JUDGMENT : Mr Justice Ramsey : TCC. 17th November 2006.

1. In this action the claimant ("P4") claimed over £70,000 for goods allegedly converted by the defendant ("Unite"). I have now given judgment and decided that P4 is only entitled to recover some £387. I therefore have to determine liability for costs.

2. I have now seen "*without prejudice save as to costs*" and other correspondence which passed between the parties. A number of Part 36 Offers and a Part 36 Payment have also been made. Of particular relevance is a Part 36 Payment into Court of £6000 made by Unite on 14 June 2005. It is common ground that, as P4 has not beaten that offer, the question of costs depends on CPR Rule 36.20(2) which provides:

   "*Unless it considers it unjust to do so, the court will order the claimant to pay any costs incurred by the defendant after the latest date on which the payment or offer could have been accepted without needing the permission of the court.*"

3. It is common ground that, on this basis, P4 would pay the Unite's costs from 5 July 2005. However P4 submits that it would be unjust to make that order. In addition, I have to consider what the appropriate order is for costs prior to 5 July 2005. Unite submits that it should have all of its costs and that they should be assessed on an indemnity basis.

4. P4's primary submission is that there should be no order as to costs for the whole period for two reasons. First, Unite's failure to provide P4 with information on Unite's payments to its subcontractor, Tudor, to whom P4 had supplied emergency light fittings which were the subject of this action. Secondly, a refusal by Unite to mediate. I therefore deal with those two reasons.

Information of Payment to Tudor

5. The position on payment to Tudor was relevant to two matters. If Unite had paid Tudor for the fittings which P4 supplied to Tudor then property in those goods and materials might have passed to Unite, providing possible defences to a claim for conversion. Also, as Mr Ackerman of Hewitsons states, and I accept at least for the early stages, if P4 had been assured that Unite had paid Tudor for all the fittings then it would have affected P4's approach.

6. This was a case where both P4 and Unite were innocent parties in the sense that P4 had supplied fittings to Tudor and had not been paid and Unite equally had been let down by the insolvency its subcontractor, Tudor. In addition, P4 knew little about what had happened between Unite and Tudor in relation to the subcontract for the work and Unite knew little of the supply contract between P4 and Tudor.

7. P4's position was, in summary, that there was a Retention of Title clause in the supply contract with Tudor; that Unite had notice of that clause and, at least from 20 October 2003, P4 had informed Unite of the operation of that clause and that Unite had then fixed a significant quantity of fittings supplied under that clause with notice of that clause. Initially, therefore, when Hewitsons wrote to Unite on 18 December 2003 they requested documents on fittings unfixed on 20 October 2003 and evidence of the dates on which light fittings were fixed.

8. In response, the first point made by Walker Morris, on behalf of Unite, was that "*Unite had made what they consider as payments in full to Tudor on or before 9 October 2003 in respect of the Goods*". They therefore stated that property in the fittings had passed under Clause 21.4.5.3. On 12 January 2004 Hewitsons asked, in response: "*Please supply us with copies of all invoices from Tudor for our client's goods with proof of payment of each of those.*" They also enclosed a copy of a quotation dated 14 October 2002 which P4 contended gave Unite earlier notice of the Retention of Title clause. In reply on 25 February 2004 Walker Morris sent a screen print showing a total payment of £1,754,901.77 made by Unite to Tudor. It did not show payment for P4's fittings. Queries were raised by P4 and then on 28 May 2004 after referring to the Pre-Action Protocol, P4 requested, again, the same invoices and proof of payment as requested in January 2004. On 3 June 2004 Unite explained that there were no separate invoices for the fittings as they formed part of the applications for payment in respect of the overall mechanical and electrical works.

9. It was only on disclosure after exchange of pleadings in these proceedings that Unite made available the document which was referred to at the hearing as the September Agreement. It was only on 16 December 2005, in response to a request for further information, that Unite served a witness statement from Mr Bacon who had been employed by them up to April 2005. He had been responsible for the payment of £190,000 under the September Agreement, which as I have now found, passed property in unfixed fittings to Unite. No satisfactory explanation was given as to why this payment or its significance had not been disclosed as part of the pre-action exchanges carried out under the general pre-action protocol. Initially these proceedings were not brought in the Technology and Construction Court but were transferred at a later stage.

