

JERSEY / JUDGMENT

Cafe de Lecq -v- Rossboroughs

[2012] JRC 154 (23 August 2012)

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judgment

the commissioner: 1. It was originally anticipated that the Court would be called upon to rule on certain matters relating to interest on damages as well as costs, but interest was subsequently agreed between the parties and this judgment is, accordingly, confined to disputed issues of costs. 2. At the time of handing down judgment following trial of the action, in the interests of short-circuiting things and saving costs, I floated the idea that an appropriate costs order might be that the plaintiff, Cafe de Lecq, should have 85% of its costs on the standard basis. That suggestion did not find favour with the plaintiff and the matter became the subject, in due course, of a contested hearing preceded by substantial written submissions by the parties, represented as before by Advocate Robinson for the plaintiff and Advocate Journeaux for Rossborough. 3. The plaintiff's case is that there should be an award of costs in its favour without any discount and, moreover, that the award should be for costs on an indemnity basis having regard to (i) the nature of the points taken by Rossborough in defence of the claim and the conduct of that defence, and (ii) the failure of Rossborough to engage seriously in any attempt to seek an out-of-court settlement by mediation or otherwise. In addition, the plaintiff seeks an order for a substantial payment on account of costs. 4. Rossborough, for its part, accepts as a starting point that the plaintiff should have its costs, but only (i) on the standard basis, (ii) subject to a discount of 15% (as proposed by the Court) to reflect the fact that there were some issues on which the plaintiff had failed, and (iii) with a cross-order that, as regards those issues (on which the plaintiff failed), Rossborough should have its costs on the standard basis. 5. The principles applied by the courts in this jurisdiction in awarding costs between parties to litigation are now well settled and were common ground. They are set out in the judgment of this court in *Watkins-v-Egglshaw*

[2002] JLR 1, have since been approved by the Court of Appeal and, as it happens, have recently been affirmed, together with one or two additional observations, by the Bailiff in his judgment on a preliminary issue in the present case, *Cafe de Lecq Limited-v-RA Rossborough (Insurance Brokers) Limited*

- [2011] JRC071. It is unnecessary to repeat the relevant principles here. 6. Similarly, the grounds on which it is appropriate to make an award of indemnity costs have been the subject of exposition in a series of decisions of the Court of Appeal, three of them in the past two years. However, it is now unnecessary to look beyond the most recent of those decisions, *Leeds United Football Club Limited-v-Weston and Levi*
- [2012] JCA088 (Steel, Jones and McNeill JJ. A.) as handed down on 3 rd May this year, which draws together the essential points of the earlier decisions. 7. In that case Jones J. A., giving the judgment of the Court, summarised the position as follows:- "(4) The circumstances in which it may be appropriate to award costs on the indemnity basis have been considered on a number of occasions by this Court. In *Dixon-v-Jefferson Seal Ltd*
- [1998] JLR 47 , Collins J. A., with whom Harman and Southwell JJ. A. agreed, concluded that there had to be "some special or unusual feature in the case" to justify such an award. (Page 59) In *Marett-v-Marett*
- [2008] JLR 384 , Fleming J. A., Sumption and Nutting JJ. A. concurring, said this:- "A court may make an indemnity costs order only where there has been some culpability, some abuse of process such as deceit, underhanded or unreasonable behaviour, abuse of court procedures, or the submission of voluminous and unnecessary evidence. There are many examples in decided cases of the application of these broad principles (see *Dixon-v-Jefferson Steel Ltd*
- (6) (1998 JLR at 52-53); *Maçon-v-Quéree (née Colligny)* (20); and *Jones (née Ludlow)-v-Jones (No.2)* (11), noting the reference to "some special or unusual feature" to justify the award of indemnity costs). There are also examples of cases where the court has made an indemnity order, even in the absence of culpability or abuse relying on the court's general discretion, in England and Wales, under the CPR, r.44.3." (Paragraph 73)
- (5) In *Leeds United Association Football Club Limited and Another-v-The Phone-In Trading Post Limited t/a Admatch*
- [2011] JCA 110 , at paragraph 11, this court pointed out that the limitation placed on the exercise of the court's discretion by the use of the word "only" in the first sentence of the foregoing passage must be regarded as an error.
- (6) In *C-v-P-S*
- [2010] JLR 645 , the court rejected a submission that an indemnity costs order should only be considered where the actions of the paying party are malicious or vexatious. *Beloff J. A.*, who delivered the judgment of the court, said this:- "We do not accept that it is appropriate to impose such a restrictive approach on the discretion of the court to make an award of costs on the indemnity basis. The question will always be-is there something in the conduct of the action by one of the parties or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs, recognizing

that there will usually be some degree of unreasonableness? We do not consider that there is a need for the claiming party to show a lack of moral probity or conduct deserving of moral condemnation, or malicious or vexatious conduct". (Paragraph 11.)

