THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2021/CLE/gen/001260

BETWEEN

FEDERICO RIEGÉ

Plaintiff

AND

(1) SARKIS D IZMIRLIAN

(2) THE PRESERVE DEVELOPMENT COMPANY LTD.

(Formerly CRIOLLO ONE LIMITED)

Defendants

Before: **The Honourable Chief Justice Sir Ian Winder**

Appearances: **Gail Lockhart -Charles, KC with Syann Thompson for the Plaintiff**

Brian Simms, KC with Wilfred Ferguson Jr. and Aquelle Tuletta for the Defendants

On the papers

JUDGMENT ON COSTS

WINDER, CJ

[1.] On 5 January 2026, I gave judgment in this action and indicated that I would hear the parties as to the appropriate order on costs, by written submissions within 21 days. Each party lodged written submissions, which I have considered and which I summarize below. This is my decision on costs.

[2.] At paragraph 70 of the Judgment the Court concluded as follows:

> Conclusion
>
> [70.] For the avoidance of doubt the decision of the Court is as follows:
>
> (1) The claims for deceit, fraudulent misrepresentation and breach of confidence are dismissed.
>
> (2) I give judgment for Riegé in the amount of $96,536.67 for restitution on a quantum meruit basis.
>
> (3) The claim against the Second Defendant is dismissed with costs to be assessed in default of agreement.
>
> (4) I will hear the parties by way of written submissions on the issue of costs as between Riegé and Izmirlian by way of written submissions within the next 21 days.

[3.] As the costs have already been determined in favor of the Second Defendant this judgment relates to the claim between the Plaintiff (Riegé) and the First Defendant (Izmirlian) and the appropriate order for costs. As the conclusion of the judgment reflected, the primary claim was for deceit, fraudulent misrepresentation and breach of confidence. The alternate claim was one for restitution on a quantum meruit basis.

The Part 35 Offer to settle.

[4.] CPR 2(l) provides:

> (1) Subject to paragraph (4), these Rules shall -
>
> (a) apply to all civil proceedings commenced in the Court on or after the date of commencement of these Rules;
>
> (b) not apply to civil proceedings commenced in the Court prior to the date of commencement of these Rules except where -
>
> (i) a trial date has not been fixed for those proceedings: or
>
> (ii) a trial date has been fixed for those proceedings and that trial date has been adjourned.

[5.] Part 35 of the CPR provides in part, as follows:

> ...

35.3 Making offer to settle.

(1) A party may make an offer to another party which is expressed to be "without prejudice" and in which the offeror reserves the right to make the terms of the offer known to the Court after judgment is given with regard to —

(a) the allocation of the costs of the proceedings; and

(b) (in the case of an offer by the claimant) the question of interest on damages.

(2) The offer may relate to the whole of the proceedings or to part of them or to any issue that arises in them.

35.4 Time when offer to settle may be made.

A party may make an offer to settle under this Part at any time before the beginning of the trial.

35.5 Procedure for making offer to settle.

(1) An offer to settle must be in writing.

(2) The offeror must serve the offer on the offeree and a copy on all other parties.

(3) Neither the fact nor the amount of the offer or any payment into Court in support of the offer must be communicated to the Court before all of liability and the amount of money to be awarded, other than and interest, have been decided.

(4) Paragraph (3) does not apply to an offer which has been accepted or where a defence of tender before claim has been pleaded.

35.6 Extent to which offer to settle covers interest, costs or counterclaim.

(1) An offer to settle a claim for damages must state whether or not the amount offered includes interest or costs.

(2) If the offer covers interest or costs it must state the amount which is included for each.

(3) If there is a counterclaim as well as a claim, the offer must state in the case of an offer by the —

(a) claimant, whether or not it takes into account the counterclaim; or

(b) defendant, whether or not it takes into account the claim, and in each case in what amount.

...

35.9 Time limit for accepting offer to settle.

(1) The offeror may state in the offer that it is open for acceptance until a specified date.

(2) The offer shall have no effect on any decision that the Court makes as to the consequences of the offer unless it is made at least twenty-two days prior to the commencement of the trial and that it is open for acceptance for at least twenty-one days.