10. Unite submits that the payment issue was not a determinative issue. For the reasons set out above, I consider that it was an important issue and one which would have been likely to have affected P4's approach, particularly at the pre-action stage. Unite point out that P4 did not later in 2006 change its position after disclosure of the September Agreement and Mr Bacon's witness statement. At that stage there were various issues which had arisen in the proceedings and I do not consider that this alters the fact that the provision of that information at an early stage would have helped resolve the dispute.

11. I therefore accept that Unite failed to provide relevant information to P4 which I consider was of importance during the pre-action protocol stage to answer P4's requests and allow P4 to understand Unite's case.

Refusal to Mediate

12. As set out in the judgment this is a case where Tudor went into liquidation without paying P4 for goods which had been delivered to site. P4 and Unite had been in contact during 2003 and on 18 December 2003 P4's solicitors, Hewitsons, wrote to Unite intimating the claim for conversion and asking for information. It drew Unite's attention to the Practice Direction on Pre-Action Protocols. Unite instructed Walker Morris as its solicitors and they responded promptly to Hewitsons letter, on 19 December 2003. Correspondence then passed between the parties in relation to the merits of the claim and there were requests for information as set out above.

13. On 26 March 2004, Hewitsons wrote a Part 36 Claimant's Offer proposing a payment by Unite to P4 of £43,000 plus costs of £1,400. In response on 22 April 2004, Walker Morris wrote making a "without prejudice save as to costs offer" of £6550 plus VAT.

14. After further correspondence, on 6 July 2004 Hewitsons wrote a further Part 36 Claimant's Offer proposing an increased payment by Unite to P4 of £50,000 plus costs. In the final paragraph they stated: "*Our client is also prepared to submit to mediation or, preferably, to have a meeting with clients and solicitors present to resolve this matter*."

15. Walker Morris responded on 11 August 2004, rejecting the Part 36 Offer and dealing with an authority cited by Hewitsons in support of the claim. They concluded the letter by saying: "*Whilst we consider that this matter is now at an end, we would reiterate our earlier comments that in the event your client decides to bring a claim against our client, then we are instructed to defend it vigorously*."

16. That clearly rejected the offer of mediation. Understandably, in the light of that reaction, there was no further correspondence before 8 April 2005 when P4 issued the Claim Form in these proceedings. On 27 April 2005 Hewitsons sent Walker Morris copies of certain documents which had been requested by Unite. At the end of that letter they added: "*Please let us know whether your client is prepared to enter mediation regarding this dispute*."

17. On 29 April 2005 Walker Morris stated that a review had been carried out of P4's claim and they had come to the conclusion that the claim would fail. They concluded, however, by offering £10,000 inclusive of interest and costs in full and final settlement of the claim. That offer was rejected by P4 on 19 May 2005.

18. On 20 May 2005, Walker Morris wrote and said:

    "*We note your proposal to enter into mediation regarding this dispute, set out in the last paragraph of your fax dated 27 April 2005.*

    We consider your conduct in this matter to be contrary to the spirit of the CPR and in particular the practice direction on protocols. In particular, the last correspondence pre-action was our fax to you dated 11 August 2004. No further correspondence has taken place since and then some 9 months later you have issued proceedings, without further notice or recourse to our Client. To then offer mediation, after issuing proceedings, appears to us to be a cynical attempt to belatedly seek protection from the costs sanctions outlined in ***Halsey v Milton Keynes General NHS Trust.***

    We reserve the right to bring this letter to the Court on the issue of costs.

    Our Client is prepared to enter into mediation but questions whether it would be a worthwhile exercise. Our client has already considered alternative dispute resolution, by putting forward a without prejudice offer.

    You are well aware that we consider your case to be fundamentally flawed on an issue of law. Indeed you appear to be seeking to make new law and, as such, we are not convinced this dispute is appropriate to mediation. Presumably, you would intend to have your counsel attend which would make the experience relatively expensive for both parties.

    We should be grateful if you would explain why you did not offer mediation prior to issuing proceedings."

