CA on appeal from the High Court Chancery Division (The Hon Mr Justice Pumfrey) before Auld LJ, Rix LJ, Jacob LJ. 14th July 2004.

JUDGMENT : Lord Justice Jacob:

1 Following our judgment given on 3 March 2004 the parties were unable to agree the consequential order. The principal disagreement was on the question of costs but there were some minor disagreements on other points too.

The Minor Points

2. The first of these was whether the recital before the operative part of the Order should include a statement to the effect that the Court did not consider a reference to the ECJ necessary. Reed Employment wanted this, but I could not understand why. It is true that the question of whether an own-name defence could apply under Art. 6.1 entered into the debate, but in the end nothing turned on it. Neither side asked for a reference nor did we did rule on the question. I see no point in the recital. It could have no legal effect whatever.

3. Next there is the form of declaration. Reed Employment's proposal read as follows:
"That prior to 27th June 2000 the First and Second Defendants have by visibly using the word "reed" on Version 1 of the totaljobs.com website home page and visibly using the Reed Business Information logos containing the word "Reed" on Versions 3 and 4 of the totaljobs.com website home page:
(i) infringed Registered Trade Mark number 1296450: and
(ii) passed off the totaljobs business and services as and for those of the Claimants and the companies represented by the First Claimant herein."

4. There were two differences in RBI's counter proposal. First the word "visibly" was not in it, and secondly it included the words "but not otherwise". Mr Howe accepted that the addition of "visibly" was appropriate. As regards "but not otherwise" the difference between the parties was not great. Mr Hobbs submitted that the words suggested that the Court had considered some other matter when it had not done so. Mr Howe did not press his point greatly. I think it is appropriate to leave the words out. The order should simply specify the manners in which there was infringement. It need not go on to deal with those that do not.

5. The third point related to the terms of a stay pending attempts to settle by alternative dispute resolution ("ADR"). It was not in dispute that there should be such a stay. The dispute was as to the scope of any proposed ADR. The present case is only one of a number of proceedings between the parties concerning the word "Reed". There are proceedings in the Trade Mark Registry in the United Kingdom, in the European Trade Mark Office ("the Office for the Harmonisation of the Internal Market") and in at least two Commonwealth jurisdictions. In the end the dispute seemed to be more about the form of words than anything else. It was common ground that this Court could not dictate to the parties the terms, or scope of, any ADR process. Following a suggestion of Rix LJ a form of words which was agreeable to both parties emerged during the course of the hearing. So there was nothing for us to resolve. It is perhaps worth recording that what was agreed includes an agreement that the parties, if they cannot agree upon a mediator, will ask Pumfrey J to appoint one from a panel of ADR Chambers or CEDR (the Centre for Dispute Resolution).

The remaining minor matter relates to the sum of £350,000 paid by RBI to Reed Employment by way of an interim payment of costs pursuant to the order of Pumfrey J. If there is to be an order for repayment of this sum with interest what should the rate of interest be, the statutory judgment rate (currently 8%) or the commercial rate (normally 1 % above base rate, but variable on appropriate evidence, ***Shearson Lehman Hutton v Maclaine Watson*** (No.2) [1990] 3 All ER 723)? Base rates have fallen a lot since the judgment rate was last fixed (in 1993 by SI 1993 No.564). So it is RBI who want the judgment rate, and Reed Employment who want the commercial rate.

7. I think the appropriate rate is the commercial rate. The judgment rate is purely artificial. I can see no reason for an artificial rate being imposed by the court save in those cases where it must, i.e. where there has been a judgment for a sum. Besides, a judgment debtor can avoid paying any interest by paying the debt so it is in a sense, a voluntary rate of interest.

Costs

8. I turn to costs. The difference between the parties is substantial. Although Reed Employment lost the appeal and, in the ultimate result, achieved only very limited success, Mr Hobbs, subject to a minor (now agreed) point about the evidence of a Mr Roche, suggests it should have 70% of the costs before Pumfrey J and of the appeal. Mr Howe asks for 70% of the costs of the action down to the second judgment of Pumfrey J, and all the of the appeal. This dispute has given rise to two preliminary issues.

9. The main issue is whether the Court, following judgment on liability can, in relation to the question of costs, compel the parties to disclose the detail of *"without prejudice"* negotiations. The other issue is whether or not the court's order as to costs should reflect the fact that RBI were not willing to take part in an alternative dispute resolution ("ADR") process after it was proposed by Reed Employment. That issue arises even if disclosure is refused.

