JUDGMENT : MR. CLIVE FREEDMAN Q.C. (Sitting as a D.J of the High Court. Ch.D.) 15th July 2005

1 I have, earlier today, given judgment for the claimant substantially in the terms sought, albeit that the declarations ordered are in some respects modified from the declarations as pleaded, and that they are prefaced by an acknowledgement. In any event, in my judgment the claimant has substantially succeeded in its case.

2 I am now asked to deal with the questions of costs. They have taken half a day of argument because they have raised some questions particularly in relation to mediation. In order to dispose of this matter today this is an ex tempore judgment, I certainly regard it as disproportionate that reserved the matter for a second time.

3 The issues which arise I take in the same order as Mr. F QC, on behalf of the claimant, namely:

1 the impact of the mediation proposals;

2 Wethered's right to deprive the claimant of some or all of the costs caused by the rectification issue;

3 any issues that arise as a result of the conduct of the parties during litigation; and,

4 the impact of the offers of settlement.

4 There is, in fact -- as appeared when Mr. Fetherstonhaugh QC, on behalf of the defendant, responded - a fifth issue. That .is whether the claimant ought to be deprived of some or all of his costs as a result of the fact that the declarations ordered are not entirely that which it had sought, and I shall deal with that as the fifth issue. The fact that it is the fifth issue does not make in any sense less important than any of the other four.

5 (*Before dealing with those issues I have been reminded about the rules about costs to apply and in particular I have been reminded about CPR 44.3(2) about the following rules which should be incorporated into this judgment if it is being transcribed):* ***viz*** [sic] CPR44.3(2)(a)(b) ... (4) all of that and (5) all of that.

"44.3 (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.

The general rule does not apply to the following proceedings -

(a) proceedings in the Court of Appeal on an application or appeal made in connection with proceedings in the Family Division; or

(b) proceedings in the Court of Appeal from a judgment, direction, decision or order given or made in probate proceedings or family proceedings.

(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. "

6 I deal first with the impact of the mediation proposals. This action was commenced in July 2004. Substantially before then, in 2003, the defendant raised mediation as a proposal on a number of occasions in order to deal with the disputes of the parties. I do not intend to refer to all of the communications, but I have considered all of the correspondence which the parties asked me to consider and a helpful reading list was supplied to me yesterday.

7 The approach of the claimant to these suggestions is summarised in a letter dated 3rd October 2003 from the claimant to the first defendant, in which the final paragraph read

"We note your suggestion for formal mediation and this has been discussed at length. The board's decision is that mediation is not a step that it is prepared to take with regard to the issue of the presence of the van. Your actions in parking the van in Wethered Park and your failure to remove it have left the WEL Board with no alternative but to pursue a legal settlement to this dispute. We would ask you to carefully consider the implications of leaving the van in Wethered Park".

At that stage and as appears in my judgment, the van had been in the estate since about the beginning of 2003 and it was to remain there until shortly before a letter dated 12" March 2004. In effect, the claimant was saying that it would not entertain mediation whilst the van remained within the estate.

8 The defendant continued to suggest that mediation was appropriate, and that it was wrong for the claimant to desist from mediation. The position of the claimant remained that at that stage it would not go to mediation but this was not a total refusal of mediation. By a letter dated 21St January 2004 the claimant's solicitors wrote to the defendants' then solicitors at p.454 saying as follows:
"Our client agrees to explore the possibility of a mutually acceptable solution to this dispute via non-binding mediation. We have advised our client, however, that it is important if mediation is to be given the best chance of succeeding that the parties to the dispute fully understand the nature of their respective opponents' case. It is therefore suggested that in order to facilitate a mediation process, the parties' respective cases be set out within court proceedings".

9 The defendant's solicitors wrote back on 4th February 2004 stating as follows:
"Our clients welcome the agreement to explore a solution via mediation and confirm that it would be helpful to have a statement of your client's case. We note you choose to incur more costs by commencing proceedings rather than simply present the information as our clients have been requesting since 23rd July 2003".

10 The claimant responded on 12th February 2004 stating that in the event that the mediation was unsuccessful they wanted to be in a position to pursue court proceedings without further delay.

