Akhtar v Boland

[2014] EWCA Civ 872

COURT OF APPEAL, CIVIL DIVISION

GLOSTER, FLOYD LJJ AND SIR STANLEY BURNTON

11 JUNE, 25 JUNE 2014

Practice – Civil litigation – Case management – Allocation – Matters relevant to allocation to a track – Financial value of claim – Assessment of financial value by court – Disregard of any amount not in dispute – Admission of part of sum claimed – CPR 26.7(1), 26.8.

The claimant A brought a claim relating to a road traffic accident against the defendant B. The claim form gave particulars of five categories of special damage which totalled £6,392.80. The value of the claim was stated as '[d]amages in excess of £5,000 but less than £10,000 plus interest and costs'. On that basis the appropriate court track was the fast track. Under CPR 26.7(1)[a], the court, in considering whether to allocate a claim to the normal track for that claim, would 'have regard to the matters mentioned in rule 26.8(1).' CPR 26.8[b] provided: '(1) when deciding the track for a claim, the matters to which the court shall have regard include—(a) the financial value, if any, of the claim … (2) It is for the court to assess the financial value of a claim and in doing so it will disregard—(a) any amount not in dispute'. B's defence admitted the accident and liability to compensate A. Lesser sums were admitted in relation to certain of the categories of special damage, totalling £2,496. The defence stated that '[f]or the purpose of allocation, the amount in dispute is £3,866.80 and falls within the remit of the small claims track' (value of claim not exceeding £5,000). However, following the admissions, the defence also raised a number of issues as to the basis on which A would be entitled to all the sums claimed. After considering the statements of case and the allocation questionnaires the district judge allocated the claim to the small claims track. A applied for the allocation to be changed. A different district judge refused that application; he entered judgment for A for the sum of £2,496 and costs, and ordered that the special costs rules applying to the small claims track were not to apply during the period until service of the defence. A appealed, contending that the district judge had been wrong in his interpretation of CPR Pt 26, in particular that a 'partial admission' of a distinct head of claim constituted a reduction in the amount in dispute. A sought to vary the order made and substitute an order allocating the claim to the fast track. There was no application to set the judgment aside. At the hearing A argued that, correctly construed, the defence was no more than an offer to pay £2,496, and that it was not an admission that A was entitled to that sum as in subsequent paragraphs of the defence B took issue with the basis on A would be entitled to judgment for all the sums claimed. The judge dismissed A's appeal. He ordered A to pay B's costs of the appeal which he assessed summarily. Under the CPR there were special rules about liability for costs for small claims and fast track trial costs, and '[o]nce a claim has been allocated to a particular track, those special rules

a Rule 26.7, so far as material, is set out at [22], below

b Rule 26.8, so far as material, is set out at [22], below

shall apply to the period before, as well as after, allocation, except where the court or a practice direction provides otherwise.' The relevant practice direction stated that before a claim was allocated the court was not restricted by any of the special rules, and that where a claim had been allocated, the special rules would apply to work done before as well as after allocation save to the extent, if any, that an order for costs in respect of that work was made before allocation. Where a claim, issued for a sum in excess of the normal financial scope of the small claims track, was allocated to that track 'only because an admission of part of the claim by the defendant reduces the amount in dispute to a sum within the normal scope of that track … on entering judgment for the admitted part before allocation of the balance of the claim the court may allow costs in respect of proceedings down to that date.' A appealed against the dismissal of his appeal against the order refusing to reallocate the claim to the fast track; he also contended that, on the basis of the allocation of the claim to the small claims track, the judge had had no power to make an order for costs.

