JUDGMENT : Master Campbell: Supreme Court Costs Office. 30th November 2006

1. In this Judgment, I give my reasons for disallowing on detailed assessment, the costs of a mediation which the Defendants ("the Feeneys") had sought to recover from the Claimant ("the Bank") in their bill served under the terms of a Tomlin order dated 28th April 2005. That order had settled proceedings between the parties concerning possession of a property in Erith, Kent and the validity of charges secured thereon in favour of the Bank.

2. The relevant parts of Tomlin order say this: *"Upon the Claimant and the Defendants having agreed to the terms of settlement ("the terms of settlement") as set out in the confidential schedule signed by the parties dated 28 April 2005 BY CONSENT it is ordered that:*
   (1) All further proceedings in this action between the Claimant and the Defendants be stayed on the terms of the confidential schedule hereto save for the purpose of carrying the terms of settlement into effect.....
   (3) The Claimant will bear its own costs of the Defendants' counterclaim dated 29 June 1998.
   (4) The Claimant waives all its rights to costs orders against the Defendants made in respect of their counter claim dated 29 June 1998.
   (5) There be a detailed assessment of the Defendants' costs, the Defendants being persons who are in receipt of services funded by the Legal Services Commission.
   (6) The Claimant will pay the costs on a standard basis of the Defendants' counterclaim dated 29 June 1998 (save as regards to the costs of the possession action), such costs be subject to detailed assessment if not agreed".

3. The detailed assessment took place on 13 June 2006 and although the arguments about the quantum of the Feeneys' bill were completed on that date, the detailed assessment was not formally concluded as the final costs certificate had still to be sealed. Before that happened, the Feeneys issued an application on 27th June 2006 to amend the bill under Civil Procedure Rule ("CPR") 40.12 in order to add as item 106A, the fees of Miss Monique Allan of Counsel for preparing for and attending the mediation on 28 April 2005. Those fees sought a further £5,050 plus VAT.

4. The application to amend was opposed by the Bank and was listed before me on 28 July 2006. On that date, I permitted the amendment having given full consideration to the Judgment of Peter Smith J on late amendments in ***Rye v The Liquidator of Ashfield Nominees Ltd*** (2005) EWHC 1189 (Ch). I also gave directions for the service of the amended bill with provision for the Bank, if so advised, to serve amended Points of Dispute.

5. The matter was listed for a further hearing on 15 September 2006 but on 5 September 2006, the Bank issued an application for an order that: *"The Claimant be granted permission to amend its Points of Dispute dated 7 December 2005 pursuant to paragraph 40.10 of the Costs Practice Direction to challenge items 107, 126 and the mediator's fees in the bill".*

6. The items mentioned in the application related to the mediation. Item 107 claimed £1750 for the Feeneys' Solicitors attending the mediation; item 126 sought £105 for attendances on the mediator and one half of his fee-£1562.50.

7. The Bank's application was also listed for hearing before me on 15 September 2006. Mr Jackson (who appeared for the Feeneys), objected to the application on the basis that the Bank had not hitherto taken issue with the mediation costs and was now estopped from doing so, but I allowed the amendments to the points of dispute on the grounds that the Court had made no ruling or finding about those costs at the assessment hearing. They had been allowed simply because no challenge had been made to them at that time. Having heard argument on the amended bill, I disallowed the mediation costs and informed the parties that my reasons for doing so would follow in writing.

The Mediation Agreement

8. During the course of the proceedings, the Bank and the Feeneys had entered into a Mediation Agreement with the intention of settling the litigation through the Centre for Effective Dispute Resolution ("CEDR Solve"). The parties to the agreement were the Feeneys, the Bank, a Mr. Tim Hardy (the mediator) and CEDR Solve. The agreement was signed by or on behalf of each party on 28 April 2005 save for CEDR Solve which signed on 18 April 2005. The agreement defined "the Parties" as the Feeneys and the Bank; Mr Hardy and CEDR Solve were respectively, "the Mediator" and "CEDR Solve".

9. Paragraph 1 of the agreement provides as follows:
   "Participation in the Mediation
   The Parties will attempt to settle the Dispute by mediation ("the Mediation"). The CEDR Model Mediation Procedure ("the Model Procedure") will determine the conduct of the Mediation and is incorporated into, and forms part of this agreement. Any amendments agreed by the Parties will be evidenced in paragraph 10 of this agreement. The definitions in the Model Procedure are used in this agreement".