- (7) In making an award of indemnity costs on the ground of unreasonableness, the court is seeking "to achieve a fairer result for the party in whose favour it is made than would be the case if he were only able to recover costs on the standard basis; in the end, it is a question of what would be fair and reasonable in all the circumstances. " (Pell Frischmann Engineering Limited-v-Bow Valley Iran Limited and Others

[2007] JLR 479 , paragraph 25, cited with approval in C v. P-S at paragraph 7)". 8. Leaving aside for the moment the plaintiff's contentions on the subject of mediation, the main factors that have influenced my ultimate decision are these:- (i) The plaintiff may reasonably claim not just to have been the successful party overall, but also, with the exception of the points noted below, to have succeeded resoundingly, as reflected in the terms of the trial Court's

judgment.

(ii) The failure of Rossborough's defence may in part have been the result of the inherent vagaries of litigation. But, for the most part, it appeared to stem from a failure to face up to what it was realistic and reasonable to expect of those involved in placing the risk when it came to them giving evidence in the witness box, and from a corporate mind-set that gave priority to procedural convenience for the broker and failed to recognise the systemic hazards of the computerised system adopted by Rossborough when it came to meeting the reasonable needs of the assured:- a mind-set that seemed to continue to inform Rossborough's approach throughout the trial despite accumulating evidence and authority that made it untenable. (iii) But, although it is a close run thing, these considerations alone are not, in my view, quite sufficient to warrant an order for indemnity costs. (iv) It is true that the plaintiff proved to be wrong in its original denial that Mr Ruellan had ever received Rossborough's letter of 16 th February, 2006, and failed in its assertion that Mr Ruellan had never received the sections of the policy documentation containing the DFF warranty. It was also unsuccessful on its claim for continuing loss of profit and ended up with a damages award the quantum of which was a long way short of that claimed. But these elements have to be seen in the context of the trial as a whole and the fact that the core issue - and by far and away the most strongly contested aspect of the dispute - was the sufficiency or otherwise of Rossborough's computer-generated documentation as a means of drawing Mr Ruellan's attention to the terms and significance of the DFF warranty. While the points on which the plaintiff was unsuccessful undoubtedly merit some attenuation of the unqualified costs order to which it would otherwise be entitled, I accept that the appropriate "net" discount should not be as much as the 15% that I originally suggested. ("Net" in the sense that this takes account of the costs, on a standard basis, to which Rossborough would otherwise be entitled in respect of the items on which it was successful:- separate cost orders would only be likely to add to the costs of taxation.) All things considered the appropriate net figure should, in my view, be 10%. 9. I turn, then, to the plaintiff's contention that Rossborough displayed a wholly unreasonable attitude

towards the possibility of mediation or engaging in negotiations and that that obduracy alone justifies an order for indemnity costs. 10. It is now well established that an unreasonable failure to engage in mediation is a factor that may be taken into account by the Court in considering costs. At the time when the matter was argued before me there were two reported Jersey cases in which the Court's jurisdiction to take account of such matters had been considered and recognised:- *Bespoke Investments Ltd-v-Lincoln Nominees Ltd*

[2005] JRC 098 which followed the decision of the English Court of Appeal in *Halsey-v-Milton Keynes General NHS Trust*

[2004] EWCA Civ 756 and *Manley-v-Bell*

[2007] JRC 025 (both decisions of the then Bailiff, Sir Philip Bailhache). Since then Clyde-Smith, Commissioner, has also had occasion to consider and affirm the jurisdiction in *Prestigic (Wisley) Nominees Ltd-v-JTC & Ors*

