Re Midland Linen Services Limited, Chaudhry v Yap [2004] ADR.L.R. 10/28

Judgment : Mr Leslie Kosmin QC (Sitting as a Deputy Judge of the High Court) Ch.Div. 28th October 2004.

1 The hearing of this matter, which has lasted almost a day and a half, has dealt solely with the question of costs. This was to be the hearing of a petition under s.459 of the Companies Act 1985, brought by the petitioner, Mr Nisar Chaudhry, in his capacity as a minority shareholder in Midland Linen Services Limited, the third respondent ("the Company").

2 Mr Chaudhry was at all material times from 1985 a director and one-third shareholder of the Company. He claims in the petition that the Company was a quasi partnership from which he was expelled by his removal as a director on 22nd October 2001. Following his removal, Mr Chaudhry began proceedings for unfair dismissal in the employment tribunal. Those proceedings were settled on 10th September 2002, when the Company agreed to pay him the sum of £40,000 in compensation by instalments. On 5th September 2003 the petition was issued on behalf of Mr Chaudhry. Following several applications for directions, the trial window of the hearing of the petition was fixed to begin on 20th October 2004.

3 On 23rd August 2004 the respondents made a CPR Part 36 payment into court of £60,000 in full and final settlement of the petitioner's claim. On 7th October 2004 the respondents increased this sum by £20,000, to £80,000. On Friday 15th October Mr Chaudhry's solicitors indicated on his behalf that he wished to accept the £80,000. Since the timing of this payment was less than 21 days before the trial date, the petitioner cannot accept it without the permission of the court and, in the absence of agreement as to the costs, there is no automatic provision for the payment of the costs.

4 The situation is governed by CPR 36.11(2). I shall read 36.11(1) to put it in proper context:

"(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."

It states: *"(Rule 36.13 sets out the costs consequences of accepting a defendant's offer or payment without needing the permission of the court)*

(2) If—

(a) a defendant's 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) ...

(ii) 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."

36.11(3) provides: *"Where the permission of the court is needed under paragraph (2) the court will, if it gives permission, make an order as to costs."*

5 I should also mention in this context the provisions of the practice direction, for the sake of completeness, 36 PD7.1: *"The times for accepting a Part 36 offer or a Part 36 payment are set out in rules 36.11 and 36.12.*

7.2 The general rule is that a Part 36 offer or Part 36 payment made more than 21 days before the start of the trial may be accepted within 21 days after it was made without the permission of the court. The costs consequences set out in rules 36.13 and 36.14 will then come into effect.

7.3 A Part 36 offer or Part 36 payment made less than 21 days before the start of the trial cannot be accepted without the permission of the court unless the parties agree what the costs consequences of acceptance will be.

7.4 The permission of the court may be sought:

(1) before the start of the trial, by making an application in accordance with Part 23, and

(2) after the start of the trial, by making an application to the trial judge.

7.5 If the court gives permission it will make an order dealing with costs and may order that, in the circumstances, the costs consequences set out in rules 36.13 and 36.14 will apply."

6 The respondents, represented in this case by Miss Helen Evans of counsel, have no objection in principle to the petitioner accepting the payment into court of £80,000. However, when it comes to the court making the order as to the costs under 36.11(3), the respondents contend that the petitioner should be deprived of all or part of his costs from the end of January 2004 for three main reasons.

(1) The petitioner rejected an alleged oral offer made on 10th September 2002, at the time of the settlement of the employment tribunal proceedings, which amounted, in effect, to an offer of £80,000 for his shares (which is the figure that he has now only recently accepted).

(2) The petitioner consistently rejected the respondents' offers to mediate or hold settlement negotiations, in particular in the period after late January 2004. At a hearing on 31st January Mr Registrar Simmonds said to the parties' counsel that this was a case where perhaps mediation would provide a solution.

(3) The petitioner should be deprived of his costs of a hearing on 9th August 2004 before Lightman J concerning the appointment of valuation experts, which costs were reserved by Lightman J to the trial judge.

