JUDGMENT : His Honour Judge Peter Coulson QC: TCC. 4th January 2008

1. Introduction

1. On 19 December, I handed down the principal judgment in this case. The relevant neutral citation number is [2007] EWHC 3027 (TCC). Following adjustments for VAT and interest, the net result was that the Claimant owed to the Defendants the sum of just £1,683. There are now important issues on costs.

2. At paragraphs 2 and 3 of that judgment, I commented upon the relatively modest sums at stake in this case and compared them with the costs which will have been incurred by both parties in preparing the voluminous documentation and contesting a five day trial. In such circumstances it was, I suppose, inevitable that such costs far outweighed the sums in issue in the litigation. Following the conclusion of the oral argument on costs at 4.15 pm on 19 December, I decided that, in the light of the importance of the costs issues to the parties, I would hand down a reserved judgment dealing with the costs issues at the start of the new year.

2. Principles

3. The starting point for my consideration of the costs issues is CPR 44.3. CPR 44.3(2) provides that *"the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party"*, although the court may make a different order. CPR 44.3(4) requires the court to have regard to all the circumstances, including: the conduct of the parties; whether a party has succeeded on part of his case, even if he has not been wholly successful; and any payment into court or admissible offer to settle in accordance with CPR Part 36.

4. CPR 44.3(6)(7) and (8), provide as follows:
"(6) The orders which the court may make under this rule include 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 part of the proceedings; and
(g) interest on costs from or until a certain date, including a date before judgment.
(7) Where the court would otherwise consider making an order under paragraph (6)(f), it must instead, if practicable, make an order under paragraph (6)(a) or (c).
(8) Where the court has ordered a party to pay costs, it may order an amount to be paid on account before the costs are assessed."

5. In **Johnsey Estates (1990) Ltd v The Secretary of State for the Environment** [2001] EWCA Civ 535, Chadwick LJ said, at paragraph 21 of his judgment, that the starting point for the exercise of the court's discretion on costs is that the costs should follow the event but that nevertheless: *"…the judge may make different orders for costs in relation to discrete issues - and, in particular, should consider doing so where a party has been successful on one issue but unsuccessful on another issue and, in that event, may make an order for costs against the party who has been generally successful in the litigation …"*

6. However, whilst the court will consider the award of costs on an issue-by-issue basis, it must be recognised that to do so in a case of any complexity, such as the present one, would simply require the parties to spend yet further costs on lengthy and complex arguments as to what items in the bill of costs were incurred by reference to which issues. In such circumstances, the better course is that sign-posted by CPR 44.3(6)(a) and 44.3(7), namely to order that a proportion only of the successful party's costs be paid by the unsuccessful party. That was the approach recommended by the Court of Appeal in **Burchell v Bullard** [2005] EWCA Civ 358: see in particular paragraph 30 of the judgment of Ward LJ.

7. The decision in **Burchell v Bullard** is also of assistance in tackling the often vexed question of identifying the successful party. At paragraph 33 of his judgment, Ward LJ considered a dispute with a claim and a counterclaim, such as the present case, and said: *"How, in circumstances like that, does one decide who the unsuccessful party is? This was, after all, a form of commercial litigation where each side was claiming money from the other. Costs following the event is the general rule and in this kind of litigation the event is determined by establishing who writes the cheque at the end of the case. Here the defendants do. They were the unsuccessful parties and my starting point is that the claimant is entitled to the costs of the proceedings, claim and counterclaim taken together."*

8. There is one other issue of principle in this case, which is again a point that arises often, although in the present case it arises in a particular way. A common complaint is for the party at risk of paying some or all of the successful party's costs to complain that the eventual winner failed to mediate or engage in some other form of ADR and so should not be rewarded by the court for his failure to explore ways in which the costs of the case might have been significantly reduced, if not avoided altogether. The leading case on this issue is **Halsey v Milton Keynes General NHS Trust** [2004] EWCA Civ 576; [2004] 4 All ER 920. In giving the principal judgment in the Court of Appeal, Dyson LJ stressed that a departure from the general rule on costs was not justified unless it had been shown that the successful party had acted unreasonably in refusing to agree to ADR. In deciding whether a party had acted unreasonably the court should bear in mind the advantages of ADR over the court process and have regard to all the circumstances of the particular case, including the nature and merits of the dispute, the extent to which other settlements had been attempted and whether the ADR had a reasonable prospect of success.