10. The main issue - disclosure for the purposes of costs only - is posed here largely in the context of an allegedly unreasonable refusal to go to ADR, but, I think it is inextricably mixed up also with all other types of "*without prejudice*" negotiations including those which are and will remain much more common than ADR, namely direct inter-party negotiation, written, oral or a combination of both.

11. I begin with the Rules, setting out all those which may bear on the problem.

Part 1 The overriding objective
1.1(1) The overriding objective of the CPR is to enable the court to deal with cases justly.

1.1(2) Dealing with a case justly includes, so far as is practicable
(b) saving expense;
(c) dealing with the case in ways which are proportionate:
(i) to the amount of money involved;
(ii) to the importance of the case;
(iii) to the complexity of the issues; and (iv) ... ;

Application by the court of the overriding objective
1.2 The court must seek to give effect to the overriding objective when it -
(a) exercises any power given to it by the CPR;

Duty of the Parties
1.3 The parties are required to help the court further the overriding objective.

Duty of the court to actively manage cases
1.4(1) The court must further the overriding objective by actively managing cases.

1.4(2) Active case management includes
(e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;
(f) helping the parties to settle the whole or part of the case;"

Part 26 Case Management - Preliminary Stage
26.4(1) A party may, when filing the completed allocation questionnaire, make a written request for the proceedings to be stayed while the parties try to settle the case by alternative dispute resolution or other means.

The allocation questionnaire (Form N150, see PD 2.1) asks: "*Do you wish there to be a one month stay to attempt to settle the claim, either by informal discussion or by ADR?"*

Part 44 General Rules about costs
r 44.3 Court's discretion and circumstances to be taken into account when exercising its discretion as to costs

(1) The court has discretion as to
(a) whether costs are payable by one party to another; (b) the amount of those costs; and
(c) when they are to be paid.

(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.

(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including
(a) the conduct of all the parties;

> *(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and*
> *(c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36). (Part 36 contains further provisions about how the court's discretion is to be exercised where a payment into court or an offer to settle is made under that Part)*
>
> *(5) 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;*
> *(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;*
> *(c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and*
> *(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.*

12. It is particularly to be observed that there is nothing in these rules which purports to touch the existing law as to "without prejudice" negotiations. By implication at least some of that is assumed to continue - rule 44.3(4)(c) clearly assumes that some offers to settle are inadmissible.

13. In paragraph 167 of the main judgment I said:*"We will have to hear fresh submissions on costs. Those submissions ought to deal with two matters raised before us during the course of argument. First, by the time the letter before action was sent, RBI had decided to reduce the amount of use of Reed considerably, yet so far as we can see, Reed Employment were not told that and the action was allowed to start essentially on a false basis. Second, RBI refused a number of offers to go to mediation. Mr Howe told us there were serious settlement discussions, but they are not the same as mediation. A good and tough mediator can bring about a sense of commercial reality to both sides which their own lawyers, however good, may not be able to convey."*

14. Since then the Court of Appeal has considered further the question of the effect of a refusal to mediate in ***Halsey v Milton Keynes General NHS Trust*** [2004] EWCA Civ 576. That decision has made it clear that: *"if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it. (para. 10)."*

    "The court's role is to encourage not to compel (para. 11)."

15. Halsey has also established that: *"13. 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."*

16. Mr Hobbs seeks to invoke that principle here. [He did not agree with the burden being on the unsuccessful party and reserved his position on this, should this case go further]. He says that Reed Employment has shown a willingness to go to ADR which (until shortly before this last hearing) has been rejected out of hand by RBI and that such conduct was unreasonable. RBI say that their attitude to mediation cannot be fully justified without making reference to the content of "*without prejudice*" communications. Reed Employment riposte by submitting that evidence of those negotiations is relevant and admissible on the question of costs. Hence it submits the Court should make an order providing for disclosure of those negotiations. The detail of the order has not been formulated, but it would obviously cover not only all written exchanges of "without prejudice" proposals but also evidence of all meetings at which settlement was discussed. It is entirely possible that there could be disputes about this, given that each side says it can show it was reasonable at the relevant time(s). The consequence might be a mini-trial. RBI resist all this. Their position is that given the fact of substantial "*without prejudice*" negotiation, both before and after trial, Reed Employment are not in a position to prove that they (RBI) were unreasonable in refusing mediation when they did. RBI say the whole exercise of disclosure and what might be a mini-trial is unnecessary. They are confident they would win it if it came to that, but there is no point in the expense of it all. They accept that the existence of and dates and times of "without prejudice" negotiations are admissible, but not their content. They say the Court can only go on open material. So that if there is doubt left as to whether a party was unreasonable, that doubt cannot count against it.

