Fenwick Elliott

ARE THE COURTS TRYING TO DO THEMSELVES OUT OF BUSINESS?

Jeremy Glover

17 September 2003

AMBIT OF THIS PAPER

(i) ADR - Ignore at your peril
(ii) Case Management and Case Management Conferences
(iii) The Expert Witness
(iv) Costs - Part 36 - New Risks

Introduction

Just before the implementation of, what became known on the Woolf Reforms, I attended one of the many conferences designed to educate lawyers about the wholesale changes being introduced to the civil procedure rules. The key note speaker was Lord Woolf himself. The one over-riding impression of his talk (and the conference itself) was that litigation was to be used as a last resort.

This should not have come as a great surprise, since in his Report, "Access to Justice" Lord Woolf had said:

> *"My approach to Civil Justice is that disputes, should wherever possible, be resolved without litigation."*

However the emphasis laid on this was somewhat unexpected. The purpose of this paper is thus to examine whether Lord Woolf has succeeded in this aim.

In other words, if the CPR Reforms are to be deemed a success, by Lord Woolf's own criteria, the amount of business going through the (civil) courts will inevitably decrease.

ADR - IGNORE AT YOUR PERIL

ADR's Place in the Context of Litigation

"Litigation is like dancing with a gorilla. You stop when the gorilla wants to stop."

ADR is of course nothing new, and the court's interest in ADR is not that new either. The first indication came from a Commercial Court Practice Statement in 1993 which was formally set out in the 1994 (the third) edition of the Commercial Court Guide.

(i) The role of ADR in litigation is now enshrined in the CPR. By Rule 1.4 (1) the court must further the overriding objective by actively managing cases, and by Rule 1.4(2) active case management includes encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure. This principle is reflected in the detailed rules, thus:

(ii) By Rule 26.4 (1) a party may, when filing the completed allocation questionnaire, make a written request for the proceedings to be stayed while the parties try to settle the case by alternative dispute resolution or other means; this provision is reflected in the TCC First case management questionnaire.

(iii) Paragraph 12.2 of Practice Direction 26, which deals with case management of assessments of damages, gives the court express power to direct that the claim be stayed while the parties try to settle the case by alternative dispute resolution or other means.

(iv) Bills of costs may contain of items under the head of *"work done in connection with mediation, alternative dispute resolution and negotiations with a view to settlement if not already covered in the heads listed above".*

(v) The procedure in Civil Appeals is for a letter of invitation to consider ADR in appropriate cases, signed by the Master of the Rolls, to be sent to the parties' solicitors when an appeal is set down.

ADR also features in the pre-action protocol, introduced for construction and engineering disputes. As I consider later one of the purposes of all pre-action protocols is to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings. Paragraph 5.4 of the Construction and Engineering Pre-Action Protocol expressly requires the parties, in respect of each of issue or dispute as a whole, to consider whether some form of ADR would be more suitable than litigation.

Success rates

It is difficult to obtain reliable statistics on the ADR success rates in the construction industry, but a number of attempts have been made most notably be Cedr whose Commercial Mediation Statistics (2002/03)[1] showed that, of the 516 commercial cases in the year, 78 per cent of cases settled during the mediation or shortly after as a result of the progress generated.

The Early Cases

The two early headline cases, which will be familiar to you, were *Susan Dunnett v Railtrack plc* and *Frank Cowl v Plymouth City Council*.

In *Susan Dunnett v. Railtrack*, in the Court of Appeal, Susan Dunnett's three horses had been killed when the gate to her paddock, which had been replaced by Railtrack, had been left open, allowing the horses onto the line. The gate was not padlocked, nor was there any mechanism for automatically closing the gate, despite the fact that Susan Dunnett had warned Railtrack that people left the gate open. There was an appeal and cross-appeal from the first instance decision, and in granting permission to appeal the Lord Justice stated that mediation or a similar process would be highly desirable in this particular case because of its inherent flexibility. Regardless of the court suggestion Railtrack refused to engage in mediation. Railtrack effectively won the appeal, but the court of appeal found that as Railtrack had refused to mediate then a costs order should not be made against the unsuccessful claimant. One of the court of appeal judges said that a skilled mediation could achieve results far beyond the courts, and a party who dismissed the opportunity for mediation without proper thought would suffer uncomfortable consequences.

The court of appeal was in effect following the view of Lord Woolf in *Frank Cowl v. Plymouth City Council*[2]. In that case Lord Woolf had emphasised the need for parties in dispute with public bodies to consider ADR. Lord Woolf said that *"today sufficient should be known about ADR to make the failure to adopt it, in particular where public money is involved, indefensible."*

In *Dunnett v Railtrack* Lord Justice Brooke stated that:

> *"When asked by the Court why his clients were not willing to contemplate alternative dispute resolution, said that this would necessarily involve the payment of money, which his clients were not willing to contemplate, over and above what they had already offered. This appeared to be a misunderstanding of the purpose of alternative dispute resolution. Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the powers of lawyers and the courts alike…"*

[1] Available at www.cedr.co.uk
[2] The Times 8 January 2002

Given that the CPR requires the parties to consider ADR, then that obligation is extended into the pre-action protocols. There is now clear obligation on the parties to seriously consider some form of mediation or other ADR process. It seems that that obligation will, if ignored, lead to cost consequences, even if the party concerned is successful. However, there may be some (limited) circumstances when a failure to mediate is justified.

Consequences of Failing to Attempt ADR

These cases have been followed and the current judicial climate is such that, whilst parties cannot be forced to settle their disputes by means of ADR, they are strongly encouraged to attempt to do so. This approach is based on the

> *"proposition that a party who refuses to proceed to mediation without good and sufficient reasons may be penalised for that refusal and, most particularly, in respect of costs. Mediation is not in law compulsory, and the (professional negligence) protocol spells that out loud and clear. But alternative dispute resolution is at the heart of today's civil justice system, and any unjustified failure to give proper attention to the opportunities afforded by mediation, and in particular in any case where mediation affords a realistic prospect of resolution of dispute, there must be anticipated as a real possibility that adverse consequences may be attracted."*[3]

Indeed this case of *Hurst v Leeming*, is of particular consequence and gives some further guidance as to when a refusal to mediate might be justified. The case concerned the dismissal of an action against a Barrister, Leeming. The Claimant argued that despite the dismissal of the action he should still receive his costs as Leeming had refused to mediate. Leeming raised five reasons as to why he had refused to mediate:-

(i) The legal costs already incurred were high.
(ii) The seriousness of the allegation, as it related to professional negligence.
(iii) The total lack of substance of the claimant's claims;
(iv) The lack of any prospects of successful mediation; and
(v) The obsessive character and attitude of Hurst, and his history of litigation.

Lightman, J considered each of these grounds and decided that the first three were insufficient. Therefore, the matter of legal costs already incurred, the seriousness of the allegation and the fact that there is no substance to the claim does not give valid reason for refusing to mediate. However, lack of any prospects of a successful mediation, given the obsessive character and attitude of the Claimant and his repeated history of litigation, which demonstrated that it was highly unlikely that

[3] Mr Justice Lightman in *Hurst v Leeming* (2002)

the Claimant would make any serious attempts to settle during a mediation was sufficient. Therefore, Leeming was not deprived of his full entitlement to costs.

This climate is reflected in the CPR[4], the Pre-action protocols, the TeCSA ADR Protocol as well as further more recent cases. Thus there are now at least 2 reasons why parties are well advised to consider mediation:

(i) It might work

(ii) A refusal to mediate may well carry a costs penalty.