10. The agreement continued:-
    "7. The person signing this agreement on behalf on the party he/she represents is agreeing on behalf of that party to proceed on the basis of CEDR Solve's Standard Terms and Conditions, including the mediation fee as previously agreed by the parties and CEDR Solve".

11. CEDR's Standard Terms and Conditions are set out in the "***Model Mediation Procedure***" annexed to the Mediation Agreement. Paragraph 21 provides as follows:
    " Fees, expenses and costs

21. *CEDR Solve's fees (which include the mediator's fees) and the other expenses of the mediation will be born equally by the parties. Payment of these fees and expenses will be made to CEDR Solve in accordance with its fee schedule and terms and conditions of business.*
22. *Each party will bear its own costs and expenses of its participation in the mediation".*

12. Guidance notes attached to the agreement then say this

"Fees, expenses and costs-paragraphs 21-22

The usual arrangement is for the Parties to share equally the fees and expenses of the procedure, but other arrangements are possible. A Party to a Dispute, which is reluctant to participate in mediation, may be persuaded to participate if the other Party(ies) agree to bear that Party's expenses. Parties may also amend the agreement to identify that the costs of mediation may be taken into account in any Court orders if there is no settlement at the mediation".

13. Paragraph 10 of the agreement provides a space for amendments to the Model Procedure. In this case there were none.

Submissions on behalf of the Bank

14. Mr Grant, for the Bank, submitted that the Feeneys should not be entitled to any costs in respect of the mediation. He contended that the terms of the Mediation Agreement prevailed over the terms of the Tomlin order since if any amendments had been agreed by the four parties to the Model agreement, they would have been set out in paragraph 10. None were.

15. Mr Grant further submitted by analogy, that if, in the course of proceedings, the Court makes an order (for example after an interlocutory application) which provides for "no order as to costs", then at the end of the action, the winning party is unable to recover against the losing party any costs incurred in relation to that order, because the Court has already adjudicated upon how such costs should be paid. In short, in such a situation, each party would bear their own costs of that application irrespective of the outcome of the action. In the present case, the parties had already agreed to pay their own costs of the mediation and the fact that the Bank had subsequently been ordered to meet the costs of the action did not override the terms of the Mediation Agreement.

16. Mr Grant also drew a comparison with the terms on which parties instruct experts jointly in litigation. In general, the fees of such experts are shared so that in a case involving just two parties, each would bear one half. That half would become part of each party's costs of the proceedings and would then be payable by the losing party in the event that the winning party was awarded costs.

17. Such a situation would have existed in the present case under paragraph 21 of the Model Procedure (which provides for the mediator's fees and other expenses of the mediation to be born equally by the parties), but for paragraph 22 (each party will bear its own costs). In these circumstances the position was different to that which pertains on the instruction of a joint expert in litigation.

18. Mr Grant also drew attention to the terms of the Tomlin order itself. Had the order not said so, the Bank would have been entitled to claim its costs in relation to various costs orders it had obtained during the proceedings against the Feeneys. However, it was expressly provided at paragraph (4) of the order that the Bank would waive all its rights to such costs. Had it been the intention of the parties that the Bank should pay the mediation costs, then the Tomlin order would have said so in the same way as it had been drafted to exclude the interlocutory orders for costs made in the Bank's favour.

Submissions on behalf of the Feeneys

19. Mr Jackson relied on the Tomlin order made by the Court. In his submission, that order superseded everything that had gone before, and it had not been necessary to provide for the mediation costs in the order because it overrode the terms of the Mediation Agreement. In the absence of any reference to the contrary, the proper interpretation of the order for costs was that the costs of the mediation were included. Mr Jackson also drew a comparison with the position that exists when an expert or Arbitrator is instructed jointly. In that event, the party in receipt of a costs order is entitled to recover the amount of the fees of the expert or Arbitrator regardless of any agreement to the contrary at the time of issuing instructions. Put another way, the successful party will recover the costs of the expert or Arbitrator regardless of any prior agreement as to sharing.