(3) Acceptance of the offer after the commencement of the trial shall have no effect on any decision that the Court makes as to the consequences of such acceptance.

(4) The Court may permit an offeree to accept an offer after the specified date on such terms as the Court considers just.

...

35.15 Costs where offer not accepted – general rules.

(1) The general rule for defendants' offers is that, if the defendant makes an offer to settle which is not accepted and in —
(a) the case of an offer to settle a claim for damages, the Court awards less than 90% of the amount of the defendant's offer;
(b) any other case, the Court considers that the claimant acted unreasonably in not accepting the defendant's offer, the claimant must pay any assessed costs incurred by the defendant after the latest date on which the offer could have been accepted without the court's permission.

[6.] On 9 November 2023, Counsel for Izmirlian wrote to Counsel for Riege making a Part 35 Offer to settle in the following terms:

> We refer to the above captioned matter in which we act on behalf of Sarkis Izmirlian and The Preserve Development Company Ltd, the First and Second Defendants respectively. Our clients are aware of the requirements of the Civil Procedure Rules 2022 ("CPR") for parties to seek to settle their disputes and we have been instructed to put forward an offer under Part 35 ('the Offer") of the CPR on their behalf.
> The Defendants are willing to settle the whole of the Plaintiff's claim on the following terms:
>
> 1. The Defendants will pay to the Plaintiff within 14 days of written acceptance of the offer, the sum of $375,000.00 (three hundred and seventy-five thousand dollars) (the Settlement Sum" in full and final settlement of all matters in action 2021/CLE/gen/01260;
> 2. The Settlement Sum is non inclusive of interest and or costs which fall to be dealt with under Part 35 of the CPR;
> 3. The Offer will remain open for acceptance by the Plaintiff until 3rd December 2023 when it will be automatically withdrawn without further notice; and
> 4. This Offer is made pursuant to Part 35 of the CPR.
>
> If your client does not accept this offer and your client obtains a judgment in this matter in an amount less than 90% of the Offer from the Defendants, a copy of this letter will be produced to the Court on the question of the costs of the proceedings.

[7.] Riege contends that the Supreme Court (Civil Procedure) Rules 2022 (the CPR) do not apply to this action. Specifically, it is argued, at Paragraph 21-23 of the submissions, as follows:

> 21. CPR 2.1 provides, so far as material, that the CPR do not apply to proceedings commenced prior to their commencement "except where [...] a trial date has been fixed for those proceedings and that trial date has been adjourned". On the facts of this case, a trial date had been fixed prior to I March 2023 and was never vacated. Although the trial dates were adjourned and refixed, there was at all material times a trial date in place. The proceedings therefore continued to be governed by the former procedural regime.

22. The present proceedings were commenced prior to the commencement of the CPR and by Directions Order dated 4 November 2022, the Court directed at paragraph 8 that the trial of this action, by Judge alone, shall take place before the Honourable Chief Justice Ian Winder or 23,24, 25, 26 and 27 October 2023. By a further Directions Order dated 31 August 2023, the Court directed at paragraph 3 that the trial shall proceed as scheduled on 4 to 8 December 2023. That order did not vacate the trial but substituted alternative trial dates.
23. Accordingly, the proceedings remained governed by the former procedural regime, including the established costs principles in Order 59.

[8.] Rule 2.1 of the CPR provides:

2. Application of Rules.
(1) Subject to paragraph (4), these Rules shall —
(a) apply to all civil proceedings commenced in the Court on or after the date of commencement of these Rules;
(b) not apply to civil proceedings commenced in the Court prior to the date of commencement of these Rules except where —
(i) a trial date has not been fixed for those proceedings; or
(ii) a trial date has been fixed for those proceedings and that trial date has been adjourned.

[9.] Respectfully, these submissions of Riege are untenable, in as much as Reige seeks to draw a distinction between an adjournment and the substitution of alternative trial dates. I am satisfied that the matter was adjourned within the meaning of Rule 2.1 of the CPR and therefore the CPR applied to this action.

