JUDGMENT : HIS HONOUR JUDGE REID Q.C. Costs Judge **:** QBD. **1st July 2003**

1 The issue with which I have to deal in this case is the issue of costs. The action was a claim for in effect goods sold and delivered by the claimants, who collectively can be called "Corenso", against the defendant, Burnden Group Plc. Burnden put in a substantial counterclaim asserting that the goods delivered were defective and that as a result they had suffered substantial losses. 9

2. Putting that in slightly more detail, the defendant, Burnden, was a manufacturer of cardboard cores. It had taken over the business of another company (Dearward Limited) and Corenso (the claimant) was a manufacturer of coreboard and of cardboard cores as well. The products purchased by Burnden came from three of Corenso's European board mills, at Pori and Varkhaus in Finland and Soustre in France. The case that Burnden put was that it specified to Corenso that it should be supplied with coreboard from Pori and, if Pori had no spare capacity, from Varkhaus. It was asserted that Burnden would not have taken board from Soustre because of the lower quality of the production there and because it was unsuitable for the purpose of winding high specification. In fact it is said that coreboard was delivered from the French factory and it was said by Burnden that this resulted in unsatisfactory goods being delivered. This in its turn resulted in unsatisfactory cardboard cores being manufactured by Burnden and despatched. This in its turn led to complaints from Burnden's customers.

3. Against that background Burnden in September 2000 wrote making a complaint and immediately received a response from Corenso's solicitors. Putting it in very brief terms, what happened thereafter was that proceedings were issued in February 2001. A Part 36 offer payment into court was made on 2nd March 2001in the sum of £64,000. Matters proceeded without being resolved right up to the point of trial. Almost at the point of trial a further Part 36 payment was made of another £26,000. That was less than 21 days before the date for trial. The additional payment was £26,000, raising the total in court to £90,000. Corenso determined to accept, if it could, that payment. However, it needed the consent of the court to do so. The reason for that is to be found in Part 36. The relevant parts of Part 36 have been helpfully set out in the skeleton argument and I propose to take them from there. By Part 36.11:

"1. A claimant may accept a Part 36 offer or a Part 36 payment made not less than 21 days before the start of the trial without needing the court's permission if he gives the defendant written notice of acceptance not later than 21 days after the offer or payment was made.

"2. If:

"(a) a defendants' Part 36 offer or Part 36 payment is made less than 21 days before the start of the trial; or

"(b) the claimant does not accept it within the period specified in paragraph (1) ;

"(i) if the parties agree the liability for costs, the claimant may accept the offer or payment without needing the permission of the court .....

"if the parties do not agree the liability for costs the claimant may only accept the offer or payment with the permission of the court.

"3. Where the permission of the court is needed under paragraph (2) the court will, if it gives permission, make an order as to costs."

It will be observed that generally speaking under Part 36.13 if a payment is accepted without the need for permission, the claimant is entitled to his costs of the proceedings up to the date of the service of notice of acceptance.

4. It is also to be noted that by the general provision relating to costs, costs are in the discretion of the court, but under 39 44.3(2):

"If the court decides to make an order about costs:

"(a) the general rule is the unsuccessful party will be ordered to pay the costs of the successful party; but

"(b) the court may make a different order."

5. Against that background in the rules, the parties were unable to agree what should happen about the costs. The claimant needed leave to take the money out. The defendant was perfectly happy that money should be taken out. But each had their own views as to what the order for costs should be.

6. In very brief terms, the claimants' case was that it had had a claim for £140,000. There had been a counterclaim for over £300,000. The net result of that was that it had achieved £90,000, which it regarded as being satisfactory in commercial terms, and it had disposed of the counterclaim, not having to make any payment under that. Therefore, said the claimant, it had won and was entitled to its costs. It went on

to point out that the payment in of a further £26,000 had been a very substantial uplift on the amount of £64,000 that had been in court before. On behalf of the defendant, it was said that very different orders for costs should be made. I need not at this stage go into the detail of them, but in essence what was said was that the claimant should get virtually none of his costs and, indeed, should have to pay a considerable part of the defendants' costs because, it was said, the defendant had offered to have mediation and that the claimant had made no response to those offers of mediation. In those circumstances, in the light of the way in which the courts now proceed, it was submitted the claimant should be deprived of its costs and, indeed, be made to pay parts of the costs of the defendant.

7. Reference was made to the current White Book at 1.4.11, indicating that as part of the overriding objective the courts would encourage the use of alternative dispute resolution and pointing out the dangers to a party who will not engage in ADR 26 in an attempt to prevent matters coming to court.

8. In the course of the hearing I was referred to a number of authorities, and I think it would be sensible simply to take 30 those in the chronological order in which the cases were decided. The first of the cases to which I was referred was **Demite Limited v Hanmer Webb-Peploe & Ors,** a decision of the Vice Chancellor on 19th October 2000. I do not, I think, need to refer to any specific passages in that decision beyond a short passage at page 13 of the transcript where the Vice Chancellor said this: *"I turn then to the third question, which is: what, if any, order for costs should be made? I accept the offer was made by Demite for commercial reasons. I also accept I cannot know why it was structured and assessed by Demite in the way that it was made. But it does not appear to me that Part 36 requires the court to have regard to such subjective matters; and, in any event, commercial reasons may include the prospects of success on the claim, if it is pursued. I also accept that I cannot assess the merits of the claim and the counterclaim in the way that would be open to a Judge who has heard the action and the counterclaim after full evidence has been given. But it does not follow that I must accept the offer without any critical examination, and treat it as an offer by Demite to settle its own claim so that, if it had been made earlier, it would have carried the costs under CPR 36.14. I am entitled, and bound, to have regard to the nature of the issues between the parties; and, against that background, to assess the economic effect of the offer."*