When Will the Courts Apply Sanctions?

The critical test will usually be whether, objectively viewed, a mediation had any real prospect of success[5]. If so, sanctions may, often will , be applied. If not, a party may refuse to mediate with impunity. To take Hurst v Leeming again:

> *"But refusal is a high risk course to take, for if the court find that there was a real prospect, the party refusing to proceed to mediation may, as I have said, be severely penalised. Further, the hurdle in the way of a party refusing to proceed to mediation on this ground is high, for in making this objective assessment of the prospects of mediation, the starting point must surely be the fact that the mediation process itself can and does often 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."*

None of the following are treated as good grounds not to attempt ADR:

- that the point in issue is one of law[6]
- that the dispute is a commercial one, without any high-running emotions[7],
- that heavy costs have already been incurred[8];
- that there was an allegation of professional negligence[9];

[4] Particularly rule 1.4(2)(e), which states that the court should further the overriding objective of the CPR by, inter alia, encouraging the parties to use ADR. Furthermore, CPR 1.3 states that the parties are required to help the court in furthering the overriding objective. Rule 44.5(3)(a)(ii) requires the court, when considering the amount of costs to be award, to have regards to the efforts made to resolve the dispute.

[5] *Hurst v Leeming* (2002)

[6] *Royal Bank of Canada v Secretary of State for Defence* (14 May 2003, Lewinson J)

[7] *Royal Bank of Canada v Secretary of State for Defence*

[8] *Hurst v Leeming*

- that one party is a public body[10]
- the fact that a party believes that he has a watertight case[11];
- that disclosure has not yet taken place[12]
- nor is it necessarily sufficient of itself that a full and detailed refutation of the opposite party's case has already been supplied, though this may well be a very relevant consideration[13].

The court's investigation into the question of whether ADR should have been attempted may not occur until fairly late in the day. But the court can intervene earlier; in *Cowl v Plymouth City Council*[14], the Court of Appeal said:

> *"To achieve this objective the court may have to hold, on its own initiative, an inter partes hearing at which the parties can explain what steps they have taken to resolve the dispute without the involvement of the courts. In particular the parties should be asked why a complaints procedure or some other form of ADR has not been used or adapted to resolve or reduce the issues which are in dispute."*

It seems that the likelihood of sanctions being imposed for refusal to mediate may be higher if the court has made an express suggestion of mediation[15], or if public funds are involved.

You must also be careful about what you say about mediation. In *Royal Bank of Canada v Secretary of State for Defence*, the Defendant won on the majority of issues. Thus, the starting point was that it would be right for the Defendant to recover some (if not necessarily all) of his costs.

However, Mr Justice Lewison took into account the conduct of the parties before as well as during the proceedings. The Claimant had on a number of occasions expressed a willingness to mediate. This request was refused by the Defendant. The Judge decided that this refusal was surprising because the Lord Chancellor's department had issued a press notice in which it made a formal pledge committing government departments and agencies to attempt to settle legal cases by ADR techniques wherever the other side agreed to this.

The Judge held that this dispute, where the main issue was one of interpretation of a lease, was suitable for ADR. He also thought it important that the government had not abided by its pledge.

---

[9] *Hurst v Leeming.* Indeed, whilst the professional negligence Pre-Action Protocol does not apply to claims against construction professionals, it is material that it envisages ADR at para B6.
[10] *Cowl v Plymouth (ibid).* On the contrary, the Lord Chancellor's pledge that mediation would be considered by all Government Departments and agencies and used in all suitable cases makes a cost sanction all the more likely; *Royal Bank of Canada v Secretary of State for Defence.*
[11] *Hurst v Leeming(ibid).* Nor indeed that the likely result of mediation would have worse that the actual outcome achieved in court; *Royal Bank of Canada v Secretary of State for Defence*.
[12] *Malkins Nominees Ltd v Societe Financiere Mirelis SA and others* (2002)
[13] *Hurst v Leeming*
[14] (2001)
[15] *Dunnett v Railtrack*

Therefore, this failure to attempt to resolve the dispute by mediation, led to the Judge deciding that the Defendant should not recover any further costs from the Claimant, notwithstanding its success in the litigation.

What Sanctions Are Imposed?

As can be seen, the normal sanction for failing to attempt ADR will be, for a winner, being deprived of a costs order[16] or some of them[17] or, for a loser, being required to pay indemnity costs[18].

Are There Cases Where You Can Justify A Refusal To Mediate?

Perhaps surprisingly there are. The Court of Appeal has also recently held that there are circumstances within which it is reasonable to refuse to mediate.

In the case of *Alan Valentine v (1) Kevin Allen (2) Simon John Nash (3) Alison Nash*[19] (which has some parallels with *Hurst v Leeming)* the Respondents had put before the Court considerable correspondence which made it clear that real efforts to settle the dispute had been made, and that the offers were reasonable and generous. The Respondents had also tried to arrange a "round the table" meeting. Those offers were refused by Valentine who sought the payment of a large sum of money in settlement. The Court of Appeal therefore distinguished this case from the case of *Dunnett v Railtrack Plc* even though the Respondents had refused Valentine's offer of mediation. The Court of Appeal held that their refusal to mediate was reasonable, and so Valentine would pay the Respondent's costs in resisting the appeal.

Pre Action Protocols

The Civil Procedure Rules (CPR) introduced the novel concept of pre-action protocols *"to build on and increase the benefits of early but well informed settlement which genuinely satisfied both parties to the dispute"*. The CPR specifically states that one of the aims of pre-action protocols is *"to put the parties in a position where they may be able to settle cases fairly and early without litigation"*.

[16] As, for example, in *Dunnett v Railtrack*, Court of Appeal (2002), where the successful defendant was deprived of its costs notwithstanding that it had made a Part 36 offer that would otherwise have protected its position.
[17] *In Malkins Nominees Ltd v Societe Financiere Mirelis SA* (ibid) the successful claimant got 85% instead of all of his costs.
[18] See *Paul Thomas v Hyland* at para 7-4 below, a case concerned more with failure to follow pre-action protocol requirements as to information than ADR.
[19] 29 July 2003

The Pre-action Protocol for Construction and Engineering Disputes ("the Protocol") was implemented on 2 October 2000. With a few limited exceptions[20] the Protocol should be used for all claims that are likely to be brought before the TCC.

The aim of the Protocol is to promote an early exchange of information and encourage the parties to reach a settlement or at least to agree the most efficient way to manage any proceedings that may be necessary. But non-compliance with the Protocol can also lead to the imposition of costs sanctions.

The General Objectives

The general objective and aims of the Protocols are in essence to ensure that before the parties actually commence Court proceedings: -

- Both the Claimant and the Defendant must provide sufficient information so that they know and understand the other's case.
- Both parties must thus have had an opportunity to consider the other's case so as to be in a position to accept or reject all or any part of the case that is being advanced at an early stage of the dispute.
- The encouragement of more pre-action contact between the parties.
- To ensure better and earlier exchange of information between the parties.
- To ensure better pre-action investigation by the parties of their own case and the case made against them.
- To ensure that the parties have had at least one formal meeting, the purpose of which is to identify, define and possibly agree issues between them and to explore the best possible way of resolving the claim without recourse to the Courts.
- Compliance with the Protocol will put the parties in a position where they may be able to fairly settle cases at an early stage without recourse to the Courts.
- Should Court proceedings become necessary, compliance will ensure that proceedings will be conducted more efficiently and to any timetable that is imposed by the Court.

