CA On Appeal from Central London County Court (Mr Recorder Sapsford) Before: Lord Justice Buxton, Lord Justice Dyson : 25th March, 2003

JUDGMENT : LORD JUSTICE BUXTON:

1. This is an appeal against an order as to costs by Mr Recorder Sapsford sitting in the Central London County Court, dated 2nd July 2002. He ordered that there should be no order as to the costs of the claim or the counterclaim in these proceedings, other than some items as to costs of the amendments of pleadings.

2. In this judgment I shall refer to the appellants, the defendants in the court below, if I may as "the Chipperfields" and the respondent, the claimant below, as "Mr Press".

3. Both the claim and the counterclaim were dismissed by the Recorder. They arose out of two property transactions that were carried out by the Chipperfields, the sale of a flat in Cleveland Square and their purchase of a flat in Portland Place.

4. Mr Press was and is a property consultant. His claim in these proceedings was for an introductory fee or commission of some £37,000 (I will use round figures throughout) in respect of services that he claimed to have provided over the purchase of the Portland Place flat.

5. The Chipperfields counterclaimed in those same proceedings for the return of a sum of broadly £10,500, which had been Mr Press's fee in respect of the sale of the Cleveland Square flat. The circumstances in which the Chipperfields paid that sum and then claimed it back are of some importance in relation to one of the grounds of appeal, and I shall have to revert to them in due time.

6. Mr Press' claim was dismissed by the Recorder because, as is trite law, his entitlement to the fee depended upon his having been the effective cause in the purchase, and the Recorder found that his involvement had been insufficient to enable that claim to be made. Further, even if he had had a contractual right to the fee, he would not have been entitled to it because of non-compliance with orders made under the Estate Agents Act.

7. The counterclaim was equally dismissed by the Recorder because, as he found, Mr Press had in fact introduced the purchasers on the sale of the Cleveland Square property and he had carried out work pursuant to his retainer. He had complied with his statutory obligations and, again a point of some significance in this appeal, he had not been, as was claimed, negligent in performing his tasks.

8. It is clear that this litigation was very strongly contested. It occupied the learned Recorder's time for some six days. In the course of that trial, as is apparent even from the short exposure to it that this court has enjoyed, the protagonists were closely examined and a very large amount of evidence was given about the relations between them.

9. The Recorder heard submissions about costs over a period of half a day. We were told that a whole day had in fact been set aside for that purpose. He had the benefit of being addressed both by Miss Holland, who appears for the Chipperfields, and by Mr McPherson on behalf of Mr Press.

10. The Recorder gave his judgment *ex tempore*, as one would expect in a costs matter, and delivered a short judgment which I think it necessary to read in full. The Recorder said this: *"This is not an easy matter to decide because there are very competing arguments, and compelling arguments, on either side. But the reality is this: I am told that the costs from the claimant's perspective as we sit here today after effectively seven days in court, are approaching £ 50,000, and I am told from the defendants' perspective the costs are approaching £80,000.*

The effect of my judgment is that Mr Press is entitled to retain £ 10,575 which he was paid with a cheque in June 2000. Whilst I have the overriding objective in mind, I must also consider proportionality, and I am very disturbed that offers of mediation did not meet with success. The reality is that when this trial opened here, everything was on the table, so to speak. I use the more colloquial expression, but everything was disputed. In the end, I have found in Mr Press's favour that he is entitled to retain £10,575 and that must be reflected in my view in some way in costs, because the normal rule is that the unsuccessful party will be ordered to pay the costs of the successful party. The reality there is that this litigation covered wider issues, but the end result is that I have dismissed both of the counterclaims.

It has been submitted that certain orders should be made in respect of the counterclaim to reflect Lord Woolf's dicta in AEI Rediffusion v Phonographic Performance Ltd which looks more at partial orders for costs which more accurately reflect the level of success achieved by the receiving party. In my view it is a great pity that there was no clear and concise offer to settle this case. I do not find the correspondence between the parties around September of last year to fall into that category. What would have been in my view a clear and concise offer to settle, which should be reflected in the order of costs that I make, would have been a payment into court. Unfortunately that did not happen.

Doing the best I can, bearing in mind that it is effectively a Judgment of Solomon that I have had to perform, the only order that I think is appropriate in the circumstances, is one of no order as to costs and that is the order that I propose to make."

