JUDGMENT : MR JUSTICE ETHERTON: Chancery Division : 29th May 2002.

1. I gave judgment in these proceedings earlier this month and when I did so I awarded the claimant, which was successful with the proceedings, 75% of its costs. In deciding to award the claimant only 75% of its costs, I bore in mind, to a significant extent, the fact that on 13th October 2000, the solicitors for the first and third defendants made an offer of resolution of these proceedings by ADR, which was rejected on behalf of the claimant. At the time that submissions were made to me on the subject of costs, immediately following my judgment on the merits, my understanding was that the offer of ADR was made before the hearing before a Master for directions and that, in view of the opposition to the proposal voiced outside the hearing before the Master, the matter was not raised when the parties came before the Master himself.

2. In reaching my decision on the importance of ADR in this case, I bore in mind particularly that this seemed to me, and seems to me today, to be a case which was eminently suitable for ADR, for the reasons that I stated in my judgment.

3. It now transpires that the information that I was given concerning ADR after the judgment was not complete in all respects. It now appears that the letter of 13th October 2000, in which the offer of ADR was raised, was sent or served on a Friday and the hearing before the Master was on the following Monday. It further appears that the matter of ADR was raised before the Master. It appears that the claimant's principal objection to ADR, at least at that stage, was that the claimant had by then given disclosure, but the first and third defendants were in default in providing disclosure. In any event, the Master did not accede to an application for a stay pending ADR and made no such order, but directions were given leading up to the trial itself. Neither party reverted to the question of mediation after disclosure by the defendants or indeed at any subsequent stage in the proceedings.

4. Mr Schaw Miller, on behalf of the claimant, has said that, in view of the new facts that have come to light, it is appropriate that I reconsider my order as to costs and that I award the claimant l00% of its costs. There are two principal matters on which he relies in support of that submission. He firstly says that, certainly with the benefit of hindsight but bearing in mind in particular that the first and third defendants were, when the matter came before the Master, in default on disclosure obligations, the defendants were pursuing a tactical manoeuvre in putting forward the proposal of ADR. He submits that the real position of the first and third defendants was that they were facing a claim which was bound to succeed and that what they should have done was to have acknowledged their liability at that stage and to have conceded a case against them; and that the offer of ADR was merely made to attempt to avoid the eventual trial and judgment against them. He submits that it would be quite wrong to reward the first and third defendants in those circumstances for a broad tactical manoeuvre.

5. The second point on which he principally relies is that the effect of an order which provides for a discount of the claimant's costs, in an order for recovery of those costs from the defendants, is to penalise the claimant alone for the failure to resolve this matter, or to attempt to resolve this matter, by alternative dispute resolution. He submits that as a matter of principle, where both parties can be seen to have been in default in promoting mediation, then it is quite wrong that one party should be penalised. He submits that the onus was on both sides, following disclosure by the defendants, to come back to the court and to seek a stay pending ADR. He says that, in failing to promote that objective, the first and third defendants are at least as culpable as the claimant.

6. For his part, Mr Stoner, on behalf of the first and third defendants, submits that the new information which has come to light really reinforces the case, that there should be a proper discount of the claimant's costs in any order against the first and third defendants, to take account of the culpable failure of the claimant to pursue ADR. He points to the fact that, by inference at any event, ADR was actively opposed by the claimant before the Master and what the claimant should have done was to have said to the Master that there should be a stay following disclosure, in order to attempt to resolve the matter by ADR.

7. I do not accept the proposition of Mr Schaw Miller that I ought to conclude, and that I have the material to conclude, that the conduct of the defendants' advisers in putting forward ADR was a cynical tactical manoeuvre. That can be said in any case in which ADR has been offered and refused by a party which subsequently loses the case. This case was a fact dependent case and, as is almost inevitably the position, I, as the trial Judge, had the unique benefit of hearing all the parties and their witnesses and was able to form a view about the credibility of some and the lack of credibility of others. I do not accept that I am entitled, on the material before me, to draw the inference that the defendants knew or should have known that they were bound to lose this case, and that the proposal of ADR was done simply to avoid the evil day.

8. Secondly, I do not accept the proposition of Mr Schaw Miller that the parties were equally to blame. It does seem to me that the advisers for the first and third defendants, having put forward the offer of ADR, it was more incumbent on the claimant at an appropriate time to return and to take up that suggestion, than for the first and third defendants to have continued to press for ADR, having at an earlier stage faced what would appear to be outright opposition by the claimant.

9. Having said that, it does seem to me that the facts that have now come to light do paint, to some extent, a rather different picture to that which I had at the end of the case. It seems to me that it is of some significance that the matter was expressly raised before the Master, who formed a view on the appropriateness of ADR at that time. Accordingly, it seems to me that some of the culpability which I had attributed to an outright refusal on the part of the claimant to the proposal for ADR is diminished but not, as I have said, entirely removed. As I have said, it seems to me that this was a case which was ideally suited to ADR and it is a matter of very considerable regret that it had to proceed to a full fought out hearing, occupying the court for a number of days, when that consequence might have been averted, had the parties and their legal advisers really concentrated on the advantages of resolution by ADR.

10. It seems to me that I am entitled to, and bound to, take into account that there was what I consider to be a genuine offer in accordance with the proportionality principles of CPR to resolve the matter by ADR, put forward on behalf of the first and third defendants, which was rejected by the claimant and was never taken up again.

11. Finally, I do take into account today, as I took into account after my judgment following the trial, that there were a number of ways in which the claimant put its case and on at least two of those, namely the question of construction and rectification through mutual mistake, the claimant did not succeed. The courts are encouraged nowadays, as the parties and their legal advisers will be well aware, to make costs orders which reflect success or failure on different issues.

12. Taking all these matters into account, I consider that the appropriate order **for costs** in the light of the new matters that have come to light, is to award the claimant 85% of its costs against the first and third defendants.