[10.] According to Izmirlian at paragraphs 40 – 46 of his submissions:

40. On 9 November 2023, the First and Second Defendants made a without prejudice offer to the Plaintiff pursuant to Part 35 of the Civil Procedure Rules ("the Part 35 Offer") in the sum of $375,000.00.
41. The Part 35 Offer complied fully with the requirements of CPR 35.5. It was made in writing, served on the Plaintiff, and copied to all other parties. Consistent with the Rules, neither the fact nor the amount of the offer was communicated to the Court prior to the determination of liability and quantum.
42. The offer was expressly stated to be exclusive of interest and costs, which were to be dealt with in accordance with Part 35.
43. The Part 35 Offer was made more than twenty-two (22) days prior to the commencement of the trial and was open for acceptance for not less than twenty-one (21) days, in compliance with CPR 35.9.
44. The Plaintiff did not accept the Part 35 Offer.

45. The Court ultimately awarded the Plaintiff the sum of $96,536.67 on a quantum meruit basis, being substantially less than ninety per cent (90%) of the amount offered by the Defendants under the Part 35 Offer.

46. In those circumstances, CPR 35.15 applies. CPR 35.15(1) provides that where a defendant makes an offer to settle which is not accepted and, in the case of an offer to settle a claim for damages, the Court awards less than ninety per cent (90%) of the amount of the defendant's offer, the claimant must pay the defendant's assessed costs incurred after the latest date on which the offer could have been accepted without the Court's permission.

[11.] I accept this submission. The judgment at trial awarded Riege the sum of $96,536.67, however Izmirlian and the Second Defendant had offered him $375,000 exclusive of costs and interests. As the sum awarded is less than 90% of the sum offered, Izmirlian is entitled to his assessed costs incurred after the latest date on which the offer could have been accepted without the Court's permission.

The appropriate order for costs of the action

[12.] The offer to settle only covers the costs up to the latest date when the offer could have been accepted. It must therefore be determined who ought to be awarded costs up to that point.

[13.] It is accepted by both parties that the Court has a wide discretion as to costs. Section 30 of the **Supreme Court Act** provides:

30. (1) Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge and the Court or judge shall have full power to determine by whom and to what extent the costs are to be paid.

[14.] Rule 71.6 of the **Supreme Court (Civil Procedure) Rules 2022** (the CPR) provides:

(1) Where the Court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.

(2) The Court may, however, make no order as to costs or, in an exceptional case, order a successful party to pay all or part of the costs of an unsuccessful party.

[15.] Rule 71.9 of **CPR** provides:

Court's discretion to order costs.

(1) The Court has discretion as to —

(a) whether costs are payable by one party to another;

(b) when to assess costs;

(c) the amount of those costs; and

(d) when they are to be paid.

(2) Without limiting the Court's discretion or the range of orders open to it, the Court may order a person to pay —

(a) costs from or up to a certain date only;

(b) costs relating only to a certain distinct part of the proceedings; or

(c) only a specified proportion of another person's costs.

(3) In deciding who, or if any person should be liable to pay costs, the Court must have regard to all the circumstances.

(4) Without limiting the factors which may be considered, the Court must have regard to —

(a) the conduct of the parties both before and during the proceedings;

(b) whether a party has succeeded on particular issues, even if not ultimately successful in the case, although success on an issue that is not conclusive of the case confers no entitlement to a costs order;

(c) the manner in which a party has pursued —

(i) a particular allegation;

(ii) a particular issue; or

(iii) the case;

(d) whether the manner in which the party has pursued a particular allegation, issue or the case, has increased the costs of the proceedings;

(e) whether it was reasonable for a party to —

(i) pursue a particular allegation; or

(ii) raise a particular issue; and

(iii) whether the successful party increased the costs of the proceedings by the unreasonable pursuit of issues; and

(f) whether the claimant gave reasonable notice of an intention to pursue the issue raised by the application.

[16.] Rule 71.10 of the **CPR** provides

Circumstances to be taken into account when exercising its discretion as to costs.

