JUDGMENT : BERNARD LIVESEY QC, Sitting as a judge of the QBD : 20 May 2004

1. On handing down judgment in this case on 13th May 2004 I adjudged that the claimants' claim should be dismissed. Following the handing down I received submissions on costs. The defendants seek the usual order for costs that they, being the successful party, should have their costs in full; the claimants ask that the defendants be deprived of all (alternatively a substantial part) of their costs on the grounds that they had declined invitations by the claimants to submit their dispute to mediation.

2. Immediately after hearing argument I indicated that it would be my Order that the defendants should have their costs of the action to be assessed on the standard basis if not agreed but that I would give my considered reasons later. This further judgment is to explain the reasons for my decision. But first, I propose to set out very briefly the facts which gave rise to the litigation.

3. The action had arisen out of a dispute over a right of way. On the 26th September 2000 the defendants had completed the purchase of a property which was to be their home. It was transferred to them with the benefit of a right of way over land owned by the claimants. The strip of land over which they enjoyed the right of way was some 75 feet long and 30 feet wide and extended along the whole frontage of their property. The defendants were registered as proprietors of the property and easement with title absolute. The plan filed at the Land Registry accorded with the right of way which they understood they were obtaining according to their contract and the transfer.

4. On the day on which they completed the purchase and moved in they discovered the existence of an Agreement, dated 2 days prior to exchange of contracts, by which their vendor had purported to abandon the right of way across over two thirds of the strip of land; they also discovered that the claimants were at an advanced stage in the process of erecting a fence enclosing it. Although the Agreement was reached *bona fide,* it had not been disclosed to the defendants prior to completion.

5. After initial but unfruitful correspondence, on 28th November 2002 the defendants removed the fence and on 3rd June 2003 the claimants instituted proceedings for a declaration, rectification of the plan filed at the Land Registry and damages for trespass. In the judgment which I handed down on 13th May 2004 I adjudged that the claimants' claim was without merit and that it should be dismissed.

6. The claimants accept that the usual order as to costs is that they, the unsuccessful party, should pay those of the defendants, to be assessed on the standard basis if not agreed. However they say that the defendants should have no costs at all, alternatively none after 24th July 2003 - the date on which the solicitors for both parties spoke at the telephone when mediation was first discussed between them and the claimants' solicitors invited acceptance of an offer of mediation which the defendants did not accept. My attention was drawn to correspondence between the parties both prior to and following proceedings, in particular to a letter dated 29th October 2003 from the claimants' solicitors to the defendants' solicitors in which a formal proposal for mediation was made in very strong terms.

7. In their letter of 29th October 2003 the claimants solicitors point out that
   - *"... the purpose of mediation is for parties to go into the mediation with open minds, in order to consider whether a settlement can be brokered.*
   - *…*
   - *It does ... occur to us that one possibility in this regard may be that, insofar as we understand your client's position, one of the greatest concerns is the blockage of their view that they consider the fence that was installed by our client would involve. Our client's main concern on the other hand is to enclose the area of land, thus extending their boundaries and effectively 'squaring off' their plot. These do not appear to us to be necessarily mutually exclusive aims."*

   The thrust of the submission to me was that mediation can enable the parties to reach a compromise, satisfactory to them, albeit in terms that the courts cannot order; for that reason it is the policy of the courts to encourage attempts to mediate and a failure to agree to do so will, in itself, be sufficient to deprive the successful party of the usual order for costs.