[2012] JRC 114 . In each of the earlier cases the point at issue was whether the overall successful party should be penalised in costs for refusing to mediate; and in each of the two Jersey cases, the Court concluded that no such penalty should apply because the refusal was, on the facts, not unreasonable. 11. In *Prestigic* , judgment in which was handed down on 8 th June, 2012, the learned Commissioner held that, although there is no Jersey authority directly in point, there is no reason in principle why the jurisdiction should not apply equally to an unsuccessful party who unreasonably refuses to mediate. I have not invited counsel to make submissions on this, most recent, decision because they have not sought such an opportunity and I had already concluded, on the submissions made to me at the time, that there was no reason in principle to confine the jurisdiction to any particular class of litigant, whether successful or unsuccessful and whether plaintiff or defendant. Mr Journeaux had submitted that none of the cases cited by Mr Robinson, whether Jersey or English, were authority for the proposition that an order for indemnity costs can be made against an unsuccessful party which unreasonably refuses to engage in mediation, though he appeared to concede that a percentage uplift in the other party's costs award, as applied in *Yorkshire Bank P & Ors-v-RDM Asset Finance Ltd*

[2004] WL 2046653], could be legitimate. But (a) the mere absence of a clear precedent plainly cannot preclude the matter being addressed as a matter of principle; (b) I am unable to see on what logical ground the distinction that Mr Journeaux bravely sought to make could be possibly justified; and (c) although the passage in question may have been obiter , the members of the English Court of Appeal in *Dyson & Field-v-Leeds City Council*

[2004] WL 2046653 (Lord Woolf MR, Ward and Laws L. JJ.) appear to have been in no doubt at all that the Court had power if necessary to order indemnity costs (or, alternatively, a higher rate of interest on damages) in the face of an unreasonable refusal to engage in mediation. 12. Having noted the existence of the jurisdiction to take account of such matters, I venture to add the following observations, drawing to some extent on the English cases and to some extent on policy considerations underlying the jurisdiction:- (i) The

jurisdiction extends not just to circumstances in which a party unreasonably declines to mediate but also to an unreasonable refusal to engage in settlement discussions or in some other form of alternative dispute resolution: per HH Judge Reid Q. C. in *Corenso (UK) Ltd-v-The Burden Group plc*

- [2003] EWHC 1805 (QB) at paragraph 60:- "The requirement on the parties is to attempt to resolve their differences without resorting to court..... So long as parties are showing a genuine and constructive willingness to resolve the issues between them, it does not seem to me that a party will be automatically penalised because that party has not gone along with a particular form of alternative dispute resolution proposed by the other side." (ii) The virtues of mediation extend beyond potential savings in costs. The point was made by Sir Philip Bailhache in *Bespoke Investments* in a passage (at paragraph 5) in which he cited an extract from a speech that he gave at the launch of the amendment to the Royal Court Rules:- "Secondly, a dispute settled confrontationally through the courts will often have a bruising effect upon the parties. There is always a loser, and sometimes there is no real winner. A mediated settlement, while not necessarily leading to total satisfaction on both sides, can enable the parties better to understand the other's point of view and occasionally to offer or to accept an apology. Particularly in a small community, where trading and even personal relationships between the litigating parties may continue, the ability to settle a disagreement in private without creating lasting wounds is, in my view, an important positive factor in favour of mediation." And in *Hurst-v-Leeming*
- [2003] 1 Lloyd's Rep 37 Lightman J. observed:- ".....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." (iii) The prospects of a mediation succeeding is not the only consideration. In *B espoke*, Sir Philip Bailhache said:- "The fundamental principle in determining whether or not to penalise a party in costs for refusing to engage in mediation is whether the successful party acted unreasonably in so doing. The question whether mediation has a realistic prospect of success is a factor in that equation, but only one of several. The character of the litigants may be relevant. The costs to be incurred in preparing for mediation may be disproportionate to the costs of preparing for trial, particularly if the offer to mediate is made at a late stage of proceedings. Again, if mediation is proposed late in the day, there may well be an unacceptable delay in the final resolution of the dispute. All these matters are to be taken into account." To similar effect are the observations of the English Court of Appeal in *Halsey* at paragraph 25:- (iv) Unreasonable belief in the merits of one's case is not a reason for refusing to engage in some form of ADR. Commenting on Lightman J's observation in *Hurst* that belief by a party that he has a watertight case - the frame of mind of so many litigants - is no

justification for refusing to engage in mediation, the Court of Appeal in Halsey said:- "In our judgment, this statement should be qualified. The fact that a party unreasonably believes that his case is watertight is no justification for refusing mediation. But the fact that a party reasonably believes that that he has a watertight case may well be sufficient justification for a refusal to mediate" (paragraph 19, original italics). (v) The jurisdiction is one that should be exercised with a degree of caution, not least because it is never going to be possible for a Court to be privy to all the considerations that affect a party's unwillingness to mediate without that party waiving privilege and because, as HH Judge Coulson QC observed in *Nigel Witham Ltd-v-Smith & Anor* (No.2)