11 As I indicated, the van had been removed shortly before the letter of 12th March 2004. That was a letter from the claimant's solicitors stating that they understood that the van had been removed from Wethered Park. They then asked if there would be confirmation that the claimant had exclusive right to manage the common parts of the park. The letter went on to say that they were forwarding the papers to counsel to settle proceedings, and asked for the information as regards what the defendants' position was.

12 There was no reply to that letter, and under cover of a letter dated 15t" July 2004, a claim form and various witness statements were served by the claimant on the defendants. That led to the defendant repeating the reference to mediation by a letter dated 20th July 2004 asking for the matter to be referred to mediation. Although I referred to some of the correspondence, I do not intend by this judgment to refer to each and every instance in which there was reference to mediation.

13 The claimant responded on 22nd July confirming that it did remain to explore the possibility of mediation, but *"for any mediation to succeed, both parties need to fully understand their respective opponents' case".*

14 In August 2004 the dispute took an unexpected turn. There was served, under cover of a letter dated 18th August 2004 from the defendants' then solicitors, a defence and part 20 claim. Technically, a part 20 claim could not be served in response to a part 8 claim: it could only be served in response to a part 7 claim. It is the substance that matters. The part 20 claim indicated that a part of the defence was a contention that the land agreement had been procured by misrepresentations and/or that the land agreement had been repudiated by the conduct of the claimant without setting out in any detail the nature of that case. The contention was that there had been misrepresentations relating to the willingness or otherwise of the residents in the estate to withhold objection to the planning applications of the defendants and that that had been a misrepresentation. Alternatively, it was contended that it was an implied term that the company would act for the residents and procure that, that they would write to the local authority to bind the residents of the estate. It was pleaded that in failing or refusing to do so, they acted in repudiatory breach of the agreement.

15 With the letter of 18th August 2004, the solicitors for the defendant said that they again wished the matter to go to mediation.

16 By a letter of 20th October 2004 the defendants' solicitors reminded the claimant's solicitors that they wished to go to mediation, and asked whether the claimant was prepared to proceed as previously proposed. The response of the claimant's solicitors dated 21st October 2004 was that they remained willing to explore the possibility of resolving the matter by way of mediation but needed to understand the other side's case. They confirmed that their client would review the position regarding the timing of a non-binding mediation after service of the evidence of the defendants.

17 It is to be noted that, by this stage, evidence had been served by both parties, namely in July by the claimant together with the part 8 claim, and in August by the defendants together with their response. Nonetheless, the approach of the defendant in the letter of 21st October 2004 was to add the following: *"Having given this matter further consideration, our client is of the view that there is not yet sufficient clarity in relation to your client's case for a mediation to succeed for reasons which will become clear at the direction hearing we consider that attending the directions hearing on 4t" November 2004 will assist the parties by clarifying the issues in dispute".*

18 There was thereafter a directions hearing on 4th November 2004 in which it was directed that the claimant would file and serve an amended statement of case as if the claim had been commenced under part 7, and that the defendant would file and serve an amended defence and part 20 claim by 2nd December 2004. At that stage it was still assumed that the defendant was going to pursue its part 20 claim. There were other directions including directions about witness statements that were made on that occasion.

19 In fact, on 2nd December 2004, when the defence was served on behalf of the defendants, there was a decision not to bring the part 20 claim. The allegations about repudiation and rescission were no longer pursued. The defendant under cover of the letter of 2nd December again repeated the wish to a mediation and stated that *"It was clear from what your counsel said at that hearing [being a reference to the hearing of 4th November 20041 that there was no real willingness on your side to employ any form of alternative dispute resolution. If we are wrong about this, then please file your concrete proposals for such ADR".*

20 The response of the claimant by a letter dated 21st December 2004 was as follows: *"You are incorrect in relation to your comments on ADR. We have expressed our client's position many times previously and we refer you to our letters of 21st January 2004, 22nd July 2004 and 21st October 2004. Our client remains willing to engage in a nonbinding mediation with a neutral third party mediator to resolve the differences between our respective clients. We think this is best done when the evidence is final".*

21 Following the Christmas vacation, the parties again wrote to each other. The claimant responded by a letter dated 19th January 2005 encouraging mediation and taking issue with the defendants. By a Calderbank letter dated 26th January 2005 the defendants stated its desire to go to mediation and the claimant stated its desire to go to mediation and, by 31st January 2005, stated openly that it confirmed that it was willing to put forward the names of three mediators with regard to future possible mediation.