(1) In deciding what order, if any, to make about costs, the Court must have regard to all the circumstances, including —

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of his case, even if he has not been wholly successful;

(c) any payment into court or admissible offer to settle made by a party which is drawn to the Court's attention and which is not an offer to which costs consequences under Part 35 and 36 apply.

...

(3) The Court may make an order that a party must pay —

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;
(d) costs incurred before proceedings have begun;
(e) costs relating to particular steps taken in the proceedings;
(f) costs relating only to a distinct issue in or part of the proceedings; and
(g) interest on costs from or until a certain date, including a date before judgment.

(4) Where the Court would otherwise consider making an order under paragraph (3)(f), it must instead, if practicable, make an order under paragraph (3)(a) or (c).

...

[17.] Costs are in the discretion of the Court, in which case it is a discretion that must be exercised judicially, i.e., in accordance with established principles and in relation to the facts of the case. The starting point is the general rule, that costs follow the event and, therefore, the successful party ought to be paid their costs.

[18.] Riege contends that he was the successful party in the proceedings and although he did not succeed on every pleaded cause of action, he obtained judgment against Izmirlian in the sum of $96,536.67 on a restitution (quantum meruit) basis following a fully contested trial. He submits that the starting point is that he is entitled to his costs as the successful party.

[19.] Izmirlian contends that

(1) He is plainly the successful party in this litigation.
(2) He successfully resisted all of Riege's substantive claims, including claims in deceit, fraudulent misrepresentation, breach of confidence and reputational damage. Those claims, he says, formed the core and gravamen of Riege's case and were the primary drivers of the scope, duration and cost of the proceedings.
(3) Reige succeeded only on a claim for restitution on a quantum meruit basis, and then only to a limited and nominal extent. The Court rejected Riege's pleaded and advanced case that he was entitled to ten per cent (10%) of the value of the land, or to any proprietary or ownership interest.
(4) It is well established that a party may properly be regarded as the successful party even if it has not succeeded on every issue. There is no automatic rule requiring a reduction of a successful party's costs merely because it has failed on one or more issues.

[20.] The issue of determining who the successful party in an action ought to be was discussed by this court in the case of **Cheerene Green v Arsene Dieugste and another** [2024] 1 BHS J. No. 180. At paragraphs 34-39 of the judgment, it states:

> [34.] Consequently, I begin with the usual rule that, when the Court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party. To see whether this rule should be applied, and to apply it, I must determine who the "successful party" is.

[35.] Although Ms. Sands provided several authorities which provide guidance on the identification of the "successful party" in civil litigation, I think it necessary to refer only to Medway Primary Care Trust v Marcus [2011] EWCA Civ 750 and Summit Insurance Limited v Bolingbroke Limited SCCivApp No. 145 of 2023.

[36.] In Medway Primary Care Trust v Marcus [2011] EWCA Civ 750, the claimant had his leg amputated below the knee on 20 June 2005. This was necessary because the arteries in his left lower leg became blocked with embolisms driving from elsewhere which caused painful ischaemia in his foot (which resulted in the death of the tissue there). The claimant brought proceedings in negligence on the basis that a doctor employed by the first defendant diagnosed his ischaemia but failed to take appropriate steps to see it treated and the second defendant, a general practitioner, failed to take any steps to diagnose ischaemia on the several occasions that the claimant saw him. The claimant's case was that, if he had been appropriately treated, his leg would have been saved. The defendants admitted breach of duty before trial but disputed causation. The claimant recovered only 0.25% of the amount claimed by him, on a basis that was only peripherally developed in his pleadings. The deputy judge at first instance awarded the claimant 50% of his costs. The English Court of Appeal held that this was wrong. The President of the King's Bench Division, Sir Anthony May said at paras [17] to [19]:

