IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(Mr Justice Popplewell)

QBENI 97/1671 CMS1

Royal Courts of Justice
Strand, London WC2

Thursday, 30th April 1998

B e f o r e :

LORD JUSTICE OTTON and
LORD JUSTICE CHADWICK

PAUL JEREMY DUFFEN Plaintiff/Respondent

-v-

FRA.BO SpA Defendant/Appellant

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MR N YELL (instructed by Messrs Nicholas Drukker & Co, London EC2) appeared on behalf of the Appellant Defendant.
MR M GIBSON (instructed by Messrs Taylor Joynson Garrett, London EC4) appeared on behalf of the Respondent Plaintiff.

J U D G M E N T
(As Approved by the Court)

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Thursday, 30th April 1998

LORD JUSTICE OTTON: The defendants in this action appeal against the order of Mr Justice Popplewell given on 13th November 1997, when he allowed in part an appeal from Master Trench. The plaintiff has served a cross-notice under RSC O.59,r.6(1)(A).

By a sales agency agreement dated 1st August 1994 the plaintiff was appointed the defendants' exclusive United Kingdom and Republic of Ireland agent for the sale of their products, namely copper piping for industry. The plaintiff's appointment to sell and promote the defendants' products was for a minimum period of four years. From 2nd April 1993 to the date of the agency agreement the defendants' United Kingdom and Ireland sales were made to FRA.BO (UK) Ltd, of which the plaintiff was a director and 50% shareholder. A second director and shareholder was Vittorino Bonetti, the managing director of the defendants. The company secretary and third director of the defendants was Giovanni Bonetti. The agency agreement was terminated by the plaintiff's letter of 11th December 1996 under clause 6.3 due to the defendants' non-payment of £20,000 of the plaintiff's invoice No. 36.

By a summons under O.14 the plaintiff sought: (i) judgment for the admitted amount of the unpaid commission, £27,115.81; (ii) judgment for £100,000 liquidated damages pursuant to clause 7.2 of the agreement; (iii) alternatively, under O.29,r.10, an interim payment. Master Trench gave judgment to the plaintiff for the sum claimed, £27,115.81, and ordered that damages were to be assessed. The defendants appealed the master's order and Mr Justice Popplewell gave the plaintiff final judgment for £100,000. The defendants now appeal that order, seek unconditional leave to defend and the dismissal of the plaintiff's application for an interim payment. The plaintiff seeks to vary Mr Justice Popplewell's order by obtaining judgment for the £27,115.81 unpaid commission in addition to the £100,000 liquidated damages.

The defendants' primary defence is that they are entitled to rescind the agreement due to it being

allegedly induced by two fraudulent misrepresentations which the plaintiff made. The allegation is based upon two alleged misrepresentations: (i) an understatement of the English company's debtors and (ii) that, as a matter of English law, the plaintiff could retain the entirety of the English company's stock for his own personal use and that he was also entitled to the proceeds personally of any such sale.

As to the understatement of the debtors, it is alleged that the £147,340 figure which was disclosed was false due to a further £53,666.79 due from DSM Ltd. The plaintiff's evidence is that there was no falsity as the DSM debt was irrecoverable due to it being in administrative receivership. The defendants maintain that it should have been included in the debtors figure and that it discovered this "fraudulent" omission, as they describe it, on 13th January 1995. Mr Justice Popplewell agreed with the master and found that the allegation of fraud was incredible. Mr Nicholas Yell, on behalf of the defendants, contends that this was not only concealed by the plaintiff, but was also the subject matter of a specific misrepresentation by the plaintiff in a fax dated 20th July 1994, where the plaintiff misrepresented the amount legally due to FRA.BO (UK) Ltd as being £147,340. This, he submits, is an unqualified representation and cannot be read subject to a qualification such as "recoverable" or "irrecoverable".