11. The Chipperfields were granted permission to appeal to this court by this court on two grounds, which again it is desirable to set out in full. The two grounds were preceded by a claim that: *"In the exercise of his discretion, the learned Judge failed to take into account sufficiently or at all the following facts or matters"* and then ground 1.1 and 1.2 are set out:

"1.1 On 7.09.2001, the Defendants' solicitors, Penningtons, made a ' without prejudice save as to costs' offer. Under the offer set out in the accompanying memorandum of 06.09.2001, the Defendants offered £ 5,400 plus VAT with respect to the Claim and withdrawal of the Counterclaim plus a contribution towards the Claimant's costs. This offer was rejected. This offer was far in excess of the result achieved by the Claimant at trial and accordingly this should have been reflected in an order for costs against the Claimant in relation to the Claim and the Counterclaim.

1.2 Further, it was the case that if the Claimant had not brought the Claim in this case, the Counterclaim would never have been pursued. This is evidenced in the clearest of terms in the contents of the last paragraph of the letter dated 18.05.2000 from the Defendant to the Claimant."

These grounds have been helpfully pursued before us by Miss Holland on behalf of the Chipperfields.

12. I turn first to the matters that concern ground one, as I shall call it.

13. The letter of 7th September, headed *"Without Prejudice Save as to Costs*", that is referred to in ground one reads as follows*: "Our clients recently requested Mr Henry Brown, a consultant at this firm with overall responsibility for their matters, to review this dispute between Mr Press and themselves. Mr Brown did so, and subsequently discussed the matter with [the Chipperfields]. As you might be aware, Mr Brown is a highly respected mediator and co-author of the leading textbook on ADR.*

The conclusion of this process of review and consultation has been that our clients have instructed us to make an offer to your client to settle this litigation on the terms set out in the attached memorandum from Mr Brown. You will note that the offer includes a contribution towards Mr Press' legal costs, and we shall be grateful if you could provide us with details of these costs to date so that our clients can take a view on the amount of any contribution they consider would be reasonable.

Clearly the procedural timetable is such that significant extra costs will be incurred shortly, and so if settlement is to be achieved it should be done as soon as possible. We therefore look forward to receiving your response as soon as possible."

14. The memorandum from Mr Brown covered two and a half pages and, one has to say, reads more like a decision in a mediation rather than a straightforward statement of an offer. Mr Brown said that he could see no case for the Chipperfields making any payment, nor, as he put it, any "*moral basis*" for Mr Press' claim as it stood. He did however consider, making an estimate of the time that Mr Press would have spent on the matter, that the sum of £5,400 plus VAT should be offered as a settlement. Mr Brown made it clear that he considered that to be a settlement that was perfectly equitable for Mr Press, and also that it was right that the Chipperfields should have accepted Mr Brown's recommendation to make a contribution towards the legal costs.

15. By way of background, it should be noted that proceedings had been issued on 16th February 2001 and there had been various pleadings since then. Therefore, by this date of 7th September 2001 significant costs would have been incurred.

16. Mr Press' solicitors did not accept that suggestion. In a letter of 19th September 2001 they criticised the employment of Mr Brown and, in fairly strong terms, some of the observations in his memorandum, and made clear that they were not prepared to accept the offer. They further said this: *"We further note that your letter was headed 'without prejudice save as to costs', however, we take issue with you upon this, as it is quite clear that your letter is also without prejudice to the issue of costs. If your client wishes to make a CPR Part 36 offer, then they should do so in the correct terms."*

The Chipperfields' solicitors replied on 25th September saying this, amongst other things*: "Clearly, our letter of 7 September 2001 does not constitute a Part 36 offer, and therefore the provisions of Part 36 will not automatically apply to it. Nevertheless, as you must be aware the court retains its discretion on matters of costs, and in that sense 'without prejudice save as to costs' correspondence in an attempt to settle a case can be taken into account by the court when assessing costs, as was the case before the CPR."*

17. Unsuccessful mediation took place on 21st November 2001 by which time Mr Press' costs were estimated to be some £19,000 plus VAT.

18. In respect of these exchanges and the judgment of the learned judge on them or in relation to them which I have already read, Miss Holland submitted that the Recorder, in making the order that he did, misdirected himself to the extent that this court should exercise its own discretion and make a significantly different order from that which the Recorder thought appropriate. Her argument was that it was indeed the case that the letter of 7th September 2001 contained *"a clear and concise offer to settle"* and that the judge was simply wrong in characterising it, as he did, in different terms.

19. I am not able to agree with that criticism of the judge's reserve about these exchanges. This was certainly an offer to enter into serious negotiations towards settlement, but it was not a finalised and clear offer because the question of costs, important as it was in this connection, is not defined or limited by the phrase "*a contribution towards his legal costs*". There was no offer of a particular sum or of even an agreement to pay a proportion of that sum. Indeed, as Miss Holland as I understood it asserted in argument, the invitation to Mr Press in that respect was to submit figures to the Chipperfields so that they could determine how much of the amount submitted they would be prepared to pay.

