Case No: B2/2004/1172

Neutral Citation Number: [2005] EWCA Civ 358
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BOURNEMOUTH COUNTY COURT
District Judge Tennant

Royal Courts of Justice
Strand, London, WC2A 2LL

Friday, 8th April 2005

Before :

LORD JUSTICE WARD
and
LORD JUSTICE RIX

- -

Between :

MR N.F. BURCHELL	**Appellant**
- and -	
MR AND MRS BULLARD AND OTHERS	**Respondent**

- -

(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
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Official Shorthand Writers to the Court)

- -

Mr Alexander Hutton (instructed by **Messrs Turner**) for the **Appellant**
Mr James Counsell (instructed by **Messrs Ian Newbery & Co.**) for the **Respondent**

- -

Judgment

Lord Justice Ward :

Introduction

1. This is an appeal by a small builder, Mr Nicholas Burchell, brought with the permission of Waller L.J. against the costs orders that were made in heavily contested litigation arising out of work done to the property of Mr and Mrs Bullard, the respondents.

The Background

2. By a contract evidenced partly in writing Mr Burchell agreed to build two large extensions to the home of Mr and Mrs Bullard in Bournemouth. The work was detailed, perhaps not fully, in two plans, one drawn by the architect and another by a structural engineer, and in the architect's construction specification. The agreement provided for four stage payments, the first when the chamber joists went in, the second at plate high, the third when the roof was on and the final payment on completion. On 31st August 2000 the builder submitted his claim for the third stage payment in the sum of £13,540.99. This was never paid. Mr and Mrs Bullard complained about the work and wrote setting out what they said had to be done before any further payment would be made. There followed more than one confrontation between the parties. In the correspondence that ensued, each accused the other of refusing to honour the contract and blaming the other for the difficulties. In the event Mr Burchell did not return to the site after 21st November 2000.

3. He instructed solicitors. On 14th May 2001 the solicitors wrote sensibly suggesting that to avoid litigation the matter be referred for alternate dispute resolution through "a qualified construction mediator". The sorry response from the respondents' chartered building surveyor was that "the matters complained of are technically complex and as such mediation is not an appropriate route to settle matters." All the Bullards wanted was for the builder to complete the contract and rectify the defective work.

4. On 5th February 2002 Mr Burchell brought his claim against Mr and Mrs Bullard for £18,318.45. The defendants counterclaimed £100,815.34 and further damages which were then not fully particularised. Of that sum £23,646.88 related to the roof which the defendants alleged needed to be "dismantled and reconstructed." In fact the roof had been built by a sub-contractor, Mr Teversham and so on 1st May 2003 the claimant brought a Part 20 claim against him alleging that insofar as the defendants had any claim in respect of the roof the subcontractor should indemnify him in respect of any sums, including costs, that might be awarded against him in the proceedings as a consequence of any defective work carried out by Mr Teversham.

The trial

5. The litigation rumbled on. Case management directions for expert evidence and for experts to meet to agree were made but it seems largely ignored. The case was heard in the Bournemouth County Court before District Judge Tennant, sitting as a recorder. He heard evidence for five days and reserved judgment on 1st March 2004. He circulated his draft judgment and it was handed down on 20th May 2004 when he entered judgment for the claimant against the defendants on the claim for £18,327.04

but gave judgment for the defendants against the claimant on the counterclaim for £14,373.15. Allowing for VAT and interest the result was that he ordered the defendants to pay the claimant the difference between the two amounts, namely £5,025.63.

6. In summary this was how he arrived at those conclusions. He preferred the evidence of the claimant to that of the defendants where their evidence differed saying:-

> "I found that the claimant was a transparently honest witness, more than ready to admit where he was wrong and to shoulder responsibility for it," and, "I am satisfied that the claimant was an honest man and a conscientious builder. If he had been allowed to do so he would probably have completed the contract and rectified any defects."

