Case 57
Rolf

v

De Guerin

[2011] 5 Costs LR 892

Neutral Citation Number: [2011] EWCA Civ 78
High Court of Justice, Court of Appeal (Civil Division)
9 February 2011

Before:
Rix, Elias and Tomlinson LJJ

Headnote

The purpose of a Part 36 offer and an associated offer to mediate had been fundamentally misapplied by the judge and the Court of Appeal exercising its discretion anew considered the appropriate order as to costs.

Judgment

1. **Rix LJ:** This is an appeal solely about costs. It is also a sad case about lost opportunities for mediation. It demonstrates, in a particular class of dispute, how wasteful and destructive litigation can be.

2. The case concerned a small building contract between a homeowner and a builder. The judge, HHJ Cowell, heard four days of evidence in the Central London County Court. He referred to "this very distressing dispute".

3. The claimant, here the appellant, is Mrs Jacqueline Rolf. The defendant, here the respondent, is Mr John De Guerin, referred to by the judge as Mr Guerin and I shall do the same. Mrs Rolf wanted a garage and a loft built at her home in London SE19. In about June

2007 she contracted with Mr Guerin to build the garage for £34,000 and the loft for £18,000. At trial Mr Guerin's first defence was that the contract(s) had not been made with him, but with his company, Greyfox Project Management Ltd. However, he lost on that issue.

4. The terms agreed were for 25% to be paid in advance, and for the balance to be paid over weekly instalments: ten weeks for the garage and 14 weeks for the loft. There were separate estimates for each, and it may be that there were two rather than one contract, but I will for simplicity refer to "the contract".

5. On 9 June 2007 Mrs Wolf paid Mr Guerin by cheque the sum of £13,000, being 25% of the £52,000 total for the two projects.

6. The building works did not go smoothly, as described in Judge Cowell's judgment. Among the difficulties was the tendency of Mrs Rolf's husband, whose name is Mr Mislati, to interfere. He was at home with the couple's young twins, while she was out at work. Thus the day to day communication between the homeowner and the builders was through Mr Mislati. The judge found that he played an aggressive and interfering role, and that it was essentially this that led to the breakdown of the contract. The judge accepted Mr Guerin's evidence that he had "no further control in practice over the contract and its conduct". "The contract had been taken away from me", he said. This amounted, together with the "final straw" of the cessation of weekly payments, to the repudiation of the contract by Mrs Rolf, which Mr Guerin accepted by walking off site. That occurred in the week beginning 20 August 2007.

7. At that time the garage had been substantially constructed, although it lacked its door and a roof, but the loft had been barely started (only some steps to it had been built). The judge found that the loft work had stopped at an early stage owing to a change of plans, that Mrs Rolf allocated all payments to the garage, and that by 12 July 2007 at latest it had been "perfectly clear that the works to the loft were not to go ahead". It is not clear, however, whether there was a consensual variation of the contract to that effect.

8. Following the final break-down of the contract, Mrs Wolf instructed other builders to finish the garage. She claimed to have spent some £20,000 in completing it, on what the judge described as "good invoice evidence".

9. In all Mrs Rolf had paid Mr Guerin £28,750 in cash before work ceased (and in addition had paid for some supplies), that is to say quite

close to the full cost of the garage, were all payments to have been properly allocated to it.

10. Mrs Rolf issued her claim form in the county court on 3 July 2008. In Particulars endorsed on the form itself she said: "We paid £30,000 for only three garage walls and eight stairs to the loft … We have just managed to complete the garage". The amount claimed was £50,000. There were no particulars as to how that sum was made up, but it might have been intended to reflect the amount spent with both Mr Guerin and the substitute builders. The claim form was issued by Mrs Rolf herself, who at that time was not employing solicitors.

11. Mr Guerin likewise filled in his own defence. He said there was no contract with him, only "an estimate provided by Greyfox … There are no payments made to Greyfox." He concluded: "I will make a counterclaim for damages if this does not stop."