9. In **Halsey** and the other cases on the topic, such as **Dunnett v Railtrack Plc (Practice Note)** [2002] 1 WLR 2434, the complaint was that the successful party failed to engage in a mediation at all. In this case, as noted at paragraph 3 of the principal judgment, the parties did attempt ADR and there was a judicial settlement conference, chaired in October 2007 by HHJ Wilcox. Thus the point now raised by Ms Lindsey, on behalf of the Claimant, is not that the Defendants refused to mediate at all, but that they only consented to mediate very late in the litigation process, when the vast majority of the costs had already been incurred. That raises the novel question as to the extent to which, as a matter of principle, the court should have regard to such matters when dealing with costs.

10. I now turn to consider the various matters which arise on the costs arguments keeping the principles noted above very much in mind.

3. Who Was The Successful Party?

11. There can be no doubt at all that the Defendants were the successful party in this litigation. I did not understand Ms Lindsey to contend to the contrary. There are a number of reasons why that is the only sensible conclusion to be drawn.

12. First, adopting the test identified by Ward LJ in **Burchell v Bullard**, the unsuccessful party is the party who writes the cheque at the end of the case. Although, as I have pointed out, the sum concerned was modest, it was the Claimant who wrote the cheque to the Defendants.

13. Secondly, it is only necessary to consider the outcome on the various issues to conclude that it was the Defendants who were the successful party. The Claimant advanced two large items of claim, namely the claim for legal costs by way of fees, and the claim for sums due in consequence of the suspension, each of which failed in their entirety. The Claimant's entitlement to a percentage fee was considerably less than it had claimed and was assessed at a final figure which was very close to that advocated by the Defendants. Finally, in relation to the variations claim, which at the end of the trial stood at £61,745.50, the Claimant recovered just £24,748, a sum that was much closer to the Defendants' figure of £16,468.

14. It is true that, in respect of the two items of counterclaim which survived until the start of the trial, namely the claim in respect of allegedly negligent costs estimates, and the claim in respect of the listed building consent, it was only the latter which was pursued in the Defendants' closing submissions and this claim was eventually valued at just £1,000. That means that I need to consider in greater detail the costs incurred in relation to the counterclaim in respect of the Claimant's costs estimates, and I do that below. But the abandonment of that major element of the counterclaim has no effect on my view as to the successful party overall in this case: even without it, the Defendants were able to demonstrate that they did not owe the Claimant any further fees.

15. Finally, I ought to say that, in my judgment, there was an air of unreality about the Claimant's position from the moment that the Defendants accepted its wrongful repudiation of the contract. The Claimant always insisted that it was entitled to considerable further sums by way of fees, without ever acknowledging or accepting that, because of the delays in the production of the detailed drawings to go out for tender, it had already been paid percentage fees far in advance of the progress of the works at the hotels. In essence, the Claimant had been overpaid when the contract came to an end, and it is that overpayment which has meant that, notwithstanding the identification of sums due in respect of variations and the like, the Claimant was not entitled to be paid any further money. That is why the Claimant was the unsuccessful party.

4. The Counterclaim In Respect Of The Claimant's Costs Estimates

16. I have referred above to the Defendant's eventual abandonment of a counterclaim based on the allegedly negligent costs estimates produced by the Claimant during the currency of the contract. I consider that this element of the counterclaim has had an unhappy history. The Defendants made two attempts to obtain permission to introduce a second expert, in the field of quantity surveying, to deal with this issue. For reasons of proportionality, timing (the second application was made very late) and common sense (the Claimant was not and did not hold himself out to be a quantity surveyor) I refused those applications. Despite that refusal, the Defendants' architectural expert sought to rely on a report produced by independent quantity surveyors, Messrs Jackson Rowe, which I was duty bound to rule as inadmissible on the first day of the trial. This was one of the reasons put forward by the Defendants for their ultimate abandonment of this item of counterclaim.

17. More widely, however, I consider that there were always difficulties with this aspect of the counterclaim. The estimates that were criticised were just that: estimates of the likely cost of the works. Ultimately, as with any building project, the costs of the refurbishment of these hotels would depend on the tenders obtained from contractors. Whilst a negligent estimate might deprive the professional of his right to fees (see, for example, **Nye Saunders v Bristow** (1987) 37 BLR 92), it is not easy for an employer to identify actionable default or, in particular, any recoverable loss caused by such default, in respect of costs estimates provided early on in the process. The mere fact that the professional, at an early stage of a project, produces an estimate which, with hindsight, might be capable of criticism, does not automatically mean that he was negligent.

