claimant's solicitor made in his claim for costs involved the claim itself; in other words, three-quarters with the counterclaim. The Defendant was quite successful - that is the only expression I can use - at the trial, although he did not beat the claim. There was an offer by the Defendants that each other's claim be dismissed but, importantly, neither had made a Part 36 offer to settle this dispute. It is the latter matter that weighs heavily in this judgment. It is easy for me to talk after the event, but, theoretically, it would have been open for the Defendants, for example, to have made an offer of, say, £750 in settlement of this case.

I do realise the practical difficulties of trying to assess a figure in a building dispute. It may be that Mr Samuel's suggestion in a letter, that each side walked away from the case, was a pretty good assessment. I understand it was a formal offer by letter.

....

In view of the length of time that this action has lasted, and the depth of argument that there has been between the parties and their solicitors, I do not think it will do the parties or their solicitors any good for me now to suggest, as I am entitled to do; that there be a detailed assessment of this bill. The preparation of the respective documents by the solicitors would take an enormous amount of time. The costs of doing that and then an assessment hearing would, in my view, be disproportionate. I am going to make an order, which I think is suited in these type of cases, doing the best that I can in difficult circumstances, by fixing figures now. The way I am going to do it is, after looking at the complete assessment bills that have been lodged with these papers, is to make what is called a contribution order, that is, that both sides should make a contribution towards the costs of the other. My view is this: first of all, dealing with the Defendants' liability, the Defendants will pay £2,000 towards the Claimant's costs. I am going to order, likewise, the Claimant to pay £5,000 of the Defendants' costs on the counterclaim."

The Appeal before Judge Overend

15. The hearing before His Honour Judge Overend was an application for permission to appeal with appeal to follow if permission was granted. Mr Spens was instructed to appeal for the claimant, literally on the eve of the hearing, and Judge Overend did not have an opportunity to read the papers before the hearing. Nor did he have, as we have, the transcript of the hearing before District Judge Turner on the costs issue. We have also been provided with a transcript of the hearing before Judge Overend.

16. Mr Spens referred the judge to the transcript of the judgment on costs and submitted that it was wrong in principle for the claimant, who had succeeded overall, to be left paying £3,000 costs to the defendants who had lost overall. In support of this, he relied upon authorities on costs in proceedings involving the claim and counterclaim which pre-dated the introduction of the Civil Procedure Rules.

17. Mr Samuel submitted that the CPR gave the judge a wide discretion as to costs and that it would not be right to interfere with the exercise of discretion unless it was totally wrong in principle or manifestly failed to follow the principles laid down in the CPR. He expressed disappointment that the whole hearing before District Judge Turner had not been transcribed, because the arguments and the provisional views expressed by the judge in the course of those arguments threw light on the reasons for his decision - "the detail was in the hearing not in the judgment". He went on to give examples of what he submitted were the special circumstances that justified the judge's order.

Judge Overend's judgment

18. Judge Overend gave permission to appeal and allowed the appeal. He started by referring to the authorities cited to him and stated that the approach to the award of costs was not governed by this jurisprudence but by the Civil Procedure Rules. He continued : *"The approach is that set out, in particular, in Rule 44.3. The court has a complete discretion as to whether costs payable by one party to another, as to the amount and when they are to be paid. There is, however, an overriding fundamental approach. 44.3.2* ***'If the court decides to make an order about costs (a) the general rule is that the unsuccessful party will be order to pay the costs of the successful party, but the court may make a different order****'."*

19. The judge went on to refer to other relevant provisions to which I shall revert. After summarising District Judge Turner's judgment, Judge Overend stated his conclusions as follows. *"In coming to his conclusion, it would appear that the learned District Judge made an order that is certainly contemplated under Rule 44.3.36(b) namely a stated amount in respect of another party's costs. He did not in coming to that conclusion state why it was that he chose that particular approach, other than to say that it was 'suited in these types of cases'.*

He did not in considering the matter refer to the general proposition that the unsuccessful party would be ordered to pay the costs of the successful party, for he approached the matter on the basis that there were two successful parties, one on the claim and one on the counterclaim.

In my judgment he was wrong to have done so. At the end of the day the successful party was the person who walked away with the balance of £784. In the normal course of events, this being a perfectly straightforward building contract claim, the successful Claimant would therefore have been entitled to a costs order and not one that required the Claimant to pay a balance of costs, a net amount of costs, to the person who had not succeeded at the end of the day. The learned District Judge has not addressed that issue and he has not said why it was that that general rule should not apply in this perfectly straightforward case.

I think that that omission entitles the Claimant to invite this appeal court to reassess the costs order, and I propose to do so. The difficulty that this court faces is that it was not the trial judge, and one way of dealing with the matter would be, I suppose, to remit the matter back to District Judge Turner and to invite him to reassess the costs on the basis that the general rules shall apply, and that there shall be a discount under 44.3.6(a) to reflect the fact that the Defendants succeeded in relation to a number of matters. The court is tempted to take that course. However, there have been far too many hearings already in the history of this action and counterclaim, and I think that this court had better do the best it can on the information that is available to it.