7. Dealing with how the contract came to an end, an important issue in the trial because the defendants' case was that if the builder had repudiated, he would not be entitled to anything at all and his claim should be dismissed, the recorder concluded that the fact that there might have been defects in the work done by the time the third stage payment was sought did not entitle the defendants to refuse payment until the defects were put right. The contract came to an end on 22nd November 2000 when, as he was satisfied, Mrs Bullard informed the claimant and the two men working for him that the contract was at an end and that they should leave. The recorder was satisfied that when Mrs Bullard wrote saying there was no point in any further meetings that amounted to a repudiation of the agreement by the defendants. He held that the consequence was that the claimant became entitled to claim for the value of the work done and in addition either the loss of his profit on the rest of the contract or his wasted expenditure and, although not precisely pleaded in that way, he was happy to accept that the pleading was sufficiently expressed as a claim for the balance of the contract price less the cost of the work not done. Any breach of contract by the claimant through faulty workmanship and poor materials had to be looked at as part of the counterclaim. In his view:-

> "There is thus to be excluded from the counterclaim, the cost (to the defendants) of completing the work. The defendants are not entitled to that as part of the counterclaim, as it was they who brought the contract to an end by their breach. The value of that work falls to be considered as an allowance against the contract price. The claimant's case as pleaded was that the value of the work necessary to complete the contract was £5,805."

8. By their counterclaim the defendants alleged that a large number of items were part of the contract and that much more should be allowed against the sum claimed by the claimant but the recorder was not satisfied that all of the items alleged by the defendants to be included in the contract were in fact part of that contract. On this issue the claimant was successful. After analysis of the individual items he came to the conclusion that the value of the contractual work which the claimant failed to complete was £5,991.41.

9. So far as the counterclaim was concerned "a major part" of it related to the roof which the defendants alleged would have to be rebuilt. There was a conflict of expert evidence drawn in respect of the alleged defective roof. There was a measure of agreement between the surveyors that the roofing work was defective in the following respects:

- "No valley boards.
- No lay boards or tilt fillets.
- Nails missing rafters.
- Holes in the Tyvek roof covering.
- On the rear slope of the rear extension an overlap of 80 mm between two sheets of Tyvek."

10. As to the other matters in dispute the recorder preferred the evidence of the claimant's expert to that of the defendants' expert for reasons he gave. The recorder was satisfied that:-

> "Mr Miles' [the defendants' expert's] opinion that the roof should be stripped was largely arrived at by applying a standard approaching perfection that exceeded the contractual standard. … [He] appears to have formed an opinion as to what the roof might possibly contain, having inspected only a small part of it and that in circumstances where there should have been little difficulty in examining the roof to the extent to which Mr Rougier [the claimant's expert] apparently examined it. Mr Miles' evidence as to what might be the extent of the problems in the roof is mere speculation. … The defendants are only able to satisfy me on the evidence that the roof needs repair and that the repairs [set out above] are appropriate."

11. He found that the amount to be allowed as the cost of repair was only £3,985 as against the sum of £23,646.88 claimed by the defendants. In other words the defendants recovered only about 17% of this part of their counterclaim.

12. Dealing with the other defects, the recorder accepted that on analysis of the pleadings the claimant accepted that the underlying work formed part of the contract and that the only real issue was the cost of carrying out the remedial work. He assessed that at £10,259.40. The counterclaim for this other work was £77,168.46, more when the unparticularised defects were added, and so the defendants succeeded to about 13% of this part of their counterclaim.

13. There was another very minor part of the counterclaim based upon an allegation that the claimant and his workmen had damaged a number of items of the defendants' property. Two of the twelve items were proved and damages of £128.75 awarded in respect of them, less than1% of the £2757.75 counterclaimed under this head.

14. Even if one ignores the extra but unquantified items in the schedule to the counterclaim, the defendants' overall success rate was less than 15%.

15. As for the Part 20 claim the recorder stated:-

> "It is not surprising in the circumstances that the claimant brought a Part 20 claim against Dean Teversham for an indemnity as to the roof."

He concluded, however, that it was plainly the responsibility of the claimant to fit the valley boards and tilt fillets so that no part of the counterclaim in respect of that defective work could be laid at the Part 20 defendant's door. He said:-

> "By far the major problem stems from the lack of valley boards and layboards. The other defects are relatively minor. … Thus, the Part 20 defendant is liable to the claimant for only £79.50 of the cost of the remedial work."

He entered judgment for the claimant accordingly.