12. I think that what happened next was that Mr Guerin made an application to strike out the claim, which was unsuccessful. By its order dated 16 February 2009, the county court ordered Mrs Rolf to provide proper particulars of her claim. This led to Mrs Rolf writing to Mr Guerin, at his solicitors whom he had by then retained, the following letter dated 23 February 2009:

> "Following the result of the last hearing in this case, and after taking legal advice, I am prepared to consider an offer of settlement from you/your client. I would like to hear your decision as soon as possible before we start the procedure ordered by the judge at the last hearing, before we employ an expert to provide a full report relating to the claim, and before we employ a solicitor to handle the remainder of the case.
>
> I am prepared to consider a settlement in order to avoid further expense on both sides."

13. That was, if I may say so, a most sensible letter to write. The parties had had a first outing, so to speak, so they must have known broadly what they were disputing about. It plainly made sense for the parties to settle their differences if they could, before the expenses of litigation began to accelerate. So often, parties leave the first attempt at settlement too late, and costs are already getting in the way.

14. On 26 February 2009, Mr Guerin's solicitors replied to say that "Whilst we commend your willingness to settle this matter we are unable to advise our client further in relation to a settlement without

sight of your particularised claim setting out the basis of your claim and the loss which you claim to have suffered." Mrs Rolf's claim could perhaps have been explored without excessive formality, however Mr Guerin was of course entitled to know what was being claimed and why.

15. Be that as it may, Mrs Rolf then proceeded to draft her own particulars, by letter dated 16 March 2009, addressed both to the county court and to Mr Guerin's solicitors. But she did so, as she explained in her letter, after taking legal advice and appointing an expert surveyor, who had provided her with a report. In her letter, to which she attached the surveyor's report, she set out her claim as being: (a) the return of £26,652 out of the £28,750 paid to Mr Guerin, allowing only £819 for the stairs to the loft and £1,379 for the garage; plus (b) £20,149 spent to complete the garage as well as a further £53,685.45 to correct defects in Mr Guerin's work: after counting back the £1,379 allowed under (a) and deducting £34,000 as the contract sum, the claim under (b) amounted to £41,213.45; plus (c) a further £24,750.45 (over and above the contract sum of £18,000) to complete the loft. In all this amounted to £92,615.90. Her letter concluded: "Therefore I am considering raising the claim amount from the original amount of £50,000."

16. Thus the demand for formality led to a potential increase in the claim. But it seems that Mrs Rolf had not yet retained solicitors for the litigation, for she wrote again to Mr Guerin's solicitors by her letter dated 6 April 2009, to say that she had now provided them with a fully particularised claim and desired a reply to her offer to discuss settlement within a week, after which "I will proceed with the court action through my solicitor". It may be that there had been a previous reply from Mr Guerin's solicitors, disputing whether Mrs Rolf's particulars were adequate, but there appears to have been no reply, or no material reply, to her latest letter. It may be that Mr Guerin, who was disputing any contract at all, at any rate with himself, was looking out not so much for particulars of the sums claimed, as to a statement of why Mrs Rolf claimed to have a contract with him (as distinct perhaps from a contract with Greyfox).

17. It seems that what happened next was that Mrs Rolf was forced into the hands of lawyers, for on 24 April 2009 "Amended particulars of claim" were served by solicitors acting for Mrs Rolf. These particulars alleged two contracts, one for the garage and another for

the loft, each with Mr Guerin, and said that the projects had never been completed with skill and care or at all. As particulars of breach, the surveyor's report dated 12 March 2009 was attached and relied on. As particulars of loss and damage, there was now a wholesale revision, reducing the garage claim to £19,685.45 and the loft claim to £24,750.45. These figures were arrived at by ignoring (i) what Mrs Wolf had paid out to Mr Guerin and (ii) what Mrs Rolf had paid to others to finish the garage. As such, these particulars of loss were not very coherent, but the result was to reduce the claim substantially from the potential figures previously advised.