The Protocol set out a clear plan of how a case should progress pre-action. It advocates a "cards on the table" approach and the spirit, if not the letter, should be followed in all sizes of claim. This is of course subject to proportionality of work and costs in small claims track cases. It assists and aids early exchange of information, better prepares the parties for litigation and ideally, persuades parties to formulate their cases earlier and so be aware of whether they should be seeking an alternative method of resolving the dispute, or even settling the matter, rather than charging into

[20]Proceedings which include a claim for interim injunctive relief; where there is to be a claim for summary judgment pursuant to Part 24 of the CPR; where proceedings relate to the same or substantially the same issues that have been the subject of adjudication or some formal ADR procedure

litigation. Of course, the work, time and cost in preparing an action prior to commencing litigation may still be substantial.

Key Features

Key features of the Protocol include the sending of a formal claim letter and, once a response has been received, the holding of at least one Pre-Action Meeting. One of the items to be discussed at this meeting is whether the dispute could be more appropriately settled by way of some form of ADR.

The Law Society Survey

The Law Society has established the Woolf Network which each year compiles a Questionnaire on the Woolf Reforms. The 5th questionnaire dated March 2003 claims that 92% of the questionnaire respondents thought the CPR rules "*were working well*", however a main concern was the *"insufficient enforcement of protocols"*.

The TCC has developed judicial guidance through case law aimed at supporting the protocols and the judges have made it clear that the protocols should be observed (eg *Paul Thomas Construction v Hyland & Anr*[21] and *Liverpool City Council v Rosemary Chevasse Ltd*). The Law Society questionnaire, however, stated that 42% believed that the practice direction on protocols was insufficient to enforce proper behaviour between the parties pre-action. In 2001, the questionnaire stated that in only 31% of cases were sanctions imposed for breaches of the protocols. The same questionnaire also stated that 15% claimed the protocols had not generally been complied with. This year's questionnaire cited an inconsistent approach by the courts in the sanctions for breaches of the protocols as a problem.

The main effect of the protocols has been the development of front-loaded litigation. This has led to an increase in costs. For lawyers the problem exists of how to reassure the parties involved that the extra effort and cost can, and does, yield the desired result without necessarily ending in a glory day in court. Statistics recently published by the TCC[22] show that since the introduction of the CPR in 1999 the number of claims issued in the TCC has fallen drastically to only 386 in 2002. Of these only 48 went to trial, the remainder either settling (321) or being transferred (5). Of course, when considering construction legal disputes due recognition must be given to the role of adjudication and its growth in usage as an alternative method of dispute resolution, which must have lead to a reduction in the number of claims in the TCC.

[21] 8 March 2000, (2001) CILL 1748 where, after the claimant unsuccessfully applied for summary judgment he ordered that the claimant pay the Defendant's costs to date on an indemnity basis because of the unreasonable manner in which the claimant had conducted itself.
[22] Selected Statistics of TCC Business, 15 January 2003.

Although these statistics indicate how construction disputes are being disposed of, they do not tell us whether the parties and/or lawyers are happier with the results produced owing to the involvement of the pre-action protocol in disposing of the claims. There will be those who used the protocol to conduct their litigation and feel it aided a successful or fair judgment and those who didn't make it to court either because the early collation of the claim and issues, as required by the protocol, precipitated a settlement or an alternative dispute method such as mediation was used successfully.

Prior to the introduction of pre-action protocols it was suggested that lawyers needed to buck up their ideas and tackle claims referred to them from clients quicker and more thoroughly. It was thought the lackadaisical manner in which lawyers reviewed files meant that a claim that was in fact not very strong or was even bound to failure was not being assessed as such until much later into the litigation process, usually involving the wasted time of the court.

A possible advantage of the protocol and its affect on the parties and lawyers maybe not so much that it has made the whole dispute process cheaper but at least with the options of settling or mediating a claim, or being well-prepared as a client heads down the litigious route, the desired result or a more satisfactory result is achieved for the parties, who may feel that at least their money was well-spent.

And Why is This Relevant to Arbitration

Because increasingly we are finding that parties are adapting the protocol even when a contract envisages arbitration.

Speed and accessibility

Cases now move far more quickly. Recent figures published by the TCC in January 2003 show the following waiting times:

Trials up to 4 days - January 2003 onwards
Trials up to 8 days - January 2003 onwards
Trials up to 24 days - June 2003 onwards
Trials over 28 days - October 2003 onwards

There are no comparable figures available from the TCC for previous years. However, the Further Findings report states that generally, post-CPR, the time between issue and hearing for cases that proceed to trial has decreased[23] and 51% of the trials took less than a year. Recently in major

[23] Interestingly, for small claims that waiting time has risen.

proceedings issued in December 2002 a 32 day case was listed as a first and only fixture for 32 days in January 2004. In fact the Judge was free to hear the case in October 2003.

EXPERT WITNESSES AND SINGLE JOINT EXPERTS

Introduction

Lord Woolf highlighted three main problems in his report in relation to experts: excessive cost, lack of impartiality and the emergence of an "expert industry". This was notwithstanding the seven key principles of expert evidence set out by Mr Justice Cresswell in *The Ikarian Reefer [1993] 2 Lloyds Rep 68*, at page 81.

A number of decisions followed which had clearly taken note of some of these principles. Whilst Mr Justice Dyson's attack, in *Pozzolanic Lytag Ltd v Bryan Hobson Associates*[24], on the conduct of experts and their "prolix reports" was widely publicised. The courts were also alive to the second of Lord Woolf's concerns, namely lack of partiality. In *London Underground Ltd v Kenchington Ford plc and Others* (1998) CILL 1452, HHJ Wilcox criticised one expert for adopting a partisan approach, noting that he *"… signally ignored his duty to both the court and his fellow experts"* and "*continued to assume the role of advocate of his client's cause."* This undoubtedly affected the weight given to that evidence, characterised as being "*invalid and unscientific".*

These criticisms were reinforced by the Court of Appeal in *Clonard Developments Limited -v- Humberts* (unreported, Court of Appeal 15 January 1999), which upheld a trial judge's decision to reject the evidence that was *"unhampered by impartiality"* of the expert witnesses of <u>both</u> parties. The Court of Appeal warned that:

> *"A judge sitting at first instance must always be astute to the possibility that the expert before him may not be fulfilling his role as an impartial or objective adviser to the court and is seeking to espouse the cause for which he has been instructed … If this were his perception it was his duty to say so and to act accordingly by rejecting or discounting those parts of their evidence which were so tainted."*

The new Civil Procedure Rules (CPR) are now in force. Part 35 relates to expert witnesses. Three key points should be borne in mind:

(i) The accompanying Practice Direction is as important as Part 35 itself;

(ii) Judges have undergone considerable training in the new Rules <u>and</u> the cultural changes intended to accompany them.

[24] (1998) CILL 1450

(iii) Regard must be had to the new Rules as a whole, particularly the overriding objective, set out in Part 1, of *"enabling the court to deal with cases justly"*.

By way of example, the Practice Direction sets out what the expert's report must cover. Following the impatience shown by the court with an expert unfamiliar with the new Rules and culture in *Stevens v Gullis,* (see below), it is crucial that the expert's report does cover these requirements.

The Single Joint Expert

The headline change was the single joint expert. Whilst the notion that the courts will promote the appointment of single joint experts to be "shared" by the parties is not new, the former power was rarely used, and the expected implementation of this part of the CPR is a radical departure. Given the prominence of this proposal it is expected to become a popular measure with the courts.