   Then a little further on he said: *"Then, should I order them to be paid by Demite? Or should I make no order? I could, but neither side has asked for them, make cross orders on both the claim and the counterclaim. I have come to the conclusion that, in the exercise of my discretion, I should order Demite to pay the defendants' costs of the action and make no order in respect of the costs of the counterclaim. Whatever the reason may be, and it matters not, Demite cannot disguise the fact that it is objectively abandoning its claim. The payment of £114,000, which is stipulated for, is a payment to itself of its own money. It was not, as the letter suggested, a payment in settlement of its claim. A party who abandons its claim should normally pay the costs incurred by the other side."*

9. The principles that I draw from that are, first, that the fact that the court has to determine whether or not to make an order for costs when it permits a payment out for which its leave is required means that the court has to exercise its discretion in determining what the appropriate order for costs is. It does not follow that because a payment out that would not have required consent carries with it automatically the costs, the same applies when consent for payment out is needed. Secondly, one cannot, despite having to examine the offer to some extent critically, try to jog back and work out precisely why the offer was made, whether it was a good offer or the precise logic behind the making of the offer and its acceptance. Thirdly, I think what shines through from the decision itself is that the general rule still applies, namely, that if you lose, the starting point is that you have to pay the other side's costs, though obviously there will be circumstances which may cause such an order not to be made.

10. The next of the authorities cited to me was the decision in **Johnsey Estates (1990) Ltd v Secretary of State for the Environment** [2001] EWCA CIV 535 [2001] 2 EGLR 128. This was a decision of the Court of Appeal on 11th April 2001 in a landlord and tenant matter. Again, I need not go to the facts. I can go straight to the passage towards the end of the judgment of Chadwick L.J. beginning at paragraph 31. The learned Lord Justice said:

    "31. Mr. Gaunt Q.C., as counsel for the Secretary of State, sought to persuade us that it was right, at the least, to deprive the landlord of all its costs between 26 September 1996 and 19 February 1999. His submission, in effect, was that the landlord was, throughout, seeking damages in amounts which were far in excess of the

amount to which it was ultimately held entitled; and that it was the landlord's inflated and unrealistic valuation of its claims which had made it impossible to dispose of the action by agreement in 1996. He accepted, of course, that the amount of the first payment in turned out to be less than the amount to which the landlord was entitled; but he submitted that that was irrelevant; when the Secretary of State increased the amount notionally in court to £450,000, the landlord would not accept it. The action went on because the landlord was not interested in any reasonable offer; and, in those circumstances, the landlord must bear its own costs.

"32. The submission has some superficial attraction on the facts of the present case; but, for my part, I would reject it. It seems to me that a court should resist invitations to speculate whether offers to settle litigation which were not in fact made might or might not have been accepted if they had been made. There are, I think, at least two reasons why a court should not allow itself to be led down that road. First, the rules of court provide the means by which a party who thinks that his opponent is not open to reason can protect himself from costs. He can make a payment in; he can made a ***Calderbank*** *offer; now, under the Civil Procedure Rules 1998, he can make a payment or an offer under CPR Pt 36. The advantage of the courses open under the rules is that they remove speculation. The court can see what offer was made, when it was made, and whether it was accepted. Second, speculation is likely to be a most unsatisfactory tool by which to determine questions of costs at the end of a trial. It is not, I think, suggested that each party would be required to disclose, at that stage, what advice it had received, from time to time, as to the strengths and weaknesses of its claim or defence. But without knowing that -- and without a detailed knowledge of the financial and other pressures to which each party was subject from time to time -speculation would be hopelessly ill-informed. If Mr. Gaunt's submission were to be accepted generally, there would, I think, be a serious danger that, at the end of each trial, the court (in order to decide what order for costs it should make) would be led into another, potentially lengthy, inquiry on incomplete material into 'what would have happened if ...?'. I am not persuaded that that could be compatible with the overriding objective to deal with cases justly."*

10 From that I draw that the court should not speculate as to what might have happened if offers had been made which were not in fact made, and, equally, should not try to deduce from the very limited material which will be before it in each case precisely why offers were made at the stage they were and what the pressures were that led to the making of those offers. The third of the authorities cited to me was **Firle Investments v Limited v Datapoint International Limited,** decided by the Court of Appeal on 25th June 2001. Schiemann LJ, who had also been a party to the decision in **Johnsey Estates,** said this at paragraphs 4 to 9 of the judgment:

"4. From those cases [that is ***Amber v Stacey*** *and the* ***Johnsev Estates*** *case] it is clear that it is manifestly desirable that the outcome of litigation, including the outcome as to costs, should be reasonably predictable. Yet the facts of cases vary infinitely and the rule makercannot make provision for every eventuality. The rules therefore leave the judge a measure of discretion in an attempt to produce justice in line with principle; and so long as the judge acts in accordance with principle, this court, which lacks the advantage of having seen the case develop, will not interfere with the decision of the judge. Another way of putting it is to say the court will not interfere unless the judge is plainly wrong.*

"5. The Civil Procedure Rules set out the relevant guidelines, in CPR 44.3, and I do not need to set them out in detail, save to remind myself that the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order; amongst the relevant factors for the court to take into account is payment in or an offer to settle; the conduct of the parties; and in particular whether a particular issue has been decided against one party who, nevertheless, managed to win overall.