Held – (1) The principle that where an allegation made by one party in proceedings was admitted by the other party in unqualified terms that other party must not seek to adduce evidence or raise arguments to the effect that the admission was not binding on him applied even more strongly to a judgment for all or part of claim. Neither party could adduce evidence or make submissions that if accepted would lead to decisions or findings inconsistent with the judgment unless there was a successful application to set the judgment aside. Where a defendant admitted part, and not the whole, of an unliquidated damages claim, the claimant was entitled to judgment on that admission and to pursue the proceedings to seek and obtain judgment for the balance. Such a judgment did not extinguish the claimant's cause of action. Where an admission was equivocal, or inconsistent with other allegations in the defence, the claimant could and should seek further information or clarification of the defendant's case. If the claimant failed to do so and the court considered that it was uncertain what were the issues between the parties that fell to be determined at trial, the court itself could make an order for clarification and in an extreme case, where the defence was truly incoherent, the court could strike it out. On an application such as that heard by the district judge in the instant case, if the court was uncertain as to whether an admission was unqualified, or as to its effect, the court should seek and obtain clarification from the defendant at the hearing and that clarification should be made or confirmed in writing. In the instant case it was clear that the district judge had interpreted the defence as including an unqualified admission that A was entitled to the sum of £2,496 and he had entered judgment for that sum. A had initially made no application to set the judgment aside and B had accepted that at trial A could not recover less than the admitted sums totalling £2,496. It followed that at trial the allegations in the defence that were inconsistent with the admissions would be disregarded. CPR 26 fell to be applied to the proceedings after A had obtained his judgment. Once the court had determined that B had accepted that A was entitled to judgment in the sum of £2,496, the only sum in dispute for the purposes of CPR 26 was the balance of the claim, which was less than £5,000. Accordingly, in the circumstances before him, in which A had retained the judgment for £2,496, the judge had been

entitled to allocate the claim to the small claims track, since the sum remaining in dispute was less that £5,000. Accordingly, the appeal would be dismissed (see [16]–[26], [32], [33], below).

(2) On the basis of the allocation of the case to the small claims track, the judge had had no power under CPR 44.9 to make the order for costs against A. The order for costs would therefore be set aside (see [27]–[33], below).

Notes

For case management: claims normally allocated to the small claims track, see 11 *Halsbury's Laws* (5th edn) (2009) para 267.

Cases referred to

Burdis v Livsey, Clark v Ardington Electrical Services, Dennard v Plant, Sen v Steelform Engineering Co Ltd, Lagden v O'Connor [2002] EWCA Civ 510, [2003] QB 36, [2002] 3 WLR 762.

Appeal

The claimant Pervez Akhtar appealed from the order of Judge Platts sitting in the Manchester County Court dismissing his appeal against the order of District Judge Fox refusing to reallocate the claimant's claim relating to a road traffic accident against the defendant Jordan Boland from the small claims track to the fast track. The facts are set out in the judgment of Sir Stanley Burnton.

Robert Weir QC and *Justin Valentine* (instructed by *AA Law*) for the claimant.

Andrew Prynne QC and *Darren Walsh* (instructed by *Horwich Farrelly*) for the defendant.

Judgment was reserved.

25 June 2014. The following judgments were delivered.

SIR STANLEY BURNTON.

INTRODUCTION

[**1**] This is an appeal by the claimant, to whom I shall refer as such, against the order of Judge Platts dismissing his appeal against the order of District Judge Fox refusing to reallocate the claim to the fast track, with the result that it remained in the small claims track. The judge ordered the claimant to pay the respondent defendant's costs of the appeal, which he assessed in the sum of £2,738.94.

[**2**] In addition, the district judge entered judgment for the claimant for the sum of £2,496 and costs.

[**3**] Although nominally an appeal between two individuals, in fact this appeal is fought between a credit hire company or credit hire companies on the part of the claimant and a motor insurance company or motor insurance companies on the part of the defendant. It raises issues as to the correct track to which claims should be assigned that are of wide general importance. The essential question is what is meant by 'the financial value … of the claim' in CPR 26.8(1)(a) and 'any amount not in dispute' in CPR 26.8(2)(a).

[**4**] Evidently, it is in the interests of a credit hire company to maximise the financial value of a claim for damages following a road traffic incident, so as to justify the instruction of lawyers and to recover the costs of doing so, and in

the interests of insurers to minimise the financial value of a claim below the limit for the small claims track, so that the claimant cannot recover any legal costs of his representation.

[**5**] In addition to the substantive appeal as to the track allocation, the defendant contends that if his appeal is unsuccessful, the judge's costs order should be set aside as inconsistent with the allocation of the claim to the small claims track.

THE FACTS

[**6**] The claim relates to a road traffic accident on 13 October 2011, the facts of which are immaterial to this appeal. The claim form, issued on 17 May 2012, gave the value of the claim as 'Damages in excess of £5,000 but less than £10,000 plus interest and costs'. The particulars of special damage in the claimant's particulars of claim were as follows:

> 'Hire of Vehicle £5280
> Recover charges £300
> Storage charges £712.80
> Vehicle test appointment £50
> Miscellaneous Expenses £50
> **Total £6392.80**'

Accordingly, the prayer was for 'Damages for (sic) exceeding £5000 but not exceeding £10,000 (sic)'. On this basis, of course, the fast track was appropriate. There was a notice of funding stating that there was a conditional fee agreement.