18. A new defence was served by Mr Guerin's solicitors on 5 June 2009. His case was that neither contract had been entered into by him, as distinct from Greyfox, He claimed that both contracts had been terminated by Greyfox's acceptance of Mrs Rolf's repudiation: "by stopping interim payments she committed a fundamental and repudiatory breach". The loss was denied. The expert's report was rejected on the basis that it stated that its writer had had to rely on what Mr Mislati had told him about the state of the garage at the time when Mr Guerin went off site. There was nothing in Mr Guerin's defence about interference by Mr Mislati. There was no counterclaim.

19. On 24 June 2009 Mrs Rolf's solicitors wrote to Mr Guerin's to make them a Part 36 offer to settle her claim for £14,000 plus her reasonable costs. The offer was said to be open for a period of 21 days. The letter added:

> "Our client is willing to attend a formal mediation or round table meeting with a view to discussing settlement. Please confirm your client's willingness to engage in the same with dates of availability."

The offer was said to be available to Mr Guerin or Greyfox.

20. As will appear below, the judge fundamentally misapplied the purpose of such an offer in his judgment as to costs, in holding it *against* Mrs Rolf.

21. There was no reply to that letter. On 20 July 2009, after the expiry of the 21 days mentioned in that letter, Mrs Rolf's solicitors sent a chaser: "We look forward to receiving your client's response to our client's offer of settlement, and offer of mediation or round table meeting with a view to resolving this dispute." It was thus clear that the Part 36 offer, and the offer of mediation etc, were still on the table. There is in fact no practical limit on the time within which a Part 36

offer may be accepted: see CPR 36.9(2). There was no reply to that letter either.

22. On 19 August 2009 Mr Guerin served further information pursuant to a CPR Part 18 request. In it he emphasised that his case in repudiation was entirely based on Mrs Rolf's failure to pay further instalments.

23. On 1 October 2009 Mrs Rolf's solicitors wrote again to Mr Guerin's solicitors, again pressing for an answer to her Part 36 offer and to her invitation to mediate or meet to discuss settlement. There was again no reply.

24. On 6 November 2009 Mrs Rolf served re-amended particulars of claim. This was for the purpose of adding to the particulars of loss the total figure of £28,750 which had been paid to Mr Guerin during the contract.

25. Trial had been fixed for Monday, 11 January 2010. On the previous Tuesday, January 5, Mr Guerin's new solicitors wrote out of the blue to Mrs Rolf's solicitors to offer to settle the claim for £14,000 plus reasonable costs, payable in monthly instalments over 36 months.

26. On January 6 Mrs Rolf's solicitors amended her Part 36 offer to accept £21,000 plus reasonable costs in settlement, again adding a willingness to mediate or to meet to discuss settlement. This was to reflect the higher particulars of loss claimed by re-amendment.

27. Later the same day, in a reply, Mr Guerin's solicitors said that he was prepared to agree to mediation or to a settlement meeting. Their letter also said that his offer of £14,000 over three years was his best offer, and added: "Our client is in financial difficulty and has been for some time. He is currently in Debt Management Programme details of which we enclose herewith." His new solicitors also said that they would not be representing him at trial, and that any further negotiations would have to be directly with him. The enclosed details of Mr Guerin's arrangements with his creditors showed that his debts had amounted to £27,721.46 and that he was paying them off at the rate of about £125 per month. So far he had made total payments of £1,433.38. It must follow that his offer to settle at £14,000 plus costs over three years was, at the very least, totally unrealistic.

28. In the circumstances the trial took place over the week of 11 to 15 January 2011. Mr Guerin represented himself. Mrs Rolf was represented by Mr Pringle of counsel, who appeared for her again on this appeal.

29. In his judgment, given on the last day of trial, the judge rejected Mr Guerin's defence that the contract had been with Greyfox and not with himself, but accepted his defence that Mrs Rolf rather than he had been in repudiation of the contract. The judge did so, not really on the pleaded ground of failure to pay further instalments, but on the basis first raised in Mr Guerin's evidence at trial (and not foreshadowed in his two witness statements, one dated 19 December 2008 and the other dated 2 September 2009) that Mr Mislati had interfered excessively in the performance of the contract. As for Mrs Rolf's allegations of defective work, the judge accepted one defect out of three, but awarded damages to her of only £2,500. In the event, he gave judgment to Mrs Rolf in the sum of £2,500 but otherwise dismissed her claim.