7 This issue of costs is the only live issue remaining in the case. It is a matter of regret that the argument over costs has taken a day and a half before the court, required a mass of evidence, and involved both instructing solicitors having to give oral evidence. Section 459 petitions are notoriously expensive for the parties, and this case is typical of those involving a private company where costs have escalated. I have been told that to recover the amount of the payment into court of £80,000 the petitioner has had to expend on these proceedings some £60,000 in costs.

8 Mr Chaudhry contends that the costs order should be the normal order consequent upon accepting a Part 36 payment within good time; namely, that the respondents should pay the petitioner's costs, to be assessed on the standard basis, if not agreed, as provided for in CPR 36.13. It is to be noted that if the respondents' Part 36 payment had been made more than 21 days before the start of the trial, and accepted (as would have been the case with the offer of the £60,000 on 23rd August 2004, to which I shall refer below), there would have been no scope for arguing that a different order for costs should apply. It is only because the payment was made within 21 days of the start of the trial that it is necessary for the court to grant permission for the offer to be accepted, and the court has a discretion as to the order for costs.

9 There are relatively few authorities dealing with the exercise by the court of the discretion under CPR 36.11(3). The first appears to have been a decision at first instance of the Vice Chancellor in **Demite Limited v Hanmer Webb-Peploe & Others**, given on 19th October 2000. Counsel have been unable to trace a transcript of that decision, but I have been referred to the passage quoted in paragraph 8 of the judgment of His Honour Judge Robert Reid QC in **Korenzo UK Limited v The Burnden Group plc** [2003] EWHC 1805 (QB), a transcript for which is dated 1st July 2003. In **Demite** the Vice Chancellor said at page 13: *"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 prospect 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 offer by Demite to settle its own claim so that, if it had been made earlier, it would have carried the costs under CPR 36.40. 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."*

A little further on the Vice Chancellor 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 counterclaim. I have come to the conclusion that, in the exercise of my discretion, I should order Demite to pay the defendant's 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."*

10 His Honour Judge Reid at paragraph 9 of his judgment in Korenzo then said this: *"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 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."

11 Judge Reid had cited, in an earlier passage of his judgment, the provisions of CPR 44.3(2), which states:

"(2) If the court decides to make an order about costs—

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

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

12 I have also been shown by Mr Bruce Gardiner, who appears for the petitioner on this matter, a transcript of the judgment of the Court of Appeal in the **Demite** case on the application for permission to appeal. That citation number is [2001] EWCA Civ 106. At paragraph 13 of his judgment, Keene LJ stated (in the part that is relevant*): "As to the point particularly pressed by Mr Lord this morning, it does not seem to me that the Vice Chancellor needed to be in a position to deal with the totality of the merits of the case, so far as the substance of the claims was concerned. In a situation where offers of this kind have been made and are being accepted, the court is principally concerned with the procedural situation. He was entitled to look at the offer and the circumstances surrounding it and to the conduct of both parties, which is what he did. I can see no error in principle in the Vice Chancellor's approach, nor any basic unfairness which results therefrom."*

13 Mr Gardiner suggests, on the basis of these authorities, that when exercising the discretion under Part 36.11(3) the court should not look at the general conduct of the litigation and the other factors referred to in CPR 44.3, but should confine itself to, or at least concentrate on, the offer and the circumstances surrounding its production.

14 Miss Evans, on behalf of the respondents, urges me to take a wider view. She points out that in his judgment in Korenzo His Honour Judge Reid did not confine himself in the way Mr Gardiner suggests. In paragraph 4 he cites Part 44.3(2), as I have mentioned, and the general principle that the loser should pay the winner's costs. He then goes on to address the conduct of the parties in that case and, in particular, their willingness to participate in mediation.

15 I agree with Miss Evans' approach. In my view the court has a wide discretion under Part 36.11(3). In exercising that discretion it must endeavour to come to a determination which is fair and just in all the circumstances. It must obviously pay particular regard to the circumstances in which the offer was made and accepted, i.e. late in the day, but it is not disbarred from considering more general matters such as the willingness or otherwise of the parties to resolve the dispute by mediation or negotiation. In my view, Part 44.3 is for general application whenever the court is exercising its discretion as to costs. The passage in parenthesis in sub-paragraph 5 of Part 44.3 cross-refers to the further provisions of Part 36.