As to the retention of stock, the defendants' evidence is that on 5th July 1994 the plaintiff orally represented at a meeting with Antonella Paderno and Giovanni Bonetti that: (i) he would not return the English company's unsold stock to the defendants; (ii) he would sell the stock and retain the proceeds; and (iii) he would not authorise an audit of the English company. The plaintiff denies making these representations. Mr Justice Popplewell dismissed the allegations, like the master, as incredible. The learned judge further held that the defendants' evidence amounted to no more than threats made by the plaintiff and not representations. Mr Yell asserts that the plaintiff used this representation as a negotiating card to secure the defendants' agreement to the terms of the agreement,

which were extremely favourable to him. The plaintiff even changed the security codes on the warehouse to prevent any risk that the defendants would physically repossess their stock. The plaintiff represented that he had complete control of the defendants' unsold stock supplied to FRA.BO (UK) and that he could dispose of it as he liked. Clearly, this was an incorrect summary of the legal position and the representations made were untrue.

Counsel further submits that the defendants relied on these misrepresentations and that had they not been made it is inconceivable that the defendants would have been prepared to enter into the agency agreement. The plaintiff's conduct and the misrepresentations made by him were both dishonest and self-serving. Since these representations were made deliberately and were false, the defendants have a claim against the plaintiff for fraudulent misrepresentation, alternatively under section 2(1) of the Misrepresentation Act 1967. Moreover, if successful, the plaintiff would not be able to enforce clause 7.2 (to which I shall refer shortly), which provides for liquidated damages, or claim arrears of commission.

I am satisfied that the conclusions of the learned judge on this issue cannot be faulted. Dealing with the first representation, he said:

> "Mr Yell says that that affirmation is not pleaded and that even if it were relied on, it would do the plaintiff no good, because although it might disentitle the defendant to rescind it would mean that the plaintiff could not recover under these Order 14 proceedings. I accept that argument as a matter of law. However, it seems to me that the factual position which I have just outlined, namely that the defendants allowed this plaintiff to operate in the way he did, they believing (as they now say) he had been guilty of fraud leads to a total disbelief in the defendants' credibility. In my judgment, it simply is not possible that they did believe, in January 1995, that the plaintiff had been guilty of fraud. They could not have conducted their affairs in the way that they did or failed to have written a letter setting out their contention. It was not until the defence and counterclaim came into being nearly two years after the audit that this allegation first surfaced. I entirely agree with the Master that the defendants' credibility on this aspect of the case is nil."

Turning to the second representation, the learned judge, having reviewed the evidence in the affidavits,

said as follows:

> "... it is equally clear that although the defendants now contend that they were forced into this agreement by reason of a fraudulent misrepresentation, that matter never surfaced - so far as I can see from any of the correspondence - until pleading and is not contained in any of the contemporaneous documents, of which there are a great many. Equally, it seems to me that reading, as best one can, the defendants' affidavits the reliance was not on the plaintiff's right, so said, he had to sell, but the fact that he was threatening to sell -- he had them in his possession. His legal ownership was immaterial to that; if it constituted anything, it constituted, as originally pleaded, a threat. I take the view that this allegation of fraud is equally incredible, for very much the same reason that I came to that conclusion on the DSM point."

I respectfully agree with the learned judge's reasoning. Moreover, it is inconceivable that the defendants considered the omission of the bad debt a material matter. As businessmen, Paderno and Bonetti probably realised that it was (as was the fact) irrecoverable. Similarly, the statement as to intent, at its most favourable to the defendants, was no more than a representation of law. The evidence does not support an interpretation that it was made wilfully (see Chitty Vol 1, ch 6, para 007). In addition, the plaintiff would have been correct to suggest that the stock should be sold, rather than be returned to the defendants in Italy, in order that the proceeds could be put into the company's account (of which Paderno and Bonetti were, of course, directors). Accordingly, I would dismiss the defendants' appeal on this issue.

The second issue concerns the construction of clause 7.2 of the agency agreement, which provides:

> "Upon the termination of this Agreement by the Agent pursuant to clause 6.3 the Principal shall immediately become liable to the Agent for and shall pay to the Agent forthwith the sum of £100,000 by way of liquidated damages which sum is hereby agreed by the parties to be a reasonable pre-estimate of the loss and damage which the Agent will suffer on termination of this Agreement by reason of the failure of the Principal to pay the sums which but for the Principal's breach hereof would have been payable to the Agent under the terms hereof."

Master Trench having held that the clause was penal, the plaintiff cross-appealed on this point. Mr Justice Popplewell held that the clause was not penal and gave the plaintiff judgment for £100,000. The defendants contend that the judge was in error in so ruling. Clause 7.2, they submit, was an

unenforceable penalty clause and the judge should have so determined under RSC O.14A.