[**7**] The defendant (in reality his insurer) served his defence on 26 July 2012. It was described by counsel for the claimant before the judge as incoherent, a description with which I have some sympathy. Paragraph 1 admitted the accident and liability to compensate the claimant for 'any proven loss and damage caused to the claimant as a direct result'. Paragraphs 2–7 were as follows:

> '2. Hire charges are denied in the sum of £5280. The defendant admits hire charges in the sum of £1860. This figure represents T4 ABI GTA daily rate of £73.81 plus VAT for a period of 21 days. The hire charges remain in dispute in the sum of £3420.
>
> 3. Recovery charges are denied in the sum of £300. The defendant admits £150 plus VAT in respect of recovery charges. The defendant avers that no specialist recovery was necessary for the claimant's accident damaged vehicle. The amount in dispute is £120.
>
> 4. Storage charges are denied in the sum of £712.80. The defendant admits £486 in respect of storage charges. This represents £15 plus VAT daily charge for a period of 27 days. The amount in dispute is £226.80.
>
> 5. The Rochdale Metropolitan Borough Council three monthly vehicle test appointment is denied in the sum of £50. The defendant avers that this head of claim is irrecoverable, pursuant to the case of [*Burdis v Livsey, Clark v Ardington Electrical Services, Dennard v Plant, Sen v Steelform Engineering Co Ltd, Lagden v O'Connor* [2002] EWCA Civ 510, [2003] QB 36, [2002] 3 WLR 762 (at [155])]. Further, or in the alternative, the defendant avers that this would have been incurred by the claimant in any event.
>
> 6. Miscellaneous expenses are denied in the sum of £50.
>
> 7. For the purpose of allocation, the amount in dispute is £3866.80 and falls within the remit of the small claims track.'

[**8**] However, these apparently unqualified admissions were contradicted in subsequent paragraphs. Paragraph 8 pleaded, correctly, that the claimant had entered into a credit hire agreement for a replacement car and claimed to have done so for a period of 40 days. Paragraph 9 was directed at the enforceability of that agreement:

> '9. The defendant is unable to plead precisely through want of knowledge. The claimant is put to strict proof as to:
>
> i. The written terms and conditions of hire by way of production of the original documentation.
>
> ii. The intended date of payment as determined when he signed the agreement.
>
> iii. What representations were made by AM or its agents, as to the terms of payment of the said hire charges. The defendant requires the claimant to attend the hearing for the purposes of cross-examination.'

Paragraphs 11 and 12 put the claimant to proof of his impecuniosity justifying his entering into the credit hire agreement. Paragraphs 13, 14, 15, 18, 21 and 22 were as follows:

> '13. It is not admitted that the claimant needed to hire a vehicle at all or for the full hire period in question. The claimant is put to strict proof that he took all reasonable steps to mitigate his losses in respect of the hire period.
>
> 14. The defendant has no knowledge of whether the claimant could have had use of another vehicle at no charge or a lesser charge during the hire period, or whether the claimant had a reasonable need for a vehicle throughout the entirety of the hire period and in these respects the claimant is put to strict proof.
>
> 15. No admissions are made as to the period of hire. The claimant is put to proof regarding how he managed without a vehicle between the accident date on 13 October and the start of the hire period on 20 October. Further, the defendant avers that hire should have ceased 7 days after the date when the cash in lieu settlement was sent to the claimant (3 November), instead of continuing until 29 November.
>
> 18. The defendant avers that the rate of hire charged by AM includes a charge for additional services and benefits, which are irrecoverable pursuant to the decision in *Dimond v Lovell*. The defendant avers that such hire charges as the claimant can recover should be calculated at the equivalent "basic hire" rate. The defendant reserves the right to adduce such "basic hire rate" evidence to support the contention that it would have been reasonably possible to hire an appropriate vehicle at a lower cost.
>
> 21. The claimant is put under strict proof as to the nature of his insurance policy and, if comprehensive cover was provided, why the policy was not utilised rather than incurring credit hire charges and additional charges.
>
> 22. The claimant has failed to mitigate his loss in that he:
>
> a. …
>
> b. Failed to make any reasonable attempt to negotiate with the credit hire company for the hire of a vehicle on less expensive terms than those set out in the credit hire agreement.
>
> c. … '