19. Hewitsons replied on 26 May 2005 and said:

    "*You make the point that the last correspondence prior to our issuing proceedings was your letter of 11 August 2004 in response to our letters of 6 July 2004 (about which see below) and 10 August 2004. We would refer to the last paragraph of your letter of 11 August 2004 "Whilst we consider this matter is now at an end, we would reiterate our earlier comments that in the event your client decides to bring a claim against our client, then we are instructed to defend it vigorously" What exactly are you suggesting was the proper response to this?*

    You ask us to explain why we did not offer mediation prior to issuing proceedings. The simple answer to that is we did. Please see the last substantive paragraph of our letter of 6 July 2004. As we have indicated in our open letter, we offered mediation again after we had issued proceedings but before your client had incurred substantial costs.

    You have made strong (and wrong) accusations that we have acted contrary to the spirit of the CPR and claimed that our actions have been "cynical". We are happy that we have acted entirely properly throughout and that your client has refused all attempts to mediate as well as make otherwise acting contrary to the spirit of the CPR. Even in your letter of 20 May 2005, you make it clear that your client questions the point of mediation. Clearly, if your client is only prepared to mediate on the basis that it does not consider it a worthwhile exercise, there may be little point to it. Nonetheless, should your client have a change of heart, we are still prepared to advise our client that mediation is worthwhile."

20. This led to Walker Morris writing on 1 June 2005, setting out their position in relation to Mediation. It stated:

    "*Our client considers it is being entirely reasonable in rejecting mediation for the following reasons:-*

1. THE MERITS OF THE CASE

1.1 Our client reasonably believes it has a very strong case. This is the opinion of both ourselves and our Counsel.

1.2 Furthermore, if our Defence based on Section 25 of the Sale of Goods Act 1979 is successful (which we are confident it will be) this provides us a complete Defence-i.e the liability to your client will be zero. We are not dealing here with a dispute where there could be varying parameters of damages payable. It is, to coin a phrase, "all or nothing".

1.3 Other settlement methods have been attempted and rejected by your client we are able to demonstrate that by no means is our client taking a stubborn entrenched stance in relation to this dispute. On the contrary, our client has offered £10,000.00 which your client has rejected

2 EXPENSE

2.1 We consider that Mediation would be an expensive exercise bearing in mind the sums at stake.

3. MEDIATION DOES NOT HAVE A REASONABLE PROSPECT OF SUCCESS

3.1 *We do not consider that there will be a reasonable prospect of success of Mediation. This is based on two points.*

3.1.1 Firstly, there is a fundamental disagreement between the parties in relation to an issue of law (the meaning of actual notice) and an issue of fact (which terms and conditions apply to the Contract between your client and Tudor). Neither party is willing to concede ground on this in correspondence between the parties to date and it is, we consider unlikely, that progress would be made during a mediation. These issues require final determination by a Judge.

3.1.2 Secondly, we do not consider your client has adopted the correct mindset to allow Mediation to work. This is illustrated for example by the offers you have previously made. Your client offered £42,000.00 plus costs in full and final settlement on 26 March 2004 and then made an offer of £50,000.00 plus costs in full and final settlement on 26 July 2004.In other words your client increased significantly its offer. Rather than to look to reach a compromise your client moved further away than its original position."

21. On 2 June 2005 Unite served its Defence and on 14 June 2005 made the Part 36 Payment of £6000. In response on 17 June 2005 Hewitsons made a further Part 36 Claimant's offer offering to accept an increased sum of £60,000 plus costs.

22. On 12 October 2005 Walker Morris wrote to Hewitsons setting out their views on the merits of the claim. They concluded inviting P4 to discontinue and offering to accept costs assessed on a standard basis rather than an indemnity basis.

23. On 4 November 2005, I rejected a part 24 application by Unite. On 7 November 2005 Hewitsons wrote a further Part 36 Claimant's offer offering to accept an increased sum of £73,000 plus costs.

24. Finally on 13 February 2006 Walker Morris wrote to Hewitsons and offered to accept a £20,000 contribution to their client's cost if P4 discontinued the action.

25. In the light of those matters, I now consider whether the rejection of mediation by Unite was unreasonable. In relation to this question, the submissions have naturally focussed on the judgment of Dyson LJ in ***Halsey v. Milton Keynes NHS Trust*** [2004] 1 WLR 3002 where he identified a number of non-exclusive factors which are relevant in considering the impact on costs of a refusal to mediate.