30. After judgment, there was a discussion about costs. The judge was told about Mrs Rolf's Part 36 offer and the correspondence set out above. Mr Pringle on her behalf submitted that she should receive a substantial percentage of her costs. There were then the following exchanges:

> "**Judge:** … because the claim was for very, very much more than I have awarded, there should be no order as to costs between the parties until … You [Mr Guerin] were right not to respond to the Part 36 offer which was first made on 24 June 2009 … So I think it is no order until June 24 but defendant to recover costs against the claimant after the three weeks expiry of 24 June 2009 …
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> **Pringle:** Do you mean the claimant to pay the defendant's costs? … On what basis?
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> **Judge:** Because you make an offer which is too high …
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> **Pringle:** Your Honour, there is something that I do not understand: the basis upon which you are making that order and –
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> **Judge:** I am making that order because ever after that date you would have accepted £14,000 and they were right to say, 'No, we are not going to pay that. We are going to trial.'"

31. On this appeal, Mr Pringle submits that the judge erred fundamentally in his appreciation of the significance of the Part 36 offer. The offer would have operated in Mrs Rolf's favour, in accordance with the provisions of Part 36, had she been awarded more

in damages by the judge's decision, but, as it was, it was essentially irrelevant, other than to show a willingness on her part to settle; as did her offer to mediate and to meet to discuss settlement. Those were all matters which went to her credit in the conduct of her claim, even though her offers had in the event been pitched higher than the judge's award. In the circumstances, this court could and should exercise its discretion anew: see, for instance, *Aspin* v *Metric Group Ltd* [2007] EWCA Civ 922; [2008] 2 Costs LR 259. Where Mr Guerin had spurned her attempts at settlement until the very last moment, and then, on the practical eve of trial, had made an offer which, in the light of his financial difficulties, could not have been made in good faith, this court should recognise that Mrs Rolf had succeeded at trial, even if the relatively small amount of £2,500 was far less than her claim or even of her offers of settlement, and had succeeded on two out of three main issues (contracting party and breach), and therefore award her at best a substantial amount of her costs, or at worst an order of no order for costs.

32. On his own behalf, Mr Guerin, who was again representing himself, and did so with great charm and ability, submitted that the appeal should be dismissed. The offers of £14,000 and then £21,000 were always way in excess of his adjudged liability, and he was therefore fully entitled to ignore them. The judge had said that the claim completely to rebuild the garage from scratch was "wholly unreasonable" (at para 49 of the judgment). The excessive demands of Mrs Rolf had caused great strains on him. He said that in a telephone conversation which he had had with Mrs Rolf's solicitors at the time of the final flurry, he had been told that Mrs Rolf was willing to accept £14,000 over three years if he had given a charge over his home, but he had declined because his wife had been unwilling to agree. When asked by the court why he had been unwilling to mediate, he said that, if he had mediated, he would have had to accept "his guilt"; he would have been unable to persuade a mediator what Mr Mislati was like, the judge had to see that for himself at trial when Mr Mislati gave evidence; and in any event, "I wanted my day in court, and I was proved correct".

33. At the time of the hearing, we announced our decision to allow the appeal and to exercise our discretion anew so as to make an order for no order as to costs. These are my reasons for that decision.

34. The judge did err fundamentally in his appreciation of the

significance of Mrs Rolf's Part 36 offer. The Part 36 mechanism provides a formal, regulated, procedure for a party, including a claimant, to express a willingness to accept something less than total success in his open position in the litigation. If the offer is not accepted and the offeror does better in the final result than his offer, he is entitled, unless the court considers it would be unjust, to costs on an indemnity basis from the expiry of the "relevant period" (i.e. a basic three weeks, unless the offer extends it) plus interest at an enhanced rate up to 10% above base rate. Therefore there are advantages to a party in pitching his offer realistically, and there are potential disadvantages to an offeree in declining the offer. However, there is nothing about the procedure which states that an offeror is to be prejudiced as to costs because he has expressed his willingness to accept less than his open position. That would make the procedure a most dangerous one to use. The judge's ruling that the incidence of costs should change at the expiry of the relevant period of three weeks confirms the illogicality of his decision. The three weeks is given to protect the offeree, who has that period to make up his mind: the judge used it, however, (to its limited extent) to protect the offeror, Mrs Rolf.