[**9**] On 16 August 2012 the claimant's solicitors filed their allocation questionnaire. They stated that they considered the most suitable track for the

claim to be the fast track; they estimated costs to date as £7,000 plus VAT and disbursements, and the overall costs likely to be £15,000 (including a 100 per cent success fee), plus VAT and disbursements, ie, over twice the amount of the damages claim. The defendant's solicitors' allocation questionnaire stated that they considered the most suitable track to be the small claims track, and gave as the reasons:

> 'The defendant refers to paragraph 7 of the defence and avers that the amount in dispute is £3,866.50. The issues in dispute are not complex and therefore the claim falls within the remit of the small claims track.'

[**10**] District Judge Stockton considered the statements of case and the allocation questionnaires, and allocated the claim to the small claims track. The claimant's solicitors applied for the allocation to be changed, and it was this application that was heard by District Judge Fox. As I stated above, he refused the application; he entered judgment for the claimant for the sum of £2,496, the total of the sums admitted in paras 2, 3 and 4 of the defence, and costs, and ordered that para 15.1 of the Costs Practice Direction should apply until service of the defence (so that the special costs rules applying to the small claims track would not apply during that period).

[**11**] The claimant appealed. In his appellant's notice, the ground of appeal was stated as follows:

> 'The judge was wrong in his interpretation of CPR Part 26 in relation to the allocation of the claim, in particular that a "partial admission" of a distinct head of claim constitutes a reduction in the amount of the dispute. Further, or alternatively, the judge erred to the appropriate extent in the exercise of his discretion in relation to the allocation of the claim by considering relevant such "partial admission". We have attached a skeleton argument in support of our appeal.'

In section 6 of his notice, in which the appellant states what he is asking the appeal court to do, the claimant's solicitors left unticked the box against 'set aside the order which I am appealing' and ticked the box against 'vary the order which I am appealing and substitute the following order'. The order sought was stated to be 'Allocate the claimant's claim to the Fast Track'. No mention was made of the judgment and there was no application to set it aside.

[**12**] As mentioned above, the claimant's application came before Judge Platts. He granted permission to appeal, but dismissed the appeal. Before him, as before this court, the claimant argued that correctly construed, the defence was no more than an offer to pay £2,496; it was not an admission that the claimant was entitled to this sum, since in subsequent paragraphs of his defence the defendant took issue with the basis on which the claim would be entitled to judgment for all the sums claimed. The judge rejected this argument. He said:

> '14. Dealing with the issue of whether or not the defence constitutes an admission, the submission is that in reality what is put forward is an offer, not an admission. I reject that argument. It seems to me that it is clear on the face of the wording of the defence that it is an admission: paragraphs 2 and 3 of the defence could not be clearer and the matter is made abundantly clear at paragraph 7 when it is said that the amount in dispute is limited as a result of those admissions. Mr Dawes relies heavily on the later paragraphs, paragraphs 13, 14, 15 and 21, to which I have made

reference, and argues that as a result of those paragraphs when taken with the earlier paragraphs the defence is incoherent or inconsistent. I do not accept that either of those is the case.

15. The admissions were sufficient for the learned District Judge to enter judgment on them, a matter which he could not have done if he properly felt that they were not admissions but rather were offers. In my judgment the later paragraphs would not allow the defendant to go behind the admissions which had been made earlier in the defence; as Mr Taylor submitted they would be relevant to any argument that the defendant wanted to raise as to the balance which was still being pursued by the claimant but I cannot see that the defendant would be permitted to argue that it could defeat the claim for credit hire or storage charges in the light of paragraphs 2 and 3 of the defence. It is also right, in those circumstances, as Mr Taylor submits, that in reality the claimant could do no worse in this litigation than as admitted in paragraphs 2 and 3 of the defence whereas if these were, in reality, offers then he could do worse. That does not arise in this case. Therefore I reject the argument that the learned District Judge was wrong to treat these as admissions; he was clearly entitled to do so and in my judgment was bound to do so, given the way the matter was pleaded.'

Accordingly, he dismissed the claimant's appeal. He ordered the claimant to pay the defendant's costs of the appeal, which he summarily assessed in the sum of £2,738.94.