The issues which took up the time appeared to have been, according to Mr Samuel, the question of the chimney - the Defendant had complained that it had no drip tray and there was no cavity in it, and that had taken up a great deal of time in preparation. Matters were not in fact conceded by the Claimant until he was being cross-examined about the matter, but that has been a very significant issue.

This court is assisted to a degree by the assessment of the learned District Judge as to the amount of time that was spent, it being said that some three-quarters of the preparation time of the Claimant related to the counterclaim, in respect of which the Defendant was to a degree, and a not inconsiderable degree, successful.

I think the right order that should have been made is one which would have entitled the Claimant to his costs subject to a discount of 50 per cent to represent the issues that were lost and the time that was spent arguing matters upon which the Claimant failed. To that extent and for that reason, the appeal is allowed in relation to that aspect."

Submissions to us

20. Mr Ball, who has appeared for the defendants, contended that Judge Overend was wrong to approach the case on the basis that District Judge Turner had not given reasons for departing from the general rule that the unsuccessful party should pay the costs of the successful party. He submitted that the judgment gave sufficient indication of those reasons. If it did not, then, submitted Mr Ball, the judge did not have sufficient knowledge of the material facts to substitute his own discretion for that of the District Judge.

21. Mr Ball drew our attention to those special circumstances that could be identified from the transcript of the hearing before District Judge Turner. First, the issue in relation to the chimney. As to this, Judge Overend rightly summarised the issues thus: was there a lead tray incorporated in the construction and was the chimney filled with blocks or was it simply an empty cavity? These were matters within the knowledge of the claimant. But it was not until shortly before the trial that he dropped his contention that he had incorporated a lead tray into the chimney. It was only right at the end of the trial, after he had given his evidence, that it was conceded on his behalf that, contrary to his assertions, the chimney stack had been built as a hollow shell.

22. Mr Ball then referred us to the attitude of the claimant or his legal advisers in relation to agreeing items in the Scott schedule prepared by Mr Gibbs, the joint expert. The defendants had suggested that issues should be narrowed by agreeing as many items as possible on the Scott schedule, but that the claimant's solicitors did not concur in that suggestion. It was not until counsel discussed the matter at the door of the court that it proved possible to agree all but five points on the Scott schedule. Some of the items agreed favoured the claimant and some the defendants.

23. Mr Ball then drew attention to the item of £857 claimed by the defendants for materials, but the judge found those were not supplied. That was the only issue on the claim and the defendants succeeded on that issue. Those circumstances, Mr Ball submits, entitled the District Judge to make the costs order that he did.

24. In the Respondent's Notice settled by Mr Spens, additional grounds were advanced for upholding Judge Overend's order. These were, in effect, repeated reliance on the authorities that Judge Overend had held were no longer applicable*: "The learned judge and, before him, the learned District Judge, both failed to apply the principle in Medway Oil and Storage Company Limited v Continental Contractors Limited [1929] AC 88 that the Counterclaim "should bear only the amount by which the costs of the proceedings have been increased by it.*

That where, in a building dispute, the defence consists of allegations of defective or uncomplete work, the determination of those issues are costs of the claim and do not form part of the costs of the counterclaim. That it is

only where the counterclaim raises an issue that does not arise out of the claim, that those costs form part of the costs of the counterclaim."

25. Apart from Medway Oil, four other authorities were cited in support of those propositions.

My Conclusions

26. This case is a cautionary tale with more than one lesson. First, it demonstrates the foolishness of litigation over relatively small amounts when the costs are manifestly going to be out of all proportion to what is at stake. This case cried out for a conciliatory approach. The defendants made a sensible offer to drop hands at an early stage but the claimant does not seem to have appreciated the dangers that were inherent in pursuing the litigation. With only a modest amount at stake, the costs of formal mediation might have seemed disproportionate, but some form of mediation at an early stage might have well saved a good deal of money, stress and ill-feeling.

27. The second lesson is that it is highly unsatisfactory for anyone, other than a trial judge, to attempt to deal with the costs of an action. If an appeal on costs is to be dealt with fairly, it is likely to require an examination as to what transpired at the trial which would render the appeal a disproportionately expensive piece of satellite litigation. Litigants should think long and hard before seeking permission to appeal against an order for costs.

28. As to the approach to an appellate court to an application for permission to appeal the costs order, we would refer to the observations of this court in **English v Emery Reinbold & Strick Ltd** and the conjoined appeals [2002] EWCA Civ 605 at paragraphs 22 to 30 and 116. Judge Overend, of course, did not have the benefit of this judgment.