35. Moreover, the consequences of a Part 36 offer are regulated by Part 36 itself. Thus, CPR 44.3(4)(c), which states that in deciding what order to make about costs, the court must have regard to all the circumstances including "any admissible offer to settle … which is *not* an offer to which costs consequences under Part 36 apply" (emphasis added), would make no sense if the offer to settle were to be held against the offeror.

36. The judge appears to have taken the view that, apart from Mrs Rolf's Part 36 offer, the justice of the case was reflected in no order for costs. That was because that was his order for costs incurred up to the making of the Part 36 offer and the expiry of the relevant period of three weeks. Presumably, but the judge did not articulate his reasoning, his basic premise might have been that, although Mrs Rolf was in one sense the winner, having been awarded £2,500 in damages, and had also succeeded on the important issue of whether Mr Guerin or Greyfox had been her contract partner, nevertheless her failure on the issue of repudiation and the relatively small amount of her monetary success entitled him to withdraw the normal discretion which would be exercised in favour of a successful claimant and to decide to regard the overall result as a draw. If so, this merely goes to emphasise the

error with which he regarded the Part 36 offer. A willingness to accept *less* than the formal claim, when the size of that formal claim has already been taken into account for the purposes of the ruling of no order as to costs, can hardly be a reason for penalising the offeror thereafter.

37. In these circumstances, and exercising a new discretion in this court, we considered that the right order should be the one that the judge instinctively thought was *prima facie* the right order to make, namely no order as to costs. That is not to say, however, that his unarticulated reasoning and ours would necessarily proceed on an identical basis.

38. I would stress the following factors. First, Mrs Rolf was the overall winner, but only just. She succeeded in obtaining a mere £2,500 out of a claim which varied between an incoherent £44,435.90 at its lowest and (potentially) £92,515.90 at its highest. In its final form, on which the trial was fought, the claim was for £70,366.90. The largest single item claimed was £53,685.45 for the complete rebuilding of the garage, which the judge thought was wholly unreasonable. In the light of his finding that defects were to be valued at only £2,500, that judgment must be correct. It turned out that the expert's report was entirely based on instructions from Mr Mislati as to his own view about alleged defects which had come to be covered up by the completion of the garage by the time the expert viewed the site in 2009.

39. Secondly, from an issue based approach, it is apparent that Mrs Rolf failed on the issue of repudiation and on two out of the three main allegations of breach; but she succeeded on the issue of contract partner, which Mr Pringle informed us took about ½ out of the four days of the trial. On an issue based approach, therefore, Mrs Rolf comes out somewhat lower in the scale than evens.

40. Thirdly, however, there is the fact that the essential ground on which Mr Guerin prevailed on the issue of repudiation was the unpleaded ground, not even reflected in his two witness statements, that Mr Mislati had interfered so much as to remove all control over the contract from Mr Guerin. It does not appear from the judge's judgment that the pleaded ground, of failure to pay outstanding instalments, would have succeeded on its own.

41. Fourthly, there was Mrs Rolf's willingness to settle. This was spurned by Mr Guerin until it was too late, and even then his offer to