26. Unite submits that there was nothing in its conduct which should deprive it of its costs. In particular in terms of the grounds in ***Halsey***, it states as follows:

(a) The nature of the dispute: Unite submits that the dispute in this case involved a long term relationship and there were allegations of bad faith raised. These, it submitted, were the types of dispute referred to in ***Halsey*** which most probably could not be successfully mediated.

(b) The merits of the case: Unite submits that this was a case where it reasonably believed that it had a strong case as can be seen from the end result.

(c) *Other settlement methods have been attempted*: Unite submits that it did make settlement offers but P4 rejected these and that this is a relevant factor in Halsey. Equally, as in Halsey, Unite states that it was making efforts to settle but P4 had unrealistic views of the merits of the case.

(d) The costs of mediation would be disproportionately high: Unite submits that the costs were significant as identified in the letter from Walker Morris of 1 June 2005.

(e) Delay: Unite accepts that there was no delay.

(f) Whether the mediation had a reasonable prospect of success: Unite submits that the mediation would not have succeeded and, in fact, P4's offers to settle increased and the parties gradually became further and further apart. In this respect P4's offers became increasingly unreasonable.

27. Unite therefore submits that it acted reasonably in rejecting P4's proposal to mediate and relies on the reasons set out in the letter from Walker Morris of 1 June 2005.

28. P4 submits that the refusal either to mediate or to meet to discuss the case was unreasonable. If the parties had done so then it is likely that matters could have been resolved. It submits that in Halsey, Dyson LJ cast no doubt on Lightman J's general proposition in ***Hurst v. Leeming*** [2003] 1 Lloyd's Rep 379:

"*…the mediation process itself can and often does bring about a more sensible and more conciliatory attitude on the part of the parties than might otherwise be expected to prevail before the mediation, and may produce a recognition of the strengths and weaknesses by each party of his own case and of that of his opponent, and a willingness to accept the give and take essential to a successful mediation. What appears to be incapable of mediation before the mediation process begins often proves capable of satisfactory resolution later.*"

29. P4 also relies on the policy under the CPR of encouraging ADR and referred to the observation of Jacob LJ in ***Reed Executive plc v. Reed Business Information Ltd*** [2004] EWCA Civ 159 where he referred to Lightman J's statement and said that negotiations are not the same as mediation: "*a good and tough mediator can bring about a sense of commercial reality to both sides which their own lawyers, however good, may not be able to achieve.*" This is also reflected in paragraph 20 of ***Halsey*** where Dyson LJ says that "*But it is also right to point out that mediation often succeeds where previous attempts to settle have failed.*"

30. P4 submits that the proposal of mediation or a meeting to discuss issues was an attempt by P4, from the outset, to understand Unite's case that it had "paid for the goods". It submits that a mediation pre-action, in which Mr Bacon participated, would have elicited the fact of the £190,000 payment and the September Agreement which only surfaced later in 2005. It states that the failure to identify this fact between December 2003 and 16 December 2005 remains the most striking aspect of this litigation.

31. In relation to the matters set out in Halsey, P4 submits that Unite's refusal to mediate was unreasonable because:

(a) ***nature of the dispute*****:** This was a case where there were disputed facts and as Dyson LJ observed at para 78 of ***Halsey*** "*disputed facts are intrinsically suitable for resolution by mediation*". P4 submits that Mediation would have enabled the parties to articulate their arguments and elicit and evaluate what was being said by the other side. It points out that the issues of incorporation of terms, notice of the Retention of Title clause to Unite and payment were all fact dependent.

(b) ***the merits of the case*****:** P4 accepts that at para 18 of ***Halsey,*** Dyson LJ qualified Lightman J's observation in ***Hurst v. Leeming*** where he said "*The fact that a party believes that he has a watertight case again is no justification for refusing mediation. That is the frame of mind of so many litigants.*" and said "*In our judgment, this statement should be qualified. The fact that a party unreasonably believes that his case is watertight is no justification for refusing mediation. But the fact that a party reasonably believes that he has a watertight case may well be sufficient justification for a refusal to mediate.*" P4 refers to what Dyson LJ said later: "*Border-line cases are likely to be suitable for ADR unless there are significant countervailing factors which tip the scales the other way.*" In this case, P4 submitted that there were no countervailing factors tipping the scales against Mediation.