- [2008] EWHC 12 (TCC) (at paragraph 32), trying to work out when the best time might be to attempt ADR or mediation is a common difficulty for parties. But, carried too far, such considerations would have the effect of rendering the entire jurisdiction nugatory. In the end, the Court has to act on the circumstances as they appear, on the evidence, to be. (vi) The burden is on the party seeking an award of indemnity costs to satisfy the court that the behaviour of the other has been unreasonable. 13. The material sequence of events in the present case began with a letter from Bedell Cristin on behalf of the plaintiff dated 1st June, 2010, drawing attention at some length to the recent High Court decision of *Nicholas G Jones-v-Environcom Ltd & Ors*
- [2010] EWHC 759 and its significance and inviting Rossborough to agree to a suspension of the pre-trial timetable in order to allow the parties to attempt to resolve the matter "by means of alternative dispute resolution e.g. mediation". The reference to *Environcom* was directly in point, going as it did to the heart of the dispute and featuring in the Court's subsequent judgment at paragraph 20. Carey Olsen, responding on behalf of Rossborough on 14th July, 2010, said "We are still seeking instructions from our client in relation to mediation. We can see merits to mediation of the dispute at some stage. However, our view is that discovery should take place before any mediation is contemplated because there are simply too many disputed factual issues, in relation to which we have little or no information, for us to mediate in advance of discovery." Bedell Cristin replied emphasising the advantages of mediation at an early stage in order to keep costs to a minimum. By 23rd July, 2010, Carey Olsen had obtained their client's instructions and, having explained their reasons at some length, concluded "Our client is not agreeable to mediation at this present time, and ahead of discovery. Our client is not closed to the idea of mediation at some stage in the proceedings. That said, our client's agreement in this respect should not be assumed. We see no benefit in the proposal for a stay for mediation at this time." 14. Six months later, with discovery complete, Bedell Cristin returned to the subject. In a letter dated 11th February, 2011, they made reference again to *Environcom*, to the fact that significant costs had been incurred since their first suggestion of mediation, and to the fact that discovery had taken place and Rossborough's application for security for costs had been determined - events on which Rossborough had insisted as prerequisites to any consideration of mediation. "It appears to us" they said "that this claim is crying out for mediation and is one that does have a real prospect of success." Carey Olsen's response on

17 th February, 2011, was to say that their client wished to consider both the plaintiff's witness of fact evidence and its expert evidence before committing to mediation, observing that there appeared to be wide discrepancies in the plaintiff's pleaded case and that the claim was significantly overinflated. At that point, service of statements of witnesses of fact was scheduled for 18 th March, 2011, and exchange of experts' reports for th April, 2011, with a view to a trial in late September that year. 15. In the event, it was not until 20 th July, 2011, that witness statements and expert evidence were exchanged. The same day Bedell Cristin e-mailed Carey Olsen, saying:- "What is your client's current stance on mediation? I am sure the court would expect us to have explored mediation particularly in a case such as this where the trial will be expensive and the value of the claim is not especially high so as to warrant that expense if it can be avoided. I would have thought that once the experts have clarified their views there can be no good reason to delay mediation but I would welcome your comments." Carey Olsen replied on 22 nd July, 2011:- "The view previously expressed by our client is that a decision would be made on mediation once all of the evidence had been obtained and reviewed. This has not changed, except that both sets of joint expert statements have taken much longer than expected to produce. If we can get these wrapped up in fairly quick order (say by the end of next week), then, we would anticipate a decision to be made on mediation very shortly thereafter." On 31 st August, 2011, Bedell Cristin e-mailed Carey Olsen once again, suggesting that the latter's client should now be in a position to make a decision, pointing out that the trial was now only seven weeks away and would need to be re-scheduled if the parties were to go to mediation. 16. Rossborough's answer came in the form of a letter from Carey Olsen dated 6 th September, 2011 :-"We now have instructions in relation to ADR. Having very carefully reviewed and considered all of the evidence received (including all of the material provided during discovery and the witness of fact and expert statements), we feel that the case is sufficiently straightforward and the respective evidence of each party sufficiently clear that we can carry out a most efficient form of ADR by a without prejudice meeting between us without the need for a third party as a mediator. Whilst our view remains that your client has a very weak case, our client is prepared to listen carefully to what you have to say and to discuss ways in which the case can be resolved without trial at a without prejudice meeting without or without your clients present (sic)." Mr Robinson of Bedell Cristin replied the same day expressing disappointment, taking issue with the suggestion that the plaintiff's case was weak ("Our client believes its claim to be strong"), pointing out that this is a not uncommon state of affairs, suggesting that the chances of achieving a settlement would be considerably enhanced by the involvement of a professional mediator, but undertaking to take his client's instructions on the Rossborough proposal. 17. On 21 st September, 2011, Mr. Robinson wrote again:- "My client remains willing to consider settlement on sensible terms as he has been all along but he is intensely frustrated that your client has proved unwilling to mediate throughout this case and has not initiated any settlement discussion by making an offer. At this very late stage the costs are so high that it is hard to see how a settlement can be achieved. To make matters worse your letter to me dated 6 September