17. Rule 44.3(4) says the court is to have regard to "*all the circumstances*". Inherent in that is a difficulty - that "*without prejudice*" negotiations, including offers and counter-offers, whether there should be an ADR, what form an ADR should take or what actually happens in an ADR (e.g. one or other side being recalcitrant) are all in principle relevant. Yet the "*without prejudice*" rule apparently makes them inadmissible on the question of costs. Mr Hobbs challenges that and says that all of these are admissible on the question of costs.

18. He does not go so far as to submit that legal advice to a party about negotiations or the strength of its case is admissible. Yet this too could form part of "all the circumstances" - whether a party is given legal advice that it has a strong or watertight case is clearly a relevant matter to its attitude to mediation, as was recognised in Halsey at paras 18-19 from which I quote two sentences: *"The fact that a party reasonably believes that he has a strong case is relevant to the question whether he has acted reasonably in refusing ADR."*

    "The fact that a party unreasonably believes that his case is watertight is no justification for refusing mediation. But the fact that a party reasonably believes that he has a watertight case may well be sufficient justification for a refusal to mediate."

19. Mr Hobbs begins his argument by submitting that the exclusion of "*without prejudice*" negotiations is a rule of evidence not a privilege, relying on ***Rush & Tomkins*** [1989] AC 1280. That case was not actually concerned with the difference. Nor, as I see, does it matter what label is attached to it. It is a rule of law. Normally "privilege" attaches to the rights of a single party, for instance a party has, and can waive, legal professional privilege. The detail of "without prejudice" negotiations has some analogy, the difference being that it is admissible if both parties "waive" their rights to non-disclosure. But none of that matters here. Whatever the label, as it seems to me, Mr Hobbs must show that the rule of law permits the court to order the disclosure of "without prejudice" negotiations on the question of costs.

20. Negotiations or offers which have taken place expressly on the "without prejudice save as to costs" basis are of course admissible on that question. So much was decided in the family law context in ***Calderbank v Calderbank*** [1976] Fam 93 and in the general civil litigation context by ***Cutts v Head*** [1984] Ch. 290. Such offers go by the name "Calderbank offers."

21. But generally, parties who have negotiated on a wholly "*without prejudice*" basis have always done so in the faith and expectation that what they say cannot be used against them even on the question of costs. As long ago as 1889 this Court held, in ***Walker v Wilsher*** (1889) 23 QBD 335 that, in the words of the headnote: *"Letters or conversations written or declared to be "without prejudice" cannot be taken into consideration in determining whether there is good cause for depriving a successful litigant of costs."*

    I shall call that the rule in ***Walker v Wilsher.*** Bowen LJ reasoned this way: *"In my opinion it would be a bad thing and lead to serious consequences if the Courts allowed the action of litigants, on letters written to them "without prejudice", to be given in evidence against them or to be used as material for depriving them of costs. It is most important that the door should not be shut against compromises, as would certainly be the case if letters written "without prejudice" and suggesting methods of compromise were liable to be read when a question of costs arose."*

22. There are exceptions to the general rule of non-admissibility of "without prejudice" negotiations. Robert Walker LJ conveniently listed the most important instances in ***Unilever v Procter & Gamble*** [2000] WLR 2436 at p. 2445. What is not included in that list is a general exception of non-admissibility when it comes to the question of costs. Indeed, it is implicit that he thought there was no such general exception, as appears from the passage where he discusses Calderbank offers on p.2445: *"(7) The exception (or apparent exception) for an offer expressly made "without prejudice except as to costs" was clearly recognised by this court in* ***Cutts v Head****, and by the House of Lords in* ***Rush & Tompkins Ltd v Greater London Council*** *[1989] A.C. 1280, as based on an express or implied agreement between the parties. It stands apart from the principle of public policy (a point emphasised by the importance which the new Civil Procedure Rules, Part 44.3(4), attach to the conduct of the parities in deciding the question of costs)."*