The law on the matter is well established and is set out in Chitty Vol 1, ch 26, para 061 at p.1253, where the seminal passage from the decision of the House of Lords in Dunlop Pneumatic Tyre Company Ltd v New Garage and Motor Company Ltd [1915] AC 79 at pp.86-88 is cited and where the law is summarised by a series of propositions in the speech of Lord Dunedin:

> "(1) Though the parties to a contract who use the words `penalty' or `liquidated damages' may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The court must find out whether the payment stipulated is in truth a penalty or liquidated damages. ...
>
> (2) The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine pre-estimate of damage.
>
> (3) The question whether a sum stipulated is a penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of at the time of the making of the contract, not as at the time of the breach.
>
> (4) To assist this task of construction various tests have been suggested which, if applicable to the case under consideration, may prove helpful or even conclusive. Such are:
>
> > (a) It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss which could conceivably be proved to have followed from the breach.
> >
> > (b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid ...
> >
> > (c) There is a presumption (but no more) that it is a penalty when `a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage.'
>
> On the other hand:
>
> > (d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties."

The grounds on which the plaintiff was entitled to terminate the agreement are contained in clause 6.3, which provides:

> "The Agent shall be entitled to terminate this Agreement forthwith by notice in writing served upon the Principal in the event that the Principal shall fail to pay to the Agent any sum due to the Agent under clause 5.1 within 30 days after the date on which it is due to be paid under the terms of clause 5.1 and shall also be entitled to terminate this Agreement forthwith by notice in writing served upon the Principal in the event that the Principal shall fail to pay to the Agent any sum due pursuant to an invoice raised by the Agent in respect of commission under clause 5.2 within 30 days of receipt of the invoice by the Principal unless the Principal shall have notified the Agent in writing within 14 days of receipt of the invoice that the Principal disputes the amount thereof stating in full the grounds of the dispute."

Thus if the principal did not pay the £4,000 monthly retainer, or if the defendants did not pay the commission due within 30 days of receipt of the invoice, the plaintiff had a right to terminate.

The learned judge, having considered authority and the effect of clause 6.3, calculated that if the contract were determined within a month or so of its inception, in broad terms, the plaintiff would have a right to recover £196,000 by way of retainer at one end of the scale and, if terminated a month or so before expiration, £6,000 at the other end of the scale. The learned judge continued:

> "Thus it will be seen that at the beginning of the contract (which is the time at which the clause has to be looked at) it is right to say that the sum stipulated for is neither extravagant nor unconscionable in comparison with the greatest loss that can conceivably be proved to have followed from the breach. At the beginning of the contract it would be quite impossible, in my judgment, to come to any true pre-estimate as to the amount of damages that would be likely to arise if the parties ceased to be contracting parties."

Later, he said:

> "When one looks at the penalty clause it seems to me that it was designed to encompass all heads of damage, both past and future."

He then went on to hold that the plaintiff was entitled to the full £100,000 provided for in clause 7.2.

Mr Martin Gibson, on behalf of the plaintiff, submits that clause 7.2 is a genuine pre-estimate of the plaintiff's loss. The onus is on the defendants to prove that clause 7.2 is a penalty and that the express term should be struck down. He submits that the learned judge correctly appreciated that the

classification of the clause is to be judged as a matter of construction and in the light of the circumstances at the time the contract was made, as is envisaged by Lord Dunedin.

Mr Gibson relies upon the following factors:

(1) While it is accepted that the wording of the clause is not conclusive, the words used indicate that the parties have expressly considered how they wish this clause to be classified.

(2) The sum does not become payable following a trivial breach. Furthermore, all the defendants need do to avoid termination is, within 14 days of receipt of the invoice, serve a notice stating the full grounds of disputing the invoice in question under 6.3. In this case the principals never did so.

(3) In the context of this agreement the fact that a single sum was payable whenever termination occurred is not surprising. The parties could not have anticipated how much commission would be earned at any particular point during the following four years.

(4) Even if the view were reached that the agency agreement is an onerous and commercially imprudent one for the principals to have signed, it is not for the court to relieve them from their bargain. In support, he relies upon Export Credits Guarantee Department v Universal Oil Products [1983] 1 WLR 399, in particular at p.403E.