> [17] In my judgment, the deputy judge was wrong in principle to conclude that the respondent was the successful party. The award of £2,000 was insignificant in the context of the claim and the action as a whole, and, although it was technically within the pleaded claim, it was in truth a last minute addition to salvage something (0.25%) from an action which the respondent lost. The whole action was about the cause of the need for the respondent to undergo a leg amputation, and, for all that the first defendants did not admit breach until a late stage, the second defendant's early admission would have carried the entire claim, if the respondent had succeeded on causation. The causation issue was squarely advanced in the original defences. Mr Brearley's opinion on the causation issue was the second defendant's case from the start and it carried the day. I have already indicated my view that such vindication as the action achieved was scant consolation for a claimant whose £525,000 claim had failed entirely. This is not a case in which identification of the party who has to write the eventual (very small) cheque is persuasive as to the costs order. There is little, if any, material distinction between this case and Oksuzoglu. The essential relevant considerations which applied in 1998 have not materially changed with the advent of the Civil Procedure Rules. The fact that the costs order in Oksuzoglu was for the costs of the liability and causation issue does not directly apply to the present case, because the deputy judge decided the action, not a preliminary issue, and the costs of the action in truth related to the causation issue. The fact that the appellants did not make a Part 36 offer or write a Calderbank letter is no more relevant to the costs issue than it was in Oksuzoglu. If the defendants had made a Part 36 offer of

(say) £3,000 at the outset, that would have carried a costs payment of some £100,000 which would have been disproportionate and unjust. More importantly, however, an award of £2,000 on an afterthought claim for a short period of extra pain is insignificant in the context of the action as a whole and the nominal failure to make a Part 36 offer is of no consequence and a technical triviality. As the deputy judge himself said, no rational person would issue or defend proceedings such as these, if the recovery was only £2,000. The subject matter of the £2,000 was simply not what the action was about, and, other than technically, that claim was not advanced until the respondent's closing submissions. The action was about the cause of the leg amputation and the costs were spent in advancing and defending that. I accept that the damages awarded were not technically nominal, but they were so small as to be insignificant.

[18] Mr Mansfield, in addition to urging upon us points which we have already addressed, submits that, as in some other cases, the Respondent could not have got his damages without going to court, and no offer was made at any time. The Appellants had to write the cheque and the First Defendant contested breach until a very late stage when the case that Dr Thorn had felt a pulse on 6 April 2005 was withdrawn. Mr Mansfield says that the Appellants are trying to achieve a more favourable result than if they had made an offer. He stresses that there is no criticism of the conduct of the Claimant. He also stresses that in Oksuzoglu the Defendant did not get the costs of the action.

[19] Although some of these points are persuasive to a result that the Respondent should not be ordered to pay all the Appellants' costs, they are not persuasive on the question of who was the successful party. I am in no doubt but that it was the Appellants, and the starting point should therefore be a costs order in their favour. The question is whether it should be reduced and, if so, by what proportion.

[37.] In Summit Insurance Limited v Bolingbroke Limited SCCivApp No. 145 of 2023, he claimants filed an action against the defendants claiming a true and correct accounting of the fees due under an insurance policy and/or an indemnity under the insurance policy. Liability under the policy was not disputed. On 25 February 2021 the action against Insurance Management (Bahamas) Limited was dismissed and they were awarded the costs of the action, to be determined at the end of trial. At the end of trial, judgment was given for Bolingbroke Limited in the amount of $182,015.48 but the Court ordered that each party bear their own costs. In relation to that order, the Court of Appeal held that the Court erred in making no order as to costs because the defendants had succeeded on the material issues in the case. Evans JA said at paras [46] to [49], para [55] and paras [63] and [64]:

46. Secondly, the cumulative effect of the letters of offer to settle, the letter dated 27 May 2017, reiterating the acceptance of liability for a claim under the Policy, but disputing the amount claimed, and the admission of liability in the Defences filed show that the only issue between the parties was quantum. In the circumstances,

where Bolingbroke claimed $1.6M but was awarded only $182,015.48 it is difficult to rationalize the finding by the learned Judge that Bolingbroke had "a measure of success."

...

48. In my view, the learned Chief Justice fell into error in not focusing on the success of the Appellants. They were successful on the main issue which was before the court i.e. the quantum of damages. This ought to have been the starting point and the factors identified above would then be relevant in determining to what extent the general rule would apply.