16. The order made was first that there be judgment for the claimant against the defendant on the claim for £18,327.04 to which should be added V.A.T. and interest. The judgment for the defendants against the claimants on the counterclaim was for £14,373.15 plus V.A.T. and interest. The third order was, however, that "the defendants pay the claimant the difference between the above amounts namely £5,025.63 by 17th June 2004". The fourth order was the judgment for the claimant against the Part 20 defendant for £79.50.

The Judgment as to Costs.

17. When judgment was handed down there was argument about the appropriate orders to make. The recorder held that he had a discretion as to whether there should be judgment by way of set off or separate judgments on the claim and counterclaim. He was satisfied there should be separate judgments:-

> "It reflects the reality of what has happened and is clearer. To do otherwise would distort the VAT position and might lead to difficulties. *It will make no difference as to costs.* The court has a wide jurisdiction which it must exercise to see that the case is dealt with justly. *This will not be affected by the way in which the judgment is expressed*." (I add the emphasis.)

18. As for the costs he observed that the costs outweighed the amount in dispute and had "swamped the litigation". He approached the matter in this way:-

> "There were no payments into court and no Part 36 offers. In the context of the Civil Procedure Rules, those who do not take advantage of Part 36 run serious risks as to costs. The starting point is that the claimant must have the costs of the claim, the defendant must have the costs of the counterclaim, and the claimant must have the costs of the Part 20 claim. The court has a wide discretion which it must exercise to ensure that the

> case is dealt with justly. The Civil Procedure Rules allow for the costs to be dealt with on the basis of issues. If the court makes an order that requires an analysis of work done on particular issues, it makes the preparation of a bill of costs for detailed assessment much more difficult and enormously complicates the process of detailed assessment. It just risks substantially increasing the costs in a case in which the costs outweigh the value of the matters in dispute. It is better if possible to deal with the matter another way."

19. Then he said:-

> "Before the Civil Procedure Rules, if the court made an order that the defendants had the cost of a counterclaim without qualification, the defendants would only recover the additional costs of the action occasioned by the counterclaim itself. That is no longer the position."

20. The basis of his judgment then followed:-

> "There are faults on both sides, and I exclude the Part 20 defendant, as to the conduct of the litigation. On balance however, I am satisfied that quite apart from the net amount actually recovered by the claimant, the defendants are more at fault than the claimant in the sense that they have conducted the litigation more unreasonably. It is of course speculation as to what would have happened if the defendants had taken up the offer of mediation made by the claimant. There is a difference between mediation that fails and mediation that does not even start because one party refuses to participate at all. This type of dispute should have lent itself to that approach. On the other hand, the outcome is always difficult to predict and largely a matter for speculation. I accept that most of the work may have been association with the counterclaim. That remains to be seen. … I am satisfied that at this stage the only possible order that will do justice is an order that the defendants pay the costs of the claimant of the claim and the claimant pays the defendants' costs of the counterclaim. Of course it may well be appropriate to disallow some costs particularly some of the costs of Mr Rougier though not all of them. That can only be done after analysing his fees. An order to disallow part of them will be arbitrary. This is particularly so, because I propose to reserve the detailed assessment of costs to myself as District Judge. Most of the considerations urged by the parties can be dealt with in that context."

21. So far as the costs of the Part 20 claim are concerned his decision was:-

> "I am satisfied that the claimant should be ordered to pay those costs. The idea that the Part 20 defendant should be ordered to pay the claimant's costs when he has lost to the extent of

> £79.50, and that when he has made offers to settle from the beginning, seems to me to be almost absurd. It would certainly not be just. The fact is that he has succeeded on the issues. There can be no question of the defendants being ordered to pay those costs. The Part 20 defendant was just that, not a joint defendant. He was not a party to the contract between the claimant and the defendant. I do not consider that an order is appropriate that those costs should be recovered by the claimant from the defendants. I accept that the claimant was placed in a difficult position when the counterclaim was made particularly in relation to the roof. It is not surprising that given the nature of the counterclaim, the claimant should have made a claim against the Part 20 defendant, but that does not mean that it was wise. The claimant might have protected his position in a different way perhaps by putting the Part 20 defendant on notice of a possible claim depending upon the fate of the counterclaim. The claimant nevertheless took a risk when dragging the Part 20 defendant into the litigation. Again, I will reserve the assessment of costs to myself as a District Judge."