does not encourage us in the belief that your client is keen to settle. You say your client is prepared to listen to what I have to say having pointed out how ours is a very weak case. This does not make me think that your client has any intention of making anything other than a nuisance value settlement offer if that. Rather than waste time I suggest that if your client has an offer to make, you put it in writing. It is not for me to convince you of the strength of my client's case. You are well placed to form your own view and to make an offer accordingly if your client so wishes." The prediction that Rossborough would not be making "anything other than a nuisance value settlement offer if that" was, as events proved, right. 18. Because Mr Robinson's letter of 21 st September, 2011, was marked "Without Prejudice" Carey Olsen wrote to him on 6th October, 2011, requesting an open response to the proposal of a without prejudice meeting in lieu of mediation, adding "Our client's decision to refuse mediation and to propose the without prejudice meeting was not made on the basis of its views on the merits of the proceedings and the likelihood of success as your client appears to suggest. Although these issues were and remain clearly relevant factors, they were not the decisive factors, as should be apparent from our letter of 6 th September, 2011." Answering this letter on 10 th October, 2011, Mr Robinson suggested that, if the intention was for Carey Olsen's letter to be put before the court at some stage with a view to demonstrating that Rossborough had acted reasonably in relation to settlement, it was only fair that the court should know the true position and to that end should see his own letter of 21 st September (as to which his client was prepared to waive privilege) and should know that that letter had gone unacknowledged by Carey Olsen and that nothing further had been heard from them until their letter of 6 th October, 2011, was received. 19. When Mr Robinson served his skeleton argument on behalf of the plaintiff in advance of the hearing before me, his account of specific events ended with Carey Olsen's letter of 6 th September, 2011, the only hint at subsequent events being in paragraph 34 in these terms:- "As for the prospect of negotiation as between the lawyers it suffices to say that at no stage in the case did the Defendant make any offer of compensation for the Plaintiff's loss at all". But by the time Mr Journeaux came to respond with his skeleton argument it had been agreed that the court should see Mr Robinson's letter of 21 st September, 2011. Having referred to that letter, Mr Journeaux's skeleton continued:- "44. Ultimately, however, Cafe de Lecq had a change of view on this [its view that a without prejudice meeting would be a waste of time and that Rossborough should put any offer that it wanted to make in writing] and a without prejudice meeting was held between the lawyers for the parties on 14 October. Without prejudice privilege attaches to the contents of that meeting and any offers made in it. This privilege cannot be waived unilaterally, and Rossborough does not agree to its waiver. The meeting did not resolve the dispute between the parties and the case proceeded to trial.