Rule 35.7(1) provides that:

> *"where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to be given by one expert only …"*

Rule 35.7(3) states that:

> *"where the instructing parties cannot agree who should be the expert, the court may*
>
> *(a) select the expert from a list prepared or identified by the instructing parties; or*
> *(b) direct that the expert be selected in such other manner as the court may direct."*

Under Rule 35.8(1), each party may give instructions to the single joint expert; under Rule 35.8(4), before such an expert is instructed, the court may:-

> (a) limit the amount that can be paid by way of fees and expenses to the expert; and
> (b) direct that the instructing parties pay that amount into court.

Under Rule 35.8(5), unless the court otherwise directs, the instructing parties are jointly and severally liable for the payment of the single joint expert's fees and expenses.

In an Admiralty Case, (*Owners of the Ship "Pelopidas" v Owners of the Ship "TRSL Concord"* 8 October 1999) Judge David Steel QC reiterated that expert evidence was not admissible without leave of the court. If parties sought expert advice without an Order enabling them to do so, those costs would not be recoverable. He also noted the potential advantages of a single expert to run the software necessary to plot the course of ships: something specific to those courts maybe, but a useful pointer to judicial thinking in general. However, this may not be the case, at least in more complex matters, in every court. The Commercial Court Guide says parties: *"… should be prepared*

to consider the use of single joint experts. However, cases… frequently are of a size and of a complexity or nature such that the use of single joint experts is not appropriate. In such cases, parties will generally be given permission each to call one expert whom they have retained in each field requiring expert evidence."

Note the references to "size" and "complexity". The courts are still concerned about costs and the possibility of extensive expert evidence. In simple cases one expert may be considered enough. Great weight is given to proportionality.

In the case of *Grobbelar v Sun Newspapers Limited* (TLR, 12 August 1999), Lord Justice Potter said that the trial judge now has power under the CPR to exclude evidence (Rule 32.1(2)). This power has no express limitation but must be exercised to deal justly with the case. Under the CPR, dealing justly with a case includes considering whether the likely benefit of taking a particular step justifies the cost of taking it. In *Thermos v Aladdin Sales* (Chancery Division, Patents Court ILR, 13 December 1999) the court observed that where an issue in dispute is factual and obvious, the court is unlikely to benefit from expert evidence.

In *Kranidiotes v Paschali & Anr* [2001] EWCA Civ 357, the Court of Appeal had to consider the actions of a judge who had appointed a single joint expert to prepare a report on the market value of shares. A fee cap of £10,000 was set. The expert realised that the extent of the material supplied was such that he could not prepare a report within the fee cap and accordingly sought directions from the judge. The judge decided he had to achieve a fair result and also one which was proportionate to the issues in dispute. The maximum sum recoverable by the claimant was £80,000. The expert suggested that his costs could amount to £70,000. Therefore, the judge decided to use his discretion and dispense with the services of the first expert and appoint a cheaper one.

The Court of Appeal declined to interfere with this case management decision since it felt that the judge had not exceeded his discretion. The judge believed that the cheaper option would still ensure that guidance could be given at trial on the claims being made. The sum of money in issue had not warranted a payment of substantial costs and the judge had stressed at all times the need to achieve a fair and proportionate result.

In *Cosgrove & Anr v Pattison & Anr* (unreported, 27 November 2000), Mr Justice Neuberger considered the Court of Appeal case of *Daniels v Walker* (see below) when allowing an appeal by the defendants that they be permitted to instruct an expert of their own since they were unhappy with the report prepared by the single joint expert. Amongst the relevant factors were the facts that thousands of pounds were at stake and the hearing was some way off. Permission was given. The judge held that whether or not to grant permission for a separate expert depends on the following criteria:-

- The nature of the dispute
- The fiscal amount and nature of the issues at stake
- The number of disputes to which the expert evidence was relevant
- The reason that the expert was needed
- The effect on the conduct of the case of permitting the additional expert
- The delay the appointment of a further expert might cause
- Any other special reasons and the overall justice to the parties in the context of the litigation

In *OTV Birwelco v Technical & General Guarantee Co Ltd*, HHJ Thornton QC, ordered that a single joint expert should investigate and report on quantum. His fee was capped and the Judge imposed conditions on what information the expert should consider. The expert reported, the parties raised questions and this amended report was used at trial.

In March 2001, the Lord Chancellor's Department published a report entitled "Emerging Findings", reviewing the changes introduced by the CPR. When focusing on the use of the single joint expert, the report declared that the "use of single joint experts appears to have worked well. It is likely that their use has contributed to a less adversarial culture, earlier settlement and may have cut costs".

According to the LCD report, the single joint expert has been used in 41% of the cases where there has been expert evidence. The report does not, however, distinguish between particular types of cases. It remains likely that in the larger, more complex cases, even if a single expert has been appointed, the parties will appoint their own expert to shadow the court appointed expert, thereby not achieving the costs saving which was part of the whole point of this particular change.

This has been recognised by Lord Woolf, who, in the case of *Daniels v Walker* [2000] 1 WLR 1382, said:-

> *"In a case where there is a substantial sum involved, one starts, as I have indicated, from the position that, wherever possible, a joint report is obtained. If there is disagreement on that report, then there would be an issue as to whether to ask questions (under CPR 35.6) or whether to get your own expert's report. If questions do not resolve the matter and a party, or both parties, obtain their own expert's reports, then that will result in a decision having to be reached as to what evidence should be called. That decision should not be taken until there has been a meeting between the experts involved. It may be that agreement could then be reached; it may be that agreement is reached as a result of asking the appropriate questions. It is only as a last resort that you accept that it is necessary for oral evidence to be given by the experts before the court …*

The great advantage of adopting the course of instructing a joint expert at the outset is that in the majority of cases it will have the effect of narrowing the issues. The fact that additional experts may have to be involved is regrettable, but in the majority of cases the expert issues will already have been reduced. Even if you have the unfortunate result that there are three different views as to the right outcome on a particular issue, the expense which will be incurred as a result of that is justified by the prospects of it being avoided in the majority of cases."

The appointment of single joint experts has an additional advantage which may not have been foreseen when the court rules were changed; in the case of *Holmes v SGB Services Plc* [LTL 19 February 2001] the Court of Appeal allowed the claimant to postpone his trial when the court appointed single joint expert put forward a different explanation as to why an accident had happened than the claimant had previously put forward. This was done so as to give him time to amend his case to include the new explanation. It is highly unlikely that the court would have postponed the claimant's trial if his own expert had produced such an explanation so close to the trial as the problem would then have been of the claimant's own making.

The recent (unreported) decision of HHJ Wilcox in *A de Grouchy Holdings Ltd v House of Fraser Stores Ltd* gives a good example of the single joint expert at work in the TCC. Here the expert understood his role to *"put myself in the shoes of the PQS and provide a report to the court."* HHJ Wilcox said of the court expert:-

"…The only expert evidence before me is that of Mr Wishart. I judge him to be an independent witness, who is both highly experienced and impressive. The court's duty is to consider his evidence as evidence in the case in the light of the instructions he has been given by the parties and to give it the appropriate weight after cross examination and any testing there may be, together with all of the other evidence there may be. Merely because a witness is a jointly instructed expert does not mean that he is deciding the case on these issues. Nonetheless, where the approach of the expert is careful and reasoned and where by his approach he demonstrates that he is both an experienced and well qualified witness in the field that he is giving evidence in, the court would have to have a very good reason for substituting another view and for not giving considerable weight to his evidence. It is evident in this case that Mr Wishart was put under pressure of time. That of course can affect the degree of care that can be given to the consideration of the technical issues. Where it did so, Mr Wishart properly pointed that out. Where he would have wanted substantiation, and either none was available, or incomplete substantiation was provided, he said so and the effect upon his ascertainment figures was apparent and clear to the court …"

Instructions To An Expert

In *Lucas vs Barking, Havering and Redbridge Hospitals NHS Trust*[25], the defendant hospital had applied for an order for inspection under CPR 31.4(2) in respect of a witness statement and an earlier expert report referred to in expert reports produced for a personal injury claim. The appellant, Mr Lucas, resisted this application on the basis that the documents were excluded from disclosure by operation of CPR 35.10(4) as they formed part of the instructions provided to the expert who made the reports that referred to the document. The Master who allowed the hospital's application at first instance considered that he was bound by an earlier decision to the effect that material that an expert was required to comply with when answering questions he was instructed to consider was not part of his instruction.

