JUDGMENT HIS HONOUR JUDGE WILCOX: TCC. 8th March 2000.

On 25th February this year there were two applications under the CPR24 and 25 and those applications were dismissed. At that hearing I indicated that the claimants' conduct in issuing proceedings in the High Court was perhaps not appropriate, and I therefore asked for justification of that conduct. In the course of argument on that day, on a further adjourned hearing and now today, I have heard extensive argument and a review of what happened in relation to this very modest litigation between a builder and his client.

It is clear to me that, when the relationship between the parties broke up in early December and a final account was delivered, the defendants not unreasonably sought further particularisation of the account then served. That information was not forthcoming until 8th February of this year. During the month of December it is evident to me that the defendants did all they could in a reasonable manner to elicit the information that they reasonably required. I would not characterise their conduct in any way, as one so often finds in cases like this, as somebody who was playing for time and trying to avoid payment. In fact, early in December, they appointed a surveyor, of the wrong variety unfortunately, he was a building surveyor who was not versed in valuation. But soon thereafter they appointed Mr Wallington, who was in fact a valuer and could assist.

Valuation in these circumstances is difficult when in fact detailed information of the final account is not readily available. There has been trenchant criticism of the defendants by Mr Reynolds that the defendants did not in fact expressly inform the claimant that Mr Wallington was on board and could not proceed without the particularised information. The claimants knew of course that there was a surveyor, they knew that reasonably these defendants wanted the information and they could and should have provided that information.

What in fact happened during the month of December is this. It is not necessary for me to review all of the letters, but I can characterise the flow of correspondence in this way. The defendants pressed the claimants to provide the information, which was not forthcoming. The claimants in fact sought an interim payment. There were discussions in correspondence about that but, more particularly to the point of particular relevance to this consideration of costs, it was canvassed between the parties that there should be an adjudicator. Mr Dancaster's name was mentioned. He was acceptable to the defendants, either as a mediator or later as indicated as an adjudicator. Of course, the Housing Grants and Regeneration Act of 1996 did not apply to this contract because the defendants were residential occupiers. Nonetheless, it is a mark of the commitment of the defendants that they were willing to do everything reasonable in order to settle this matter without recourse to litigation.

Ultimately, Mr Dancaster indicated that he would only accept an appointment as an adjudicator, but the position of the claimant was that, unless there was an undertaking as to his costs by the defendant, they would not agree his appointment.

By the time that 12th January came along, it was known by the claimants that Mr Wallington had been appointed as the valuation quantity surveyor, but they were raising difficulties even then by suggesting that he was not a qualified quantity surveyor: "*A check of the RICS records does not show that he is a member and we question his ability to act as an expert on quantity surveying matters.*" That perhaps underlines the pettifogging approach that was the approach to this litigation. If somebody has confidence in a professional, it is a matter for them. The negotiations that then take place thereafter are quite another matter.

In that letter of 12th January there was demand for a further payment of not less than £42,000, this being in respect of a modest claim of £76,000 by 12 noon on Friday, 14th January: "*We hold instructions to commence and serve proceedings without further notice to you. In the event that your client is not prepared or able to make such a payment, we would be obliged for your confirmation that you will accept service, otherwise proceedings will be served on your client direct.*" If the figure of £42,000 is paid, then it is clear, and only then clear, that they will be prepared to talk. That somewhat characterises the approach of the claimants. It is a heavy-handed approach. It is very much at odds with the TCC ethos that runs through the CPR. Of course, the protocol was not in force at that stage, and therefore it plays no part in my decision today, although it must have been known to the parties that negotiations were under foot and consultations were under way as to its

import. But, in any event, the CPR pre-action protocol did apply and the strong imperative put upon both parties to negotiate, to be frank in disclosing documentation and to talk and discuss was upon them.

By the time that 14th January came along the claimants were writing thus: "*We confirm that in the absence of any payment being offered by your client proceedings will be issued tomorrow Friday and served on you as you have indicated you will accept service on behalf of your clients*", again underlining the approach.

The reply by fax and later letter of 14th January notes that the claimants were not then seeking the £42,000 originally sought, and requested a payment on account, and indicated that they were prepared to make a payment on account of some £10,000 conditional upon discussions with Mr Melidi(?), the building surveyor, and Mr Wallington, the quantity surveyor. It is clear that the defendants were placatory and reasonable and attending to the concerns that were raised by the claimants. It elicited a reply on 17th January: "We thank you for your fax and letter of 14th January upon which we have taken instructions. The proposals are not acceptable and proceedings will be served on you very shortly."

Mr Wallington was not able immediately to meet with the claimants' quantity surveyor, but it was known that he would be back in early February for that very purpose. By 18th January the defendants reminded the claimants of their duty in relation to the protocol practice direction, and in particular paragraph 4 of the protocol. That seemed to have, sadly, no effect upon restraining the keenness and aggressive stance that was adopted by the claimants.

I note that in the letter of 19th January the claimants were in fact reiterating their claim in the first five paragraphs of the letter. When Mr Wallington's role was considered as a quantity surveyor acting on behalf of the defendants in discussions, at paragraph 7 of the letter: "*There is no point in appointing an expert when we do not know what the dispute is. We note Mr Wallington's possible availability. No meeting can be of any value until we know what he is going to say, at least in draft form.*" When one considers that against the basis of oft repeated requests for information as to the final account that was not given, that approach somewhat beggars belief.