23. Mr Hobbs submitted that the inadmissibility of "without prejudice" negotiations is based on public policy and that there was no public policy favouring exclusion solely on the question of costs - quite the reverse. He pointed to Part 44.3(4) ("all the circumstances") and to what was said about the rule in ***Walker v Wilsher*** by Oliver and Fox LJJ in ***Cutts v Head***. Oliver LJ said: *"If, however, the protection against disclosure rested solely upon a public policy to encourage out-of-court settlement of disputes,* ***Walker v Wilsher*** *is not really intelligible, for, although the court - and in particular - Bowen L.J. - seem to have been prepared to assume that an inability to refer to the correspondence on a question of costs, after judgment, would encourage settlement, it is difficult to see, if one thinks about it practically, how that could do so. As a practical matter, a consciousness of a risk as to costs if reasonable offers are refused can only encourage settlement whilst, on the other hand, it is hard to imagine anything more calculated to encourage obstinacy and unreasonableness than the comfortable knowledge that a litigant can refuse with impunity whatever may be offered to him even if it is as much as or more than everything to which he is entitled in the action. The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.*

    And (at p.307, G to H): *Whatever may have been the position in 1889, it is, I think clear that there can now no longer be said to be any reason in public policy why, where offers have been made and refused of everything which could be obtained by the proceedings, that fact should not be brought to the court's attention in the argument as to costs.*

    Fox LJ said (at p.315, F to G): *If a party is exposed to a risk as to costs if a reasonable offer is refused, he is more rather than less likely to accept the terms and put an end to the litigation. On the other hand, if he can refuse reasonable offers with no additional risk as to costs, it is more rather than less likely to encourage mere stubborn resistance."*

24. That public policy is no longer (if it ever was) the foundation of the rule in ***Walker v Wilshire*** was reaffirmed by Hoffmann LJ in ***Muller v Linsley & Mortimer*** [1996] 1 PNLR 74 where he said (p. 77 C to D): *"So the* ***Cutts v Head*** *rule that one could not rely upon a "without prejudice" offer on the question of costs after judgment was held not to be based upon any public policy. It did not promote the policy of encouraging settlements because as Oliver LJ said: "As a practical matter, a consciousness of a risk as to costs if reasonable offers are refused can only encourage settlement ..."*

25. It is noteworthy that Hoffmann LJ plainly accepted that the rule was still good law. It is simply that its justification is only an implied agreement "arising out of what is commonly understood to be the consequences of offering or agreeing to negotiate without prejudice", not the public policy of encouraging parties to negotiate and settle.

26. It is also important to record that ***Walker v Wilshire*** was referred to (at p. 1300) by Lord Griffiths giving the leading speech in ***Rush & Tomkins***. He stated the rule it decided without any adverse comment on it.

27. So, until the decision in ***Halsey***, the rule in ***Walker v Wilsher*** was the law: evidence of the detail of "without prejudice" negotiations could not be given on the question of costs unless both sides agreed. Its application could be avoided by the simple expedient of using the Calderbank formula of negotiating "without prejudice save as to costs."

28. Has Halsey changed that position? Is the Calderbank formula now redundant? I think not. ***Halsey*** certainly does not expressly abrogate the rule in ***Walker v Wilsher***. Indeed it does not refer expressly to the rule at all, still less ***Walker v Wilsher*** itself.

29. So far as what actually happens in an ADR, Halsey clearly assumes and states that the rule applies. In paragraph 14 the Court said: *"14. We make it clear at the outset that it was common ground before us (and we accept) that parties are entitled in an ADR to adopt whatever position they wish, and if as a result the dispute is not settled, that is not a matter for the court. As is submitted by the Law Society, if the integrity and confidentiality of the process is to be respected, the court should not know, and therefore should not investigate, why the process did not result in agreement. "*

30. I can think of no rational reason why party-to-party negotiations should not be treated on the same basis. Indeed sometimes the line between a third-party assisted ADR and party-to-party negotiations may be fuzzy. Just because there is a mediator is no reason for the parties not to talk to each other if that is found to be helpful at some point in the process.

31. Mr Hobbs suggested it was implicit that Halsey pointed in a different direction from the rule in ***Walker v Wilshire***. He particularly referred us to the following passages: *"16 ... 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."*

    Mr Hobbs relies on the reference to "*all the circumstances*." But I read that as "*all admissible circumstances*" not as abrogating the rule in Walker v Wilshire.