"6. What is important and is relevant to the present case is what was said by Chadwick L.J. in ***Johnsey*** *and agreed with by the remainder of the court in paragraph 42 of the judgment [he then sets out the passage that I have just read]."*

Carrying on at paragraph 7 of the learned Lord Justice's judgment:

"7. Without knowing the detailed advice received by each party at each stage of its claim -- and it was not suggested in that case, and I do not think it is in the present case, that this should have been available -- the speculation of the court would be hopelessly ill-informed.

*"8. The matter was put slightly differently by Simon Brown L.J. in **Amber v Stacey** where he said this in paragraph 39 and following:*

"'There are in my mind compelling reasons of principle and policy why those prepared to make genuine offers of monetary settlement should do so by way of Part 36 payments. that way lies clarity and certainty, or at any rate greater clarity and certainty than in the case of written offers'".

"9. He goes on to say:

"'Payments into court have advantages. They at least answer all questions as to (a) genuineness, (b) the offeror's ability to pay, (c) whether the offer is open or without prejudice, and (d) the terms on which the dispute can be settled. They are clearly to be encouraged, and written offers, although obviously relevant, should not be treated as precise equivalents.'"

Then the judgment continues at paragraph 10: 3

"10. But Simon Brown L.J. draws attention in paragraph 40 to a possibly important consideration, that a party may be able to establish that it was their opponent's unreasonable conduct which prevented them making a properly informed decision about their prospects in the litigation and thus avoid what would be the usual costs order."

13. The next case cited to me was the case of **Cowl & Ors. v Plymouth City Council** [2001] EWCA Civ 1935, decided by the Court of Appeal on 14th December of 2001. The Lord Chief Justice gave a judgment to the court. As the start of the headnote points out: *"Litigation should be a last resort and use should be made of alternative dispute resolution, in the present case the complaints procedure. A great deal of expense, time and anxiety to the claimant could have been avoided if the complaints procedure had been used."*

This was a case where claimants living in a residential home owned and run by the defendants were threatened with eviction because the intention of the defendant was to close the home. Judicial review was threatened and the local authority said they would be willing to put the matter before a Panel chaired by an independent person. Although the Panel's decision would have been binding the council stated it was conscious of the need to give sufficient weight to the Panel's conclusions. Nonetheless, an application for judicial review proceeded.

14. At page 10 of the judgment, the Lord Chief Justice said this: *"We do not single out either side's lawyers for particular criticism. What followed was due to the unfortunate culture in litigation of this nature of over-judicialising the processes which are involved. It is indeed unfortunate that, that process having started, instead of the parties focusing on the future they insisted on arguing about what had occurred in the past. So far as the claimants were concerned, that was of no value since Plymouth were prepared, as they ultimately made clear was their position, to reconsider the whole issue. Without the need for the vast costs which must have been incurred in this case already being incurred, the parties should have been able to come to a sensible conclusion as to how to dispose of the issues which divided them. If they could not do this without help, then an independent mediator should have been recruited to assist. That would have been a far cheaper course to adopt. Today sufficient should be known about ADR to make the failure to adopt it, in particular when public money is involved, indefensible."*

That, of course, was a public law case but the principle, I think, remains clear that every effort should be made to avoid going to litigation and that attempts at ADR should be made throughout in order to try and save costs and time.

15 The remaining three cases that were cited to me were, firstly, **Dunnett v Railtack plc**, then **Hurst v Leeming** [2002] EWHC 1051 and, finally, **Societe Internationale de Telecommunication Aeronautiaues SC v Wvatt Co (UK) Limited & Ors.** [2002] EWHC 2401 (Ch), with Maxwell Batley as Part 20 Defendant.

16. In **Dunnett** there was an appeal which failed, and then a separate argument about costs. What I need to look at, I think, are paragraphs 12 to 15 of the judgment on costs. Those paragraphs in the judgment of Brooke L.J., with whom the other two L.JJ, Robert Walker L.J. (as he then was) and Sedley L.J., agreed, were as follows:

"12. In helpful notes to that rule (that is CPR 1.4). In the Autumn 2001 edition of the White Book, the editors write on page 18: 'The encouragement of facilitating of ADR by the court is an aspect of ... achieving the

overriding objective. The parties have a duty to help the court in furthering that objective and, therefore, they have a duty to consider seriously the possibility of ADR procedures being utilised for the purpose of resolving their claim or particular issues within it when encouraged by the court to do so. The discharge of the parties' duty in this respect may be relevant to the question of costs because, when exercising its discretion as to costs, the court must have regard to all the circumstances, including the conduct of all the parties (r44.3(4), see too r 4.5).'

"13. The value of that observation is that it draws attention to the fact that the parties themselves have a duty to further the overriding objective. That is said in terms in CPR r 1.3. What is set out in CPR r 1.4 is the duty of the court to further the overriding objective by active case management, which includes the feature to which I have referred.

"14. Mr. Lord [he was counsel for the successful respondents, British Rail, on the appeal], when asked by the court why his clients were not willing to contemplate alternative dispute resolution, said that this would necessarily involve the payment of money, which his clients were not willing to contemplate, over and above what they had already offered. This appears to be a misunderstanding of the purpose of alternative dispute resolution. Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve. This court has knowledge of cases where intense feelings have arisen, for instance in relation to clinical negligence claims. But when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solutions which are beyond the powers of the court to provide. Occasions are known to the court in claims against the police, which can give rise to as much passion as a claim of this kind where a claimants' precious horses are killed on a railway line, by which an apology from a very senior police officer is all that the claimant is really seeking and the money side of the matter falls away.