THE SUBSTANTIVE APPEAL AGAINST THE SMALL CLAIMS TRACK ALLOCATION

The parties' contentions

[**13**] Before us, as before the judge, the claimant's principal contention was that the defence did not include true admissions, but in reality offers. In essence, the defendant was saying that the sums admitted could be accepted, but if not everything, including liability for the sums admitted in paras 1–4 of the defence, would be contested at trial. It was submitted that an admission that part of a sum claimed was payable was not an admission for present purposes. Mr Weir QC focused on CPR Pt 14, on admissions, and pointed out that such a partial admission does not lead to judgment unless the claimant seeks judgment: CPR 14.5.

[**14**] The defendant's submissions varied. Initially, it was submitted that if the sums to which he admitted that the claimant was entitled were not accepted, all of the issues raised in the defence would have to be determined at trial. But it was submitted that the district judge had been entitled to treat the defence as containing admissions on the basis of which the claimant was entitled to, and was given, judgment. In contrast to Mr Weir, Mr Prynne QC focused on CPR Pt 26, dealing with case allocation and management.

Discussion

[**15**] I begin by mentioning what seem to me to be commonplace propositions concerning admissions and interlocutory judgments.

[**16**] Where an allegation made by one party in proceedings is admitted by the other party in unqualified terms, that other party must not seek to adduce evidence or raise arguments to the effect that that admission is not binding on

him. The court has no jurisdiction to investigate a fact that has been admitted, unless the party making the admission obtains the permission of the court under CPR 14.1(5) to withdraw the admission and does so.

[**17**] This principle applies even more strongly to a judgment for all or part of a claim. Neither party may adduce evidence or make submissions that if accepted would lead to decisions or findings inconsistent with the judgment, unless there is a successful application to set the judgment aside.

[**18**] Where a defendant admits part, and not the whole, of an unliquidated damages claim, the claimant is entitled to judgment on that admission, and to pursue the proceedings to seek and obtain judgment for the balance. Contrary to the claimant's submission, such a judgment does not extinguish the claimant's cause of action.

[**19**] Where an admission is equivocal, or inconsistent with other allegations in the defence, the claimant may, and should, seek further information or clarification of the defendant's case under CPR 18.1. If the claimant fails to do so, and the court considers that it is uncertain what are the issues between the parties that fall to be determined at trial, it may itself make an order for clarification, and in an extreme case, where the defence is truly incoherent, the court may strike it out. On an application such as that heard by District Judge Fox, if the court is uncertain as to whether an admission is unqualified, or as to its effect, I would expect the court to seek and to obtain clarification from the defendant at the hearing, and for that clarification to be made or confirmed in writing (under CPR 18.1 or in an amended defence).

[**20**] In the present case, it is clear that District Judge Fox interpreted the defence as including an unqualified admission that the claimant was entitled to the sum of £2,496: hence he entered judgment for that sum. We have the transcript of the argument before the judge, from which it is clear that initially the claimant made no application to set the judgment aside, and that the defendant accepted that at trial the claimant could not recover less than the admitted sums totalling £2,496. It follows that at trial the allegations in the defence that were inconsistent with the admissions in paras 1–5 would be disregarded, and could indeed have been struck out. However, in the discussion after judgment, Mr Dawes, for the claimant, accepted that if the allocation of the claim was changed the judgment would have to be set aside.

[**21**] It follows from this that at trial the defendant could not, for example, challenge the entitlement of the claimant to damages for loss of use of his vehicle, or the reasonable need of the claimant to hire a replacement vehicle for a reasonable time and at a reasonable hire charge: for the defendant to do so would be inconsistent with the admission in para 2 (as well as with the judgment). The rate of the hire charge and its duration beyond 21 days would be in issue.

[**22**] CPR Pt 26 fell to be applied to the proceedings after the claimant had obtained his judgment. CPR 26.7 and 26.8 provide, so far as relevant:

> '**26.7 General rule for allocation**
>
> (1) In considering whether to allocate a claim to the normal track for that claim under rule 26.6, the court will have regard to the matters mentioned in rule 26.8(1).
>
> (2) …
>
> **26.8 Matters relevant to allocation to a track**
>
> (1) When deciding the track for a claim, the matters to which the court shall have regard include—

(a) the financial value, if any, of the claim;
(b) …
(c) the likely complexity of the facts, law or evidence …
(2) It is for the court to assess the financial value of a claim and in doing so it will disregard—
(a) any amount not in dispute … '

[**23**] Once the court had determined that the defendant accepted that the claimant was entitled to judgment in the sum of £2,496, the only sum in dispute was the balance of the claim, which was less than £5,000. This is confirmed by CPR PD 26, para 7.4(2). The relevant parts of that practice direction are as follows:

'7.2 The object of this paragraph is to explain what will be the court's general approach to some of the matters set out in rule 26.8.