8. I was referred to, and have considered carefully, two authorities where the effect of a refusal by one party to proceed to **mediation** was considered. The first in time was a decision of the Court of Appeal in ***Dunnett v Railtrack plc*** **[**2002] 1 WLR 2434. The second was ***Hurst v Leeming*** [2003] 1 Lloyd's Rep *379.*

9. In ***Dunnett*** the claimant failed in her appeal to set aside a judgment at first instance in favour of the defendants. She had at all times up to the hearing of the appeal been unrepresented. She obtained representation from counsel assigned by the Bar *Pro Bono* Unit just before the appeal. The defendants were however deprived of their costs. The basis for this refusal appears to be that they had refused out of hand to agree to a suggestion, made in terms by the court, that the case was one for alternative dispute resolution ("ADR"). The court had made the suggestion in accordance with its duty to further the overriding objective by actively managing cases, as set out in CPR 1.4 by, inter alia, "(*e) encouraging the parties to use alternative dispute resolution procedure if the court considers that appropriate ..."* The refusal to contemplate ADR therefore meant that the defendants themselves had failed to comply with the duty imposed on them by CPR 1.3 *"to help the court to further the overriding objective; this refusal, at a stage before the costs of the appeal had started to flow, meant that the court "did not think it appropriate to take into account"* the offers in settlement that the defendants had made and this had the consequence that the defendants, though successful, were not entitled to their costs.

10. It has been urged upon me and I accept that an important point of distinction between this case and ***Dunnett*** *is* that there had not in this case been any order or suggestion from the court that there should be use of ADR. In my judgment the point of distinction is actually quite important because the absence of a case management order for ADR has the consequence that it cannot be said that the party refusing it is in breach of a duty imposed by CPR 1.3.

11. In ***Hurst v Leeming*** Lightman J was faced with two parties, one of whom (the unsuccessful claimant) was a person with an obsession which drove him to litigation and the other had formed the view that, by reason of the character and attitude of the claimant, mediation had no real prospect of getting anywhere. Lightman J came to the conclusion that if mediation could have no real prospect of success a party may refuse to proceed to mediation litigation on that ground. He decided not to penalise the successful defendant but awarded him his full entitlement to costs without discount on the grounds that he had reasonably and fairly come to the view he did as to the prospects of a successful mediation.

12. Apart from these two exceptions there does not seem as yet to be a general rule that a successful party should be deprived of his costs for failing to go to mediation. Yet this is not the first occasion on which a '***Dunnett***' type of submission has been made to me with the confidence that it ought self-evidently to be successful and act as a trump card to render the victory of the opposite party either partially or entirely pyrrhic. The question is whether there ought to be a general rule and whether such a submission ought to be self evidently successful.

13. The starting point must be the CPR. Part 44.3 explains very clearly that the court has a discretion as to costs and sets out the *"circumstances to be taken into account when exercising its discretion as to costs"*.

14. CPR 44.3 (2) states:
    - *"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.*

15. CPR 44.3 (4) makes it clear that in deciding what order (if any) to make about costs, the court "must have regard to all the circumstances". It then proceeds to specify certain particular circumstances which should be taken into account including
    - *"(a) the conduct of all the parties; ….*
    - *(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)*

16. CPR 44.3 (5) explains what is meant by "conduct" of the parties.
    - *"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)....*

17. I pause here to comment on a linguistic trait in the drafting of the CPR. In paragraph (3) the court is invited to "*have regard to all the circumstances* ***including"*** a number specified in following sub-paragraphs. Paragraph (5) gives an explanation of what is conduct of the parties which ***"includes"*** three specified matters. It seems to me that the purpose of this wording is to draw attention to some specific matters which either were relevant considerations prior to the CPR and are expressly preserved or to matters which were not then generally regarded as relevant consideration but have been introduced and now are to be regarded as relevant considerations as a consequence of the policy which drove the reforms.

18. I should not of course forget the 'overriding objective' set out in CPR 1.1 (1), the overriding objective of enabling the court to 'deal with cases justly'. The reason that this cannot be forgotten is because by CPR 1.2 the court must seek to give effect to the overriding objective when it exercises any power given to it by the Rules and, of course, the power to award costs is just such a power.

19. "*Dealing with a case justly*" is explained in CPR 1.1 (2) with the same linguistic trait, to which I drew attention in paragraph 17 above, in that the rule begins by stating *"Dealing with a case justly* ***includes,*** so *far as is practicable …" (emphasis supplied)* and then proceeds in the following subparagraphs to set out a number of considerations to do with efficiency, fairness and expense in litigation, proportionality and the resources of the court.

