CA on appeal from QBD (Mr Justice Moore-Bick) before Simon Brown LJ, Waller LJ, Sedley LJ. 6th February 2002.

JUDGMENT : Lord Justice Simon Brown:

1. Upon the handing down of our judgments on 28th January 2002, dismissing by a majority MGN Limited's appeal against the jury's award of £105,000 damages to the late Mr Kiam (the appeal ultimately being argued on the sole ground that the award was excessive), Mr Browne QC for the successful respondent applied for the costs of the appeal on an indemnity rather than standard basis. The essential basis for the application was that on 27th June 2001 Mr Kiam's solicitors, by letter headed "Without Prejudice Save as to Costs", had offered to accept £75,000 and to return to the appellants £30,000 plus appropriate interest, an offer which the appellants simply ignored.

2. The application seemed to me to raise an important point of principle and we had the advantage of both written and oral submissions upon it.

3. The question of indemnity costs orders following upon offers of settlement has recently been explored in a trilogy of Court of Appeal decisions: ***Petrotrade Inc v Texaco Limited*** [2001] 4 AER 853; ***McPhilemy v Times Newspapers (No 2)*** [2001] 4 AER 861; and ***Reid Minty (a firm) v Taylor*** [2001] EWCA Civ 1723 (transcript 29th October 2001). The first two of these cases dealt specifically with the claimant's position under Rule 36 and decided that an Order for indemnity costs under Rule 36.21(3) was not penal and carried no stigma or implied disapproval of the defendant's conduct and so ought generally to be made where a claimant recovers in court more than he has previously offered to take. The two cases are fully reported and I need not further summarise them. ***Reid Minty,*** however, has broken new ground. To some extent it appears to suggest that the Rule 36 approach may allow defendants too, by way of Rule 44(3), to claim indemnity costs when they defeat a claim having previously made a settlement offer which the claimant has declined. The most directly relevant part of Rule 44(3) is paragraph 4 which reads: *"In deciding what Order (if any) to make about costs, the court must have regard to all the circumstances, including a) the conduct of all the parties; b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36)."*

4. The leading judgment in the Court of Appeal was given by May LJ (and to this I shall return) but Kay LJ pithily added: *"The approach of the CPR is a relatively simply one: namely, if one party has made a real effort to find a reasonable solution to the proceedings and the other party has resisted that sensible approach, then the latter puts himself at risk that the order for costs may be on an indemnity basis. What would be a reasonable solution will depend on all the circumstances of the case …."*

5. It is principally upon ***Reid Minty*** that Mr Browne relies in submitting that the unsuccessful appellants here, having refused the *"reasonable solution"* and "*sensible approach"* represented by Mr Kiam's offer (to take reduced damages of £75,000), should accordingly pay the costs of the appeal on an indemnity basis. Mr Browne does not go so far as to suggest that the respondent is in the same position as a first instance claimant who beats his own Rule 36 offer. He submits, however, and with this I agree, that he is in a comparable position to that of a first instance defendant whose position was explored in ***Reid Minty.***

6. The reason why I regard this application as raising an important point of principle is this: the underlying rationale of Rule 36.21 - to encourage claimants to make offers - has simply no counterpart with regard to defendants. As Chadwick LJ pointed out **in *McPhilemy***, the provision in Rule 36 that, where it applies, the court will order indemnity costs *"… unless it considers it unjust to do so …"* is: *"… intended to provide an incentive to a claimant to make a Pt 36 offer. The incentive is that a claimant who has made a Part 36 offer (which is not accepted) and who succeeds at trial in beating his own offer, stands to receive more than he would have received if he had not made the offer."* (p871)

7. I myself put it thus: *"The judge below, without the benefit of this Court's judgment in **Petrotrade,** wrongly directed himself that an indemnity costs order under CPR 36.21 is of a penal nature and implies condemnation of the defendant's conduct and so would be unjust unless the defendants had behaved unreasonably in*

continuing the litigation after the offer. That misunderstands the rationale of the rule. It is not designed to punish unreasonable conduct but rather as an incentive to encourage claimants to make, and defendants to accept, appropriate offers of settlement. That incentive plainly cannot work unless the non-acceptance of what ultimately proves to have been a sufficient offer ordinarily advantages the claimant in the respects set out in the Rules." (p874)

8. If the claimant thought that, even if he were to make and then beat an offer, he was going to get no more than his costs on the standard basis, why would he make it? It would afford him no advantage at all. He would do better simply to claim at large and recover his costs whatever measure of success he gained. His position is, in short, quite different from that of the defendant who plainly has every incentive to make a settlement offer, generally by way of payment into court, irrespective of the basis on which any costs order will be made. Take any ordinary damages claim. A defendant wishing to protect himself will pay money into court. The incentive to do so is self-evident. The incentive does not need to be created or stimulated by raising the defendant's expectation as to the level of costs he will recover. And, consistently with this, where payments in are not beaten, defendants routinely recover their costs on the standard basis; I know of no rule or practice in such cases for making indemnity costs orders.