22 The issue which arises in connection with mediation and costs is whether the delay of the claimant in agreeing to go to mediation amounted to conduct of the claimant before as well as during the proceedings which should have an effect on costs. I was referred to the leading case **Halsey v Milton Keynes General NHS Trust** [2004] 1 WLR, 3002. In the judgment of the court which was given by Dyson LJ at para. 16, Dyson LJ stated, *"In deciding whether a party has acted unreasonably in refusing ADR, this consideration should be borne in mind. That 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 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 may be relevant to the question of 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 matters have been attempted; (d) whether the costs of*

the ADR will be disproportionately high; (e) whether any delay in setting up and attending the ADR would be prejudicial; (f) whether the ADR had a reasonable prospect of success. We shall consider these in turn. We wish to emphasise that in many cases no simple factor will be decisive and that these factors should not be regarded as an exhaustive checklist".

23 In connection with the question as to whether the mediation had a reasonable prospect of success, the Court of Appeal said the following at para.28: *"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 for a mediation which had 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 reasonable refusal is on the unsuccessful party. We see no reason why the burden of proof should lie on a 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 reasonable 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 the 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 mediation would have been successful. This is not an unduly onerous burden to discharge. He does not have to prove the mediation would in fact have succeeded. It is significantly easier for the unsuccessful party to prove that there was a reasonable prospect that mediation would have succeeded than for the successful party to prove the contrary".*

24 I have also been provided with a copy of the judgment of the Court of Appeal in the case of **Burchill v Mr & Mrs Ballard** [2005] EWCA (Civ) 358 and in that case there were remarks by their Lords Justices regarding the time when the request to mediate was made at para.43 Ward LJ said the following: *"The parties cannot ignore a proper request to mediate simply because it was made before the claim was issued. With court fees escalating it may be folly to do so. I draw attention, moreover, to para.5.4 of the pre-action protocol for construction and engineering disputes, which I doubt was at the forefront of the parties' minds, it should preferably apprise the parties to consider at a preaction meeting whether some form of alternative dispute resolution procedure would be more suitable than litigation. These defendants have escaped the imposition of a costs action in this case but defendants in a like position in the future can expect little sympathy if they blithely battle on regardless of the alternatives".*

25 At para.50 Rix LJ said that he agreed entirely with what Ward LJ had said. He said the following: *"The merits of the case, its structure and the great risks involved in fighting to conclusion favour mediation and did so at an early stage before substantial costs began to be incurred. In the present case Mr. Burchill offered mediation at an early stage, long before litigation started, I agree that mediation here would have had a reasonable prospect of success and that a party cannot rely on its own obstinacy to assert that it would not. I would also add that it may not be able to rely on its solicitors or experts ... that where the result shows that mediation ought reasonably to have been attempted".*

26 Applying that law to the facts of this case, I have come to the view that the conduct of the claimant in this case should not be categorised as unreasonable. In coming to that view I have had regard to the following stages: the first stage is the stage prior to the commencement of the action. The requests for mediation were first put were when the van had been parked on the estate. I refer to the judgment which I have handed down in this matter and in particular to my findings from paragraph 36-46. I found that the length of the period of time that the van was parked in the estate may indicate a determination to bring about an end to opposition to the planning application and was *"some retaliation for what Miss Davis believed had been unjustified conduct at his expense".*

I refer also to the fact that it was not only the van that was being used but also there was a threat to bring about public access to the estate. I also referred to the nature and to the tenor of the correspondence at the time.

27 Having considered carefully the evidence in relation to this aspect of the matter which was relevant to the question as to whether declarations should be imposed, and having seen the witnesses give evidence, I have come to the view that I am not satisfied that it was unreasonable on the part of the claimant to refuse mediation while the van was parked in the estate. I have found that the conduct of the defendants was a lever to procure capitulation and that it was in circumstances unjustified. Whilst it is not every dispute where a party can say that it is reasonable to refuse to go to mediation, in the very peculiar circumstances of this case and the conduct to which I have referred in my judgment, I have come to the clear view that it was reasonable to refuse mediation for so long as the van was there.