The court had to construe both CPR 35.10(3) – the provision that compelled experts to set out all their "material instructions", including any privileged material of which they may have had sight when preparing their report – and CPR 35.10(4), relied upon by the appellant. The court decided that the purpose of CPR 35.10(4) was to prevent compliance with CPR 35.10(3) rendering a statement referred to by the expert as part of his "material instructions" disclosable unless there were grounds for believing that the expert's statement of his instructions was "inaccurate or incomplete". Provided therefore the expert set out in his report that the parts of the privileged material supplied to him as part of his instructions were material to those instructions, that the remainder of those documents remained privileged and need not be disclosed. The appellant's expert in this case had set out the material parts of the privileged material given to him as part of his instructions, and accordingly the remainder of those documents was excluded from disclosure by operation of CPR 35.10(4).

The basic position under CPR 31.14(2) is that a party may apply for an order for inspection of any document mentioned in an expert's report that has not already been disclosed in the proceedings. The proviso to which this is subject in CPR 35.10(4)(a) is that the court will not order disclosure of any specific document from which those instructions were taken unless it considers that the expert has given an inaccurate or incomplete statement of his instructions. While obviously privilege is lost in the material that is set out in an expert's report, provided that there is no suggestion that the report has been based on further material contained in the same documents that had not been set out as part of the instructions, then the court will not order disclosure of the remainder of the otherwise privileged documents.

[25] 23 July 2003

The Role of the Expert Witness

The CPR states that the expert owes a duty to the court, not their client or instructing solicitor. Rule 35.3 is clear:

> "*(1) It is the duty of an expert to help the court on the matters within his expertise.*
> *(2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.*"

The Rules provide support for experts. The right for an expert to file a request at court for directions, given by Rule 35.14, is at least partly a tool to provide a way out when put under pressure by those instructing him.

In *Stevens v Gullis* (TLR 6 October 1999), the Court of Appeal upheld a judge's rulings in May 1999, debarring the defendant from calling his expert witness to give evidence in the main trial and in third party proceedings. Prior to the introduction of the CPR at the end of April 1999, the expert had failed to comply with an order regarding the drawing up of a memorandum of agreement/disagreement following an expert's meeting. As a result, the judge ordered the expert to comply with paragraph 1.2 of the Practice Direction to Part 35, which sets out the requirement for details to be included in an expert's report.

The expert failed to comply and the judge therefore ruled that the expert could not be called to give evidence for the defendant. The Court of Appeal emphasised that the court has the power to control evidence given at trial, and that this expert had demonstrated by his conduct that he had no concept of the requirements of expert witnesses under the CPR. Furthermore, the expert witness's overriding duty is to the court rather than to the party instructing him. For these reasons the judge was entitled to make the order he did.

Lord Woolf said:-

> *"… The position was made clear in numerous authorities but, in particular, in the decision of Cresswell J in the Ikarian Reefer [1993] 2 LLoyd's Rep 68... There can be no excuse, based upon the fact that the CPR only came into force on 26 April 1999, for the fact that Mr Isaac did not understand the requirements of the courts with regard to experts. Those requirements are underlined by the CPR.. It is now clear from the rules that, in addition to the duty which an expert owes to a party, he is also under a duty to the court.*
>
> *The requirements of the Practice Direction that an expert understands his responsibilities, and is required to give details of his qualifications and the other matters set out in paragraph 1 of the Practice Direction, are intended to focus the mind of the expert on his*

responsibilities in order that the litigation may progress in accordance with the overriding principles contained in Part 1 of the CPR.."

The expert must understand exactly what is required of him as an expert witness under the CPR. If he does not then the sanctions are likely to be draconian. That duty includes the need to make oneself available to do the necessary work when it is required. Deadlines are tighter under the new regime. The penalties for failing to meet them can be severe, ranging from costs to the dismissal of a case. Just as costs awards can (and will) be made against solicitors, it is not inconceivable that an expert might find himself vulnerable to such a finding from the court.

In *Matthews v Tarmac Bricks and Tiles Limited* (TLR 1 July 1999), the Court of Appeal confirmed the need to take all practical steps to ensure that witnesses, including experts, are available for the trial. The court will not necessarily be sympathetic if an expert is unavailable, since he has made a deliberate career choice to follow this particular field. In that case, the Court of Appeal upheld the judge's refusal to vacate trial dates owing to the unavailability of expert witnesses. Lord Woolf said that experts had to be prepared, as far as practicable, to rearrange their diaries to meet the commitments of the court.

Under the CPR, there is a new requirement that an expert's report must contain details of the substance of all material instructions, whether written or oral. It is clear that this requirement, coupled with the fact that instructions are discloseable, or can be the subject of questioning if the court considers the expert's statement of instructions is incomplete or inaccurate, and with the overriding duty of experts to the court, is affecting the way parties work with experts. More formal, arm's length relationships appear to have developed and it also seems that, especially in large cases, parties are beginning to rely on separate experts to advise in preparing the case and the instructions to the "testamentary" expert, thus increasing rather than decreasing costs.

In the case of *Anglo Group Plc v Winther Brown* [2000] All ER 294, HHJ Toulmin QC held that it is normally inappropriate for the same expert to undertake both the role of expert witness and claims consultant. In that particular case, the defendant's expert *"was unable to distinguish"* between these roles and could not be relied upon. As long as the expert understands that his primary duty is to the court , it is, however, permitted, for the expert to be an employee of one of the parties (*Field v Leeds City Council* TLR 18 January 2000).

One of the essential reforms behind Rule 35 was to ensure that an expert witness no longer served exclusively the interests of the party by whom he had been instructed and to ensure that his expertise was available to all so that the court was provided with all relevant material in the most cost effective way. By way of example, Rule 35.11 provides that one party can use the other party's expert report even if that party chooses not to rely upon it themselves.

Judge Toulmin, updated the *Ikarian Reefer* principles in the case of *Anglo Group Plc v Winther Brown & Company Limited* [2001] All ER 294; he included the following new, or substantially revised, requirements:-

> *"1. The expert's evidence should normally be confined to technical matters on which the court would be assisted by receiving an explanation, or to evidence of common professional practice. The expert witness should not give evidence or opinions as to what the expert himself would have done in similar circumstances or otherwise seek to usurp the role of the judge.*
>
> *2. He should co-operate with the expert of the other party or parties in attempting to narrow the technical issues in dispute at the earliest possible stage of the procedure and to eliminate or place in context any peripheral issues. He should co-operate with the other expert(s) in attending without prejudice meetings as necessary and in seeking to find areas of agreement and to define precisely areas of disagreement to be set out in the joint statement of experts ordered by the court.*
>
> *3. An expert should be ready to reconsider his opinion, and if appropriate, to change his mind when he has received new information or has considered the opinion of the other expert. He should do so at the earliest opportunity."*

In that case, the expert evidence was rejected by the judge on the ground of lack of independence. The judge found that one expert had *"failed to conduct himself in the manner to be expected of an expert witness"*.