49. The Appellants were vindicated on the issue as to quantum. They were successful on interlocutory applications and four of the Summonses resulted in orders that the Insurers receive their costs of the applications, to be available only if the Insurers were successful in the action. They also failed on the claims that the Insurers breached their respective duties to carry out the proper assessment of the claim; that the Insurers were guilty of intentionally delaying and/or frustrating the claims process or otherwise acting in bad faith and in breach of duty; the claims in relation to conflict of interest; and in relation to claims made by Bolingbroke that the Insurers did not properly explain how the deductible worked. Those are all issues which were held over to trial and ultimately Bolingbroke did not succeed on any of those additional claims that were made.

...

55. It is not unusual in cases where, after considering the circumstances of a case, a court may find that there was no clear winner in a trial. It is also not unusual to find that the order made in such cases is likely to be that both parties will bear their Cheerene Green v Arsene Dieugste and another [2024] 1 BHS J. No. 180 own costs. This is not such a case. In my respectful view, the facts point clearly to the Appellants being the successful parties. I am satisfied that there is merit in all of the grounds of appeal and Mrs. Smith properly conceded that the extension of time should be granted. I am further satisfied that having heard full submissions from the parties the appeal should be allowed.

...

63. I am further satisfied that on the totality of the evidence The Insurers were the successful parties at trial. They succeeded before the court on every material issue which was raised. The learned Chief Justice provided no reasons as to why they were deprived of their costs in this matter. From our own review, the evidence shows that the Insurers did everything possible to settle the claim. Offers of settlements were made beginning prior to trial and a payment was made into court. Liability was not contested paving the way for a speedy resolution.

64. In considering the payment into court and the offers to settle, I have taken them into consideration only to the extent that they show the Insurers good faith efforts to

> settle the claim and avoid a trial. I am satisfied that although Bolingbroke may have had a genuine belief that they were entitled to a greater compensation that does not provide a valid reason for depriving the Insurers of their costs due to them as the successful party.
>
> [38.] In Summit Insurance Limited, Evans JA explained at paras [25] to [27] and [61], in the context of the Rules of the Supreme Court, that the Court's discretion as to costs, although wide and unlimited, is not to be exercised arbitrarily but must be exercised judicially. This requires the Court to act in accordance with established principles applied to the relevant facts of the case. The general rule is that, at the conclusion of a hearing, costs follow the event unless there are special circumstances. The duty of the judge is to make an order which meets the justice of the case. If a judge deprives a successful party of his costs, cogent reasons are required to explain why.
>
> [39.] Returning to the present case, when I ask the question "which party, as a matter of substance and reality, has been successful in these proceedings?", I am driven to the conclusion that the Claimant is the "successful party". In Roache v News Group Newspapers Ltd [1998] EMLR 161, Sir Thomas Bingham MR spoke of asking whether "...the plaintiff won anything of value which he could not have won without fighting the action through to finish" and whether "...the defendant has substantially denied the plaintiff the prize which the plaintiff fought the action to win". The central issues in this case were the cause of the accident and the cause of Colebrook's death. The Claimant succeeded on those issues, as the Defendants denied all liability for the accident or Colebrook's death. I am not prepared to hold that a representative of the dependents of a deceased person wins nothing of value by establishing liability after a highly contested trial.

[21.] Having succeeded in the primary contest of whether there had been deceit, fraudulent misrepresentation or breach of confidence, Izmirlian was essentially the winner of the dispute as a matter of substance and reality.

[22.] While Riege was successful on the alternate claim of quantum meruit in an amount of $96,536.67, this is a small fraction of the $4,327,505 (4 %) he sought his contribution to be assessed at. This was not the focus of the dispute, I therefore agree with Izmirlian's assessment that in Riege's pleaded case, only two paragraphs (30, 31) of the Statement of Claim addressed a claim for quantum meruit and that the overwhelming majority of the pleadings, evidence and submissions were directed to the failed allegations of fraud, deceit, breach of confidence and reputational damage.

[23.] Having identified Izmirlian as the successful party in this litigation, it is necessary also to consider whether there should be a departure from the general rule that the successful party's entire costs of the action should be paid by the unsuccessful party.