16 Regard must also be had, as I have mentioned, to paragraph 7.5 of the Part 36 practice direction, which states that the court may order in the circumstances the costs consequences set out in Rules 36.13 and 36.14. In my view, that is an indication, but no more than that, that the court has a discretion to provide the claimant with the same entitlement to his costs up to the date of acceptance of the payment in, as it would have done if the payment had been made and accepted within proper time.

17 Mr Gardiner argues that the normal costs consequences of a Part 36 payment set out in 36.13, namely that the accepting party should receive his costs up to the date of acceptance, should apply in this case unless there is good reason to depart from those principles. In my view, the rule is not so worded and there is no presumption one way or the other. The court must examine all the relevant circumstances,

including the conduct of the parties in the course of the litigation, in order to reach a fair and just result.

18 I will now attempt to apply this approach to the facts of this case.

19 By reference to a schedule prepared by his solicitor, Mr Jervis, Mr Gardiner has explained the history of the various settlement offers made in this case. The first was an offer made on 22nd March 2002 of £40,000 for the petitioner's shares. On 9th September 2002 counsel for the respondents put forward what was described as a global offer covering both the petitioner's employment claim and his claim in respect of his shares. That was said to be of £100,000. There is a dispute between the parties' solicitors as to whether, on 10th September 2004, the date of the tribunal hearing, this oral offer was raised to £120,000, or whether it remained at £100,000. The petitioner accepted £40,000 that day for his employment claim. This is not an issue I can resolve. The discussions were between counsel then instructed. Neither has provided any evidence, not surprisingly. Moreover, in fact it is not necessary, in my view, to resolve this dispute, because, on 13th September (barely three days later), Mr Jaffa, the respondents' solicitor, reduced the offer for the shares to £60,000 rather than the net figure of £80,000 in the alleged oral offer. Furthermore, by a letter dated 16th September, Mr Jaffa withdrew even that reduced offer. Thereafter, there was no offer on the table for consideration by the petitioner until a new offer of £36,000 was made by the respondents by a letter from their solicitors dated 25th July 2003. That did not offer anything for the petitioner's costs or give a timescale for payment. Not surprisingly, that offer, which was £44,000 below the alleged offer made on 10th September 2002, was not accepted.

20 The petition was presented on 5th September 2003. The next offer was made on 3rd October. That was £45,000 for the shares, to be paid within six months. On 7th October 2003 there took place the first directions hearing in the petition. At that hearing, a previous arrangement between the parties to appoint an independent chartered accountant to advise them as to the value of the company and the petitioner's shares was enshrined in the court order. The accountant, Mr Pym, whose appointment had been held up for months over disagreements as to his fees, was appointed the joint expert for the purposes of the proceedings.

21 On 31st October the respondents increased their offer to £50,000 plus reasonable costs. On 11th December 2003, Mr Pym delivered his report as joint expert. He arrived at values for the petitioner's shares of £115,000 and £ 130,000 as at the two key dates for valuation. These figures alarmed the respondent, who sought alternative professional advice on Mr Pym's report. That advice from another reputable firm of accountants, Howarth Clark Whitehall, queries Mr Pym's figures and his reasoning. A previous valuation obtained from the company's auditors in May 2003 had come up with figures of £85,000 to £ 130,000 as the value for the whole company.

22 On 4th May 2004 the petitioner made his only settlement proposal of £ 125,000 for his shares, no doubt influenced by Mr Pym's report. That was rejected by the respondents. On 21st June 2004 they made a new offer to pay £ 60,000, but this was inclusive of costs, the amount payable within three months.

23 On 23rd August the respondents made their first payment into court of £ 60,000. On 30th September their solicitor, Mr Jaffa, in a discussion with Miss Michelle Davies of the petitioner's solicitors, put the petitioner on notice that there would be a further offer. That was announced in a letter dated 6th October 2004 from Mr Jaffa. On 7th October 2004 the final offer of £80,000 was paid into court. It is that offer that was accepted on 15th October by the petitioner.