22. There is no appeal against the decision to enter judgment on the claim and counterclaim separately. The appeal relates only to the award of costs. The appellant submits that the judge ought to have given the appellant his costs not only of the claim but also the counterclaim or at least his costs of the counterclaim insofar as it related to the issue of the roof, with no order as to the rest of the counterclaim. He also submits that the judge ought to have allowed him to recover the Part 20 defendant's costs from the respondents. There is no Respondents' notice.

23. On 20th July 2004 Waller L.J. gave permission to appeal because it seemed to him "that an injustice may have been done in the way the costs orders work out." We explored this a little further when the appeal opened. As we had expected, an horrific picture emerges. In this comparatively small case where ultimately only about £5,000 will pass from defendants to claimant, the claimant will have spent about £65,000 up to the end of the trial and he will also have to pay the subcontractor's costs of £27,500. We were told that the claimant might recover perhaps only 25% of his trial costs, say £16,000, because most of the contest centred on the counterclaim. The defendants' costs of trial are estimated at about £70,000 and it was estimated the claimant would have to pay about 85%, i.e. £59,5000. Recovery of £5,000 will have cost him about £136,000. On the other hand the defendants who lost in the sense that they have to pay the claimant £5,000 are only a further £26,500 out of pocket in respect of costs. Then there are the costs of the appeal - £13,500 for the appellant and over £9,000 for the respondents. A judgment of £5000 will have been procured at a cost to the parties of about £185,000. Is that not horrific?

24. But I must add to the horror. After permission to appeal had been given because of arguable injustice, the appellant's solicitors wrote on 11th August enquiring whether the respondents "would submit the question of costs to mediation pursuant to the Court of Appeal Scheme." The response the following day was:-

> "Our clients' position is very clearly set out in counsel's skeleton argument. The issues are straight forward and although our clients would remain willing to listen to any sensible proposals that your client has to make in this matter, we do not see that involvement of the Court of Appeal mediation scheme would be necessary or appropriate."

This response will have no bearing on the issue of costs in the court below but it may be a factor which becomes relevant when dealing with the costs of the appeal.

Discussion on the appropriate order for costs

25. Appeals against orders for costs are notoriously difficult to sustain. That is because the trial judge has a wide discretion with the result that this court will only interfere with his decision if he has exceeded the generous ambit within which there is usually much room for reasonable disagreement or because, even more unusually, he has erred in principle. The point is firmly taken by Mr Counsell for the respondents and I must bear it well in mind.

26. Nonetheless, aspects of the recorder's approach do cause me concern. He correctly set out the position "before the civil procedure rules" summarising what is set out in the headnote to *Medway Oil & Storage Co. Ltd. v Continental Contractors Ltd.* [1929] A.C. 88:-

> "Where a claim and counterclaim are both dismissed with costs, upon the taxation of the costs, the true rule is that the claim should be treated as if it stood alone and the counterclaim should bear only the amount which the costs of the proceedings have been increased by it. No costs not incurred by reason of the counterclaim can be costs of the counterclaim. In the absence of special directions by the court there should be no apportionment. The same principle applies where both the claim and the counterclaim have succeeded."

I do not know why he said that is no longer the position. Part 48 of the CPR sets out the "general principles and case law relating to costs and their assessment" and in the introductory note at 48.11.1 it is stated that:-

> "This section is not intended to be a definitive work on the general principles of assessment, but a compilation of decisions and commentary which may from time to time need be referred to."

Part 48.15.3 deals with a counterclaim and cites *Medway Oil & Storage Co.* with apparent approval. Although I disagree with the Recorder's observation, it is not a point going to the heart of this appeal.

27. Once the recorder had decided to enter judgment on the claim and the counterclaim separately and not to set off one against the other, then to take as his starting point that costs should follow the event on each on claim and counterclaim is understandable. It is, however, only the starting point. In any event he said, "It will make no difference

as to costs." He was also correct to direct himself that the court's wide discretion had to be exercised so as to ensure that the case was dealt with justly.