I have come to the conclusion that clause 7.2 cannot be said to be a genuine attempt to estimate in advance the loss which the agent will suffer from a breach of the principals' obligations under the agreement. The sum payable is not graduated. £100,000 is payable irrespective of the unexpired duration of the term. It would still be payable if termination occurred in the last month of the contract's life. The plaintiff could thus recover a substantial windfall. This, to my mind, would be both extravagant and unconscionable, to employ the phrase of Lord Dunedin. The sum payable does not necessarily bear any reasonable relationship to the loss that the plaintiff will sustain as a result of termination. The agreement can be terminated under clause 6.3 for comparatively trivial reasons: for

example, if the repayment of the monthly retainer is one day late. What constitutes a full explanation from the principals is a vague concept which almost inevitably will lead to controversy between the parties.

Consequently, but not without considerable hesitation when differing from this experienced judge, I have come to the conclusion that I must part company with the learned judge's reasoning and conclusions. I would hold that clause 7.2 is a penalty and unenforceable and set aside the judgment for £100,000. The effect would be to reinstate the defence, which contains a set-off and a counterclaim which, in its amended form, has been presented to the court this morning, subject to argument.

THE RESPONDENT'S NOTICE

This arises out of the learned judge's interpretation of the last three lines of 7.2. At page 19 of the judgment the learned judge said:

> "Mr Gibson observes (and submits) that those last three lines are simply saying that the plaintiff was entitled to terminate because of the failure of the principal to pay sums due and have no connection with the quantification of loss and damage ... That does not seem to me to give any effect to the phrase `failure of the principal to pay the sums which would have been payable to the agent under the terms hereof'; if that were designed simply to show the reason for termination a good deal of those three lines is quite unnecessary. It seems to me that the whole purpose of a clause of this sort is to avoid any assessment of damage, both past and future [my emphasis], and to set out to what it is the parties have agreed to avoid that possibility. In my judgment, that includes both a past and future loss; and the total sum which the plaintiff is entitled to is £100,000."

This point is now of academic interest in view of my conclusion that the respondent cannot rely on clause 7.2. Suffice it to say that in argument Mr Yell did not seek to support the learned judge's conclusion on this aspect. For my part, I would hold that this passage conflicts with clauses 7.1.3 and 7.1.4 and the agent would be entitled to any outstanding commission or retainers at the date of

termination in addition to the liquidated damages under clause 7.2 if they were so recoverable.

An argument was considered by the learned judge regarding the Commercial Agents (Council Directive) Regulations 1993, which came into force on 1st January 1994. The plaintiff asserts that he is entitled to invoke the benefit of these Regulations. Of relevance is regulation 7, which provides for an entitlement to commission on transactions concluded during an agency contract. It states:

> "7. (1) A commercial agent shall be entitled to commission on commercial transactions concluded during the period covered by the agency contract -
>
> (a) where the transaction has been concluded as a result of his action; or
>
> (b) where the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind.
>
> (2) A commercial agent shall also be entitled to commission on transactions concluded during the period covered by the agency contract where he has an exclusive right to a specific geographical area or to a specific group of customers and where the transaction has been entered into with a customer belonging to that area or group."

Regulation 17 concerns the entitlement of a commercial agent to indemnity or compensation on the termination of an agency contract. The material subparagraphs provide:

> "(1) This regulation has effect for the purpose of ensuring that the commercial agent is, after termination of the agency contract ... compensated for damage in accordance with paragraphs (6) and (7) below.
>
> (6) Subject to paragraph (9) and to regulation 18 below, the commercial agent shall be entitled to compensation for the damage he suffers as a result of the termination of his relations with his principal.
>
> (7) For the purpose of these Regulations such damage shall be deemed to occur particularly when the termination takes place in either or both of the following circumstances, namely circumstances which -
>
> (a) deprive the commercial agent of the commission which proper performance of the agency contract would have procured for him whilst providing his principal with substantial benefits linked to the activities of the commercial agent; or
>
> (b) have not enabled the commercial agent to amortize the costs and expenses that he had incurred in the performance of the agency contract on the advice of his principal."

Regulation 18 provides that compensation shall not be payable to the commercial agent where -

> "(a) the principal has terminated the agency contract because of default attributable to the commercial agent which would justify immediate termination of the agency contract pursuant to regulation 16 above; ... "

Paragraph 19 provides a prohibition on derogation from regulations 17 and 18. It states:

> "The parties may not derogate from regulations 17 and 18 to the detriment of the commercial agent before the agency contract expires."