20. Miss Holland argued that, even leaving those difficulties aside, had this offer been accepted even on the most unpromising terms as to costs, Mr Press in the event would have done better than what happened to him at the trial. The question, however, is not simply that, but whether the judge was obliged to give weight to this offer to the extent that he was obliged to make an order different from that which he did.

21. True it is that under CPR Part 44.3, and in particular rule 4 thereof, in deciding what order to make about costs the court must have regard to all the circumstances including*: "(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)."*

Miss Holland said that by his observations about the desirability of a Part 36 payment, the judge had effectively limited his discretion, or at least that that was the effective outcome of what he had said.

22. I am not able to agree with that submission either. It is clear that the judge did have regard to this exchange of correspondence, which he mentioned specifically in his judgment. He was entitled to say, as I have already indicated, that it did not have the clarity and definition sufficient for him to be able to act upon it. He did not say that only a Part 36 payment was acceptable, but merely gave such an offer as an example of what would have been a clear and concise offer to settle upon which he would have acted.

23. In referring to the role that Part 36 payments are able to play the judge, although he did not quote the case, was taking the same view as was taken in this court by Simon Brown LJ in **Amber v Stacey** [2001] 1 WLR 1225, where Simon Brown LJ said, at paragraph 39: *"There are to my mind compelling reasons of principle and policy why those prepared to make genuine offers of monetary settlement should do so by way of CPR Pt 36 payments. That way lies clarity and certainty, or at any rate greater clarity and certainty than in the case of written offers."* Simon Brown LJ did not say, any more than did Mr Recorder Sapsford, that a Part 36 payment was the only acceptable way to do it. But both of them, if I may say so with respect, were pointing out the need for offers to be clear before the court is prepared to act on them, and pointing out that that clarity can be achieved by, even though not only by, a Part 36 payment.

24. For those reasons therefore, as far as ground one is concerned, it is my view that the judge did not misdirect himself, nor limit his discretion. It was well open to him to take the view that he did of this correspondence in the context of his discretionary decision about costs.

25. I turn to the second ground of appeal. This, it is fair to say, took a somewhat different form in the submissions made to us and in Miss Holland's skeleton argument from that which it took in the ground of appeal that I have already read. It will be recalled that the ground of appeal simply complained that, if the letter of 18th May 2000 had been acted upon, the proceedings would never have occurred at all, or at least the counterclaim would not have been pursued. We shall have to go to the correspondence in a minute. But to that claim it seems to me there is a short answer. The answer is that that is not what happened. What the Chipperfields chose to do, when the suggestion that they had made was not acted upon, was indeed to pursue the counterclaim. Alternative courses were of course open to them. It is important to note that it was a counterclaim in respect of a different transaction, albeit between the same parties, from that to which the claim related. The two claims were not therefore intimately linked in the way that they would have been if this had been a case of set-off. Had it been a case of set-off, then this argument might have more force; but it is not such a case. The Chipperfields having chosen to enter into that litigation, and not only incur costs themselves but no doubt increase -- we have seen no figures, but it is common sense to say substantially increase -- the costs of Mr Press, it is no defence to that, and no defence to the judge's view of that, to say that had people been more sensible the matter could have been resolved without them litigating at all.

26. The appeal however, took a somewhat different form -- and if I may be permitted to say, a more cogent form -- in Miss Holland's oral submissions to us, which I quite accept were foreshadowed by her skeleton argument. In order to understand that, it is necessary to go to the correspondence again. This was initially correspondence between Professor Chipperfield himself and Mr Press arising out of an intimation by Mr Press of a claim on his part, broadly in the sum that his eventual claim was made. The view of Professor Chipperfield was that the claim was incorrect and inflated. This is Professor Chipperfield's letter of 18th May 2000: *"Unfortunately there seems to be little possibility of sorting this problem as you have now decided to take us into a further realm of fantasy with your new invoice. If the purpose of this invoice is to frighten me then may I suggest that you tear it up and reissue for the agreed amount of £10,575. I will send a cheque by reply. If however you are serious in your determination to take this stupid case to court, then so be it."*