20. I remind myself that the word *'includes'* does not mean that the considerations set out in the five sub-paragraphs in paragraph (2) have now themselves become the overriding objective. Although we do not find anywhere in the rule the objective of defining the rights of the parties according to law, doing justice or, in colloquial terms which any litigation lawyer would understand, the notion of the judge 'getting the right answer', it cannot be the case that this traditional objective has ceased to be a highly important part, if not the most important part, of the overriding objective of a court in a civilised society. The effect of the inclusion of the matters set out in paragraph (2) seems to me to be designed to emphasise the fact that these new matters, which had traditionally been of minimal if any importance prior to the CPR, were now to be taken into account and given such effect as might be appropriate in all the circumstances. It would be quite incorrect if the notion were to get about that the CPR had failed to secure the overriding objective whenever a case got to trial on the merits before a judge.

21. Now this case was always one of those which was an 'all or nothing case'. Either the right of way extended over the whole of the strip of land or it did not. There was not any middle way which the court could have found. The defendants, whom I found to have been wronged, were brought to the court to defend themselves against a claim which was unjustified. They clearly took the view, quite strongly, that their assessment of their rights was correct and that they were not prepared to compromise the rights which they were satisfied that the law had given them and which they believed that the Queen's courts would declare and protect. I infer that it is probably for that reason that they declined an offer of mediation. In so doing, I have not any doubt that they understood that if they lost the litigation they would both lose their right over the land and also be penalised by having to pay their own and the claimants' costs. If, contrary to their firm conviction, they had in fact lost the action, they would have had no defence to an application by the claimants that they should pay the whole of their costs. On what principle should they lose the benefit of the usual order now? Why should they be compelled to enter into mediation**,** which implicitly will require them to make a concession of some part of their rights and entitlement, under the threat from this court that, if they do not do so, they would be penalised in costs?

22. The fact that the acceptance of mediation implicitly requires a concession by what I will call the innocent party of some part of his rights and entitlement follows from the submissions before me. As counsel for the claimants accepted, it was most unlikely that mediation would have achieved an outcome for the claimants as good as that which will result from my judgment. If anything, that acceptance was an understatement. The chances of the claimants in mediation abandoning their claims and paying the defendants their costs to the date of the mediation were, I should have thought, non-existent.

23. There are two further aspect of the mediation process which may not be irrelevant. First of all, whereas in the litigation process the parties will appear before a judge who will strive to make an impartial judgment on the merits of the dispute and seek to achieve what I have described above as *'the right answer'*, it is not entirely clear that the position is the same in relation to the mediation process. The

mediator can of course be expected to be impartial but he will have his own interest in securing a successful result to the process, that is to say a settlement, without which his involvement might not have been regarded as worthwhile, and the consequence may be that the party most vulnerable to pressure will, as a consequence, make the most concessions, indeed make concessions which he should not be making.

24. This brings me to a second feature of mediation. It is said that mediation can enable the parties to get together to listen to the other side's arguments with a view to better understanding them and reaching a compromise with the friendly shake of a hand accordingly. And that may well be an entirely valuable feature of some mediations. But it is not inevitably a feature of them all. Indeed, the court is aware that mediation is also increasingly being used in order to enable one party to get his point across directly to the other party, and thereby to get behind the 'barrier' of the other party's lawyers in order to impose pressure on the other party. However, as a matter of generality, it seems to me that where there is not any criticism that the successful party's lawyers are doing anything other than performing their obligations properly, I find it difficult to understand why it is that the successful party should be penalised in costs simply because he has not exposed himself to the pressure of direct arguments from the opposite side, which the judge has by his judgment concluded to be incorrect arguments. This is a matter of particular significance in this case because the issue between the parties was almost entirely a question of law and the claimants were evidently receiving advice which was absolutely correct. I do not think that the law obliges me to penalise the defendants for failing them to submit to the arguments of the claimants which I have found were wrong.