28 The van was removed in March and there was a letter sent in March. There was then no response to that letter until July and in my judgment no points can be made against the claimant relating to that period between March to July when there was no communication between the parties. I shall refer to that period of March to July as "the second period".

29 The third period is the period between July, that is the commencement of proceedings in July 2004, and unconditional willingness to go to mediation in January 2005. The question which arises is whether the desire to see the allegation set out both in pleadings and in witness statements was a reasonable reason to defer mediation. In many cases it would not be reasonable to defer mediation until the litigation was at an advanced for the reasons outlined in the case of Burchill v Ballard, to which I have made reference. However, this was a peculiar case. First, it involved questions of construction of an agreement against a factual matrix where there was a controversy about facts. In those circumstances I am sympathetic to the notion of the solicitors for the claimant that they believed that a mediation would have greater prospects of success when the matters had been formulated. Secondly, it would not have been foreseen at the time when that was first stated, that the matter would take so long to reach a stage when the evidence would be complete, particularly because the matter was brought by way of a part 8 claim. Whether it was right or wrong to bring the matter by way of a part 8 claim, it would have been expected that the evidence would be complete at an earlier stage. Thirdly, and most significantly, the nature of the dispute was difficult to fathom in the period between August 2004 and December 2004. In August 2004 the defendant served its defence and part 20 claim indicating the defence of accept and counter-claim of acceptance, repudiatory breach and rescission. In order to be able to understand that, there would have had to be much greater detail to explain what was meant by it. I am sympathetic to the notion expressed, particularly, in October 2004 by the defendants' solicitors that they wished to have the allegations set out more particularly prior to the commencement of mediation.

30 When the part 20 claim had been withdrawn, or shortly thereafter by January 2005, the conditions about particularisation of claims and evidence were then removed. The significance of that is as follows: it is apparent that the objections of the claimant were bona fide objections. They were bona fide because the claimant did proceed to mediation at the point in time when it believed that the allegations had been adequately set out.

3l The next stage is the stage of the mediation itself. The defendant may have sought to say that I should refer to what actually occurred in the mediation. They may have sought to say that by reference to correspondence of a Calderbank nature that was put before me in connection with the question of costs, with the suggestion that I could infer from those letters that the failure of the mediation was caused by an impasse in relation to costs. The submission would then be that if the matter had gone to mediation at an earlier stage, then any impasse would have been easier to have overcome. In the alternative, whether I am right or wrong in inferring that that is what the defendant was asking that I should do, the defendant was saying that I could infer the same by reason of the subsequent correspondence where the parties negotiated in open terms. The suggestion was that it was apparent from that subsequent correspondence that the major issue between the parties is that the claimant wanted to have its costs and the defendant wanted to have the costs paid by the claimant to it.

32 I make the following findings in relation to this aspect of the matter. First, mediation is entirely a without prejudice process. Second, the privilege of the mediation process must be maintained unless

in certain circumstances the parties agree to waive the mediation. Whatever requirements there are for such a mutual waiver to take place, it must clearly be a clear and unequivocal consent. Thirdly, there has not been any such consent in this case, to the extent that any matters were raised in the context of the part 36 letters. They were not with the clear and unequivocal consent of the parties, and I do not understand them as clearly waiving the privilege in relation to the mediation. Fourthly, in the event that the without prejudice privilege was waived in relation to the mediation, which I find is not the case here, then in order for the court to take into account the conduct, the court would have to look at the communications throughout the whole process. It would be entirely unreliable and unhelpful to look at one or two parts of the mediation process in order to come to a view as to why it had failed.

33 In the circumstances, I am not prepared either to admit evidence concerning what happened in the mediation, or to make inferences as to what I believe would have happened. Similarly, I am not prepared to accept a submission made by Mr. Fancourt QC for the claimant that I should in some way form a judgment as to how Mr. Davis would have behaved in the mediation having regard to the nature of his evidence. I express no view as to what did occur at the mediation; I have not the material in order to do so and I am not prepared to enter into unsatisfactory hypotheses.