(c) ***the extent to which other settlement methods have been attempted*****:** P4 points out that it made two separate proposals for mediation, both before and shortly after proceedings were issued. It also states that its solicitors, Hewitsons proposed a meeting of clients and lawyers, before proceedings were issued. Walker Morris responded to the letter but disregarded the proposal. P4 states that at no stage did Unite propose any without prejudice process nor given any indication of a willingness to compromise on any fact or issue. P4 submits that this is not therefore a case where other ADR strategies have been pursued in the alternative to mediation.

(d) ***whether the costs of the ADR would be disproportionately high*****:** P4 submits that they would not be disproportionately high compared to the costs of the hearings in November 2003 and the hearing in February 2006. It rejects Walker Morris' view in the letter of 1 June 2005 that the cost of mediation would be an expensive exercise bearing in mind the sums at stake and submits that a mediation of this dispute would readily have been accommodated within the one day ordinarily allotted.

(e) ***whether any delay in setting up and attending the ADR would have been prejudicial*****:** P4 submits that there was no delay in proposing mediation as it was proposed before proceedings were issued.

(f) ***whether the ADR had a reasonable prospect of success*****:** P4 submits that, given the nature of this litigation, a mediation would have had a reasonable prospect of success. P4 states that it is no answer that Unite, as things turned out, was able, to establish payment and vesting of unfixed materials. That cannot be prayed in aid in relation to the stance adopted at the time that mediation was rejected because the September Agreement and payment had not been identified by Walker Morris as of any relevance. P4 submits that had mediation been undertaken, or else a meeting of the parties with their lawyers been held (as recommended by the Construction and Engineering Pre-Action Protocol) the essential nature of the dispute could have been identified and information exchanged.

32. P4 submits that a mediation or meeting of lawyers and clients at an early stage would have had a reasonable prospect of success and would have provided an opportunity for Unite to show how it contended that it had paid Tudor for all materials in September 2003. It submits that the fact that Unite was unable and or unwilling to provide such explanation before December 2005/March 2006 was unsatisfactory and unreasonable.

33. In the light of those submissions, I now turn to consider the particular factors in Halsey, bearing in mind that those factors are not exclusive.

***(a) nature of the dispute*:**

34. This was a case where the sums in dispute whilst significant were not large and where there were a number of issues on which P4 might have succeeded in obtaining a much more substantial sum than it did. There were factual issues arising out of the incorporation of the Retention of Title clause and notice to Unite; there was an issue as to the number of unfixed lighting fittings on site on 20 October 2003 and there was an issue as to whether Unite had paid its subcontractor, Tudor, for the emergency light fittings supplied by P4. I consider that the nature of this case was a classic example of a case which leant itself to ADR and indeed I expressed that view to the parties at the hearing in February 2006. I do not accept that this is a case in the category of a long-term relationship where a point of law needs resolution. Nor do I accept that, at the time Mediation was proposed, there were allegations of lack of bona fides. These came later in 2005. This, therefore, was a case where I consider that the nature of the dispute fell within the category of dispute where the court has and continues to encourage parties to seek ADR, in particular mediation, at the pre-action protocol stage, as emphasised by recent amendments to those protocols.

(b) the merits of the case:

35. I consider that, initially, as Unite did not have copies of the correspondence between P4 and Tudor relating to the Orders, they could not reasonably have thought that they had a watertight case on the incorporation of the Retention of Title clause. That became stronger during the course of the proceedings when it was apparent that the quotation from P4 had been faxed without the terms and conditions on the back. Equally, in terms of Unite having notice of the Retention of Title clause, P4 raised the question of Unite having had notice in October 2002 when they received a quotation direct for the supply at the relevant project. That point was not responded to pre-action, but became weaker as the position on the incorporation of terms became stronger. So far as the number of fitments on site was concerned, the evidence of this was poor, there were no detailed records but only an estimate which depended on oral evidence. There was however evidence which showed the extent of completion and the number of fittings on each floor which allowed the parties to narrow the dispute substantially but only at the hearing. This is a classic issue which could and should have been dealt with at an earlier stage in the context of discussions or mediation. In relation to payment, as I have stated above, until Mr Bacon provided information on 12 October 2005 which identified the September Agreement, the position of Unite was weak.