Decision

20. It is common ground that mediation costs are, in principle, recoverable as costs of the action. For my part, I consider that they are analogous to the costs of :- *"negotiations: work done in connection with negotiations with a view to settlement"*

21. This was an item of recoverable work expressly provided for in RSC Order 62 appendix 2 Part II 4 (x), the predecessor to the CPR. Section 4.6 of the Costs Practice Direction to CPR 43 sets out items that may be included in a bill and provides at sub paragraph (8):- *"work done in connection with negotiations with a view to settlement ...."*

22. Mr Grant, rightly in my view, does not suggest that the Bank could have avoided liability for the mediation costs had the Mediation Agreement been silent as to how they should be met.

23. Costs are in the discretion of the Court: (see Section 51 Supreme Court Act 1981), and I accept that Mr Jackson is right that the Court can make such costs orders, in relation to the mediation costs, as it thinks fit having regard to

the provisions of CPR. However in the present case, I do not share his view that the Tomlin Order overrode the terms of the Mediation Agreement or, that it extinguished all earlier orders and agreements about costs. Expressed differently, I do not agree that the order included the costs of the mediation, as he has contended but having said that, I do consider that there is a distinction to be drawn between the costs of participating in the mediation and the fees and expenses associated with it.

24. So far as the costs of participation are concerned, I prefer Mr Grant's submissions. Suppose, for example, that during the course of the litigation, the Feeneys had applied to the Court for more time to serve their defence and, prior to the return date, an extension was agreed on terms that they would pay the Bank's costs of and occasioned by the application. Such an agreement is frequently embodied in a consent order, but in many cases, it will be reflected in a simple exchange of letters between solicitors in order to avoid the expense of drawing up an order, and/or an attendance before the Master. In my judgment, an agreement made in this way is not displaced by a later Tomlin order in the nature to that agreed in this case which is expressed in terms that "X will pay Y's costs of the (counter)claim to be assessed if not agreed". On the contrary, absent an express term to the contrary in the Tomlin Order, in my opinion, the agreement would stand and it would be open to the Bank to bring in for assessment, a bill for the costs of the application for time, together with any other interlocutory orders or agreements under which the Feeneys had agreed or been ordered to meet the Bank's costs.

25. In the present case, the Parties to the Mediation Agreement (that is to say the Feeneys and the Bank), expressly agreed in paragraph 1 to incorporate into the Agreement, the Model Procedure including Paragraph 22 which, for convenience, I repeat:- *"Each Party will bear its own costs and expenses of participating in the Mediation."*

26. In my judgment, that meant that the Feeneys and the Bank would each meet their own costs of taking part in the Mediation*, irrespective of the outcome*, unless they agreed to amend the Model Procedure by altering paragraph 10 of the Agreement : it is common ground that they did not do this. It follows that in my opinion the costs of participation are covered by paragraph 22 and not the Tomlin order and accordingly items 106A, 107 and 126 (the attendances on the mediator), must be disallowed.

27. This point is made good, in my opinion, also by reference to what **did** happen in the present case in relation to the interlocutory costs orders awarded against the Feeneys. By paragraph (3) the Bank expressly waived all its rights to its costs orders on the counterclaim. If the hypothesis advanced by Mr Jackson were to be correct, such a term would be superfluous because the Tomlin Order would have overriden everything that had gone before. In my judgment, the fact that the Feeneys wished to have it included, supports Mr Grant's submission that agreements made about costs during the course of the proceedings are not extinguished by an order for costs at the end of the case unless expressly provided for. If it were otherwise, it would be necessary for a party paying costs also to repay at the detailed assessment stage, any interlocutory costs which had been summarily assessed in his favour against the party receiving costs, during the course of the action. It is because orders for costs of an action made in favour of one party at the expense of another, do not have that meaning, that in the present case in was necessary for the Bank and the Feeneys to agree expressly via clause (4) that all costs awarded in the Bank's favour on the counterclaim were excluded: if it were otherwise, they would all have been susceptible to detailed assessment and payable by the Feeneys to the Bank.

28. A further point is that if it was unnecessary to spell out in the Tomlin Order that the Feeneys would be paid the costs of the mediation notwithstanding what the mediation agreement said, why was it necessary for the interlocutory costs, of which the Bank had the benefit, to be expressly mentioned in the order? After all, it would have been a simple task to have added the words "including the mediation costs" in paragraph (6) of the Tomlin Order if that had been the parties' intention, in which case no issue would have arisen on detailed assessment. Put another way, if the words "the Claimant will pay the costs on a standard basis of the Defendants' counter-claim" are sufficient to cover the Feeneys' costs of the mediation notwithstanding what was agreed in the Mediation Agreement, as Mr. Jackson contends, why were they insufficient to cover the adverse interlocutory costs orders made against the Feeneys on their counter-claim? In my judgment, in order to cover the costs of mediation, specific mention should have been made in the Tomlin order, as was the case for the Bank's interlocutory costs orders. Absent words such as "…including the costs of the mediation" in clause (6), the order is incapable of bearing the meaning contended for by Mr. Jackson.