28. CPR 44.3 gives help in coming to the right decision:-

> "(2) 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. …
>
> (4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including –
>
> (a) the conduct of all the parties;
>
> (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and
>
> (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).
>
> (5) The conduct of the parties includes –
>
> (a) conduct before, as well as during, the proceedings, …
>
> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
>
> (c) the manner in which a party has pursued or defended his case or a particular allegation or issue;
>
> (d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.
>
> (6) The orders which the court may make under this rule include an order that a party must pay –
>
> (a) a proportion of another party's costs;
>
> (b) a stated amount in respect of another party's costs;
>
> (c) costs from or until a certain date only; …
>
> (f) costs relating only to a distinct part of the proceedings; …
>
> (7) Where the court would otherwise consider making an order under paragraph (6)(f), it must instead, if practicable, make an order under paragraph (6)(a) or (c)."

29. The modern tendency is at least to consider the award of costs on an issue by issue basis. The recorder addressed that but dismissed it because of the difficulty in the preparation of a bill of costs and the enormous complication of the process of detailed assessment. I agree with that. I also agree with him that it is better if possible to deal with the matter another way. His judgment shows, however, that he did not find another way: he resorted to costs following the event. In doing so I fear he fell into error.

30. His error in my judgment was to fetter his discretion and not to go on to consider, as he should have considered, what alternatives were available to him. The most obvious and frequently most desirable option is that signposted in CPR 44.3 paragraph (6)(a), namely to order a proportion of the party's costs to be paid. The recorder had directed his mind to paragraph 6(f), namely ordering costs relating only to a distinct part of the proceedings but he seems to have overlooked paragraph (7) which required him, where he would otherwise have considered confining costs to part of the proceedings only, to make instead, where practicable, an order under (6)(a) for a proportion of the costs. Ordering a proportion of costs obviates all the difficulties he acknowledged in an assessment of how much is properly to be allocated to each and every issue considered in isolation. Better by far to decide, despite the difficulty and imprecision of the calculation, that the relevant issue or issues should bear a percentage of the costs taken overall. As the recorder erred in principle, the appeal on this aspect must be allowed.

31. He also erred in his treatment in the costs of the Part 20 claim. Having accepted that "the claimant was placed in a difficult position when the counterclaim was made" and that "it was not surprising that given the nature of the counterclaim, the claimant should have made a claim against the Part 20 defendant", his conclusion that it was unwise to join the Part 20 defendant cannot be supported. This was a paradigm case for third party proceedings. The defendants were asserting that the roof had to be replaced. The roof had been built by the subcontractor. In my judgment it would have been unwise for the builder not to have brought his subcontractor into these proceedings because that was the only proper way he could have protected his position. Giving him notice of a possible claim depending upon the fate of the counterclaim was no protection because there would be no issue estoppel unless all three parties were engaged in the same litigation. The claimant would have run a risk of the court coming to a different conclusion if separate proceedings were brought. Better by far that all the evidence be available at the same time before the same judge. In my judgment the recorder was wrong and the appeal against that part of his order must also be allowed.

32. The question then arises as to whether or not the matter should be remitted to the recorder for reconsideration or whether this court is in a position to exercise the discretion itself. Although we cannot capture the full flavour of the hearing which lasted five days and certain nuances of the judgment will be lost to us, I am quite satisfied that we are sufficiently able to capture the essential features of the case so as to exercise our own judgment. Certainly I am totally satisfied that it would be utterly wrong to incur the waste of costs which would result from sending the matter back to the court below.

33. I take as my starting point the recorder's decision, which I would honour, to exercise his discretion to give separate judgments on claim and counterclaim on the basis that

it would make no difference as to the costs. The order as drawn did in fact allow the set off because paragraph 3 of the judgment ordered the defendants to pay the claimant the difference between the sum awarded to the claimant on his claim and the sum awarded against him on the defendants' counterclaim. How, in circumstances like that, does one decide who the unsuccessful party is? This was, after all, a form of commercial litigation where each side was claiming money from the other. Costs following the event is the general rule and in this kind of litigation the event is determined by establishing who writes the cheque at the end of the case. Here the defendants do. They were the unsuccessful parties and my starting point is that the claimant is entitled to the costs of the proceedings, claim and counterclaim taken together.

