JUDGMENT : Mr. Justice Jack : QBD. 11th November 2005.

Permission to appeal

1. My reasons for my variously granting and refusing permission to appeal at the hearing on 4 November 2005 are as follows:

(a) The claimant's applications

(i) The finding that the claimant had a 60 per cent chance on his claim in respect of exempt sheep

I granted permission. I think that the claimant should have an opportunity to argue before the Court of Appeal that a higher percentage would have better reflected his chances.

(ii) **The light lambs claim**

I refused permission. Whether or not I was right to conclude that Mrs Feakins must have checked these shipments, it cannot be said that Mr Burstow was at fault.

(iii) **17 invoices already paid**

I refused permission. For the two reasons given in my judgment, I consider that this claim has no reasonable prospect of success.

(b) The defendants' applications

(i) The application of the principle in *Amory v Delamirie*

I refused permission. Both as a matter of principle and on the basis of ***Mount v Baker Austin*** [1998] PNLR 493 and ***Browning v Brachers*** [2005] EWCA Civ 753 it is clear that the principle in ***Amory v Delamirie*** (1772) 1 Stra. 505 - that where the tortfeasor is responsible for the loss of the subject matter of the claim, the benefit of doubt as to its value should be given to the claimant – is not limited when applied to a claim against a solicitor for allowing a cause of action (or a defence) to be lost, to those cases where the solicitor had advised that the claim (or defence) had a good prospect of success or had inflated the prospect of success.

(ii) Contributory negligence

I granted permission. There is no authority as to the approach to be adopted in a situation such as existed between Mr and Mrs Feakins and Mr Burstow in 1992, and the defendants' should have permission to argue that my approach was wrong. On the other hand, for the reasons stated in my judgment, the position as to 1996 is clear. The issue of causation if there was contributory negligence in 1992 but not in 1996 was not addressed by counsel (nor in the judgment).

2. The time for filing notice of appeal is extended to run from the date of delivery of this ruling.

Costs

3. I reserved my ruling as to costs.

4. It was contended on behalf of Mr Feakins that he should have an order for his costs of the action to be paid by Mr Burstow (in reality by the Solicitors' Indemnity Fund). It was submitted on behalf of Mr Burstow that the order should be for 60 per cent of those costs only. On behalf of Mr Burstow Mr Philip Moser relied on (i) the degree to which the action failed both in terms of the total amount that was claimed, and the failed claims themselves, (ii) on the fact that Mr Burstow had beaten by a large margin Mr Feakins' Part 36 offer to accept £420,000 made by letter of 26 April 2005, (iii) on the fact that Mr Burstow had probably beaten his own without prejudice offer to settle for £550,000 inclusive of costs made by letter of 23 June 2005, and (iv) on the fact that Mr Feakins' costs are more than twice the sum recovered. Both parties also addressed me on aspects of the conduct of the action.

5. I will not repeat matters which are set out in my judgment delivered on 8 September 2005. That judgment had been considered by the parties in draft, and on 8 September there was agreement that there should be judgment for £270,000 inclusive of interest, which was therefore ordered. That took account of my findings that Mr Burstow had been negligent, that Mr Feakins had thereby lost a 60 per cent chance of succeeding on his claim in respect of exempt sheep, that Mr Feakins was entitled to some damages in respect of costs incurred by him in the proceedings brought against him by the Board. It also took account of Mr Burstow's small counterclaim for costs. It took account of interest. It thus reflected the outcome of the judgment in a single monetary sum.

6. Mr Feakins failed in the action in the following respects. I assessed the chances of him succeeding on his claim in respect of exempt sheep at 60 per cent rather than the 100 per cent he had contended for. It had been contended on behalf of Mr Burstow that the chance was nil or negligible. The amount of the exempt sheep claim without interest was £197,422. Mr Feakins failed on his separate claims for negligence in respect of light lambs (£31,327), 17 invoices already paid (£47,647), and credit notes (which I stated in the judgment to cover two notes, one for £13,948 and one for £29,113, but during the submissions on costs Mr Andrew Sutcliffe Q.C. said the claim related only to the latter: I merely note that no alteration to this aspect of the judgment was suggested when it was seen in draft). Mr Feakins also had claims for costs in relation to costs paid to Mr Burstow (£30,000 before interest), costs for which he was held liable to the Board (£6,000 before interest), and costs incurred in resisting the Board's enforcement proceedings against his farm (£40,000 before interest). These were costs which he asserted would have been saved if his claim in respect the exempt sheep, and the other three claims, had been raised when they should have been. He succeeded in part in relation to the costs he had paid to Mr Burstow and in part in relation to the costs of the Board. He failed in respect of the enforcement proceedings costs. None of these matters took up substantial time. They were ancillary: what the action was about was the exempt sheep claim. Mr Moser suggested that about a day of the twelve day trial was spent on these and about 10 per cent of the costs. Mr Sutcliffe suggested about half a day. I think that the time spent was between the two.