settle, mediate or meet for discussions was undermined by his difficult financial situation. Other than the material annexed to his solicitor's letter of 6 January 2010, we know nothing of his financial circumstances, nor of what if any equity he and his wife held in their home. However, it is clear in retrospect, and it would have been clear to the parties at the time, had they met for sensible discussions, or been assisted towards settlement by a mediation, that Mr Guerin's difficulties were among his best defences. Moreover, whatever the judge said or Mr Guerin now says about excessive claims, it was completely clear to Mr Guerin, from the very first, that Mrs Rolf wanted to avoid litigation if she could, and was willing to settle at a figure which was far lower than her claim. In effect, she was willing to settle at a figure, £14,000, which represented some 70% of her out of pocket expense for completing the garage. Moreover, even that figure was plainly negotiable, as was to be inferred from her anxiousness to mediate or to meet for discussions, as well as her desire to avoid the expense of litigation. As for Mr Guerin's reasons for declining mediation or settlement discussions, they do not seem to me to hold water. It is true that at the end of the day he emerged with a judgment of only £2,500 against him, but he incurred costs down to the time of trial, he could be said to be fortunate to win the issue of repudiation on an unpleaded point, he was wrong to say that no contract had been made with him, and, in any event, he could not know until he entered into the spirit of a settlement or mediation what Mrs Rolf's bottom line was. He did know, however, that she was a weak claimant. As for saying that the judge had to see what Mr Mislati was like, that could hardly have been his reasoning at the time, as distinct from a subsequent rationalisation, otherwise he would have pleaded and given written evidence about Mr Mislati. As for wanting his day in court, that of course is a reason why the courts have been unwilling to compel parties to mediate rather than litigate: but it does not seem to me to be an adequate response to a proper judicial concern that parties should respond reasonably to offers to mediate or settle and that their conduct in this respect can be taken into account in awarding costs.

42. Thus CPR 44(4) says that the court must have regard, as part, of "all the circumstances", to the conduct of the parties; and CPR 44(5) shows that the conduct of the parties covers a potentially wide field of enquiry. There is authority that such conduct can include the reasonableness of a party's response to a call for mediation, especially

where the court itself (as admittedly did not occur in this case) has encouraged or recommended it: see *Dunnett* v *Railtrack plc (Practice Note)* [2002] EWCA Civ 303, [2002] 1 WLR 2434. There the defendant, although successful in the litigation both at first instance and on appeal, was given no costs on the appeal. After permission to appeal had been granted to the claimant, the defendant had offered not to enforce its order for costs below, and £2,500, if the claimant dropped her appeal, an offer which the claimant declined. In the event, the claimant would have done better to have accepted it. As Brooke LJ said (at para 7), in the normal way the defendant would have got its costs. However, Schiemann LJ had subsequently suggested mediation ("I have advised her that she ought to explore the possibility of alternative dispute resolution" *ibid*). That was not an order, or even a recommendation, but a suggestion. The claimant did refer the suggestion to the defendant, who rejected it out of hand. The explanation was that the offer of £2,500 was considered by the defendant to be its limit, in a case where it felt confident of success. This court considered that explanation to be inadequate to prevent the court from marking the defendant's failure to respond by a special order as to costs of the appeal.

43. Brooke LJ pointed out that, quite apart from Schiemann LPs suggestion made as part of the court's duties of case management to further the overriding objective (see CPR 1.4(2)(e)), "the parties themselves have a duty to further the overriding objective" (at [13]). He continued by pointing out that "Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve" (at [14]). That may have been particularly apposite in that ease, where the claim arose out of the loss of the claimant's horses which had been killed on a railway line and where passions were running high: but it remains apposite in a case like the present, where the parties had equally got across one another, as at any rate emerged at trial.

44. In *Halsey* v *Milton Keynes General NHS Trust* [2004] 3 Costs LR 393; [2004] EWCA Civ 576; [2004] 1 WLR 3002, this court gave detailed consideration to the circumstances in which it might be said that a party had acted unreasonably in refusing ADR: such as the nature of the case, its merits, the extent to which other settlement methods had been attempted, its costs and delay, and whether it had reasonable prospects of success. This court there held that an unusual

order on the ground of a refusal to mediate always had to be justified, with the burden on the party seeking such an order to show that the refusal was unreasonable. It seems to me, for the reasons stated above, that such considerations strongly militated in this case in favour of attempts at settlement, even mediation. In particular, as I will develop below, the nature of the case, namely a small building dispute between a householder and a small builder, is well recognised as one in which trial should be regarded as a solution of last resort, and one which is likely to give an unsatisfactory outcome to the parties at disproportionate cost, to which should be added the cost of disproportionate anxiety.