24 I now turn to Mr Gardiner's submissions in support of the proposition that the petitioner should receive the costs of the proceedings.

25 Mr Gardiner argues, on the basis of witness statements and in fact oral evidence that has been given, that there was an oral agreement between the parties' solicitors in a conversation between Miss Davies and Mr Jaffa on 7th October 2004. It is claimed on behalf of the petitioner that on that date the parties in effect agreed that the respondents were liable for the costs of the proceedings under Part 36.11(2)(b)(i). Mr Gardiner relies on an attendance note of his solicitor, Miss Davies, who gave oral evidence on this matter when I pointed out to Mr Gardiner that I could not resolve this dispute on

witness statements alone. Miss Davies' attendance note was prepared on the day of her discussion with Mr Jaffa. It purports to record the gist of their conversation and it is backed up by her contemporaneous manuscript note, which I have seen. Much of the attendance note is uncontroversial. However, it contains the following key passage, which is in dispute. The third paragraph reads: *"By way of an aside, Mr Jaffa explained the draft accounts for 2004 would shortly be available. The company's state is very dire. That would put matters in perspective. His client had put a lot in to keep the business afloat. MRD [Miss Davies] had some concern about that given that the Part 36 Payment In automatically entitled our clients to a payment of their costs to be assessed if not agreed. Presumably Mr Jaffa had informed his client of that? Mr Jaffa confirmed that he had. He understood that our costs were not inconsiderable."*

There is then a subsequent passage on the second page of the note. Referring to Mr Jaffa it reads: *"He continued by saying his client does want to settle. However, they would not go any further than the monies paid in to settle. Those were the terms. He confirmed his clients are anxious in relation to the costs if the payment was accepted, but it was the lesser of two evils. They either went to trial and took the risk of even bigger costs or just took it on the chin. There were risks for both. It was a no win situation for his client as they had had problems with their marriage and money problems due to this matter."*

26 It is frankly accepted by Miss Davies that, until recently, she was under the misapprehension that the inevitable consequence of acceptance by the petitioner of a Part 36 payment was that he would receive his costs from the respondent regardless of timing. She did not appreciate that, pursuant to Rule 36.11, the costs would be at the discretion of the court. In my view, that misunderstanding unquestionably coloured her recollection of her discussion with Mr Jaffa, who was also cross-examined on this issue by Miss Evans for the respondents.

27 Having seen both witnesses, whom I am certain gave evidence to the best of their recollection, I am in no doubt that there was no agreement reached with them as to the liability for costs. They were entirely at cross-purposes on the issue of the entitlement to costs under Part 36.11. Mr Jaffa made the point that he had no instructions to agree anything. Unlike Miss Davies, it was not suggested to him that he had misunderstood the rule. Indeed, having seen him in the witness box, I very much doubt that that was the case. His recollection is that the discussion was very general, with his expressing concern about the escalating costs and the possible inability of his clients to pay them. He was convinced that nothing was said that could constitute an agreement as to costs. I accept this evidence and I find that Miss Davies unfortunately misunderstood what had been said, her misunderstanding having been derived from her ignorance of the effect of Rule 36.11.

28 That Miss Davies is mistaken is supported by the terms of a letter sent by her principal, Mr Jervis, on 15th October 2004. The relevant part of that letter states as follows: *"We refer to our Miss Davies' telephone conversation with you of yesterday.*
We confirm that our client accepts the two Part 36 offers made by your clients totalling £80,000. We will contact you separately in relation to agreeing the rate and amount of interest on the Part 36 payments along with the level of our costs. If we are unable to agree these elements with you, then plainly we will have to make an application to the court (given that we are less than 21 days before trial) for the monies to be released from court and for our client's costs to be assessed."