29. We sympathise with Judge Overend at being confronted with this case without the benefit of a transcript of what happened at the hearing below or the assistance of a representative of the claimant who had previous experience of the litigation. We are better placed.

30. The costs order made by the District Judge was unconventional, and one needs more information to follow its import. That information is conveniently provided in the Respondent's Notice. The bill of costs put forward by the claimant totalled £8,942.96; that for the defendants totalled £20,179.66. The District Judge estimated that a quarter of the claimant's preparation time and an eighth of the hearing time was devoted to the claim which was virtually admitted. Thus, the £2,000 that the judge allowed the claimant in respect of the claim, amounted, effectively, to a total recovery of the costs devoted to the claim. The claimant had to pay £5,000 towards the defendants' costs leaving them to bear 75 per cent of their own costs. Most of these must have been devoted to the counterclaim.

31. I consider that the District Judge showed a robust wisdom in adopting the approach in making lump sum awards of costs rather than awarding proportions of costs to be assessed on a detailed assessment which would have involved further expense. The District Judge canvassed with the advocates the merits of adopting such a "rough and ready" approach and each concurred in his doing so.

32. The judgment delivered by District Judge Turner gave some indication of the reasons for his award, namely that the claim was virtually admitted, the vast majority of costs incurred related to the issues arising on the counterclaim, and on these the defendants had been *"quite successful"*. Judge Overend plainly did not consider that these reasons justified the order made in what, in the course of argument, he described as a *"bog standard building claim"*. Although he discounted the effect of the authorities that pre-dated the Civil Procedure Rules, his approach was that the claimant fell to be treated as the successful party and the defendants as the unsuccessful parties. He considered that the proper order was one which resulted in the defendants paying at least part of the claimant's costs. He described CPR 44.3.2 as laying down an overriding fundamental approach. I do not believe that he meant those words to carry more weight than the words of the rule itself, which describes this as "the general rule". It is certainly not an overriding approach. It is a starting point in the absence of special factors.

33. As to special factors, the following provisions of the Civil Procedure Rules are relevant. CPR 44.3(4):

"(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....
(5) The conduct of the parties includes-
(a) conduct before, as well as during, the proceedings, and in particular the extent to which 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."

34. These provisions are, in my judgment, incompatible with any inflexible rule that where a set-off and counterclaim fails totally to extinguish a claim, there must be a costs order in the claimant's favour. I do not, myself, purport to make any comment as to what should be the general approach to such a situation or even whether there should be a general approach. The issues on the facts of this case are: (i) was it open to Judge Overend to substitute his own discretion for that of the District Judge; and, if not, (ii) was the order made by the District Judge one that was properly open to him?

35. I do not consider Judge Overend was justified in substituting his own discretion for that of the District Judge on the ground that the latter had provided inadequate reasons. Before giving judgment the District Judge observed to the parties that, *"... it is a troublesome case, of course, and whatever way one jumps on this, I can explain the decision if need be"*. Judge Overend would not have been aware of this. He was, however, told by Mr Samuel that there were a number of points raised during the lengthy costs hearing on which the judge expressed provisional views as the hearing progressed, The hearing had lasted half a day in relation to a summary assessment of costs. That was certainly not a standard form situation and was indicative of the fact that the decision on costs was one which involved consideration of special factors. It was plainly likely that the reasons for the judge's order would have been apparent to the parties even if not set out in detail in the judgment itself.

36. If Judge Overend considered that the District Judge's order was inadequately explained by his reasons, I think, in the circumstances of this case, that he should have considered inviting the District Judge to give a further explanation (see paragraph 25 of English).

37. Having considered the transcript of the hearing before the District Judge and the submissions of Mr Ball, I consider that there were circumstances which rendered District Judge Turner's decision on costs one which was properly open to him in accordance with the provisions of the Civil Procedure Rules. It was open to him to conclude that the conduct of the defendants in relation to the litigation as a whole was manifestly more reasonable than that of the claimant; it was open to him to conclude that the major issues on which he ruled in favour of the defendants were not issues which it had been reasonable for the claimant to pursue; it was open to him to conclude that the manner in which the claim had been pursued, having particular reference to a failure to agree items on the Scott schedule until a very late stage was one which reflected on the claimant; and it was open to him to have regard to the fact that the only item on the claim which was disputed was one which was advanced without foundation. All those matters, in my judgment, could properly justify the order that he made.

38. For those reasons, I would allow this appeal and reinstate the costs order made by the District Judge.

39. **LORD JUSTICE KEENE**: I agree.

Order: Appeal allowed with costs summarily assessed in the sum of £14,000. Costs order made by District Judge Turner to be reinstated. Respondent to pay appellant's costs of hearing before Judge Overend in sum of £3,189.54.

MR STEPHEN BALL (Instructed by Messrs Samuels, Barnstaple, EX32 8BA) appeared on behalf of the Appellant
The Respondent did not attend and was not represented.