A further recent case is *The Royal Brompton Hospital National Health Service Trust -v- Frederick Alexander Hammond and Others,* Technology and Construction Court, His Honour Judge Richard Seymour QC (2001 CILL 1714).

The Claimant ("the Trust") entered into a contract with Taylor Woodrow Construction Limited for the construction of a six storey hospital in Chelsea, London. The Trust also engaged Watkins Gray International (UK) ("WGI"), the eighth Defendant, as architect for the project and subsequently engaged Project Management International ("PMI"), a partnership, collectively the first to seventh Defendants, to act as project managers. The works were delayed and WGI granted Taylor Woodrow several extensions of time, both before and after practical completion which was certified on 22 May 1990. Inter alia, extensions of time were granted in respect of four grounds. In this sub-trial the Trust alleged negligence on the part of WGI and PMI in relation to the extensions of time granted to Taylor Woodrow on these four grounds, contending that in the case of the first two, no extensions at all should have been granted and in the case of the last two that the extensions granted were of such excessive length that no reasonably competent architect or project manager could possibly have considered them justified. The parties relied solely upon expert evidence and

no witness of fact having direct knowledge of the progress of the works was called. (emphasis added)

This judgment contains some remarkably trenchant views upon the nature of expert evidence in heavyweight construction disputes. The judge was particularly damning of experts who allow themselves insufficient time to get properly au fait with the paperwork, and who accept from their instructing solicitors, or themselves make, factual assumptions intended to circumvent a full investigation. The judge also made some scathing remarks about the lack of contemporary knowledge of experts who no longer actively practise in the field but who devote most of their time to providing expert or consultancy services. Certain passages within this judgment will make very uncomfortable reading for some expert witnesses.

Having also criticised the conclusions of the single joint expert appointed by the court, Judge Seymour made it clear that in the absence of any credible expert evidence, the court may only substitute its own judgment and commonsense in the most straightforward of cases. The court is not in a position to provide a view on any matter in respect of which any special skill, training or expertise is required to make an informed assessment. Judge Seymour's one finding of negligence against WGI was based upon correspondence which made it clear that WGI was addressing its mind not to the likely completion date of the works as a whole (in respect of which the extension of time was granted), but rather the likely extended date for completion of the floor works alone. This is a finding he felt able to derive from the documents in the absence of any witnesses of fact or any credible expert evidence.

PART 36, SETTLEMENT OFFERS AND COSTS

The introduction of Part 36 under the new civil procedural rules has had a noticeable affect on the conduct of litigation. The majority of parties in dispute are seeking to settle the matter and direct the entirety of their attention to the running of their businesses. The Civil Procedure Rules seeks to encourage negotiation and/or ADR, and indeed any attempts to settle the matters in dispute. Settlement, will of course, involve some element of compromise, and one or other of the parties may seek to use the litigation process either to push the other party towards a compromise, or progress the matter towards a binding resolution in the failure of compromise.

The purpose then of Part 36 is to force the parties to consider the strengths and weaknesses of their case and compromise their position. In a move bringing litigation into line with arbitration. A claimant may specify the amount that he would be willing to accept, or alternatively a defendant may offer a sum of money to the claimant in order to bring the matter to a close. If the claimant accepts the offer then the relevant cause of action ends and the claimant would generally be entitled to his costs to date. The pressure to settle arises from the effect that a Part 36 Offer has in respect of costs.

If a Part 36 Offer does not settle the matter, then the parties are taking an increased risk in respect of costs. There are, basically three potential outcomes of a trial:-

1. If the claimant fails to recover more than the Part 36 Offer (or by that stage the payment into Court) then the Judge will usually make two costs orders. First, the claimant will be awarded its costs up to the date of the payment in, or the earlier Part 36 Offer. Second, costs from that date will be awarded to the defendant. The result is that the claimant pays a substantial part of both parties' costs even though he has in effect won the action.
2. If the claimant is awarded more than the Part 36 Offer then the offer has failed to resolve the matter, and costs will be decided in the usual way; and
3. If the claimant is awarded more than his offer then the defendant is likely to suffer heavy financial penalties in the form of additional interest and costs from the date of the offer.

The Part 36 Offer can be made by either the claimant or the defendant, and Rule 36.10 provides that pre-action offers may be made providing that they comply with the particular provisions of that Rule. The court will then take pre-action offers into account when making any order as to costs. A Part 36 Offer may be made at any time after the proceedings have commenced, including during appeal proceedings, but a party that is offering to pay an amount of money must be prepared to pay that amount of money into court.

A substantial number of decisions have been reported in respect of Part 36 Offers. A search on Lawtel in August 2002, identified over 800 cases dealing with Part 36 Offers in the preceding 12 month period. Many of these cases deal with particular applications of specific sections of the Rules, although some have wider applications. Generally, the courts have taken a purposive approach, and the message from the courts is that Part 36 Offers are to be encouraged, and a party that has made a sensible attempt to settle the matter will be looked upon favourably by the court. It is clearly not possible to cover all of these cases, but set out below our several developing themes, which are of particular application in favour of construction law.

First, the provision of adequate information in order for the Offeree to make an informed decision about whether to accept or reject the Part 36 Offer. Little is said in Part 36 about the requirement to provide the Offeree with information in respect of a Part 36 Offer. However, Part 36 Rule 21(5) states that the court is required to have regard to the information available to the parties at the time when the Part 36 Offer or Part 36 payment was made.

In the case of *Ford v. G.K.R. Construction Limited* [2000] 1WLR 1397 Part 36 Offers were made before the commencement of litigation. The Court of Appeal was asked to consider a first instance cost award where the Judge had granted the Claimant her costs in the personal injury case, despite the fact that she was awarded a sum which was less than that paid into court. The Defendant introduced new evidence at a late stage in the proceedings and the Court of Appeal considered that

it should have been introduced much earlier. Lord Woolf MR stated at page 1403 (paragraphs D to E):-

> *"If the process of making Part 36 Offers before the commencement of litigation is to work in the way in which the CPR intended, the parties must be provided with the information which they require in order to assess whether to make an offer or whether to accept that offer. Where offers are not accepted, the CPR make provision as to what are to be the cost consequences; Rules 36.20 and 36.21. Both these Rules deal with the usual consequences of not accepting an offer which, when judged in the light of the litigation, he should have accepted."*

It seems then, that if an offeror has not provided information to the offeree which would enable them to assess whether or not to accept an offer then that non-disclosure may be a material matter for the Court to consider when deciding what order to make in respect of costs. An important aspect of this case was that the offer was made before the commencement of litigation, and so before any material disclosure. It seems that if one part is seeking to make an early Part 36 Offer then that party should provide sufficient supporting documentation to the offeree to enable the offeree to assess the Part 36 Offer.

More recently, the case of *Challenger and Challenger v. Watkins and Watkins* [2002] EWCA Civ 281, an appeal was made against the Judge's order that both parties should pay their own costs. The case concerned a claim that one party was entitled to the benefit of a right of way over the Defendant's land without being under an obligation to repair the right of way. The Defendants initially disputed that right, but conceded the point. The sole issue at trial was whether there was an obligation on the Claimants to repair the lane over which they had right of way. The Defendant's Part 36 Offer was that both parties share equally the costs of repairing the lane. At trial the Judge decided that the Claimants had no obligation whatsoever to contribute to the costs of repair. The Judge went on to hold that the Claimants had issued the proceedings precipitately and as a consequence no order was made in respect of costs. He also concluded that the Claimants had not done any better than the Part 36 Offer, because the Defendants were under no duty to carry out repairs, and so if the Claimants chose to carry out some repairs then the Claimants would have had to pay for the entirety of those repairs.