45. In addition to showing that Rossborough's refusal to mediate was unreasonable (which is denied), it is clear from the passage cited from Halsey above Cafe de Lecq must also show that mediation had a real prospect of success. That the without prejudice meeting did not result in a settlement is an indication that mediation did not have such a prospect - that the two parties' views of the merits of the case were sufficiently diametrically opposed that the prospects of a successful resolution using ADR were exiguous.
46. Cafe de Lecq criticises Rossborough for not making an offer which involved compensation. The meeting of 14 October, 2011, was clearly on a without prejudice basis, privilege in relation to which has not been waived, and cannot be unilaterally waived by Cafe de Lecq. The generality of the statements made at paragraphs 9, and 10 of page 2, and at paragraph 34 of Cafe de Lecq's skeleton must be read in terms which respect the privileged nature of that meeting." 20. Not surprisingly the subject did not rest there. By the time the matter came on for hearing before me it had been agreed that the Court should receive a short form of words by way of an account of the meeting that had taken place on th October, 2011:- "A without prejudice meeting was held between Mr Journeaux, for the Defendant, and Mr Robinson, for the Plaintiff, on Friday, 14 October, 2011. The Defendant made an offer to settle the proceeding on a drop hands basis, i.e. all claims were to be withdrawn with each party to pay its own costs. The offer was rejected by the Plaintiff who made no counter offer or proposal." 21. Against this background, Mr Robinson submitted that the plaintiff had done everything it possibly could to persuade Rossborough to engage in mediation or some other form of ADR; that its overtures had been rejected time and again; that Rossborough itself had taken no initiative to promote an out-of court settlement and had made no offer of any kind prior to the 14 th October, 2011, meeting; that the offer then made, ten days prior to the start of the trial, by which time very substantial costs had been incurred, was derisory - as he had said in his letter of 21 st September, 2011, he anticipated it would be; that, tested by the various factors suggested as relevant at paragraphs 17 to 26 of the judgment in Halsey , the case was ideal for mediation; that mediation at a stage before the level of costs became a major complicating factor would have had a good chance of success; and that far from demonstrating the contrary, as suggested by Rossborough, the fact that the meeting on 14 th October achieved nothing was merely indicative of a stubborn refusal on the part of Rossborough to acknowledge that it was its own case that was weak, as reflected in the multiplicity of hopeless contentions squarely rejected by the Court at trial. For the most part, a powerful set of considerations to my mind. 22. The central theme of Mr Journeaux's response - the "over-arching" consideration as he put it - was that the Court should bear in mind the practical difficulties of judging the optimum time for engaging in mediation as acknowledged in Witham :- "It is a common difficulty in cases of this sort, trying to work out when the best time might be to attempt ADR or mediation. Mediation is often suggested by the claiming party at an early stage. But the responding party, who is likely to be the party writing the cheque, will often want proper information relating to the claim in order to be able to assess the commercial risk that the claim represents before embarking on a sensible mediation. A premature mediation simply wastes time and can sometimes lead to a

hardening of the positions on both sides which make any subsequent attempt of settlement doomed to fail. Conversely, a delay in any mediation until after full particulars and documents have been exchanged can mean that the costs which have been incurred to get to that point themselves become the principal obstacle to a successful mediation. The trick in many cases is to identify the happy medium: the point when the detail of the claim and the response are known to both sides, but before the costs that have been incurred in reaching that stage are so great that a settlement is no longer possible. " 23. The second sentence of this passage, pointing out that the party invited to mediate will often want proper information relating to the claim in order to be able to assess the commercial risk before agreeing to mediation was, understandably, one on which Mr Journeaux particularly relied. This was, he said, precisely the thinking behind Rossborough's response to the plaintiff's repeated overtures: the need to find out what the case was about and how it matched up with the evidence. He accepted that ideally the aim in every case is to act before costs get out of hand. But in the present case the delays in exchange of witness statements and experts' reports could not have been foreseen and it was not unreasonable to decline to take a firm view on the proposal for mediation until his client had had a chance to review the entirety of the evidence. Picking the best moment to start talks or some form of ADR is very much a judgment call that merits the allowance of a fair margin of appreciation for those responsible for making such decisions. 24. The problem in the present case is that while it was, in my view, not unreasonable for Rossborough to have treated the plaintiff's initial suggestion of mediation in June 2010 as premature, their ever-expanding prerequisites before they would even consider such a course were unreasonably demanding and more or less killed any prospect of a mediation ever taking place. The court's observation in Witham on the risks of premature mediation and the reasonable need for the responding party to have an appropriate level of information before engaging in mediation represents only one half of the balancing exercise: the other, as was observed in that case, is that delaying until full particulars and documents have been exchanged "can mean that the costs which have been incurred to get to that point themselves become the principle obstacle to a successful mediation." Here, as far as I can see, Rossborough lost sight of this other essential consideration, pushed matters too far and never really effectively addressed the need to settle for a "happy medium". And the terms of the offer eventually made at the meeting between counsel on 14 th October, 2011, reflects, as it seems to me, a wholly unrealistic and unreasonable refusal on the part of Rossborough to recognise that the merits of the matter might be other than entirely in their favour and to accept that a process of mediation engaged in with good will on both sides might well produce a solution satisfactory to both parties. 25. For these reasons I unhesitatingly find that Rossborough's sustained refusal to consider any form of realistic out-of-court resolution cannot reasonably be justified, the only question being at what point in time it can fairly be said to have crossed the boundary between reasonableness and unreasonableness. As already indicated, Rossborough's initial stance in July 2010 was to my mind fair enough. But by the time of Bedell Critin's second overture in mid-February 2011 the position had changed significantly: discovery had been given, security for costs had been dealt with (as Rossborough had wanted), the statements of