18. Even during the oral evidence, the Defendants appeared to attach some importance to the allegedly defective estimates and Mr Smith, the First Defendant, said in terms that, had he known what the likely out-turn cost was likely to be, he would have terminated the Claimant's contract much earlier. I consider that evidence to be unrealistic. The contemporaneous documents made plain that the Defendants were aware at an early stage that the costs of the full scheme might well be beyond their budget, but they wanted to know what the whole scheme

would cost so as to be able to work out which parts they might proceed with and which parts they would abandon.

19. As noted in the judgment, this item of counterclaim was not formally conceded until Ms Shaw's closing submissions. It seems to me that it is an important element of the dispute which the Defendants lost and in respect of which, therefore, they should be deprived of their costs. Ms Lindsey does not seek an order that the Defendants pay any part of the Claimant's costs, but she does rely on this point as one reason for a percentage reduction in the costs otherwise due from the Claimant to the Defendants.

20. For the reasons which I have given, I accept Ms Lindsey's submission. I also accept, in accordance with the principles noted in paragraphs 5 and 6 above, that the right course is for me to make a percentage reduction in the fees otherwise recovered by the Defendants to reflect their failure on this item of counterclaim, rather than to make an issue-based order. It seems to me that that is entirely in accordance with CPR 44.3(6)(a) and 44.3(7).

5. The Defendants' Recoverable Costs

21. Thus, before I go on to consider Ms Lindsey's detailed arguments as to why there should be a reduction in the costs recoverable by the Defendants, the following position has been reached. The Defendants were the successful party and are, prima facie, entitled to their costs of the action. That conclusion is not altered by the fact that a major item of counterclaim in respect of negligent costs estimates was abandoned in the Defendants' closing submissions. However, the failure of that part of the counterclaim means that the Defendants should be deprived of a proportion of their costs in consequence.

22. I have been provided with a costs schedule by the Defendants. This identifies the following gross sums:

Solicitors costs	£73,762.50
Counsel's fees	£16,425
Expert's fees	£33,246.35
Total	£123,433.85

23. Minor amounts relate to costs orders already made and assessed, and the costs of the judicial settlement conference which are not recoverable, but the schedule gives a clear picture of the sort of level of costs that the Defendants have incurred.

23. I am told that these figures exclude two particular items of cost. The first is the costs incurred by the Defendant's previous solicitors instructing an architect, Mr Calcroft, who produced a report which was sent to the Claimant but which was not subsequently relied on in the proceedings. The second is the costs of the Jackson Rowe report, to which I have previously referred.

24. Since the matter arose in argument, I should say that I am in no doubt that the Defendants cannot recover the costs of these two expert's reports. The report of Mr Calcroft was irrelevant to the litigation and no justification has been put forward in support of a claim for his fees as costs. As to the Jackson Rowe report, given that it was commissioned despite the fact that I had refused the Defendant's permission to rely on an expert quantity surveyor, and was a report which I subsequently ruled inadmissible, it is plain that the Defendants cannot recover the costs of that report. Accordingly, for the avoidance of doubt, I rule that the Defendants' recoverable costs must exclude those two items of expert's fees. Their remaining costs, excluding those two items, are therefore recoverable, subject to an appropriate percentage reduction to reflect the failure of the counterclaim for negligent costs estimates. I now turn to deal with that aspect of the costs dispute, along with the other reasons relied on by Ms Lindsey in support of the percentage reduction.

6. The Factors Said To Be Relevant To A Percentage Reduction

(a) The Costs Estimates Point

25. For the reasons which I have already given, I accept Ms Lindsey's arguments that there should be a percentage reduction to reflect the costs estimate point. It was an important part of the litigation up to and including the trial itself before its abandonment on the last day. Whilst neither Counsel were prepared to put a percentage on that part of the case, I consider that, in all the circumstances, a reduction in the Defendants' costs of 15% is appropriate to reflect that failed item of counterclaim.

(b) Two Experts

26. Ms Lindsey argued that the original plan was to have a single joint expert and that this was only abandoned because of the counterclaim for professional negligence introduced by the Defendants. She said that, because ultimately the counterclaim was worth just £1,000 in relation to the planning permission point, both parties have incurred considerable additional costs as a result of the ultimately unsuccessful counterclaim.

27. There is some superficial attraction in this point. However, I consider that I must be careful not to judge the parties' conduct too harshly in the glare of hindsight. The Defendants took a number of points in their counterclaim. Ultimately, only one was successful. I am already penalising the Defendants by making a reduction of 15% in consequence of the failure of the costs estimate counterclaim. I do not think it appropriate to penalise them again for the same reason. In any event, given the nature and scope of the disputes between the parties on every

element of the Claimant's claim, on which the experts produced reports and gave evidence, I doubt very much whether a single joint expert would have been an appropriate or workable solution in any event.