The Court of Appeal held that there was nothing precipitate about the commencement of proceedings and that the Claimants had clearly succeeded on the only issue at trial. However, while the Claimants did not have to contribute to the costs of repair, there was no obligation placed upon the Defendants to repair the lane either. Nonetheless, the Claimants had still improved upon the Part 36 Offer made by the Defendants in that the Claimants were free from any obligation to contribute. Therefore the Claimants should have been awarded the entirety of their costs.

A Part 36 Offer is not restricted to financial amounts. In the case of *Rosalind Huck v. Tony Robson* (2002) 3 AER 263 a Part 36 Offer was made by which the Claimant agreed to apportion liability for a road traffic accident in the ratio of 95-5. The Judge at first instance disregarded the offer on the grounds that it was "illusory", in that no Judge would have apportioned liability in such a way. The Court of Appeal decided that the decision to award indemnity costs was discretionary, and so it was therefore permissible to ignore tactical offers, and but the first instance Judge was still wrong to ignore the offer even if it was unlikely that a Judge would have apportioned liability in such a way. The offer was a genuine attempt at settlement, and the Defendant had rejected it at his peril.

When a Judge considers a Part 36 Offer while making an order in respect of costs, only substantive issues should be considered. In other words, costs themselves were not relevant when deciding whether a judgment was more advantageous than if the Part 36 Offer had been accepted. In the case of *Mitchell and Others v. Ron James and Others* [2002] EWCA Civ 997 a party had made what they described as a Part 36 Offer, the terms of which included a term that the Claimant and Defendant were to bear their own costs, including those in the third party proceedings, and that they would also bear half of the accountant's costs. The offer also stated that the business would be sold and that a fixed sum would be paid to the Plaintiff and that the Defendant's counterclaim would be dismissed. The Claimant was found to be entitled to half of the shares in the company and the counterclaim was dismissed. The Claimant therefore argued that this order was more advantageous than the terms of the Part 36 Offer, and therefore they should receive costs on an indemnity basis. This Defendant did not agree. On appeal, the Claimant accepted that it was not possible to establish whether the shares to which it was found to be entitled were of a greater value than the fixed sum set out in the offer. However, the Claimant contended that after taking the cost order into account they were in fact better off.

The Court of Appeal held that the question of whether a judgment was more advantageous than a Part 36 Offer was intended to refer to the substantive issues only rather than the ancillary matter of costs. A term in offer in respect of costs was not within the scope of a Part 36 Offer. However, the party could make an offer in respect of costs and the court would have regard to exercising its discretion after the trial in respect of that offer but such a term could not be used to obtain an order for indemnity costs.

In the case of *Perry Press t/a Pereds v (1) David Chipperfield (2) Evelyn Stern* (Court of Appeal, 25 March 2003) in the Court of Appeal Buxton LJ and Dyson LJ decided that a judge was entitled to conclude that an offer made during the proceedings was not clear and concise such that he did not need to take it into account when consider the costs of the matter. The Defendants had sent a letter to the Claimant headed "without prejudice save as to costs" in which they offered to settle the claim for £5,400 plus a contribution to the legal costs. The Defendants asked the Claimant what it considered would be reasonable costs.

The Claimant rejected the offer. The first instance judge held that the offer was not clear and concise, and was certainly not made in the manner of a Part 36 offer. The Court of Appeal agreed. They thought that the letter was merely an offer to enter into serious negotiations rather than a clear offer that could be accepted.

The term "contribution" to legal costs was not an offer to pay a particular sum nor an agreement to pay a particular proportion of the legal costs. It was certainly not an offer to pay all of the legal costs. It therefore did not have the clarity required of an offer when considering the costs of an action.

Islam v Ali (Court of Appeal, 26 March 2003). In this case Mr Islam sought remuneration in respect of his services as a chartered accountant during a period when he ran the Defendant Mrs Ali's late husband's accountancy business. He had received around £72,000 for that period, but sought a further £84,000. He was awarded £12,746.41. Mrs Ali had argued that Mr Islam ran the business purely as an agent and was only entitled to reasonable remuneration. However, the only offer that she made to settle the action was that Mr Islam should pay her legal costs of £15,000 plus disbursements. On the other hand, he had offered to settle for £45,000 plus interest plus £15,000 in respect of his legal costs. The trial judge ordered Mrs Ali to pay Mr Islam's legal costs.

Mrs Ali argued, on appeal, that the judgment was not really a true "win" for Mr Islam as he only managed to obtain a relatively small sum of money in contrast to his much larger claim. The Court of Appeal agreed, accepting that he was only entitled to reasonable remuneration. Therefore, Mrs Ali was the true winner and the judges ordered that Mrs Ali pay Mr Islam costs in substitution for an order that there be no order as to costs. This is perhaps slightly surprising given that the Claimant did in fact receive a sum of money, and the Defendant did not really make any offer whatsoever in respect of that sum. Nonetheless the case demonstrates that the Courts will now look to the reasonableness of the issues argued, and the proportionality of the claim by comparison to the amount eventually awarded.

A fresh Part 36 offer may well need to be made in respect of appeal proceedings. In the case of *Various Claimants v (1) Bryn Alwyn Community (Holdings) Limited (2) Royal & Sun Alliance plc* [2003] EWCA Civ 383 the Court of Appeal found that the machinery of Part 36 was not available to the Court of Appeal during appeal proceedings. During the substantive proceedings the Claimant made Part 36 offers and obtained judgment for more than those offers. The Second Defendant appealed the award of interest on the general damages, and in response the Claimants challenged the refusal to award interest on an indemnity basis. They sought to argue that the "date of judgment" for the purposes of Part 36.21(2) related to the judgment of the Court of Appeal.

The Court of Appeal held that the date of judgement under Part 36 could have only been the date of the original judgment. The Court of Appeal would only be able to use the machinery of Part 36 if

a fresh offer had been made during the appeal proceedings. They refused to use their discretion to achieve a similar result by reference to the pre-appeal Part 36 offer.

Costs

Rule 44.3 deals with the Court's discretion and circumstances to be taken into account when exercising that discretion in respect of costs. Generally, the unsuccessful party will be ordered to pay the otherside's costs, but the court may make a different order by taking into account several factors, including the conduct of the parties, and any offer made into court in respect of a Part 36, and whether a party has succeeded on part of his case even if not wholly successful.

All parties to litigation have an obligation to comply with the overriding objective and to assist the Court. Rule 1.1 of the CPR sets out that which is required by the parties' solicitors in order to comply with the overriding objective. One of those tasks is to prepare a "case plan". This requires those conducting litigation to assess in advance the likely values of the claim, its importance and complexity, and then to plan the necessary work and the appropriate level of fee earner in order to carry it out at an appropriate manner but with an appropriate estimate of costs for each stage. In some low value construction cases the complexities of establishing breach of contract and causation etc may appear to be out of proportion to the potential claim for damages. If this is the case, one approach is to serve a Part 36 offer as early as possible in order to put the Defendant on notice that non-acceptances may lead to penalisation by way of indemnity costs.