On 28th January a letter was written to the claimants' solicitors by the defendants, reiterating the history of the matter in some detail. In particular at paragraph 5 the point was raised that there were no formal letters before action as such. It set out in a comprehensive way the defendants' approach to this dispute and the offers that they had made to accommodate the claimant. It is interesting that there was a meeting between I think Mr Smith and the claimants on 22nd February, and in fact defects were inspected, and immediately thereafter there was an offer of payment on account.

This is a case where, in my view, the conduct of the claimants has been exceedingly heavy-handed. They have been uncooperative, and they are in fact clearly, in my judgment, in breach of the protocol practice direction and, in particular, paragraph 4. I have to ask myself this question: how should their conduct be characterised? I have had my attention drawn to two decided cases, one brought to my attention by Mr Reynolds, the case of **Joseph v Boyd & Hutchinson** in the Chancery Division, a decision of Mr Justice Park on 13th January 1999, in which he considered a protracted dispute between the client of a solicitor who had represented her and their solicitors. In relation to the question of indemnity costs I turn to page 15 and the paragraph at the head of the page, looking at Mr Littman's submissions:
"I do not think that he [the taxing master] regarded Mr Littman's submissions on this issue as hopeless or unreasonable. It was just that, after considering in the light of the authorities and the legislative history, he did not agree with them. The court should not award indemnity costs in the case where the losing party had put forward a perfectly respectable argument with which in the end the court did not agree."

The case of **Munkenbeck & Marshall**. **v McAlpine**, reported in 44 Construction Law Review, a decision of the Court of Appeal, was cited on behalf of the defendants. There it is clear there was a concerted and deliberate attempt to avoid liability and to protract matters, and the court there took a firm view that indemnity costs were appropriate. If I can pick up on page 32, there is approbation of the judgment of Lord Justice Kerr in an unreported decision in **Disney v. Plummer**: *"I whole heartedly agree with the course which the judge took in relation to this ill-advised, if I may say so, stupidly conducted piece of litigation. It is the sort of robust attitude which should be taken to pieces of litigation of this kind. The defendants still suffer, even when they win. But they should at any rate have been given such assistance as can be provided by the rules. I do not accept, as*

counsel submitted, that indemnity costs are only appropriate if there is some deception or underhand conduct on the part of the losing party, but not if the litigation is merely fought bitterly or unreasonably. In the latter type of cases judges can still exercise their discretion under [the then rule] RSC Ord 62, r 3(4)."

Culpability here means wholly unreasonable behaviour. That must be measured against the reasonable conduct of reasonable solicitors at the time and must be informed by the current rules and, in particular, paragraph 4 of the pre-action protocol. I take the view that it was wholly unnecessary to commence this litigation. It was wholly unreasonable. It is clear that there could have been and should have been explored alternative dispute resolution. That may include sensible discussions between the parties not necessarily involving a third party. In my judgment, there is in those terms some culpability in this case. In my judgment, indemnity costs are warranted. I turn now to the question of the schedules. What costs? Schedule 1 deals with the whole matter, including the costs - forgive me, it is net of the costs on 24 and 25?

MR REYNOLDS: *I think schedule 2 is subsumed into schedule l, my Lord. The credit allowed by my friend's instructing solicitor on page 3 relates to costs he said would have been incurred anyhow.*

MR ROBB: *Even if we had had to go to mediation.*

JUDGE WILCOX: *Thank you very much. I order therefore that there will be a detailed assessment of the costs. Credit will be given for the costs that would have been incurred in any event, had the claimant agreed to adjudication, mediation or some other form of dispute resolution prior to issue and service of proceedings. I accept that those costs would have been of the order, including VAT, of £6,889.32. The detailed assessment will relate to the costs of the action.*

MR ROBB: *Sorry, my Lord, which figure?*

MR REYNOLDS: *The figure of ---*

MR ROBB: *The credit is accepted as at about £6,000?*

MR REYNOLDS: *Yes.*

JUDGE WILCOX: *So far as the costs of today are concerned, that is schedule 3, and in my judgment there will be a summary assessment of those. It will be in the sum claimed.*

MR ROBB: *The order is effectively that the claimant pay the defendants' costs of the action to date on an indemnity basis?*

JUDGE WILCOX: *Yes, but with credit being given in relation to the work that would of necessity have been done in relation to alternative dispute resolution. That is for a detailed assessment.*

MR REYNOLDS: *My Lord, one point further now arises. You had before you after the hearing on 25th February a draft order which had been painstakingly written out by my friend. There is £25,000 in court and that order, my Lord, will be part 1 of the part to obtain the payment out. I imagine the answer is that we have to re-cast the order and submit it to your Lordship for signature, and then it can be used as the part I for the payment out. I think Mr Carter will confirm that will surely be done.*

JUDGE WILCOX: *Yes indeed. Can that be done this morning?*

MR ROBB: *I am afraid, my Lord, that I am actually due for an appointment before Master Turner at 12 o'clock.*