34. The circumstances of the case may justify a departure from the general rule and so the conduct of the parties, and questions of whether they have not been wholly successful become relevant. CPR 44.3(5) identifies specific aspects of conduct for the court to consider including conduct before as well as during the proceedings, the reasonableness of the party's raising, pursuing or contesting particular allegations or issues, the manner in which he has done so and the extent to which, though successful, he has exaggerated his claim.

35. Dealing with those matters in reverse order, it is clear to me that in this case the claimant hardly exaggerated his claim: in fact his claim was for £18,318.45 and he actually recovered more than that, namely £18,327.04. On the other hand the defendants most certainly exaggerated their counterclaim. The counterclaim was for £100,815.34 plus the cost of ten other items "to be advised". It is impossible for us to estimate how much more was involved in those extra items. As I have pointed out, succeeding to the extent of £14,373.15 was succeeding to about only 15% of the sum claimed. The defendants were markedly unsuccessful judged even by the figures being put forward in the closing submission when the value of the counterclaim was estimated at £49,745.

36. The next factor to consider is the manner in which the parties pursued their claims. The judge was critical of the way in which expert evidence was deployed. Mr Miles, instructed by the defendants, was criticised because he had not inspected the roof fully yet advised that it needed to be replaced. He was originally a jointly instructed expert but the claimant was – rightly as it transpires – dissatisfied with his opinion and so instructed Mr Rougier. The defendants had a Mr Vincent, presumably the same surveyor as had advised them not to mediate, and shortly before the trial a direction was made that he and Mr Rougier and if thought necessary Mr Miles and the third party's roofing expert meet to prepare a joint statement setting out areas of agreement and disagreement. That was never complied with because the defendants dispensed with the services of Mr Vincent. With the trial looming they had no evidence to support the counterclaim that the items of work were defective as alleged. They were largely reliant on admissions made in the reply. On 7th January 2004 an order was made that Mr Rougier prepare a schedule of the works to be done to take the property to mortgagable condition, with a Mr Gardner, originally retained by the claimant, to attach costings to the various items. In fact Mr Rougier prepared two schedules one of which was ruled inadmissible and it may be for that reason that the recorder made the adverse comment that it may well be appropriate to disallow some of his costs on the assessment which he would conduct. The recorder was nevertheless satisfied that

Mr Rougier's reasoned criticisms that Mr Gardner's prices were high were convincing. That doubtless explains why the claimants abandoned Mr Gardner. In the curious game of musical chairs played in this litigation the recorder noted:-

> "Worse still, the defendants then "adopted" Mr Gardner as their "expert" and took issue with the contribution of Mr Rougier."

37. In the event, whilst accepting Mr Rougier's criticisms, the recorder took the Gardner figures as his starting point and discounted them to allow for the criticism. He did not proceed on the figures produced by Mr Rougier himself which were too low. The interlocutory dance was, therefore, something of a muddle, the full effect of which it is difficult for this court to assess. All we can do is take account of the recorder's views that:-

> "There are faults on both sides … as to the conduct of the litigation. On balance however, I am satisfied that quite part from the net amount actually recovered by the claimant, the defendants are more at fault than the claimant in the sense that they have conducted the litigation more unreasonably."

That is a finding which must bear upon the allocation of costs.

38. Whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue is a relevant factor and needs to be looks at in a little more detail. The defence to the claim was firstly that the claimant had repudiated. The defendants lost that issue. They asserted that much more was left undone than the claimant asserted to have been within his contract. On that the defendants lost. The roof was a major issue. The defendants lost their case that the roof had to be replaced. The defective work was obviously a large part of the counterclaim. The defendants had to rely on admissions to prove their case because they had little or no expert evidence available to them. In some instances the claimant resiled from admissions and to that extent prolonged the case. The defendants had no evidence to support their costing of their counterclaim until they embraced Mr Gardner at the very last minute. Looking at the matter in the round, the defendants lost much more than they won.