25. I emphasise that in this case there is not any matter of 'conduct' which could be alleged against the defendants, apart from their failure to agree to mediate. Nor was there any pre-action protocol (requiring consideration of ADR) with which they failed to comply before proceedings could be launched. Nor has it been hinted, let alone contended, that there was anything 'disproportionate' about the decision of the defendants to take this matter to trial - this certainly is not the sort of case where the proprietary rights at the centre of the litigation were of little intrinsic value and, even if they might have been, it cannot but be accepted that both parties regarded them as being of considerable importance to themselves to justify the litigation over them which ensued.

26. In my judgment, where there is no issue of '*conduct'* and no question of proportionality, and where the court has not itself either ordered or suggested that mediation take place, the mere failure to submit to a request by the unsuccessful party for mediation**,** in a case such as the present, ought not as a matter of principle of itself have such significance as to result in the successful party being deprived of his entitlement to the usual order for costs.

27. That does not mean that a failure to agree to ADR is not a relevant factor for the court to take into account. It clearly is and any failure should be given such weight as in all the circumstances of the case in question is appropriate. But it is only one of the relevant factors. To elevate it, as the typical ***Dunnnett*** type of application attempts to do, to the pre-dominant factor seems to me to run the risk of fettering the discretion of the court, which in adjudicating as to costs *"must have regard to all the circumstances of the case":* see CPR 44.3 (4).

28. Equally it seems to me that it is relevant also to take into account the fact that a party has an entitlement to ask the court to declare its rights and to seek to obtain from the court what I have described above as 'the right answer'. If this were not self evident it is enshrined in CPR (5) (b) viz. *"whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue"*. It is also relevant in my judgment to take account of the stage in the litigation at which the successful party made his decision to decline an offer from the other to mediate. I would also hold that the amount of costs of the litigation which have by then already been incurred is also a relevant factor, to be given such weight as is appropriate in all the circumstances of the case under consideration. In this I respectfully differ from a view expressed by Lightman, J in ***Hurst.*** I differ because it seems to me that to ignore these factors would be to fetter the court's discretion in a manner in which the CPR does not allow.

29. The conduct of the parties is expressly a relevant matter to take into account. In my judgment there is relevant conduct on the part of the claimants which ought here to be mentioned. I need to refer to the underlying facts.

30. After the defendants' solicitors had failed to secure relief in correspondence the defendants removed the fence and stacked it undamaged within the claimants' boundary. The claimants went to their solicitor who sent a letter on 3rd December 2002 in which the claimants demanded unequivocal confirmation that the defendants had no right of way over the land in dispute and agreement that they would pay for a new fence to be installed in place of the one which defendants had removed. If what amounted to total surrender did not arrive within 14 days, proceedings would be commenced forthwith for an injunction, a declaration, rectification of the register, damages, costs (on an indemnity basis) and interest. They threatened that should the defendants seek to lay concrete on the surface of the land "such activity would amount to criminal damage and may well lead to a criminal prosecution against you." The defendants responded on 13th December 2002 and set out their explanation of their clients' position essentially as it was argued at the trial. On 4th and 19th February 2003 and on 18th March 2003 further letters were sent by the claimants' solicitors in similar terms (but without the threat of prosecution). Proceedings were then instituted on 3rd June 2003 and in late June the Defence was filed, in terms which accorded with the defence as originally intimated by the defendants' solicitors in correspondence. An Allocation Questionnaire filed by the claimants before the 23rd July 2003 confirmed that the claimants' solicitors did not wish there to be a one month stay to attempt to settle the claim either by informal discussion or by ADR.

31. The view that I take of the letters sent initially by the claimants' solicitors is that they were deliberately expressed to be highly intimidatory, as was the institution of proceedings. The basis for the contention that on these facts the defendants should forego all costs was not developed by the claimants in argument, remained obscure and appears in any event to have no merit.