34 There is an unusual feature of this case. Most cases where mediation has been refused and it is taken into account are cases where there has been a complete refusal to go to mediation. This case is unusual because the submission is being made that there was a delay in going to mediation and notwithstanding the fact that the case did go to mediation and that mediation was unsuccessful, that that should be relevant in relation to the question of costs. That in no way rules out the submission. There will be cases that will arise where a delay in going to mediation was unreasonable and where it is a matter which could and should be taken into account in relation to the questions of conduct. However, my conclusion in this case is as follows. First, I take the view that it has not been shown to be unreasonable conduct for the claimant not to have gone to mediation prior to the action whilst the van and the other conduct was going on at the estate. Secondly, it has not been proven to be unreasonable for mediation not to have taken place between then and the time when it did, particularly having regard to the difficulty of definition as to what was the true nature of the dispute between the parties and the changing face of the descriptions of the dispute in the course of documents and in particular the defence and part 20 claim. Thirdly, I am not prepared to draw inferences in relation to why the mediation failed. Taking all these matters into account I therefore resolve the question about the mediation in favour of the claimant and I do not make any reduction in relation to the costs or adjustment in relation to the costs arising from the mediation.

35 I now turn to the question of rectification. Mr. Fancourt QC on behalf of the claimant said that it was a secondary claim, that it was not to be regarded as a claim but as a remedy for the purpose of CPR 38. CPR 38 deals with discontinuance of claims and I refer to CPR 38.1 and 38.2 as if they were a part of this judgment.

36 He said that there were various inferences that could be drawn as to why the claimant abandoned the rectification claim with effect from 25th April 2005. It could be that it was hopeless; it could be that it was unreasonable; it could be that it was a tactical position which did not necessarily reflect on it being hopeless or unreasonable. He postulated that if it had been retained as a claim, but it had not been necessary to deal with the matter at trial, it would not necessarily follow that the rectification with the cost of the rectification claim would be paid by the claimant to the defendant.

37 On this aspect of the matter, I accept the submissions of Mr. Fetherstonhaugh QC for the defendant. It does not seem to me to be necessary to find whether rectification is to be regarded as a separate cause of action or a separate remedy. In that regard I take, with respect, a similar approach to the approach taken by Mr. Justice Park in the case of **Isaac v Isaac** [2005] EWHC 435 from para.93 onwards, to which I was referred. Whatever the way in which the plea of rectification should be characterised, it was a plea which would make a difference to the cost of the action. This is because a plea of rectification leads to the admissibility of more evidence than would be admissible if the case was simply based upon construction of an agreement. A plea of rectification gives rise to an exception to the parole evidence rule and there can be admitted in evidence matters relating to negotiations even

subject to intention of the parties. Therefore, rectification would be likely to have an effect in relation to, for example, the witness statements and possibly in relation to disclosure, albeit that the questions of admissibility and disclosure are different questions. A party pleading rectification must be taken to know that.

38 Further, if the plea of rectification was a hopeless or an unnecessary plea, or indeed a tactical decision which was thereafter abandoned, then it seems to me prima facie the costs ought to follow the event of the rectification plea having been abandoned. There has been no reason indicated to me as to why a different course should follow and, in my judgment, to the extent that costs were added by the rectification plea, the costs should be paid by the claimant to the defendant.

39 The question then arose as to how I should give effect to that. I referred at the beginning of my judgment to CPR, part 44.3. I now to refer to 44.3(6)(x) (b) (c), (f) and 7. They read as follows:

"44.3(6) The orders which the court may make under this rule include an order that a party must pay -

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(f) costs relating only to a distinct part of the proceedings; and

Where the court would otherwise consider making an order under paragraph (6)(f), it must instead, if practicable, make an order under paragraph (6)(a) or (c)."

40 I had hoped to be able to give effect to my ruling in relation to the costs of the rectification issue by ordering that a proportion of the claimant's costs should be reduced to take into account my decision on rectification and thereby to facilitate the process of the assessment of costs. The parties helpfully tried to assist in that by providing me with information about the nature of the costs. Without going through all of that information, what was revealed was that the percentage of costs attributable to rectification on the part of the claimant was 10%-15% until the time when that plea was abandoned, and the percentage on the part of the defendant was about 33%. There is a clear imbalance between that. There is also an imbalance as to the costs that were incurred in that period.

41 I have come to the view that albeit that one has to go with a broad brush in relation to costs, this is a step too far in this case it has curiosities which can be investigated if the parties wish upon the assessment and therefore that I should make a split order as to costs. I do so because I take the view that it is not practicable to make a just order by ordering the proportion and therefore make the split order in the terms that I have proposed.