39. Neither party made any payment into court or any admissible offer to settle so far as we know. Given the claim would be set off against counterclaim and that the claimant was the eventual winner, the onus was slightly more on the defendants to pay into court than on the claimant to pay money in satisfaction of the counterclaim which, if taken, still left his claim to be fought to judgment.

40. The defendants' refusal to mediate does need careful analysis. The offer to refer the matter for mediation was made in May 2001, long before the action started and long before the crippling costs had been incurred. The issue which arises is whether the defendants acted unreasonably in refusing ADR. In *Halsey v The Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 1 WLR 3002 this court gave some guidance as to how that question should be answered. Among the relevant matters to take into account here are (a) the nature of the dispute; (b) the merits of the case; (c) whether the costs of the ADR would be disproportionately high and (d) whether the ADR had a reasonable prospect of success.

41. Dealing with those in turn, it seems to me, first, that a small building dispute is *par excellence* the kind of dispute which, as the recorder found, lends itself to ADR. Secondly, the merits of the case favoured mediation. The defendants behaved unreasonably in believing, if they did, that their case was so watertight that they need not engage in attempts to settle. They were counterclaiming almost as much to remedy *some* defective work as they had contracted to pay for the whole of the stipulated work. There was clearly room for give and take. The stated reason for refusing mediation that the matter was too complex for mediation is plain nonsense. Thirdly, the costs of ADR would have been a drop in the ocean compared with the fortune that has been spent on this litigation. Finally, the way in which the claimant modestly presented his claim and readily admitted many of the defects, allied with the finding that he was transparently honest and more than ready to admit where he was wrong and to shoulder responsibility for it augered well for mediation. The claimant has satisfied me that mediation would have had a reasonable prospect of success. The defendants cannot rely on their own obstinacy to assert that mediation had no reasonable prospect of success.

42. It seems to me, therefore, that the *Halsey* factors are established in this case and that the court should mark its disapproval of the defendants' conduct by imposing some costs sanction. Yet I draw back from doing so. This offer was made in May 2001. The defendants rejected the offer on the advice of their surveyor, not of their solicitor. The law had not become as clear and developed as it now is following the succession of judgments from this court of which *Halsey* and *Dunnett v Railtrack plc (Practice Note)* [2002] 1 WLR 2434 are prime examples. To be fair to the defendants one must judge the reasonableness of their actions against the background of practice a year earlier than *Dunnett*. In the light of the knowledge of the times and in the absence of legal advice, I cannot condemn them as having been so unreasonable that a costs sanction should follow many years later.

43. The profession must, however, take no comfort from this conclusion. *Halsey* has made plain not only the high rate of a successful outcome being achieved by mediation but also its established importance as a track to a just result running parallel with that of the court system. Both have a proper part to play in the administration of justice. The court has given its stamp of approval to mediation and it is now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate. The parties cannot ignore a proper request to mediate simply because it was made before the claim was issued. With court fees escalating it may be folly to do so. I draw attention, moreover, to paragraph 5.4 of the pre-action protocol for Construction and Engineering Disputes - which I doubt was at the forefront of the parties' minds - which expressly requires the parties to consider at a pre-action meeting whether some form of alternative dispute resolution procedure would be more suitable than litigation. These defendants have escaped the imposition of a costs sanction in this case but defendants in a like position in the future can expect little sympathy if they blithely battle on regardless of the alternatives.

44. Balancing all those factors how then is justice to be done? The claimants cannot have the whole of their costs which follow the event that they were successful to the tune of £5,000 odd. Some recognition has to be paid to the fact that a large part of the trial was taken up with the counterclaim on which the defendants did have some, albeit

limited, success. The object of the exercise is to make a just and fair award of costs. Standing back and looking at the matter in the round it seems to me that the claimant enjoyed the greater share of the spoils of victory. In my judgment justice is achieved by awarding the claimants 60% of the costs of the proceedings, claim and counterclaim, lumping them together. The district judge assessing these costs will still be able to decide to what extent Mr Rougier's fees must be disallowed.