32. The basis for the contention that the defendants should have no costs after 24th July 2003 arises from the disclosure of an attendance note of that date on which it was recorded that the claimants' solicitor discussed with the defendants' solicitor the possibility that there should be mediation**.** The defendants' solicitor's note indicates that he explained why he did not think that mediation would be successful. In a letter dated 24th October 2003 he made the point that it would have been possible to refer the matter to mediation at the outset rather than issuing proceedings and clearly considerable costs had by then been incurred; that the mediation process itself was clearly going to involve considerable expense and he questioned whether the process was likely to lead to a negotiated settlement. In my judgment the refusal of the defendants to accede to a request for mediation was not made "out of hand" but was reasoned. To this the claimants' solicitors responded by the letter which I have set out in paragraph [7] of this judgment and there were further letters encouraging mediation**.**

33. The point that the exchange between the parties commenced with highly intimidatory letters from the claimants is in my judgment not irrelevant. It might possibly be relevant 'conduct' within the meaning of CPR 44.2 (5). Even if it is not, its intimidatory nature and the fact that the claimants did not seek **mediation** before issuing proceedings calls into question in my mind whether the change in attitude following the 24th July 2003 conversation was genuine rather than tactical. I am not unaware that one result of the ***Dunnett*** decision is that even parties to litigation who have no intention of compromising sometimes are advised that they should either request, or accede to a request for, a mediation which they do not want simply for tactical reasons to do with either gaining, or not losing, an entitlement to costs by the application of the ***Dunnett*** principle. I do not think a court can presume, from what appears on the face of it and without holding an enquiry at which privilege is waived, the *bona fides* of a request, though I stress that there is not anything which leads me to think that the offer in this case was not *bona fide.*

34. Even if it was subjectively genuine on the part of the claimants, it was in my judgment material that considerable costs had been incurred by that stage and those together with the effect of the earlier correspondence was likely to make settlement extremely difficult. It may be that mediation would have resulted in a settlement. I am reasonably satisfied that if a settlement had been reached there was not any

chance of it being reached on terms that would have given the defendants the rights to which they were entitled by law and which will result from my judgment. For such a result to be have been achieved it would have been necessary for the claimants to give notice of discontinuance of their claim and consent to pay the defendants' costs thrown away to that date, a concession which counsel for the claimants accepted was unlikely. Indeed, the refusal of one party to agree to **mediation** should not be elevated into a predominant consideration in favour of the losing party for the latter is not rendered helpless - he can always counter the refusal by making to the other party an offer in settlement which can be drawn to the attention of the court pursuant to CPR 44.3 (4) (c).

35. Finally, I have had the advantage of seeing the parties. I was particularly impressed by the defendants. They had purchased a nice but comparatively modest new-build bungalow in a small village and in a delightful setting; they had moved into a village in which the claimants were established as residents, were in a much larger property with 12 acres of paddock, a home which they used as their base in England when the first claimant was not pursuing his business interests in Hong Kong. The claimants had entered into the Agreement *bona fide* with a view to 'squaring off' their property and securing the new boundary. This would probably have had an adverse effect on the value of the defendants' bungalow but, possibly more importantly, would have had a serious effect on their ability to enjoy their own home. As is clear from what I have said earlier, it required considerable fortitude on their part to pursue their action to trial, having regard to the likelihood that if they failed they would have no answer to an application that they should pay the costs of the claimants. They expected the courts to declare no less than their entitlement according to the law of the land and will have had the expectation that if they were successful they would be entitled to the costs of so doing. The effect of depriving them of their costs would be tantamount to requiring them to pay a second time for rights which they already owned as a result of their original purchase.

36. I am required by the Rules to give, and do give, to each one of all the relevant circumstances of the case such weight as each of them properly requires. Having done so, it is my firm judgment in the exercise of my discretion that the defendants should have the usual order as to costs. To deprive them of these would offend my sense of justice and that I am not prepared to do.

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