42 Having said that, I would urge the parties to agree a split order if they feel able to do so at any stage before the matter comes to the costs Judge if they are unable to reach agreement. I do take into account the matters which Mr. F said as to the fact that this adds to costs, but it is possible to the parties to protect themselves or seek to protect themselves in relation to those costs consequences. I therefore order that the costs of the rectification issue, in so far as it is added to the costs of the claim, be paid by the claimant to the defendant.

43 The next issue concerns the conduct of the parties. Mr. Fancourt QC for the claimant says that there is nothing objectionable in relation to the conduct of the parties. Mr. Fetherstonhaugh QC for the defendant says that there was a failure to particularise the claim adequately, which was only made good by a late amendment in April 2005 and further that the second and third declarations only came into being at that stage. In my judgment the nature of the claim was well known to the defendant by that stage. This was not the addition of new claims. The matter had been set out in very full witness statements which were served at the beginning of the action. The second and third declarations were amplifications of matters which at one stage had been thought to be dealt with by the more general declaration in the terms of the first of the three declarations. In my judgment that is not an aspect of conduct which should affect the overall order.

44 The fourth matter was the offer of settlement. I have been taken through various correspondence, and in particular a short bundle of correspondence wasprovided to me. As a result of this correspondence, it was submitted by Mr. Fancourt that I should treat as an effective part 36 offer that which was offered on 26th April 2005 from the claimant's solicitors to the defendants' solicitors. I refer to that

letter in my judgment as if I had read it out. In my judgment it is not appropriate to treat the claimant as having matched or beaten their part 36 offer. I do so particularly because of my conclusions in relation to the issue of rectification. Had that offer been accepted, it would have led to all of the costs of the action to that date being payable by the defendant to the claimant save for such costs as had been ordered the other way by the court. Further, and as a secondary reason, the addenda that were offered to the 2001 agreement did not make the allowances to the defendant which are made by the declarations which I have ordered by my judgment. For this reason also I take the view that for this purpose the claimant cannot be treated as having done as well as or better than the part 36 offer, and therefore that I should not depart from a usual order giving standard costs in favour of the claimant.

45 That then leads to the fifth and final question whether I should take the view that the defendants have as a result of the acknowledgement and as a result of the matters contained in the declarations, obtained a result such as the claimant should not be given all of its costs save for those which I have already disallowed. The defendant submits that the claimant has been trivialising the re-wording of the declaration and the acknowledgement. It submits that as a result of this, there should be in fact no order as to costs. At the heart of that submission is the suggestion that the claimant has in some way altered its case in the course of this case, in effect from absolute control to management by reference not only to the interest of the residents of the estate, but by reference also to the interests of the claimant. The defendants point to para.15 of the opening skeleton argument of the claimant and point to the fact that in my judgment I had referred to the matter being about management, construction of the agreement being by reference to management rather than control.

46 In emphasising the first sentence of that paragraph in my judgment the submission of the defendants did not give adequate weight to the second sentence of para.l5 which stated that the claimant's management did not exclude the defendants' ownership but that the defendants' ownership was subject to the claimant's right of exclusive management of the transfer land and the interest to the residents of the estate generally. In my judgment nothing within the submissions or the evidence are of such import as to indicate that this is a case where the claimant has significantly changed its case. There are a number of indications that the claimant was referring to management control rather than to absolute control and that it recognised the obligations to enable , the claimant to carry out the construction and development which the claimant recognised was its right under the land agreement. In these circumstances, in my judgment, the recognition and the acknowledgment are substantially in line with that which has already been recognised in correspondence. The claimant has succeeded in obtaining the three declarations, and I regard the modifications to those declarations as, albeit significant, not in any way affecting the fact that the claimant has substantially succeeded in its case.

47 1 did consider whether there should be a modest discount to the claimant, but in the circumstances and in the exercise of my discretion, I do not consider that that is appropriate. In the event, I hold that the costs should follow the event; the defendants should pay the costs to the claimant of the action save for the costs of the rectification issue which are to be paid by the claimant to the defendants. The costs are to be paid on the standard basis.