"15. It is to be hoped that any publicity given to this part of the judgment of the court will draw the attention of lawyers to their duties to further the overriding objective in the way that is set out in CPR Pt 1 and to the possibility that, if they turn down out of hand the chance of alternative dispute resolution when suggested by the court, as happened on this occasion, they may have to face uncomfortable costs consequence."

That is what the Court of Appeal said on 22nd February 2002. 11

17. In **Hurst v Leeming,** a decision of Lightman J. on 9th May 2002, 13 at page 4, the learned judge said this:

*14 "The professional negligence pre-action protocol lays down that in proceedings of professional negligence, if one party opts to proceed to mediation, the other party, if he refuses, should state his reasons. Implicit in that protocol, and explicit in two decisions of the Court of Appeal [***Cowl*** and ***Dunnett****] is the proposition that a party who refuses to proceed to mediation without good and sufficient reasons may be penalised for that refusal and, most particularly, in respect of costs. Mediation is not in law compulsory, and the protocol spells that out loud and clear. But alternative dispute resolution is at the heart of today's civil justice system, and any unjustified failure give proper attention to the opportunities afforded by mediation, and in particular in any case where mediation affords a realistic prospect of resolution of dispute, there must be anticipated as a real possibility that adverse consequences may be attracted."*

He then went on and held that on the facts of that case the defendant had been justified in not going to mediation and assessed the costs in his favour in the sum of £55,000.

18. Finally, there was the decision of Parke J. in the **SITA** case on 14th November of last year. I can pick three fairly short passages from it, beginning halfway down paragraph 2: *"Mr. Moger cited two cases as showing that a party who eventually succeeds in a case which goes to trial (or to appeal) may nevertheless be denied some or all of his or its costs by reason of having refused, before the trial (or appeal), to take part in a mediation. The cases are* ***Dunnett v Railtrack plc*** *[2002] 1 WLR 2434 (Court of Appeal) and* ***Hurst v Leeming*** *[2002] Ll R(PN) 508 (Lightman J). Notwithstanding those cases, I do not accept Mr. Moger's submissions. In my judgment Maxwell Batley are entitled to an order for the payment by Watson Wyatt of all of their assessed costs of the proceedings."*

He then went on and dealt with CPR 44.3(ii) and at paragraph 10 says: *"Mr. Moger's argument that Maxwell Batley should be deprived of some of their costs rests on the first two occasions, when Maxwell Batley declined to participate in either the January round or the April round of the SITA/ Watson Wyatt mediation [it has to be borne in mind here that Maxwell Batley were solicitors and the object that Watson Wyatt had in trying to get them into the mediation between SITA, the claimants, and Watson Wyatt, the defendants, was to try and persuade Maxwell Batley to put some money into the pot for the benefit of Watson Wyatt when Watson Wyatt came to make an offer to SITA]. In my judgment, however, it was entirely reasonable for Maxwell Batley to decline to participate in those mediations. There are five specific points which I wish to make."*

He then makes those five specific points, and at paragraph 16, having done so, said this: *"The circumstances of this case are totally unlike those in the two cases referred to by Mr. Moger and mentioned in paragraph 2 above. (In any event in one of those cases – **Hurst v Leeming** -- the judge did not in any event refuse costs to the successful party who had declined to take part in a mediation.) In my judgment it would be a grave injustice to Maxwell Batley to deprive them of any part of their costs on the ground they declined Watson Wyatt's self-serving invitations (demands would be a more accurate word) to participate in the mediation."*

He then awarded Maxwell Batley the whole of their costs of the proceedings between them and Watson Wyatt, the first defendants and the Part 20 claimants.

19. From that, it seems to me that what shines through is that one must look at any offers of mediation and what happens to them, and that it is possible that a failure to engage in the mediation process may have adverse costs consequences for a successful party. It is not, however, by any means inevitable, and one of the factors, it seems to me, which is not expressed in those decisions is that the requirement is for the parties to engage in ADR. ADR is not necessarily mediation. Mediation is one form of ADR. It was the relevant form in **Dunnett** because that was what was suggested in that particular case. It was the relevant form in **Hurst v Leeming** because the protocol suggested mediation. In **Dunnett,** as in **Hurst v Leeming,** there was no other form of ADR which was suggested. Similarly, in the Maxwell Batley case, the only suggestion was mediation. In my judgment, a party can quite properly discharge his obligations to consider ADR, and to attempt to engage in it, without necessarily being prepared to enter into mediation if he takes the view that there are other forms of ADR which are more appropriate or more likely to produce the appropriately desired result.

20. Against that view of the law, I turn to the course that was followed in this particular case. I have already in outline said what the facts are about, and what I propose to do now is do what was done by counsel in the course of argument before me and go through the exchanges between the parties to see how the two parties complied with their respective obligations to consider ADR as a means of discharging their obligations under the CPR.