36. In my judgment, when Mediation was offered on 6 July 2004 and 27 April 2005, Unite cannot reasonably have thought that they had a watertight case. They had risks on a number of issues and by the figures on which their offers were made, they were exposed at least in respect of the number of fitments unfixed and on site on 20 October 2003.

***(c) the extent to which other settlement methods have been attempted*:**

37. I accept that the parties exchanged written offers and, in that way, it could be said that there was a process of negotiation. They also exchanged views and information on the case. It also evident that the sum which P4 offered to accept increased from £43,000 (26 March 2004) to £50,000 (6 July 2004) in the period that mediation was being offered. It was later increased to £60,000 and then £73,000. That, it seems to me, does indicate that P4 had increasingly unrealistic views of the merits of its case. However, as Dyson LJ said in Halsey, whilst this is a relevant factor, mediation often succeeds where previous attempts to settle have failed and therefore, although the fact that settlement offers have already been made is potentially relevant to the question whether a refusal to mediate is unreasonable, on analysis it is an aspect relevant to whether the mediation had a reasonable prospect of success.

38. In particular, in this case, I do not consider that letters from solicitors which make offers can be a proper substitute for the process of ADR which involves clients engaging with each other and a third party, such as a mediator, to resolve a dispute. In such circumstances, the aspirations of each party are soon brought within realistic bounds and a situation in which one party makes increasingly unrealistic offers is avoided. There was no proper engagement in the correspondence on the central issues and concerns which are usually the focus of ADR, through such things as position papers in mediation.

***(d) whether the costs of the ADR would be disproportionately high*:**

39. In the letter from Walker Morris of 1 June 2005 they stated that they considered that Mediation "*would be an expensive exercise bearing in mind the sums at stake*". I do not consider that this is the only relevant comparison. The total costs of proceeding to trial are a major factor which has to be taken into account and, on any view, the costs of mediation should have been seen as small compared to those costs. In the event, those costs have amounted to over £120,000 for Unite. In addition P4 is a company in business as the supplier of emergency light fittings which are specified by Unite for use in its buildings. Both those companies have had to spend valuable time and effort in dealing with this action which, in my judgment, should also be taken into account in the comparison with the costs of mediation.

***(e) whether any delay in setting up and attending the ADR would have been prejudicial*:**

40. As Unite accepts, there was no delay. P4 offered mediation both pre-action and immediately after proceedings were commenced. Unite's suggestion in the correspondence that P4 had failed to offer mediation before proceedings was wrong and indicates that Unite was not seriously considering ADR at that stage when it should have been.

***(f) whether the ADR had a reasonable prospect of success*:**

41. Experience of mediation has shown that the vast majority of cases are capable of settlement and are, in fact, settled in this way. In my judgment, that has to be taken as the starting point. In relation to a particular case, the question must focus on an objective view of the facts and the ADR process but taking into account the subjective approach of the parties. This, in principle, poses a difficult question.

42. In relation to this case, Unite relies on P4's position and equates it to the example given in Halsey by Dyson LJ at paragraph 25 when he said: "*In a situation where B has adopted a position of intransigence, A may reasonably take the view that a mediation has no reasonable prospect of success because B is most unlikely to accept a reasonable compromise. That would be a proper basis for concluding that a mediation would have no reasonable prospect of success, and that for this reason A's refusal to mediate was reasonable.*"

43. However, Dyson LJ also pointed out that it should not be overlooked that the potential success of mediation may not only depend on the willingness of the parties to compromise.

44. I consider that mediation or some type of meeting in this case would have had not only a reasonable prospect, but a good prospect of succeeding in resolving this matter. Whilst I accept that P4's position in increasing the acceptable sum was not helpful, I do not consider that P4 was intransigent. However, even if that were so, parties who through solicitors' letters may appear intransigent are often quite the opposite when they meet face to face, particularly before a third party mediator. Having seen the witnesses, I consider that this is likely to have been the position here.