MR. T. FANCOURT Q.C. [Mr.T.F] (instructed by Rosling King) appeared on behalf of the Claimant.

MR.G.FETHERSONHAUGH Q.C.[Mr.G.F] (instructed by Allen & Overy) appeared on behalf of the Defendants.

Mr.T.F: My Lord, I am very grateful. Would your Lordship then order, as is now the usual course, an interim payment of costs - which is an even more broad-brush exercise than the broad-brush exercise that has been discussed so far. The total figure of costs as set out in the email we looked at earlier, about 3164,000. From that must be deducted the claimant's costs in relation to the rectification claim. If you were to take 15% as sort of 10% of the costs up to the time when rectification was abandoned, that would be a figure of £12,000 to come off, leaving a figure in excess of £150,000. Obviously there has got to be a further allowance because of ... interim payment of costs in relation to the main part of the claim, my learned friend could do the same in relation to the rectification point, so I perfectly accept that that will have to be reduced further, but I would ask for a payment of one half of the net figure on account as an interim payment, 44.38 so, dealing in round figures, £50,000, £150,000 would lead to a payment in my direction of £75,000. Deducted from that would then have to be an approximation of the defendants' costs of the rectification claim which they put at one-third, of about £33,000 which is £11,000 but that was reduced by the same percentage, about 50% to that leaves something in the region of £70,000 as a reasonable interim payment, I suggest.

THE D.J: I am getting lost: 150/2 = 75-11 = 64.

Mr.T.F: No, 11 will be the defendants' total costs of the rectification claim, but they are only entitled to an advance payment on the same discounted basis.

THE D.J: I see. Yes, I follow.

Mr.T.F: So that clearly in effect halves that, brings it down to roughly £70,000, and that is the interim payment I would ask for.

THE D.J: Mr. Fetherstonhaugh?

MR. G.F: Well, my Lord, Mr. Davis is not here, he has had no warning of this at all. My Lord it is an awful lot of money for one man to find as opposed to not very much money for four people to split between them. My Lord, I ask that an interim payment be refused. The claimants are covered by interest, of course, and in the meantime until the outcome of the assessment, my Lord, it simply would not be fair to order that Mr. Davis, who is not here and had no warning of this, should be ordered to find such a large amount of money within a short period.

THE D.J: It is a usual order at this stage.

MR. G.F: My Lord, it is usual on notice, in my submission, not usual to be sprung upon a party who has had no warning of it.

THE D.J: I do not think that that is a fair expression, "sprung on". The courts usually grant a payment on account at this stage, there is not usually a prior application that is made, and I do intend to make such an order unless there is some good reason why I should not, and I do not regard the fact that Mr. Davis is not here now as a good reason for that.

MR. G.F: Well, my Lord, I have got no instructions as to the amount - if your Lordship is going to make an order ---

THE D.J: I know it is late, but do you want to speak to Mr. Davis - to try and telephone him to take instructions if you can?

MR. G.F: Lord, yes, please.

THE D.J: Yes, well I will ---

MR. G.F: It is not something I have discussed at all, I am afraid.

THE D.J: I will certainly give you that opportunity.

MR. G.F: My Lord, thank you very much indeed.

THE D.J: I will rise to enable you to do that.

(LATER)

MR. G.F: My Lord, thank you for that. I have taken instructions, £70,000 within 14 days, which I understood to be the demand that was being made.

THE D.J: Yes.

MR. G.F: My Lord, that is agreed.

THE D.J: Thank you. There will be a payment on account to be paid of £70,000 to be paid within 14 days (and I think we should specify what that date is).

MR. G.F: It is 29th July.

THE D.J: Mr. Fetherstonhaugh, I am very grateful to you for being so pragmatic.

MR. G.F: My Lord, thank you.

THE D.J: Are there any other matters which arise?

MR. G.F: My Lord, I think not.

Mr.T.F: My Lord, thank you very much indeed for sitting late.

THE D.J: It is customary of Judges, and particularly District Judges, who almost go through a routine of saying how helpful counsels' submissions and conduct have been. I just want to say exactly the same, but I want to preface it by saying that it is not a routine here. I have been enormously impressed by the service that both counsel have given to their respective clients. I have been greatly assisted, and the way in which counsel have attended to the judgment and other matters and come back so promptly is a credit to both of you.

Thank you.