21. As I have said, the first complaint was made on 15th September 23 2000 by the Burnden Group. The response from Campbell Hooper, the claimants' solicitors was immediate, and shortly thereafter, on 2nd November, Campbell Hooper, after a little further correspondence, wrote a letter which was, I think it is now accepted, not a particularly well-judged letter. Criticism was made on behalf of the defendants of the fact that Campbell Hooper had become involved so early, but it is clear that the defendants' solicitors were also on the scene from a very early stage because on 7th November 2000 they responded saying, "We've been monitoring your correspondence with our client". So although they had not until that point surfaced, they were, none the less, on the scene. Campbell Hooper wrote again on the 9th, enquiring whether the defendants' solicitors were fully appraised of all aspects of their client's position, pointing out this might help prevent litigation, and inviting the defendants' solicitors to speak to a Mr. Granger, a partner in the claimants' solicitors.

22. Matters did not rest there. On 16th January the claimants' solicitors wrote again, the letter headed "*without prejudice save as to costs*", which they said, at the end of the first 44 paragraph, *"We indicated it is always better to reach any settlement rather than litigate but your client's failure over many months to provide the information requested gives our clients great cause for concern. We repeat that offer to you. We suggest if your client has any proposals to make it is made soon before litigation begins".*

23. On 5th February the defendants' solicitors wrote a Part 36 offer of £64,000 in full and final settlement, inclusive of interest, VAT and all legal costs incurred by the claimants up to the date 21 days after the offer is made. That, however, did not achieve the desired result and on 15th February proceedings were issued.

24. On 21st February the claimants' solicitors wrote what, on the face of it, is an open letter, offering to take £140,000 in full and final settlement of claim and counterclaim. That letter was, however, treated as being "without prejudice save as to costs" (see Addleshaw Booth's letter of 22nd February).

25. On 2nd March the £64,000 was paid into court. It had, of course, been impossible to back the Part 36 offer by a payment in until proceedings had been issued. On 23rd April a defence and counterclaim was served.

26. On 9th May there was an offer of a stay for one month so that an attempt should be made to settle informally or by ADR. That was made by the defendants' solicitors.

27. On 14th May the reply and defence to counterclaim was served, and on 22nd June the order for a stay was in fact made by Master Tennant, who had considered the statements of case and the listing questionnaires and allocated the matter to multi track.

28. On 3rd July there was a telephone conversation between WDG, on the part of the claimants' solicitors (that is to say, Mr. Granger) and Ms. Boldero of Addleshaw Booth. Both versions of the attendance note are before me. I should say that my task has not in fact been made any easier by each side having supplied a filleted bundle of correspondence, in each case filleted with a view to their own advantage. The two different versions are these. According to Mr. Granger, he suggested it may be that ADR is appropriate but it would appear both sides are very far apart, and Ms. Boldero thought that now the claimants had seen their counterclaim they might be able to make a new offer but Mr. Granger thought the reverse was the case; the counterclaim was so vague there appear to be little substance in it. Mr. Granger's version is that it was agreed that each side would check with their clients to see what kind of settlement, mediation or ADR may or may not be appropriate; Peter Gourri, the legal executive who normally had charge of the file, to revert. Ms. Boldero's attendance note is rather fuller. She says, amongst other things, this, *"He [that is William Granger] asked whether I had any ideas as to who settlement negotiations might proceed, i.e. whether it should be through solicitors, through clients getting together or by more formal means. I said that it would probably depend on how far apart our clients were at this stage. If we were relatively close then it might be possible for solicitors to achieve a settlement. If not, then I thought mediation was a possibility but I would need to take instructions. We agreed that informal discussions between our parties were unlikely to be successful in view of the bad feeling between the parties"*.

    It will be noted that that last passage does not appear in Mr. Granger's version and that no similar suggestion appears elsewhere later on in the correspondence, but it was a point that was stressed on behalf of the defendants as showing that the claimants ought to have been taking the view at an early stage that mediation was appropriate and ought to have responded positively to suggestions as to mediation.

29. Mr. Gourri had been on holiday at this time. When he returned he did not in fact immediately make contact, which resulted on 16th July in a letter headed "without prejudice" from the defendants' solicitors, which contains at paragraphs 3 and 4 the following, *"We had understood that Mr. Gourri had made contact when he returned from holiday and disappointed that our initial enquiry has not been taken up. In the circumstances we shall be obliged if you will contact us as soon as possible to clarify your client's position. Our clients indicate they would in fact be prepared to meet with your client direct if this would facilitate negotiations"*.

30. On the same day there was a further letter of offer without prejudice from the defendants' solicitors. This was not a particularly helpful one because it back-tracked from the £64,000 payment into court and this time offered £44,000 on the basis that was £64,000 less the costs subsequently incurred and suggested that of the money in court, £44,000 be paid out to the claimants and the balance to the defendants and that each party would bear its own costs.

31. On 23rd July the claimants' solicitors wrote saying that they were hoping to take instructions, and in another letter of the same date, wrote, *"We would also consider alternative dispute resolution. We are unaware*

of whether or not it will be specifically possible to secure services of some form of mediator or arbitrator who is an expert in the particular area in dispute. Do you or your clients have any thoughts in connection with this matter? Please let me have your comments".

32. On 9th August the claimants' solicitors wrote back relating to the offer, refusing the offer of £44,000, saying they were prepared to accept £139,500 plus costs in full and final settlement. It will be borne in mind that by this stage their claim was in round terms £140,000 plus interest plus costs, so they were not offering much of a discount. It is suggested that the interest by this time might have been some £15,000.