9. With these thoughts in mind, I return to ***Reid Minty*** in which the central issue arising was whether the trial judge had been right to direct himself*: "… that indemnity costs should only be awarded on an indemnity basis if there has been some sort of moral lack of probity or conduct deserving of moral condemnation on the part of the paying party."*

10. In holding that to be a misdirection, May LJ referred to the following passage in my judgment in ***McPhilemy*****:** *"When dismissing the principal appeal, we left over for decision whether The Times should pay the respondent's costs of that appeal on the standard or an indemnity basis. Clearly rather more of a stigma attaches to an indemnity costs order made in this context than in the context of a Rule 36.21 offer - although even then no moral condemnation of the appellant's lawyers is necessarily implied …"* (p874).

11. May LJ's essential approach to the question of indemnity costs for unreasonable conduct appears from the following two paragraphs:

"28 As the word 'standard' implies, this will be the normal basis of assessment where the circumstances do not justify an award on an indemnity basis. If costs are awarded on an indemnity basis, in many cases there will be some implicit expression of disapproval of the way in which the litigation has been conducted. But I do not think that this will necessarily be so in every case. What is, however, relevant to the present appeal is that litigation can readily be conducted in a way which is unreasonable and which justifies an award of costs on an indemnity basis, where the conduct could not properly be regarded as lacking moral probity or deserving moral condemnation. …

32 There will be many cases in which, although the defendant asserts a strong case throughout and eventually wins, the court will not regard the claimant's conduct of the litigation as unreasonable and will not be persuaded to award the defendant indemnity costs. There may be others where the conduct of a losing claimant will be regarded in all the circumstances as meriting an order in favour of the defendant of indemnity costs. Offers to settle and their terms will be relevant and, if they come within Part 36, may, subject to the Court's discretion, be determinative."

12. I for my part, understand the Court there to have been deciding no more than that conduct, albeit falling short of misconduct deserving of moral condemnation, *can* be so unreasonable as to justify an order for indemnity costs. With that I respectfully agree. To my mind, however, such conduct would need to be unreasonable to a high degree; unreasonable in this context certainly does not mean merely wrong or misguided in hindsight. An indemnity costs order made under Rule 44 (unlike one made under Rule 36) does, I think, carry at least some stigma. It is of its nature penal rather than exhortatory. The indemnity costs order made on the principal appeal in ***McPhilemy*** was certainly of that character. We held that the appeal involved an abuse of process on the footing that: *"… to have permitted the defendants to argue their case on perversity must inevitably have brought the administration of justice into disrepute among right-thinking people."*

13. It follows from all this that in my judgment it will be a rare case indeed where the refusal of a settlement offer will attract under Rule 44 not merely an adverse order for costs, but an order on an indemnity rather than standard basis. Take this very case. No encouragement in the way of an expectation of indemnity costs was required for him to make his offer to accept £75,000: its object was to protect the respondent against a standard costs order were the Court, say, to reduce the damages to that level. Where, as here, one member of the Court considered the jury's award "wholly excessive", and thought that £60,000 would have been the highest sustainable award, it seems to me quite impossible to regard the appellant's refusal to accept the £75,000 offer as unreasonable, let alone unreasonable to so pronounced a degree as to merit an award of indemnity costs. It is very important that ***Reid Minty*** should not be understood and applied for all the world as if under the CPR it is now generally appropriate to condemn in indemnity costs those who decline reasonable settlement offers.

14. I recognise, of course, that under an indemnity costs order the receiving party only recovers the amount of costs actually incurred. But those costs may well be disproportionate (proportionality not being an issue under an indemnity order). In any event, the greater the disparity between the settlement figure offered and that achieved (and *prima facie*, therefore, the more "unreasonable" the rejection of the offer) the more the receiving party will be in pocket as against what he was prepared to accept/pay so as to be in a position to meet any costs shortfall.

15. I add only this. Mr Browne sought to bolster his application by reference to a second submission, namely that time and costs were wasted in preparing both written and oral arguments upon two other grounds of appeal which in the event were abandoned at the outset of the hearing. I think it unnecessary to deal with this in detail. Suffice it to say that it would be generally undesirable to penalise by indemnity costs a decision not to press particular points in the interests of the expeditious disposal of the appeal. I can see no good reason for departing from that policy here.

16. I would accordingly refuse this application and award the respondent his costs of the appeal on the standard basis.

Lord Justice Waller:

17. I agree.

Lord Justice Sedley:

18. I also agree.

LORD JUSTICE SIMON BROWN: For the reasons given in the judgment, which has already been handed down, the order made is that the appeal be dismissed, with costs to be taxed if not agreed on the standard basis, save that there be no order as to the costs of the hearing on Monday, 28th January. Permission to appeal to the House of Lords be refused. This order has been made in the absence of counsel, pursuant to the recent practice direction, in the terms of the order having now being agreed.

Andrew Caldecott Esq, QC (instructed by Messrs Olswang for the Appellant)
Desmond Browne Esq, QC & Miss Lucy Moorman