Proportionality is a term which is now frequently raised in respect of the issue of costs. Paragraph 11.2 of the Cost Practice Direction states:

> *"In any proceedings there will be costs which will inevitably be incurred and which are necessary for the successful conduct of the case. Solicitors are not required to conduct litigation at rates which are uneconomic. Thus in a modest claim the proportion of costs is likely to be higher than in a larger claim, and you can equal or possibly exceed the amount in dispute."*

Therefore, if a step is necessary for the purpose of taking the proceedings forward then a reasonable amount of costs will be allowed for that step. If any step appears to be unnecessary, then the costs in respect of that course of action will be disallowed. More guidance from the Courts is slowly becoming available. For example, in respect of unreasonable behaviour and the non-compliance with a Pre-action Protocol, it has been held that the appropriate sanction is an order that the Claimant pay the costs of the action on an indemnity basis *(Paul Thomas Construction Limited v (1) Damian Hyland (2) Jackie Power* (2002) CILL 1748).

The case of *Dick Van Dijk v. Anthony Wilkinson (TA Hff Construction)* [2002] EWCA Civ 1780 concerned an appeal from a decision of HHJ Bowsher QC in which he had ordered a Defendant to pay one half of the Claimant's costs. The dispute arose out of building work carried out by the Defendant to the Claimant's property. The Judge found that there was a repudiatory breach of contract by the Defendant contractor and a sum of money was awarded in that regard, however the Defendant was partially successful on his counterclaim in respect of the final account. Finally, the Defendant was ordered to pay half of the Claimant's costs.

The Defendant appealed on the basis that the Judge had:

(i) failed to reflect the relative success of the Defendant in the proceedings;
(ii) failed to take account of the Claimant's unreasonable conduct; and
(iii) failed to take account of an open offer by the Defendant to accept £15,000 in full and final settlement.

The Court of appeal held that the Judge had erred in his discretion in respect of costs. His order should have reflected the fact that the Defendant had succeeded on his counterclaim and enjoyed success in relation to his defence of the defects claim. The Judge had also failed to take into account the Defendant's open offer, which CPR 44.4 expressly required him so to do. Further, the Defendant's complaints about unreasonable conduct also carried significant weight. The appeal was therefore allowed and the appropriate costs order was that the Claimant should have had two thirds of his costs in respect of the repudiation issue, but that the Defendant should have had the balance of the costs of the proceedings.

The Court should also have regards to Part 36 Offers made and the effects that refusal of those offers had on costs. The case of *SCT Finance v. Bolton* [2002] emphasises on the need for judges to exercise their discretion, but to remain within the Part 44 Rules. In that case the Judge had failed to comply with Part 44 by failing to consider the effect of the Part 36 Offer. It seems then that whilst has a discretion in respect of costs, the Judge must properly consider the effect of a Part 36 Offer and make an award of costs in the light of that offer.

In the case of *Robert Crosby v (1) Stephen Munroe (2) Motor Insurance Bureau* [2003] EWCA Civ 350 the Court considered the meaning of cost proceedings in the context that the claim had been settled before proceedings had been issued. The parties were involved in a road traffic accident in July 2002. The Claimant's claim was settled before any proceedings were served for just over £1,500. The Claimant's solicitors served a bill of costs for £4,800.25. Agreement was not reached, and they commenced cost only proceedings under CPR 44.12A claiming the sum of £5,310.84. The Defendant offered to take £2,650 under CPR 47.19. The Claimant's solicitors accepted that offer, and then sought the cost of their costs only proceedings. The District Judge held that the offer to settle included the costs of the costs proceedings. The Court of Appeal did not agree. The term

"proceedings" in CPR 47.19(1)(a) related to the dealings between the parties for the disposal of the substantive claim, not the cost only proceedings.

In the case of *Excelsior Commercial & Industrial Holdings Limited v. Salisbury Hammer Aspen & Johnston & Others* [2002] concerned an appeal from the Costs Order of HHJ Bladbury. Joint Defendants made a Part 36 Offer of £100,000 one day before the start of the trial. The Claimant was awarded nominal damages of £2 against the Second Defendant. The Judge ordered that the Claimant pay the Defendant's costs up to the 8 June 2001 on the standard basis, and thereafter on an indemnity basis. The Claimant argued that it was successful against the Second Defendant and the Judge's order was therefore wrong. The Claimant also tried to persuade the Court of Appeal to set up guidelines for judges when considering such issues.

The Court of Appeal refused to set out the guidelines, stating that there were an infinite variety of situations that might go before a court, and that the Judges should exercise their discretion, but within the width of discretion provided in part 44. It was not possible for the Court of Appeal to "second guess" the costs order, as the trial judge was in a far better position to determine where the costs ought to lie. The appeal was therefore dismissed.

Finally, the case of the Spanish fisherman against the Secretary of State for the unlawful prohibition from fishing in the United Kingdom territorial water continues to raise its head from time to time. Most recently an issue arose in respect of contingency fees. In *R (Factortame Limited & Ors) v SOS for Transport, Local Government and the Regions* [2002] EWCA Civ 932 the Court of Appeal considered the preliminary issue as to whether an accountant's contingency fee arrangement was champertous.

A firm of accountants had agreed with the Claimants that they would prepare and submit claims for loss and damage suffered as a result of the prohibition on the basis of an 8% payment for any damages recovered. The Claimant was successful, and the Secretary of State argued that the arrangement amounted to maintenance and champerty. The Court of Appeal recognised that conditional fees were now permitted in certain circumstances. There was however the undesirability of a clash of interest in respect of officers of the court and expert witnesses. The accountants had not been employed as expert witnesses and had no role to play in the issue of liability that was heard in the House of Lords. Therefore, public policy was not affronted by the agreement and the agreement was upheld.

Conclusions

The joint expert has not become the norm, but the courts are taking a hard line when experts fail to understand their duty to the court, are unfamiliar with the documents and fail to provide unbiased expert opinion. Part 36 Offers are having considerable impact on litigation because of the heavy

cost consequences on the parties. The Judge has a considerable discretion in respect of the costs of the matter, but must stay within the boundaries within Part 44. The recent cases of *Dunnett v. Railtrack* and *Hurst v. Leeming* further demonstrate the emphasis of the CPR and the courts in moving parties away from an exclusively adversarial approach to the resolution of dispute and towards negotiation and ADR. There has been a distinct decline in the number of claims issued at the TCC in London:

Claims issued:

1997	611
1998	538
1999	346
2000	344
2001	354
2002	386

On the face of it this suggests that Lord Woolf has succeeded in his objectives. However, the number of claims issued in 2001 has risen. Of the claims issued in 2000, approximately 25% related to enforcement of adjudicators' decisions. The reduction in numbers for that year may, however, have been as a result of the introduction of the pre-action protocol combined with the other requirements of the CPR, may result in a higher incidence of settlement before proceedings are instituted at all.

Conversely one of the reasons for the increase in claims may be the pre-action phase in litigation. It used to be possible to serve a writ and then investigate the detail of the claim during the initial phases of the litigation process. Under the CPR, the pre-action protocols demand a detailed claim letter. There is then a period of time for a response and a pre-action meeting before commencing proceedings. This procedure delays the issuing of a claim form, and also provides a timeframe for consideration of the case and attempts at settlement. However in these cases it cannot compel the parties to settle and in these cases so parties will still turn to the Courts. That said, if a party does resort to the Courts, it must litigate on the Court's terms, and the penalties for being unable to abide by those terms are far more severe that they used to be.

17 September 2003

Jeremy Glover
Fenwick Elliott LLP