32. There are other paragraphs of Halsey which to my mind make it clear that the Court considered that the rule was still good law. These occur in the passages about court encouraged ADR: *"29. So far we have been considering the question whether a successful party's refusal of ADR was unreasonable without regard to the impact of any encouragement that the court may have given in the particular case. 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.*

30. An ADR order made in the Admiralty and Commercial Court in the form set out in Appendix 7 to the Guide is the strongest form of encouragement. It requires the parties to exchange lists of neutral individuals who are available to conduct "ADR procedures", to endeavour in good faith to agree a neutral individual or panel and to take "such serious steps as they may be advised to resolve their disputes by ADR procedures before the neutral individual or panel so chosen". The order also provides that if the case is not settled, "the parties shall inform the court what steps towards ADR have been taken and (without prejudice to matters of privilege) why such steps have failed". It is to be noted, however, that this form of order stops short of actually compelling the parties to undertake an ADR.

31 Nevertheless, a party who, despite such an order, simply refuses to embark on the ADR process at all would run the risk that for that reason alone his refusal to agree to ADR would be held to have been unreasonable, and that he should therefore be penalised in costs. It is to be assumed that the court would not make such an order unless it was of the opinion that the dispute was suitable for ADR.

32. A less strong form of encouragement is mentioned in the other Court Guides to which we have referred at para 6 above. A particularly valuable example is the standard form of order now widely used in clinical negligence cases, and which was devised by Master Ungley. The material parts of this order provide: *"The parties shall by [sic] .... consider whether the case is capable of resolution by ADR. If any party considers that the case is unsuitable for resolution by ADR, that party shall be prepared to justify that decision at the conclusion of the trial, should the judge consider that such means of resolution were appropriate, when he is considering the appropriate costs order to make.*

    The party considering the case unsuitable for ADR shall, not less than 28 days before the commencement of the trial, file with the court a witness statement without prejudice save as to costs, giving reasons upon which they rely for saying that the case was unsuitable."

33. Both forms of Court approved order, themselves approved in Halsey, refer to the "without prejudice" rule. This would be wholly unnecessary if it did not apply when the question of costs was being considered after the determination of liability.

34. I therefore conclude that the rule in ***Walker v Wilshire*** remains good law and that the Court cannot order disclosure of "without prejudice" negotiations against the wishes of one of the parties to those negotiations. This may (indeed does) mean that in some cases the Court when it comes to the question of costs cannot decide whether one side or the other was unreasonable in refusing mediation.

35. I do not regard such a conclusion as disastrous or damaging from the point of view of encouraging ADR. Far from it. Everyone knows the Calderbank rules. It is open to either side to make open or Calderbank offers of ADR. These days there is no shame or sign of weakness in so doing. The opposite party can respond to such offers, either openly or in Calderbank form. If it does so and gives good reason(s) why it thinks ADR will not serve a useful purpose, then that is one thing. If it fails to do so, then that is a matter the court may consider relevant (not decisive, of course) in exercising its discretion as to costs. The reasonableness or otherwise of going to ADR may be fairly and squarely debated between the parties and, under the Calderbank procedure, made available to the Court but only when it comes to consider costs.

36. Before parting with the general question there is one other matter I should mention. Suppose one party is prepared for the "without prejudice" negotiations to be disclosed and the other not. Is that a matter that can be taken into account in deciding costs - with some sort of adverse inference to be drawn against the party refusing disclosure? Mr Hobbs did not advance such a case, though the point was raised by the Court prior to the hearing. He was right and realistic not to do so. The rule, based on convention, is that the negotiations cannot be used. If an adverse inference were to be drawn against a party refusing disclosure there would be clear indirect pressure on it to permit disclosure. That would be contrary to the basis of the completely without prejudice negotiations.

37. Accordingly I do not think the court has power to order any disclosure of the detail of the *"without prejudice"* negotiations for the purposes of deciding the question of costs.

38. Further, even if there were a discretion in the matter (which I do not think there is) all questions of liability in this case are not over. Determination of "liability" can mean two things: final determination of all the matters in dispute, or determination of only some matters in dispute. ***Walker v Wilshire*** and the other cases cited were instances where there had been a final determination of the dispute as a whole - they were not split trial cases. Here disclosure of the "*without prejudice*" negotiations would include disclosure of the undecided contentious point of quantum of damage. It would also involve disclosure in advance of decision in all the trade mark registry and foreign litigation. Disclosure is being sought after a battle, not the war.

