CA on appeal from QBD (His Honour Judge Geddes, sitting as a Deputy High Court Judge) before Brooke LJ, Latham LJ, Mr Justice Hart : 25th March 2003)

1. **LORD JUSTICE BROOKE:** I will invite Lord Justice Latham to give the first judgment.

JUDGMENT : LORD JUSTICE LATHAM:

2. The argument that has taken place today, in the main in relation to costs, has simply compounded the sorry tale of this case. Mr Moy not only suffered (as we have explained in our judgments in the main action) from the failures of both solicitors and counsel in the course of the proceedings which were ultimately settled in April 1998, but, despite the fact that (again as our judgments show) there was clear liability on the part of both the solicitors and counsel, he had not only to bring proceedings, which he did in April 1999, but he had to fight those proceedings right through to trial. It was only immediately before the trial itself that the figure to which he was entitled was ultimately agreed. The consequence was that there was a further two and a quarter years' delay from the date that he started those proceedings, which means that he had to wait in total over three and a quarter years for the deficiencies in the services of his lawyers to be put right. That, it seems to me, does not redound to the credit of those who were concerned in this litigation.

3. It is particularly sad to see that this dispute was able to develop in the way it did when clearly the Solicitors Indemnity Fund, who were supporting the first defendants, and the Bar Mutual, who were supporting the second defendant, had sought to put in place some procedures which would ensure that this particular type of in-fighting between defendants should not delay prompt and proper settlement of claims. But that, sadly, was not a process which was adopted in this case.

4. It is apparent that, from the time that the proceedings were first issued in April 1999, those acting on behalf of the first defendant solicitors had already determined that they should blame counsel; and, in circumstances which Mr Livesey has explained to us, they did so before the writ was in fact issued. The position was that they clearly considered that they needed to provide a pre-emptive defence to what was quite clearly going to be a difficult claim to meet.

5. At the end of the day we have to determine the extent to which our ultimate conclusion that it is apparent that the claim should have been settled, and settled promptly in 1999 at the latest, should be reflected in costs, bearing in mind the fact that counsel continued to deny responsibility effectively right up to and including the appeal, subject always to the Part 36 offer, to which I will return.

6. The consequence of our conclusion as to liability is that the second defendant counsel has had to meet approximately 20 per cent of the overall sum of damages which was agreed as appropriate for Mr Moy's compensation. The suggestion by Mr Livesey, on the part of the first defendant solicitors, is that we should use that as the yardstick by which to approach the apportionment of costs in relation to both the trial and the appeal. The suggestion by him is that in relation to the trial the claimant's costs should be apportioned as between the defendants in that proportion; that is that the first defendant solicitors should pay 80 per cent and the second defendant counsel should pay 20 per cent. Secondly, he submits that, as far as the first defendants' costs are themselves concerned, there should be no differentiation between the Part 20 costs and the costs of defending the claim and that, again applying the proportion, the second defendant should pay 20 per cent of those costs.

7. As far as the appeal is concerned, he submits that a different approach should be adopted. He accepts that the grounds of appeal as first put before this court contained a root and branch attack on the judgment of the judge, including the conclusions that the judge had reached as to the responsibility of the first defendant appellants. He acknowledges the fact that, as he tells us on instructions, that part of the appeal was abandoned at the beginning of the hearing. He suggests that the result should be that the respondent second defendant should pay 80 per cent of his costs up to the date of the judgment of this court and 100 per cent of the costs thereafter.

8. On the other hand Mr Ross, on behalf of the second defendant counsel, submits that we should have regard to the history of the matter; and he has taken us through the correspondence in some detail. It is, as it seems to me, apparent from that correspondence that the solicitors and, indeed, those instructing the solicitors on behalf of the appellants had clear views right from the beginning that the

second defendant should in fact be involved in the trial and were determined not to settle the case unless the second defendant was involved. The nadir (if that is the right description) of that approach can be seen in a letter of 8th March 2001, in which it was said: *"The first Defendant (and standing behind them the SIF) wishes for sensible and sound commercial reasons to settle the current proceedings but is not prepared to buy off the litigation at a sum disproportionate to the perceived merits of the case against them. The first Defendant will fight the case if an appropriate settlement cannot be reached with your client. However, in a final attempt to avoid further litigation and the costs of trial, our client puts forward this Part 36 offer."*

9. That carries with it echoes of some conversations which have been deposed to by a Mr Cunningham which took place between himself and a representative of the Solicitors Indemnity Fund in September 1999.