45. For reasons I have given there was no justification for refusing to make some order in the claimant's favour in respect of the costs he has been required to meet in the Part 20 proceedings. Joining the subcontractor was a reasonable and proper course to take. It flowed entirely from the counterclaim and the substantial challenge to the fitness of the roof. I start with allowing the claimant the whole of those costs but then I have to have regard to the fact that the substantial part of the proven defective work was in fact the responsibility of the claimant. It was not a clear-cut case of the subcontractor's full responsibility for all the work done on the roof. The claimant's own failures must be marked to some extent in costs. Doing the best I can, and taking a broad view of the justice of the case overall, I conclude that he should have the same proportion of his costs of the third party proceedings as he does of the proceedings overall.

46. In the result I would allow the appeal, discharge the recorder's orders for costs and direct that the defendants pay 60% of the claimant's costs of the claim, counterclaim and Part 20 proceedings and 60% of his liability to pay the Part 20 defendants' costs.

47. We have not heard argument on the costs of this appeal. In order that more costs are not wasted, I say that my preliminary view is that costs of the appeal should follow the event. The appellant has been successful and as at present advised and having regard to the checklist of relevant considerations set out in CPR44.3, I can see no justification for his not having the costs of the appeal. Counsel will, however, have an opportunity to address the court further when this judgment is handed down.

Lord Justice Rix :

48. I agree, and add a few words of my own only to underline my concern for the expenditure of such large costs in such a case and my support for what my Lord, Lord Justice Ward, has said about mediation and *Halsey*.

49. Lord Justice Ward has set out the current estimates of the parties' costs to date in paragraph 23 above. It is a matter of real and substantial concern that parties are taking, or being forced to take, such great risks in the expenditure of costs in a case where the claim was essentially admitted and the £100,000 counterclaim (and more, if account is taken of further unparticularised items) succeeded in the sum of only some £14,000. I do not know if litigants are being fully advised as to the risks involved in a "kitchen-sink" approach to litigation. I do not say that that was the defendants' approach in this case: but, having regard to the very limited success which the counterclaim received and the recorder's views that the defendants were being unreasonable in their approach to litigation, it is hard to eliminate the possibility that the defendants thought that, once committed to litigation, they might as well put their case as high as it could possibly be put. Now, however, that CPR 44.3, quoted in my

Lord's judgment above, has given to the courts such flexibility in the awarding of costs, litigants should be aware, and should be made aware by the lawyers whom they consult, that there are considerable perils in adding to a good case other aspects or items of dubious merit.

50. As for mediation and *Halsey*, I agree entirely with what Lord Justice Ward has said. The merits of the case, its structure, and the great risks involved in fighting it to a conclusion, favoured mediation, and did so at an early stage, before substantial costs began to be incurred. In the present case, Mr Burchell offered mediation at an early stage, long before litigation started. I agree that mediation here would have had a reasonable prospect of success and that a party cannot rely on its own obstinacy to assert that it would not. I would also add that it may not be able to rely on its solicitor's or expert's advice either, where the result shows that mediation ought reasonably to have been attempted. I suspect that there are many disputes of this kind where one party offers and desires mediation and is simply met by a blank refusal. The court is entitled to take an unreasonable refusal into account, even when it occurs before the start of formal proceedings: see CPR 44.3(5)(a).

51. In *Halsey*, this court was particularly concerned with the problem of whether an unreasonable refusal of mediation could prejudice a *successful* party in costs. The present case illustrates that the problem may arise in many different situations, as here where the counterclaiming defendants were (a) the overall losers in the litigation and (b) exaggerated their counterclaim so as to receive only a small percentage of it. In such circumstances, it seems to me to be in principle easier than in the *Halsey* situation to give effect to an unreasonable refusal of mediation in costs.

Order:

1. The Appeal be allowed and the cost order as between the Appellant and the Respondents made by the Recorder at the trial of this matter be discharged.

2. The Respondents do pay 60% of the Appellant's costs of the claim, counterclaim and Part 20 proceedings, and do pay 60% of the costs which the Appellant is liable to pay to the Part 20 Defendants to be the subject of detailed assessment on the standard basis if not agreed.

3. The Respondents do pay the Appellant's costs of the appeal to be the subject of detailed assessment on the standard basis if not agreed, any such assessment to be heard together with the assessment of the costs below.

4. Permission to appeal to the House of Lords refused.

(Order does not form part of approved judgment)