39. Mr Hobbs recognised that. He said these matters could be covered by an appropriate order restricting any use of the disclosure in relation to these ongoing disputes. That may be so in an appropriate case - it was done in **Family Housing Assn. v Michael Hyde** [1993] 1 WLR 354 (a case involving disclosure of affidavit evidence of "without prejudice" material for the limited purpose of defeating an application to strike out for want of prosecution). But there is always a danger of leakage and more so where the disclosure may go beyond mere documents and may perhaps be a prelude to a mini-trial about who was unreasonable and when. So the fact that the war is not fully over may also be a reason for the court maintaining the confidentiality of the without prejudice negotiations. I think there is enough undecided matter in this case, that even if there were a discretion, disclosure ought to be refused.

40. I turn to whether, on the open materials, it is shown that RBI were unreasonable in refusing to go to ADR. It is important here to summarise the facts concerning the proposals for mediation. Neither side asked for a stay for settlement or ADR on the allocation questionnaire even though that questionnaire positively raises the question. Each was positively saying "no point" to such a procedure up to and including trial.

41. The first mention of ADR was by Pumfrey J on 14th October 2002, the first day of the hearing about the form of order. This was well after the first judgment by which Reed Employment had achieved a substantial measure of success - practically all uses of Reed by RBI were held to amount to passing off or infringement or both. By then also both sides had spent a large amount of costs.

42. In open court Reed Employment then suggested a stay of any inquiry as to damages (but not the finalisation of the order) pending ADR. The hearing continued, the second judgment was given and the order finalised.

43. I cannot see any room for any special order for costs arising from a failure to mediate down to that point. By the time of the Judge's suggestion, most of the costs had been spent, and in any event neither side proposed a mediation to take place prior to finalisation of the order.

44. What then about the costs of the appeal? Mr Hobbs relies upon the fact that Reed Employment openly invited RBI to make use of the Court of Appeal's mediation scheme, an invitation rejected by RBI. That is the high-water mark of his case that RBI were unreasonable in refusing mediation. He submits that pursuit of the overriding objective in effect required RBI to go to ADR and that by its failure to do so it was in breach of its duty under Part. 1.3

45. I do not think refusal at that stage remotely shows that RBI were unreasonable. Reed Employment by then would have been negotiating from a position of considerable strength - they had got a decision which might put RBI in difficulties over the use of its name, a wide meaning given to "employment agency services" which could well be used in other jurisdictions, a very substantial order for costs, and they were claiming very substantial damages. Mr Hugh Laddie (as he then was) used to say when he was at the Bar "*Always try to negotiate with your foot on the other man's neck*." That would have been the starting point of any negotiation or any ADR process. Lateness in proposing ADR is itself a relevant factor and the proposal was very late here.

46. Far from being unreasonable I think it was entirely reasonable for RBI to pursue the appeal. They had at least a reasonable (and as it turned out justified) belief in their prospects. For all I know they had been advised they had a very good or even watertight case. They had ongoing disputes in other jurisdictions to consider. It may be that an ADR process would have worked, but the prospects did not look good given the wide disparity between the parties. Moreover the case was full of novel points (metatag use, Art. 5(1)(a) or (b), own name used as a trade mark and so on) - this would have made it much trickier to formulate any deal.

47. Accordingly I conclude that the possibility of ADR is not a relevant factor to be taken into account for the court's decision on costs. That leaves over for debate the other factors referred to in the parties' several skeleton arguments, particularly those relating to allocation of issues and whether the action was allowed to start on a false basis (see para. 168 of the main judgment quoted above).

48. There must be a further short hearing concerning this matter and any other matters (which include leave to appeal) still in contention. That date has already been fixed. I propose that the parties should submit a fresh draft order indicating their agreements and disagreements seven days before that hearing together with new skeleton arguments gathering together all their submissions on the points still in issue.

Lord Justice Rix:

49. I agree.

Lord Justice Auld:

50. I also agree.

Geoffrey Hobbs QC (instructed by Slaughter & May) for the Respondents/Claimants

Martin Howe QC and Amanda Michaels (instructed by Olswang) for the Appellants/Defendants