28. I those circumstances, I decline to make a further reduction in the Defendants' costs merely because each side had their own expert rather than there being a single joint expert.

(c) Variations

29. Ms Lindsey submitted that there should be a reduction because the Claimant was successful in its variations claim. I reject that submission completely. As I have already pointed out, the Claimant ultimately recovered a sum that was less than half the amount claimed for variations, and which was much closer to the figure advocated by the Defendants. It is contrary to common sense, in such circumstances, for the Claimant to contend that it was the successful party on that item of its claim. No reduction can possibly be appropriate.

(d) Conduct/Failure To Mediate

30. Ms Lindsey's next point was to the effect that the Defendants failed to mediate until very late in the day, at a time when the majority of the costs had been incurred. She said that this was unreasonable and should therefore be reflected in the costs order that I make. In support of the parties' respective submissions on this point, I was taken through a lengthy bundle of correspondence. As a result of that material, I have reached the following conclusions.

31. First, it is clear that the Defendants did not refuse to mediate. In an early letter dated 27 June 2006, the Defendants' then solicitor indicated that mediation was premature at that point, although it was a possibility that the Defendants were prepared to consider. That remained the Defendants' position throughout the pre-litigation period. The Defendants consistently said that they were prepared to consider mediation but only once the Claimant had properly set out its claim. In view of the fact that the Claimant did not set out the detail of its claim until some time after the termination, and even then was obliged to make radical amendments to the claim following the commencement of proceedings, I consider that that was not an unreasonable line for the Defendants to take.

32. It is a common difficulty in cases of this sort, trying to work out when the best time might be to attempt ADR or mediation. Mediation is often suggested by the claiming party at an early stage. But the responding party, who is likely to be the party writing the cheque, will often want proper information relating to the claim in order to be able to assess the commercial risk that the claim represents before embarking on a sensible mediation. A premature mediation simply wastes time and can sometimes lead to a hardening of the positions on both sides which make any subsequent attempt of settlement doomed to fail. Conversely, a delay in any mediation until after full particulars and documents have been exchanged can mean that the costs which have been incurred to get to that point themselves become the principal obstacle to a successful mediation. The trick in many cases is to identify the happy medium: the point when the detail of the claim and the response are known to both sides, but before the costs that have been incurred in reaching that stage are so great that a settlement is no longer possible.

33. In the present case, it appears that that critical moment, if it ever existed, was missed by both sides. When the judicial settlement conference took place in October 2007, extensive costs had been incurred on both sides and attitudes had hardened still further. Thus the settlement conference was unsuccessful. I do not see that any blame can attach to either party as a result; certainly, on the information that I have, I do not believe that the Defendants can be criticised because they did not agree to mediate at an earlier stage.

34. Secondly, I am not persuaded, even if the Defendants had agreed to an early mediation, that it would have led to a settlement. The documents make plain that, at the very start of the dispute, Mr Witham had an extremely uncompromising attitude to the Defendants and his claim against them. He informed the mediator that he was proposing that the First Defendant was "*a donkey*" whom he had "*under enormous pressure right now*", and that the Defendants were "*the clients from hell*". The Claimant's pre-action correspondence is littered with references to its intentions to pursue an entitlement to every penny of the claim. Compromise and reconciliation do not feature prominently in the Claimant's correspondence. As a result, in accordance with one of the key principles in **Halsey,** as noted in paragraph 8 above, I conclude that an early mediation had little or no chance of success.

35. For completeness, I should say that I do not accept the Defendants' criticism of the Claimant that he failed to comply with the pre-action protocol. It seems to me that, in the pre-action period, both sides were pursuing their own methods of negotiation and preparation, and that the protocol was complied with in spirit, even if it was not followed to the letter.

36. It seems to me that the principles in **Halsey** might, in an exceptional case, be applicable to the situation where there was a mediation, but very late, when its chances of success were very poor, and that, if it could be shown that the successful party unreasonably delayed in consenting to the mediation, that might lead to an adverse costs order. But such considerations do not arise here on the facts, because there is nothing to demonstrate that the Defendants unreasonably delayed in consenting to the judicial settlement conference. Furthermore, I conclude that, even if there had been an earlier mediation, the Claimant's uncompromising attitude meant that it would not have had a reasonable prospect of success.

(e) Conduct/Offers

37. The final element of conduct which I need to consider concerns the offers that were made. I deal separately, in Section 7 below, with the recent Part 36 offer made by the Defendants. The offers I consider here are those which were not in accordance with Part 36 but which, pursuant to CPR 44.3(4)(c), I must consider before exercising my discretion on costs.