45. In *Reed Executive plc* v *Reed Business Information Ltd (No. 2)* [2004] 4 Costs LR 662; [2004] EWCA Civ 887; [2004] 1 WLR 3026, it was held that, although the court would not break the confidence of without prejudice discussions, it was often possible to debate the reasonableness or otherwise of going to or declining mediation. In the present case there has been no difficulty at all in exploring the reasons why Mr Guerin rejected any opportunity to attempt to settle the claim against him.

46. *Burchell* v *Bullard* [2005] EWCA Civ 358; [2005] BLR 330; [2005] 3 Costs LR 507 concerned a dispute between a homeowner and a small builder about defects in the work. The builder claimed some £18,000 and the homeowner counterclaimed some £100,000. In the end, there was a balance of some £5,000 to be paid by the homeowner to the builder. The trial judge was concerned at the amount of costs which had been expended. There was an appeal by the builder relating to costs. He had offered mediation before he had even commenced his action. This court for special reasons did not find that the homeowner's refusal to mediate had been unreasonable, because it had been rejected on legal advice at a time before the decisions in *Dunnett* and *Halsey* had been made. Nevertheless, Ward LJ said this:

> "41. … it seems to me, first, that a small building dispute is *par excellence* the kind of dispute which, as the recorder found, lends itself to ADR. Secondly, the merits of the dispute favoured mediation, The defendants behaved unreasonably in believing, if they did, that their case was so watertight that they need not engage in attempts to settle … The stated reason for refusing mediation that the matter was too complex for mediation is plain nonsense. Thirdly, the costs of ADR would have been

> a drop in the ocean compared with the fortune that has been spent on this litigation …
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> 43. … *Halsey* has made plain not only the high rate of a successful outcome being achieved by mediation but also its established importance as a track to a just result, running parallel to that of the court system. Both have a proper part to play in the administration of justice … The parties cannot ignore a proper request to mediate simply because it was made before the claim was issued …"

47. In Lord Justice Jackson's report into costs, *Review of Civil Litigation Costs: Final Report*, at pages 298/300, the virtue of ADR (alternative dispute resolution) in the case especially of low value construction disputes is documented (see also paras 30.3.4/5 of his preliminary report). At para 4.6 on page 299 he writes:

> "*Encouraging ADR*. Mediation is dealt with in chapter 36 below. The two principal forms of ADR are conventional negotiation and mediation. ADR has proved effective in resolving construction disputes of all sizes. In relation to small building disputes, however, it is particularly important to pursue mediation, in the event that conventional negotiation fails."

See also chapter 36 of the report at pages 355/363 on mediation.

48. In the present case, even the offer, often repeated, for round-table discussions was spurned. No reason was given at the time, and the reasons advanced by Mr Guerin at this appeal do not bear real examination and are unreasonable. It is possible of course that settlement discussions, or even mediation, would not have produced a solution; or would have produced one satisfactory enough to the parties to have enabled them to reach agreement but which Mr Guerin might now, with his hindsight of the judge's judgment, have been able to say did him less than justice. Nevertheless, in my judgment, the facts of this case disclose that negotiation and/or mediation would have had reasonable prospects of success. The spurned offers to enter into settlement negotiations or mediation were unreasonable and ought to bear materially on the outcome of the court's discretion, particularly in this class of case.

49. In these circumstances, I consider that an order for no order as to costs does substantial justice between the parties. Indeed, I would not have been averse to an order somewhat, but not by very much, in

favour of Mrs Rolf, if it were not for the fact that, on appeal, this court should recognise that, even though it may, as here, be fully entitled to exercise its discretion afresh, it should recognise the limitations under which it suffers as not being the court of trial; and if it were not also for the fact that, as Mr Pringle himself realistically accepts, an order in favour of Mrs Rolf would be unlikely to produce real results.

50. **Elias LJ:** I agree.

51. **Tomlinson LJ:** I also agree.

Mr W Pringle (instructed by Bennett Welch Solicitors) appeared for the appellant.

Mr J De Guerin appeared in person.