29. The fees and expenses associated with the mediation are another matter: these would include Mr Hardy's fees. At the hearing, Mr Grant submitted that the mediator's costs in this case were in a different category to those costs incurred where parties agree to share the costs of a disbursement. In addition to the example about experts given by Mr Grant, this can also occur where the parties agree to engage a transcriber to provide overnight transcripts of the previous day's evidence; such an agreement would be made on the basis that "*we agree to share the costs of X & Co transcribers*". This would not mean that, however, that the expense is shared for all time. On the contrary, under such an agreement the charge would be a cost of the action and recoverable by the ultimate winner (assuming a costs order were to be made in his favour).

30. Mr Grant submitted that the position here was different. Whilst the parties did agree to share the expenses of the mediation, he contended that paragraph 22 "*changed the position completely*". By that paragraph the parties contracted to bear their own costs of the mediation. Absent such a term, Mr Grant accepted that whoever ultimately was awarded their costs could have recovered their half share from the loser, but the inclusion of paragraph 22 displaced that entitlement.

31. At the conclusion of the hearing, I told the parties that I agreed with Mr Grant's submission, but upon mature reflection I consider that I was hasty in reaching such a conclusion. As I said in paragraph 22, in my view there is a distinction to be drawn between fees and expenses of mediation and the costs of participation: indeed the relevant part of the Mediation Agreement is headed "*Fees, expenses and costs*" which is suggestive of their being such a distinction.

32. So far as the former are concerned, paragraph 21 of the Model procedure is clear namely that fees and expenses of mediation are to be shared. Within the compass of that paragraph would fall, in my view, such matters as the Mediator's fee and the venue costs (if any). Paragraph 22, on the other hand, is directed at the parties' legal costs, meaning their lawyers' fees and disbursements. For Mr Grant's submission to be correct, I consider paragraph 21 would need to be subservient to paragraph 22 but I do not believe that it is. On the contrary, paragraph 21 is concerned with expenses which are to be shared whilst paragraph 22 is directed at legal costs which are to be borne by each party. It follows that, contrary to the decision I gave on 15th September 2006, I consider that I ought to have allowed Mr Hardy's half fee as an expense of the mediation and not it disallowed it as a legal cost of participation. However since I have already decided the point in the Bank's favour, it will be for the learned Judge to put this right on appeal if he wishes to do so.

Conclusion

33. It follows, for the reasons I have given, that in my judgment, the mediation costs (items 106A, 107 and 126) are not costs which fall within the ambit of the Tomlin Order: likewise the Mediator's half fee, but in his case, only because I have already given judgment in the Bank's favour on this point. I concur with Mr Grant to the extent that I agree that the Tomlin order does not override the Mediation Agreement and it is the Mediation Agreement and not the Tomlin order which determines how the mediation costs are to be paid. In other words, the order between the Feeneys and the Bank settling their differences, without containing an express term doing so, did not alter the earlier out-of-court agreement made between the Feeneys, the Bank, the mediator and CEDR Solve about how the mediation costs were to be met. Where Mr. Grant and I part company is in relation to the interpretation of paragraphs 21 and 22 and in the distinction that I consider is to be drawn between fees and expenses of the mediation on the one hand, and the costs of participation on the other. Unlike him, my revised position is that I consider that Mr. Hardy's fee is a cost of the action, which falls outside the scope of the Tomlin order and is an expense recoverable under paragraph 21.

34. In view of the fact that I understand these points and mediation costs as a whole are causing difficulties on detailed assessment (and specifically whether they are recoverable at all as costs of action) , as I indicated at the end of the hearing on 15 September 2006, I give the Feeneys permission to appeal if they wish to have the matter reviewed by a higher court.

Mr Grant (instructed by Denton Wilde Sapte) for the Claimant
Mr Jackson (instructed by Sebastians) for the Defendants