29 In my view, the wording of that letter belies the suggestion that there had been an agreement that the respondents would pay the petitioner's costs in any event. Miss Davies says that she was very surprised when the respondents told her of their intention to dispute the costs. I am sure that that is true, but that was as a result of her own misunderstanding of what had been said by Mr Jaffa rather than through any change of stance on the respondents' part.

30 Accordingly, I reject Mr Gardiner's first submission on behalf of the petitioner.

31 I now turn to deal with the other matters which have been at the centre of counsels' submissions. These are points that largely have been put forward by Miss Evans on behalf of the respondents to justify a withholding of costs to the petitioner, but I will deal with them issue by issue.

32 Firstly, the lack of mediation and the unwillingness to mediate. It is common ground between the parties that an unreasonable refusal to mediate or negotiate is a factor that the court may take into account when deciding whether a successful party should be deprived of all or part of its costs. For the avoidance of doubt, I wish to make it clear that in this case there can be no doubt but that the petitioner is the successful party in these proceedings. He has obtained what he desired from the beginning, which is the purchase of his shares at a price which is acceptable to him.

33 The law on the question of the impact of a refusal to mediate has been the subject of a recent decision of the Court of Appeal in **Halsey v Milton Keynes General NHS Trust** [2004] EWCA Civ 576. Dyson LJ, giving the judgment of the court, pointed out in paragraph 2 of the judgment that there seemed to be some uncertainty as to the approach that should be adopted in answering the question as to whether the court should impose a cost sanction against a successful litigant where it can be shown that he had refused to take part in an alternative dispute resolution. Dyson LJ began his judgment by referring to the general encouragement for the use of ADR that is contained both within Lord Woolf's Report on Access to Justice and in the Civil Procedure Rules at CPR 1.4(1). At paragraph 9, having referred to earlier authorities, Dyson LJ said this: *"We heard argument on the question whether the court has power to order parties to submit their disputes to mediation against their will. It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court."*

It is clear from that passage and what follows that there is no power in the court to order parties who are unwilling to mediate to mediate.

34 On the issue of costs Dyson LJ cited the provisions of CPR 44.3(2) as to the general rule that the unsuccessful party will be ordered to pay the costs of the successful party. He also cited CPR 44.3(4), that: *"In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including (a) the conduct of the parties".*

He said*: "Rule 44.3(5) provides that the conduct of the parties includes '(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol."'*

35 At paragraph 13 the judgment states: *"In deciding whether to deprive a successful party of some or all of his costs on the grounds that he has refused to agree to ADR, it must be borne in mind that such an order is an exception to the general rule that costs should follow the event. In our view, the burden is on the unsuccessful party to show why there should be a departure from the general rule. The fundamental principle is that such departure is not justified unless it is shown (the burden being on the unsuccessful party) that the successful party acted unreasonably in refusing to agree to ADR. We shall endeavour in this judgment to provide some guidance as to the factors that should be considered by the court in deciding whether a refusal to agree to ADR is unreasonable."*

36 At paragraph 15 the judgment recognises that mediation has a number of advantages over the court process, being less expensive and it being open to the parties to agree a wider range of issues.

37 At paragraph 16 the judgment states: *"In deciding whether a party has acted unreasonably in refusing ADR, these considerations should be borne in mind. But we accept the submission made by the Law Society that mediation and other ADR processes do not offer a panacea, and can have disadvantages as well as advantages: they are not appropriate for every case. We do not, therefore, accept the submission made on behalf of the Civil Mediation Council that there should be a presumption in favour of mediation. The question whether a party has acted unreasonably in refusing ADR must be determined having regard to all the circumstances of the particular case. We accept the submission of the Law Society that factors which may be relevant to the question whether a party has unreasonably refused ADR will include (but are not limited to) the following: (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success."*

38 The judgment of the court thereafter examined each of these points in turn. On the key issue of whether the mediation had a reasonable prospect of success, at paragraph 27 Dyson LJ points out that:

"... sometimes it may be difficult for the court to decide whether the mediation would have had a reasonable prospect of success."