witnesses of fact were expected to be exchanged in a little over a month's time, to be followed shortly afterwards by experts' reports. That, to my mind, was the time for Rossborough to have responded positively, with a view to getting the mediation process under way by, say, the end of April (immediately after Easter). Nor should the fact that the exchange of witness statements, factual and expert, was subsequently delayed have been allowed to make any difference. Insistence on their availability before Rossborough was prepared even to entertain the possibility of mediation was already pushing things too far and their absence by no means an insuperable impediment to getting on with a mediation given the ever-increasing level of costs. The situation at that point may not have been perfect from Rossborough's point of view. But it seems to me to have represented as good a "happy medium" as it was realistic to hope for and that Rossborough's rejection of it was well beyond any legitimate margin of appreciation. 26. I accordingly conclude that, subject to the matter of an overall discount, as discussed earlier, the plaintiff has discharged the burden of proving that an award on indemnity costs in its favour from 1 st March, 2011, onwards would be the fair and proper order for me to make. I take 1 st March, 2011, as the appropriate date on the basis that had Rossborough responded positively to Bedell Cristin's letter of 11 th February, 2011, a stay of the action could have been put in place by the end of February. The plaintiff will, therefore, be entitled to have its costs of the action paid by Rossborough (i) for the period up to the end of February 2011 as to 90% on the standard basis, and (ii) for the period from 1 st March, 2011, to judgment as to 90% on an indemnity basis. Standing back and endeavouring to look at the litigation as a whole, this also seems to me compensate the plaintiff for the legal costs of having to bring this action and pursue it to and through trial to the fairest extent that the legal system allows (see the passage from Pell Frischmann cited in Leeds United-v-Weston) . 27. That leaves the plaintiff's application for an order for a payment on account of costs. 28. In Centre Trustees (CI) Ltd & Anor-v-van Rooyen & Anor

[2009] JRC133 Clyde-Smith, Commissioner, following English practice, held that the Royal Court does indeed have inherent jurisdiction to make such orders, observing "Whilst the successful party will receive interest on any sums due under the taxation process, I accept the proposition that, in fairness to the successful party, there is no good reason to keep it out of a sum which it is likely to recover on a conservative basis in any event." He also noted that the usual English practice is to make an interim order for payment of one-half of the untaxed costs of the successful party, although in the particular circumstances of that case, he did not allow as much as that. In the present case the plaintiff seeks an on-account payment of £200,000, which is said to represent 50% of its costs excluding counsel's and experts' fees. On the basis of figures presented by Mr Robinson and Mr Journeaux's commentary on those figure, it appears to me that an amount of £200,000 is indeed a fair and conservative one given my ruling that the plaintiff should have its costs on an indemnity basis from 1 st March, 2011, onwards (even allowing for the discount of 10 % to which I have made reference earlier). There will be liberty to both parties to apply by close of close of business on Friday 24th August, 2012, as regards the period within which such payment is to be made, but in the absence of any such application the order

will be for payment to be made by close of business on Friday 31 st August, 2012, unless otherwise agreed by the parties. 29. The plaintiff's costs of and incidental to the determination of the matters the subject of this ruling are to be paid as to 90% by Rossborough on the standard basis. 30. The parties are invited to agree the precise terms of the appropriate formal order. Authorities Watkins-v-Egglshaw

[2002] JLR 1 . Cafe de Lecq Limited-v-RA Rossborough (Insurance Brokers) Limited

[2011] JRC 071 . Leeds United Football Club Limited-v-Weston and Levi

[2012] JCA 088 . Bespoke Investments Ltd-v-Lincoln Nominees Ltd

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