45. In this case, there was a dispute with comparatively small sums at stake, with the potential for disproportionate costs and with a number of uncertain factual and legal issues. Viewed from the perspective of the correspondence up to June 2005, there were potential difficulties for both sides and there were large prospective costs to resolve the dispute. This was also a case where Unite had for a number of years been specifying P4's fittings on its projects and there had in the past been a commercial relationship between the parties, albeit that Unite did not themselves purchase fittings direct from P4. Indeed, in late 2002, P4 was seeking to develop this relationship. That is another factor which, in the context of the potential for success in mediation is of great importance. Mediation and other successful forms of ADR aim to create a solution which meets the various needs of the parties.

46. I consider that ADR would have had a better prospect of success if Unite, at an early stage, had been able to explain to P4 the payment position in relation to Tudor, including the September Agreement. As I have stated, I accept that for P4 a matter of importance was whether Unite had paid Tudor for the goods delivered by P4. If P4 knew that Unite were being asked to pay twice, that would have been likely to have changed P4's perception at any early stage. Equally, an early discussion on the number of unfixed fittings would, in my view, have increased the likelihood for success.

47. My overall conclusion is that Unite's rejection of mediation or some form of meeting was unreasonable. This was a case where I consider that the type of interchanges which mediation or face to face meetings permits, would certainly have stood reasonable prospects of resolving the matter, at least up until Unite made its Part 36 Payment.

Effect on costs

48. In the light of the small amount recovered by P4, the failure on the main issues and the early offers made by Unite, this would have been a case where Unite would have been entitled to its costs from the beginning of the action.

49. I therefore have to consider how this position is affected by Unite's conduct in failing to disclose information on payment and in refusing to mediate. For the reasons given below, I do not consider that, in this case, the conduct should affect the position which would normally pertain after the Part 36 Offer. However, in the period up to the Part 36 Offer, I consider that the conduct of Unite deprived the parties from being able to resolve this case at minimal cost. In all the circumstances, I have come to the view that justice is properly served by an order that P4 should have its costs up to 5 July 2005. This is not a case where I consider that no order for costs in the overall action is appropriate. Neither do I consider that depriving Unite of its costs up to 5 July 2005 by making no order as to costs up to that date does justice, in particular to the failure to mediate. I also bear in mind that if P4 had accepted the Part 36 Payment, it would have been entitled to costs up to 5 July 2005.

50. However as I have already indicated, in terms of the requirements of Rule 36.20(2), I do not consider that it is unjust that Unite should have its costs after 5 July 2005. Unite made the Part 36 Payment at the time of Service of its Defence. Information about payment was made available to P4 soon after and P4's case then became weaker as matters developed. P4 does not then seem to have taken a realistic view of the outcome, given the increasing sums which it sought in the Part 36 Offers. By then the conduct of the litigation must be viewed on the merits and the previous conduct is of lesser importance. In those circumstances, having reflected that previous conduct in the order made on costs prior to 5 July 2005, I do not consider that Unite should be deprived of its usual entitlement to costs under Rule 36.20(2). I therefore hold that Unite is entitled to its costs from 5 July 2005.

Basis of Assessment

51. In terms of the application by Unite for costs to be assessed on an indemnity basis, I take into account the decision of the Court of Appeal in ***Reid Minty v. Taylor*** [2002] 1 WLR 2800 and the factors summarised in the decision of Tomlinson J in ***Three Rivers v Bank of England*** [2006] EWHC 816 (Comm) at paragraph 25. I do not consider that there is conduct by P4 or any other circumstance which takes this case out of the norm. First, in assessing conduct, I have to bear in mind my views on Unite's conduct pre-action. Secondly, whilst the litigation was hard fought, this is

not a case where I would make the type of criticism of the way in which the litigation was conducted which is implicit in the award of indemnity costs. In those circumstances, I consider that assessment on a standard basis is appropriate.

Summary

52. I therefore order that, save for the matters on which I have made different orders, Unite should pay P4's costs of the action up to 5 July 2005 and that P4 should pay Unite's costs of the action from 5 July 2005. Those costs are to be assessed on a standard basis, if not agreed. Unite seeks a payment on account of costs under CPR 44.3(8). As I ordered on 24 October 2006, P4 should pay Unite £45,000 on account of costs, within 28 days, that is by 21 November 2006 .

Paul Marshall (instructed by Hewitsons, Cambridge) for the Claimant
Lucy Garrett (instructed by Walker Morris Leeds) for the Defendant