The learned judge, having held that clause 7.2 entitled the plaintiff to the liquidated damages of £100,000, stated:

> "I take the view that the Regulations play no part in this case, that the detriment which it is said the plaintiff is likely to suffer from this clause simply does not exist and that the idea that the defendants are in some way prevented from arguing the penalty clause because of Regulation 19 is, in my judgment, misconceived. Likewise, it seems to me on a first reading that Regulation 17(6) does not give the plaintiff an additional right to compensation for damages in addition to the penalty clause, but simply sets out the right to a claim for damages, the calculation of which the Regulations say nothing about."

As I have come to the conclusion that the plaintiff cannot avail himself of clause 7.2, it must follow that the plaintiff is entitled to the benefit of the Regulations. They came into being following the 1986 EC Directive on the Co-ordination of the Laws of the Member States Relating to Self-employed Commercial Agents. Thereafter, the United Kingdom was given time to bring harmonising or co-ordinating legislation into effect, which was duly done by these Regulations. They clearly do now apply. The plaintiff does not seek to aggregate compensation under the Regulations with his common law entitlement. He merely seeks to rely on the Regulations to augment (i.e. top up, if necessary) his common law entitlement with an award under the Regulations. I am satisfied that, in principle, he is entitled to do so.

DAMAGES

The question now arises, if the plaintiff is not entitled to liquidated damages under clause 7.2, is he entitled to any damages at this stage of the proceedings? Master Trench awarded £27,115.81. Subsequent to that hearing, and before the hearing before the learned judge, the defendants, by an affidavit of Miss Antonella Paderno, deposed as to the position as she found it, having perused the documents. She stated, at paragraph 5:

> "If the Plaintiff is entitled to commissions on all sales for the whole of 1996, the correct figure for the Plaintiff's outstanding commission entitlement would be £27,934.65. If he is not entitled to commission on sales by GT Marketing or Flowflex, the correct figure would be £9,133.89 for the whole of 1996. Moreover, the Plaintiff would only have been entitled to £16,933.62 in total from 1st August 1994 to 31st December 1996, whereas in fact he was paid £34,612.36 over that period. If one were to exclude sales to GT Marketing and Flowflex post-March 1996, the correct figure for commission on all sales owed to the Plaintiff for 1996 would be £454.03."

Mr Yell concedes, first, that if the plaintiff is entitled to commission on direct sales (that is, the sales to which reference is made) the plaintiff is entitled to recover the higher sum; second, that by virtue of clause 6.8 of the agreement the defendants cannot set off any sums to which the defendants may be entitled to counterclaim for alleged non-performance or misperformance.

However, Mr Yell contends that the agreement permitted the defendants to sell directly in the United Kingdom without accounting to the plaintiff for the commission. I am unable to accept that contention by virtue of paragraphs 2.2, 4.1.6 and 5.3 of the agreement. It is not necessary to set out the first two terms, but 5.3 provides:

> "Within 28 days after the end of each month the Principal shall submit a statement to the Agent showing the aggregate Net Sales Value of each description of Products invoice by it [my emphasis] during that month and, forthwith upon receipt from the Agent of an invoice therefor, shall send to the Agent a remittance in sterling in respect of the commission thereon to which the Agent is entitled pursuant to clause 5.2."

Counsel contended that the word "it" referred to the agent and not the principal. As a matter of construction, I consider that that is untenable. The substitution of "agent" for "it" renders the clause meaningless. It is not without significance that the defendants have in fact paid the commission for

direct sales to the plaintiff. I would, therefore, in the exercise of this Court's powers under O.14A, decide this issue at this stage of the proceedings to the effect that the plaintiff is entitled to commission from the defendants' direct sales in the United Kingdom and the principals are not entitled to retain such commission to their own benefit.

CONSEQUENCE

As a consequence of my conclusions, I would set aside the judgment for £100,000. I would allow judgment for the enhanced figure of £27,934.65. In view of the concession made, I would not allow a stay on that sum pending determination of the outstanding issues, and I would remit this action to the Central London County Court for its determination.

To that extent, I would allow this appeal.