At paragraph 28 he states: *"The burden should not be on the refusing party to satisfy the court that mediation had no reasonable prospect of success. As we have already stated, the fundamental question is whether it has been shown by the unsuccessful party that the successful party unreasonably refused to agree to mediation. The question whether there was a reasonable prospect that a mediation would have been successful is but one of a number of potentially relevant factors which may need to be considered in determining the answer to that fundamental question. Since the burden of proving an unreasonable refusal is on the unsuccessful party, we see no reason why the burden of proof should lie on the successful party to show that mediation did not have any reasonable prospect of success. In most cases it would not be possible for the successful party to prove that a mediation had no reasonable prospect of success. In our judgment, it would not be right to stigmatise as unreasonable a refusal by the successful party to agree to a mediation unless he showed that a mediation had no reasonable prospect of success. That would be to tip the scales too heavily against the right of a successful party to refuse a mediation and insist on an adjudication of the dispute by the court. It seems to us that a fairer balance is struck if the burden is placed on the unsuccessful party to show that there was a reasonable prospect that mediation would have been successful. This is not an unduly onerous burden to discharge: he does not have to prove that a mediation would in fact have succeeded. It is significantly easier for the unsuccessful party to prove that there was a reasonable prospect that a mediation would have succeeded than for the successful party to prove the contrary.*

39 Finally at paragraph 29 Dyson LJ points out: *"Where a successful party refuses to agree to ADR despite the court's encouragement, that is a factor which the court will take into account when deciding whether his refusal was unreasonable. The court's encouragement may take different forms. The stronger the encouragement, the easier it will be for the unsuccessful party to discharge the burden of showing that the successful party's refusal was unreasonable."*

40 The evidence in this case, which comprised two volumes of correspondence and four witness statements, has dealt in detail with the negotiations and discussions between the parties from the start of this dispute. It is contended on behalf of the respondents that the petitioner acted unreasonably in this matter in refusing to agree to mediation and, in particular, acted unreasonably in refusing to abide by a suggestion made by the Registrar at a hearing on 31st January 2004 that the case was suitable for mediation.

41 It would serve little purpose, in a judgment that is already over long, to refer to the minutiae of the correspondence over the period after the issue of the petition. Suffice it to say, it is clear that both sides were aware of the views of the learned Registrar at the January 31st 2004 hearing that they should consider mediation. What followed was this.

42 On 9th February Mr Jaffa's firm, Loynton & Co, wrote to Miss Davies' firm, Gateley Wareing, and pointed out that, as he understood it, counsel had informed him that the Registrar had put some emphasis on the fact that this was a case that should be considered appropriate for mediation, and said: *"We are certainly prepared to consider this with our clients subject obviously to the scope of that mediation."* (There is a minor and irrelevant typographical error in that letter.)

43 The reply from Gateley Wareing on 12th February in response to that was that it had been mentioned to them by their counsel that the topic of mediation had been raised by the Registrar and that they were happy to take their client's instructions on the issue, although they wished to point out that they had attempted to resolve the matter through correspondence and negotiations with the respondents over a considerable period of time and that it was only as a result of issuing the petition that the client had made any headway whatsoever in respect of the matter, and that their client would have to be convinced of the merits of entering into a mediation process with the respondents, if that was to go ahead.

44 The next important letter was one of the 6th April 2004, which was a lengthy eight-page letter written by Gateley Wareing to Loyntons, explaining why they could see that there was no prospect of a successful mediation and why they declined to go by that route. In previous letters of 10th March and

2nd April, Mr Jaffa had mentioned that the court in the case of **Shirayama v Danovo** [2003] EWHC 3306 had held that it had authority and jurisdiction to order a mediation to take place, even where only one party was in favour of mediation, and had indicated that the respondents might make an application to the court for such an order. The letter of 6th April is a reasoned response on behalf of the petitioner, explaining why they felt that that case did not apply and why it was not appropriate in this case to go down that route. The letter stated that it was the view of the petitioner's solicitors that the proposal of mediation was simply being thrown into the ring in a further attempt to delay matters and to prevaricate.