7. The total sum claimed by Mr Feakins in his revised schedule of loss and damage dated 26 May 2005 was £781,953, which included interest. If the individual claims are taken as I have set them out above (and so including the credit note for £13,948) they total £398,472 without interest, of which £197,422 was the exempt sheep claim. Against that Mr Feakins succeeded as to £118,453 (60% of £197,442).

8. I was referred to the provisions of Rule 44.3 as to costs. I have them in mind, and will not lengthen this ruling by setting them out.

9. This was a hard–fought action. The consequences of the litigation with the Board have been disastrous for Mr Feakins. The Board secured judgment against him in June 2000 for £650,645. That remains unpaid and interest has been accruing on it. It is his case that, if Mr Burstow had not been negligent and his exempt sheep claim had been properly raised with the Board in 1992 or 1996, he could have settled with the Board raising the money by selling his farm, and emigrated to Australia which is what he wished. Instead he has become embroiled in further litigation with the Board. Meanwhile the allegation of negligence on Mr Burstow's part was at all times strongly resisted. I express no view as to whether Mr Feakins' assertions as to what otherwise would have happened are correct. I do think, however, that in the context of actions such as the present the court should be astute to see that the fruits of victory are not whittled away by the order for costs unless there is clear reason. The general rule is that the unsuccessful party pays the costs of the successful party: rule 44.3(2)(a).

10. I do not think that any reduction in the costs to be paid by Mr Burstow should be made to reflect the fact that he succeeded on a 60% basis in respect of the exempt sheep claim. He succeeded in establishing negligence. It had been argued on behalf of Mr Burstow that the exempt sheep claim had a nil or negligible chance of success. It had been pleaded that the claim was bound to fail and that its chances should be assessed at 0% or less than 20% : re-re-amended defence and counterclaim, paragraphs 47 and 56.

11. I have considered whether I should reduce the costs because Mr Feakins lost on the issues he did. I accept that it is now common in appropriate cases to make an order reflecting the failure of the claimant on a distinct issue or issues. I do not think that would be appropriate here. It was not unreasonable for Mr Feakins to raise these claims. They occupied little time at the trial – something of the order of 1/15th of the time, and the related costs of preparation will have been of no greater proportion, perhaps less.

12. I do not think that Mr Feakins's claim was 'exaggerated': rule 44.3(5)(d). 'Exaggerated' means unduly magnified or inflated. That did not happen here. Further, although the unsuccessful ancillary claims made up a large part of the total claim, it was always clear that the core of the claim was the exempt sheep claim and the litigation was conducted on that basis.

13. Mr Moser also addressed me as to the conduct of the case, referring in particular to the inclusion of a claim for negligence in the conduct of the action before the European Court of First Instance and in the claim made by Mr Feakins in his action against the Board relating to claw-back. Those allegations were deleted by discontinuance and amendment in October 2004, with the usual cost consequences. The reason was probably the defence raised as to limitation. I am not persuaded that there was anything in the inclusion of these claims that should affect the order for costs at this point. Mr Sutcliffe referred to conduct on Mr Burstow's side in pursuing the limitation defence to the whole of the claim until very shortly before it was due to be decided by way of a preliminary issue, and to a failed application for security for costs. In each case orders for costs were made against Mr Burstow. As I have said, his defence has been hard-fought.

14. Mr Moser did not suggest that by itself Mr Feakins's failure to beat his own Part 36 offer required a cost consequence. He submitted that the consequence of the non-acceptance of Mr Burstow's offer made on Thursday 23 June 2005 together with other factors was that Mr Feakins should be denied a proportion of his costs. He did not submit that Mr Feakins should have to pay all Mr Burstow's costs after the latest date when the offer might have been accepted, which is the consequence under Part 36 – see Rule 36.20(2). But he did submit as an alternative to his 60% submission that Mr. Feakins should have his costs up to 23 June but only 40% thereafter. I accept that in accordance with ***Trustees of Stokes Pension Fund v Western Power Distribution (South West) Plc*** [2005] EWCA Civ 854 it is open to the court to have regard to an offer which satisfies the four conditions set out in paragraph 24 of the judgment of Dyson LJ in that case. Those conditions are: (1) the offer must be expressed in clear terms so that there is no doubt what is offered; (2) it must be open for at least 21 days and otherwise accord with the substance of a ***Calderbank*** offer; (3) it must be genuine and serious; (4) the defendant must be clearly good for the money.

15. The offer letter of 23 June sent by fax at 11.15 am was headed 'Without prejudice save as to costs'. It first mentioned the discussions at mediation the day before. Mr Sutcliffe submitted that this in itself made the offer objectionable. He did not elaborate. I do not see that this invalidates the offer as a costs consideration. The letter then stated: *'The offer of £550,000 inclusive of damages, interest and all costs, remains open for acceptance until 2 pm tomorrow Friday 24 June 2005. In the meantime we are continuing with our preparations for trial.'*

The trial was due to, and did, begin on Monday, 27 June. Parker Bullen replied on 23 June rejecting the offer but saying that an offer on the same terms of £680,000 would be accepted. There it rested. Parker Bullen's response shows that, despite the timing of the offer, Mr Feakins and his advisers were able to respond to it and to come back with a counter-offer made on the same basis, that is, taking into account costs.