LORD JUSTICE CHADWICK: I agree that, for the reasons set out in the judgment of Lord Justice Otton, the order below should be set aside and a fresh order made in the terms which he has proposed.

In deference, however, to the arguments cogently addressed by Mr Gibson, on behalf of the respondent, I add some observations of my own on the question whether clause 7.2 of the agency agreement dated 1st August 1994 must be regarded as a penalty and so unenforceable.

That the correct approach to the question whether a provision of this nature is to be treated as a genuine pre-estimate of damages or as a penalty remains that set out in the speech of Lord Dunedin in Dunlop Pneumatic Tyre Company Limited v New Garage and Motor Company Limited [1915] AC 79 at p.86 was affirmed recently by the Judicial Committee of the Privy Council in Phillips (Hong Kong) Ltd v The Attorney General of Hong Kong (1993) 61 BLR 49; see, in particular, at pp.56 and 58, in the opinion delivered by Lord Woolf.

After referring to the decisions of the High Court of Australia in AMEV UDC Finance Ltd v Austin (1986) 162 CLR 170 and Esanda Finance Corporation Ltd v Plessnig [1989] ALJ 238, Lord Woolf observed, at the foot of p.58:

"These statements assist by making it clear that the court should not adopt an approach to provisions as to liquidated damages which could, as indicated earlier, defeat their purpose.

Except possibly in the case of situations where one of the parties to the contract is able to dominate the other as to the choice of the terms of a contract, it will normally be insufficient to establish that a provision is objectionably penal to identify situations where the application of the provision could result in a larger sum being recovered by the injured party than his actual loss. Even in such situations so long as the sum payable in the event of non-compliance with the contract is not extravagant, having regard to the range of losses that it could reasonably be anticipated it would have to cover at the time the contract was made, it can still be a genuine pre-estimate of the loss that would be suffered and so a perfectly valid liquidated damage provision."

But Lord Woolf went on to say this:

"A difficulty can arise where the range of possible loss is broad. Where it should be obvious that, in relation to part of the range, the liquidated damages are totally out of proportion to certain of the losses which may be incurred, the failure to make special provision for those losses may result in the `liquidated damages' not being recoverable."

In my view this is such a case. It must have been obvious, at the time when the agreement of 1st August 1994 was made, that in relation to part of the range of possible loss the liquidated damages agreed were totally out of proportion to the losses that might be incurred. For the reason which my Lord has given, liquidated damages of £100,000 would be totally out of proportion to the loss which the agent would suffer if the agreement were to be terminated in the last few months of the contractual term of the agency. That is a matter for which it would have been relatively easy for the parties to make provision by some formula which resulted in a gradation of the liquidated damages recoverable under clause 7.2 if termination occurred under clause 6.3 during the period after a 12-month notice of termination had been served under the provisions of clause 6.1. They did not do so.

That, as it seems to me, must lead to the conclusion that the provision in clause 7.2 was not intended to be a genuine pre-estimate of the loss which the agent would suffer in those circumstances. It follows that the clause fails under the second head set out by Lord Dunedin at page 86 in the Dunlop case.

(Following submissions re costs)

LORD JUSTICE OTTON: We consider that the orders for costs should be in following terms. Those arising out of the garnishee proceedings will be left undisturbed, and the order there is to take its course on appeal to the judge. The order for costs before Master Trench is to stand. As to the appeal and cross-appeal, we anticipate that to make any split orders reflecting the outcome to the appeal and cross-appeal would lead to unnecessary taxation and expense and to no real purpose. Consequently, we consider that the appropriate order is no order for costs here or below either on the appeal or the cross-appeal.

Order: appeal allowed; judgment for £100,000 set aside and replaced by judgment for total sum of £31,799.11 (i.e. the enhanced figure of £27,934.65 plus contractual interest of 10%); no stay allowed on that sum pending determination of the outstanding issues, and action remitted to the Central London County Court for its determination; costs arising out of the garnishee proceedings to be left undisturbed and the order there to take its course on appeal to the judge; the order for costs before Master Trench to stand; no order for costs here or below on the appeal or the cross-appeal; judgment sum of £31,799.11 not to be paid for 14 days; leave to amend defence and counterclaim granted unless an application is made to the Central London County to disallow the amendments within 14 days; counsel to assist in the drawing of a minute of order. [Not part of approved judgment]