45 On 14th April 2004 Mr Jaffa responded on this issue, noting the comments of Gateley Wareing and stating as follows: *"We note your comments on mediation but find it hard to see what is so frightening in talking about the issues and problems with a view to resolve them. Mediation could take one of several forms. It could be a simple meeting with an independent chairman with just the solicitors present. It could clearly be formal and complex but our proposal is purely based on our wish to bring this case to an end speedily and at a minimum cost."*

46 It is to be noted that there were no precise or specific details of the proposed mediation put forward by Mr Jaffa.

47 Witness statements in the matter were due to be served on 16th April, and they were so served, at least by the petitioner. On 21st April Gateley Wareing again wrote another lengthy letter dealing with outstanding issues and, in particular, in paragraph 16, referred to the re-listed directions hearing that was due to take place two days later, on 23rd April. Gateley Wareing asked for details of the directions that would be sought. The final sentence of the letter said this: *"Can you let us have suggestions as to the directions that you believe are necessary, including those relating to mediation and how that will fit in with the directions to take this matter to trial."*

48 On 22nd April Loynton & Co responded to that letter but made no mention of proposed directions for mediation.

49 The hearing on 23rd April took place before Mr Registrar Jaques. His order is within the bundles. Suffice it to say, there is no reference on the face of the order to mediation, apparently because it was not raised by the respondents at that hearing and nor was the subject raised by the learned Registrar.

50 In the period that followed there were numerous disputes between the parties as to the selection of a valuer for the purposes of valuing the company's linen industry assets. The order of the learned Registrar provided in paragraph 5 that: *"The parties should agree the identity of one expert to be instructed on a joint basis to value the freehold property, laundry, machines and linen on or before 4th May 2004. If the parties reasonably agree that one expert would not have the expertise to value all such assets, the parties have permission to jointly instruct more than one expert. The reasonable fees of such experts to be paid by the respondents."*

51 Unfortunately, there followed an acrimonious series of correspondence between the solicitors, as the parties found it virtually impossible to agree the identity of the relevant expert. They did agree that there would have to be separate experts (i) for the freehold property and (ii) the laundry, machines and linen, but they could not agree on the identity of the experts.

52 This disagreement led to a hearing before Lightman J on 9th August 2004 in the Vacation Court, to which I will make further reference below.

53 On 21st July 2004 Loynton & Co raised for the next time the issue of mediation. They had made no application to the Registrar on 23rd April; they had made no specific proposals for the appointment of a particular mediator; they had not contacted CDER, or any other mediation organisation so far as I am aware; and they had not produced any nominated names. They had simply, time and again, raised the issue of mediation, but in fact had let it drop after the letter from Gateley Wareing of 21st April 2004. The letter of 21st July 2004 contains merely a passing reference to the issue of mediation in response to the argument over the valuer and Mr Jaffa's understandable concerns about the escalating legal costs.

54 However, I think it fair to conclude, on the basis of the material I have seen, that there was not a serious engagement in the process of mediation by the respondents to justify a finding, in accordance with the principles laid down by the Court of Appeal in Halsey, that the petitioner should in some way be deprived of his costs.

55 To summarise, for my part I do not consider that the respondents have shown that the petitioner acted unreasonably in refusing to agree to mediation in this case for the following reasons.

56 First, the respondents had not provided sufficient evidence of their intention to go down the route of mediation to the other side. They had not taken the necessary steps to start a mediation, and it is, therefore, unfair of them to place the blame for the failure to mediate entirely on the petitioner.

57 Secondly, there had been these repeated disputes over the appointment of independent experts. The first dispute had arisen over the appointment of the independent accountant, Mr Pym, and the payment of his fees. There had also been a dispute about the outcome of Mr Pym's report.

58 Thirdly, there had been a dispute over the appointment of the expert to value the laundry and linen aspects. When the petitioner had objected to the expert nominated by the respondents and quite fairly suggested that the parties asked the National Association of Valuers and Auctioneers to nominate a suitable party, the respondents objected. The final outcome, as I say, was the hearing before Lightman J.