33. The defendants' solicitors took instructions on 16th August and on 22nd August the defendants' solicitors wrote again, saying, *"Our clients are also prepared to consider mediation and we shall provide you with a list of possible mediators shortly".*

    On the same date they wrote an open letter in which they also referred to mediation, *"As we have indicated previously, our client is prepared to consider alternative dispute resolution. Please confirm formally whether this is an avenue your client wishes to pursue".*

34. On 4th September there was an internal file note of Ms. Boldero, having been speaking to Mr. Fielding of Burnden Group, in which she noted at the bottom line, *"He does want to take the matter to mediation on that basis but would wish to avoid the cost of having to respond to the request for further information. Agreed, therefore, I will speak to Campbell Hooper to obtain clarification of their formal position".*

35. The following day Campbell Hooper wrote to the defendants' 35 solicitors: *"We have invited you to discuss this matter on the telephone so the respective individuals for the conduct of this matter can exchange information with a view to narrowing the issues and hope that settlement can be reached. You appear to refuse to do so, opting instead to incur further costs through disclosure. This is contrary to the overriding objectives. We look forward to receiving your list of possible mediators so we may consider the same with our client".*

36. On the following day there was an exchange of e-mails between the claimants' solicitors and the lay client, the last e-mail of which to the lay client's representative says this, *"Dear Stuart,*
"The current position in this matter in relation to offers is that Burnden have rejected our offer of settlement and despite offering to have further discussions with their lawyer on the telephone they have chosen to reject this suggestion. The next stage in the proceedings is a directions appointment to enable the court to decide how the matter should proceed".

37. On 7th September the defendants' solicitors wrote to the claimants' solicitors saying, amongst other things, *"We have obtained details of the standard mediation fee structure from CEDR's website and enclose a copy for your consideration".*

    They then included a long download from CEDR's website dated March 2001. But that day, 7th September, CEDR wrote to Ms. Boldero enclosing a list of four mediators whose biographies were enclosed who the writer (the dispute resolution adviser at CEDR Sol) thought most closely met the specification. Regrettably, despite the letter of 5th September in which Campbell Hooper said they looked forward to receiving a list of possible mediators so that they could consider the same, that list was never forwarded to the claimants.

38. On 6th November, some couple of months later, the defendants' 28 further information (it used to be called "further and better particulars") were served and on 12th December the claimants' solicitors wrote, *"Mr. Fielding has said he would like to agree a settlement without this matter proceeding to court [that is Mr. Fielding of Burnden who had apparently spoken directly to a Mr. Esa Makela of the claimants' parent company]. Our clients are prepared to consider any sensible proposal which your client has for settlement but for the benefit of doubt, any offer of settlement made by your client should be on sensible lines and not along the lines of the proposals which have been made thus far by your clients. We look forward to hearing from you".*

39. On 13th December they wrote again, *"Before any further costs are incurred in this matter you should be confirming whether or not your clients are in fact serious about settlement or not. If the comments concerning the settlement are merely some form of tactic on the part of your clients we would hope that you would be advising us accordingly".*

40. On 18th December the defendants' solicitors wrote, *"We confirm that during our telephone conversation on 17th December we informed you that our client was prepared to agree to the payment to your client of the monies previously paid into court pursuant to CPR Part 36, together with all accrued interest in full and final settlement of your client's claim and our client's counterclaim and on the basis that each party bears their own costs. We write to record your indication that such offer was not acceptable to your client and to put you on notice we reserve the right to refer to this letter in due course when costs are considered".*

    So effectively in December the defendants went back to the offer they had made shortly before proceedings were issued but from which they had resiled earlier on in the year.

41. On 21st December a letter was written directly to Mr. Esa Makela by Mr. Fielding, as Managing Director of Burnden, making an offer, and on 14th January the claimants' solicitors sent a copy of that letter, having received it from Mr. Makela in Finland, to the defendants' solicitors. That letter concluded, *"The position in relation to settlement has and remains the case that if your clients wish to make sensible proposals for settlement they should feel free to do so but we are instructed to request that they should cease proposing offers of settlement which they have previously made and are nowhere near the level of settlement which our clients can even begin to entertain let alone consider with any degree of seriousness".*

42. On 16th January Ms. Boldero wrote to Mr. Fielding [that is to the Managing Director of Burden], *"Corenso certainly appear to be adopting an intransigent position which is at odds with their failure to take proactive steps to pursue the matter through the courts. I still think that mediation could assist the parties to resolve the matter, failing which I think we should be taking the lead to push the matter on to trial. Perhaps you would give me a call to discuss this".*

    Nothing thereafter happened. So the inevitable inference is that if there was a call, Mr. Fielding certainly was not saying, "*Yes, go ahead, ask the other side to do something about mediation".*

43. The next entry that was disclosed was 13th June of that year,when Mr. Gourri spoke to Ms. Teal at the defendants' solicitors. Her attendance note contains this passage, *"He stated on a without prejudice basis that he has done a report to his clients in relation to future costs of progressing this matter forward. He stated his client therefore wishes to propose a commercial offer of settlement. This was on the basis that they believe they have a very good chance of success. He therefore intends to put forward a Part 36 offer. Corenso will accept £100,000 plus costs. I asked what Corenso's costs amounted to and he informed me they are £40,000. He said this would of course be subject to detailed assessment".*