16. Mr Feakins's base costs to the date of the mediation, 22 June, were £223,695, which after uplift under conditional fee agreements reached £367,195. The sum recovered in the action exclusive of costs was £270,000. Deducting that from £550,000 gives £280,000 which was therefore the sum offered on account of costs if one takes £270,000 as the figure Mr Feakins should have accepted on account of his claim. This was considerably more than Mr Feakins' costs before uplift and between 3/4s and 7/9s of his costs of £367,195 after uplift. That figure of £367,195 is the total bill and would be subject to reduction in an unknown amount on assessment to give the maximum figure for which Mr. Burstow might be liable. When I first prepared a draft of this judgment I took the wrong costs figures (which were substantially higher), and I have had to consider the effect of the offer afresh.

17. Mr Sutcliffe submitted that the offer was not "an admissible offer to settle" within Rule 44.3(4)(a) because it was inclusive of costs. He said that it raised a conflict of interest between Mr Feakins and his advisers because of the contingency fee arrangements. He did not elaborate on that but I understood him to refer to the interest which the advisers had in the costs and the division of the settlement sum between damages and costs. He submitted that an offer had to be equivalent to a payment into court in its costs aspect, that is, it must be an offer to pay costs up to the date for acceptance. If that was not so, he said it should have no cash consequences. In ***Mitchell v James*** [2004] 1 WLR 158 the Court of Appeal accepted that an offer which included a term as to costs could be

considered under Rule 44.3(4)(c) even though it was not a Part 36 offer because it included a term as to costs: paragraph 36 of the judgment of Peter Gibson LJ. That respectfully seems to me to be right. For Rule 44.3(4)(c) does not impose any limitation as Mr. Sutcliffe suggests. Nonetheless an offer of a single figure for both claim and costs does pose difficulties. These have not been considered by the Court of Appeal. Nor did I hear submissions on them of any length. The issue, I have to consider is whether, having regard to all the circumstances, it was reasonable for Mr Feakins to rejecte the offer.

18. The offer was made at a very late stage. Parker Bullen responded to it as I have stated. This could indicate that they had no difficulty in considering it. However, the swift response does not mean that its form did not cause difficulty between Mr Feakins and his advisers. Their counter-offer was at a figure which enabled it to be structured to avoid difficulty between Mr Feakins and his advisers and I presume that it was. I have to bear in mind that, if Mr Burstow and the Solicitors Indemnity Fund had wished to protect themselves on costs in the event that negligence was found on the exempt sheep claim and in the event that Mr Feakins established that he had had a substantial chance succeeding on that claim, they had ample opportunity to do so in a conventional way long before 23 June 2005: but they did not. It is unclear now whether Mr Feakins has in fact "beaten" the offer – because costs have not been assessed, and it was equally unclear at the time of the offer what the assessed costs might be and so what costs Mr Feakins was entitled to. I conclude that in the circumstances it was reasonable for Mr Feakins to refuse the offer and that the refusal should not have the costs consequences for which Mr Moser contends.

19. The last matter relied on by Mr Moser was the amount of Mr Feakins' costs. The problem of very large bills of costs together with conditional fee agreements was considered by the House of Lords in ***Campbell v MGN Limited*** [2005] UKHL 61, where other relevant cases were considered. It is a matter of great regret that today bills for costs are frequently very large in proportion to the sum at stake. Costs often become as important or more important in settlement as the claim itself, and settlement is inhibited. Further, when civil litigation is so expensive, the ability of the legal system to deliver justice is affected. These general reflections are not a reason for depriving Mr Feakins of a proportion of his costs in this case. The amount of those costs will be examined by the costs judge and Rules 44.4 and 44.5 will apply. As Lord Hoffman stated in ***Campbell***: *'Only costs which have been proportionately and reasonably incurred and which are proportionate and reasonable in amount will be recoverable against the paying party… .'* – paragraph 4 of his speech.

    Therefore the amount of the bill is not a matter with which the court is concerned at this stage.

20. Mr Moser raised the issue of the percentage mark-ups on the conditional **fee agreements. He did so to protect Mr Burstow's position before the costs judge having *Aaron** v Shelton* [2004] EWHC 1162(QB) in mind. The mark-ups and related findings as to Mr Feakins' chances of success against Mr Burstow must all be dealt with by the costs judge.

21. There will be an order that Mr Burstow pay Mr Feakins his costs of the action to be assessed if not agreed. I suggest that there be no order on the costs of the counterclaim as it seems to me that there are unlikely to be any separate costs of substance: but I did not hear counsel on this.

Andrew Sutcliffe QC (instructed by Messrs Parker Bullen) for the Claimant
Philip Moser (instructed by Messrs Beachcroft Wansbroughts) for the Defendants