That letter was followed by a letter from the Chipperfields' solicitors of 14th June 2000 in these terms: *"Our clients take the view that the service provided by Mr Press on behalf of Pereds on the sale of 28 Cleveland Square was far from satisfactory. ...*
Notwithstanding this point our clients have instructed us that they are prepared to pay the amount of the invoice in respect of the sale of 28 Cleveland Square as a goodwill gesture to your client. Their position has always been that they did not refuse to pay your client's invoice in this regard, but merely wished to receive an apology or simply an explanation for what they perceived to be unprofessional behaviour before making that payment. We wish to make it clear that this payment is without prejudice to our clients' right to seek damages for the negligence of your client in relation to this transaction should any proceedings be commenced in respect of the purchase of 82 Portland Place. ... In accordance with our clients' instructions we enclose their cheque for £10,575. Kindly acknowledge safe receipt. Kindly also confirm that your client will not be commencing proceedings against our clients in respect of the alleged claim relating to Portland Place."
Then some week later, in another letter indicating what the cheque related to: *"We repeat the statement in our letter of 14 June 2000 that the payment is without prejudice to our clients' right to seek damages for the negligence of your client in relation to the sale of 28 Cleveland Square should any proceedings be commenced in respect of the purchase of 82 Portland Place."*

27. Miss Holland said that was effectively an offer that everybody should lay down their arms. If Mr Press had accepted the £10,500 and not sued any further, he would have been in exactly the same position as he was at the end of the proceedings. The judge should have taken those exchanges into account. It does not appear that he did so. There are two elements in that. First of all, did the judge simply overlook this? Secondly, if he did not, can he be criticised for not acting upon this exchange?

28. So far as the question of whether the judge overlooked the matter is concerned, I am not persuaded that he did. We have been reminded of what has recently been said by this court in **English v Emery Reimbold & Strick Ltd** [2002] 1 WLR 2409, more particularly in a passage of the Master of the Rolls in paragraph 30, which can be summarised as saying that this court will not look too pedantically at reasons given by experienced judges for costs decisions after they have received submissions, but will assume that the judge has taken on board the points, no doubt very effectively -- and we are certain in this case very effectively -- made to him by counsel, and has given them proper weight. There was nothing revolutionary, if I may respectfully say so, in what Lord Phillips there said. It is of a piece with the jurisprudence of this court dating back many years, which has the element that this court not only will not willingly reopen costs decisions, but also will not entertain detailed enquiry as to what the judge did or did not take into account: provided, first of all, he has heard submissions; and, secondly, that his conclusions reasonably follow from those conclusions. In this case the judge heard extensive submissions. We have no reason to think that he did not appreciate the present point.

29. Secondly, there is a further reason that demonstrates that the judge was seized of the implications of this argument. True it is that he does not refer specifically to this correspondence in his judgment, as he did refer to the later correspondence that arises under ground one. But I return to what the judge said about the situation at the trial: *"The reality is that when this trial opened here, everything was on the table, so to speak. I use the more colloquial expression, but everything was disputed."*

That, in my respectful judgement, accurately reflects an appreciation of the fact that this suggestion having failed, the Chipperfields then chose to go ahead with seeking to recover the £10,575. Both sides therefore entered upon litigation. Costs were incurred on both sides. It was entirely open to the judge to take that factor into account, and not assume that Mr Press must have a costs order made against him because he did not accept the suggestion of the Chipperfields.

30. Furthermore, a point that Mr McPherson valuably and correctly drew to our attention, the counterclaim that was brought was not in the event simply limited to recovering the £10,575; that is to say, was not simply limited to, as it were, tracking the suggestion made by Professor Chipperfield in his earlier letter. As presaged by the Chipperfields' solicitors in the letters that I have already read, they also made a claim for damages. We are told that that claim was not by any means overlooked at the trial.

31. In all those circumstances it was entirely open to the judge not to act upon the suggestion made by Miss Holland that he should be guided, indeed compelled, by the letter of 18th May 2000 written by Professor Chipperfield.

32. As I have said, I am quite satisfied that the judge will have had this point in mind. What clearly affected him, having heard the trial, is that whatever position the Chipperfields had taken in the earlier correspondence between the parties, first, that position was extended and altered in subsequent solicitors' correspondence; and, secondly, the effect of going ahead with the trial was inevitably to expose themselves to peril as to costs if, as was inevitable, costs were incurred as a result of the counterclaim being actually pleaded.

33. It needs strong reasons to go behind a decision of a trial judge on a matter of costs, particularly when his judgment depends upon an assessment of the balance and, as this court has said on more than one occasion, the feel of the case, that only a judge who has tried it, and in this case tried it for six days, can accurately acquire. Although this court does not exclude the possibility of interfering it needs strong reasons to do so. The reasons which have been carefully investigated in this case and put, as we have said, very fully by Miss Holland, do not constitute reasons of that sort.

34. I therefore would dismiss this appeal.

LORD JUSTICE DYSON:

35. I agree.

ORDER: Appeal dismissed with costs.

Miss K Stern (instructed by Messrs Penningtons, London EC4N 8PE) appeared on behalf of the Appellants.
Mr G McPherson (instructed by Messrs Masons, London EC1R 0ER) appeared on behalf of the Respondent.