[24.] In **Re Elgindata (No 2)** [1992] 1 WLR 1207, the petitioners, shareholders in Elgindata Ltd, obtained an order that another shareholder in the company (the "purchasing shareholder") purchase their shares in proceedings brought under section 459 of the English Companies Act 1985. The trial judge found most of the petitioners' case failed but found some conduct on the part of the purchasing shareholder was unfairly prejudicial. The trial judge therefore ordered that three-quarters of the purchasing shareholder's costs be paid by the petitioners and one-quarter of the petitioners' costs be paid by the purchasing shareholder. The English Court of Appeal substituted an order that the petitioners should be deprived of half of their costs. *Nourse LJ* said at pages 1213 and 1214:

> In order to show that the judge erred I must state the principles which ought to have been applied. They are mainly recognised or provided for, it matters not which, by section 51 of the Supreme Court Act 1981 and the relevant provisions of R.S.C., Ord. 62, in this case rules 2(4), 3(3) and 10. They do not in their entirety depend on the express recognition or provision of the rules. In part they depend on established practice or implication from the rules. The principles are these. (i) Costs are in the discretion of the court. (ii) They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made. (iii) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs. (iv) Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party's costs. Of these principles the first, second and fourth are expressly recognised or provided for by rules 2(4), 3(3) and 10 respectively. The third depends on well established practice. Moreover, the fourth implies that a successful party who neither improperly nor unreasonably raises issues or makes allegations on which he fails ought not to be ordered to pay any part of the unsuccessful party's costs. It was because of his disregard of that principle that the judge erred in this case.

[25.] In **Beoco Ltd v Alfa Laval Company Ltd** [1995] QB 137, a case in which the plaintiff obtained judgment against the first defendant for an amount to be assessed reflecting the loss and damage which the plaintiff would inevitably have incurred in replacing or repairing a defective heat exchanger employed at its plant. This claim arose as a result of an amendment made to its statement of claim in the course of trial. The plaintiff failed on its primary claim that the defective heat exchanger caused an explosion at its plant. *Stuart-Smith LJ* (with whom the rest of the English Court of Appeal agreed) said at page 156:

> What then should be the result in this case? I can see no reason to deprive the first defendant of the costs down to the date of the amendment. Thereafter, they were essentially the winners, since the primary contest related to the damage caused by the explosion. Even on the basis of the judge's conclusion that the defendant would be liable for the hypothetical

loss of production, it was a case in which the first defendant should have been awarded a proportion of their costs thereafter, for the reasons I have already given. As it is, in the light of our decision that the only damages that the plaintiff is entitled to recover is the cost of replacing the casing of the heat exchanger and such loss of production that occurred on 24 August as a result of the defect discovered on that day, this is likely to be no more than £21,574.28 now claimed in the Scott schedule and it may well be less. Although this sum cannot by itself be described as trivial, in the context of a claim for £1m. and the enormous expense of this action, it is trivial. It makes no commercial sense to incur costs of this sum to recover such a small sum. And it seems to me very probable that if the first defendant had had a proper opportunity to make a payment into court on the basis that its liability on the alternative claim was limited in the way we have held it to be, it would have done so. A payment in of £21,574, plus interest, would obviously not have been accepted and it would have made sound commercial sense to have made it. But for the reasons I have indicated, the first defendant had no chance to do so. Accordingly, in my judgment, although some discount should be made to reflect the very modest degree of success that the plaintiff achieved, it should not be a large one. I would award the first defendant 85 per cent of its costs after 24 February 1992.

[26.] In my view, a slight departure ought to be made in the context of this case to acknowledge Riege's success on the quantum meruit claim. In my judgment therefore, although some discount should be given to reflect the very modest degree of success that Riege has achieved, it should not be a large one. I would award the Izmirlian 85 % of his costs up to the date of the expiry of the relevant acceptance period under CPR 35.15. Thereafter he ought to be entitled to 100% of his costs as a result of the offer to settle.

[27.] I certify costs fit for two counsels to be assessed in default of agreement.

Dated the 23rd day of June 2026

Sir Ian R. Winder Kt.
Chief Justice