38. On 10 July 2006 the Claimant offered to accept £53,000. On 28 July 2006 the Defendants offered to accept £10,000 from the Claimant. On 12 April 2007 the Defendant repeated their offer that they would accept £10,000.

39. I conclude that, in general terms, the effect of these offers is largely neutral on the exercise of my discretion on costs. Plainly, the Defendant's offers of July 2006 and April 2007 were much closer to the eventual result than the Claimant's offer of 10 July 2006, and therefore underpin further my conclusion that the Defendants were the successful party. Certainly, the offers do not provide any ground at all for making a percentage reduction to the Defendants' costs.

(f) Conclusion

40. I accordingly conclude, for the reasons set out above, that a percentage reduction of 15% is appropriate to reflect the Defendant's abandonment of the counterclaim based on the negligent estimates. I do not consider that there is any other reason to reduce the costs recoverable by the Defendants.

7. The Part 36 Offer

41. On 12 October 2007, the Defendants offered the Claimant £10,000, together with its costs. The offer was open for acceptance for 21 days, ie until 2 November 2007. The Claimant accepts that this was a valid Part 36 offer. Obviously, the Defendants did better than the offer by a considerable margin. In consequence, on behalf of the Defendants, Ms Shaw submits that, from 2 November 2007, the Defendants should be entitled to the entirety of their costs, without deduction.

42. CPR 36.14(2) provides that, where a claimant fails to obtain a judgment more advantageous than the defendant's Part 36 offer, then the court will order ("unless it considers it unjust to do so") that the defendant is entitled to his costs from the date on which the relevant period expired, together with interest on those costs. Ms Shaw says that, even if I was persuaded to make a reduction in the costs recoverable by the Defendants, because of the failure of the costs estimates counterclaim, that reduction should not apply after 2 November 2007 because the Defendants have been successful as against their Part 36 offer.

43. I consider that it would be unjust to award the Defendant 100% of their costs, as opposed to the 85% identified above, for the period after the 2 November 2007. It does not seem to me that the Defendants should recover their costs of a counterclaim which they ultimately abandoned, regardless of the Defendants' success overall as against their Part 36 offer. Assume, for the sake of argument, that Ms Shaw had abandoned that item of counterclaim at the start of the trial. She would have had no answer to an immediate application by Ms Lindsey for the costs of that abandoned counterclaim. The fact that the counterclaim was abandoned at the end of the trial rather than at the beginning can make no difference to the proper outcome on costs; if anything, since some costs were incurred during the trial on this unsuccessful item of counterclaim, the lateness of the abandonment is a point that operates against the Defendants.

44. For these reasons, it seems to me that I ought to make the order envisaged by CPR 36.14(2)(a) but that I should make clear that, for the reasons which I have given, such an order relates to 85% of the Defendants' costs, not 100% of those costs.

45. It seems to me that, because the Defendants have beaten the Part 36 offer, they are entitled to interest on 85% of their costs from 2 November 2007 in accordance with CPR 36.14(2)(b). The late service of the Defendants' expert report is irrelevant to this issue, and I note that, when it was served, the Claimant made no offer in consequence.

8. Interim Payment Of Costs

46. In accordance with CPR 44.3(8) Ms Shaw seeks an interim payment on account of the Defendants' costs. There can be no question but that the Defendants are entitled to such an order. The question then becomes: how much should be awarded by way of an interim payment?

47. The right course is to award the Defendants the amount that they would almost certainly recover on the final assessment of costs: see the judgment of Jacob J (as he then was) in **Mars UK Ltd v Teknowledge Ltd (Costs)** [1999] 2 Costs LR 44. In that case, considering all the circumstances, the judge took as his starting position a figure of 40% of the costs claimed and then made further reductions to arrive at the amount of the interim payment.

48. In the present case, I consider that 40% of the Defendants' recoverable costs represent the minimum that they are likely to recover on a detailed assessment. Thus, taking their total costs at a round figure of £123,000 I first make a reduction to reflect the 15% noted above. 15% of £123,000 is £18,450. That calculation indicates a maximum recovery on costs of £104,550. I reduce this to £103,000 to reflect the costs of the judicial settlement conference, which are not recoverable. 40% of £103,000 is **£41,200**.

49. I therefore order that there be an interim payment by the Claimant to the Defendants on account of costs in the sum of £41,200. In accordance with Ms Lindsey's application for an extended period, I order that that sum should be paid no later than 6 February 2008.

Ms Susan Lindsey (instructed by Justin Nelson) for the Claimant
Ms Annabel Shaw (instructed by Fenwick Elliott) for the Defendants