10. Be that as it may, it has to be said that those acting on behalf of the second defendant were themselves reluctant to enable a settlement to be reached sensibly. An example of the approach from them can be seen in a letter in response to a suggestion of mediation, in which it is clear that they were not at that stage prepared to involve themselves in negotiations. The letter is dated 12th September 2000 and states: *"We believe that the responsibility to settle the case is that of your clients. If they do so our client will be prepared to bear her own costs both of the Part 20 proceedings and the main action but, as the action continues and her costs increase, that position may change.*

As far as mediation is concerned, we would not object to the matter going to a mediation and would endeavour to assist your client and the claimant settle the case. However, you should not infer from that that our client's position would be any different at mediation to that stated in this letter."

11. Doing the best one can overall to assess the way in which the respective attitudes of the parties should be reflected in the ultimate order for costs, it seems to me that, again going through the issues and the order suggested by Mr Livesey, one starts with the costs of the claimant which were ordered by the judge to be paid by the first defendants. It seems to me that, to reflect the fact that the first defendants failed to take the course which in my judgment was the sensible and appropriate course to take, which is to have dealt with the claim of Mr Moy promptly by way of settlement and resolved any issues with the second defendant thereafter, that order should not be disturbed.

12. As far, however, as the costs of the Part 20 proceedings are concerned and the costs of the first defendants, the issue as between the first defendants and the second defendant had inevitably to be disposed of either by way of litigation or alternative dispute resolution; and in relation to litigation, which in fact occurred, the appropriate protection for the second defendant was to make a Part 36 offer. A Part 36 offer was indeed made, but it was not adequate to meet the liability which we consider was appropriate. In those circumstances it seems to me that Mr Livesey's submission that the appropriate order for costs should reflect the proportion of the whole claim (which is, by coincidence, the same proportion as, realistically speaking, the issue on which he was successful in relation to the whole trial) means that the proportion should be that the second defendant pay 20 per cent of the first defendants' costs of the hearing below.

13. Turning to the appeal, the submission made on behalf of the second defendant by Mr Ross is that a very substantial proportion of the preparatory work for the appeal was in fact necessary in order to deal with the grounds of appeal which were abandoned at the hearing itself. I acknowledge the argument by Mr Livesey that the appeal itself lasted the two days that had originally been estimated as the appropriate length of the hearing. But bearing in mind the material that had to be assembled and considered and, indeed, considered by this court prior to the hearing of the appeal, it seems to me that the allowance which Mr Livesey accepts has to be made against the overall figure for costs is not sufficient and that the appropriate proportion of their costs to which the first defendant appellants are entitled is two-thirds. That is to be the proportion applied to all the costs involved in the appeal, including the costs which have been incurred since June 2002.

14. Having dealt with those contentious matters, I turn to the proposed order helpfully set out in Mr Livesey's skeleton in order to assist in determining how the order should ultimately be drawn up. That would mean that, so far as 1.1. to 1.4 are concerned, they are as originally drafted, subject to the

amendment of £210,000 to £87,000 in 1.4. 1.5 is deleted, as is 1.6. 1.7 is amended in the form which we discussed in argument to provide for the division as between the first defendants and the second defendant of the overall sum of £210,000 into £166,500 to be paid by the first defendants and £43,500 by the second defendant. As far as 1.8 is concerned, that should be amended to the proportion that we have applied. That must be amended to reflect the fact that it is 50 per cent of the overall liability in relation to the second defendant's negligence, i.e. £43,500. As far as 1.9 is concerned, that remains as drafted. The action and the order for an interim payment of costs of £65,000 is deleted. As far as 1.10 is concerned, the consequence is that the costs and interest should be repaid within 14 days. As far as 1.11 is concerned, in my judgment that should be amended to reflect what I have set out as the appropriate proportion, which is 20 per cent of the first appellants' costs of the Part 20 proceedings and the action. Then 1.12 will be that the respondent Part 20 defendant pay two-thirds of the first appellants' costs of the appeal.

15. Those will be my proposed orders.

16. **MR JUSTICE HART:** I agree.

17. **LORD JUSTICE BROOKE:** I also agree.

Order: costs as set out herein; application by second defendant for permission to appeal refused.

Mr Bernard Livesey QC (instructed by Messrs Barlow Lyde & Gilbert, London EC3) appeared on behalf of the Appellant First Defendants Pettman Smith.

Mr John Ross QC and Mr John Norman (instructed by Messrs Withers, London EC4) appeared on behalf of the Respondent Second Defendant Jacqueline Perry.