44. In September 2002 a new figure appeared on the scene. He was Mr. Howard Roche of Helix. He describes himself as being a "partner in Helix Agencies which carries on the business of commercial research and business services", and he has the Burnden Group as one of his clients. He was approached by Mr. Fielding to see whether he could act as an intermediary and tried to broker some form of settlement. He clearly was not independent but, equally, he was someone who was being produced by Mr. Fielding, without knowledge of his solicitors, in an attempt to act as an honest broker and to resolve difference between the two parties. There was a meeting at the premises of Corenso [I say the premises of Corenso but I may be wrong, it may have been at the premises of Burnden, but at one or other's premises] at which Mr. Gourri happened also to be present. A good deal of heat and precious little light was engendered over what went on at that meeting. But nothing was resolved and because the Burnden Group had left their solicitors out of the loop, that in its turn produced some fairly vituperative correspondence between the respective solicitors; the defendants' solicitors taking the view that the subject of sharp practice by the claimants' solicitors in effect going direct to their client and their client's agent rather than going through them. I do not think any purpose is served by going through the issue of whether or not there was technically some sort of breach of the rules by the claimant's solicitors. The claimants' solicitors took the view that Mr. Roche was an independent consultant acting on behalf of the defendants. The defendants' solicitors took a rather different view of the matter.

45. Eventually the dust to some extent settled. On 17th September the defendants' solicitors wrote, *"We understand from our client that during without prejudice discussions between Mr. Fielding and Mr. Gibson our client made an offer to pay your clients the total sum of £100,000 in full and final settlement of your client's claims and our client's counterclaims and on the basis that all parties should bear their own costs. The offer was subject to*

your client's agreement to the payment to our client the monies currently held in court. The purpose of this letter is to record the fact the above-mentioned offer has been made and it has been rejected by your clients".

46. On 2nd October there was, I think, a case management conference -- it is described in the attendance note as 12 *"conference"* -- which concludes the note in these terms, *"Therefore, having a discussion with Peter Gourri in connection with settlements, Peter Gourri stated that his clients are adamant that our case is a complete fabrication in relation to our counterclaim. They are, however, likely to go away for £140,000 all-in despite counsel and his advice that Corenso have a very good case".*

47. On 1st November there was an exchange of e-mails between Ms. Boldero and Mr. Gourri, who was at that time ill at home. Mr. Gourri said that he had had some constructive feedback from his client and wanted to discuss it further on Monday, and Ms. Boldero said that she looked forward to hearing him on the Monday.

48. On 8th November -- and I do not know what happened on the Monday (it does not appear) -- Ms. Boldero (and this is where mediation comes to the fore again) notes, *"We would like to repeat the confirmation we have given on a number of occasions that our client would be agreeable to a mediation in this matter, having regard to the fact that costs of pursuing this action and trial are likely to be disproportionate in the context of the amounts at issue".*

49. On 12th November Mr. Gibson of Corenso sent an internal letter to Mr. Gourri, *"Hi, Peter. Thanks for this, bearing in mind your and our discussion with their lawyers, Mr. Howard Roche and my meeting with Gary Fielding when we all tried to reach a compromise, final offer from him was £100,000. Now they know for definite we will go into court do you think they may well now wish seriously to settle? Is it worth one last shot before we all go down a route they perhaps do not wish to go down?"*

50. On 13th November the claimants' solicitors wrote to the defendants' solicitors without prejudice, *"Our clients are open to having further discussion concerning this matter but not convinced that mediation is the right forum. They take the view it is more sensible for the parties to simply meet with their respective lawyers in the hope of reaching some form of arrangement, failing which the matter will proceed to trial".*

51. So the position there is that the claimants are saying, *"We don't think mediation is the right form of ADR but what about further negotiation?".* The response to that was on 14th November from the defendants' solicitors, *"Our client considers that mediation may assist with the negotiation of a settlement but is, nevertheless, prepared to meet with lawyers on a without prejudice basis. Would you please inform us of whom it is intended will attend the meeting on your client's behalf and also provide us with some suggested dates at the beginning of December".*

52. Then on the 15th Mr. Gibson communicated again with Mr. Gourri by e-mail: *"Howard Roche called me in the car yesterday to say Gary Fielding has received the hearing date and thinks it is crazy for both parties to continue although he knows we have a strong case and in turn secure our money. At this end he has asked to met him and Howard next Thursday, 21st November to see if we can resolve the issue without going into court. First offer was £64,000, second offer, £100,000, third offer query. I explained we are willing to settle but at the appropriate price and said even if we did not reach agreement next Thursday it is always 'good to talk'. Will let you know the outcome and will try to phone you or Gourri during the meeting if a suitable offer is made to see if we could accept."*

53. On 21st November the defendants' solicitors wrote a letter which contained the final paragraph, *"If your clients are not prepared to proceed by way of mediation then please would you provide us details of their reasons."*

54. On 27th November there was a response to the letter of 14th November and the claimants' solicitors said that Mr. Gibson will attend the meeting and he was fully empowered to provide any information. They have referred to the fact that the meeting of the 21st had been called off and asked, *"Are your clients actually serious about without prejudice negotiations. Until we know the position there is no point in giving you a date".*

    It will be noted that neither then, nor in any subsequent letter, did the claimants' solicitors provide the details that they had been asked for as to the reason why their client was not prepared to proceed by way of mediation.

55. On 27th November there was a further letter about the aborted meeting and whether it was worth having another meeting, and nothing further then happened, so far as negotiation is concerned, until on 12th February the defendants' solicitors wrote, *"Firstly, we note you have not responded to our latest suggestion that the parties resort to mediation. Please respond by return"*.