"the financial value of the claim"

7.3

(1) Rule 26.8(2) provides that it is for the court to assess the financial value of a claim.

(2) Where the court believes that the amount the claimant is seeking exceeds what he may reasonably be expected to recover it may make an order under rule 26.5(3) directing the claimant to justify the amount.

"any amount not in dispute"

7.4 In deciding, for the purposes of rule 26.8(2), whether an amount is in dispute the court will apply the following general principles:

(1) Any amount for which the defendant does not admit liability is in dispute,

(2) Any sum in respect of an item forming part of the claim for which judgment has been entered (for example a summary judgment) is not in dispute,

(3) Any specific sum claimed as a distinct item and which the defendant admits he is liable to pay is not in dispute,

(4) Any sum offered by the defendant which has been accepted by the claimant in satisfaction of any item which forms a distinct part of the claim is not in dispute.

It follows from these provisions that if, in relation to a claim the value of which is above the small claims track limit of £10,000, the defendant makes, before allocation, an admission that reduces the amount in dispute to a figure below £10,000 (see CPR Part 14), the normal track for the claim will be the small claims track. As to recovery of pre-allocation costs, the claimant can, before allocation, apply for judgment with costs on the amount of the claim that has been admitted (see CPR rule 14.3 but see also paragraph 7.1(3) of Practice Direction 46 under which the court has a discretion to allow pre-allocation costs).'

[**24**] In my judgment, in the circumstances before him, in which the claimant retained the judgment for £2,496, the judge was entitled to allocate the claim to the small claims track, since the sum remaining in dispute was less than £5,000.

[**25**] Mr Weir pointed out that this result meant that many, if not most, of the issues in the case would be those that would have to be decided if the claim had remained in the fast track. That may be so, but it would equally be so if the claim had been for less than £5,000 from the beginning. If a case is too complex

for the small claims track, the court may allocate it to another track: see CPR 26.8(1)(c). The present case is not such a case, and it has never been suggested that it is.

[**26**] For these reasons, I would dismiss the substantive appeal.

THE COSTS APPEAL

[**27**] The claimant contends that on the basis of the allocation of the case to the small claims track, the judge had no power to make an order for costs, and this court has no power to order the claimant to pay the defendant's costs of the appeal.

[**28**] At the date of the judge's order, CPR 44.9 provided:

> '(1) Part 27 (Small claims) and Part 46 (Fast track trial costs) contain special rules about—
>
> (a) liability for costs;
>
> (b) …
>
> (2) Once a claim is allocated to a particular track, those special rules shall apply to the period before, as well as after, allocation except where the court or a practice direction provides otherwise.'

[**29**] CPR PD 44.15 was as follows:

> '15.1
>
> (1) Before a claim is allocated to one of those tracks the court is not restricted by any of the special rules that apply to that track.
>
> (2) Where a claim has been allocated to one of those tracks, the special rules which relate to that track will apply to work done before as well as after allocation save to the extent (if any) that an order for costs in respect of that work was made before allocation.
>
> (3)
>
> (i) This paragraph applies where a claim, issued for a sum in excess of the normal financial scope of the small claims track, is allocated to that track only because an admission of part of the claim by the defendant reduces the amount in dispute to a sum within the normal scope of that track.
>
> (See also paragraph 7.4 of the Practice Direction 26)
>
> (ii) On entering judgment for the admitted part before allocation of the balance of the claim the court may allow costs in respect of proceedings down to that date.'

[**30**] It follows that the judge should not have made his order for costs against the claimant.

[**31**] I would therefore set aside the order for costs made by the judge, but would otherwise dismiss the appeal.

FLOYD LJ.

[**32**] I agree with the judgment of Sir Stanley Burnton and the order he proposes.

GLOSTER LJ.

[**33**] I also agree.

Appeal dismissed.

Charlotte Hennessey Solicitor (non-practising).