59 Fourthly, the case is marked by a pattern on behalf of the respondents of making and withdrawing offers. The oral global offer of £120,000 allegedly made on 10th September 2002 was withdrawn within three days. The offer made by the respondents was as low as £36,000 in July 2003. That was hardly an incentive to the petitioner to negotiate. Whilst the offers did then increase after the presentation of the petition, firstly to £45,000 plus costs, then to £50,000 plus costs, that was the figure at which they stood at the time of the hearing before Mr Registrar Simmonds. These figures were still well below the previous proposals that had been made.

60 In my view, I doubt whether the atmosphere that had been generated between the parties would have enabled a successful mediation to take place. Whilst it is clear from the Court of Appeal's decision in Halsey that the burden is on the unsuccessful party to show there were reasonable prospects of success and that that is not an onerous one, there must be some firm basis for such a finding. In this case there is not. While the respondents had repeatedly stated their willingness to negotiate, their approach in negotiation was both inconsistent and uncertain. I would add that it was also apparent from the evidence of Mr Jervis that the respondents had failed to comply with several procedural directions for the conduct of the matter, which could only have added to the strain and costs of the petitioner in preparing for trial.

61 Accordingly, I do not consider that the respondents have met the test in Halsey on the basis of a failure to mediate.

62 In relation to the general issue of the discretion under Part 36.11(3), I would add that it is clear to me that it is only when the £80,000 was paid into court that a sum was provided that the petitioner found acceptable to meet his claim. In my view, it was open to the respondents at any time and well in advance of either 23rd August or 7th October to make a substantial payment into court under Part 36. They chose not to do so, but to leave things to the last minute. That was their choice. In addition, they chose not to make the offer to be bound by an independent valuation of the petitioner's shares that was the approach recommended by Lord Hoffman in the House of Lords in **O'Neill v Phillips** [1999] 1 WLR 1092, [1999] 2 All ER 961, and I refer in particular to the passages at 974H to 976A. Again that was their decision, but it hardly presents a case worthy of special consideration in relation to costs.

63 So in my view, exercising my discretion as best I can pursuant to Part 36.11(3), and having regard to all the relevant circumstances referred to in the affidavit evidence and in the submissions of counsel, I conclude that this is a case where the party accepting a payment into court, namely the petitioner, should be entitled to his costs of the proceedings from the time of the notice of acceptance. In my view, that is the only fair and just outcome in the circumstances of this case.

64 I turn now to the question and the separate issue of the hearing of 9th August 2004. A direction for the appointment of an independent expert had been made by Mr Registrar Jaques in his order of 23rd April 2004. That was to be achieved by 4th May. The squabble between the parties was most unfortunate. It prevented compliance with the court orders. There had been a substantial slippage in the timetable. Strictly speaking, the parties should have returned to court to get the timetable reviewed, but they did not. There is therefore some substance in Mr Gardiner's submission that the matter would have been brought back before the court in any event.

65 The outcome of the hearing before Lightman J was to permit the respondents to have, as their own expert, the gentleman whom they had nominated as a joint expert, and for the petitioner to seek an appointment through the mechanism of the National Association of Valuers and Auctioneers. Lightman J, in the context of a busy vacation list, reserved the question of costs to the trial judge. I see no reason to treat the orders of the hearing and of the documents filed in support of the hearing of 9th August any way differently from the rest of the case. In my view, it was incumbent on the parties to sensibly cooperate over the choice of a joint expert. The proposal put forward by the petitioner, namely to ask an independent body to make the nomination, was fair, reasonable and appropriate.

66 I therefore have no hesitation in treating the costs of 9th August 2004 as part of the general costs of the case, which I award to the petitioner.

67 Accordingly, I decline to make any order depriving the petitioner of any of his costs, whether since February 2004 or before, and I order that the costs of 9th August 2004 should be treated as part of the general costs of the petition, and those costs should be paid by the respondents on the standard basis.

Mr B Gardiner (instructed by Gateley Wareing) appeared on behalf of the Petitioner.
Miss H Evans (instructed by Loynton & Co) appeared on behalf of the Respondent.