56. On 26th February they wrote again: *"Firstly, we note that once again you have failed to give us an answer to our question of whether you are prepared to enter into mediation. We expect a response to our repeated suggestions in this regard in your next letter to us, failing which we shall assume a response in the negative. We should remind you the proposal the parties resolve their differences by mediation originally came from the court and as such we shall mention your silence on this issue to the court when the matter of costs is considered."*

I am not entirely clear where that suggestion of mediation coming from the court is supposed to have originated; supposedly on some interlocutory hearing.

57. There was then a lengthy complaint about disclosure. Following that, there was still further matters about disclosure. There was then, a hearing relating to disclosure, as a result of which the claimants' application for further disclosure was dismissed, the defendants were granted some further disclosure, part of which, it emerged, were some records from the Corenso French factory which the defendants say demonstrated the goods that were being supplied from that factory were substandard. Slightly surprisingly, that disclosure, which it was said by the defendants strengthened their hand, resulted in them upping their Part 36 offer, and on 19th June the increase to £90,000 was in fact made. Whilst this was going on there had been instruction of a single joint expert who had had a meeting between the parties and prepared a first draft report, which happily, although it is before me, I need not go into.

58. What emerges from all of that? Firstly, that it is impossible to say that either party was at fault in dealing with the methods of ADR suggested or used until a fairly late stage. The initial suggestions had rather run into the sand. It was clear, it seems to me, that no blame can be attached to either claimant or defendant for any failure to enter into mediation, until certainly the middle of 2002. In particular I should note that the defendants' solicitor had promised that a list of potential mediators had received such a list from CEDR but had failed to pass it on, and, further, that she appears to have raised the matter again as to the possibility of mediation with her client in January 2002 but, so far as the material before me goes, did not, at least by June 2002, have any instructions which enabled her to go back and suggest that mediation should take place. In the meantime, there had been attempts at negotiation and, really, it was only at a late stage that any serious and persistent attempts were made on behalf of the defendant to persuade the claimants that mediation was the appropriate way forward. The starting point of that last push, if I can put it that way, was 8th November of 2002.

59. The response to that, on 13th November, was that the claimants were open to further discussions but were not convinced that mediation was the right forum, though they never provided details of why they did not think that mediation was not the right forum. That, however, does not seem to have prevented attempts being made to dispose of the matter and, indeed, it is noticeable that eventually the matter was disposed of by an offer made (by Part 36) and a further payment into court, which did deal with the matter. In contradistinction, therefore, to other cases, what happened in this instance, at worst, from the claimants' point of view, was that the defendant was unable to settle until a rather later date because of failure to mediate. I take the view that the suggestion that further payment into court was in some way prompted by the further discovery is a complete red herring. I can see no sensible basis on which it can be said that further payment into court, increasing an offer, was a result of the further disclosure which, according to the defendants, strengthened their hand. In my view, therefore, the position was simply this, that the defendants, rather late in the day, decided that they would make some substantially more realistic offer.

60. Should the claimants in those circumstances be penalised in costs because they did not agree to a mediation, and put in place a mediation, sometime in the period beginning at the earliest in mid-November of last year? In my judgment, they should not. It was clear that the parties were capable of negotiating between themselves. It is clear that the parties between themselves were prepared to attempt to resolve the matter without going to court. As I said earlier in this judgment, ADR is not synonymous with mediation. The requirement on parties is to attempt to resolve their differences without resorting to

court by alternative dispute resolution. In some cases the only available way may be mediation. In other cases, it may well be that negotiation, or attempts to use honest broker, may be equally appropriate .So long as parties are showing a genuine and constructive willingness to resolve the issues between them, it does not seem to me that a party will be automatically penalised because that party has not gone along with a particular form of alternative dispute resolution proposed by the other side. It is in any event a matter of speculation as to whether or not a mediator would have achieved any better or quicker result, or would have talked the defendants into making the offer which they did eventually make at an earlier stage. This was not a case such as the **Dunnett** case where there was an absolute refusal to negotiate, or equally, for that matter, the **Leeming** case, in which there was an absolute refusal to negotiate but it was held to be justified.

61. In my view, this was a case in which essentially the claimants have succeeded, the defendants have abandoned their very substantial counterclaim and there are no good reasons why the basic rule should not apply or why the claimants should be deprived of their costs. Nothing occurred in the lengthy build-up to the trial at any time from the issue of the counterclaim onwards which should have affected the Burnden Group's view as to the appropriate amount to pay in. Had they paid in rather earlier, the claimants would have been entitled to their costs as of right. There is nothing that has happened, in my view, in this case which takes this case outside the ordinary run of cases where a winner should obtain his costs, and I therefore propose to order that the defendants pay the claimants their costs of the action on the standard basis. So far as the applications for disclosure are concerned, insofar as those have been reserved, but it seems to me that those were both applications on which the defendants succeeded. In the one instance it got disclosure it had asked for and was held to be entitled to. In the other, it resisted an application for disclosure, which was unjustified, and I therefore propose, subject to any further submissions on that point that either party may wish to make, because I have not heard any detailed argument about it, that the claimants should pay the defendants' costs which were reserved on one of those two summonses, to be set off against the costs of the action. I will say a detailed assessment.

MR. F. MOERAN (instructed by Messrs. Campbell Hooper) appeared on behalf of the Claimant. 40 41

MR. S. COGLEY (instructed by Messrs. Addleshaw Goddard) appeared on behalf of the Defendant. 42 43 44